

**Author: SS Terblanche**

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OF DEPARTURE WITH RESPECT TO THE SENTENCING OF YOUNG OFFENDERS**

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## THE *CHILD JUSTICE ACT*: A DETAILED CONSIDERATION OF SECTION 68 AS A POINT OF DEPARTURE WITH RESPECT TO THE SENTENCING OF YOUNG OFFENDERS

SS Terblanche\*

### 1 Introduction

Sentences for young offenders<sup>1</sup> have for many decades been at least somewhat more lenient than those for adults.<sup>2</sup> When called upon to specifically address the issue, our courts have often acknowledged that young offenders should be afforded special treatment.<sup>3</sup> Whatever the actual practice, the sentencing principles for child offenders changed fundamentally when the *Constitution of the Republic of South Africa*, 1996 was adopted.<sup>4</sup> This change was necessitated by section 28 of the Constitution, which introduced a set of rights specifically aimed at the protection of children.<sup>5</sup> Some of these rights directly affect children "in conflict with the law", as

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\* Stephan Terblanche. Blur (PU for CHE), LLD (Unisa). Professor, Department of Criminal and Procedural Law, University of South Africa. Email: terblss@unisa.ac.za. Unisa provided funding for research visits, the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany made available its research facilities and Professor Louise Jordaan had valuable comments on an earlier draft. I want to express my gratitude to them all.

1 In the past a few different categories of young offenders were specifically addressed in our law. For example, s 290 of the *Criminal Procedure Act* 51 of 1977 (before its repeal by the *Child Justice Act* 75 of 2008) had specific provisions for "young offenders" under the age of 18 years, some of which were also available to offenders under 21 years of age; s 1 of the *Correctional Services Act* 8 of 1959 (repealed by the *Correctional Services Act* 111 of 1998) defined a "juvenile" as someone under the age of 21 years of age. See eg Rabie, Strauss and Maré *Punishment* 205-206; Terblanche *Guide to Sentencing* (1999) 375, 384-394.

2 See *S v B* 2006 1 SACR 311 (SCA) para 14: "The recognition that children accused of committing offences should be treated differently to adults is now over a century old"; *DPP, KwaZulu-Natal v P* 2006 1 SACR 243 (SCA) para 12 (youth has always been a mitigating factor). Some of the earlier judgments include *R v Smith* 1922 TPD 199; *S v Yibe* 1964 3 SA 502 (E); *S v Mohlobane* 1969 1 SA 561 (A); *S v Solani* 1987 4 SA 203 (NC); *S v Jansen* 1975 1 SA 425 (A); *S v Ngoma* 1984 3 SA 666 (A).

3 In addition to the cases in the previous footnote, see also *S v Adams* 1971 4 SA 125 (C) 126; *S v Lehnberg* 1975 4 SA 553 (A) 561. See also Terblanche 2007 SACJ 246.

4 The change was initiated with the promulgation of the first Bill of Rights in the interim *Constitution of the Republic of South Africa Act* 200 of 1993): see Sloth-Nielsen 1996 *Int'l J Children's Rts* 325 (the first inclusion of the best-interests principle); Keightley "Children and the Legal System" 1-2; Van der Vyver 2006 *Emory Int'l L Rev* 10; *S v Williams* 1995 2 SACR 251 (CC), esp. paras 69 (noting "growing interest in moves to develop a new juvenile justice system"), 74-75 (the state should provide an effective juvenile justice system; and "new creative methods to deal with the problem of juvenile justice" are required).

5 The inclusion of children's rights in the Bill of Rights is widely viewed as one of the better examples of why the Constitution is held in such high regard internationally: see further, eg,

child accused or offenders are often referred to.<sup>6</sup> In relation to sentencing, important rights include that the best interests of the child are paramount,<sup>7</sup> and that children should not be imprisoned unless such imprisonment is unavoidable.<sup>8</sup>

The rights in section 28 were at least in part informed by international agreements with respect to children.<sup>9</sup> The most important of these is the *United Nations Convention on the Rights of the Child* (hereafter referred to as "the Convention").<sup>10</sup> South Africa had already signed and ratified this agreement when the Constitution came into effect, but the country had not yet complied with everything the Convention required of its signatories.<sup>11</sup> The government then requested the South African Law Commission to investigate child justice in South Africa.<sup>12</sup> Less than a decade later, this investigation culminated in the *Child Justice Act 75 of 2008* (hereafter referred to as "the Act").<sup>13</sup> The Act establishes a criminal justice system for child accused, separate from the criminal justice system, which continues to apply for adult accused.<sup>14</sup>

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Grupp *Südafrikas neue Verfassung* 78-79; Van der Vyver 2006 *Emory Int'l L Rev* 11, 40 (referring to the complete legislative package, including s 28 of the *Constitution*).

6 See the Preamble to the *Child Justice Act 75 of 2008*; Gallinetti "Child Justice" 649; Inter-Ministerial Committee *Interim Recommendations* 35. An alternative phraseology is children "in trouble with the law" (see Sloth-Nielsen 1996 *SACJ* 61; Sloth-Nielsen 1996 *Int'l J Children's Rts* 344).

7 Section 28(2) *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

8 Section 28(1)(g) of the *Constitution*.

9 *S v M* 2007 2 *SACR* 539 (CC) para 16.

10 *United Nations Convention on the Rights of the Child* (1989) (the Convention), adopted by the General Assembly of the UN in 1989 and ratified by South Africa on 16 June 1995.

11 See, in this connection, Sloth-Nielsen 1995 *SAJHR* 417-420.

12 See SA Law Commission *Discussion Paper* para 1.2. For more on the development of child justice until this point, including the essential role of Nelson Mandela, see Maguire 2012 *New Crim L Rev* 84-91.

13 The Act (*Child Justice Act 75 of 2008*) was promulgated on 11 May 2009 (GN 549 in GG 32225 of 11 May 2009) and came into operation on 1 April 2010: s 100. (Although s 100 allowed the President to put the Act into operation at an earlier date, this did not happen). The birth of the Act was a drawn-out process that has been particularly well-documented: see, eg, Badenhorst *Implementation of the Child Justice Act 1-3* (a brief overview); Ehlers *Child Justice* 1-31 (more detail, especially on the Law Commission's work and the Parliamentary process); Skelton *Restorative Justice and Child Justice* 375-425; Gallinetti 2006 *SA Crime Quarterly* 7-12; Skelton and Gallinetti 2008 *SA Crime Quarterly* 3-9; Gallinetti "Child Justice" 643-648; Sloth-Nielsen and Gallinetti 2011 *PELJ* 63, 80-81; Maguire 2012 *New Crim L Rev* 91 *et seq*.

14 The Preamble specifically refers to "...this new criminal justice system for children..." See also Gallinetti "Child Justice" 648; Le Roux-Kemp 2008 *Annual Survey of South African Law* 298 (the Act contains a "separate, but parallel, criminal justice system for children"); Maguire 2012 *New Crim L Rev* 72 (intended as a dramatic reform of the child justice system).

The Act aims to keep children out of detention and away from the formal criminal justice system, mainly through diversion.<sup>15</sup> When these interventions would be inadequate or unsuccessful, the Act provides for child offenders to be tried and sentenced in child justice courts. Until now there has been little discussion of the details of the provisions dealing with sentencing.<sup>16</sup>

Sentencing in a child justice court is regulated by chapter 10 of the Act and section 68 is the first section in this chapter. It reads as follows:

A child justice court must, after convicting a child, impose a sentence in accordance with this Chapter.

This section effectively amounts to the "jurisdictional" provision of the new child sentencing system. It not only mandates child justice courts to impose their sentences in terms of the Act, but also provides the first set of boundaries (or the first part of the framework) within which sentencing should take place.

Despite its brevity section 68 is not without interpretative challenges. Of course, it has to be interpreted within the context of the whole Act.<sup>17</sup> Explaining this context is the first function of this article. The various aspects of section 68 are then evaluated. The greatest challenges lie in the meanings of the words "child justice court" and "child", as well as the precise extent of the punitive jurisdiction of the courts.

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15 See 2.5 below.

