

Case No: A343/2018

In the matter between:

Appellant

And

**THE STATE**

Respondent

Heard : 7 December 2018

Delivered : 14 May 2019

**JUDGMENT**

SEALE, AJ

## THE CHARGES

1. The appellant was charged with the contravention of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) No. 32 of 2007, read with sections 256, 257 and 281 of the Criminal Procedure Act No 51 of 1977, the provisions of section 51, Schedule 2 of the Criminal Law Amendment Act, No. 105 of 1997, as amended by Act 38 of 2007 as well as sections 92(2) and 94 of the Criminal Procedure Act No. 105 of 1977 ("the CPA"), Schedule 2 Part 1.

2. In short, the accused was charged with the rape of his eleven-year old daughter. He was convicted of attempted rape, a competent verdict in terms of section 51(1) of the CPA, and he was sentenced to a term of eight years direct imprisonment.

3. The appellant appeals to this court against both the conviction and the sentence, with the leave of the court a quo.

4. In order to protect the complainant, the name of her father has been removed from this judgment as it will become a public document.

## THE TRIAL

5. After the charges were put to him, the appellant who was represented throughout the trial proceedings, pleaded not guilty and denied all of the elements of the charge brought against him. Subsequently, however, the appellant formally admitted that the complainant is his biological daughter and that she was 11 years of age at the time. He made further formal admissions concerning the DNA evidence during the trial.

6. The state called and led the evidence of three witnesses:

6.1 the complainant;

6.2 Ms the “first reporter”, who is a teacher at the complainant’s school and who has known the complainant for several years;

6.3 Dr Ashaman Narula who is a qualified medical doctor practising as a clinical forensic medical practitioner at the Heideveld Thuthuzela Centre.

7. The state also presented, *inter alia*, the following documentary evidence which was admitted by the appellant:

7.1 the “Report by Authorised Medical Practitioner” completed by Dr Narula;

7.2 the affidavit in terms of section 212 of the Criminal Procedure Act in

respect of DNA testing carried out on material found in the complainant's undergarment;

7.3 forensic evidence in the form of DNA results and the chain of evidence affidavits;

8. At the close of the state's case, the appellant elected to exercise his right to silence, gave no evidence and did not call any witnesses.

#### THE FACTS

9. The complainant gave evidence via CCTV at the commencement of the trial, on 24 May 2017. After a few minutes of evidence, however, she became too emotionally upset to continue and the matter was adjourned in order to give her time to compose herself. Later that day, as she was still unable to testify, the matter was postponed.

10. The complainant attended court at the next hearing, but was not afforded the opportunity to complete her evidence as the matter was postponed at the request of the accused, on the grounds that he was ill. The trial was thereafter repeatedly postponed for various reasons. Ultimately the matter came before court on more than twenty occasions. I deal with the repeated postponements of the trial in another context hereinbelow.

11. It subsequently emerged that the complainant's mother was either unwilling or unable to ensure her daughter's return to court and, as a consequence of her young age and her dependency on her mother's assistance in this regard, the complainant

never completed her evidence in chief and was never cross- examined.

12. For obvious reasons, these events could have occasioned a significant failure to achieve justice for the complainant. An important consequence of her not completing her evidence was that the court *a quo* could not, and did not, consider any of her evidence in determining the guilt of the appellant. The matter was therefore decided without reference to the complainant's evidence.
13. The first reporter, gave evidence after having attended at the court on two previous occasions when she had not been called to give evidence. The first reporter, testified that she knew the complainant and had, three years before, taught the complainant as her class teacher. She also coached the complainant at netball.
14. Evidence was that during May 2016, the day after a netball match, she saw the complainant standing at the door of her classroom crying. The complainant was inconsolable and cried for a long time. In addition to direct evidence of her own observations, hearsay evidence was also given, without objection from the appellant, as to what was reported to her by the complainant.
15. The complainant described to Ms<sup>1</sup> what had been done to her by her father during the course of the previous night when she had slept over at his home after the netball match. None of this evidence, whether direct or hearsay, about what was done to the complainant by the appellant was challenged during cross-examination. As a matter of principle, while there might have been an objection to the hearsay evidence, no objection could be made to the evidence of the first reporter's own observations.

16. The evidence confirmed that on the same day, the complainant was taken to the Heideveld Thuthuzela Centre where Dr Ashaman Narula, a clinical forensic medical practitioner with specific training in the field of sexual offences forensics, examined the complainant and prepared a report.
17. Dr Narula gave evidence at the trial, also only on her third attendance at court. Her evidence confirmed that she had completed the J88 form after having examined the complainant on 20 May 2016, the day following the incident.
18. Dr Narula found evidence of fresh injuries to the vaginal and anal areas of the complainant in the form of tears, redness and bruising. She stated that the injuries were compatible with recent, forced, or attempted, penetration with a penis or an object. She confirmed that these injuries were caused by blunt force trauma and she observed that there were no old injuries. Penetration, in her view, was possibly only superficial, and, based on the nature of the injuries, she was of the opinion that the assault constituted an attempted rape.
19. It was reported to Dr Narula that the complainant was wearing the same underwear as the night before and this garment was tested for DNA. The results confirmed that the appellant's DNA was found in the complainant's underwear.
20. The evidence of Dr Narula was not materially disputed during cross-examination. There was in fact no challenge at all to the evidence concerning the nature of the injuries and the probable cause of the injuries. No dispute was raised about the underwear evidence at all. The appellant subsequently also confirmed the content and accuracy of the DNA report, which was later handed in as an exhibit.

