



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 114/13

In the matter between:

J Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT** Second Respondent

and

CHILDLINE SOUTH AFRICA First Amicus Curiae

TEDDY BEAR CLINIC FOR ABUSED CHILDREN Second Amicus Curiae

**NATIONAL INSTITUTE FOR CRIME PREVENTION
AND THE REINTEGRATION OF OFFENDERS** Third Amicus Curiae

Neutral citation: *J v National Director of Public Prosecutions and Another* [2014] ZACC 13

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

Heard on: 6 February 2014

Decided on: 6 May 2014

Summary: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 – constitutional validity of section 50(2) – best interests of the child – section 50(2)(a) unconstitutional

ORDER

On confirmation from the Western Cape High Court, Cape Town (per Henney J):

1. The second respondent's application for condonation is granted.
2. The order of the Western Cape High Court, Cape Town is set aside and replaced by the following:
 - a. Section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is declared inconsistent with the Constitution and invalid to the extent that it unjustifiably limits the right of child sex offenders to have their best interests considered of paramount importance.
 - b. The declaration of invalidity is suspended for a period of 15 months from the date of this order to afford Parliament the opportunity to correct the defect in the light of this judgment.
3. The respondents are directed by 30 July 2014 to furnish a report to the Registrar of this Court setting out:
 - a. the number of persons whose particulars were included on the National Register for Sexual Offenders by virtue of

- section 50(2)(a) who were younger than 18 years when they committed the offence that required their inclusion;
- b. the courts that directed that their particulars be so listed; and
 - c. the dates on which the orders in question were made.
4. There is no order as to costs.

JUDGMENT

SKWEYIYA ADCJ (Moseneke ACJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] These are confirmation proceedings for an order of constitutional invalidity made by the Western Cape High Court, Cape Town (High Court). The matter concerns section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ (Sexual Offences Act). It provides that a court “must make an order” to include the particulars of a person convicted of a sexual offence against a child or person who is mentally disabled on the National Register for Sex Offenders (Register).²

¹ 32 of 2007.

² See below at [3] for the full text of section 50(2).

Background

[2] The applicant, J,³ was charged with the rape of a seven-year-old boy and two six-year-old boys in contravention of section 3 of the Sexual Offences Act. He was further charged with assault with intent to cause grievous bodily harm for stabbing a 12-year-old girl. J was 14 years old at the time of the commission of the offences.

[3] In the Magistrates' Court, J was assisted by his mother and was legally represented. He pleaded guilty to all four charges and was accordingly convicted. In relation to the three rape charges, he was sentenced to five years' compulsory residence in a Child and Youth Care Centre⁴ and a further three years' imprisonment thereafter.⁵ For the assault charge, he was given a suspended sentence of six months' imprisonment. In addition, the Magistrates' Court made an ancillary order in terms of section 50(2) of the Sexual Offences Act that the applicant's particulars be entered in the Register. Section 50(2) provides:

- “(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,

³ On 6 February 2014, this Court issued an order to secure the applicant's anonymity as he was a child at the time of the offences and was still a child at the time of the hearing. No person shall publish any information which reveals, or may reveal, the identity of the applicant.

⁴ In terms of section 76(1) of the Child Justice Act 75 of 2008.

⁵ Id section 76(3).

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.”

[4] The matter came before the High Court by way of automatic review in terms of section 85(1)(a) of the Child Justice Act. The High Court *mero motu* (of its own accord) raised the question with the Regional Magistrate and the Director of Public Prosecutions, Western Cape (DPP)—

“whether it was competent for the court to make an order in terms of section 50(2) of the Sexual Offences Act if regard is had to the provisions of sections 2, 3 and 4 of the [Child Justice Act] dealing with the objects of the Act, as well as section 28 of the Constitution.”

[5] The Regional Magistrate, in detailed reasons for the order, and the DPP, in its written opinion, concluded that the Magistrates’ Court was competent to make the ancillary order and recommended that the High Court confirm it. A Full Bench was constituted to hear the matter.

High Court

[6] The Full Bench⁶ held that section 50(2) of the Sexual Offences Act may violate the child offender's rights by requiring the particulars of a child offender to be included in the Register. The High Court went further, however, to hold that "because of the consequences and impact of the inclusion of an offender's name in the Register, the rights of such offender . . . *whether a child or an adult*, would indeed be violated."⁷

[7] The High Court considered whether the infringement was justifiable under section 36⁸ of the Constitution. It held that because the legitimate constitutional purpose of the Sexual Offences Act is to protect victims of sexual abuse, the limitation on the offender's rights by section 50(2) is reasonable and justifiable in an open and democratic society. Regarding child offenders, the Court held that the best interests of the child, in terms of section 28(2)⁹ of the Constitution, may be limited. The High Court concluded that section 50(2) precludes a court from assessing if the child offender truly poses a threat to others and whether indeed the circumstances justify placing the child on the Register. This is because the Sexual Offences Act criminalises a broad array of conduct and because the presiding officer lacks discretion when making an order to place an offender's particulars on the Register.

