

Protecting child offenders' rights

Testing the constitutionality of the National Register for sex offenders

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The Constitutional Court recently declared the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (Act 32 of 2007) unconstitutional in its requirement that the names of child offenders be automatically included on the National Register for Sex Offenders when convicted of a sexual offence against a child or a person with disability. The Court held that automatic inclusion on the Register violated a child's right in terms of section 28(2) to have their best interests taken into account as the paramount consideration in every matter affecting the child. The Court held that the individual circumstances of children should be taken into account and that they should be given the opportunity to be heard by the sentencing court regarding the placement of their details on the Register. The Court decided that sentencing courts should be given the discretion to decide whether to place a child on the Register or not.

The past few years have seen significant developments in the laws that determine how the criminal justice system interacts with child offenders. Greater emphasis is placed on practices such as diverting child offenders from the criminal justice system; applying restorative justice principles to child offenders while ensuring their responsibility and accountability for crimes committed; and effectively rehabilitating and reintegrating child offenders to minimise the potential of reoffending.¹ This has resulted in increased dialogue and a proliferation of judgements² that aim to provide guidance on the implementation of legislation regulating this interaction. Courts have engaged and grappled with the law, and issues that arise from the law, in light of the Constitution and international law.

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The recent Constitutional Court judgement of *J v National Director of Public Prosecutions and Another*³ is no exception, with its main focus being the constitutionality of automatically placing child offenders on the National Register for Sex Offenders (the Register) after conviction. (The Register and its purpose are discussed in more detail below in the section 'Overview of the legal provisions at issue'.)

Brief background

When the applicant (J) was 14 years old, he was charged with the rape of three minors in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (Act 32 of 2007, the Sexual Offences Act). In addition, he was charged with assault with intent to cause grievous bodily harm after stabbing a 12-year-old girl. He pleaded guilty to all the charges and was convicted by a Child Justice Court. J was sentenced to five years' compulsory residence in a child and youth care centre and a further three

years' imprisonment thereafter for the three rape charges.⁴ For the assault charge he was given a suspended sentence of six months' imprisonment.⁵ The magistrate also ordered that J's name be entered on the Register in terms of section 50(2) of the Sexual Offences Act.⁶ Section 50(2) states the following:

- (a) A court that has in terms of this Act or any other law—
 - (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or
 - (ii) made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person,

must make an order that the particulars of the person be included in the Register.

- (b) When making an order contemplated in paragraph (a), the court must explain the contents and implications of such an order, including section 45, to the person in question.⁷

The matter went before the Western Cape High Court by way of automatic review in terms of section 85(1)(a) of the Child Justice Act.⁸ The High Court *mero motu* [of its own accord] asked the regional magistrate and the Director of Public Prosecutions whether the magistrate was competent to make an order in terms of section 50(2) of the Sexual Offences Act, in light of the objectives of the Child Justice Act as well as section 28 of the Constitution. Both responded in the affirmative and recommended that the High Court confirm it.⁹ A full bench was constituted to hear the matter on 3 May 2013. J was

represented by Legal Aid, and the Centre for Child Law, upon the invitation of the Court, entered the matter as *amicus curiae*.¹⁰

Deliberations in the high court

It was argued on J's behalf that regional magistrates are granted no discretion by section 50(2) to decline to make an order to place child offenders' details on the Register, as the Act does not distinguish between a child sexual offender and an adult sexual offender.¹¹ The automatic inclusion of their details on the Register ignores the rights of child offenders, such as the right to be protected against degradation and the right not to have his or her well-being, moral or social development placed at risk.¹² Inclusion, it was argued, fails to consider the long-term effects on the child offender and is not in line with the objectives and principles of the Child Justice Act, which places child offenders in a different category from adult offenders and recognises their unique and vulnerable position in society.¹³

The *amicus curiae* agreed that section 50(2) violates a number of the constitutional rights of child offenders, and undermines the objectives of the Register.¹⁴ It argued that the section is not properly in touch with the aim of the Register, which is to protect children and persons with disabilities from predatory adults by limiting their employment opportunities to jobs that do not involve access to children or persons with mental disabilities.¹⁵ The *amicus* further pointed out that the section is too broad, particularly as a result of the comprehensive definition of sexual assault, which includes everything from rape to kissing.¹⁶ The *amicus* submitted that the section cannot be read in a constitutionally compliant manner, and therefore amounts to a constitutional infringement of rights.¹⁷

