

THE BEST INTERESTS OF THE CHILD V THE DUTIES OF POLICE AS PEACEKEEPERS

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The Constitutional Court (the Court) recently heard a matter concerning the principle of the best interests of the child. In this case, *Raduvha v Minister of Safety and Security and Another*, the Court heard an appeal lodged by Michell Raduvha (the applicant) in a claim for damages which she brought against the Ministry of Safety and Security (the Minister), as well as the South African Police Service (SAPS) following her arrest and detention at the age of 15. The Court's ruling has serious implications for the rights of children who find themselves in conflict with the law and the conduct of law enforcement officials in such situations.

The applicant was arrested in 2008 at her home without an arrest warrant. At the time of the arrest she was 15 years old and the arrest took place when the police were responding to a complaint about the breach of a protection order against the applicant's mother. Raduvha stood between the police officers and her mother to prevent the latter's arrest. She was arrested based on section 40(1)(j) of the *Criminal Procedure Act* (the CPA), which permits police to arrest anyone who is obstructing the execution of their duties. She and her mother were bundled into a vehicle and were detained at the Brixton Police Station for 19 hours, after which they were released with a warning.

The applicant instituted proceedings against the Minister in the South Gauteng High Court. She sought damages which arose from both her arrest and detention. The High Court dismissed her case on the basis that her arrest and detention had indeed been lawful as the arresting officers had exercised their power to do so in terms of the CPA as explained above. She appealed to a full bench and was unsuccessful. The Supreme Court of Appeal (SCA) denied her leave to appeal, which is how the matter found itself before the Constitutional Court, with the Centre for Child Law joining the case as a friend of the Court. Before this Court, she argued that the fact that her father had been present throughout the ordeal and had requested her release into his custody at the police station meant that the decision to arrest and detain her was irrational and could not be reasonably justified. She further argued that detention should have been an option of last resort and that the police could have considered alternatives to arresting and detaining her.

It is common knowledge that in South Africa anyone who is under the age of 18 is a child and should be treated as such. The Constitution expressly protects the rights of children in the Bill of Rights. Section 28(2) states that in every matter concerning a child, his or her best interests are of paramount importance. Moreover, as was emphasised by the Centre for Child Law, section 28(1)(g) of the Constitution stipulates that children have a right not to be detained and if it so happens that a child is detained, it must only be as a measure of last resort and for the shortest period possible. In addition, international law instruments such as the *International Convention on the Rights of the Child*, the *African Charter on Human and People's Rights* and the *International Covenant on Civil and Political Rights* all speak to the advocacy and promotion of the best interests principle where children are concerned. These

provisions, buttressed by those in the Constitution, illustrate the importance of the protection of children.

The Court delivered a unanimous judgment and said that despite the existence of the jurisdictional requirements necessary for the arrest of an offender as per the CPA, police officers have, in terms of the empowering provision, *discretion* when it comes to making an arrest. The Court said that this discretion must be properly exercised in accordance with the facts before them, as well as in line with the Bill of Rights. The Court further said that the Constitution is a direct consequence of the history of South Africa and the abuse of state power during apartheid which was facilitated by the police force. The Constitution seeks to change the culture of law enforcement and ensure that a culture of human rights is what informs the functions of the SAPS.

The concerned officers should have gone over and above to determine if the facts justified an arrest because an arrest is a drastic invasion of a person's liberty and impairs one's dignity. The impact of an arrest on a child might be long-lasting and law enforcement must be sensitive to the vulnerability of children and insulate them from trauma. The officers did not consider that they could have secured her presence in court by alternative means. Furthermore, the fact that the applicant's father was present and willing to keep her in his custody until such time as she was required in court was not taken into account. Because the Police failed to consider the rights of the applicant when arresting her and also failed to consider her best interests is using their discretion to arrest her in that situation, the Court upheld the appeal and found that both her arrest and detention were unlawful.

This judgment is important because it reminds us of the constant need to find that delicate balance between rights and duties in the Constitution. The Court emphasised the fact that this decision does not bar the arrest of child offenders - of which, unfortunately, there are many. Rather, it seeks to remind the SAPS, as has been done time and time again, to conduct themselves in a manner that is cognisant of the human rights culture that the Constitution seeks to perpetuate. By confirming the best interests of the child principle, the Court has created precedent for all children who find themselves at odds with the law. The fact that it took eight years and a refusal by the SCA speaks to the failure of not only our law enforcement, but also our courts to apply the Bill of Rights correctly. Section 7(2) of the Constitution commands the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This includes the Police and the Judiciary. The Court admonished courts never to shirk the responsibility of promoting the values in the Bill of Rights when carrying out their functions.