⁶ *J v S* [2013] ZAWCHC 114; 2013 (2) SACR 599 (WCC).

⁷ *Id* at para 102. Emphasis added.

⁸ See [46] below for the relevant portions of section 36.

⁹ See [35] below for the full text of section 28(2).

[8] Returning to the question of adult offenders, the High Court held that the section infringes on the offender's right to a fair hearing in terms of section 34¹⁰ of the Constitution as it does not allow for an offender to make representations to persuade a court not to make the order. The High Court held the infringement to be unjustifiable as it served no legitimate constitutional purpose. It therefore held section 50(2) to be invalid and inconsistent with the Constitution and ordered words to be read into the provision.

[9] The High Court's order reads, in relevant part:

“(1) Section 50(2) of the Criminal Law (Sexual Offences And Related Matters) Amendment Act No. 32 of 2007, is declared invalid and inconsistent with the Constitution, insofar as it does not allow the court to inquire and decide after affording the accused an opportunity to make representations, whether or not the particulars of the accused should be included in the National Register for Sexual Offenders.

(2) The declaration in para (1) shall not be retrospective and its effect shall be suspended for 18 months to afford the legislature an opportunity to amend section 50(2) so that it can be constitutionally compliant.

(3) During the period of suspension or until such sooner date as any amendments in para (2) above come into force, section 50(2) shall be deemed to read as follows: (the words inserted in the existing text are underlined for convenience).

‘2(a) A court that has in terms of the Act or any other law—

¹⁰ Section 34 of the Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

- (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) . . . must subject to the provisions of paragraph (c), make an order that the particulars of the person be included in the Register.
- (b) [When] Before making an order contemplated in paragraph (a) the court must explain the contents and the implications of the order, including section 45, to the person in question.
- (c) Notwithstanding paragraph (a) above, a court contemplated in that paragraph, may on good cause shown direct that such person's particulars not be included in the Register and shall, before making an order in terms of paragraph (a) inform the convicted person of the court's power to make a direction under this paragraph (c) and afford him or her an opportunity to make representations as to whether such a direction should be made or not.”

In this Court

[10] Section 172(2)(a) of the Constitution provides that “an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.” None of the parties in this Court opposes the confirmation of the High Court’s order.

[11] The applicant argues that section 50(2) is overbroad. Depending on the circumstances, a sex offender may not pose any threat and there is no need to protect a particular complainant through the use of the Register. In not allowing good cause to be shown before an entry is made in the Register, the provision further infringes on the offender’s right to a fair hearing in terms of section 34 of the Constitution.

[12] The state respondents¹¹ do not oppose the confirmation of the High Court's order. They acknowledge that the provision imposes an unjustifiable limitation on the offender's right to be heard and, consequently, on his or her right to a fair trial. The state respondents argue, however, that the High Court's order is overbroad in two respects. First, the High Court inaccurately declared the entirety of section 50(2) unconstitutional when its declaration should have extended only to section 50(2)(a) and not section 50(2)(b) as well. Second, the High Court's order ostensibly extends to adult offenders. While in written submissions it was argued that a similar challenge to the rights of adults might not withstand constitutional scrutiny, in oral argument the state respondents argued that the issues before the High Court concerned only child offenders. Accordingly, the declaration of constitutional invalidity should have been limited exclusively to child offenders.

[13] The *amici curiae* (friends of the Court) are Childline South Africa, the Teddy Bear Clinic for Abused Children and the National Institute for Crime Prevention and the Reintegration of Offenders.¹² They support the confirmation of the High Court's order of invalidity. They argue, however, that the Court erred in not holding that the provision infringed unjustifiably on the applicant's right in terms of section 28(2) of the Constitution. Individual assessments of child offenders are required to cure the

¹¹ During the hearing in this Court, counsel for the second respondent, the Minister of Justice and Constitutional Development (Minister), indicated that she had been briefed to make her oral submissions on behalf of the National Director of Public Prosecutions (NDPP or first respondent) as well as the Minister, the latter on whose behalf her written submissions had been filed. For convenience's sake, I will refer to the first and second respondents together as the "state respondents".

¹² The three *amici curiae* are all non-profit organisations that provide support services and programmes to children.

defect in the provision. The *amici* further argue that it was impermissible for the High Court to declare the provision constitutionally invalid in relation to adults.

Issues

[14] The primary question for determination is whether the High Court's declaration of constitutional invalidity should be confirmed. Does the provision 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 provision must be declared unconstitutional and the Court must determine a just and equitable remedy.

[15] Before reaching the rights analysis, a few preliminary issues arise. The second respondent's application for condonation for the late filing of its written submissions must be considered before giving a brief overview of the statutory framework. The scope of the confirmation proceedings in this Court must also be clarified: should the proceedings extend to adult offenders as well and should subsection (b) of section 50(2) be included in the constitutional analysis?