The state argued that placing offenders' details on the Register is not an infringement of their inherent dignity.¹⁸ The contents of the Register are not made public; only certain categories of people can access the contents of the Register through an application process.¹⁹ The section gives judicial officers the power to order that the name of a sexual offender, including a child sexual offender, be included in the Register with the aim of eradicating the high number of sexual offences in South Africa.²⁰

On considering the arguments by all the parties, the High Court found that the rights of child offenders as well as those of adult offenders would be infringed by section 50(2) of the Sexual Offences Act because of the consequences and the impact of inclusion of their details on the Register, and mainly because it affected their right to be heard.²¹

On the question of whether the infringement of these rights was justifiable in terms of section 36 of the Constitution, the High Court held that because the legitimate constitutional purpose of the Sexual Offences Act is to protect victims of sexual abuse, the limitation of the rights of the offenders was reasonable and justifiable in an open and democratic society.²² It further found that in the case of child offenders, the best interests set out in section 28(2) of the Constitution may be limited.²³

The High Court was, however, of the view that section 50(2) prevents a court from assessing child offenders to determine if they pose any threat to others and if circumstances warrant their inclusion on the Register.²⁴ This is due to the fact that the Sexual Offences Act criminalises a broad array of conduct, and the presiding officer making the decision to place a child on the Register is granted no discretion in the matter.²⁵

Interestingly, on the issue of the right of adult offenders to be heard, the High Court held that section 50(2) of the Sexual Offences Act infringes on their right to a fair hearing as set out in section 34 of the Constitution.²⁶ The section does not give the offender an opportunity to persuade the court that he should not be placed on the Register.²⁷ The High Court found this infringement to be unjustifiable, as no legitimate constitutional purpose is served.²⁸ It therefore found section 50(2) of the Sexual Offences Act to be invalid and inconsistent with the Constitution.²⁹

The declaration of constitutional inconsistency was suspended for 18 months to afford the legislature the opportunity to amend the section.³⁰ Through the process of 'reading in', the Court inserted words into section 50(2) that would be applied during the 18-month suspension. The intent of the insertion was that, if good cause was shown, a court could direct that an offender's details not be included in

the Register.³¹ Furthermore, courts would have the responsibility to inform convicted persons that they could make representations on their inclusion in the Register.³²

Deliberations in the Constitutional Court

Section 172(2)(a) of the Constitution requires an order of constitutional invalidity to be confirmed by the Constitutional Court before coming into force. On 6 February 2014 the Constitutional Court heard arguments and dealt with the issues below:³³

- Should the proceedings extend to adult offenders?
- Does section 50(2) of the Sexual Offences Act limit constitutional rights and, if so, can the limitation be justified in terms of section 36 of the Constitution?
- If the limitation cannot be justified, the section must be declared unconstitutional and the Constitutional Court must determine a just and equitable remedy.

Overview of the legal provisions at issue

Chapter 6 of the Sexual Offences Act provides for the establishment of the Register to contain particulars of persons convicted of any sexual offence against a child or a person with a mental disability.³⁴ The Register aims to protect children and persons with mental disabilities from coming into contact with sex offenders by ensuring that relevant employers, licensing authorities and childcare authorities are informed that a particular person is on the Register.³⁵ A prospective employer must apply with the Registrar to check the prospective employee's details against the Register.³⁶

Once a person's details are on the Register, section 41(1) of the Sexual Offences Act provides that they cannot be employed to work with children; hold any position that places them in a position of authority, supervision or care of children; be granted a licence or approval to manage or operate an entity, business or trade in relation to the supervision or care of children or where children are present; and become foster parents, kinship caregivers, temporary safe caregivers or adoptive parents.³⁷

An offender has an obligation to disclose any previous sexual offences against children or persons with mental disabilities to an employer, licensing authority or childcare authority. Failing to do this will result in criminal sanction.³⁸

Once an offender's details have been entered on the Register they can only be removed under limited circumstances.³⁹ Section 51(2) lays out two circumstances in which a person's details may never be removed, namely when someone has been sentenced to a period of imprisonment of over 18 months (even if wholly suspended), or if a person has two or more convictions of a sexual offence against a child or persons with mental disabilities.⁴⁰

A plain reading of section 50 of the Sexual Offences Act points to the registration applying to child offenders.⁴¹ Section 50(2)(a) applies to 'a person [convicted] of a sexual offence against a child or a person who is mentally disabled', where 'person' applies to both children and adults.⁴²

The scope of the proceedings

When the matter was before the High Court, the main issue before it, and the questions raised, focused on child offenders.⁴³ The Court, however, made an order that deliberately extended to adult offenders, while making no distinction between child offenders and adult offenders.⁴⁴

