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AN ASSESSMENT OF THE LEGAL REQUIREMENTS REGARDING PROOF OF CRIMINAL CAPACITY IN DIVERSION AND GUILTY PLEAS

by

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DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Pretoria, for the degree Master of Laws (LLM) in Child Law has not been previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

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Ketelo V. N **Date**

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CHAPTER 1

1.1 INTRODUCTION

In June 1995, South Africa ratified the United Nations Convention on the Rights of the Child (UNCRC) and in January 2000, the country ratified the African Charter on the Rights and Welfare of the Child (ACRWC). As a signatory to these international and regional instruments, South Africa was obliged by their terms to take all legal and administrative steps necessary to implement the obligations of these treaties as captured in their Articles. In effect, South Africa has to ensure that children's rights as contained in these treaties are realised and implemented. This was one of the factors that led to the inclusion of section 28 in the Constitution of the Republic of South Africa.[1] Section 28 of the Constitution deals specifically with the rights of children. Particularly important for this dissertation is section 28(2) which states: "A child's best interests are of paramount importance in every matter concerning the child". South Africa has an obligation to ensure that its domestic laws comply with the provisions in these international and regional treaties and to give effect to our Constitution.[2]

The UNCRC places a duty on state parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law.[3] The General Comment No.10[4] was issued by the Committee on the Rights of the Child in 2007. It added further guidance on the minimum age of criminal responsibility, and to the issue of the best interests of the child being applicable at all stages of the criminal process.

[1] Act 108 of 1996, hereinafter referred to as "the Constitution".
[2] Act 108 of 1996.
[3] Article 40(3)(a).
[4] UN Committee on the Rights of the Child (UNCRC), CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10. The CRC Committee elaborates its general comments with a view to clarifying the normative contents of specific rights provided for under the Convention on the Rights of the Child or particular themes of relevance to the Convention, as well as offer guidance about practical measures of implementation. This General Comment 10 of the CRC interprets the Convention of the Rights of the Child as regards children's rights in juvenile justice.

In South Africa the minimum age of criminal capacity is determined by the Child Justice Act 75 of 2008.[5] Children who are below the age of ten years are irrebuttably presumed by the law to lack criminal capacity. Children over the age of 10 years but under the age of 14 years are presumed to lack criminal capacity unless the State proves that the child has criminal capacity.[6]

1.2 TERMINOLOGY

Criminal capacity means the ability to appreciate the wrongfulness and to act in accordance with such appreciation;[7] and

Criminal responsibility means the age at which children are able to understand and appreciate consequences of their conduct.[8]

It should be noted that these terms will both be used in this dissertation. The Child Justice Act generally uses the term 'criminal capacity', but in relation to diversion a child is required by section 52 of the Act to acknowledge 'responsibility'. The author acknowledges that the Legislature might amend the law and set an age that does not require the State to prove criminal capacity. That is, children will either be presumed to lack criminal capacity or have criminal capacity. There will be no presumption that operates in favour of a child who is in conflict with the law.

1.3 PROBLEM STATEMENT AND RESEARCH QUESTIONS

Diversion in the Act requires, *inter alia* an acknowledgement of responsibility. Acknowledging responsibility means acknowledging responsibility without formal admission of guilt. The same is true for guilty pleas by child offenders. A court must be satisfied that all elements of the crime have been admitted. Criminal capacity is an

[5]Child Justice Act 75 of 2008.
[6] Section 7(2) of the Child Justice Act 75 of 2008.
[7] CR Snyman, Criminal Law 4th edition (2002) 158 LexisNexis, Durban.
[8] Article 40 (3) of the United Nations Convention on the Rights of the Child.

element of a crime, this means that rights may be placed at risk if a child who is presumed in law to lack criminal capacity due to age is asked to plead or is diverted without criminal capacity being proved.

This dissertation examines the challenges regarding criminal capacity in diversion and guilty pleas. Presiding officers often fail to consider criminal capacity for children in conflict with the law when their legal representatives submit written statements in terms of section 112 of the Criminal Procedure Act.[9] This can result in the child being convicted on his or her guilty plea without an inquiry being conducted by the trial court on whether the child has criminal capacity or not.[10] Regarding diversion, it is unwarranted to divert the matter of a child who cannot be prosecuted because he or she lacks the required criminal capacity. This is also of importance when the child fails to comply with the diversion order which may result in the prosecution of the child. With regard to the above, the Act does not provide any mechanism for dealing with such an instance.

The following research questions are central to the study:

(1) What are the legal requirements regarding proof of criminal capacity in diversion and guilty pleas?
(2) What legislative amendments, if any, are required to assist in determination of a child's criminal capacity?

To this end, a detailed study of the applicable legislative framework to identify the limitations to the assessment and proof of criminal capacity will be undertaken.

Following the introductory chapter, the dissertation will consider the contemporary developments regarding criminal capacity, both internationally and in South Africa. The dissertation will then consider the South African case law pertaining to criminal capacity and guilty pleas, before finally moving on to a focus on criminal capacity and diversion.

[9]Act 51 of 1977.
[10]S v Mshengu 2009 (2) SACR 316 (SCA) which is also reported as SPM v State [2009] ZASCA.

The Child Justice Act includes a scheme that allows for prosecutors to divert minor offences listed in schedule 1 to the Act, whereas schedule 2 and 3 offences are diverted at a preliminary inquiry. When prosecutors divert children in conflict with the law in terms of section 41 of the Act,[11] they have no cast-iron certainty about the criminal capacity of the child. Therefore, this research will explore whether it is necessary that children who are being considered for diversion even during the preliminary inquiry stage should be proved to have criminal capacity.

Although the above challenges have been pointed out in some research papers and reports,[12] no procedures have been developed to address them. Therefore, the research will attempt to come up with recommendations to ensure that there is a legislative mechanism to deal with these problems.

1.4 RESEARCH METHODOLOGY

The dissertation contains an in depth study of the relevant articles of international and regional instruments to establish the extent to which they guide the provision for the minimum age of criminal capacity of children. The Committee on the Rights of the Child and General Committee No. 10 is also examined.

This dissertation undertakes an analytical study of relevant constitutional provisions, legislation, case law and published articles, chapters and reports relating to the proof of criminal capacity of children, with a particular focus on diversion and guilty pleas. This constitutes a desktop study approach.

[11] A prosecutor may divert a matter involving a child who is alleged to have committed an offence referred to in Schedule 1 of the Act, if the prosecutor is satisfied that all the requirements of diversion provided for in section 52(1) of the Act are met. One of the requirements of diversion in line with section 52(1) is that there should be a *prima facie* case against the child and that includes criminal capacity.

[12] A Skelton 'Proposals for the review of the minimum age of criminal responsibility' (2013) 3 *SACJ* 257 at pages 268 & 269; A Skelton & C Badenhorst 'The Criminal Capacity of Children in South Africa: International Developments & Considerations for a Review (2011) 24 & 25.

1.5 OUTLINE OF THE STUDY

Following this introduction, chapter 2 focuses on the international and regional law requirement that a minimum age of criminal capacity be set by member states.The focus will thus be on the United Nations Convention on the Rights of the Child requirement that a minimum age of criminal capacity be set by member States; the guidance provided by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice for States when exercising their discretion in setting up the age of criminal capacity and the African Charter on the Rights and Welfare of the Child provision for the establishment of the age of criminal capacity. Finally, the chapter examines what the Committee on the Rights of the Child has said about this in General Comment no 10.

The following chapter examines the past and the current South African legal framework regarding criminal capacity. The issue of criminal capacity as provided for in the Act[13] and the provisions relating to the evaluation of criminal capacity of children are also discussed.