Condonation

[16] The Minister was granted an extension to file his written submissions. Upon refusing a second request for an extension, this Court advised that the Minister would have to seek condonation if he filed his submissions out of time. The submissions were eventually filed 17 court days late.

[17] The Minister avers that the necessary advice and authorisation could not be secured in time because there was a misunderstanding on when the senior officials were to return from their festive-season vacation. Further, the notice that the request for a second extension had been declined came late to the attention of the State Attorney. The Minister's senior counsel was abroad and could not draft the application for condonation until his return. The Minister argues that he is not adopting an adversarial position and he does not oppose the confirmation of the order. However, he is of the view that the submissions will make a meaningful contribution to the debate and that the parties will suffer no prejudice if condonation is granted.

[18] It is unacceptable that state parties continue to make light of the Rules of this Court and to disrespect other parties, the general public and the Court by failing to comply diligently with Court directions. The Minister had ample time to prepare submissions and the first request for an extension was granted to the very date that the Minister elected. It is to the great displeasure of the Court that unprofessional conduct of this nature continues to plague its proceedings. If it were not for the fact that the applicant's counsel is funded by the state, awarding costs against the Minister would have been an appropriate consideration.

[19] Nevertheless, it is not in the interests of justice to refuse condonation in this instance as it would deprive the Court of submissions that are important to the determination of the matter. This is in the light of the absence of evidence of prejudice caused to the applicant or opposition to the grant of condonation.

Legal provisions

[20] Chapter 6 of the Sexual Offences Act provides for the establishment of the Register which is to include—

“particulars of persons convicted of any sexual offence against a child or a person who is mentally disabled or are alleged to have committed a sexual offence against a child or a person who is mentally disabled and who have been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, whether committed before or after the commencement of this Chapter and whether committed in or outside the Republic”.¹³

The purpose of the Register is to protect children and persons with mental disabilities from coming into contact with sex offenders by informing relevant employers, licensing authorities and childcare authorities that a particular person is listed on the Register.¹⁴

[21] A number of adverse consequences flow from having one’s particulars¹⁵ entered on the Register. Section 41(1) of the Sexual Offences Act provides:

“A person who has been convicted of the commission of a sexual offence against a child or is alleged to have committed a sexual offence against a child and has been dealt with in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977,

¹³ Section 42(1).

¹⁴ Section 43. See *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) (*Teddy Bear Clinic*) at para 57.

¹⁵ Section 49 requires that the following details of the offender are recorded, amongst others: their title and full name; profession or trade; last known physical address, postal address and any other contact details; identity number, passport number and driver’s licence number; the sexual offence of which the person is convicted; the sentence imposed; the date and place of conviction; prisoner identification number; the trial court and case number; and other particulars as prescribed by regulation.

whether committed before or after the commencement of this Chapter, whether committed in or outside the Republic, and whose particulars have been included in the Register, may not—

- (a) be employed to work with a child in any circumstances;
- (b) hold any position, related to his or her employment, or for any commercial benefit which in any manner places him or her in any position of authority, supervision or care of a child, or which, in any other manner, places him or her in a position of authority, supervision or care of a child or where he or she gains access to a child or places where children are present or congregate;
- (c) be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of a child or where children are present or congregate; or
- (d) become the foster parent, kinship care-giver, temporary safe care-giver or adoptive parent of a child.”

[22] An employer, as defined in the Sexual Offences Act,¹⁶ may not employ a person who is listed on the Register.¹⁷ A licensing authority¹⁸ may not grant a licence

¹⁶ “Employer” is defined in section 40 of the Sexual Offences Act as—

- “(a) any—
 - (i) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
 - (ii) other functionary or institution when exercising a power or performing a duty in terms of the Constitution of the Republic of South Africa, 1996, or a provincial constitution or exercising a public power or performing a public function in terms of any legislation,
 which—
 - (aa) employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a child or in a position of authority, supervision or care of a child or will gain access to a child or places where children are present or congregate; or
 - (bb) employs employees who, in any manner and during the course of their employment, will be placed in a position to work with a person who is mentally disabled or in a position of authority, supervision or care of a person who is mentally disabled or will gain access to a person who is mentally disabled or places where persons who are mentally disabled are present or congregate; or
- (b) any person, organisation, institution, club, sports club, association or body who or which, as the case may be—
 - (i) employs employees who, in any manner and during the course of their employment, will be placed in a position of authority, supervision or care of

or approve the management or operation of an entity, business concern or trade relating to the supervision or care of children or persons with mental disabilities without determining if the applicant for the licence is listed on the Register.¹⁹ A relevant authority (referred to here for convenience as “childcare authority”) may not consider or approve an application of a person for appointment as a foster parent, kinship caregiver, temporary safe caregiver or adoptive parent without first determining whether the applicant is listed on the Register.²⁰ The Act imposes criminal sanctions against any employer,²¹ licensing authority²² or childcare authority²³ for contravening these provisions.