16 See Gallinetti "Child Justice" 659-663 and Gallinetti *Getting to Know the Child Justice Act* 53-57 for the most extensive discussions so far. Updated works on criminal procedure contain brief discussions, with Du Toit *et al Commentary* 28-29 stating that the Act "will in future be commented upon as case law and literature pertaining to Chapter 10 [the chapter dealing with sentencing] become available". See also Kruger *Hiemstra's Criminal Procedure* 28-60 to 28-63, and Joubert (ed) *Criminal Procedure Handbook* 339-342.

17 See *Jaga v Dönges* 1950 4 SA 653 (A) 662 for an authoritative statement of this general principle of statutory interpretation. This judgment is frequently quoted by the Constitutional Court. See eg *Bertie Van Zyl v Minister for Safety and Security* 2010 2 SA 181 (CC) para 21; *Du Toit v Minister for Safety and Security* 2009 6 SA 128 (CC) para 37; *South African Police Service v Public Servants Association* 2007 3 SA 521 (CC) para 17. See also, eg, *Picardi Hotels v Thekwini Properties* 2009 1 SA 493 (SCA) para 5; Du Plessis "Interpretation" 287-288.

## 2 Interpreting the Act

### 2.1 Introduction

The Act itself contains a number of useful interpretive tools. The Preamble is particularly important. The current trend<sup>18</sup> amongst our courts (and the Constitutional Court in particular) is to use preambles to legislation quite extensively in the process of interpreting that legislation.<sup>19</sup> A preamble is considered a valuable summary of what the legislation aims to achieve,<sup>20</sup> and the lengthy Preamble to the Act is a good example of this approach. Sections 2 and 3 of the Act are also useful tools: section 2 reflects the objects of the Act and section 3 contains guiding principles to be applied in relation to the Act. These sections reinforce some of the general considerations set out in the Preamble. The specific considerations, which may assist in interpreting section 68, are considered below.

### 2.2 Tools in the Act itself

The Preamble prominently recognises the constitutional emphasis on the best interests of children and their need for special protection.<sup>21</sup> In the case of children "in

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18 Before the constitutional era it was not common for legislation to include a preamble (see further Steyn and Van Tonder *Uitleg van Wette* 145-146). When it did, the preamble would be considered only when the legislation itself was unclear or ambiguous – see *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 597; *Green v Minister of the Interior* 1968 4 SA 321 (A) 327; *S v Kola* 1966 4 SA 322 (A) 326G-H; *S v Heita* 1987 1 SA 311 (SWA) 319J-320B; *S v Davidson* 1988 3 SA 252 (ZS) 254E-J; and even as recently as in *Geyser v Msunduzi Municipality* 2003 5 SA 18 (N). In *NDPP v Seevnarayan* 2003 2 SA 178 (C) para 58 such an approach was described as "antiquated".

19 See *S v Mhlungu* 1995 3 SA 867 (CC) para 112 (Sachs J stated: "The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes"). Also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 2 SA 104 (CC) paras 24, 36; *S v Acting Regional Magistrate, Boksburg* 2011 2 SACR 274 (CC) para 21 (with respect to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*); *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) paras 170-171 (containing substantial reference to the Preamble to the *Prevention and Combating of Corrupt Activities Act 12 of 2004*); Du Plessis "Interpretation" 391. See also Sloth-Nielsen and Gallinetti 2011 *PELJ* 66-67 (the Preamble to the *Child Justice Act* is "not insignificant and ... can play a role in the future interpretation" of the Act).

20 Du Plessis *Reinterpretation* 242; De Ville *Constitutional Interpretation* 146-151.

21 The need for special protection stems mainly from children's greater vulnerability and immaturity, resulting in diminished criminal responsibility. See, from a vast volume of authorities, *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) paras 26-28, 35; Keightley "Children and the Legal System" 3; Junger-Tas "Trends in International Juvenile Justice" 510-511; Sloth-Nielsen "Chicken Soup" 7; Viljoen "African Charter" 338.

conflict with the law" the emphasis is on their rights "not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time", and not to be subjected to any harmful practices. The Preamble then spells out several aims of the Act, and the following two affect the interpretation of section 68: (1) whenever "appropriate circumstances" prevail, child offenders should be diverted from the criminal justice system; and (2) when diversion is not possible or advisable, the child offender should be dealt with "in the criminal justice system in child justice courts". When the child offender has to go through the trial process to the sentencing phase, the Act specifically sets out to provide "for a wide range of appropriate sentencing options specifically suited to the needs of children". The Preamble also emphasises "the long-term benefits of a less rigid criminal justice process that suits the needs of children in conflict with the law in appropriate cases." It also acknowledges that there are resource and other constraints in South African society, which might require an incremental implementation of the reformed juvenile justice system.

Amongst the various objects of the Act set out in section 2, the following two in particular may assist with the interpretation of section 68: (1) protecting the constitutional rights of children;<sup>22</sup> and (2) encouraging the use of diversion.<sup>23</sup> The guiding principles in section 3 "must be taken into account" when applying the provisions of the Act. Two of these guiding principles are particularly relevant to section 68: (1) the principle that a child should not be treated more severely than an adult would have been under similar circumstances;<sup>24</sup> and (2) that the "rights and obligations of children contained in international and regional instruments" also have to be taken into account.<sup>25</sup>

A number of these considerations require closer scrutiny: the best interests of the child; the importance of diversion; that children should not be treated more severely than adults; and the relevant "international and regional instruments".

### **2.3 *International and regional instruments***

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22 Section 2(a).

23 Section 2(d).

24 Section 3(b).

25 Section 3(i).

The reference to "international and regional instruments" in the Preamble and in section 3 means that these documents are not merely of academic or political interest, but that every child justice practitioner should have more than a mere passing knowledge of their provisions.<sup>26</sup> This requirement is supported by section 39(1)(b) of the Constitution, which requires South African courts to interpret national legislation consistently with the provisions of relevant international documents.<sup>27</sup> For the current purposes the most important instruments are the Convention and the *African Charter on the Rights and Welfare of the Child* (hereafter referred to as "the Charter"). Both of these instruments are expressly mentioned in the Preamble.<sup>28</sup>

The Convention has already been referred to in a number of judgments affecting the rights of children, specifically in connection with sentencing.<sup>29</sup> The provisions of the

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26 For an example of the effect the Convention can have on the practice of child justice, see Long 2009 *Int'l J Children's Rts* 155-170 for a discussion of the position in Italian law. It is not always known that signatories to these international and regional instruments are expected to report on a regular basis on the implementation of their provisions. See Wakefield and Assim 2011 *Afr Hum Rts L J* 699-720 in connection with reporting on the Charter, and Van der Vyver 2006 *Emory Int'l L Rev* 34, on implementation of the Convention.

27 See further *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) para 75: "In addition [to s 39(1)(b) of the Constitution], under s 233, when interpreting any legislation, as we are called upon to do in these cases, we are required to prefer 'any reasonable interpretation of the legislation that is consistent with international law'. International law therefore provides a useful interpretative tool in the interpretation of the rights in the Bill of Rights."

28 There are other relevant international instruments. The Convention has been succeeded by several documents published by various agencies of the United Nations, often aimed mainly at encouraging signatories to further improve their measures and processes in the interests of children: see (1) the Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") – General Assembly Resolution 40/33 adopted on 29 November 1985; see further, eg, Skelton "Developing a Juvenile Justice System" 186-190; (2) the Rules for the Protection of Juveniles Deprived of their Liberty (the JDL or "Havana Rules") – General Assembly Resolution 45/113 adopted on 14 December 1990; see Goldson and Muncie (eds) *Youth Crime* ix; Gallinetti "Child Justice" 636-637; Du Preez and Luyt 2005 *CARSA* 48; and (3) the Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh guidelines") – General Assembly Resolution 45/111 adopted on 14 December 1990; see *S v B* 2006 1 SACR 311 (SCA) para 16. For a general discussion of these instruments, with reference to sentencing, see Jefferson and Head 2007-2008 *Hum Rts & Globalization L Rev* 111-117. Although our courts have at times referred to these instruments (see further *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) para 76; *S v M* 2007 2 SACR 539 (CC) para 31; *S v N* 2008 2 SACR 135 (SCA) para 14; *S v B* 2006 1 SACR 311 (SCA) para 16), they have not really affected sentencing practice as such.