21. After the prosecution closed its case, the appellant elected to do the same, without giving any evidence. The court *a quo*, in its judgment, stated that it would ignore the evidence of the complainant and it decided the matter on the basis of the circumstantial evidence only.
22. As mentioned, the evidence of the injuries and the fact that the injuries suffered by the complainant had been caused by a sexual assault was not disputed. That the complainant had been sexually assaulted was specifically conceded  
  
on behalf of the appellant during argument, as was the fact that the appellant's DNA was found in the complainant's underwear. The only remaining issue in dispute then was whether it had been the appellant who had committed the sexual assault.
23. It was argued on the appellant's behalf, that the abovementioned circumstantial evidence was insufficient to support a conviction of the appellant. The appellant's representative argued that there were other inferences that might be drawn from the facts and that a conviction should not follow.
24. The appellant, however, could not and did not, point to any other inference that might reasonably be drawn from the abovementioned set of facts. Not a single, alternative explanation was put up on his behalf. The court *a quo* therefore found, correctly in my view, that the only reasonable inference to be drawn was that the appellant had sexually assaulted his own daughter.

25. This conclusion is supported by the principles to be applied in considering circumstantial evidence, which were discussed in *S v Nduna* 2011 (1) SACR 115 (SCA), where the court held (in that case regarding finger print evidence) as follows:

*“[14] Counsel for the appellant argued that the inference of guilt was not the only possible inference to be drawn from the circumstantial evidence presented in the case (Rv Blom 1939 AD 188 at 202). The enquiry before us then is whether the court a quo, on the evidence before it, could*

*reasonably have come to the conclusion that it was indeed the appellant who perpetrated the robberies in question. This involves a determination of whether the two cardinal rules of logic in Blom had been invoked: first, the inference that the appellant committed the robberies must be consistent with all the proved facts. If it is not, that inference cannot be drawn. Second, the proved facts should be such that they exclude every reasonable inference from them, save that it was the appellant who was the perpetrator.*

*[15] The first leg of the enquiry is clearly met: the inference that the appellant was one of the robbers is consistent with the fingerprint evidence. The answer to the second depends upon the probative value to be accorded to the appellant's thumb and palm prints found on the Venture and the Isuzu bakkie. Can it be said, ultimately, that his explanation as to how his palm print came to be on the Isuzu bakkie and his lack of knowledge as to how his thumb print came to be on the Venture is reasonably possibly true, such that the conclusion that the appellant was guilty on both counts is wrong?”.*

26. It must be remembered that in the instant matter the appellant made no attempt to provide any explanation at all for the presence of his DNA in his daughter's underwear, notwithstanding the evidence which confirmed that she had been sexually assaulted. The court a quo therefore had no alternative explanation



available to it for evaluation purposes.

27. The next step in the decision-making process involves the appellant's decision not to provide any alternative explanation and the legitimate consequences of

that decision. In *Sv Boesak* 2000 (1) SACR 633 (SCA), at paragraph 46, the court dealt with this issue as follows:

*"[46] It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a prima facie case has been established and the accused fails to gainsay it, not necessarily by his own evidence, but by any cogent evidence. I've use the expression 'prima facie evidence' here in the sense in which it was used by this Court in Ex parte the Minister of Justice: In re R v Jacobson & Levy 1931 AD 466, where Stratford JA said at 478:*

*' "Prima facie" evidence in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.'*

*[47] Of course, a prima facie inference does not necessarily mean that, if no rebuttal is forthcoming, the onus will have been satisfied. But one of the main and acknowledged instances where it can be said that a prima facie case becomes conclusive in the absence of rebuttal is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation. In the present case the only person who could have come forward to deny the prima facie evidence that he had authorised, written or signed the letter is the appellant. His failure to do so can legitimately be taken into account. "*

28. The same court confirmed at page 33 paragraph 50 that the failure to cross-

examine on supposedly disputed issues also carries consequences:

*“[50] In the context of the dispute now under discussion, ...in the wider context of the outcome of this appeal and the conduct of the defence in*

*the trial Court, it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can, nor should it be turned into a forensic ambush.*

*[51] In this respect, we are in full agreement with the comments made by the Constitutional Court in President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at 36J-37E.*

*‘[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross- examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct. ’...*

*[52] The rule stated by the Constitutional Court applies also to the challenging of all evidence adduced by the counter-party, whether on the basis of hearsay, inadmissibility or lack of proof of authenticity, accuracy, etc.”*

29. The constitutional right to silence does not provide a catch-all justification for not giving evidence where an explanation is required. In DPP v Heunis

(196/2017) [2017] 136 (29 September 2017) at paragraph 18-19 Bosielo JA writing

for the majority said that:

*"to my mind this damning evidence called for an answer from the respondent, no answer came forth from him, instead he elected to rely on his unsworn section 115 statement which was problematic ...on proper reconsideration of the evidence including the respondent's section 115 statement, I am of the view that although the respondent was exercising his constitutional right in terms of section 35(3)(h) to remain silent and not to testify during the proceedings; his failure to do so must be taken into account against him"*

30. The direct consequence of not giving evidence, where it becomes necessary, was confirmed in the matter of S v Mthethwa (CC03/2014) [2017] ZAWCHC 28 (16 March 2017) DJP Goliath said:

*"the accused elected not to testify, all the state's evidence cumulatively established that the vehicle of the accused was at the scene of crime beyond reasonable doubt...there are consequences and risks associated with an election not to testify... the prosecution's case is strengthened when such evidence is uncontroverted due to the failure of the accused to testify"*

31. The uncontroverted evidence confirmed that the appellant's DNA was found in the complainant's undergarment. This fact, coupled with the complainant's injuries which established that she had been recently sexually assaulted, required an explanation. The appellant's failure to challenge the evidence of the first reporter or of the medical expert and his decision to remain silent in the

face of the *prima facie* evidence of the assault having been committed by him, gives rise to the consequences enunciated by the judgments referred to above.