[23] “Employer” is broadly defined. It includes in the targeted employment categories any position, in the public or private sector, in which one “gains access” to a child or mentally disabled person or to a place where children or mentally disabled

a child or a person who is mentally disabled or working with or will gain access to a child or a person who is mentally disabled or places where children or persons who are mentally disabled are present or congregate; or

- (ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled or working with or who gains access to a child or a person who is mentally disabled or places where children or persons who are mentally disabled are present or congregate”.

¹⁷ Section 45.

¹⁸ Section 40 of the Sexual Offences Act defines “licensing authority” as—

“any authority which is responsible for granting licences or approving the management or operation of any entity, business concern or trade relating to the supervision over or care of a child or a person who is mentally disabled”.

¹⁹ Id section 47(1).

²⁰ Id section 48(1).

²¹ Id section 45(3).

²² Id section 47(3).

²³ Id section 48(3).

persons are “present”. The potential breadth of the exclusion from work is extensive.²⁴

[24] Further to this, an offender is obliged, under threat of criminal sanction, to disclose any previous sexual offences against children or persons with mental disabilities to an employer,²⁵ licensing authority²⁶ or childcare authority.²⁷ On the face of it, it may be understood that convicted offenders are required in perpetuity to disclose the fact of their convictions to employers, licensing authorities and childcare authorities, even if they are no longer listed on the Register.²⁸

[25] Once entered on the Register, a person’s particulars may only be removed in limited circumstances.²⁹ In terms of section 51(2), two circumstances exist in which a person’s details may never be removed from the Register. This applies to persons sentenced to a period of imprisonment of over 18 months or who have two or more

²⁴ Le Roux and Williams “Sections 40-53: National Register for Sex Offenders” in Smythe and Pithey *Sexual Offences Commentary: Act 32 of 2007* (Juta & Co. Ltd, Cape Town 2011) at 17-8 argue that the objects of the Sexual Offences Act suggest that a conservative approach is warranted to the interpretation of these provisions. However, the repetition of the aim to prevent “access to” children and persons with mental disabilities in section 2(g) of the Act and the use of the words “in any manner” in the definition of “employer” makes clear the breadth of the intended exclusion from employment.

²⁵ Section 46 of the Sexual Offences Act.

²⁶ *Id* section 47(2).

²⁷ *Id* section 48(2).

²⁸ Le Roux and Williams above n 24 at 17-28 are of the view that by placing these obligations on employees and potential employees, the Legislature aims to cover those who are convicted but not captured on the Register.

²⁹ Under section 51(1)(a)(iii) of the Sexual Offences Act, persons who are dealt with under sections 77(6) or 78(6) of the Criminal Procedure Act 51 of 1977 may apply to the Registrar to have their particulars removed after five years have lapsed since their recovery from mental illness and their discharge from any restrictions placed on them in terms of the Mental Health Care Act 17 of 2002. Those offenders sentenced to six or fewer months’ imprisonment may apply to the Registrar to have their particulars removed after seven years following their release or the expiration of the period of suspension in terms of section 51(1)(a)(ii). For lesser sentences, a person may apply for removal after five years have lapsed since their inclusion on the Register (section 51(1)(b)). Offenders sentenced to a period of imprisonment between six and 18 months may apply to have their particulars removed only after 10 years following their release or after the period of suspension has lapsed (section 51(1)(a)(i)).

convictions of a sexual offence against a child or mentally disabled person. In the applicant's case, his particulars may never be removed from the Register.

[26] Only a court's obligation to enter the offender's details on the Register was declared unconstitutional because the High Court exclusively targeted the constitutional validity of section 50(2). An offender's obligation to disclose previous convictions to an employer, licensing authority or childcare authority remains as do the consequences of one's details being entered on the Register.

[27] From a plain reading of section 50 the provision includes the registration of child offenders. Section 50(2)(a) applies to "a person [convicted] of a sexual offence against a child or person who is mentally disabled". The word "person" applies both to children as it does to adults: there is nothing in the Sexual Offences Act to infer that the ordinary meaning of the word is not applicable to children.

The scope of the confirmation proceedings

[28] The High Court was seized with the application of section 50(2) to a child offender. It raised the question of the provision's constitutional validity in specific application to child offenders and in the context of the Child Justice Act. The Court's order,³⁰ however, makes no distinction between child and adult offenders and its reasoning indicates that this was deliberate.

³⁰ See [9] above.

[29] In anticipation of the hearing, this Court issued directions to the parties to address in written submissions the application of the High Court's judgment to both adults and children. The applicant had no objection to this Court considering the provision's application to adults. He acknowledged that different considerations may apply to adults as opposed to children. Nevertheless, adults and children are on the same footing insofar as the Sexual Offences Act prohibits an overly broad array of sexual conduct and insofar as the provision infringes on the offender's section 34 right to a fair hearing. The state respondents and the *amici* argued that the Court should limit its consideration to child offenders.