29 See *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 61; *S v N* 2008 2 SACR 135 (SCA) para 14; *S v M* 2007 2 SACR 539 (CC) para 16; *DPP, KwaZulu-Natal v P* 2006 1 SACR 243 (SCA) para 15; *S v B* 2006 1 SACR 311 (SCA) paras 16-20; *S v Cloete* 2003 2 SACR 489 (O) 494; *S v Nkosi* 2002 1 SACR 135 (W) 145; *S v Van Rooyen* 2002 1 SACR 608 (C) 610; *S v Blaauw* 2001 2 SACR 255 (C) 263-264; *S v Kwalase* 2000 2 SACR 135 (C) 138-139. Many of these judgments were written by Van Heerden J (as she then was). See also Mahery "Convention on the Rights of the Child" 323.

Convention that are of particular relevance to criminal justice include articles 3 (the primacy of the child's best interest), 19 (protecting children against any form of violence, injury, abuse, maltreatment, etc), 37 (imprisonment as a last resort and for the shortest appropriate period; treatment with humanity, respect and dignity) and 40 (promoting the child's sense of dignity and worth).<sup>30</sup> There is no doubt that the Convention's provisions influenced the contents of section 28 of the Constitution. They also played a major role in the coming into being of the Act.<sup>31</sup> For current purposes the Convention is a particularly useful aid to understanding the standard of the best interests of- the- child.

Although the Charter has not been as influential as the Convention in shaping the Act,<sup>32</sup> it has considerable potential to influence the further development of our child justice system.<sup>33</sup> The Charter has been adopted in Africa in order to address unique African concerns about children, and because of frustration with the limited involvement of African countries in the drafting of the Convention.<sup>34</sup>

#### **2.4 The best interests of the child**

According to section 28(2) of the Constitution a "child's best interests are of paramount importance in every matter concerning the child."<sup>35</sup> Since "paramount" is a stronger term<sup>36</sup> than "a primary" consideration, as used in the Convention,<sup>37</sup> or "*the*

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30 Goldson and Muncie (eds) *Youth Crime* ix-x.

31 See, eg, *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) para 76; *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 25; *S v M* 2007 2 SACR 539 (CC) para 16.

32 South Africa ratified the Charter on 7 January 2000, "despite some misgivings": Viljoen "African Charter" 349. For these misgivings, see Viljoen 1999 *SALJ* 660-664.

33 For one example of its potential for further development, see *Gani v S* 2011 ZAGPJHC 154 (14 Oct 2011) para 2: "Article 17 of this Charter specifically provides that every child accused or found guilty of infringing a penal law shall have the right to appropriate treatment".

34 Kaime *African Charter on the Child* 23. See also, in general, Viljoen "African Charter" 335-348. Even before the acceptance of the Children's Charter, the need for the protection of the rights of children was recognised in a 18(3) of the *African Charter on Human and People's Rights* (1981): see Kaime *African Charter on the Child* 22; Viljoen "African Charter" 333 (the practical effect of this recognition).

35 See in general Ngidi "Upholding the Best Interests" 225-242.

36 "Paramount" means "more important than anything else; supreme": Rhodes University *Oxford South African Concise Dictionary* vide "paramount". See Skelton "Constitutional Protection of Children's Rights" 280 ("more emphatic" than international instrument); Mahery "Convention on the Rights of the Child" 319 ("a higher standard"); *S v M* 2007 2 SACR 539 (CC) para 25.

37 Article 3(1) of the Convention. Alston 1994 *JLJF* 12 (quoting from UN doc E/CN. 4/1989/48, paras 121-122) explained that the words "a primary consideration" were preferred to "the primary

primary consideration" (the terminology of the African Charter),<sup>38</sup> one would have thought it safe to conclude that the child's best interests are, in South Africa, more important than any other consideration.<sup>39</sup> However, the Constitutional Court has consistently rejected this view.<sup>40</sup> In *Centre for Child Law v Minister of Justice and Constitutional Development*<sup>41</sup> the Court explained that, although "the child's interests are 'more important than anything else'", this did not mean "that everything else is unimportant". As the "child's best interests" is not an unlimited right,<sup>42</sup> other rights also have to be taken into account and, when necessary, given effect to.<sup>43</sup> The result is that, despite the difference in wording, the child's best interests are of no greater importance under the Constitution than under the Convention.<sup>44</sup> Nevertheless, it is

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consideration" or "of paramount" importance specifically because "there were situations in which the competing interests *inter alia* of 'justice and society at large, should be of at least equal, if not greater, importance than the interests of the child'." The exact wording of a 3(1) of the Convention was accepted only after lengthy discussions: see Alston 1994 *IJLF* 10-11. The rest of this article [1-25] is most useful for its consideration of the significance and context of the best interests principle, within the Convention as a whole. A vast body of literature exists on this principle in the Convention. In addition to the sources referenced in this section, see also Zermatten 2010 *Int'l J Children's Rts* 483-499; Sloth-Nielsen 1995 *SAJHR* 408-409; McCarney "Child-friendly Justice" 119-127; Parker 1994 *IJLF* 26-41; Bekink and Bekink 2004 *De Jure* 40; Junger-Tas "Trends in International Juvenile Justice" 507; Barratt "Best Interest of the Child" 145-146; Bennett 1999 *Obiter* 145-157; Currie and De Waal *Bill of Rights Handbook* 618; Bonthuys 2002 *SALJ* 767; Guggenheim 2006 *Emory Int'l L Rev* 64; Skelton 2011 *NJLSP* 422.

38 Article 4 *African Charter on Human and People's Rights* (1981). See, in general, Kaime *African Charter on the Child* 109-119; Viljoen "African Charter" 336; *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) para 76. With regard to the Convention, Alston 1994 *IJLF* 13 notes that the more specific "the primary consideration" is used in certain provisions of the Convention, eg a 37(c) (children and adults should be separated in custody, unless it is in the child's best interests not to be separated).

39 See also Müller and Tait 1999 *De Jure* 324-325; *S v M* 2007 2 SACR 539 (CC) para 25.

40 See further *De Reuck v DPP, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 55; *Sonderup v Tondelli* 2001 1 SA 1171 (CC) paras 27-30; *S v M* 2007 2 SACR 539 (CC) para 25. Davel "General Principles" 2-12 comments: "It can therefore not necessarily be assumed that the best interests of children will *always* outweigh the constitutional rights of parents, educators or other role players." See also Skelton 2008 *CCR* 360-363.

41 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 29.

42 For authority that it is a "right", despite its being framed more as a guideline, see, eg, *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17 ("[s 28(2)], which creates a right that is independent of those specified in section 28(1)") and para 77 (*per* Yacoob J for the majority); *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 25; *S v M* 2007 2 SACR 539 (CC) para 14; *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) para 72. See also, eg, Davel "General Principles" 2-10.

43 See further *S v M* 2007 2 SACR 539 (CC) para 26; *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) para 72; *Le Roux v Dey* 2011 3 SA 274 (CC) para 49 (*per* Yacoob J, minority judgment).

44 See Mahery "Convention on the Rights of the Child" 319-320.

difficult to overstate the importance of what has been termed the heart of children's rights.<sup>45</sup> In *S v M*<sup>46</sup> the Court expressed itself as follows:

The ambit of the provisions [s 28(2) read with s 28(1)]<sup>47</sup> is undoubtedly wide. The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.

The principle that the child's best interests are "more important than anything else" (in other words, that they are paramount) has, since *Fletcher v Fletcher*,<sup>48</sup> been considered part of our common law.<sup>49</sup> This is applied mostly in matters relating to family law, such as the custody of children in divorce proceedings, adoption, foster care and so on.<sup>50</sup> However, section 28(2) requires acknowledgement of the child's best interests "in every matter concerning the child",<sup>51</sup> which would certainly encompass criminal law and criminal justice as well. The extension of the best interests principle beyond its application to family law has been precipitated by international documents on the rights of children, and specifically by the Convention.

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45 Parker 1994 *IJLF* 27.