The Constitutional Court did not approve of this approach and was of the view that '[w]hile courts are empowered to raise constitutional issues of their own accord, this power is not boundless.⁴⁵ In order for the interests of justice to favour a court considering a constitutional issue of its own accord, it is important that the issue arises on the facts because it is generally undesirable to deal with an issue in abstract ...'⁴⁶

The facts presented before the High Court raised the application of section 50(2) to child offenders.⁴⁷ The Constitutional Court held that it was inappropriate for the High Court to consider the constitutionality of the section in relation to adult offenders and then to extend its order to cover all offenders.⁴⁸ The issues raised by the case would apply differently to children and adults, and they had not been discussed

properly on the facts or in legal argument in the High Court or the Constitutional Court.⁴⁹

Does section 50(2)(a) infringe on the rights of the child offender?

The Court confirmed that the starting point for matters concerning the child is section 28(2) of the Constitution, which provides that:

A child's best interests are of paramount importance in every matter concerning the child.⁵⁰

The best-interests principle:

... encapsulates the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass. [The Constitutional Court] has emphasised the developmental impetus of the best-interests principle in securing children's right to learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood. In the context of criminal justice, the Child Justice Act affirms the moral malleability or reformability of the child offender.⁵¹

The Court laid out key principles for applying the best interests approach to child offenders:⁵²

- The law should generally distinguish between adults and children
- The law must allow for an individualised approach to child offenders
- The child or their legal representative must be afforded an appropriate and adequate opportunity to make representations at every stage of the criminal justice process, giving due weight to the age and maturity of the child

The Court discussed the three principles and found that in relation to the first principle, section 50(2) in its current form does not distinguish between adult offenders and child offenders.⁵³ Furthermore, in relation to the second principle, the Court was of the view that the best interests approach should be flexible enough to allow for the determination of factors that will secure the best interests of

the child offender, taking into account individual circumstances.⁵⁴ The Child Justice Act was held up as an example to follow, as it provides for an individualised approach and contains guiding principles to be taken into account when dealing with children in the criminal justice system.⁵⁵

With regard to the third principle, the Court also referred to the Child Justice Act, which provides in its guiding principles that every child should be given an opportunity to participate in proceedings that would result in decisions that affect him or her.⁵⁶

When section 50 of the Sexual Offences Act is read as a whole, it can be seen that a court is granted no discretion on whether or not to include an offender's details on the Register.⁵⁷ The registration occurs automatically after conviction and sentencing, or after the court has made a finding in terms of section 77(6) or 78(6) of the Criminal Procedure Act.⁵⁸ This is an infringement of the best interests of the child.⁵⁹ The requirement for automatic registration excludes an opportunity for individual responses to the child offender, as well as the opportunity to take into account the views and representation of the child.⁶⁰ The restricted conditions under which an offender can apply for his or her details to be removed from the Register are not flexible enough to consider the particular child's development, or ability to reform.⁶¹

The consequences that arise from being placed on the Register will not only affect the child offender while still a child, but may extend into adulthood.⁶² Child offenders who have served their sentences but whose details have been included on the Register 'will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life, and ability to pursue a living'.⁶³ This seriously affects the rights of the children concerned, as they may still be able to benefit from rehabilitation services and be integrated into society if given the opportunity and necessary tools.⁶⁴

Is the limitation of the right of the child offender justifiable?

The right of child offenders to have their best interests considered paramount, as set out in section 28(2) of the Constitution, can be subject to limitation.⁶⁵

Section 36 of the Constitution states that rights can be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and sets out the following factors to be taken into account:

- The nature of the right
- The importance of the purpose of the limitation
- The nature and extent of the limitation
- The relation between the limitation and its purpose
- Less restrictive means to achieve the purpose⁶⁶

The Court began by acknowledging that, when dealing with children exposed to the criminal justice system, the importance of the best-interest principle cannot be denied.⁶⁷ It then went on to recognise that the Register has a commendable and legitimate aim, to keep children and persons with disabilities safe in the places where they learn and grow.⁶⁸ It acknowledged the harm caused by sexual violence: it 'threatens a victim's rights to freedom and security of the person, privacy and dignity in a profound way. Sexual offences have effects that ripple far beyond the horrific immediacy and physicality of the crime.'⁶⁹