Chapter 4 focuses on the requirements of diversion, guilty pleas and the test used by our courts in dealing with the age of criminal capacity. This is relevant because the considerations regarding criminal capacity in the context of guilty pleas are similar to those in the context of diversion. This chapter will demonstrate the similarities and differences and determine the extent to which law reform is required. An appraisal of the relevant case law handed down both before and after the commencement of the Child Justice Act is also dealt with.

This final chapter encapsulates the impact of the international instruments in as far as the age of criminal capacity of children is concerned. Finally, it deliberates on conclusions drawn from the research and provides recommendations on how the courts should approach the issue of criminal capacity, guilty pleas and diversion.

[13]Section 7 of the Child Justice Act 75 of 2008.

CHAPTER 2

2.1 INTRODUCTION

In this chapter a summary of the United Nations Convention on the Rights of the Child (UNCRC)[14] requirement that a minimum age of criminal capacity should be set by member states will be set out and discussed. The discussion will entail what the Committee on the Rights of the Child has said about this in General Comment No.10.[15] In addition, the guidance provided by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice[16] to States when exercising their discretion in setting up the age of criminal capacity will be considered.

The African Charter on the Rights and Welfare of the Child (ACRWC) provision for the establishment of the age of criminal capacity will be discussed as well as the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa.[17] The chapter will further consider the contemporary debates about the minimum age of criminal responsibility, through a discussion of recent literature.

2.2 INTERNATIONAL INSTRUMENTS

The UNCRC contains two fundamental articles concerning children in conflict with the law.[18] It focuses on Article 40, which includes a minimum age requirement as a fundamental principle in the child criminal justice system. Article 40(1) introduces the

[14] South Africa ratified the United Nations Convention on the Rights of the Child on 16 June 1995.
[15] General Comment No. 10 of 2007: Children's Rights in Juvenile Justice ("General Comment No.10").
[16] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, often referred to as the Beijing Rules, is a resolution of the United Nations General Assembly regarding the treatment of child suspects and offenders in member nations.

[17] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247 (1999). Available at http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/. Accessed on 11 December 2017.
[18] Article 37 and Article 40.

directives that State Parties should strive to achieve when dealing with children in conflict with the law. State Parties should treat accused children in a manner consistent with promoting their sense of dignity and worth.[19] The child should enjoy these rights when he or she comes into conflict with law until the final decision is taken as to how to deal with the child.

Article 40(3) requires specialised legislation and procedures for children in conflict with the law. These laws and procedures must meet the needs and protect the rights of the child offender, meet the needs of society and ensure that the implementation of such rules and procedures are both fair and efficient[20]. Article 40(3) requiring State Parties to establish "laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law," has been interpreted not only as requiring, at a minimum, that states establish juvenile justice systems but is also increasingly being construed as implying the need for distinct and dedicated legislation in the sphere of juvenile justice upon ratification of the Convention.[21] Article 40(3)(a) seeks to promote a minimum age of criminal responsibility. In doing so, it calls upon ratifying States to set a minimum age of criminal responsibility for children in conflict with the law. Children below the set minimum age at the time of the offence are deemed to lack criminal capacity. There has been much deliberation about what should be the appropriate age of criminal responsibility as there is no categorical international standard in this regard.

In General Comment No. 10, the Committee on the Rights of the Child concludes that 'a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable'.[22] At the same time the Committee stresses that States parties should not lower their age of criminal responsibility to 12 where it has already been set higher and strongly encourages States to introduce a higher

[19]Article 40(1) of the UNCRC.
[20]Rules 2.3(a) – (c) of the Beijing Rules.
[21] A Skelton "Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice" in Keightley (ed) (1996) Children's Rights 183.
[22] UN Committee on the Rights of the Child (CRC), CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10 Paragraph 32.

minimum age of criminal responsibility, for an example 14 or 16 years of age. Without doubt there is nothing to prevent States from having 18 as their minimum age of criminal responsibility and a number of countries have chosen to do. Columbia, Mexico and Uruguay are examples where the minimum age is set at 18 years.

Whereas General Comment No. 10 does not constitute binding international law, it can nevertheless play a significant role in the interpretation of the issue of an acceptable minimum age of criminal responsibility at domestic level.[23] Most importantly, Skelton pointed out that several court judgements[24] have paid particular attention to articles 37 and 40 of the UNCRC, together with the non-binding instruments relating to juvenile justice.[25] General Comment No. 10 elaborates on the nature of States Parties' obligations in terms of Article 37 and Article 40 of the UNCRC and the implementation of these obligations at national level. It also addresses the subject under present discussion: the minimum age of criminal responsibility. In this particular regard, the obligation is clearly stated and based on universal wisdom: A fixed minimum age of criminal responsibility of not lower that 12 years was established and it was recommended that States Parties should progressively raise the minimum age where possible.[26] General Comment No. 10 provides that any age below 12 years is unacceptably low. The inference can therefore be made that such a low age is also in contravention of the UNCRC. This aspect of the General Comment was an important milestone as it put an end to the issue as to what the international standard for an appropriate minimum age of criminal responsibility should be.

When establishing minimum ages of criminal capacity, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985:4) (hereinafter referred to

[23] J Sloth-Nielsen "A New Vision for Child Justice in International Law" (2007) 9(1) Article 40 1 at 1. The South African Constitutional Court has taken cognisance of General Comments. See for example *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) para29-31 where the Court took note of General Comments issued by the United Nations Committee on Economic, Social and Cultural Rights.

[24] The *Centre for Child Law v Minister of Justice* 2009 (6) SA 632(CC);*Media 24 Ltd v National Prosecuting Authority*: *In re S v Mahangu and Another* 2011 (2) SACR 32.

[25] Skelton 'South Africa' in T Liefaard & JE Doek (eds) Litigating the rights of the Child: The UN Convention on the Rights of the Child and International Jurisprudence, Dordrecht: Springer [2014]2015 page 29.

[26] General Comment No. 10 at paragraph 32.

as the Beijing Rules) strive to provide guidance for states when exercising their discretion. Skelton (1996:186) explains that although the Beijing Rules were written before the Convention on the Rights of the Child, a number of fundamental principles have been incorporated into the UNCRC, and the Beijing Rules are expressly referred to in the preamble of the UNCRC. Rule 4 of the Beijing Rules also recommends that the legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity'.[27] Van Bueren (1995:173) indicates that the Beijing Rules link the establishment of a minimum age below which children should be presumed not to have criminal capacity to infringe the penal law, to the child's development and maturity.[28] As a result of this concern, General Comment 10 elaborates on the nature of State Parties' obligations in terms of Article 37 and 40 of the UNCRC and the implementation of these obligations at a national level. It also addresses the subject under discussion, the minimum age of criminal responsibility.

