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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

High Court Ref. No. DR 162/15

Magistrate's Serial No. 44/15

Case no: 23/14112/2015

In the matter between:

THE STATE

Versus

[H.....] [J.....]

Coram: Chetty J and Jeffrey AJ (in chambers)

Date of judgment: 15 September 2015

SUMMARY: **Juvenile offender** – 17 years old – Malawian – both parents deceased - charged with unlawfully entering and remaining in South Africa without a permit - age of accused established only after conviction – matter remitted to court *a quo* to commence *de novo* to comply with Child Justice Act 75 of 2008 including a preliminary inquiry

and an investigation into the diversion of matter from criminal justice system – Immigration Act 13 of 2002 s 49(1)(a); Child Justice Act 75 of 2008 Chapters 7 and 8.

JUDGMENT

Jeffrey AJ

[1] This is a special review referred to this Court by the presiding magistrate, Mr P B Bhengu, at the Durban Magistrate's Court, who has requested that the conviction he imposed on the accused be set aside and that the matter be referred to the relevant children's court.

[2] The accused was arrested on 9 August 2015 on a charge of contravening s 49(1)(a) read with ss 1, 9, 10, 25, 26 and 32 of the Immigration Act No. 13 of 2001. It was alleged that he was from Malawi and he entered or remained in South Africa without a valid permit.

[3] The matter came before the presiding magistrate on 11 August 2015. The accused conducted his own defence, pleaded guilty and was convicted as charged. The charge sheet stated that he was 18 years of age; but, before being sentenced, he informed the presiding magistrate that he was 17 years of age. Upon being so informed, the presiding magistrate properly remanded the case to enable the Westville Youth

Centre to assess the accused's age. This assessment was done and on 20 August 2015 the presiding magistrate was informed that it had been established that the accused was indeed 17 years of age. In addition he was informed that the accused's parents were dead and that the accused was living with a friend in Sydenham. The presiding magistrate then ordered that the accused be detained at the Westville Youth Centre and he referred the matter on special review to this Court.

[4] The presiding magistrate properly concedes that the conviction that he imposed does not comply with the provisions of the Child Justice Act, No. 75 of 2008.

[5] It is clear that the conviction cannot stand.

[6] But more than that, on the facts before us, the accused is a minor, a foreign child whose parents are both dead and his only brush with the law, as far as we know, is his failure to be in possession of a valid permit to be in South Africa. The accused's background, what became of his parents, how he entered South Africa, for what reason, how long he has been here, and who, if anyone, is caring for him are just some of the matters that require thorough investigation.

[7] I respectfully agree with what Victor J said in *S v Ganie NO 2012 (2) SACR 468 GSJ 468j – 469a* at para [1] -

‘Deeply embedded in the soul of our nation have been the protection and appropriate care of our children in situations of acrimonious matrimonial dispute, in wide-ranging forms of abuse, in orphanages, and amongst child refugees and those who clash with the law.’

The Child Justice Act, No 75 of 2008, which commenced on 1 April 2010, was enacted with the specific objective of protecting the rights of children that are entrenched in the Constitution. Section 28(2) of the Constitution requires that a child's best interests have paramount importance in every matter concerning a child, subject to any justifiable limitation under s 36: see *S v M* 2008 (3) SA 232 (CC) 249E-250C at para [26]. The first guiding principle set out in s 3(a) of the Child Justice Act to be taken into account in its application states that 'all consequences arising from the commission of an offence should be *proportionate* to the circumstances of the child, the nature of the offence and the interests of society'. Importantly the Act also provides a mechanism for diverting any matter concerning a child from the criminal justice system. In my view, on the facts of this case, a diversion of this matter would seem to be appropriate and in the interests of justice. But this must be thoroughly investigated in terms of Chapters 7 and 8 of the Act.

[8] The order, therefore, that I propose is:

1. The conviction is set aside.
2. The matter is remitted to the court *a quo* to be commenced *de novo* and in compliance with the provisions of the Child Justice Act, No. 75 of 2008 and in particular Chapters 7 and 8 of that Act.

JEFFREY AJ

I concur and it is so ordered.

CHETTY J