The limitation therefore aims to achieve a valuable purpose, which is to protect children and persons with mental disabilities.⁷⁰ However, the automatic operation of section 50(2)(a) results in the limitation not always achieving its purpose for child offenders.⁷¹ The Register functions on the premise that the offenders concerned pose a risk to children and persons with mental disabilities, and disregards the fact that patterns of recidivism for sexual offences vary considerably between adults and children.⁷²

The Court was of the view that there are less restrictive means to achieve the aims of the Register.⁷³ If the courts are granted discretion, and the child offender granted an opportunity to make representations on the issue of registration, there would be the possibility of greater congruence between the limitation and its purpose.⁷⁴ This would also provide courts with more flexibility to respond to cases on individual merits so as to meet the child's best interests.⁷⁵

The Court concluded that the limitation of the right of child offenders in section 50(2)(a) is not justified in an open and democratic society, which resulted in the section being declared constitutionally invalid.⁷⁶

Remedy

The Court held that the legislature must be afforded the opportunity to fix the constitutional defect while taking into account expert opinion on the unique circumstances of child sex offenders and victims in South Africa.⁷⁷

The Court, however, found that it was faced with difficulties that arose as a consequence of having to determine what just and equitable order to grant in the interim, namely:⁷⁸

- The Sexual Offences Act creates complex mechanisms that regulate the treatment of offenders following their convictions. Only section 50(2)(a) was before the Court. The Court cannot order an interim remedy without affecting the rest of the statutory scheme.
- The Register fulfils an important purpose of protecting vulnerable persons from sexual abuse in places where they should be safe, and no evidence was placed before the Court that children and/or persons with mental disabilities would not be harmed. Therefore it could not issue a moratorium on the registration of child offenders or allow the declaration to operate retrospectively.

The Constitutional Court therefore instructed Parliament to remedy the defect within 15 months, during which the declaration would be suspended.⁷⁹ However, it advised that a shorter period of correction of the defect be preferred, as rights infringements to child offenders would continue to operate as a result of the suspension of the declaration.⁸⁰

With regard to child offenders who have already been placed on the Register, the Court ordered that a mechanism be provided to identify them so that they have an opportunity to obtain legal advice and assistance.⁸¹ This should be done in order to salvage the rights of these children.⁸² The Court will then make the information available to persons and organisations seeking to assist these child offenders.⁸³

Analysis and conclusion

This judgement contributes positively to the developing jurisprudence that promotes the principle that the best interests of children must be considered central in matters concerning them. It builds on other Constitutional Court judgements that target and develop the application of the best interests of child offenders (among the often conflicting interests of victims and the community).⁸⁴ It confirms the view that children, child offenders in particular, are to be regarded as individuals whose cases must be decided on their own merits and in light of their own individual circumstances. The Court recognises the severity of placing child offenders' details on the Register. Such inclusion does not create or encourage a growth space in which a child can be influenced in positive ways through various means that allow for rehabilitation, reform and reintegration. Child offenders are thus not merely abandoned to the criminal justice system without the consideration of less restrictive alternatives.

The rights and interests of victims are not ignored by the Court either. The Court successfully strikes a balance between the rights and interests of child offenders and those of victims. It recognises and acknowledges the harm caused by sexual violence to the victim, as well as to society. It emphasises the importance of protecting vulnerable members of society from sexual abuse. There is an appreciation of the fact that the Register fulfils the important role of protecting victims of sexual abuse, and therefore does not completely do away with the possibility of including child offenders on the Register. Instead, it advocates for granting sentencing courts a discretion that is dependent on the circumstances in individual cases.

This said, there are concerns that arise from the order that was given by the Court. The first relate to the remedies that are available, if any, for child offenders whose details have already been included on the Register. Once they have been identified, questions arise about whether they should be subject to individual assessments, who would carry out these assessments, and against what criteria. Also, even when they have received the required legal assistance, and the courts have been convinced that

some children should not be on the Register, there is no legal standing on which these courts or the Registrar can effect the removal of their details from the Register. The declaration of invalidity has been suspended, leaving the provisions in place, and no interim measures have been put in place to assist these children.

Lastly, it is a pity that the Court failed to set out a structured order that would address the issue of what should be done about child offenders who, during the 15 months of the suspension of the declaration of invalidity, are convicted of and sentenced for sexual offences and are therefore automatically placed on the Register.

It is hoped, however, that in the interim, the continued implementation of this judgement will result firstly in the amendment of the offending legislation and provisions therein, and secondly in the protection of the best interests of child offenders.