46 *S v M* 2007 2 SACR 539 (CC) para 15. See also Skelton 2008 *CCR* 354, 359; Gallinetti 2010 *SAPL* 111-116; Erasmus 2010 *SAPL* 126-129.

47 See *S v M* 2007 2 SACR 539 (CC) para 14.

48 *Fletcher v Fletcher* 1948 1 SA 130 (A) 134 (*per* Centlivres JA, for the majority, the real issue "in all custody cases is the interests of the child itself"), 143 (*per* Schreiner JA, minority judgment, referring to "the well-established but variously expressed rule that the interest of the children is the main or paramount consideration..."), 145 (*per* Schreiner JA, referring to "...the paramountcy of the welfare of the children ..."). See also Bonthuys 2002 *SALJ* 779-780.

49 See, eg, *Jackson v Jackson* 2002 2 SA 303 (SCA) 317D-F (the minority judgment); *Lubbe v Du Plessis* 2001 4 SA 57 (C) 66; *V v V* 1998 4 SA 169 (C) 177; Heaton, Church and Church "Marriage" 187; Ngidi "Upholding the Best Interests" 227. See also *S v M* 2007 2 SACR 539 (CC) para 12.

50 See further *A S v Vorster* 2009 4 SA 108 (SE) 118, 120; *AD v DW* 2008 3 SA 183 (CC) para 49; *Bannatyne v Bannatyne* 2003 2 SA 363 (CC) para 24; *Central Authority v MV* 2011 2 SA 428 (GNP) para 26; *F v F* 2006 3 SA 42 (SCA) para 8; *B v B* 2008 4 SA 535 (W) para 25; *Fish Hoek Primary School v GW* 2010 2 SA 141 (SCA) para 14; *GF v SH* 2011 3 SA 25 (GNP); *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC). See also Clark 2000 *Stell LR* 3-20; Bonthuys 2002 *SALJ* 751-771; Palmer "Best Interests Criterion" 98-113; Davel "General Principles" 2-9 to 2-10; Müller and Tait 1999 *De Jure* 325; Sloth-Nielsen and Mezmur 2008 *Int'l J Children's Rts* 21-25.

51 *S v M* 2007 2 SACR 539 (CC) para 25 (noted as "the far-reaching phrase"); see also Skelton 2008 *CCR* 359. This "phrase" has extended the scope of the principle to all fields of the law: see further Davel "General Principles" 2-6 (the application of the principle has gradually "been extended far beyond private law disputes"); Müller and Tait 1999 *De Jure* 322-329. See also a 3(1) of the Convention; a 4.1 *African Charter on the Rights and Welfare of the Child* (1990) (African Children's Charter); Kaime *African Charter on the Child* 110.

There is no doubt that the *Child Justice Act* fully recognises the best-interests principle in the field of child criminal justice, as explicitly noted in the Preamble.

A child's best interests play a vital role in the interpretation of any statutory provision affecting child offenders. It is a consideration that must be given practical effect whenever a question is asked as to the purpose of a specific provision in the Act. As is normally the case, what is actually in the best interests of a child offender during the sentencing process can be established only through careful analysis of all of the facts relevant to the matter at hand.<sup>52</sup> Courts have wide discretionary powers to ensure that effect is given to the best interests of children.<sup>53</sup> They have to make sense of the "almost endless" number of factors<sup>54</sup> involved in every individual case in order to properly exercise the value judgment that any decision about the best interests inevitably requires.<sup>55</sup>

In closing it should be noted that most of the other rights in section 28 give effect to the best-interests principle (eg, the rights to parental or appropriate alternative care, to basic nutrition and other services, protection "from maltreatment, neglect, abuse or degradation",<sup>56</sup> and so on). In addition, children are obviously also entitled to the other constitutional rights in the Bill of Rights.<sup>57</sup> Specifically related to sentencing, these rights include the rights to life, to dignity, a fair trial, and not to be punished in a cruel, inhuman or degrading manner, to state the most obvious examples.<sup>58</sup>

## **2.5 The importance of diversion**

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52 *Lubbe v Du Plessis* 2001 4 SA 57 (C) 66E; *F v F* 2006 3 SA 42 (SCA) paras 8-9; *J v J* 2008 6 SA 30 (C) para 20 (all the facts, including likely future occurrences); *AD v DW* 2008 3 SA 183 (CC) para 50. See also Davel "General principles" 2-7; Heaton, Church and Church "Marriage" 187; Bekink and Bekink 2004 *De Jure* 40.

53 Junger-Tas "Trends in International Juvenile Justice" 507.

54 *S v M* 2007 2 SACR 539 (CC) para 24.

55 *P v P* 2007 5 SA 94 (SCA) para 14. See also Davel "General Principles" 2-7; Bekink and Bekink 2004 *De Jure* 40.

56 Section 28(1)(d) of the *Constitution*.

57 See further Gallinetti 2010 *SAPL* 118-119. Some exceptions have been noted: see further Skelton "Constitutional Protection of Children's Rights" 277-279 (eg, with respect to corporal punishment in a non-criminal setting); Currie and De Waal *Bill of Rights Handbook* 600.

58 See also Terblanche and van Vuren 1997 *SACJ* 184. A 37 of the Convention also outlaws "cruel, inhuman or degrading treatment or punishment".

It is one of the central themes of the Act that children in conflict with the law should be diverted from the formal criminal justice system whenever possible.<sup>59</sup> Generally, diversion means that an accused person is not put through formal criminal proceedings but is subjected to an alternative process that does *not* involve a formal trial, conviction and a criminal record.<sup>60</sup> No sentence is imposed, although the alternative process may require the person to perform services or tasks, or to submit to training or other regimes, some of which might be of a punitive nature.

Diversion is widely considered to provide people in conflict with the law with a better opportunity of being successfully reintegrated into society than dealing with their behaviour through the formal criminal justice system.<sup>61</sup> There is abundant evidence that the deeper child offenders get involved in the formal criminal justice system, the better the chances are that, as adults, they will end up living a life of crime.<sup>62</sup>

## **2.6 Children not to be treated more severely than adults**

This guiding principle<sup>63</sup> has probably been inserted into the Act in order to allay fears that the Act was too child-friendly or would result in responses that are not sufficiently punitive.<sup>64</sup> There are no equivalent provisions in either the Convention or the Charter, nor the earlier Beijing Rules. In fact, all indications from these instruments are that children should be treated *less* severely than adults. Van Bueren, one of the most influential authors on the Convention, writes as follows on this issue:<sup>65</sup>

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59 See further the Preamble; s 2(d) (it is one of the Act's objectives). The whole ch 8 of the Act deals with diversion. For more detail about diversion in the Act, see Gallinetti "Child Justice" 656-658; Sloth-Nielsen and Gallinetti 2011 *PELJ* 74-77; Joubert (ed) *Criminal Procedure Handbook* 74-79; Gallinetti *Getting to Know the Child Justice Act* 43-50. See further also Maguire 2012 *New Crim L Rev* 72, 79-83 (the Act establishes "a large-scale diversion programme").

60 See, eg, Gallinetti, Muntingh and Skelton "Child Justice Concepts" 32; SA Law Commission *Issue Paper* para 7.1 *et seq*; Bedu 2009 *Law, Democracy and Development* 96. S 1 of the Act defines diversion as "diversion of a matter involving a child away from the formal court procedures", which is not particularly helpful.

61 See further Skelton "Developing a Juvenile Justice System" 188-189. See also *Gani v S* 2011 ZAGPJHC 154 (14 Oct 2011) paras 13-20, where the court found that the case of a child with a previous conviction for shoplifting is precisely the kind of case that should now be diverted.

62 See further Goldson and Muncie (eds) *Youth Crime* xviii (as only one example of many sources).

63 From s 3(b) of the Act.

64 See, for some indication of this, Maguire 2012 *New Crim L Rev* 108, 111.

65 Van Bueren *International Law* 184 (emphasis added).

Another fundamental principle of sentencing is that deprivation of liberty, if used at all, should only be used as a measure of last resort and for the shortest appropriate period of time. Consequently, the international law regulating the sentencing of children is characterised by an emphasis on the constructive purpose of the disposition rather than its punitive side. Specifically, *and in contrast to adults*, international law places restrictions on the periods for which children can be deprived of their liberty.