[30] While courts are empowered to raise constitutional issues of their own accord, this power is not boundless. 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.³¹ Other issues to consider are whether declining to determine the issue would create undesirable uncertainty or leave an issue that was declared unconstitutional in limbo, and whether the constitutional validity of an issue is moot.³²

[31] The facts before the High Court raised the application of the provision to child offenders. Different considerations apply to child and adult offenders. These considerations have not been ventilated properly on the facts or in legal argument in

³¹ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) (*DPP*) at para 43.

³² *Sibiya and Others v Director of Public Prosecutions, Johannesburg and Others* [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC) at para 44.

the Court below or in this Court, notwithstanding the opportunity that this Court gave to the parties to make further submissions. It was inappropriate for the High Court to consider the provision's constitutional validity in relation to adult offenders and to extend its order to cover all offenders. It is similarly not in the interests of justice for this Court to make findings on the provision's application to adult offenders.

[32] The state respondents argue further that the High Court erred in including subsection (b) of section 50(2) in the ambit of its order. Subsection (b) deals with the requirement that the court must explain the contents and implications of the order made in terms of subsection (a) to the accused person. This requirement does not relate to the heart of the alleged invalidity and so should not have been included within the ambit of the declaration. I now focus on the constitutional validity of section 50(2)(a), to the exclusion of subsection (b).

Should the order of constitutional invalidity be confirmed?

a. Does the provision infringe on the rights of the child?

[33] The applicant submits that having one's particulars entered on the Register infringes that offender's rights to dignity, privacy, fair labour practices, and freedom of trade, occupation and profession.³³ However, the focus of the argument follows the reasoning of the High Court: that section 50(2) is invalid because it makes no provision for good cause to be shown that an order for registration should not be

³³ In terms of sections 10, 14, 23(1) and 22 of the Constitution, respectively.

made. That impedes the offender’s right to a fair hearing in terms of section 34³⁴ of the Constitution.

[34] The state respondents argue that while the purpose of section 50(2)(a) is constitutional, the peremptory language of the provision is not. The state respondents argue that “individualised justice is required to avert injustice.”³⁵ They contend that once it is accepted that the inclusion of an offender’s particulars in the Register is prejudicial, the offender should have a reasonable opportunity to make representations. This would respect the right to a fair trial in terms of section 35 of the Constitution.

[35] The *amici* argue that the provision infringes the best interests of the child, in terms of section 28(2) of the Constitution, which provides:

“A child’s best interests are of paramount importance in every matter concerning the child.”

The *amici* are correct that the starting point for matters concerning the child is section 28(2). This Court has held that the “best-interests” or “paramountcy” principle creates a right that is independent and extends beyond the recognition of

³⁴ As quoted above at n 10. Conceivably, section 35, guaranteeing the right to a fair trial, could also be relevant.

³⁵ On individualised justice, see the statement of Ngcobo J in *DPP* above n 31 at para 120.

other children's rights in the Constitution.³⁶ The "ambit of the [best-interests provision] is undoubtedly wide."³⁷

[36] The contemporary foundations of children's rights and the best-interests principle encapsulate 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. This 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."³⁸ In the context of criminal justice, the Child Justice Act affirms the moral malleability or reformability of the child offender.

[37] A number of key principles arise from this approach to the best interests of the child offender. First, the law should generally distinguish between adults and children.³⁹ As explained above,⁴⁰ section 50(2) applies, without distinction, to adult and child offenders.

³⁶ *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) (*Fitzpatrick*) at para 17. See also *Fraser v Naude and Others* [1998] ZACC 13 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 9.

³⁷ *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (*M*) at para 15.

³⁸ *Id* at para 19. At para 20, the Court further expressed the role of the law as being to "create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives." (Footnote omitted.)

³⁹ See *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at paras 26-9, in which this Court explained the importance of differentiating the treatment of children from that of adults:

"The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make

[38] A second important principle is that the law ought to make allowance for an individuated approach⁴¹ to child offenders. The best-interests standard should be flexible because individual circumstances will determine which factors secure the best interests of a particular child.⁴² In *M*, this Court held:

“A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”⁴³

[39] Individualised justice is foreseen in the Child Justice Act. It requires that certain guiding principles are taken into account in the implementation of criminal justice concerning children. These include that all “consequences arising from the

choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.

These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults.

These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children’s crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.

This is not to say that children do not commit heinous crimes.”

⁴⁰ See [27] above.

⁴¹ *Centre for Child Law* above n 39 at para 32.

⁴² *Fitzpatrick* above n 36 at para 18.

⁴³ *M* above n 37 at para 24. See also *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) at para 55 in which this Court held:

“Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. . . . This means that each child must be looked at as an individual, not as an abstraction.”