The Committee on the Rights of the Child took a step further and commented that the use of two minimum ages of criminal responsibility such as is occasioned by the retention of the rebuttable presumptions for certain categories of children is discriminatory in that it is in contravention of Article 2 of the United Nations Convention on the Rights of the Child. It was noted that the presumption of *doli incapax* is not only confusing but also leads to children being treated differently according to their maturity and the nature and quality of the rebuttal evidence adduced by the prosecution.[29] The Committee noted further that, in practice, this results in the use of the lower age limit in cases of more serious crimes.[30] The Committee on the Rights of the Child also expressed its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use

[27] UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29 November 1985.
[28] A Skelton & C Badenhorst: *The Criminal Capacity of Children in South Africa International Developments & Considerations for a Review*, A Research Report; A Skelton: *Proposals for the review of the minimum age of criminal responsibility,* SACJ (2013) 3.
[29] Community Law Centre "The Minimum Age of Criminal Responsibility: 10 or 12 years?" 2008 (10)1 *Article 40* 8 at 9.
[30] General Comment No. 10 at paragraph 30.C

of a lower minimum age in cases where the child, for example, is accused of committing a serious offence, or where the child is considered mature enough to be held criminally responsible. It was strongly recommended that States Parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.[31] While General Comment No. 10 does not constitute binding international law, it can nevertheless play a significant role in the interpretation of the issue of an acceptable minimum age of criminal responsibility at the domestic level.[32] In 2000 the United Nations Committee on the Rights of the Child noted in its concluding observations that South Africa has drafted legislation to increase the legal minimum age for criminal responsibility from 7 to 10 years.[33] The Committee expressed the concern that the fixing of criminal responsibility at the legal minimum age of 10 years was too low. It was recommended that South Africa reassess the draft legislation on criminal responsibility with a view to increasing the proposed legal minimum age (10 years) in this regard.[34] Furthermore, in 2016 the Committee in its concluding observations further noted that the Child Justice Act (2008) raised the minimum age of criminal responsibility to 10 years. With reference to its general comment No. 10 (2007) on children's rights in juvenile justice, the Committee recommends that South Africa should provide effective implementation of national legislation, in line with international standards, in particular to expedite the review of the minimum age of criminal responsibility with a view to raising it to an internationally acceptable level.[35]

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[31] General Comment No. 10 at paragraph 34.

[32] J Sloth-Nielsen "A New Vision for Child Justice in International Law" (2007) 9(1) *Article 40* 1 at 1. The South African Constitutional Court has taken cognizance of General Comments, see for example *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) para 29-31 where the Court took note of General Comments issued by the United Nations Committee on Economic, Social and Cultural Rights.

[33] United Nations Committee on the Rights of the Child (2000) *Concluding Observations of the Committee on the Rights of the Child*, South Africa. CRC/C/SR.609, 610 and 611, held on 25 and 26 January 2000, the Committee on the Rights of the Child considered the initial report of South Africa (CRC/C/51/Add.2), which was submitted on 4 December 1997. Available at http://hrlibrary.umn.edu/crc/southafrica2000.html. Accessed on 25 April 2018.

[34] United Nations Committee on the Rights of the Child (2000) *Concluding Observations of the Committee on the Rights of the Child*, South Africa. UN Doc. CRC/C/15/Add.122 (2000). Available at http://hrlibrary.umn.edu/crc/southafrica2000.html. Accessed on 03 November 2017.

[35] United Nations Committee on the Rights of the Child (2016) *Concluding Observations of the Committee on the Rights of the Child*, South Africa. UN Doc CRC/C/ZAF/Q/2/Add.1 (2016). Available at http://tbinternet.ohchr.org/Treaties/CRC. Accessed on 03 November 2017.

2.3 REGIONAL LAW

The ACRWC sets binding regional standards in the sphere of child justice on all its signatories. South Africa ratified the African Charter on the Rights and Welfare of the Child on November 1999.The African Charter on the Rights and Welfare of the Child[36] in Article 17.4 also provides for the establishment of the minimum age for criminal capacity. Article 17.4 provides that there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. The wording of this Article is the same as the one in the UNCRC. The African Charter on the Rights and Welfare of the Child (ACRWC) specifically provides for children in conflict with the law in Article 17 which provides for the rehabilitation, restoration and reintegration of the child in conflict with the law in a similar vein as the UNCRC. The ACRWC blends the children's rights with the duty to respect and be accountable to the family and community and it accords well with the concept of restorative justice.[37]

In its concluding recommendations the ACRWC was concerned about the minimum age of criminal responsibility which is at the age of 10 and the retaining of the *doli incapax* presumption for children between the ages of 10 to 14 years. The Committee requested an update from South Africa on progress made towards the review of the minimum age of criminal capacity and whether it would include a review of the *doli incapax* presumption and whether there will be any improvement.[38]

In addition, the African Union Committee of Experts on the Rights and Welfare of the Child (ACERWC) in paragraph 17 of the Republic of South Africa Initial Report on the Status of Implementation of the ACRWC circulated in January 2015, raised concerns about the South Africa's minimum age of criminal responsibility and the retention of the

[36] South Africa ratified the African Charter on the Rights and Welfare of the Child on 18 November 1999.
[37] A Skelton "Juvenile Justice Reform: Children's Rights Versus Crime Control" in Davel (ed) (1999) *Children's Rights in a Transitional Society* 102.
[38] Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 2014. Available at http://www.acerwc.org/concluding-observations/. Accessed on 03 November 2017.

doli incapax presumption for children between the ages of 10 years to under 14 years. The ACERWC omitted to state reasons for the concerns, but it is presumed that the Committee referred to the concerns raised by the United Nations Committee on the Rights of the Child that the use of two minimum ages of criminal responsibility such as is occasioned by the retention of the rebuttable presumptions for certain categories of children is discriminatory in that it leads to children being treated differently according to their maturity and the nature and quality of the rebuttal evidence adduced by the prosecution.[39] The Committee noted further that, in practice, this results in the use of the lower age limit in cases of more serious crimes.[40]

In addition, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides that States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law. More so, the age of criminal responsibility should not be fixed below 15 years of age and that no child below the age of 15 shall be arrested or detained on allegations of having committed a crime.[41]

2.4 SUMMARY

The international and regional instruments discussed in this chapter have had significant impact in the field of child justice. It is also evident that the setting of the minimum age of criminal capacity is regarded as an important protection by the relevant instruments whose main objective is to protect the rights of children.

The question of the minimum age arises in article 40(3) of the UNCRC and article 17(4) of the African Charter on the Rights and Welfare of the Child. The availability of the rights

[39] Community Law Centre"The Minimum Age of Criminal Responsibility:10 or 12 years?"2008(10)1 *Article 40* 8 at 9.
[40] General Comment No. 10 at paragraph 30.
[41] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247 (1999) at paragraph O (d). Available at http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/. Accessed on 11 December 2017.

and protections afforded by the juvenile justice provisions to children in conflict with the law, and their effective implementation are dependent on a clearly defined minimum age. South Africa has the obligation to establish a criminal justice for children, who are in conflict with the law and are accused of committing offences, in accordance with values underpinning the Constitution and the International obligations of the Republic as well as to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system. While it is up to each individual State Party to the UNCRC to decide how implementation of its provisions is to be achieved including through legislation, the passing of the laws compliant with the UNCRC is clearly an obligation, not a matter of choice.[42]

In the next chapter the past and current South African legal framework regarding the criminal capacity will be examined.

[42]P Veerman and B Gross "Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank and Gaza" (1995) 3 *The International Journal of Children's Rights* 296.

CHAPTER 3

3.1 INTRODUCTION

This chapter will examine the past and current South African legal framework regarding the criminal capacity. There will be a consideration of the rationale underpinning criminal capacity of children in South African law.

3.2 WHAT IS CRIMINAL CAPACITY UNDER SOUTH AFRICAN LAW?

According to Snyman:

> "before a person can be said to have acted with culpability, he must have criminal capacity. A person is endowed with capacity if he has mental abilities required by law to be held responsible and liable for his unlawful conduct. It stands to reason that people such as mentally ill (the 'insane') and very young cannot be held criminally liable for their unlawful conduct, since they lack the mental abilities which normal adult people have.
>
> The mental abilities which a person must have in order to have criminal capacity are:
> (1) the ability to appreciate the wrongfulness of his conduct; and
> (2) the ability to conduct himself in accordance with such an appreciation of the wrongfulness of his conduct.
>
> If a person lacks one of these abilities, he lacks criminal capacity and cannot be held criminally liable for unlawful conduct in which he engaged while lacking one of these abilities".[43]

[43] CR Snyman, *Criminal Law* 5th ed (2008) 160.