Although the passage quoted refers to sentencing and more specifically to the deprivation of liberty, its essence permeates the provisions of the Convention with respect to juvenile justice.<sup>66</sup> children must be treated in ways reflecting their age; the successful reintegration of child offenders into society is *the* desirable outcome,<sup>67</sup> and the treatment must be proportionate to the child's circumstances and the offence.<sup>68</sup> Given these principles, which have to be taken into account as guiding principles as well,<sup>69</sup> it is difficult to see how even treatment equal to that of an adult offender could be justified – after all, none of these considerations apply to adult offenders.

### 3 The basic provision on sentencing: section 68

#### 3.1 "A child justice court..."

It is striking that the Act does not explicitly establish child justice courts.<sup>70</sup> Instead, it defines a "child justice court"<sup>71</sup> as "any court provided for in the Criminal Procedure

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66 Van Bueren *International Law* 169-199. See also, in connection with the African Charter, Wakefield and Assim 2011 *Afr Hum Rts L J* 716 (institutionalisation should be kept to a minimum).

67 Article 40(1) of the Convention.

68 Article 40(3)(b) of the Convention.

69 In terms of s 3(i) of the Act.

70 Such establishment was proposed by the South African Law Commission for the child justice courts (see further cl 1 of the proposed Bill: a child justice court is defined as "the court described in section 71" and "court" as "a child justice court or any other court acting in terms of the provisions of this Act"; cl 71 would establish child justice courts at the level of district magistrates' courts, involving regional and High Courts, especially to hear more serious cases). See also ch 9 (paras 9.1-9.46). The more familiar practice in our law is to explicitly establish a court and to circumscribe its powers in legislation. Accordingly, eg, children's courts are specifically established in terms of the *Children's Act* 38 of 2005: every "magistrates" court, as defined in the *Magistrates' Courts Act* 32 of 1944 "... shall be a children's court..." (s 42). For other examples, see the establishment of land claims courts in terms of the *Restitution of Land Rights Act* 22 of 1994; small claims courts in terms of the *Small Claims Courts Act* 61 of 1984; equality courts in

Act [51 of 1977], dealing with the bail application, plea, trial or sentencing of a child". The reference to the *Criminal Procedure Act* in this definition is surprising, as that Act does not establish any courts, nor does it generally determine their jurisdiction. It does make provision for "magistrates' courts", "lower courts", "superior courts" and "supreme courts".<sup>72</sup> The sentencing of offenders is one of the functions of all these courts. It is a fairly safe assumption that the legislature intended to declare that all of the courts that are involved in the criminal procedure of the country (dealing with "bail application, plea, trial or sentencing") are "child justice courts" when they apply or are required to apply the provisions of the Act. In other words, district magistrates' courts, regional courts and high courts may all operate as child justice courts. Other commentators on the Act also assume this to be the position.<sup>73</sup>

Of course, by the time that the proceedings have reached the sentencing phase, there should be little doubt whether the court is a child justice court or not. The issue should be dealt with during the plea and trial stage and the Act specifically requires, in section 63(1)(a), that the trial of a child<sup>74</sup> has to be conducted in a child justice court:<sup>75</sup>

Any child whose matter has been referred to the child justice court in terms of section 49(2), must appear before a court with the requisite jurisdiction to be dealt with in terms of this Chapter.

In order to better comprehend this provision, one must briefly note the basic elements of the new child justice system. The first process is referred to as the preliminary enquiry, an informal process which serves as a child suspect's first court appearance.<sup>76</sup> If the child had been arrested, the preliminary enquiry must, in

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terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000; and maintenance courts in terms of the *Maintenance Act* 99 of 1998.

71 Section 1 of the Act.

72 Section 1 of the *Criminal Procedure Act* 51 of 1977.

73 See further Kruger *Hiemstra's Criminal Procedure* 28-60 (child offenders who are not diverted "are dealt with in Child Justice Courts"); Gallinetti *Getting to Know the Child Justice Act* 13 (even a high court applying the provisions of the Act is a child justice court for these purposes) 51; Sloth-Nielsen and Gallinetti 2011 *PELJ* 84 (most cases will be tried in the lower courts).

74 "Child" should also be understood as intended by the Act. See, in this connection, 3.4 below.

75 "[This] chapter" refers to chapter 9, the chapter dealing with trials in the child justice court.

76 A preliminary enquiry is a requirement (s 5(3)), unless the child has been taken out of the child justice process already. See, in general, Gallinetti "Child Justice" 653-654; Kruger *Hiemstra's Criminal Procedure* 28-60. See s 43(3)(c), confirming that the preliminary enquiry amounts to the "first appearance before a lower court".

principle, take place within 48 hours of the arrest.<sup>77</sup> The enquiry is conducted by a magistrate in the presence of the child, a parent (or other person to support the child), a prosecutor and a probation officer.<sup>78</sup> Its main aim is to ensure that the child's case does not get lost in the system. At some point in the process the probation officer must formally assess the child in order to inform the decision of the enquiry magistrate as to the best next step to take. One of the outcomes of such an enquiry is that the child may be ordered to appear before a child justice court for trial. In fact, as is clearly implied by section 63(1)(a), a child can be referred to court for trial only following a preliminary enquiry.

Section 63(1)(a) requires that the child justice court must have "the requisite jurisdiction". This is the only reference in the Act to the jurisdiction of this court. A court may lack "the requisite jurisdiction" because of the crime of which the accused is charged. For example, a district magistrates' court does not have the jurisdiction to try an adult offender for rape, murder or high treason, and a regional court not for high treason.<sup>79</sup> Although there are no specific provisions in the Act confirming such limitations in the case of child justice courts, the limitations are confirmed by the following basic principles and objects of the Act:<sup>80</sup> to protect the rights of children in general,<sup>81</sup> to ensure that they are not treated more severely than adults,<sup>82</sup> and that their best interests are of paramount importance throughout.

The same considerations as those noted above indicate that it is also safe to assume that the various courts retain the punitive jurisdiction that they have for adult offenders, in so far as such jurisdiction is not expressly changed by the Act. In other words, a magistrate's court acting as a child justice court will normally be limited to imprisonment of three years per offence, or fines of up to R 60 000; a regional court will normally be limited to imprisonment of 15 years per offence, or fines of up to R 300 000; high courts are limited to 25 years' imprisonment,<sup>83</sup> but the maximum fine is

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77 Gallinetti "Child Justice" 654 (it is possible for the enquiry to be postponed, for not more than another 96 hours, under certain conditions – ss 48(1) read with 48(2)).

78 Gallinetti "Child Justice" 654.

79 See s 89(1) of the *Magistrates' Courts Act* 32 of 1944.

80 As provided for specifically in the Preamble, and in ss 2 and 3: see 2 above.

81 Section 2(a).

82 Section 3(b).

83 The longest sentence permitted by s 77(4) of the Act.

unlimited.<sup>84</sup> As always, these limitations are subject to express statutory exceptions.<sup>85</sup>

It is unfortunate that the Act does not expressly create child justice courts and that it does not state explicitly that child offenders are now to be tried and sentenced in a different, child-focused and child-friendly court.<sup>86</sup> The Act would have been clearer in this respect if the statement in the Preamble "while children whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts" was followed with an explicit creation of such courts in the Act itself.

It is worth noting (even if *ex abundanti cautela*) that child justice courts are different from children's courts, which are established in terms of the *Children's Act* 38 of 2005. Children's courts are aimed at protecting the general welfare and well-being of children.<sup>87</sup> In particular, this includes the care, support and adoption of children, as well as the care of children in care centres and similar institutions.<sup>88</sup> Section 45(2) specifically declares that a children's court does not have jurisdiction to try any person on a criminal charge.<sup>89</sup> These considerations clearly show that the *Children's Act* follows a so-called welfare or "welfarist" approach, in contrast to the justice approach followed by the Act.<sup>90</sup>

### 3.2 "...after convicting..."

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84 See Terblanche *Guide to Sentencing* (2007) 14, for a summary of these jurisdictional limitations.