32. In the circumstances, the court *a quo* found correctly that the only reasonable inference to be drawn from the established facts was that it was the appellant who had sexually assaulted the complainant by attempting to rape her.
33. I can therefore find no fault with the court *a quo*'s reasoning or with its conclusion. The state proved beyond reasonable doubt that the appellant had attempted to rape his daughter and the appeal against the conviction must be dismissed.

#### SENTENCING

34. The appellant was 43 years of age at the time of the trial. He was married with two children and was, at the time of the assault, separated from his wife, the mother of the complainant. He was unemployed at the time of sentencing, as his contract had not been renewed due to the absenteeism that was a consequence of the criminal trial. He had previously worked as a welder earning R 2,500.00 per week. This was his first conviction.

35. It is trite law that the appeal court may not and shall not interfere with the imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably.<sup>1</sup>
36. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows directly or inferentially, that the court did not exercise its discretion at all or that it exercised it improperly or unreasonably, such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence.<sup>2</sup>
37. An analysis of the sentencing imposed for similar convictions reveals that the sentence itself does not stand out as an exception<sup>3</sup>. The court is also required to consider the facts peculiar to this matter, in addition to the appellant's personal circumstances.
38. The complainant was eleven years old at the time of the attempted rape and she is the biological daughter of the appellant. Our courts have justifiably expressed deep concern at this kind of offence. In *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at paragraphs 17 & 22 the court observed that *"the emergence of a trend of rapes involving young children is becoming endemic"* in this country.
39. In my view, the facts underlying this crime serve as aggravating circumstances.

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1 Naeser Teboho Raletsapo v The State (A248/14) WCHC [23 April 2018]; R v Maphumulo & another 1948 (2) SA 677 (AD) at paragraph 24 said that

2 S v Pillay 1977 (4) SA 531 A at page 534 paragraph H - page 535 paragraph G

3 S v Mkhathshwa 2015 JDR 1104(GP); Nkosi v S 2014 (2) SACR 525(GP); DPP Eastern Cape v Yoyo (581/17) [2018] ZASCA 21 (20 March 2018); Madiba v The State (497/2013) [2014] ZASCA 13 (20 March 2014)

Where a father rapes or attempts to rape his own daughter, and where the act is of sufficient severity to cause physical injury to the child, that father is deserving of a severe punishment because such conduct ranks amongst the most severe of violations of parental care and trust.

40. In *S v PB* 2013 (2) SACR 533 (SCA) at [13] the court expressed itself in these terms:

*"[13] It can hardly be disputed that rape of young girls by their fathers is not only scandalous; it has become prevalent as well. To all right-thinking people it is morally repugnant. It has emerged insidiously in recent times as a malignant cancer seriously threatening the wellbeing and proper growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our social and moral fabric."*

41. The judgment of the Supreme Court of Appeal in *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552; 2012 (6) SA 353 put this crime in its proper context:

*"[1] Rape is a repulsive crime. It was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity'. In S v Chapman [(1997 (3) SA 341 (A) at 345A-B)] this court called it a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim' and went on to say that*

*'[w]omen in this country . . . have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and*

*enjoyment of their lives.<sup>1</sup>*

*[2] Yet women in this country are still far from having that peace of mind. According to a study on the epidemiology of rape 'the evidence points to the conclusion that women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa'. During 2007 as many as 36 190 reports of rape were made to the police. Perhaps in some cases the report was false, but the figure is nonetheless staggering bearing in mind that rape is notoriously under-reported. It is also notorious that relatively few offenders are caught and convicted. "*

42. The epidemic of rape in this country has not abated since 2008. Furthermore,

that which applies to adults, applies even more to young children, who have every right to expect to be safe from harm in their own homes and particularly whilst they are in the care of their parents. The violation of this sanctity cannot be condemned in terms which are strong enough.

43. Commenting on this kind of offence, the court in *S v Abrahams* 2002 (1) SACR

116 (SCA) said that:

*"of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence in a daughter's best interest, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense."*

44. In my opinion, it cannot be said that the sentence handed down by the court

a *quo* is disproportionately severe when considered in the context of the crime committed. Counsel for the appellant conceded as much during argument at the appeal. Conduct of this nature is justly condemned and the courts should do their best to contain this kind of abuse of our children. Leniency is not an appropriate response.

45. I can therefore find no reason to reduce the sentence handed down by the court a *quo*. On the contrary, had the accused come before this court as a court of first instance, he would likely have received a longer period of incarceration, however, the sentence handed down cannot be described as shockingly inappropriate. For these reasons I do not find that this court is at liberty to intervene.

46. I would therefore dismiss the appeal against both the conviction and the sentence.

47. This finding is, however, unfortunately not the end of this matter. Events surrounding the trial and treatment of the complainant during the trial, as well

as thereafter, require the attention of this court and, as will be seen, of the appropriate authorities.

#### ADDITIONAL MATTERS THAT REQUIRE CONSIDERATION

48. As the upper guardian of the children of South Africa, this court is required to be concerned about the welfare of the complainant as well as other children in her position. This concern should extend to her treatment by the criminal justice system and to her participation in the trial of her assailant.