The mere fact that a child has committed an unlawful act is not sufficient to render a child criminally liable. Before the court can conclude that a child acted with culpability the court must be satisfied that the child had criminal capacity, that is, that the cognitive and conative aspects have been proved beyond reasonable doubt.

The cognitive function is related to a person's reason or intellect, in other words the child's ability to perceive, to reason and to remember.[44] The emphasis is on is on a person's insight and understanding. Cognitive aspects include consciousness, orientation, attention, concentration, memory, intellect, judgment, insight and reasoning, abstraction, reading, writing, drawing, calculation, planning and organisation, comprehension and correct and fluent use of language, recognition and motor programming.

The conative function consists of a person's ability to control the child's behavior in accordance with his or her insights which means that he or she is able to make a decision, set him a goal, to pursue it, and to resist impulses or desires to act contrary to his insights into right and wrong. Here, the keyword or idea is self-control.[45]

3.3 THE RATIONALE UNDERPINNING CRIMINAL CAPACITY

According to Burchell and Milton the fundamental reason for the requirement of criminal capacity is the emphasis on the individual autonomy.[46] It is fair that only persons who have capacity to appreciate the wrongfulness of their conduct and the capacity to act in accordance with this appreciation should be subjected to criminal liability. It is the capacity to act differently in the circumstances that provides the essential of subjective blameworthiness.[47]

[44]CR Snyman – Criminal Law 5th Ed P161.S v Laubscher 1988 1 SA 163 (A) 166 H-I.S v Calitz 1990 1 SACR 119 (A) 126e. S v Wiid 1990 1 SACR 561 (A) 563h.
[45]Snyman *supra* 162.Laubscher *supra* 166 I – J.
[46] J Burchell and J Milton *Principles of Criminal Law* 3rded (2006).
[47]J Burchell and J Milton *Principles of Criminal Law* 3rded (2006) page 358.

3.4 PRE CHILD JUSTICE ACT ERA

Before the enactment and implementation of the Act[48] the minimum age of criminal capacity and related issues were governed by a common law principle.[49] In terms of this principle, two presumptions applied to the criminal capacity of children. Criminal capacity of children was governed by two common law rules, *doli capax* or *doli incapax*. In terms of these common law presumptions all children under the age of seven years were irrebuttably presumed to be *doli incapax* and could not be prosecuted. Children between the ages of seven years or older but under the age of 14 years were rebuttably presumed to be *doli incapax.*[50] The prosecution was required to prove the essential elements of the offence and that the child had the requisite criminal capacity at the time of the commission of the offence. The presumption of *doli incapax* required the prosecution to prove that the child offender was able to distinguish between right and wrong and to act in accordance with that appreciation.[51]

In practice, especially in older cases, a short cut is usually taken by simply asking whether the child was aware that what he was doing was wrong.[52] This formulation is unacceptable as it confuses the requirements for liability, namely criminal capacity and awareness of unlawfulness.[53] It also contains no reference to the child's ability to act in accordance with his appreciation of right and wrong. Children act impulsively or under the influence of older persons.[54] It is necessary to determine whether a child has the

[48] Act 75 of 2008.
[49] A Skelton: *Proposals for the review of the minimum age of criminal responsibility,* SACJ (2013) 1
[50] Eskom Holdings Ltd v Hendricks 2005 (5) SA 503 (SCA) at 512F-H
[51] In Eskom Holdings *supra* Scott JA quoted with approval the distinction drawn in W*eber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A)* and *Jones NO v Santam Bpk 1965 (2) SA 542 (A)* between issue of capacity on the part of a child to commit a wrong and the issue of fault. The first inquiry as to capacity, was subjective, while the second as to fault, was objective. In each case what had to be determined was whether the child in question had developed the emotional and intellectual maturity to appreciate the particular danger to be avoided and, if so, to act accordingly.
[52] Dyk 1969 1 SA 601 (C) 603; Pietersen 1983 4 SA 904 (E) 910H.
[53] CR Snyman 2008 Criminal Law Durban 5th edition: Butterworths at 180.
[54] S v *Ngobese* 2002 1 SACR 562 (W) 565.

necessary capacity for insight and self-control. Insight and self-control refer to the cognitive and conative aspects of criminal capacity.

The failure by the courts not to appreciate that a child offender may not be mature enough to be criminally responsible for acts committed. The above approach has led to courts not appreciating that an investigation into the child offender's criminal capacity is necessary. This may be attributed to the fact that the concept of capacity has only relatively recently been recognized as a general requirement for liability. There are however indications that in recent times the courts are more conscious of the fact that the investigation referred to entails an investigation into the child's capacity. In *Mbanda*[55] the court pointed out that the test to determine the capacity of children below the age of fourteen ought to be the same as the test applied to determine capacity in general. In *Ngobese*[56] the court correctly emphasised that it is important to investigate the child offender's conative abilities, a view which indicates clearly that the test deals with child offender's criminal capacity. It follows that even if the prosecution proves that the child offender committed the act but fails to satisfy the cognitive or conative aspect, the prosecutions fails. The prosecution must prove that the child offender knew that what he was doing was wrong within the context of the facts of the case.[57]

Under case law, several principles have been developed as indicators that a child has criminal capacity. A false account as to where the child had obtained stolen goods,[58] and a proof of a 'malicious mind' on the part of the child,[59] have been used to rebut the presumption of criminal incapacity.

It has been held that where a child offender has been accused of committing a statutory offence, the evidence to rebut the presumption of criminal capacity should be more compelling as it is not about the general ability of the child to differentiate between right

[55] 1986 2 PH H108 (T).
[56] S v *Ngobese* 2002 1 SACR (W) 565.
[57] Snyman C R 2002 Criminal Law Durban 4nd edition: Butterworths.
[58] S v Kholl 1914 CDP 840.
[59] Attorney-General, Transvaal v Additional Magistrate of Johannesburg 1924 AD 421.

and wrong, but rather whether he or she knew in the specific instance that he acted wrongly.[60]

The State must show that the child knew what the reasonable and probable consequences of his or her act would be. The fact that a child ran away after committing a crime may be understandable on the ground that he or she was too frightened to return home.[61] If there is evidence that the child planned the offence and hid the fact that he or she committed the offence because he or she was afraid of the punishment, the presumption could be successfully rebutted.[62]

In cases where a child offender is charged with an adult offender or a child that is appreciably older than him or her, the court must consider the fact that the child might have acted under the coercion or influence of the adult or older child.[63] Also, when a child commits a crime with a person whom he or she can be expected to obey, it leads to the presumption that the child acted as a result of compulsion.[64] Where the prosecution does not set out deliberately to prove criminal capacity, the court is nevertheless entitled to look at the evidence in general in order to determine whether the accused has the required criminal capacity.[65]

In *S v Ngobese* and others,[66] the court suggested four factors that the State should take into account when discharging the onus of proving that the child offender has the required criminal capacity. The first of these is precise age of the child, as the presumption weakens with the advance of years towards 14 years of age.The second is the nature of the crime, as the presumption weakens when the offence is inherently bad. The third is advancement of evidence that the particular accused appreciated the distinction between right and wrong. The fourth is proof that he or she knew the act which had been committed