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.”⁴⁴

[40] A third principle is that the child or her representatives must be afforded an appropriate and adequate opportunity to make representations and to be heard at every stage of the justice process, giving due weight to the age and maturity of the child.⁴⁵ This is also accommodated in the guiding principles under the Child Justice Act, which provide in section 3(c) that “every child should, as far as possible, be given an opportunity to participate in any proceedings . . . where decisions affecting him or her might be taken.”

[41] The wording of section 50 of the Sexual Offences Act, read as a whole, indicates that a court has no discretion whether or not to include an offender’s particulars on the Register. Section 50(1) provides that the particulars of the offender “*must* be included in the Register.”⁴⁶ Section 50(2)(a) provides that the relevant court “*must* make an order that the particulars of the person be included in the Register.”⁴⁷

⁴⁴ Section 3(a).

⁴⁵ *C and Others v Department of Health and Social Development, Gauteng, and Others* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at para 27. Section 10 of the Children’s Act 38 of 2005 embodies this component of the best-interests principle in requiring that every “child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.” See also Article 12 of the Convention on the Rights of the Child, November 20, 1989, 1577 UNTS 3; 28 ILM 1456 (1989), which obliges state parties to ensure that a child who is capable of forming his or her own views enjoys the right to express those views in matters affecting the child and that those views be given due weight. See, in this respect, Committee on the Rights of the Child, “General Comment No 12 (2009): The right of the child to be heard” Fifty-first Session, 20 July 2009, CRC/C/GC/12 at paras 1 and 15. At para 57, the Committee affirmed that the right extends “throughout every stage of the process of juvenile justice.” See also Committee on the Rights of the Child, “General Comment No 10 (2007): Children’s rights in juvenile justice” Forty-fourth Session, 25 April 2007, CRC/C/GC/10 at paras 12 and 43-5.

⁴⁶ Emphasis added.

⁴⁷ Emphasis added.

This occurs after the person has been convicted and sentenced⁴⁸ or after the court has made a finding in terms of section 77(6) or 78(6) of the Criminal Procedure Act.⁴⁹ That a court has no discretion but to register the offender's particulars is affirmed in section 50(4) of the Sexual Offences Act, which provides:

“Where a court, for whatever reason, fails to make an order under subsection (2)(a) the prosecuting authority or any person must immediately or at any other time bring this omission to the attention of the court *and the court must make such order.*”⁵⁰

[42] The provision requires that registration follows automatically from conviction of and sentencing for the particular crimes. This infringes the best interests of the child. The opportunity for an individuated response to the particular child offender, taking into account the child's representations and views, is excluded both at the point of registration and in the absence of an opportunity for review. The limited circumstances in which an offender can apply for his or her removal from the Register are insufficiently flexible to consider the particular child's development or reform.

[43] Being placed on the Register bears serious consequences for the offender. As outlined above,⁵¹ restrictions are placed on the ability to work, on the ability to license certain facilities or ventures, and on the privileges of certain roles in the care of children or mentally disabled persons. While it is clear that child offenders fall within the ambit of “persons” to be registered under section 50(2)(a), the consequences that

⁴⁸ See the wording of section 50(2)(a)(i).

⁴⁹ Section 50(2)(a)(ii).

⁵⁰ Emphasis added.

⁵¹ See [21] above.

flow from the provision may not always affect the child offender while still a child.⁵² The impact of registration is reduced in practical terms and varies according to the particular child's circumstances and age. However, this Court has held that consequences for the criminal conduct of a child that extend into adulthood (such as minimum sentences) do implicate children's rights.⁵³ So, in the case of J, the fact that he was a child when the offence was committed means that his rights as a child are implicated, albeit that the consequences of registration will, for the most part, only be felt as an adult.

[44] Child offenders who have served their sentences 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 abilities to pursue a living. An important factor in realising the reformatory aims of child justice is for child offenders to be afforded an appropriate opportunity to be reintegrated into society.⁵⁴ Furthermore, it is undoubted that there is a stigma attached to being listed on the Register⁵⁵ even if the Sexual Offences Act closely guards the confidentiality⁵⁶ of its contents. Given that a child's

⁵² For example, it is a criminal offence to employ a child under 15 years in terms of section 43 of the Basic Conditions of Employment Act 75 of 1997. It would therefore have no effect with respect to employment restrictions to have a child under 15 on the Register until such a time as the child becomes eligible to be employed. Similarly, licensing authorities and childcare authorities may be unlikely to grant licences and authorise custodial care of a child to another child. In terms of section 231(2)(c) of the Children's Act, a prospective adoptive parent must be over the age of 18 years. While there is no explicit requirement in the Children's Act that foster parents must be over the age of 18 years, it is "inconceivable that a children's court could ever regard a child as a suitable person to be entrusted with the foster care of another child." (Schäfer *Child Law in South Africa: Domestic and International Perspectives* (LexisNexis, Durban 2011) at 468.)

⁵³ *Centre for Child Law* above n 39 at para 35.

