

**REPUBLIC OF SOUTH AFRICA**



**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**CASE NO: H47/11**

**DATE:14/10/2011**

**REPORTABLE**

In the matter between:

AYSHA ISMAIL GANI N.O

on behalf of Ms P S

and

**THE STATE**

**APPLICANT**

**RESPONDENT**

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**REVIEW JUDGMENT**

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- [1] Deeply embedded in the soul of our nation has been the protection and appropriate care of our children from situations of acrimonious matrimonial dispute, wide ranging forms of abuse, the care of orphans, child refugees and those who clash with the law. The evolution of penal jurisprudence pertaining to children who have clashed with the law from ancient times to the present is amply demonstrated in the crucial balance reached between the introduction of statutes and the general discourse on the concept of the philosophy of childhood. The enactment of statutes such as our Bill of Rights in the Constitution of South Africa, the Children’s Act No 38 of 2005 and of critical importance the Child Justice Act No 75 of 2008 (the act) demonstrates the pinnacle reached in South Africa on the protection of children. South Africa is a signatory to a number of significant international charters and conventions thereby confirming our consistent commitment to the welfare and protection of our children.
- [2] The African Charter on the Rights and Welfare of the Child to which South Africa is a signatory expressly recognizes that the “child occupies a unique and privileged position” and needs to grow up in an “atmosphere of understanding”. 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.
- [3] The practical application of this jurisprudence is a critical step guiding the outcome of this review.

### **RELEVANT BACKGROUND FACTS**

- [4] This judgement reviews the fate of a young female offender who was under the age of 18 years when she clashed with the law. Although it was initially assumed that she was 18 years of at the commencement of the trial it ultimately transpired that she was 17 years old at the time of the offence. Accordingly she is still a child. (See Section 1 of the act). Unfortunately the review file was sent to me in incomplete format. I have established purely by chance that an application was made to the High Court under case number 2011/18156 by one Aysha Ismail Gani N.O. Van Oosten J appointed her as curator ad litem and directed that the matter be sent for review in terms of the provisions of Section 16(2) of the act). The application contains a number of important procedural facts highly relevant to the review procedure envisaged in the act. I respectfully agree with the orders given by Van Oosten J.
- [5] Since the procedural application of the many intricate facets of the act are *res nova*, the appointment of curator ad litem to young offenders and the unique and valuable role they will play in conjunction with the young offender's legal representatives in the proper implementation of procedures consistent with our modern penal jurisprudence, is to be encouraged and commended.
- [6] At the time of commencement of the trial in the court a quo there was an error in the child's age as described above. This fact only became known after pleading stage. In terms of s16(3) of the act notwithstanding an error in age if the presiding officer finds that there is no prejudice he may continue with the trial. Section 16 (3) provides:

“16 (3) Subject to subsection (1), if a presiding officer is of the opinion that an error regarding age has not caused any prejudice to the person, the presiding officer must continue with the proceedings in terms of the provisions of this Act, in accordance with his or her age, as altered.”

[7] In this case it is not clear from the record what the court a quo’s opinion was on prejudice but the matter was very properly adjourned for the matter to be sent for review as the child had already pleaded guilty.

### **DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM**

[8] It would seem that the submission by the child’s counsel was that she should have been diverted from the criminal justice system. This approach found favour and hence the stay of the proceedings in the court a quo and referral of the proceedings to the High Court. In the addition the child has already found guilty and diversion from the criminal justice system would require a setting aside of the conviction. Ultimately the order of review in terms of S 16(3) of the act was granted. S 1 of the act defines the diversion of a child from the criminal justice system as:

'diversion' means 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;”

[9] In terms of S 14(3)(a) of the act, the age was changed on the charge sheet. The child had stolen toiletries to the value of R446.02 from Checkers Hyper. She understood the

charges and pleaded guilty. The facts were very simple and it was clear that the plea of guilty was done voluntarily.

[10] The child is a Zimbabwean citizen and both her parents are deceased. She appears to have a sister here in South Africa. Her sister refused to attend court. The child does not have a fixed address and has a previous conviction for theft. On 15 June 2010 she was sentenced to R2000 or 4 months imprisonment of which R500 or 1 month imprisonment was suspended for 5 years on condition that she does not commit a similar offence. On 7 September 2010 she was released on parole. She has committed the current offence during the period of suspension. There is no evidence as to what her legal status is in this country. The South African justice system is charged with implementing our criminal jurisprudence whatever her residential status in this country.