[60]*R v Mahwahwa And Another* 1956 (1) SA 250 (SR).
[61]*R v K* 1956 (3) SA 353 (A) and *R v Tsutso* 1962 (2) SA 666 (SR).
[62]S v S 1977 (3) SA 305 (OPA).
[63]*S v Pietersen and Others* 1983 (4) 904 (ECD).
[64]*S v Khubeka and Others* 1980 (4) SA 221 (ODP) and *S v M* 1978 (3) SA 557 (TKSC).
[65]*S v M* 1979 (4) SA 564 (BSC).
[66]*S v Ngobese* and others 2002 (1) SACR 562.

by him or her was wrong within the content of the particular case. Where a child pleads guilty to a charge and hands in a statement in terms of section 112(2) of the Criminal Procedure Act, the statement must set out the facts which the accused admits; and on which he or she has pleaded guilty and the presiding officer must be satisfied that the accused is indeed guilty of the offence. This should include a reference to the child's criminal capacity at the time of the commission of the offence. A deficiency in a section 112(2) statement cannot be cured by the fact that the child had been legally represented.[67]

3.5 POST CHILD JUSTICE ACT

The Act provides for a minimum age for criminal capacity in section 7 which reads:

"7(1) A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.
(2) A child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11.

(3) The common law pertaining to the criminal capacity of children under the age of 14 years is hereby amended to the extent set out in this section."

The Act amends the common law pertaining to criminal capacity of children. Section 7(3) of the Act provides that a child who commits an offence while under the age of ten years does not have criminal capacity and cannot be prosecuted for that offence. However, the Act provides for interventions for children who commit criminal acts but are under the minimum age of criminal capacity.[68] These are educational and non-punitive measures rather than criminal sanctions. Children that are over the age of ten years but under the

[67]Obakeng v S Case Number CA11/2009 North West High Court; Mshengu v S 2009 (2) SACR 316 (SCA) and S v Skade and Another Case Number 49/10 Unreported Eastern Cape Division.
[68]Section 9 of the Child Justice Act.

age of 14 years are presumed to lack criminal capacity unless the prosecution proves it in accordance with section 11 of the Act. From section 11 of the Act it is apparent that criminal capacity has the meaning now well-established in our criminal law, namely the capacity at the time of the commission of the alleged offence, to appreciate the difference between right and wrong (the cognitive element) and to act in accordance with that appreciation (the conative element).[69] The presumption of lack of criminal capacity terminates when the child turns 14, not 15. Therefore, according to the law, children who are 14 years and older have full criminal capacity.[70]

A person may lack criminal capacity for reasons other than youthfulness.[71] In the case of mental illness or mental defect, s 78(1) of the Criminal Procedure Act 51 of 1977 provides that a person is not criminally responsible for an act or omission if, at the time of such commission or omission, he suffered from a mental illness or intellectual disability[72] which made him incapable of appreciating the wrongfulness of his or her act or omission or of acting in accordance with such appreciation. Although the wording is not identical to s 11(1) of the Act, one is in each case concerned with an enquiry into the same cognitive and conative abilities of the accused person.[73]

Section 11(3) of the Act an inquiry magistrate of the child justice court may, on own accord, or on request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child, in the prescribed manner, by a suitable qualified person which must, *inter alia,* focus on the cognitive, moral, emotional, psychological and social development of the child. The enquiry envisaged in this subsection refers to youthfulness and not an enquiry that requires the reporting envisaged by section 79 of the Criminal Procedure Act.

[69]S v Laubscher 1988 (1) SA 163 (A) at 166G-167E; Burchell *Principles of Criminal Law* 3rd Ed at 147 and 358-359.
[70] The Child Justice Act recognises this as it makes provision for a child offender to be referred in terms of section 77 or 78 of the Criminal Procedure Act for observation.
[71]S v T 2015 (1) SACR 489 (WCC) at 497 F.
[72] Section 77 and 78 of the Criminal Procedure Act was amended by the Criminal Procedure Amendment Act 4 of 2017. The words "mental defect" were deleted and substituted with the words "intellectual disability".
[73]S v T *supra* at 497 B-C.

When deciding whether to prosecute a child between the ages of 10 and 14, the prosecutor is required to take into account the following factors-[74]

- The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
- The nature and seriousness of the alleged offence;
- The impact of the alleged offence on any victim;
- The interests of the community;
- A probation officer's assessment report in terms of Chapter 5;
- The prospects of establishing criminal capacity in terms of section 11 if the matter were to be referred to a preliminary inquiry in terms of Chapter 7;
- The appropriateness of diversion; and
- Any other relevant factor.

The recommendation the probation officer makes is two-fold. That is, the possible criminal capacity of the child offender and measures to be taken in order to prove criminal capacity.[75] The probation officer's recommendation cannot discharge the onus of proof that rests upon the prosecution or *vice versa.* It is open to challenge by the prosecution and the child offender. The prosecutor's decision to prosecute or not has important consequences. If the prosecutor decides not to prosecute because there is not a *prima facie* case, then the child offender cannot be referred to a probation officer,[76] diverted[77] or prosecuted.[78] When considering whether to prosecute or not the prosecutor should

[74] S 10(1)(a) – (h) of the Child Justice Act.
[75] Section 40(1)(f) of the Child Justice Act.
[76] S10(2)(b) of the Child Justice Act provides that if the prosecutor is satisfied that the child's criminal capacity is unlikely to be proved, the child may be referred to a probation officer to be dealt with in terms of section 9 of the Act.
[77] Section 49(2) read with section 52(1)(c) requires that that the inquiry magistrate must be satisfied that the child has criminal capacity and that there is a *prima facie* case.
[78] It is trite that to avoid a malicious prosecution that only prosecutions in which there are reasonable prospects of success are instituted.

have at his disposal the relevant docket and the probation officer's assessment report.[79] It is not required at this early stage that the prosecutor be satisfied that the prosecution can prove the child offender's criminal capacity beyond reasonable doubt. The prosecutor need only decide that after consideration of the factors set out above that the child offender's criminal capacity is likely to be proved. If the prosecutor decides that the prosecution is unlikely to prove the child offender's criminal capacity then the prosecutor may refer the child to a probation officer to be dealt with in terms of section 9 of the Child Justice Act. The National Director of Public Prosecutions has directed that prosecutors should refer such a child to the probation officers.[80] It is desirable that some form of intervention takes place to assist the child in not re-offending. Where the prosecutor decides to prosecute the child offender, diversion at the preliminary inquiry or before the conclusion of the prosecution's case[81] or during the trial can be considered.[82]

As already stated above, a diversion order can only be made when the inquiry magistrate is satisfied that the child offender has the requisite criminal capacity. The investigation into the child's criminal capacity is done in an informal inquisitorial manner.[83] If necessary, an evaluation report can be requested to assist in the proof of criminal capacity.[84] An evaluation report is not a necessity. This is clear from the wording of the subsection. The subsection enjoins the inquiry magistrate or the child justice court, to consider the probation officer's recommendation and all the evidence placed before it prior to diversion or conviction, as the case may be, which may include an evaluation report. If one of the requirements for diversion are not met, criminal capacity becomes a trial issue. It is not a

[79] S 40(5) read with section 43(3)(b)of the Child Justice Act sets out the time periods in which the assessment report must be submitted to the prosecutor. Section 48(1) –(2) of the Child Justice Act permits a preliminary inquiry to be postponed for the obtaining of an assessment report.
[80]Para.E 3 of the National Directives.
[81] Section 5(4)(c) read with section 67(1) of the Child Justice Act.
[82] Section 52(1) of the Child Justice Act. S v MK 2012 (2) SACR 533 (GSJ).
[83]Section 43(a) of the Child Justice Act 75 of 2008.
[84] Section 11(3) of the Child Justice Act. Section 11(4) provides that the report must be submitted within 30 days of the date of the order. In practice this is not easily accomplished because there is insufficient capacity at State institutions and too few private practitioners are prepared to assist.

requirement of the Child Justice Act that criminal capacity be proved for the referral of a child offender from the preliminary inquiry to the child justice court.

