

**AFFORDING CHILDREN THE OPPORTUNITY TO MAKE CHOICES IN THE MORAL
WORLD OF ADULTHOOD**

**THE TEDDY BEAR CLINIC FOR ABUSED CHILDREN AND ANOTHER V MINISTER
OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER 2014 (2) SA 168
(CC)**

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ABSTRACT

Children must be afforded the opportunity to relish their childhood, and this involves not only growing up in a stable environment, free of fear, trauma and violence but also one that safeguards their rights and liberties. In South Africa, an absence of legislative guidance has intensified the uncertainty facing many South African children who appear to have been chastised by a legal system that tends to punish consensual sex between them. Many laws have been put in place to alleviate the adversities experienced by children on a regular basis but some of them have inadvertently ignored the need for adolescents to make their own choices in the social and moral world of adulthood. Sexual conduct and intimacy amongst teenagers are common in this day and age and even though our legal system may warrant interventions being put in place to protect children from sexual abuse and sexually transmitted diseases, the position is slightly different where children engage in consensual sexual conduct. Controversially, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in the form of Section 15 and 16 sought not only to criminalise consensual sexual conduct between an adult and child but also between child and child. The article sets out to address the grey area that currently exists in instances where children engage in consensual sexual conduct. The Constitutional Court has provided a way forward in terms of addressing the matter. The Teddy Bear Case provides a refreshingly different approach from earlier decisions where children are now viewed as independent social beings. The ruling gives weight to the State's constitutional obligation to safeguard the best interests of children at all times and this entails giving effect to children's rights to autonomy, dignity and privacy. The Court clearly highlighted that it would be against the spirit of the Constitution to allow the criminal justice system and its role-players to invade the private intimacy of consenting adolescents who chose to give expression to their sexuality. The court in the Teddy Bear Case recognised its constitutional obligation in safeguarding the dignity, privacy and integrity of adolescents to fall in line with an ever evolving society. The article expands on the legal position of adolescents who engage in consensual sexual intercourse with each other and details how the Constitutional Court has managed to smooth out the indifference that existed within the current legislative framework. The Constitutional Court has clearly recognised the importance of educating adolescents instead of punishing them and the time has come for the various role-players involved in the criminal justice system to follow suit.

KEYWORDS: Adolescents, Moral, Consensual, Sexuality, Intimacy

1 INTRODUCTION

“Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.”¹

Despite their vulnerability and need for guidance, children must be afforded the opportunity to relish their childhood, and this involves not only growing up in a stable environment, free of fear, trauma and violence but also one that safeguards their rights and liberties. An absence of legislative guidance afforded to adolescents in recent times has exacerbated the uncertainty facing many South African children who appear to have been chastised by a legal system that tends to punish consensual sex between them. Many laws have been put in place to assuage the adversities experienced by children on a regular basis but some of them have inadvertently ignored the need for adolescents to make their own choices in the social and moral world of adulthood.² Article 12 of the United Nations Convention on the Rights of the Child³ as well as the Children’s Act⁴ and the Child Justice Act⁵ provide the foundation for children to participate in their own choices and decisions that could guide their future lives. The South African Constitution⁶ dictates that children, like adults have the right to have their privacy and dignity respected.⁷ Sexual conduct and intimacy amongst teenagers are common in this day and age and even though our legal system may warrant interventions being put in place to protect children from sexual abuse and sexually transmitted diseases, the circumstances may be different where children engage in consensual sexual conduct. Controversially, the Criminal Law (Sexual Offences and Related Matters) Amendment Act⁸ in the form of Section 15 and 16 sought not only to criminalise consensual sexual conduct between an adult and child but also

¹See S v M (Centre for Child Law as Amicus Curiae) 2007(12) BCLR 1312 where Sachs J held that all children have the right to express themselves as independent social beings and should be afforded the opportunity to make their own choices which is part of the transition into adulthood.

² See S v M (Centre for Child Law as Amicus Curiae) 2007(12) BCLR 1312. .

³ See Convention on the Rights of the Child, adopted 20 November 1989(entered into force 2 September 1990). The Convention has been ratified by all the states in the world except the USA and Somalia. See office of the United Nations High Commissioner for Human Rights ‘Status of ratifications of the principal international human rights treaties’ at <http://www.ohchr.org/english/countries/ratification/11.htm> (accessed 11 September 2014).