[11] After entering her correct age on the record the approach which the court a quo adopted when considering her release or continued detention as envisaged in terms of section 21 and section 32 of the act was appropriate.

[12] The presiding officer from the outset took the view that a pre sentence report was required. Her continued detention at the Walter Sisulu Place of Safety was appropriate. This approach although not expressly stated by the court a quo took account of the objects of the act<sup>1</sup>.

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<sup>1</sup> **Objects of Act**

2. The objects of this Act are to—

(a) protect the rights of children as provided for in the Constitution;  
(b) promote the spirit of *ubuntu* in the child justice system through  
(i) fostering children's sense of dignity and worth;  
(ii) reinforcing children's respect for human rights and the fundamental

[13] The question of diversion from the 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 is of itself a fatal factor in the conviction process. The conviction cannot stand. I must state however that except for this factor the court a quo acted in a commendable manner in making sure that the child understood the process.

[14] This matter must be referred back to the court a quo for consideration. Hopefully in these circumstances there will be enough information in the pre sentence report which has already be requested for the fact of diversion to be considered and assessed by the court a quo. If not then an appropriate report will have to be obtained to assist the court a quo in the proper application of the act.

[15] 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.

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freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;  
(c) provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;  
(d) prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution,

[16] 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 re-visit the first conviction as well in the light of this judgement.

[17] The facts in this case call for a proper application of the guiding principle as set out in s 3 of the act and provides

“(a) All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.”

[18] The objectives of diversion are set out very clearly in section 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.

“ The objectives of diversion are to—

- (a) deal with a child outside the formal criminal justice system in appropriate cases;
- (b) encourage the child to be accountable for the harm caused by him or her;
- (c) meet the particular needs of the individual child;
- (d) promote the reintegration of the child into his or her family and community;
- (e) provide an opportunity to those affected by the harm to express their views on its impact on them;
- (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (g) promote reconciliation between the child and the person or community affected by the harm caused by the child;
- (h) prevent stigmatizing the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
- (i) reduce the potential for re-offending;
- (j) prevent the child from having a criminal record; and
- (k) 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.

[19] In this case the child has acknowledged responsibility for the offence as envisaged in section 52 (1) (a) (a) "the child acknowledges responsibility for the offence". She pleaded guilty. Although the diversion options as envisaged in S53 may be limited as the child has no family in this country who has displayed an interest in her, nonetheless S 53(1) diversion options must be considered. These may include a

" (e) "a reporting order" means an order issued in the prescribed manner, requiring a child to report to a specified person at a time or at times specified in the order so as to enable that person to monitor the child's behaviour; and  
 (f) "a supervision and guidance order" means an order issued in the prescribed manner, placing a child under the supervision and guidance of a mentor or peer in order to monitor and guide the child's behaviour. Or (k) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose. Presiding officers are required to take all relevant factors into account when selecting a diversion option as envisaged in section 54(1) of the act. The relevant minimum standard applicable to diversion must give consideration to the provisions of section 54 (2) where "diversion programmes must, where reasonably possible—  
 (a) impart useful skills;  
 (b) include a restorative justice element which aims at healing relationships, including the relationship with the victim;  
 (c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution;  
 (d) be presented in a location reasonably accessible to the child;  
 (e) be structured in a way that they are suitable to be used in a variety of circumstances and for a variety of offences;  
 (f) be structured in a way that their effectiveness can be measured;  
 (g) be promoted and developed with a view to equal application and access throughout the country, bearing in mind the special needs and circumstances of children in rural areas and vulnerable groups; and  
 (h) involve parents, appropriate adults or guardians, if applicable."

[20] The 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. In these circumstances I find that the conviction should be set aside and the process envisaged in terms Chapters 6 and 8 of the act be considered afresh.

The order I would make is:

The conviction is set aside and the matter is referred back to the court a quo for proper implementation of the relevant provision of the act.

**BY THE COURT**

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**VICTOR J**

**JUDGE OF THE HIGH COURT**

**I concur**

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**JUDGE OF THE HIGH COURT**