⁵⁴ See, for example, *S v Saayman* 2008 (1) SACR 393 (ECD) at 403B-C in which Pickering J discusses the role of reintegration within a restorative approach to criminal justice.

⁵⁵ *Teddy Bear Clinic* above n 14 at para 57.

⁵⁶ Section 52 of the Sexual Offences Act.

moral landscape is still capable of being shaped, the compulsory registration of the child sex offender in all circumstances is an infringement of the best-interests principle.

[45] Having found that the provision limits the child offender's right in terms of section 28(2) of the Constitution, it is not necessary to consider the further infringements alleged by the parties.

b. Is the limitation justifiable?

[46] The right of the child offender in terms of section 28(2) is nevertheless not absolute and can be limited.⁵⁷ Section 36 of the Constitution provides for the limitation of rights when it is justifiable in an open and democratic society, taking into account all relevant factors including—

- “(a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

Context and proportionality must be kept in mind when conducting the limitations analysis.⁵⁸

⁵⁷ *M* above n 37 at para 25-6. See also *Teddy Bear Clinic* above n 14 at para 79 and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 55.

⁵⁸ *M* above n 37 at para 37.

[47] The importance of the best-interests principle cannot be gainsaid, particularly when, as here, one is dealing with children exposed to the criminal justice system. How we treat and nurture our children today, including child offenders, impacts the shared dignity of the broader community for years to come. It is nevertheless a laudable and legitimate constitutional aim that the Register seeks to achieve – to provide spaces of safety for children and persons with mental disabilities to learn and grow, be it in schools, in foster homes or places to play and socialise. Caring for and educating children and persons with mental disabilities is a responsibility that should not be afforded to persons who will harm them.

[48] Sexual violence threatens a victim's rights to freedom and security of the person,⁵⁹ privacy⁶⁰ and dignity⁶¹ in a profound way. Sexual offences have effects that ripple far beyond the horrific immediacy and physicality of the crime. Our success or failure as a community to prevent and protect against sexual violence has bearing on us all, collectively and individually. I can think of few endeavours more important for a community than protecting vulnerable persons in particular, such as children and persons with mental disabilities, from sexual abuse.

[49] The limitation aims to achieve a valuable purpose. The objectives of the Register are, however, premised on the idea that the relevant offenders pose a risk to children and persons with mental disabilities. And patterns of recidivism for sexual

⁵⁹ Section 12 of the Constitution.

⁶⁰ Id section 14.

⁶¹ Id section 10.

offences may vary significantly between adults and children.⁶² The automatic operation of section 50(2)(a) means that the limitation will not always achieve its purpose for child offenders.

[50] There are less restrictive means to achieve the aims of the Register. Affording courts a discretion and the concomitant opportunity to the child offender to lead evidence and make argument on the question of registration would permit the possibility of greater congruence between the limitation and its purpose. Where a court decides on matters affecting children, discretion plays an important role in allowing for an individuated response to meet the child's best interests.⁶³ Modifications to registration parameters (such as when registration is triggered and how it is terminated) may also permit for more individualised concerns to be taken into account in a consistent fashion.

[51] I conclude that the limitation of the right of child offenders in section 50(2)(a) is not justified in an open and democratic society. While the limitation promotes

⁶² The particular nature of recidivism in child sexual offenders has been researched by a number of writers. Examples include: Grover "Delinquency and Punishment: The Impact of State v. Williams on Juvenile Sex Offender Registration in Ohio" (2013) 81 *University of Cincinnati Law Review* 291 at 302; Human Rights Watch *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* (Human Rights Watch, United States of America 2013); Jaffé "Child and adolescent abusers – For a rehabilitative approach driven by scientific evidence" in Council of Europe *Protecting children from sexual violence: A comprehensive approach* (Council of Europe Publishing, Strasbourg 2010) at 225 and 231; Lussier and Blokland "The adolescence-adulthood transition and Robin's continuity paradox: Criminal career patterns of juvenile and adult sex offenders in a prospective longitudinal birth cohort study" (2013) 42 *Journal of Criminal Justice* 153. Available at <http://dx.doi.org/10.1016/j.jcrimjus.2013.07.004>, accessed on 3 March 2014; Piquero et al "Sex offenders and sex offending in the Cambridge study in delinquent development: prevalence, frequency, specialization, recidivism, and (dis)continuity over the life-course" (2012) 35 *Journal of Crime and Justice* 412 at 412; Reingle "Evaluating the continuity between juvenile and adult sex offending: a review of the literature" (2012) 35 *Journal of Crime and Justice* 427; Vess et al "International sex offender registration laws: research and evaluation issues based on a review of current scientific literature" (2013) 14 *Police Practice and Research: An International Journal* 205 at 209; and Zimring et al "Investigating the continuity of sex offending: Evidence from the second Philadelphia birth cohort" (2009) 26 *Justice Quarterly* 58.