⁴ 38 of 2005 duly amended in 2007.

⁵ 75 of 2008.

⁶ The Constitution of South Africa Act 108 of 1996 (hereinafter referred to as the Constitution).

⁷ Section 10 and Section 14 of the Constitution.

⁸32 of 2007,(hereinafter referred to as the Sexual Offences Act).

between child and child. Despite South Africa's comprehensive statutory framework safeguarding children, it appears that the Sexual Offences Act and to a certain degree, the criminal justice system has failed to give due recognition to the importance of children's interests. Sexual conduct and intimacy amongst teenagers are common in this day and age and even though our legal system may warrant interventions being put in place to protect children from sexual abuse and sexually transmitted diseases, the circumstances may be different where children engage in consensual sexual conduct. It may be argued that children lack the acumen to make informed decisions about their sexual conduct but this view must be juxtaposed against the notion that consensual sexual conduct is part of the childhood exploration process which facilitates decision-making and proper life choices amongst youngsters who want to express themselves as independent social beings.

The disparity in participation rights between children and adults has sparked an uproar in media and legal circles in recent times with many divided over the issue of policing morality amongst children as compared to safeguarding their legal rights and interests. The ruling in the Jules High School case⁹ and the media attention devoted to the incident, which was filmed and uploaded on the internet, has been seen to be the catalyst for the debate in public and legal spheres as to whether children should face criminal sanction for engaging in consensual sexual conduct.¹⁰ This controversial issue was dealt with unequivocally by the Constitutional Court in the case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*¹¹ where the Court stressed that it was not concerned with the issue of whether children should or should not be engaging in sexual conduct but whether it was constitutionally permissible for adolescents to be subject to criminal sanctions where they have engaged in consensual sexual conduct. The *Teddy Bear Case* provides a refreshingly different approach from earlier decisions where children are now viewed as independent social beings. The ruling gives weight to the State's constitutional obligation to safeguard the best interests of children at all times and this entails giving effect to children's rights to autonomy, dignity and privacy.¹² The Court clearly highlighted that it would be against the spirit of the Constitution to allow the criminal justice system and its role-players to invade the private intimacy of consenting adolescents who chose to give expression to their sexuality. The court in the *Teddy Bear Case* recognised its constitutional obligation in safeguarding the dignity, privacy and

⁹The matter which is unreported was heard in the Johannesburg Magistrate's Court in 2010. For a discussion on the case see the *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2011 6 SA 134 (CC) at 27.

¹⁰Two boys, aged 14 and 16, allegedly raped a 15 year old girl who claimed she had been drugged by the boys. The incident took place on the sports ground of the Jules High School in 2010 and the incident was filmed and uploaded on the internet. The girl then allegedly confessed that she and the boys had engaged in consensual sexual intercourse and the State then decided that it would be difficult to prosecute the boys on the charge of rape. The State controversially charged all three teenagers with statutory rape for contravening Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 and the constitutionality of Section 15 and Section 16 of the said Act was then brought into question.

¹¹2014 (2) SA 168 (CC) hereinafter referred to as the *Teddy Bear Case*.

¹²The right to bodily integrity and autonomy is expressed in Section 12(2) of the Constitution of RSA and the right to privacy is expressed in Section 14 of the Constitution.

integrity of adolescents to fall in line with our evolving society. The note expounds on the legal position of adolescents who engage in consensual sexual intercourse with each other and details how the Constitutional Court has managed to smooth out the indifference that existed within the current legislative framework.

2 A GENERAL OVERVIEW OF THE CURRENT LEGAL FRAMEWORK IN SOUTH AFRICA

The protection of children is at the forefront of an all-inclusive statutory framework which is set out for the most part in the South African Constitution and flanked by key international instruments and domestic legislation. At an international level, South Africa acceded to the United Nations Convention on the Rights of the Child in 1995, resulting in an undertaking to take all necessary measures to protect children from all forms of abuse and negligent treatment. In acceding to the African Charter on the Rights and Welfare of the Child¹³, South Africa undertook to safeguard children from all forms of exploitation and sexual abuse. South Africa also ratified the United Nations Convention on the Elimination of all forms of Discrimination against Women¹⁴ which has resulted in a concerted effort to protect and promote women's and children's rights in recent times. The rights of all South Africans, including children are safeguarded in the Constitution. Section 28(2) of the Constitution provides that the child's best interests are paramount in every matter concerning the child. Section 28(1) (d), provides that, "every child has the right to be protected from maltreatment, neglect, abuse or degradation." Section 28(2), read with Section 28(1) reinforces the notion that the courts and the criminal justice system have a duty to protect children through enforcement of their rights.¹⁵ The South African Constitution¹⁶ dictates that children, like adults have the right to have their privacy and dignity respected.¹⁷