85 Terblanche *Guide to Sentencing* (2007) 14.

86 The proposals by the SA Law Commission were much more explicit in this respect (see SA Law Commission *Discussion Paper* clause 53; SA Law Commission *Report* clause 71), although not without their own problems. See Ehlers *Child Justice* 11-13 for a discussion of the various models considered.

87 See Preamble, s 45 *Children's Act* 38 of 2005.

88 Section 45(1)(j) *Children's Act* 38 of 2005. See also Kruger *Hiemstra's Criminal Procedure* 28-62. The same situation applied in terms of the *Child Care Act* 74 of 1983, the predecessor of the *Children's Act*. See SA Law Commission *Discussion Paper* para 10.4.

89 There are two exceptions (s 45(2)(a)), namely non-compliance with an order of a children's court and contempt of court. It would probably have been better had these exceptions been left for child justice courts to deal with, as the present arrangement negatively impacts on the non-criminal nature of children's courts.

90 See further, eg, Ehlers *Child Justice* 13-14. On the distinction between "welfare" and "justice" as central themes of child justice, see Easton and Piper *Sentencing and Punishment* 246-249; Skelton 2011 *NJLSP* 414-417 (the development of welfarism); Ehlers *Child Justice* 16-18; Human "Theory of Children's Rights" 246-247; and Doob and Tonry "Varieties of Youth Justice" 12-16.

As with all offenders, sentencing is possible only after the conviction of an offence.<sup>91</sup> This characteristic establishes an important difference between the basic underlying philosophies of the Act and that of the *Children's Act*.

No offences are excluded from the operation of the Act, which "applies to all criminal offences".<sup>92</sup> These offences are categorised into three schedules to the Act, which are arranged roughly in terms of seriousness: the least serious offences are in Schedule 1<sup>93</sup> and the most serious in Schedule 3.<sup>94</sup>

### 3.3 "...a child..."

#### 3.3.1 Introduction

Nowadays, when reference is made in legislation to "a child", it is not unfair to assume that it refers to a person under the age of 18 years. Certainly, such an assumption would be supported by the Constitution, in terms of which a "child" is someone under the age of 18.<sup>95</sup>

However, it is immediately evident why, whenever the phrase "a child" is used in the Act in general, and in section 68 in particular, it could not always refer to a person under the age of 18. The problem is this: offenders who committed their crimes as children might no longer be children by the time they appear in the child justice court for trial and sentence. This problem is particularly acute in South Africa, where criminal cases can take years to complete, and where there are many examples of child offenders who are sentenced long after they had committed their crimes.<sup>96</sup> The reasons for this apparent anomaly range from the delayed laying of charges to problems relating to the apprehension of the offender, and sometimes simply the

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91 This is a requirement of the legality principle, in terms of which only criminal conduct can be punished. See Rabie, Strauss and Maré *Punishment* 6-7, 81-89; Snyman *Criminal Law* 48-49.

92 Gallinetti "Child Justice" 649.

93 Some of the most serious of these offences include theft involving property of an amount not exceeding R 2 500; fraud not exceeding an amount of more than R 1 500; unlawful possession of certain drugs; consensual "statutory rape"; common assault, etc.

94 Including crimes such as treason, murder, rape, aggravated robbery, and so on.

95 Section 28(3) of the *Constitution*. Of course, this definition is directly aimed at interpreting section 28 of the *Constitution*. It does not necessarily export to other legislation as well.

96 See further *S v Dayile* 2011 1 SACR 245 (ECG) (who committed the crime at 17, but was sentenced only 10 years later).

inertia of the criminal justice system. Finally, some prosecutors and other officials might be tempted to delay proceedings until the offender's eighteenth birthday simply in order to prevent the protection of the Act from applying to the offender.<sup>97</sup>

There are two sides to this coin. On the one hand, delays in the system should not remove any child from the protection provided by the Act for no fault of his or her own. On the other hand, someone much older than 18 at the time of sentencing might, for that reason alone, not be a suitable candidate for the sentences provided for in Chapter 10, or be in need of the protection offered by the Act.

It is the intention of the Convention that child offenders should be treated differently from their adult counterparts.<sup>98</sup> The age of "under 18" is the international standard reflected in the Convention<sup>99</sup> and all related documents, including the African Children's Charter. These instruments also informed the rights in section 28 of the Constitution in this respect. The important result is that all persons who were under 18 years when they committed their offences should, ideally, be given the "benefits and protections" of the Bill of Rights for as long as this is the cut off age.<sup>100</sup> The question is how this ideal can be achieved in the case of child offenders without burdening the courts with offenders who, despite being children at the time of the crime, are much older during sentencing.<sup>101</sup> The way in which the Act approaches this issue is considered next, and it is useful to separate offenders who are children (under 18) during sentencing from those who are no longer children at the time of sentencing.

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97 Section 342A of the *Criminal Procedure Act* 51 of 1977 specifically aims to monitor unreasonable delays in finalising criminal proceedings (see further Du Toit *et al Commentary* 33–16 to 33–16D, discussing some case law in this regard). Every accused person has the right "to have their trial begin and conclude without unreasonable delay" (s 35(3)(d) of the *Constitution*), as part of the right to a fair trial, but applicants find it hard to convince the courts that delays were unreasonable to the extent that they are entitled to some kind of remedy. See eg *S v Pennington* 1999 2 SACR 329 (CC) para 41; *Broome v DPP, Western Cape* 2008 1 SACR 178 (C) paras 44–48, for an overview of the law; also Snyckers and Le Roux "Criminal Procedure" 51–123 to 51–134.

98 See further Van Bueren *International Law* 184

99 See Goldson and Muncie (eds) *Youth Crime* ix: "The presumption within the [Convention] is that the term 'child' refers to 'every human being below the age of eighteen years'".

100 See further *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 39.

101 In terms of the proposals in SA Law Commission *Report* para 3.6 the juvenile justice legislation would have applied to all persons who were children at the time of the offence. The draft legislation specifically provided that the child justice legislation would apply "until conclusion of such proceedings, despite the fact that such person may have reached the age of 18 years during the course of such proceedings" (cl 2(4)). For a brief exposition of the position in Ghana, see Ame 2011 *Int'l J Children's Rts* 274–275.

### 3.3.2 *The child offender is under 18 during sentencing*

The Act defines a child as, in the first instance, any person under 18 years of age.<sup>102</sup> This description is consistent with the Constitution<sup>103</sup> and other legislation affecting children, such as the *Children's Act* 38 of 2005. When the offender appearing before the child justice court for sentencing is under 18 years old, the position is clear: the court must sentence such an offender in terms of section 68, and it must apply all of the principles relevant to the sentencing of children.

### 3.3.3 *The child offender is 18 or older when sentenced*

When the child offender has reached the age of 18, the problems referred to earlier may arise. The Act attempts to solve these problems by focusing on the age of the offender when the criminal proceedings *are instituted*. The relevant provision, section 4(1)(b), reads as follows:

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

- (b) was 10 years or older<sup>104</sup> but under the age of 18 years when he or she was—
- (i) handed a written notice in terms of section 18 or 22;
  - (ii) served with a summons in terms of section 19; or
  - (iii) arrested in terms of section 20,
- for that offence.

The processes noted in paragraphs (i) to (iii), involving sections 18 to 20 and 22 of the Act, relate to the different ways in which the presence of the accused at the criminal proceedings can be ensured. The implication of section 4(1)(b) is clear that

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102 Section 1 of the Act.

103 Section 28(3) of the *Constitution*. See also Skelton "Constitutional Protection of Children's Rights" 279.

104 Children under the age of 10 do not have criminal capacity and they cannot be prosecuted (or convicted) for any offence – s 7(1). When such a child commits an act that would otherwise have been criminal the child has to be dealt with in terms of s 9, which provides for a hearing by a children's court and various other measures. See eg Gallinetti "Child Justice" 649-650.

when these proceedings *are instituted* before the offender's eighteenth birthday, the provisions of the Act apply. Taken literally, even if the proceedings then take another, for argument's sake, ten years to complete, they will still have to take place in a child justice court, despite the fact that such a person might be 28 years old by the time of sentencing.