If the prosecutor indicates that the child offender may not be diverted, the inquiry magistrate is required to obtain confirmation from the prosecutor that based on the facts at his disposal and after consideration of other relevant factors, there is sufficient evidence or reason to believe that further investigation is likely to result in the necessary evidence being obtained and must refer the child offender for trial to the child justice court.[85] The further investigation envisaged above includes investigation into the child offender's criminal capacity. It must be recalled that the prosecutor's decision to prosecute relates to whether criminal capacity is likely to be proved, not that it can be proved beyond reasonable doubt. If the child offender is not diverted at the preliminary inquiry, the criminal capacity becomes a trial issue.

When a child offender is referred to the child justice court for trial the child offender will be required to plead guilty[86] or not guilty.[87] A child offender appearing at the child justice court may not waive the right to legal representation.[88] In the event of the child offender pleading guilty the child justice court may proceed in terms of section 112(1)(a) or 112(1)(b) or 112(2) of the Criminal Procedure Act. The procedure in terms of section 112(1)(a) is undesirable because there will be no enquiry into the child offender's criminal capacity. The child justice court proceeds to sentence without determining whether the child offender's plea of guilty is correctly made or not. When the procedure in section 112(1)(b) or (2) is used, the child justice court must be satisfied that that the child offender is guilty of the offence pleaded to. That is, that the facts admitted to by the child offender must be such that it is certain that the child offender committed the act with the requisite criminal capacity. In the event of the child pleading not guilty, the onus is on the

[85] Section 47(9) of the Child Justice Act.
[86] Section 112 of the Criminal Procedure Act.
[87] Section 115 of the Criminal Procedure Act.
[88] Section 83(1) of the Child Justice Act. Section 83(2) provides that where a child offender does not wish to have a legal representative or declines to give instructions to an appointed legal representative, this must be recorded on the record and the matter referred to Legal Aid South Africa to assist the court.

prosecution to prove that beyond reasonable doubt the guilt of the child offender. Criminal capacity becomes one of the elements that the prosecution is required to prove.

The remarks of the presiding officer in *S v TS*, Rogers J, are apposite-

> *"One must also remember that, where a person who was between the ages of 7 and 14 at the time of the alleged offence is put on trial and called upon to plead, criminal capacity is not determined (or certainly does not have to be determined) in advance of other issues. It follows that, by the time the trial court is called upon to determine the accused's guilt (including criminal capacity), it will have heard evidence on all the circumstances of the alleged crime. The Child Justice Act contains provisions for a preliminary enquiry into various matters, including the child's criminal capacity, but these procedures are aimed at assisting those involved in the criminal justice system to determine whether the child should be charged. Once the child is charged (which would reflect a view on the part of the prosecution that there is a reasonable case for regarding the child as having had criminal capacity at the relevant time), the ordinary rules of criminal procedure apply. These entail, inter alia, that the state must prove beyond reasonable doubt that the accused had criminal capacity at the relevant time"*[89]

Rogers J's approach accords with what was common practice before the promulgation of the Child Justice Act. Criminal capacity is investigated just as any other element of the offence. That is primarily the duty of the investigating officer and the prosecutor. The Child Justice Act has not brought about any change. An evaluation report by an expert into the child offender's criminal capacity can be requested at any stage during the trial.[90] The presiding officer should, if he is of the view, that such an evaluation report is necessary in the interests of justice, on own accord, request such a report.[91]

Whether the child offender is guilty of the offence will be decided on all the facts. If the child justice court finds that the prosecution has not proved that the child offender has the

[89] *S v TS* 2015 (1) SACR 489 @ 498 F - H [para. 16].
[90] S 11(3) of the Child Justice Act.
[91] *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA).

requisite criminal capacity it may, in the best interests of the child, refer the child offender to a probation officer.[92]

3.6 CONCLUSION

This chapter has examined in detail the past and present legal framework regarding the criminal capacity of children. It has also revealed how the courts have dealt with criminal responsibility.

As noted, the police officials, probation officers and prosecutors should gather information about the child offender to make a well-informed determination whether the criminal capacity of the child offender can be proved or not. If this is done, the consideration of the child for diversion and a suitable diversion programme becomes easier. If the child is not diverted, the trial in the child justice court is concluded as speedily as possible. The child offender will be in a better position as he will know what evidence has been gathered against him. This might result in the child offender making informed admissions when pleading guilty or restricting the dispute between himself and the prosecution at a trial.

The next chapter will focus on the requirements of guilty pleas in line with the Criminal Procedure Act and the test used by the courts and different cases will be discussed. It will also look at diversion and criminal capacity in line with the Child Justice Act.

[92] Section 11(5) of the Child Justice Act.

CHAPTER 4

4.1 INTRODUCTION

This chapter is relevant because the considerations regarding criminal capacity in the context of guilty pleas are similar to those in the context of diversion. It will further demonstrate the similarities and differences and determine the extent to which law reform is required. An appraisal of the relevant case law handed down both before and after the commencement of the Act will also be dealt with.

4.2 PROVISIONS OF SECTION 112 of the Criminal Procedure Act[93]

When an accused pleads guilty the *lis* between the accused and the State ends. Where the offence is a minor one and the prosecutor accepts the accused's guilty plea, the court may impose any competent sentence other than imprisonment or other form of detention without the option of a fine.[94] In more serious offences the court may question the accused person with reference to the allege facts to ascertain whether the accused admits the allegations and if so satisfied, convict the accused.[95] A plea statement in which the accused admits all the alleged facts may also be used.[96]

A prosecutor, being *dominis litis,* may in his discretion accept a plea of guilty to a lesser offence. The legal effect of the prosecutor's action in accepting the plea to a lesser offence is illustrated in *S v Ngubane.*[97] The accused, indicted on a charge of murder had pleaded guilty to culpable homicide. Counsel for the accused informed the court that the prosecution accepted the plea as tendered. The prosecution did not indicate otherwise. Nevertheless the trial court proceeded with the trial and convicted the accused of murder.

[93] Act 51 of 1977.
[94] Section 112(1)(a) of the Criminal Procedure Act.
[95] Section 112(1)(b) of the Criminal Procedure Act. This subsection is used when a court is of the opinion that the sentence to be imposed exceeds that which is referred to in section 112(1)(a) or the prosecutor requests the court to do so.
[96] Section 112(2) of the Criminal Procedure Act.
[97] 1985 (2) ALL SA 340 (A).

On appeal it was held that the trial court was bound by the prosecutor's acceptance of the plea.