A number of key domestic statutory instruments such as the Children's Act¹⁸ and the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹⁹ were enacted to give effect to provisions espoused in the Constitution. Other legislative instruments such as the Child Care Act,²⁰ the Criminal Procedure Act²¹ and the Domestic Violence Act²² serve to safeguard the interests and well-being of

¹³African Charter on the Rights and Welfare of the Child, adopted 11 July 1990 (entered into force 29 November 1999) OAU Doc CAB/LEG/67/3 Rev 5.

¹⁴Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/46 1980.

¹⁵According to Sachs J in *S v M (Centre for Child Law as Amicus Curiae)* 2007(2) SACR 539 (CC), it was held that the courts are obliged to enforce children's rights rather than treat them as guidelines.

¹⁶The Constitution of South Africa Act 108 of 1996 (hereinafter referred to as the Constitution).

¹⁷Section 10 and Section 14 of the Constitution.

¹⁸Act 38 of 2005.

¹⁹Act 32 of 2007.

²⁰Act 74 of 1983.

²¹Act 51 of 1977.

children at a domestic level. The Children's Act²³ and the Child Justice Act²⁴ provide the foundation for children to participate in their own choices and decisions that could guide their future lives. Besides creating new statutory offences for adults, the Sexual Offences Act has created new offences relating to sexual acts against children. Controversially, the Sexual Offences Act in the form of Section 15 and 16 sought not only to criminalise consensual sexual conduct between an adult and child but also between child and child. Despite South Africa's comprehensive statutory framework safeguarding children, it appears that criminal justice system fails to give due recognition to the importance of children's interests.²⁵ In recent times, our Criminal Courts have highlighted the failure on the part of the legislature to give effect to children's constitutional rights that are embedded in Section 28 of the Constitution.²⁶ In the matter of *S v Mokoena; S v Phaswane*²⁷ the Court stressed that the conventional procedures of the criminal justice system are contemptible when dealing with the needs and requirements of child witnesses. In the case, the court raised several constitutional issues relating to the position of children involved in criminal trials and stressed that the criminal justice system faces critical systematic challenges.²⁸ The High Court in *Mokoena*²⁹ highlighted the that children are not equipped to deal with the challenging and adversarial settings of a courtroom and exposing a child to such a hostile environment without proper assistance cannot be in the best interests of the child.³⁰ This view was reiterated in the case of *S v Stefaans*,³¹ where Mitchell AJ, stated that subjecting children to the harsh realities of the criminal justice system exposed them to added trauma, possibly as severe as the trauma caused by the crime itself.³² It is against this backdrop of conflicting interests and legislative instruments that one needs to ask whether criminalising consensual sexual exploration between children would in fact be in their best interests.

3 A SUMMARY OF THE FACTS

The case in the Constitutional Court stemmed from an application for confirmation of a ruling by the North Gauteng High Court, Pretoria that key provisions of the Sexual Offences Act relating to the criminalisation of consensual sexual conduct between children were constitutionally invalid. The High Court's ruling was subject to confirmation by the Constitutional Court in terms of Section 172(2)(a) of the Constitution. The first Applicant in the matter was the Teddy Bear Clinic for Abused Children, a non-profit organisation that provided assistance to abused children and co-ordinated

²²Act 116 of 1998.

²³ 38 of 2005

²⁴75 of 2008.

²⁵See discussion by D.Iyer and L.Ndlovu "Protecting the Child Victim in Sexual Offences : Is there a Need for Separate Legal Representation" *Obiter* 2012(33) 1.

²⁶ *S v Mokoena; S v Phaswane*2008 (2) SACR 216 (T) and *S v Stefaans* 1999(1) SACR 182.

²⁷2008 (2) SACR 216 (T).