49. It is an uncomfortable truth that the complainant's exposure to the trauma of her assault did not end with the arrest of her father. The first indications of discomfort are occasioned by the fact that the criminal trial required twenty-one appearances before it could be resolved. These were as follows:

- (1.) 22 November 2016 (postponement at accused's request);
- (2.) 8 December 2016 (postponed at accused's request);
- (3.) 8 February 2017 (declared trial ready);
- (4.) 29 March 2017 (accused absent);
- (5.) 24 April 2017 (postponed for plea and trial);
- (6.) 22 May 2017 (accused ill);
- (7.) 24 May 2017 (trial, complainant gives evidence, not completed);
- (8.) 28 June 2017 (postpone for further trial);
- (9.) 15 August 2017;
- (10.) 4 September 2017 (state witness absent);
- (11.) 28 September 2017 (accused ill);
- (12.) 2 October 2017 (complainant had asthma attack);
- (13.) 10 November 2017 (CCTV not working and complainant writing exams);
- (14.) 7 December 2016 (complainant and mother absent);
- (15.) 12 February 2018 (state requests affidavit to explain mother's reluctance to bring complainant to court);
- (16.) 22 February 2018 (accused's attorney off sick);
- (17.) 8 March 2018 (state closes case as does accused);
- (18.) 26 March 2018 (state case re-opened);

- (19.) 12 April 2018 (judgment);
- (20.) 25 April 2018;
- (21.) 7 May 2018;
- (22.) 17 May 2018; and
- (23.) 22 May 2018.

50. Of these allocated dates, it appears, from what was stated at the hearing, that the complainant was present at court on seven days. To make matters worse, her evidence was never completed and could not be considered at all for the purposes of the judgment. As a consequence, every one of those days when she was taken to court was an exercise in futility and served no good purpose, as far as the trial was concerned.

51. One can only imagine what each attendance at court required of this child. Not only would she have been compelled to relive the assault in preparing herself to give evidence on each occasion, but she would have endured the hardships of getting to court utilising the public transport system and then of waiting to give evidence of her assault.
52. In addition, her mother would likely have had to be away from her work and the complainant would have had to have absented herself from school. It is small wonder that the complainant's mother eventually refused to co-operate and failed to return with her daughter to court to complete her evidence.
53. It also emerged during argument that the appellant and the complainant had been brought into contact with one another by the complainant's mother at the appellant's home while the trial was still under way. This was highly inappropriate in the circumstances and very likely detrimental to the child's wellbeing.
54. There is furthermore no indication from the record that a social worker or a therapist had been assigned to the complainant, either to assist her with the trial itself or to provide trauma counselling of any sort. Both such interventions would clearly have been necessary. Indeed, trauma counselling is undoubtedly still required.
55. In my view, the history referred to above represents a significant failure by the criminal justice system to provide proper care for the complainant, care which it is required by law to provide so as to avoid as far as possible secondary trauma being occasioned to the victim.

56. I am acutely aware of the budgetary issues and other constraints that affect the delivery of services in our country, but where the legislature has made specific provision for certain minimum standards to be maintained there can be no excuse for not doing so. The problem requires remediation for the sake of our children.
57. In order that there be no ambiguity about the legal requirements imposed on the criminal justice system, I consider it to be necessary to set out in some detail the legislative environment pertaining to matters of this sort. Our law has taken significant strides in recent years with the aim of avoiding children being subjected to the potentially grinding effect of the criminal justice system and these laws should be adhered to by the relevant participants in that system.

#### THE LEGISLATIVE ENVIRONMENT

58. The Legislature has adopted policies which have found expression in detailed legislation specifically aimed at providing for the care and the nurturing of children, and specifically those children who have suffered harm<sup>4</sup>. The primary source of our law is the Constitution which makes specific provision for the proper care of children. Section 28(2) holds that:

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

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<sup>4</sup>! have added emphasis where I consider this to be necessary.

59 The preamble to the Children's Act No. 38 of 2005 gives more concrete expression to this sentiment by providing as follows:

*"Preamble*

*WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person;*

*AND WHEREAS every child has the rights set out in section 28 of the Constitution;*

*AND WHEREAS the State must respect, protect, promote and fulfil those rights;*

*AND WHEREAS protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities;*

*AND WHEREAS the United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance;*

*AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children;*

*AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or*

*her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding, ”*

60. Having considered the guiding principles, I now quote extensively from the

Children’s Act, as particular attention is given in that Act to the vulnerability of children in our society and to the obligation to provide a special degree of care for them. The Act stipulates, at Section 6, that children require special treatment:

*“General principles*

(1) *The general principles set out in this section guide-*

*fa) the implementation of all legislation applicable to children, including this Act; and*

*(b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.*

(2) *All proceedings, actions or decisions in a matter concerning a child must-*

*fa) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation:*

*(b) respect the child's inherent dignity;*

*(c) treat the child fairly and equitably;*

*(d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child;*

*(e) recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and*

*(f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has”.*

61. Section 8 Application provides further that:

- “(1) The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.*
- (2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.*
- (3) A provision of this Act binds both natural or juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. ”*

62. Section 9 provides that the best interests of a child are “paramount”:

*“In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied. ”*

63. To give practical effect to these principles, the legislature has seen fit to promulgate legislation which deals specifically with sexual offences, in the form of The Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007. This Act required the preparation and implementation of a National Policy Framework (the “NPF”) (ss 62-65).

*“Section 62 National policy framework*

- (1) The Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, adopt a national policy framework, relating to all matters dealt with in this Act, fcfa) ensure a uniform and co-ordinated approach by all*

*Government departments and institutions in dealing with matters relating to sexual offences;*

- (b) guide the implementation, enforcement and administration of this Act; and*

- (c) enhance the delivery of service as envisaged in this Act by the development of a plan for the progressive realisation of services for victims of sexual offences within available resources.

(2) The Minister must-

- fa) before 31 March 2009, adopt and table the policy framework in Parliament;
- (b) publish the policy framework in the Gazette within one month after it has been tabled in Parliament;
- (c) review the policy framework within five years after its publication in the Gazette and at least once every five years thereafter; and
- (d) amend the policy framework when required, in which case the amendments must be tabled in Parliament and published in the Gazette, as provided for in paragraph (b).