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Notes

- 1 See the Child Justice Act 2008 (Act 75 of 2008), Pretoria: Government Printer, preamble.
- 2 See, for example, *S v CKM and Others* 2013 (2) SACR 303 (GNP); *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA); *S v FM* 2013 (1) SACR 57 (GNP); *Mpofu v Minister of Justice and Constitutional Development* 2013 (9) BCLR 1072 (CC) or 2013 (2) SACR 407 (CC); *The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development* 2013 (12) BCLR (CC); *S v VC* 2013 (2) SACR 146 (KZP); *S v CS* 2013 (2) SACR SACR 323 (ECG).
- 3 *J v National Director of Public Prosecutions and Another* 2014 (2) SACR 1 (CC).
- 4 *J v NDPP* para [3]. This was done in terms of section 76(1) and (3) of the Child Justice Act.
- 5 *Ibid.*
- 6 *Ibid.*
- 7 Section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- 8 *J v NDPP* para [4].
- 9 *Ibid.*
- 10 *S v JJ* 2013 (2) SACR 599 (WCC) at para [11].
- 11 *Ibid.*, para [54].
- 12 *Ibid.*, para [56].
- 13 *Ibid.*, para [57 to 60].
- 14 *Ibid.*, para [70].
- 15 *Ibid.*, para [74].
- 16 *Ibid.*, para [79].
- 17 *Ibid.*, para [74].
- 18 *Ibid.*, para [85].
- 19 *Ibid.*
- 20 *Ibid.*, para [89] – [90].
- 21 *J v NDPP* para [6].
- 22 *Ibid.*, para [7].
- 23 *Ibid.*
- 24 *Ibid.*
- 25 *Ibid.*
- 26 *Ibid.*, para [8].
- 27 *Ibid.*
- 28 *Ibid.*
- 29 *Ibid.*, para [9].
- 30 *Ibid.*
- 31 *Ibid.*
- 32 *Ibid.*, para [8] – [9].
- 33 *Ibid.*, para [10] and [14] – [15].
- 34 *Ibid.*, para [20]. Also see Sexual Offences Act, section 42.
- 35 *Ibid.* Also see Sexual Offences Act, section 43.
- 36 See Sexual Offences Act, sections 44 and 45.
- 37 *J v NDPP* para [21].
- 38 *Ibid.*, para [24]. Also see Sexual Offences Act, section 46.
- 39 *J v NDPP* para [25]. Also see Sexual Offences Act, section 51.
- 40 *Ibid.*
- 41 *J v NDPP* para [27].
- 42 *Ibid.*
- 43 *Ibid.*, para [28]
- 44 *Ibid.*
- 45 *Ibid.*, para [30].
- 46 *Ibid.*
- 47 *Ibid.*, [para 31].
- 48 *Ibid.*
- 49 *Ibid.*
- 50 *Ibid.*, para [35].
- 51 *Ibid.*, para [36].
- 52 *Ibid.*, para [37 to 40].
- 53 *Ibid.*, para [37].
- 54 *Ibid.*, para [38].
- 55 *Ibid.*, para [39].
- 56 See Child Justice Act, section 3 (c); *J v NDPP* para [40].
- 57 *J v NDPP* para [41].
- 58 *Ibid.*
- 59 *Ibid.*, para [42].
- 60 *Ibid.*
- 61 *Ibid.*
- 62 *Ibid.*, para [43], and see footnote 52 of the judgement.
- 63 *Ibid.*, para [44].

- 64 Ibid.
- 65 Ibid., para [46].
- 66 Ibid.
- 67 Ibid., para [47].
- 68 Ibid.
- 69 Ibid., para [48].
- 70 Ibid., para [49].
- 71 Ibid.
- 72 Ibid.
- 73 Ibid., para [50].
- 74 Ibid.
- 75 Ibid.
- 76 Ibid.
- 77 Ibid., para [54].
- 78 Ibid., para [54 to 55].
- 79 Ibid., para [56].
- 80 Ibid.
- 81 Ibid., para [57].
- 82 Ibid.
- 83 Ibid.
- 84 See for example: *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) or 2007 (12) BCLR 1312 (CC) or 2007 (2) SACR 539 (CC); *Centre for Child Law v Minister of Justice and Constitutional Development and others (National Institute for Crime Protection and Reintegration of Offenders as amicus curiae)* 2009 (6) SA 632 (CC) or 2009 (2) SACR 477 (CC) or 2009 (11) BCLR 1105 (CC); *Mpofu v Minister of Justice and Constitutional Development* 2013 (9) BCLR 1072 (CC) or 2013 (2) SACR 407 (CC).