²⁸*Mokoena* 224.

²⁹2008(2) SACR 216 (T).

³⁰1999(1) SACR 182.

³¹*Ibid.*

³²*Stefaans* 182.

diversion programmes pertaining to young sex offenders. The second Applicant in the matter was RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect); also a non-profit organisation dedicated to promoting legal and policy reforms which sought to protect children from abuse and exploitation. The first Respondent in the matter was the Minister of Justice and Constitutional Development who was responsible for the administration of the Sexual Offences Act and the second Respondent was the National Director of Public Prosecutions. The first Amicus was JASA (Justice Alliance of South Africa) whose interest in the matter stemmed from its undertaking to uphold Judeo-Christian values and values underpinned by the Constitution and South African legislation through litigation. The second and third Amici were the Women's Legal Centre Trust and the Tshwaranang Legal Advocacy Centre whose organisations were responsible for safeguarding women's constitutional rights in South Africa.

The Applicants in seeking a confirmation of the High Court order argued that Sections 15 and 16 of the Sexual Offences Act unjustifiably infringed children's constitutional rights to have their dignity, privacy and integrity respected and protected. They also argued that the aforementioned sections of the Sexual Offences Act do not give effect to Section 28(2) of the Constitution which states that a child's best interest must be of paramount importance in all matters concerning the child. The Respondents contended that Section 15 and 16 of the Sexual Offences were not unconstitutional and served a cogent purpose of protecting children from the risks associated with their involvement in sexual activity which was on par with government's objectives.

The Constitutional Court had to decide whether subjecting children to criminal sanctions where they have engaged in consensual sexual activity would expose them to unforgiving circumstances that could adversely affect their development. In answering the question the Court further looked at the crucial issue of whether Sections 15 and 16 of the Sexual Offences Act were constitutional or not.

4 ISSUES FACING THE CONSTITUTIONAL COURT

4.1 The Scope of the Sexual Offences Act

The Constitutional Court commenced proceedings by first looking at some of the unique sections in the Sexual Offences Act that deal with sexual acts against children. The Act came into operation in December 2007 with the objective of dealing with all laws relating to sexual offences in one statute.³³ In addition to repealing the common law definition of rape and indecent assault and replacing it with a new expanded definition of rape and sexual assault, it has created new statutory offences relating to certain compelled acts of penetration or violation.³⁴ Besides creating new statutory offences for adults, the Sexual Offences Act has created new offences relating to sexual

³³See CR Snyman *Criminal Law* 5ed (2008) 353 and D Smythe and B Pithey *Sexual Offences Commentary* (2011).

³⁴D Smythe and B Pithey *Sexual Offences Commentary* (2011).

acts against children. Controversially the Sexual Offences Act in the form of Section 15 and 16 sought not only to criminalise consensual sexual conduct between an adult and child but also between child and child. Consensual sexual activities such as kissing amongst adolescents constituted a criminal offence under the Sexual Offences Act. In the Teddy Bear case the Court held that it was primarily concerned with Part 1 of Chapter 3 of the Sexual Offences Act which criminalised the act of consensual sex by adults and children with children aged between 12 and 16 years. In terms of the Sexual Offences Act, a “child” is defined as “a person 12 years or older but under the age of 16 years,” despite the Constitution defining a “child” as “any person under the age of 18 years.”³⁵ Section 56 (2) and (3) creates a statutory defence for adolescents less than two years apart in age who had engaged in kissing, petting and hugging but this defence cannot be raised by an adolescent who had engaged in sexual conduct with another adolescent.³⁶ However, quite strangely the Sexual Offences Act allows an adolescent of fifteen years to escape punishment when engaging in sexual activities with a seventeen year old who is the one that faces prosecution. Other relevant sections of note is Section 54 of the Sexual Offences Act, which creates an obligation on any person who has knowledge that a sexual offence has been committed against a child to report same to a police official or face criminal prosecution. The list to report the sexual offence would include amongst others, teachers, parents, counsellors and pastors who are all important role-players in the developmental stages of children. Section 50(2)(a)(i) of the Sexual Offences Act requires the Court that convicts a person of a sexual offence against a child to make an order that lists the convicted person in the National Register for Sex Offenders.³⁷ Incredibly, Section 50 does not exclude children from the list in the National Register.

