

**“IN THE HIGH COURT OF SOUTH AFRICA”
NORTH WEST HIGH COURT, MAHIKENG**

CASE NO. HC 12/2012

In the matter between:

JAN NAKEDI

APPLICANT

and

THE STATE

RESPONDENT

GURA J AND GUTTA J.

***EX-TEMPORE* JUDGMENT – APPLICATION FOR LEAVE TO APPEAL**

GUTTA J.

A. INTRODUCTION

- [1] The applicant applied for leave to appeal, to the Supreme Court of Appeal (“the SCA”) or to the Full Bench of this Division, the whole of the review judgment delivered on 02 February 2012 by myself, in which my brother Landman J concurred.
- [2] The applicant also applied for condonation for the late filing of this application. The condonation application is not opposed and I am of the view that the applicant has shown good cause for the late filing and has shown reasonable prospects of success on appeal, which is dealt with more fully hereinbelow.

B. BACKGROUND

- [3] The applicant, a 15 years old teenage boy, stood arraigned at the Swartruggens Magistrates Court, before Magistrate Kleynhans. He was charged with three counts of housebreaking with intent to steal and theft.
- [4] On 24 September 2011 he pleaded guilty to all the charges and he was convicted accordingly.
- [5] The applicant was sentenced in terms of section 76(1) of the Child Justice Act 75 of 2008 ("the Act") as follows:
 - 5.1 to undergo 5 years compulsory residence in a youth care facility providing programmes referred to in section 191(2)(j) of the Children's Act 38 of 2005 ("the Children's Act");
 - 5.2 in terms of section 76(4)(b)(i), the centre to which he is to be admitted is specified as Bosasa Secure Care Centre ("Bosasa") in Boitekong;
 - 5.3 in terms of section 76(4)(b)(iv), a probation officer is directed to monitor the movement of the child to Bosasa, in compliance with the court order, and to report to the Court in writing once the child has been admitted to the centre.
- [6] After conviction, the matter was referred to the High Court for automatic review in terms of the provisions of section 85(1) of the Act.
- [7] In the review application, the Court was asked to make a ruling on a point of law as to whether the proceedings (the sentence of imprisonment or compulsory residence) imposed on a minor in terms of section 85 of the Act are subject to automatic review in cases where a minor was represented by a legal practitioner during the trial as there was a decision by the Western Cape High Court, namely, ***The State v Johan Pierre***

Ruiter Case No. A278/2011, delivered on 14 June 2011, which held that such matters are subject to automatic review.

- [8] On 02 February 2012, the review court held that a sentence of imprisonment or compulsory residence imposed upon a child, as contemplated in terms of section 85 of the Act, who was represented by a legal practitioner is not subject to automatic review. It is this decision for which application for leave to appeal is sought.
- [9] The legal position has since been changed by the provisions of section 39 of the Judicial Matters Amendment Act 42 of 2013 (“the Judicial Matters Act”), which was signed into law by the President of the Republic of South Africa on 22 January 2014.
- [10] Section 39 of the Judicial Matters Act, amended section 85 of the Act by substituting subsection (1) to read as follows:

“Amendment of section 85 of Act 75 of 2008

39. Section 85 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (1) of the following subsection:

- (1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child **[was, at the time of the commission of the alleged offence–**
- (a) **under the age of 16 years; or**
- (b) **16 years or older but under the age of 18 years, and]** has been sentenced to any form of imprisonment **[that was not wholly suspended,]** or any sentence of a compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children’s Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a

judge of the High Court having jurisdiction, irrespective of—

- (a) the duration of the sentence;
- (b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;
- (c) whether the child in question was represented by a legal representative;
- (d) whether the child in question appeared before a district court or a regional court sitting as a child justice court.”

[11] It stands to reason that the amendment of the Act has laid to rest the issue of whether a matter should be referred for automatic review in circumstances where a child is legally represented as the Act prescribes automatic review irrespective of whether the minor is legally represented or not, and in principle, it is not strictly necessary in the circumstances for the Full Bench to make a ruling on this point as it is provided in the Act.

[12] Counsel for the applicant submitted that Magistrates in our Division may rely on the review judgment handed down on 02 February 2012, being unaware that the position has since changed, and that the Full Bench can correct the position and put it in line with the amendment. Further, that the amendment does not have a retrospective effect and the applicant will benefit if the matter is referred to the Full Bench. I accept the explanation proffered.

[13] The requirement for leave to appeal is the existence of reasonable prospects of success or some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. In view of the amendment as stated *supra*, and the conflicting authorities, this Court will grant the applicant leave to appeal.

[14] A further issue raised by the applicant is the following:

14.1 the youth care facility to which such compulsory residence is to give effect must provide a programme referred to in section 191(2)(j) of the Children's Act. Section 191(1) defines a child and youth care centre as "a facility for the provision of residential care to more than six children outside the child's family environment in accordance with a residential care programme suited for the children in the facility". The Magistrate in this instance referred the applicant to Bosasa for compulsory residence in terms of section 76(4)(b)(i). It later transpired that the Bosasa does not have a programme referred to in section 191 of the Children's Act, particularly in respect of convicted and sentenced youth offenders. The applicant, in part, seeks the correction of this position.

[15] This is not an issue for this Court to consider as the reviewing court only dealt with the point of procedure in law and did not have information pertaining to the centre where the applicant was ordered to serve his sentence, and the Full Bench may, in the circumstances, as the upper guardian of all minors, exercise its inherent powers to review and set aside the decision of the lower court.

C. ORDER

[16] In the circumstances, I grant the following order:

- a) The application for condonation for the late filing of the application for leave to appeal is granted.
- b) The application for leave to appeal to the Full Bench of this Division is granted.

N. GUTTA
JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 05 SEPTEMBER 2014
DATE OF JUDGMENT	: 05 SEPTEMBER 2014
COUNSEL FOR APPLICANT	: ADV N.L. SKIBI
COUNSEL FOR RESPONDENT	: ADV N.G. MUNYAI
ATTORNEYS FOR APPLICANT	: MAFIKENG JUSTICE CENTRE
ATTORNEYS FOR RESPONDENT	: THE DIRECTOR OF PUBLIC PROSECUTIONS