What should the position be if the proceedings were instituted when the accused was under 18 years of age, but the proceedings were interrupted for some reason? At least two situations could be distinguished. First, if the case is withdrawn by the prosecution and reinstated when the accused is 18 years old or older, the reinstatement should amount to a separate process unaffected by section 4.<sup>105</sup> Such a process is not problematic unless the case is withdrawn simply as a means to circumvent having to charge the accused in a child justice court. Secondly, when a case is interrupted because the accused fails to return to court after a postponement of the matter or to comply with bail conditions, a new case is not opened and the original case number remains in place. In this case there would be little reason to deviate from the earlier stated position, namely that the case should be dealt with in the child justice court even if the proceedings drag on until the accused is much older than 18 years of age.

The provisions of section 4(1)(b) apply "subject to subsection (2)". Section 4(2) of the Act does not limit the position just explained, but actually extends it, as the subsection permits persons of 18 years old (and even older) to be tried and sentenced in terms of the sentencing provisions of the Act. It reads as follows:

The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97(4)(a)(i)(aa),<sup>106</sup> in the case of a person who—

(a) is alleged to have committed an offence when he or she was under the age of 18 years; and

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105 An accused person is not entitled to a verdict when the charge has been withdrawn (s 6(a) of the *Criminal Procedure Act* 51 of 1977). A new prosecution may be taken up at any later stage – Joubert (ed) *Criminal Procedure Handbook* 71.

106 These directives were published on 31 March 2010. See also Badenhorst *Implementation of the Child Justice Act* 10.

(b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b),  
direct that the matter be dealt with in terms of section 5(2) to (4).<sup>107</sup>

It remains an absolute requirement that the alleged offence must have been committed while the offender was under the age of 18 years. Section 4(2) permits the prosecution to be instituted subsequently, as long as the accused is under the age of 21 and it is permissible in terms of the NDPP directives. Once such an accused has been convicted by a child justice court, sentencing will also have to take place in terms of the Act.

The NDPP directives contain a list of considerations that are set in the alternative (they are separated by "or"). These considerations are any of the following:<sup>108</sup>

- (a) the offence is a Schedule 1 offence, in other words, listed with the least serious offences;<sup>109</sup> or
- (b) the co-accused is a child;<sup>110</sup> or
- (c) there is doubt about the accused's age; or
- (d) the accused "appears to be intellectually or developmentally challenged";  
or
- (e) "where other pertinent and relevant circumstances so demand, such as those listed in paragraph J.2 above".<sup>111</sup>

It is striking that undue delay in the institution of the proceedings is not mentioned as a factor, although it could potentially be included within (e) above.

The directives indicate that section 4(2) is unlikely to find frequent application. Although children frequently commit the kind of offences listed in Schedule 1, it is the

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107 Also note the definition in s 1 of an "adult", which "means a person who is 18 years or older but does not include a person referred to in section 4(2)".

108 NDPP "Directives" para M.4.

109 For examples of these offences, see fn 102 above.

110 NDPP "Directives" para M.8 adds that a "...direction should generally not be given where the co-accused are adults, unless the person was used by them to commit the crime."

111 These circumstances, listed in NDPP "Directives" para J.2, include the following: the offender was particularly youthful when the offence was committed; the child experiences "particular hardship, vulnerability or handicap", such as being the head of a household; and diminished criminal responsibility.

clear intention of the Act that the vast majority of these offences should be diverted rather than committed for trial.<sup>112</sup>

When the offender is 21 years of age or older when criminal proceedings are initiated,<sup>113</sup> regardless of whether or not the crime was committed when this person was still a child, the Act cannot find application. Such a person can be charged, tried and sentenced only in terms of the provisions of the *Criminal Procedure Act*.

### **3.4 "...must ... impose a sentence in accordance with this Chapter."**

#### *3.4.1 What the child justice court has to do*

The last part of section 68 requires the child justice court to impose a sentence, and to do so "in accordance" with the chapter of which section 68 is part, namely chapter 10. The phrase "in accordance with" points towards procedure, as it means "in a manner conforming with".<sup>114</sup> Is there any significance to this choice of words? Certainly, chapter 10 contains both procedural and substantive provisions. Section 69, which contains the basic principles of sentencing, is a substantive provision, as are those sections containing the different sentencing options.<sup>115</sup> Sections 70, 71 and 79 are purely procedural provisions, but many of the other provisions also contain procedural parts.<sup>116</sup> There is no indication that the legislature attempted to separate substantive from procedural aspects in chapter 10, and it will be difficult to sustain any significance to the words "in accordance with". It is submitted that it was the intention of the legislature simply to point a child justice court to the provisions of chapter 10 as a first port of call after the conviction of a child offender.

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112 See further, in particular, s 52(2) of the Act, which unconditionally permits the diversion of Schedule 1 offences.

113 As would happen when the victim of a crime lays a charge only many years after the event (see further *S v Cornick* 2007 2 SACR 115 (SCA) (complaint laid 19 years after the crime of rape); *Bothma v Els* 2010 1 SACR 184 (CC) (prosecution instituted on a rape committed 39 years earlier) or if the offender is found only many years after the fact; *S v Acting Regional Magistrate, Boksburg* 2011 2 SACR 274 (CC) (complaint laid only three years after the commission of the crime). See also *Van Zijl v Hoogenhout* 2005 2 SA 93 (SCA).

114 Rhodes University *Oxford South African concise dictionary* vide "accordance".

115 Sections 72-78 of the Act.

116 Eg s 74(3), in connection with fines; s 76(3)(b), in connection with reports by a child and youth care centre; s 77(5), requiring the antedating of prison sentences under certain circumstances; and so on.

The sentences in chapter 10 are the following: community-based sentences, restorative justice sentences, a fine, correctional supervision, residence in a child and youth care centre, and imprisonment. Most of these sentences may also be imposed as suspended sentences.

### 3.4.2 *The incorporation of the provisions of the Criminal Procedure Act*

Although sentencing must take place in terms of the provisions of the Act, it is immediately apparent that chapter 10 of the Act is not self-contained. It does not contain all of the powers necessary to enable the child justice court to give the offender a fair sentencing hearing. There are several provisions in the *Criminal Procedure Act* 51 of 1977 with no equivalent in the *Child Justice Act*, but which are essential in the interests of child offenders, the victims of the crimes and/or the administration of justice. Such provisions include, for example, the authority to permit evidence necessary for the court to be properly informed about an appropriate sentence,<sup>117</sup> the right of the defence to produce evidence on sentencing and to address the court on a proper sentence,<sup>118</sup> the power of one presiding officer to impose sentence when the officer who convicted the offender is not available,<sup>119</sup> the power to order sentences to be served concurrently,<sup>120</sup> and the power to correct an incorrectly passed sentence.<sup>121</sup>

It is exactly for this reason that parts of the *Criminal Procedure Act* are expressly incorporated into the Act. Two provisions contain a general incorporation of the provisions of the *Criminal Procedure Act*, namely sections 4(3)(a) and 63(1)(b). It needs to be established if these provisions also affect the sentencing phase, and to this end they need to be considered separately.

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117 Section 274(1) *Criminal Procedure Act* 51 of 1977.

118 Section 274(2) *Criminal Procedure Act* 51 of 1977.

119 Section 275 *Criminal Procedure Act* 51 of 1977.

120 Section 280 *Criminal Procedure Act* 51 of 1977.

121 Section 298 *Criminal Procedure Act* 51 of 1977.

### 3.4.3 Section 4(3)(a)

Section 4(3)(a) reads as follows:

The Criminal Procedure Act applies with the necessary changes as may be required by the context to any person referred to in this section, except in so far as this Act provides for amended, additional or different provisions or procedures in respect of that person.

This provision is intended as a "catch-all" provision for the application of the Act.<sup>122</sup> It contains two conditions for the provision of the *Criminal Procedure Act* to apply to a child justice court:

- 1) the *Child Justice Act* does *not* provide "for amended, additional or different provisions or procedures"; and
- 2) the Criminal Procedure Act "applies ... to any *person* referred to in this section".