#### *Section 63 Establishment of Inter-sectoral Committee*

- (1) There is hereby established a Committee to be known as the Inter-sectoral Committee for the Management of Sexual Offence Matters.
- (2) The Committee shall consist of-
  - (a) the Director-General: Justice and Constitutional Development, who shall be the chairperson of the Committee;
  - (b) the National Commissioner of the South African Police Service;
  - (c) the National Commissioner of Correctional Services;
  - (d) the Director-General: Social Development;
  - (e) the Director-General: Health; and
  - (f) the National Director of Public Prosecutions.
- (3) The members of the Committee may designate an alternate to



*attend a meeting of the Committee in their place.*

- (4) (a) *The members of the Committee shall designate one of its members as deputy chairperson of the Committee, and when the chairperson is not available, the deputy chairperson shall act as chairperson.*

(b) *If neither the chairperson nor deputy chairperson is available, the members present at a meeting shall elect a person from their own ranks to preside at that meeting.*

#### *Section 64 Meetings of Committee*

- (1) *The Committee shall meet at least twice every year and meetings shall be held at a time and place determined by the chairperson.*
- (2) *The procedure, including the manner in which decisions shall be taken, to be followed at meetings of the Committee and the manner in which the Committee shall conduct its affairs shall be determined by the Committee.*
- (3) *The Committee shall report in writing on every meeting to the Minister within one month of such meeting.*

#### *Section 65 Responsibilities, functions and duties of Committee*

- (1) *The Committee shall be responsible for developing and compiling a draft national policy framework, as contemplated in section 62 (1), which must include guidelines for-*

  - (a) *the implementation of the priorities and strategies contained in the national policy framework;*
  - (b) *measuring progress on the achievement of the national policy framework objectives;*
  - (c) *ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of the national policy framework and this Act; and*
  - (d) *monitoring the implementation of the national policy framework and of this Act.*

- (2) *The Committee may make recommendations to the Minister with regard to the amendment of the national policy framework. ”*

64. Notwithstanding the requirement to have produced and published the NPF within one year of the Act, the NPF was revealed in its final version only several years later. In their article “*Court support workers speak out: Upholding children’s rights in the criminal justice system*” published in the SA Crime Quarterly in June 2014, the authors<sup>5</sup> report that:

*“In September 2013, five years later than it was due, the National Policy Framework on Management of Sexual Offences (NPF) was published in the Government Gazette. The NPF is based on the principles of ensuring a ‘victim centred approach to sexual offences’: adopting multidisciplinary and inter-sector responses: providing specialised services in these matters: and ensuring ‘equal and equitable access to quality services’. The NPF provides a number of new measures that may improve the implementation of existing laws and policy. Firstly, it recognises a range of factors that increase the vulnerability of victims ‘due to gender power imbalances, age, disability, sexuality and cultural dynamics’. Secondly, it requires that budget allocations and expenditure on sexual offences must be separately tracked to monitor this and ensure sufficient resources are made available. It also requires the development of SAQA- accredited training, allowing for improved standards in training. Perhaps most importantly, the NPF provides that ‘psychosocial services and practical assistance must be provided as an integrated part of support services at all stages’. Other key developments in the past 20 years include the establishment of specialist Sexual Offences Courts (SOCs) in 1993 and the introduction of TCCs in 2000. ”*

65. In the foreword by the then Minister of Justice and Constitutional Development to the National Policy Framework (“the NPF”) Management of Sexual Offences Matters of June 2012 the Minister stated, *inter alia*, that:

*“The Criminal Law (Sexual Offences and Related Matters) Amendment*

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<sup>5</sup> Waterhouse, Samantha; Townsend, Loraine and Nomdo, Christina

*Act 32 of 2007 (the Act) stands as a perfect example of a comprehensive piece of legislation that is rich with features that protect the rights of victims against sexual violence. It is an Act that puts emphasis on the progressive development of a Criminal Justice System (CJS) that is victim-centred, responsive and caring. It creates a wide range of new specific crimes to better respond to sexual violence perpetrated against children and persons with disabilities, in particular. With its expressed emphasis on leaning on the international trend of service integration, it further provides for the development of a policy framework to guide the integrated management of sexual offences. This document therefore stands to represent the fulfilment of this requirement. It is the National Policy Framework on the Management of Sexual Offences, which the key stakeholders in the CJS jointly developed, under the leadership of my Department. "*

*...It is our goal, as the DOJ&CD and the JCPS Cluster Departments and Institutions, to continually and collectively equip our CJS system to fully respond and prevent sexual violence in all its forms. This Policy Framework therefore seeks to establish coordinated planning, resource allocations and execution of services within the sexual offences sector. It entrenches the victim-centred CJS, and promotes specialization in service delivery to respond to the special needs of the victims. "*

66. While it is important to consider the NPF as a whole, quoting the entire document would occupy too much space in this judgment. I will therefore only refer to certain aspects of the document, which confirm that the:

*"NPF seeks to ensure that all government departments and other role-players are collectively guided in the implementation, enforcement, administration, monitoring and evaluation of the Act".... [and it confirms that the Act] "acknowledges flaws in the CJS and recognizes that the system exacerbates the plight of the victims 'through secondary victimisation and traumatising".*

67. Furthermore, it states that:

*“the Act places a significant degree of responsibility and accountability on government departments to deliver appropriate, adequate, and efficient services to all victims of sexual violence. The entrenchment of the intersectoral coordination of services in the Act further reflects a major departure from the fragmented service delivery of the past, as it requires the alignment of all policies and programmes to efficiently respond to the scourge of sexual violence. The Act further puts emphasis on systemic monitoring and evaluation to measure progress.*

