

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 70/2013

In the matter between:-

THE STATE

and

THABO SEKOERE

CORAM: KRUGER, CJ MUSI *et* DAFFUE, JJ

JUDGMENT BY: CJ MUSI, J

DELIVERED ON: 27 JUNE 2013

- [1] I have read the judgment of my brother Daffue, J. I agree with his reasoning and conclusion, which is also supported by the historical setting and genesis of section 85 of the Child Justice Act (CJA). This judgment endeavours to illustrate the aforesaid proposition.

[2] Genetic interpretation, we are told, is best employed with circumspection and that it is mostly not relied on as a primary mode of construction, but only to confirm the results arrived at through other methods of construction. However reports of parliamentary and other commissions of investigation recommending the adoption of specific legislation may more readily be consulted when that legislation is construed. See **Lourens du Plessis *Re-Interpretation of Statutes* : Lexisnexis Butterworths** 2002 at 268 par 12.6.

[3] In **Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd** 1986 (2) SA 555 (A) 562J – 563A the following was said:

“In my view it is permissible, in construing Act 105 of 1982, to have regard to what is stated in the Third Interim Report as to the mischief aimed at. In England it has been authoritatively held that in construing a statute where the words are not clear and unambiguous the Court may have regard to the report of a Royal Commission or committee appointed by the Government which shortly preceded the passing of the statute in order to ascertain the mischief aimed at and the state of the law as it was then understood to be, but not to determine the meaning attached by the commission or committee to any draft bill recommended in the report which formed the basis of the statute passed by Parliament (see *Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG* [1975] AC 591 (HL) ([1975] 1 All ER 810); *R v Bloxham* [1983] 1 AC 109 (HL) at 115 ([1982] 1 All ER 582); see also *Re Eastman Photographic Materials Co Ltd's Application*; *Eastman Photographic Materials Co v Comptroller-*

General of Patents, Designs and Trademarks [1898] AC 571 (HL); *Assam Railways and Trading Co Ltd v Inland Revenue Commissioners* [1935] AC 445 (HL); *Halsbury* 4th ed vol 44 para 901). In *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) at 852, this Court, having referred to *Eastman's* case *supra* and the *Assam Railways* case *supra*, left the point open, but in *S v Mpetha* 1985 (3) SA 702 (A) at 712H - 713E, GALGUT AJA, delivering a minority judgment (the majority judgment did not consider the point), held that it was permissible for this Court in construing the Internal Security Act 74 of 1982, to have regard to the report of the Commission of Enquiry into Security Legislation in order to ascertain the mischiefs aimed at. The *Black-Clawson* case *supra* has been followed in Zimbabwe (*Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS) at 496 - 7 and in Canada (*Re Urman* (1981) 128 DLR (3rd) 33 at 37 - 8). In my opinion, our Courts too are entitled, when construing the words of a statute which are not clear and unambiguous, to refer to the report of a judicial commission of enquiry whose investigations shortly preceded the passing of the statute in order to ascertain the mischief aimed at, provided that there is a clear connection between, on the one hand, the subject-matter of the enquiry and recommendations of the report and, on the other hand, the statutory provisions in question."

- [4] The South African Law Commission's report on juvenile justice (Project 106) was completed in July 2000 and submitted to the former Minister for Justice and Constitutional Development by the Acting Chairperson of the Commission the Honourable Madam Justice Mokgoro. That report recommended the enactment of the CJA.

- [5] The mischiefs which the legislature sought to address and the solutions therefor, relative to the problem under discussion, are discussed in paragraph 12.2 and 12.3 of the report which reads as follows:

“12.2 At present, appeal and review are the only methods of control over child sentencing. The present review criteria⁴¹⁸ do not protect children sufficiently... The Commission agreed with the view expressed by most respondents to the issue paper that the present system of automatic review by judges of the High Courts should be extended, and that in principle all sentences involving a residential element should be subject to the review procedure.⁴¹⁹ This conforms to the principle that detention be used as a measure of last resort.

12.3 In addition to the automatic review procedures, it was proposed that a superior court’s inherent right of review of irregularities in proceedings of lower courts should continue to be applicable to the child justice system.”

Footnote 418 reads as follows:

“...Sentences of imprisonment imposed by longer serving magistrates, and sentences falling below other thresholds set in the Criminal Procedure Act, frequently escape High Court scrutiny. In addition, sentences imposed by Regional Courts and sentences where the accused was legally represented are not reviewable”

In footnote 419 the following is stated:

“The Discussion Paper proposed that no exceptions should be made for cases where the magistrate has been in office for a particular period of time, nor should the fact that the accused was legally represented at any time during the proceedings disqualify the case from being subject to this type of review. Decisions of regional courts should also be reviewed. Further, the experiences with monitoring of the implementation of section 29 of the Correctional Services Act have shown that regional courts have often breached the provisions intended to protect children, and that children who are tried in regional courts are frequently faced with long delays in their cases. This suggested that in order to ensure the effective implementation of the protective provisions of the legislation regional courts should be included within the ambit of automatic review procedures”.