Section 4(3) is so adamant about this "person" that it also links the "amended, additional or different provisions or procedures" to such a person (by reading "amended, additional or different provisions or procedures *in respect of that person*" – emphasis added). The next question is who "any person" could refer to. It is firstly limited to "any person referred to *in this section*", clearing meaning section 4. The only persons that are referred to in section 4 are children and young adults who allegedly committed an offence.<sup>123</sup> As judicial officers are not referred to in section 4 at all, those powers in the *Criminal Procedure Act* given to *judicial officers* in order to facilitate the sentencing process or the sentences themselves cannot be read into this provision and, strictly speaking, such provisions in chapters 27 and 28 of the *Criminal Procedure Act* cannot be incorporated into the *Child Justice Act* in terms of section 4(3)(a).

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<sup>122</sup> See further the heading to s 4 of the Act.

<sup>123</sup> Although the NDPP and the DPP are also mentioned, they are not involved in the substance of sentencing. It is not even clear that such state officials could be a "person" (see, regarding whether or not organs of state are considered "persons", De Ville *Constitutional Interpretation* 109, *contra* Du Plessis *Reinterpretation* 208).

#### 3.4.4 Section 63(1)(b)

In terms of section 63(1)(b), the provisions of the *Criminal Procedure Act* relating to plea and trial proceedings have to be followed by child justice courts. It reads as follows:

A child justice court must apply the relevant provisions of the Criminal Procedure Act relating to plea and trial of accused persons, as extended or amended by the provisions as set out in this Chapter [9] and Chapter 10.

The question is if this provision also involves the sentencing stage of criminal proceedings. The word "trial" is sometimes interpreted to include the sentencing phase as well.<sup>124</sup> For example, in *S v Khuzwayo*<sup>125</sup> the court rejected the trial magistrate's statement that diversion is possible only before conviction, clearly assuming that the "trial"<sup>126</sup> includes the sentencing phase. For the purposes of interpreting section 63, such an inclusion is supported by the fact that chapter 10, which deals with sentencing, is specifically mentioned. However, the issue is confused by the inclusion of the term "plea". Since the plea stage might also be considered part of "a trial", the fact that it is specifically used would indicate that the term "trial" as used here should be understood in accordance with its narrow meaning, being the process subsequent to the plea, until the court's conviction or acquittal.<sup>127</sup> In the end, it is difficult to find a clear indication of the legislature's intention with respect to the question of whether or not section 63(1)(b) should be extended to the sentencing phase.

#### 3.4.5 Assessment

Neither section 4(3)(a) nor section 63(1)(b) provide for a clear incorporation of the sentencing provisions of the *Criminal Procedure Act* into the *Child Justice Act*.

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124 For example, there is no doubt that the right to a fair *trial* (s 35(1) of the *Constitution*) extends to the sentencing phase as well (see Terblanche *Guide to Sentencing* (2007) 12).

125 *S v Khuzwayo* Unreported Case Nr 65/2012 (GSJ) (31 May 2012) paras 3-4. The court did not explain its assumption.

126 As used in s 52(1) of the Act.

127 Such an interpretation would be favoured by the presumption that the inclusion of one thing means the exclusion of the other (*inclusion unius est alterius exclusion*): see further De Ville *Constitutional Interpretation* 131; Steyn and Van Tonder *Uitleg van Wette* 206-207.

There is no elegant solution to this problem. It is submitted that the following approach, given the general mood of the Act and its interpretive tools, is the best indication of the intention of the legislature. Section 4(3)(a) should be given a wider, "purposive" interpretation, not limited to the provisions in the *Criminal Procedure Act* that deal only with "any person", so that it applies to all of the sentencing provisions in chapters 27 and 28 of the *Criminal Procedure Act*, except in so far as any such provision or procedure has been amended or added to by the *Child Justice Act*, or in so far as they differ from those in the *Criminal Procedure Act* (in accordance with the words in s 4(3)(a) "amended, additional or different provisions or procedures"). Such an approach would obviate the need to include the sentencing stage into the provisions of section 63(1)(b).

This conclusion would mean that all of the provisions noted above as being in the interests of the offender must be complied with by a child justice court. The same position should apply, for example, to section 271 of the *Criminal Procedure Act*, which specifically permits the prosecution to prove the offender's record of previous convictions. Other provisions which should be included are those dealing with fines: section 287 permits a sentencing court to impose a fine with alternative imprisonment, and sections 288 and 289 provide ways to recover a fine that has not been paid.

However, the sentences provided for in the *Child Justice Act* differ from those in the *Criminal Procedure Act* and it is submitted that section 4(3)(a) cannot be used to incorporate the provisions of the *Criminal Procedure Act* in connection with the nature of the sentences that may be imposed. Therefore, a child justice court may impose only those sentences specifically contained in chapter 10 of the Act and not, for example, sentences such as periodical imprisonment or committal to a treatment centre.<sup>128</sup> Although this conclusion is not very clear from the above approach, it is submitted that it is the closest to the original intention of the legislature, as indicated in the Preamble and other interpretive tools in the Act. In particular, these considerations include the best interests of the child, and the need for sentencing measures "specifically suited to the needs of children".

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128 As provided for in s 296 *Criminal Procedure Act* 51 of 1977.

#### 4 Conclusion

It will not be possible to achieve the aims of the *Child Justice Act* through a too legalistic and literal interpretation of its provisions. Equally, it is impossible to consider its provisions on sentencing in isolation. The result is that, even when considering a provision as short and apparently to the point as section 68, there are no shortcuts to finding the legislature's true intentions.

Some of the potential pitfalls of section 68 include that the "child" offender who has to be sentenced need not be a "child", a person under 18 years old, which is what the term is lately generally taken to mean. And one of the biggest challenges is going to be to convince all role players that the sentences for child offenders are limited to those contained in the Act itself.

In essence there are two measures for the success of the new child justice system. The first is how many children can be effectively diverted from the criminal justice system. The second measure is, when they cannot be diverted, how effective their sentences will be. A proper understanding of section 68 provides a corner stone for a foundation to effective sentencing in terms of the *Child Justice Act*.

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**List of abbreviations**

Afr Hum Rts L J	African Human Rights Law Journal
CARSA	Child Abuse Research in South Africa
CCR	Constitutional Court Review
DPP	Director of Public Prosecutions
Emory Int'l L Rev	Emory International Law Review
Hum Rts & Globalization L Rev	Human Rights & Globalization Law Review
IJLF	International Journal of Law and the Family
Int'l J Children's Rts	International Journal of Children's Rights
NDPP	National Director of Public Prosecutions
New Crim L Rev	New Criminal Law Review
NJLSP	Northwestern Journal of Law and Social Policy
PELJ	Potchefstroom Electronic Law Journal
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg

## THE CHILD JUSTICE ACT: A DETAILED CONSIDERATION OF SECTION 68 AS POINT OF DEPARTURE WITH RESPECT TO THE SENTENCING OF YOUNG OFFENDERS

SS Terblanche\*

### SUMMARY

The *Child Justice Act 75* of 2008 establishes a criminal justice system for child accused, separate from the criminal justice system which continues to apply for adult accused in South Africa. The Act aims to keep children out of detention and away from the formal criminal justice system, mainly through diversion. When these interventions would be inadequate or unsuccessful, the Act provides for child offenders to be tried and sentenced in child justice courts. Until now there has been little discussion of the details of the provisions dealing with sentencing.

Sentencing in a child justice court is regulated by chapter 10 of the Act and section 68 is the first section in this chapter. This section effectively amounts to the “jurisdictional” provision of the new child sentencing system: it not only mandates child justice courts to impose their sentences in terms of the Act, but also provides the first set of boundaries (or the first part of the framework) within which sentencing should take place.

Despite its brevity, section 68 is not without interpretative challenges. Of course, it has to be interpreted within the context of the entire Act. Explaining this context is the first function of this article. The various aspects of section 68 are further critically explored and discussed.

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\* Stephan Terblanche. BLur (PU for CHE), LL.D. (Unisa). Professor, Department of Criminal and Procedural Law, University of South Africa. Email: terblss@unisa.ac.za. Unisa provided funding for research visits, the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany made available its research facilities and Professor Louise Jordaan had valuable comments on an earlier draft. I want to express my gratitude to them all.

**KEYWORDS:** Child Justice Act; young offenders; sentencing of children; sentencing of young offenders; child justice court.