68. Of considerable importance to the present matter, the NPF also emphasises that special attention must be given to the thorny issue of:

*“secondary victimization and traumatising to describe the negative criminal justice experiences by victims of sexual offences. However, secondary victimization can be defined as an attitude, process, action and/or omission that may intentionally or unintentionally contribute to the re-victimization of a person who has experienced a traumatic incident as a victim. This*

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*may take place through failure to treat the victim with respect and dignity, disbelief of the person's account, unsympathetic treatment, blaming the victim, lack of, or insufficient coordinated support services to assist the victim at a personal, institutional and broad social level.”*

**Principle 1: Adoption of a Victim-Centred Approach to Sexual Offences**

*This principle underlines the importance of providing services to victims of sexual offences based on a victim-centred model. This approach recognises the centrality of the victim's role in the management of sexual offence cases and promotes the provision of services, processes and*

*institutional mechanisms that improve victims' emotional and psychological well-being. This approach recognises, at its core, that addressing the vulnerability of victims due gender power imbalances, age, disability, sexuality and cultural dynamics and other factors often has a great impact on the outcome of the sexual offence cases. An efficient and effective victim-centred response therefore requires all service delivery points within the value chain of sexual offences to provide victim-friendly services that exhibit speed, sensitivity and responsive attitudes to reduce, and ultimately, eradicate secondary victimisation.*

### ***Principle 2: Adoption of a Multi-disciplinary and Intersectoral Response to Sexual Offences***

*This principle rests on the premise that an efficient and holistic response to the management of sexual offences requires a multi-disciplinary and intersectoral approach. It requires collective participation of service providers such as the police officials, health care professionals, social workers, prosecutors, judicial officers, correctional officials, educators and traditional leaders. At community level, the integrated response of organizations such as NGO's, Community-based Organizations and Religious-based Organizations, which enhance interventions against sexual violence, also become imperative.*

*This principle therefore promotes a coordinated response to sexual crimes so as to allow room for joint development and execution of intervention actions and programmes, shared services and resources, integrated skills development, and collective monitoring and evaluation mechanisms, with the aim to improve the quality and quantity of services. Intersectoral collaboration not only provides a continuity of care and coordinated response to victims' needs, but also provides the opportunity for on-going oversight, feedback and evaluation, which leads*

*to the improved provision of services. The DG ISC becomes critical in this regard, as it is empowered by the Act to monitor the execution of the intersectoral response and prevention of sexual violence in the country.*

***Principle 3: Provision of Specialized Services to the Victims of Sexual Offences***

*International and national research studies continue to highlight the severe consequences of sexual violence on both the direct and indirect victims of this crime. The international trend in addressing these consequences puts emphasis on the adoption of specialized services when dealing with victims of sexual offences. It requires the provision of specialized services by people who acquired specialized knowledge and skills to specifically deal with sexual offences matters.*

*By making reference to the vulnerability of victims and the eradication of secondary victimization, the Act may be further construed as recognizing the peculiar circumstances of victims of sexual violence, which often gives rise to special needs that require a specialized response.*

*The existing government approach to service delivery recognizes the notion of the provision of specialized services as imperative for victims of certain crimes, such as rape, domestic violence and other crimes associated with gender-based violence. Moreover, the Act itself requires the introduction of "certain services to certain victims of sexual offences" which is read to mean "specialized services". Government departments have established specialized units, divisions or structures that are capacitated by specialist personnel and special resources to deal with sexual offences matters. Examples of these include specialized services offered by Clinical Forensic Medicine Centers (CFMC) in the DOH; Family, Child and Sexual Offences (FCS) Units within SAPS; Thuthuzela Care Centers (TCCs) established by the NPA; Court*

*Preparation Officers provided by NPA; as well as the Sexual Offences Courts that are capacitated with Witness Testifying Rooms, One-Way Mirrors, Anatomical Dolls and Intermediaries provided in courts, as well as One-Stop Centers managed by the DSD.*

### **2.2.2 Specific Objective 2- To Develop and Strengthen Coordinated Services**

#### **(a) Description**

*The Act makes it mandatory for government to "provide certain services to certain victims of sexual offences" and "to minimize or,*

*as far as possible, eliminate secondary traumatization... including the manner in which sexual offences and related matters must be dealt with uniformly in a coordinated and sensitive manner..." The services must be rendered in a coordinated and integrated manner to avoid secondary victimization of the victim. These provisions address two main service delivery obligations i.e. the provision of support to victims of sexual violence and the implementation of mechanisms to prevent sexual violence incidents.*

**The Support Obligation** requires that support services be provided in a manner that would instill the confidence of the victim in the CJS and that his or her resort to the law will transform the victim to a survivor. Reference to "certain services" refers to provision of specialized services which must be rendered in an equitable manner throughout the CJS.

**The Prevention Obligation** requires government to adopt measures aimed at preventing sexual violence. This obligation includes the reduction of repeat offending by means of offender rehabilitation programmes and the development of responses that reduce harmful consequences caused by sexual violence on the victim and society.