4.3 CRIMINAL CAPACITY AND A PLEA OF GUILTY

The provisions of section 112 of the Criminal Procedure Act apply to child offenders. It follows that a court may utilize any of the three procedures mentioned above when a child offender pleads guilty to any offence. It should be borne in mind that at the preliminary inquiry a child is required to acknowledge responsibility for the offence.[98] The proceedings are informal proceedings, inquisitorial in nature in which the child offender is required to participate.[99] The nature of the proceedings should enable the inquiry magistrate to satisfy himself that the child offender has the requisite criminal capacity and make an order to divert the child offender.[100]

The problem arises when the child is over the age of 10 years but under the age of 14 years pleads guilty at a child justice court. The court must be satisfied that in addition to the child admitting the alleged facts of the case the child also has the requisite criminal capacity. The question then arises is whether the court can use the procedure in section 112(1)(a) where such a child offender pleads guilty? It is difficult to envisage a situation where a court could satisfy itself that the child offender has the requisite criminal capacity without any questioning. It must be borne in mind that a hybrid procedure cannot be used.[101] It is desirable to protect a child offender that the procedure in section 112(1)(b) or 112(2) be adopted. Questioning by the court should provide the court with sufficient information to ascertain whether the child offender admits the allegations with reference to the facts of the case and has the requisite criminal capacity.

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[98] An acknowledgement of responsibility is an acknowledgment of responsibility without a formal admission of guilt – Section 1 of the Child Justice Act No. 75 0f 2008. It is not the equivalent of a guilty plea which amounts to an unequivocal admission of guilt – *S v M* 1982 (1) SA (N) 240 at 242 C.

[99] Section 3(c) read with sections 43(2)(e) – (g) and 47(7) of the Child Justice Act.

[100] Section 49(2) of the Child Justice Act. If there is doubt as to the child's criminal capacity, the inquiry magistrate must consider the probation officer's assessment report referred to in section 40 and all evidence placed before the inquiry which may include an evaluation report by an expert.

[101] See Commentary on the Criminal Procedure Act *op cit* page 17.5.

In *S v Kubheka en andere*[102] the review court accepted, without question, that the questioning in terms of section 112(1)(b) could be supplemented by evidence relating to criminal capacity without recording a plea of not guilty to allow for the introduction of such evidence.[103] The questioning in terms of section 112(1)(b) has a two-fold purpose. The first is to establish the factual basis for the plea of guilty and the second is to establish the legal basis for the plea. In the first phase the admissions made may not be added to by other means such as a process of inferential reasoning.[104] To this one should add by the adducing of evidence whilst the plea of guilty is live.

In *S v Pietersen*[105] the review court dealt with questioning in terms of section 112(1)(b). The review court was satisfied that the questioning was insufficient for the trial court to ascertain whether the child offender was doli capax. The review court declined to comment on the desirability of the procedure adopted in *Khubeka en Andere*. The view was also expressed that in appropriate cases a 13 year old could be dealt with in terms of section 112(1)(b).[106] However, the review court was also of the view that generally speaking, the circumstances of the case should be dealt with through the leading of evidence.[107]

In *S v M supra* the review court dealt with the guilty plea of a 9 year old boy. The review court held that the questioning by the court was cursory and superficial.[108] The questioning had to amount to an unequivocal admission of guilt in all its ramifications.[109] Whilst the review court did not address it the inference is that the section 112(1)(b) procedure could be used.

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[102] 1980 (4) SA 221 (O) 222A

[103] The conviction was set aside on review as the Review Court found that the 11 year old child offender acted under compulsion of the other two older accused. The conative aspect of criminal capacity was not admitted or proved.

[104] *S v Nyanga* 2004(1) SACR 198 (C) at 201 b-e.

[105] 1983 (4) SA 904 (E) 908 A-B.

[106] *Pietersen* supra at 907 B – C.

[107] *Pietersen* supra at 910H – 911 A.

[108] *S v M* supra at 243A. Only two questions were asked.

[109] *S v M* supra at 242C.

In *S v N* [110] the review court held *inter alia* that the child offender, a 13 year old boy, was required to admit all the elements of the offence and it must be clear that he understands the nature of the offence, its elements and the nature and effect of the admissions he makes.

The above cases illustrate that the questioning by the court must be thorough to ascertain whether the child offender admits the offence to which he pleads in all its ramifications. One cannot be inflexible and require a plea of not guilty be entered on the record just because the child is presumed to lack criminal capacity. However the child justice court must exercise caution when dealing with such a child offender as one is dealing with a person that does not appreciate all the legal consequences. The plea statement is *in lieu* of the court's questioning. The same principles apply. Legal representatives must place sufficient information in the statement that leaves no doubt that criminal capacity is admitted. A bald statement will not suffice.

In *S v Mshengu*[111] the accused, a child offender who had legal representation, was convicted on the basis of his section 112(2) statement which was a simple regurgitation of the charge. In setting aside the conviction Jafta JA (Ponnan and Mhlantla JJA concurring) held as follows at [9]:

> 'The accused in this particular instance is rebuttably presumed to be criminally non-responsible. The burden of rebutting this presumption rests on the prosecution. An important step in the proceedings was to ascertain whether his development was sufficient to rebut the presumption. That plainly did not occur. The prosecution would obviously have been relieved of that obligation had an appropriate admission been made by the accused. That likewise did not occur. Also, no evidence capable of rebutting that presumption had been placed before the magistrate. When regard is had to the record in its entirety, it is obvious that

[110] 1992 (1) SACR 67 (Ck) 69i-j.
[111] 2009 (2) SACR 316 SCA.

none who were involved in the trial were alive to the presumption of criminal non-responsibility that was in operation in respect of this child.'

In *S v Mbuyisa*[112] the Supreme Court of Appeal had an opportunity to explain (at [7]) that in *S v Mshengu supra*, it was held that a simple regurgitation of the contents of the charge could not serve to establish that the accused was indeed capable of forming the necessary criminal intent. In *S v TS*[113] which has also been reported as *S V TNS*[114], a 13 year old child's culpable homicide conviction, based on her section 112(2) statement, was set aside on review. There was doubt as to the criminal capacity of the child, as well as the element of unlawfulness.

4.4 RELEVANT CASE LAW RELATING TO GUILTY PLEAS

In *S v Mshengu supra* the requirements of a plea of guilty in terms of section 112 of the Criminal Procedure Act were restated. This judgment followed an appeal by a 17-year-old boy (the "appellant") who was 13 years old when he was charged and convicted for the murder of a 14-year-old child. According to the section 112(2) statement handed in at the Regional Court, the appellant had stabbed the deceased once in the chest, which resulted in the death of the deceased. The Regional Court sentenced the appellant to eight years imprisonment.

The appellant appealed against both the conviction and the sentence in the Pietermaritzburg High Court.[115] However, only the sentence (and not the conviction) was set aside by the High Court. The matter was sent back to the Regional Court for a fresh sentence to be handed down – upon which the Regional Court sentenced the appellant to three years imprisonment, wholly suspended on certain conditions. The Centre for

[112]2012 (1) SACR 571 (SCA). This case involved a 20 year old. However the general principle that the charge sheet must not be regurgitated stands. The SCA distinguished this case from Mshengu's The SCA said that the mere fact that the same language is used does not necessarily mean that the facts are not admitted. Each case must be decided uponits own facts. In Mbuyiswa case, the SCA felt that there were sufficient facts admitted on which to convict. In Mshengu the facts admitted were insufficient to satisfy the criminal capacity question.
[113]2015 (1) SACR 489 (WCC).
[114]2015 1 ALL SA 223 (WCC) at par [40] and [41].
[115] *Mshengu v the State* (446/2008) [2009] ZASCA 65 (29 May 2009).