4.2 A Closer Look at Section 15 and 16

Section 15 of the Sexual Offences Act reads as follows:

“Acts of consensual sexual penetration with certain children (statutory rape)

(1) A person ('A') who commits an act of sexual penetration with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.

³⁵ Section 28(3) of the Constitution.

³⁶In terms of Section 56(2):“Whenever an accused person is charged with an offence under-

- (a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older; or
- (b) section 16, it is a valid defense to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.”

³⁷ See Chapter 6 of the Sexual Offences Act.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).

(b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”

Section 16 of the Sexual Offences Act reads as follows:

“Acts of consensual sexual violation with certain children (statutory sexual assault)

(1) A person ('A') who commits an act of sexual violation with a child ('B') is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the Director of Public Prosecutions concerned authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).

(b) The Director of Public Prosecutions concerned may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

Section 15(1) deals with the offence of statutory rape and it takes place where an adult or child who is 16 years or older engages in consensual sexual penetration with a child between 12 and 16 years (adolescent) or between two adolescents.³⁸ The two adolescents who engage in sexual penetration with each other will be guilty of statutory rape in terms of the Sexual Offences Act. Section 16(1) creates the offence of statutory sexual assault in instances where some form of sexual violation has occurred between an adult or child who is 16 years and older and an adolescent as well as between adolescents.³⁹ The effect of Section 15 of the Sexual Offences Act is that it outlaws sexual activities between a child who is 12 and 16 years of age for engaging in an act of consensual sexual penetration with another child aged between 12 and 16 years. It also penalises a child who is between sixteen and eighteen years of age for engaging in an act of consensual sexual penetration with a child

³⁸The Sexual Offences Act gives the term, “sexual penetration” a wide definition which includes vaginal, anal and oral sexual intercourse as well as including forms of masturbation.

³⁹ In terms of the Sexual Offences Act, “sexual violation” includes masturbation by another person as well as petting, kissing and hugging.

who is younger than 16 years of age and is two years or less younger than the other child. Likewise Section 16 of the Sexual Offences Act punishes a child who is between 12 and 16 years of age for engaging in an act of consensual sexual violation with another child aged between 12 and 16 years where there is more than a two year difference between the two children.⁴⁰ A close-in-age defence for sexual violations as set out in Section 56 of the Sexual Offences Act is available to children under the age of 18 years but crucially this defence is not available to children whose age difference is more than two years between them. The Court had to take this important factor into account when deciding on the issue of the constitutionality of Sections 15 and 16 of the Sexual Offences Act.

4.3 The unconstitutionality of Section 15 and 16

A key argument put forward to the Court was the unconstitutionality of Section 15 and 16 which were deemed to be inconsistent with the fundamental rights set out in the Constitution. The Respondents argued that Section 15 and 16 of the Sexual Offences Act did not infringe on any constitutional rights but rather sought to serve a progressive purpose in delaying the onset of sexual activity amongst children who lacked the maturity to make informed decisions on whether to engage in sexual activity or not. This view was supported by JASA who went on to add that sexual conduct amongst children is a perilous activity which should not be condoned and is not in the best interests of the child. However, the respondents went on to argue that should the Court find that such infringement existed, then they were reasonable and justifiable in terms of Section 36 of the Constitution.

The purpose of the Sexual Offences Act which was to protect children from the risks associated with sexual activity irrespective of their consent in engaging in sexual conduct was a key factor that the Court had to consider, according to the Respondents. The Respondents went on to add that the impugned provisions were designed narrowly and in such a way that they had had to be put in practice with other important child law instruments and measures such as the Children's Act,⁴¹ the Child Justice Act⁴² and the criminal justice system in the form of diversion. The counter argument by the Applicants was that these two Sections infringed on the children's rights to dignity, privacy and bodily and psychological integrity as well as the best interests of the child standard as set out in the Constitution.⁴³ The second and third amici supported the argument by the Applicants and went on to

⁴⁰ See discussion by Buthelezi M.C. and Bernard R.B. "The Court knows the law The Teddy Bear Clinic for Abused Children & RAPCAN v Minister of Justice and Constitutional Development and National Director of Public Prosecutions 73300/10 2013 ZAGPPHC 1 (unreported 04-01-2013):regspraak *Tydskrif* 2014 (3) 625 where the authors compared the close-in-age of not more than 5 years in the case of 14 and 15 year olds and not more than 2 years in the case of 12 and 13 year olds in Canada as compared to South Africa which had just one close-in-age of two years across the board. It was also stated that the Criminal Code in Canada is directed against adults rather than adolescents. The difference in law in Romania, Germany and the United States was highlighted against that of South Africa.