⁶³ DPP above n 31 at paras 120 and 123.

legitimate and constitutionally sound aims, there exist accessible and direct means to achieve the purpose that are less restrictive to the child offender's rights. Section 50(2)(a) is constitutionally invalid and must be declared so.

Remedy

[52] Following a declaration of constitutional invalidity, the Court is empowered to grant a just and equitable remedy,⁶⁴ which may include ordering a suspension of the declaration and a temporary reading-in, as the High Court did.

[53] The state respondents have pointed to a number of problems in the High Court's order, including that the interim reading-in leads to inequitable results for different categories of offenders. The applicant is in favour of an interim reading-in but is against a retrospective declaration of constitutional invalidity as there may be child offenders on the Register who do pose a threat as sexual predators. The *amici* argued for a 12-month period of suspension of the order of constitutional invalidity coupled with a moratorium against further children's particulars being placed on the Register. This, they argued, would be a low-risk solution that is cleaner than the reading-in proposed.

[54] The Legislature must be afforded time to correct the constitutional defect, taking into account expert opinion on the unique circumstances of child sex offenders and victims in South Africa. The Court is confronted with a number of difficulties

⁶⁴ Section 172(1) of the Constitution.

that challenge its capacity to grant a just and equitable interim order. The Sexual Offences Act creates complex mechanisms regulating the treatment of offenders following their conviction. Of these, only section 50(2)(a) is before us. This Court cannot craft an interim remedy within the bounds of our democratic limits that would not do violence to the statutory scheme.

[55] There is no evidence before us that children or persons with mental disabilities will not be harmed. This Court cannot issue a moratorium on the registration of further child offenders or allow the declaration to operate retrospectively. The Register fulfils an important purpose. Given the urgency of protecting vulnerable persons from sexual abuse in places where they should be safe, it is not just and equitable for the provision to cease to operate in the interim.⁶⁵

[56] For these reasons, section 50(2)(a) must be declared constitutionally invalid and Parliament must be instructed to remedy the defect within 15 months, during which period the declaration will be suspended. Given that the rights infringements to child offenders will continue to operate in the interim period, a shorter period for correction of the defect is preferred. Because the constitutionality of certain provisions of the Sexual Offences Act in relation to their effect on children is already under

⁶⁵ I am aware of the existence of the National Child Protection Register, operating in terms of sections 111-28 of the Children's Act. While the National Child Protection Register may afford similar protections to children as does the Register under present consideration, no independent register exists in my knowledge to protect persons with mental disabilities. However, insofar as there is any similarity or overlap with the Register presently under consideration, it would be prudent for the Legislature not to consider section 50(2)(a) of the Sexual Offences Act in isolation.

consideration,⁶⁶ it is feasible that the Legislature is positioned to move on the correction of the defects. In so doing, Parliament should be mindful of the operation of the Sexual Offences Act as a whole, the disclosure provisions and the definition of “employer” in particular. Parliament would be advised to consider the creation of a provision for child offenders included on the Register to have the opportunity to motivate that their particulars be expunged upon application.

[57] In the interim, however, it is necessary that some mechanism be provided to identify those child offenders whose names have already been entered on the Register in conflict with the principles set out in this judgment. This will enable them to obtain legal advice and assistance. That is the path this Court followed in *Centre for Child Law*,⁶⁷ where minimum sentences applying to under-18s were struck down, but only limited retrospective relief was granted. The order that follows provides for a similar mechanism. It is correct that the information contained in the Register is confidential. But, for the purpose of salvaging the rights of children already included in conflict with the principles set out in this judgment, it is necessary for the Court to require the respondents to furnish the details in question. This is done in the exercise of the Court’s wide jurisdiction to make an order that is just and equitable. The Court will in turn make the information available to persons or organisations seeking to assist those child offenders.

⁶⁶ See *Teddy Bear Clinic* above n 14.

⁶⁷ Above n 39.

Order

1. The second respondent's application for condonation is granted.
2. The order of the Western Cape High Court, Cape Town is set aside and replaced by the following:
 - a. Section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is declared inconsistent with the Constitution and invalid to the extent that it unjustifiably limits the right of child sex offenders to have their best interests considered of paramount importance.
 - b. The declaration of invalidity is suspended for a period of 15 months from the date of this order to afford Parliament the opportunity to correct the defect in the light of this judgment.
3. The respondents are directed by 30 July 2014 to furnish a report to the Registrar of this Court setting out:
 - a. the number of persons whose particulars were included on the National Register for Sexual Offenders by virtue of section 50(2)(a) who were younger than 18 years when they committed the offence that required their inclusion;
 - b. the courts that directed that their particulars be so listed; and
 - c. the dates on which the orders in question were made.
4. There is no order as to costs.

For the Applicant:

Advocate M Calitz instructed by Legal
Aid South Africa.

For the Respondents:

Advocate S Hassim and K Ramaimela
instructed by the State Attorney.

For the Amici Curiae:

Advocate A Skelton instructed by the
Centre for Child Law.