*Psycho-social support can prevent re-victimization as well as reduce the risk of some victims later becoming perpetrators. Furthermore, the ultimate goal of any prevention programme must be to create an environment where all persons feel safe and secure from sexual violence.*

*Section 62(1) (c) of the Act also requires government departments to develop an implementation plan for the progressive realization of services to victims of sexual offences within available resources.*

*(b) The Specific Principles Informing Coordination of Services*

*(Hi) Psycho-social services and practical assistance must be provided as an integral part of support services at all stages of the management of sexual offences.*

*(iv) Service providers must adopt an integrated or multi-sectoral approach to service provision to increase levels of confidence in the CJS.*

*(v) All cases of sexual offences must be dealt with through the CJS;”*

69. The NPF also provides, as a general set of principles, as follows<sup>6</sup>:

*“Government Departments and institutions mentioned in the Act and their officials: a) All implementing Government Departments - with clearly defined responsibilities in terms of the Sexual Offences Act must ensure that their obligations are carried out. This will require coordinated implementation efforts that may include government departments beyond the JCPS Cluster to achieve efficiency and effectiveness. For instance, the DBE becomes critical in ensuring that all responsibilities related to the protection and promotion of the rights of children are met in*

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<sup>6</sup> National Policy Framework on Management of Sexual Offences: Criminal Law [Sexual Offences and Related Matters] Amendment Act 2007 (Act 32 of 2007), Section 62(1), Government Gazette 36804, 21—23.

*a coordinated fashion. ...*

*CHAPTER 2: THE FRAMEWORK 28 b) Government officials - accountability, roles and responsibilities must be clearly defined for*

*officials responsible for providing services related to sexual offences in terms of prevention, support and care across all spheres of government. Monitoring and evaluation tools and guidelines can be utilised to standardise performance. This will ensure understanding of the requirements of the NPF at all levels, c) NGO, Religious Based Organisations and Community Based Organisations working with victims of sexual violence must be consulted when the NPF is reviewed and the 5-year strategic plan for the implementation of the NPF and other plans are developed, where necessary. Consultative processes must be put in place at all levels to ensure the collective prevention, response and care in the management of cases of sexual offences. ”*

70. As can be seen from these extracts there are legislatively imposed structures and procedures which are required to be put in place and implemented to ensure that child victims of crime are treated in such a manner as to reduce, as far as possible, the occurrence of secondary trauma to the victim during the trial of the perpetrator.
71. Events such as the delays and repeated postponements referred to hereinabove should not be permitted. Everything that can be done should be done to reduce the anxiety and stress that accompany the giving of evidence at a criminal trial. There is a positive obligation on those involved to take active steps to assist the complainant in matters of this nature.
72. The court in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and*

Constitutional Development and Another 2014 (2) SA 168 (CC) held that:

*"[1] Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that are necessary for their positive growth and development. Indeed, this court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development. "*

#### PRACTICAL ISSUES THAT REQUIRE ATTENTION

73. I now turn to what I consider could have been done and what still should be done to assist this complainant and future child complainants as well. The first aspect that I will refer to relates to the conduct of the trial and to court procedures. The second relates to social services that ought to be provided to children in this predicament.
74. It cannot be over emphasised that the complainant was a mere child of eleven when she was assaulted by her father and that it was certainly not in her best interests to have been compelled to attend at the criminal court on so many separate days. One can only imagine the stress and anxiety that even one attendance would cause a child of this age, and indeed any rape victim at all, let alone seven appearances.

75. In what I set out below, I do not intend to legislate but I do intend to suggest possible and practical solutions to what seem to be considerable problems with the current system. My primary intention, however, is to highlight these problems so that the experts in the appropriate fields might attend to the practical remedial actions.

#### STEPS THAT COULD BE TAKEN AT COURT LEVEL

76. That the complainant was not protected from her father, or at the very least not put outside of his reach during the trial indicates a failure to impose appropriate bail conditions which would have provided protection from this kind of contact.
77. That she was required to attend at court on so many occasions, is indicative of a system that is not effectively geared towards preventing, or at the very least reducing as far as possible, the “secondary victimization and traumatising” occasioned by repeated attendances at court to give evidence. Proper trial and court management procedures would go a long way to preventing a reoccurrence of this scandal.
78. Practically speaking, it should be possible to arrange matters so that notice could be given in advance of the fact that the trial will not be proceeding on a particular day. If a delay is due to the accused, he should be required to provide advance notice so that the complainant and witnesses do not attend on court for no purpose. The giving of advance notice could either be ordered specifically or could be a condition of bail, so as to avoid unnecessarily traumatising his alleged victim. Where the court or court

officers occasion a delay the same courtesy should be extended to the other parties and witnesses, in advance. This would go some way to avoiding unnecessary attendances at court.

79. If this might occasion difficulties with obtaining the attendance of witnesses and the accused at court they could be given several dates in advance and warned to attend at court on each date.

80. The system should provide for those victims without adequate means or those who have to rely on an inadequate public transport system, to be collected from their homes and transported to court. Either the police or the social welfare staff could be tasked with this function. In this matter there was clearly no real effort made to assist the complainant with attending at court.

81. The other witnesses were also inconvenienced by the manner in which the trial progressed. Both the first reporter and the expert witness gave evidence on

only their third attendance at court. One is aware of the inconvenience that repeated attendances entail, particularly for people who have no direct interest in the matter at hand, and the danger to the satisfactory completion of the trial that this presents.

82. Effective case management procedures would go a long way to reducing the number of postponements, the number of required attendances by all concerned, and to reducing the length of trials in general.

STEPS THAT CAN BE TAKEN AT THE SOCIAL WELFARE LEVEL

83. It is not impossible to comprehend that relatively simple precautions and procedures adopted during the conduct of a criminal trial involving a child complainant would go some way towards reducing the anxiety and trauma likely to be experienced by the child complainant as a consequence of the court proceedings.