⁴¹ 38 of 2005.

⁴² 75 of 2008.

⁴³ See Section 10, 14, 12(2) and 28(2) of the Constitution.

add that the impugned provisions disproportionately affected girls by violating their right to access health care services and reproductive health care which is against the Constitution.⁴⁴

5 CRITICAL MATTERS ARISING FROM THE *TEDDY BEAR CASE*

The Court had to determine whether the route of criminalising sexual conduct between children was paramount in deterring sexual behaviour amongst them as well as protecting them from the risks associated with sexual behaviour. The Court resolved to determine whether the State's objective of deterring sexual behaviour amongst adolescents through the enforcement of Section 15 and 16 was a reasonable and justifiable limitation of the adolescent's right to dignity and privacy which was entrenched in the Constitution. The Court had to base its decision against the backdrop of the best interest principle laid out in Section 28(2) of the Constitution. Other critical issues arising from the case was the negative impact that exposure to the criminal justice system could have on a child – more so the psychological harm and stress that a child could be exposed to. In addition the Court had to juxtapose the risks attached to “premature” sexual behaviour against the sexually explorative developmental stage of a child's life where sexual experimentation is part and parcel of cognitive development amongst adolescents.

In addition to Section 15 and 16, another important section of the Sexual Offences Act that was considered relevant, was Section 54 which created an obligation and offence in relation to the failure to report sexual offences against children. Section 54 applied to consensual acts between adolescents that were criminalised in terms of Section 15 and Section 16 of the Sexual Offences Act. In addition Chapter 6 of the Sexual Offences Act established the National Register for Sex Offenders which had to include the personal details of any person convicted of a sexual offence against a child. Section 50(2)(a)(i) of the Sexual Offences Act requires the Court to make an order for inclusion of the personal particulars of the convicted person in the National Register. The consequences are dire in that the convicted person may not be employed to work with a child under any circumstances. Once again this section applied to adolescents convicted in terms of Section 15 and 16 of the Sexual Offences Act and the Court had to look at its impact on the future lives of these adolescents.

6 THE FINDINGS OF THE COURT

In a unanimous judgement, Khampepe J declared Section 15 and 16 of the Sexual Offences Act unconstitutional. It was held that children, like adults have rights and such rights must be protected in a free and democratic country.⁴⁵ The Court held that children enjoy fundamental rights that are espoused in the Constitution and such rights are granted to all people of South Africa.⁴⁶ The Court held that children have the right to dignity and this right must be promoted and respected.⁴⁷ The

⁴⁴Section 27 of the Constitution.

⁴⁵ Teddy Bear Case 13.

⁴⁶Ibid.

⁴⁷ Section 10 of the Constitution.

Court correctly pointed out that if the constitutional text intended to exclude children from enjoying the right to dignity, then

the distinction would have been expressly stated as with other sections in the Constitution which specifically mention, “adult citizens”.⁴⁸ The right to dignity is not held in abeyance until the child reaches adulthood and this right recognises the worth of all individuals, a worth that integrates feelings of value, understanding and perception amongst children.⁴⁹ Khampepe J went on to add that if children’s consensual sexual choices are not valued but criminally punished, their dignity and self-worth would inevitably diminish.⁵⁰

The Court clearly stated that the right to protection of one’s privacy as set out in the Constitution⁵¹ is fundamental in safeguarding an individual’s “family life, sexual preference and home environment.”⁵² Khampepe J went on to add that by allowing the criminal justice system and its role-players to invade the private intimacy of consenting adolescents who chose to give expression to their sexuality clandestinely is a breach of their privacy and against the spirit of the Constitution.⁵³ This intrusion into their private intimacy is further exacerbated by the provisions of Section 54 which demand that third parties divulge information shared with them in the strictest confidence.⁵⁴ The implications thereof are that it impacts negatively on the support structures available to adolescents. The Constitutional Court clearly felt that allowing an intrusion into the intimate lives of adolescents where confidential information divulged to trusted parties was to be shared with the police, prosecutors and judicial officers breached the adolescents’ constitutional rights and accordingly declared the reporting provisions in the Sexual Offences Act to be invalid.⁵⁵ The Court however suspended the order of invalidity and gave Parliament eighteen months to amend the relevant provisions.⁵⁶ By suspending the order of invalidity, the court sought to prevent instances of sex between adults and adolescents being treated in the same legal manner as sex between adolescents. Confusing as this sounds, the Court clarified the position by expressly stating that from

⁴⁸ Teddy Bear Case 13. See further *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232, where it was held that children have their own dignity which is independent of their parents.

