

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 97/18, 98/18, 99/18 and 100/18

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
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SIGNATURE	DATE

In the matter between:

THE STATE

and

LM AND 3 OTHERS

DIRECTOR OF PUBLIC PROSECUTIONS

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

MINISTER OF SOCIAL DEVELOPMENT

MINISTER OF HEALTH

MINISTER OF BASIC EDUCATION

MINISTER OF POLICE

and

CENTRE FOR CHILD LAW

Child Offenders

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Amicus Curiae

LEGAL SUMMARY

INGRID OPPERMAN J

[1] The matter had its genesis in an urgent review concerning four children, which came before magistrates for diversions in terms of section 41 of the Child Justice Act Act 75 of 2008, as amended (*the Child Justice Act*). The four children were alleged to have committed offences referred to in Schedule 1 of the Child Justice Act. They had all tested positive for cannabis which tests had been performed at school. They were accordingly alleged to have been in possession of cannabis which constitutes an offence in terms of Schedule 1 of the Child Justice Act.

[2] On 5 February 2019, this court held that section 41 of the Child Justice Act, where the alleged offences fall within the ambit of Schedule 1 of the Child Justice Act, does not permit for compulsory residence as an option. The acting senior Magistrate drew attention to the fact that these four matters for review, emanate from informal diversions run as a special project by the Senior Prosecutor, Johannesburg and raised the concern that there may be other children who are detained under this project under similar circumstances to those children forming the subject matter of the review. Short of inspecting all relevant files in Krugersdorp and other surrounding courts, he had no means of identifying these children. He accordingly approached this court for an addendum to the previous order, which order would come to the assistance of such unidentified children. On 7 February 2019, the court granted a *rule nisi* calling for an audit. The judgment documents what had to be done to achieve compliance with the court's order.

[3] The Constitutional Court, in the matter of *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening)*; *National Director of Public Prosecutions v Rubin*; *National Director of Public Prosecutions v Acton* 2018 (6) SA 393 (CC) provisionally decriminalised the use or possession of cannabis by **an adult** in private and for his/her own consumption; and the cultivation of cannabis by **an adult** in private and for his/her own consumption. The judgment and order of the Constitutional Court expressly related to adults only.

[4] The Court held that several children's rights are directly violated by the statutes criminalising cannabis in the hands of children simply on account of the (alleged) offenders age. The court held that statutes having this effect violate, amongst other rights, a child's right to equality and the "best-interest" or "paramountcy" principle. Having concluded that the children's rights had been infringed, the court found that it was not justifiable.

[5] All the Ministers who had joined in the matter, the DPP and the *amicus* were all in agreement that section 4(b) of the Drug Trafficking Act, in so far as it applies to children, is unconstitutional.

[6] All the Ministers emphasised in their written submissions and at the hearing (which views were echoed by the DPP and the *amicus*) that they do not condone the use of cannabis by children but that a child-oriented rather than a crime-oriented approach should be followed to deal with drug abuse by children, which approach should include drug awareness and educational programs, treatment and rehabilitation. They were in agreement that there are other measures available to deal with children who use or who are addicted to cannabis and which will not expose them to the punitive consequences of the criminal justice system but will achieve the same objective of protecting children from drug abuse. The Court endorsed this view.

[7] It was accepted and indeed emphasised that the selling and provision of cannabis to minors and the use and possession in public, is and will continue to be a criminal offence.

[8] It is important to emphasise that this case does not engage with questions like whether children should use or possess cannabis or whether the use of cannabis is good or bad for the health and social well-being of children. The central question in this case relating to the use or possession of cannabis by children is a narrow one and deals with the constitutional validity of section 4(b) of the Drug Trafficking Act in respect of the use and possession of cannabis by children as opposed to adults in the light of the *Prince* decision. This case is not about the legalisation of cannabis for children. It is rather about decriminalising its use and/or possession so that other, more appropriate assistance may be rendered to children who succumb to its temptations.

[9] Drug testing at schools is comprehensively regulated by section 8A of the South African Schools Act 84 of 1996. The court emphasized that no criminal proceedings may be instituted against the learner regardless of whether she is found in possession of an illegal drug or simply tests positive for such illegal drug. The tests, as a rule, remain strictly confidential. The appropriate response to a learner found in possession of an illegal drug or who has tested positive for such an illegal drug is to address the issue, first-and-foremost, with her parents and, if so requested, refer the child for counselling and/or to a rehabilitation centre. The only sanction authorised is the institution of disciplinary proceedings against the child.

[10] The court dealt with the constitutional imperatives that should guide the decisions of the stakeholders and the statutory processes outlined by the Child Justice Act when diversions are considered and dealt with. In this judgment the Court documents what it considered to be wrong, how the wrongs should be remedied and

deals with the results of the audit of children in detention in such circumstances. The Court ordered that certain remedial measures be taken in the best interests of the children and in accordance with values inherent in the Constitution.