84. For example one can appreciate how the following interventions might provide comfort and assistance to the child:

84.1 Early involvement of the Department of Social Services to appoint a social worker to assess the child complainant's circumstances and to provide trauma counselling and assistance;

84.2 Requiring that the investigating officer or the appointed social worker make prior arrangements to assist the complainant and her custodian to travel to court from their home on the morning of the hearing would avoid the difficulties and costs occasioned by having to utilise an unreliable public transport system;

84.3 Providing counselling to the child complainant's non-offending parent on methods to assist the child, specifically, in this instance guidance about the advisability of putting her daughter into a situation where she would meet with her father during the trial; and

84.4 Providing continued trauma counselling after the completion of the trial for a reasonable period of time.

85. In this instance there is no indication on the court record of social services or court support staff being on hand to assist either the complainant or her mother, other than

to a limited extent when evidence was actually being led. Counselling should have been provided and, I am of the opinion that it should still be provided to this child for the foreseeable future. It would amount to a failure of the system should she be left without counselling after the events that befell her.

86. I cannot emphasise enough the importance of the relevant welfare structures receiving notification of the victim and her circumstances and thereafter of stepping in to provide assistance and counselling for the complainant.

87. The Constitutional Court held, per Ngcobo J, in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) that:

*“Introduction*

*[1] Until recently, the law did not pay much attention to the stress that child complainants in sexual offence cases suffer when they testify in courts. Child complainants in sexual offence cases were required to relive the horror of the crime in open court. The circumstances under which they gave evidence and the mental stress or suffering they went through while giving evidence did not appear to be the concern of the law. And, at times, they were subjected to the most brutal and humiliating treatment by being asked to relate the sordid details of the traumatic experiences that they had gone through. Regrettably, although there were welcome exceptions, the plight of child complainants was seldom the concern of those who required them to testify or those before whom they testified.*

*[2] The advent of our constitutional democracy must change all of that. Our constitutional democracy seeks to transform our legal system. Its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, introduce a new ethos that should permeate our legal system. Consistent with these values, s 28(2) of the Constitution*

*requires that in all matters concerning a child, the child's best interests must be of paramount importance. Recently, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Sexual Offences Amendment Act) introduced certain amendments to the Criminal Procedure Act (the CPA). The amendments that are relevant to these proceedings are those that concern the protection to be given to child complainants when giving evidence in criminal proceedings involving sexual offences.*

*[3] The central question presented in these consolidated cases is whether the provisions of the CPA that concern the protection to be given to child complainants in criminal proceedings involving sexual offences provide protection consistently with s 28(2) of the Constitution. In particular, the question presented is whether the provisions of ss 153(3) and (5) (proceedings in camera), 158(5) (the duty to give reasons for refusing to allow a child to give evidence by means of closed circuit television), 164(1) (testifying without taking an oath or the affirmation), 170A(1) (testifying through an intermediary) and (7) (the duty to give reasons for refusing to appoint an intermediary) of the CPA are consistent with s 28(2) of the Constitution. These provisions will be referred to collectively as the invalidated provisions. This is an important constitutional question for it concerns persons who are not parties to criminal proceedings but whose constitutional rights may be affected.*

*[4] There are two other equally important questions which arise from the manner in which the central question arose in these cases and the relief that the High Court granted. The first concerns the powers of a court to raise a constitutional issue of its own accord. The other concerns the power of the High Court to make declaratory and supervisory orders. The importance of these questions lies in the fact that they often arise in the context of child complainants in sexual offence cases, who are not parties to the proceedings in which they testify, yet who have constitutional rights that require protection. They also arise in the context of our adversarial system in criminal trials where those accused of crimes enjoy rights to a fair trial and where the presiding officer is neutral and may not take any side in the contest. They also arise in*



*the context of a constitutional State where the Constitution is the supreme law and any law or conduct that is inconsistent with it is invalid.*

*[5] But, as the judgment of the High Court and the submissions made by the parties in these cases amply demonstrate, behind these legal questions lies the core issue concerning the administration of justice. Specifically, two questions arise in this regard. First, whether the provisions of the CPA that were enacted to protect child complainants from the mental stress and anguish associated with testifying in criminal proceedings are being interpreted and implemented consistently with the Constitution. Second, the duty of all superior courts, including this court (as the upper guardian of all minors) - if any - to investigate any failure to implement these provisions, which deny child complainants the protection they constitutionally deserve, once any failure to do so is brought to the court's attention. These cases are therefore fundamentally about the administration of justice in those courts in which child complainants of sexual offences appear to testify.*

*[6] It is these questions that we must answer. "*

88. In my view, the Criminal Justice System has, in dealing with the complainant in this matter, confirmed that it has yet to provide proper answers to these questions. For all the good intentions and policy considerations exemplified in the Act and the NPF, the system, on this occasion, simply failed the complainant.

89. I therefore intend to cause copies of this judgment to be delivered to those concerned with implementing these policies for their consideration and appropriate action.

ORDER:

90. I therefore make the following order:

RE: THE APPEAL

- (a) The appeal against both the conviction and the sentence is dismissed.

RE: REMEDIAL STEPS TO BE TAKEN REGARDING CHILD VICTIMS

- (b) The Head of the Department of Social Development, Western Cape Province, shall:
  - (c.1) ensure that a qualified social worker is appointed to provide trauma counselling for the complainant;
  - (c.2) monitor such trauma counselling and report back to this Court, in writing to my learned brother Samela J within 6 weeks of this order to confirm that the counselling has commenced and on the progress being made in such counselling;
- (c) A copy of this judgment and Order shall be delivered to the following persons:
  - (d.1) the Director-General: Justice and Constitutional Development;
  - (d.2) the National Commissioner of the South African Police Service;
  - (d.3) the Director-General: Social Development;
  - (d.4) the Director-General: Health;
  - (d.5) the National Director of Public Prosecutions;
  - (d.6) the Chief Magistrate, Wynberg Magistrates' Court; and (d.7) The

Chief Prosecutor, Wynberg Regional Court.

M.SEALE

Acting Judge of the High Court

I agree and it is so ordered.

M.I SAMELA

Judge of the High Court