⁴⁹ Teddy Bear Case 17.

⁵⁰ Teddy Bear Case 18.

⁵¹ Section 14

⁵² Teddy Bear Case 19.

⁵³ Teddy Bear Case 20. The Court went on to refer to the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999(1) SA 6, where it was held that “privacy” allows us to grow relationships without interference from others and that sexuality is at the heart of privacy. There should be no invasion of privacy if one practices consensual sexual activity without harming anyone.

⁵⁴ Teddy Bear Case 20.

⁵⁵ Khampepe J held that, “the existence and enforcement of the offences created by the Sexual Offences Act exacerbate harm and risk to adolescents by undermining support structures, preventing adolescents from seeking help and potentially driving adolescent sexual behavior underground.”

⁵⁶ Teddy Bear Case 20.

the date of judgment, a moratorium was placed on all investigations, arrests, prosecutions, criminal proceedings against children under the age of sixteen in relation to Section 15 and 16 until Parliament corrected the defects. The Court also expressly suspended the reporting obligations in respect of adolescents. The Court was of the view that Parliament as the law-making body was in a better position to improve the relevant provisions.

7 CONCLUSION AND WAY FORWARD

On a positive and perhaps heartening note, this landmark decision highlights the way forward in terms of the manner in which courts should approach children's rights in general. There is no doubt that the legal system does have a role to play in protecting and enforcing the rights and liberties of children but where such a system adversely affects their development, then an unjustified invasion into their personal growth takes place.⁵⁷ Legal intervention can at times have a negative effect on children, especially where they do not see themselves as victims or there is an allegiance to the offenders.⁵⁸ In such instances, children may see the criminal justice system as agents for their parents and as limiting their own autonomy and in many instances, feelings of humiliation, self-guilt and denunciation emerge.⁵⁹ The courts have a role to play in protecting children from adult sexual offenders but where children engage in healthy sexual behaviour, it becomes necessary for parents and teachers rather than the criminal justice system to play an active role in educating them.

A key principle that can be derived from the case is that the fundamental rights that are entrenched in the Constitution apply equally to children and adults.⁶⁰ The ruling gives weight to the State's constitutional obligation to safeguard the best interests of children at all times and this entails giving effect to children's rights to autonomy, dignity and privacy. The Constitutional Court has clearly recognised the importance of educating adolescents instead of punishing them and the time has come for the various role-players involved in the criminal justice system to follow suit and accept that any unjustified intrusion into the personal lives of these children can never be in their best interests. From a moral perspective, some may criticise the decision in that it may be deemed to be promoting promiscuity between adolescents as well as exposing them to sexually transmitted diseases but the reality is that classifying adolescents as sex offenders and punishing their normative behaviour would do more harm than good to their natural development.⁶¹ The time has come for more emphasis

⁵⁷Teddy Bear Case 1.

⁵⁸ D.Hines and D.Finkelhor "Statutory sex crime relationships between juveniles and adults: A review of social scientific research" *Aggression and Violent Behaviour* 12(2007) 300-314.

⁵⁹ Ibid.

⁶⁰ Teddy Bear Case 18.

⁶¹ See discussion by Philip Stevens Decriminalising consensual sexual acts between adolescents within a constitutional framework: The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Others case: 73300/10 [2013] ZAGPPHC 1 (4 January 2013) 2013 SACJ 41 where it was highlighted that there is a fine line between immorality and criminality and with proper education, children can approach their future sexual encounters with the necessary knowledge and responsibility without being

to be placed on sex education at schools and homes in order to effectively address the consequences of unsafe sex rather than denying children the opportunity of making their own decisions in the moral world of adulthood.

labeled as an offender.