- [6] It is clear that the legislature wanted to afford children who faced any sentence that involved incarceration or a residential element the protection of having their cases reviewed by a High Court, irrespective whether they were legally represented in the lower court.
- [7] Although the legislature, for unclear reasons, decided to distinguish between children who were under 16 and those who were 16 and 17 years old at the time of the commission of the offence, the principle that no child should be sentenced to a sentence that has a residential element without the case being reviewed by a High Court has been retained. This is in accordance with the express intention of the legislature to give children in conflict with the law and who have been convicted and sentenced “special

protection” and “specific safeguards”. See also **Centre for Child Law v Minister for Justice and Constitutional Development and Others** 2009 (6) SA 632 (CC) paragraph [25].

- [8] I find it very difficult to accept that the mere presence of a legal representative who, in the district courts, is more often than not an inexperienced articulated clerk, should override the added safeguard of the child’s case being reviewed by a High Court. In my view, it could not have been the intention of the legislature to deprive a child of his/her review right, which is part of the States’ international obligations, just on account of the fact that the child was legally represented.

- [9] The preamble to the Child Justice Act makes it clear that the intention was “to establish a criminal justice system for children who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the International obligations of the Republic...”

- [10] Daffue, J dealt with the constitutional values in his judgment. I propose to say something about our international obligations. Daffue, J pointed out that the United Nations Convention on the Rights of the Child (CRC) is the most important international instrument when dealing with children’s rights. I agree. South Africa ratified the CRC in 1995.

[11] The relevant parts of article 40 of the CRC read as follows:

- “1. State parties recognize the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

 2. To this end, and having regard to the relevant provisions of international instruments, States Parties should, in particular, ensure that:
 - a) ...
 - b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, **and to have legal or other appropriate assistance in the preparation and presentation of his or her defence...**
- (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law...** (My emphasis.)

- [12] Article 40 clearly postulates a situation where the child's case should be reviewed irrespective of the fact that the child was legally represented or not. The bifurcated system whereby the legislature decided to distinguish between 16 and 17 year old children and others was a policy decision taken by the legislature which limits 16 and 17 year old children's rights. Whether that is constitutional or not is not for us to decide in this matter.
- [13] It is the bifurcated system that creates the possibility for "some minor children to fall into the cracks as far as automatic review goes". See **S v TS** 2013 (1) SACR 92 (FB) at paragraph [13]. Had all children under the age of 18 years been treated like those under 16, no child would have fallen through the cracks. The cracks were designed by the legislature.
- [14] The heading to section 85 which reads "Automatic review in certain cases" in my view does not assist in solving the conundrum relating to the reviewability of sentences where the child was legally represented. It is at best a neutral factor.
- [15] Clearly the phrase "certain cases" refers to age and sentence imposed and not legal representation. The intention was that sixteen and seventeen year old children who were sentenced to a non-residential sentence should

not enjoy the added protection of having their cases automatically reviewed.

[16] In **S v Nakedi** (12/2012) [2012] ZANWHC 5 (2 January 2012) reference is made to section 28(2) of our Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child (par [14]). The court concluded that the referral of all matters wherein the minor child is legally represented for automatic review is not consistent within the Criminal Procedure Act and Child Justice Act (par [15]). This judgment as well as **S v TS** do not indicate how the restricted interpretation promotes the best interests of the child. Clearly an interpretation that affords the child the right to have her/his matter reviewed irrespective of whether he/she was legally represented is in the best interests of the child. In my view, the conclusions in **Nakedi** and **TS** are inconsistent with our Constitution, the CJA, the historical setting of section 85 as well as our international obligations.

[17] In **S v TS** at paragraph [17] it was said that:
 “Had the Legislature intended to exclude minor offenders from the purview of section 302(3)(a) of the CPA it would, in my opinion, have done so explicitly regard being had to the fact that the provisions of this section concern an established practice which has been in existence for a very long time...”

This conclusion disregards the fact the CJA represents a break from the past in the way children are dealt with. It is a new criminal justice system for children who are in conflict with the law. I agree with Daffue J that where there is conflict, between the CJA and the CPA, the CJA should prevail.

C. J. MUSI, J