Child Law (the "Centre") approached the High Court on behalf of the appellant for leave to appeal against the conviction in the SCA. Upon being granted leave to appeal, the appellant argued in the SCA that the conviction should be set aside for the following reasons:

That criminal capacity is linked to culpability and as such it is an aspect of liability, and a court must be satisfied prior to convicting any person that he or she had criminal capacity at the time of the commission of the offence and the State bears the onus of proving that the child has criminal capacity. In this matter, a plea of guilty was tendered in terms of section 112(2) of the Criminal Procedure Act on behalf of the appellant by his legal representative. However, the process followed by the court amounted to a serious irregularity in that the onus on the State was not discharged. The section 112(2) statement contained insufficient information to allow the court to be satisfied that the appellant had criminal capacity. The fact that the appellant was legally represented does not mean that the court should automatically accept that the words "unlawfully and intentionally" included in the section 112(2) statement implied that the appellant had criminal capacity. Lastly, the legal representative should not have conceded that the accused had criminal capacity. If he was at liberty to make such a concession it should have been done in an explicit manner, and should not merely have been assumed in the words "unlawfully and intentionally".[116]

In response, Counsel for the State argued that even though the issue of the appellant's criminal capacity was not overtly canvassed in the trial court, the appellant appreciated the wrongfulness of his conduct. According to the State, this conclusion could be made by taking the whole record into consideration and therefore no miscarriage of justice had occurred. However, it was also argued that if the SCA was of the opinion that an injustice had occurred, the matter should be remitted to the trial court to determine the appellant's criminal capacity at the time of the commission of the offence.

[116] SPM v S Appellant's Heads of Argument.

The SCA identified two issues arising from the matter, whether the appellant's statement, in view of his age, complied with section 112(2) of the Criminal Procedure Act and if the statement did not comply with section 112(2), whether the matter should be remitted to the trial court. With regard to the section 112(2) statement, the court stated that the primary purpose of a section 112(2) statement is to set out the admissions of the accused and the factual basis supporting his or her guilty plea. Therefore legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence in respect of which a guilty plea has been tendered. If not, the provisions of section 113 have to be invoked. The accused in this matter is presumed to be rebuttably criminally non-responsible, therefore the prosecution has the burden to rebut this presumption. An important step in the proceedings was to ascertain whether the appellant's development was sufficient to rebut this presumption, and this plainly did not occur.

Although the prosecution would have been relieved of this burden had the accused made an appropriate admission, this also did not occur and no evidence rebutting the presumption was placed before the magistrate. Taking the whole record into account, none of the parties involved in the trial were alive to the presumption of criminal non-responsibility that was in operation in respect of the appellant and the statement told the magistrate nothing about the state of mind of the appellant at the time the stabbing took place or of his level of perception then, nor if he was, mature enough to answer for his behavior. For these reasons, the court found that the conviction had to be set aside.

In this matter the appellant had served more than two years of the original sentence when he appeared before the trial court for purposes of resentencing. Since there had already been a remittal to the trial court, which found it appropriate to impose a non-custodial sentence, it would be unfair to order another remittal. Though the court did not go so far as to lay down a process of how criminal capacity of children should be established before the court can convict a child offender, it emphasised that the courts need to ensure that section 112(2) statements should canvass the aspect of the child accused criminal capacity in order to satisfy compliance with section 112 of the Criminal Procedure Act.

From this case it is apparent that the lower courts deal with this criminal capacity in the context of guilty pleas in an unguided, haphazard and unsatisfying manner. The Supreme Court of Appeal, however, did not use the opportunity to formulate guidelines as to how an inquiry into the rebuttal of the presumption of criminal capacity of a child, ten years or older but under the age of 14 years should be conducted in the context of a guilty plea.

Although the above case was heard before the implementation of the Act, the provisions in the Act do not take the matter any further. The child in the above case was charged with a serious offence and this case came under the spotlight because of the heavy sentence imposed by the court *a quo*. There are no provisions or guidelines in the Act dealing with criminal capacity and guilty pleas by children ten years or older but under the age of 14 years. There is therefore no reason to believe that similar cases will not be dealt in the same way by lower courts and this presents an ongoing challenge in the way that courts deal with the *doli incapax* presumption in cases where children plead guilty.

4.5 CRIMINAL CAPACITY AND DIVERSION

Diversion can be defined as the channeling of prima facie cases away from the criminal justice system with or without conditions.[117] Diversion is one of the defining features of the Child Justice Act. It is essentially aimed at redirecting the child in conflict with the law, as far as reasonably possible, away from the ordinary criminal justice process, thus protecting him or her from its harmful effects and consequences. Chapter 6 and 8 provide for diversion of the child away from the formal criminal justice system.[118] These chapters are the essence of the Act. The possible benefits of diversion is that it prevents children from being stigmatised as criminals,[119] it ensures predictability in the manner in which children are dealt with, it will ensure that court rolls are not clogged[120] with cases that could be diverted away from the courts and that children will be dealt with in an age

[117] C Badenhorst and H Conradie 'Diversion: The present position and proposed future provisions' (2004) 17 *Acta Criminologica* 115-130.
[118] S 51(a) of the Child Justice Act.
[119] S 59 of the Child Justice Act.
[120] Child Justice Act, National Police Instructions 2 of 2010.

appropriate manner. Diversion captures the restorative elements of the Act because it seeks to give children a second chance to make amends for their wrongdoing. It also allows the victim an opportunity to express a view as to how the matter should be dealt with and reconciles the child with the community.[121] A further major benefit it offers is that diversion avoids a child getting a criminal record.[122]Under the Child Justice Act, The Prosecutor has to consider diversion whenever confronted with a case involving a child in conflict with the law. Diversion must be considered prior the pre-trial stage of preliminary inquiry, during the preliminary inquiry, trial and sentence stages.[123] The Act does not create a right to diversion, but rather provides that it should be considered in appropriate cases.[124] The court may make an order of diversion from the options contained in the Act, or may develop an individual diversion option that meets the requirements of a particular matter.[125]

The criminal capacity or lack thereof is also of importance when considering the diversion of a case involving a child in conflict with the law, for reasons that will be discussed below.

4.5.1 THE OBJECTIVES OF DIVERSION

The act sets out the objectives of diversion as follows:

(i) To deal with a child outside the criminal justice system in appropriate cases;
(ii) Encourage the child to be accountable for the harm caused by him or her;
(iii) Meet the particular needs of the individual child;
(iv) Promote reintegration of the child into his or her family and community;
(v) Provide an opportunity to those affected by the harm to express their views on its impact on them;
(vi) Encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for them;

[121] *S 51 (e)* of the Child Justice Act.
[122] *S 51 (j)* of the Child Justice Act.
[123] *Sections 41,49 and 67* of the Child Justice Act.
[124] *S 51* of the Child Justice Act.
[125] *S 54 (3)* of the Child Justice Act.

(vii) Promote reconciliation between the child and the person or community affected by the harm caused by the child;
(viii) Prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
(ix) Reduce the potential for re-offending;
(x) Prevent the child from having a criminal record; and
(xi) Promote the dignity and well-being of the child, and the development of his or her sense of self worth and ability to contribute to society.[126]

The list of objectives demonstrates the value of diversion. It is therefore crucial that all children are given this opportunity in appropriate cases. It would be very unfortunate if the younger children, who are below the age of criminal capacity, lose out on diversion because of difficulties with establishing their criminal responsibility.

4.5.2 REQUIREMENTS FOR DIVERSION

In terms of section 52(1) of the Act, a matter may be considered for diversion provided all relevant information is considered, including previous diversion. Diversion may be considered if the child acknowledges responsibility for the offence; the child has not been unduly influenced to acknowledge responsibility; there is a *prima facie* case against the child; the child and, if available, his or her parent, guardian, or appropriate adult, consent to diversion; and the prosecutor or the Director of Public Prosecutions indicates that the matter may be diverted.

Diversion as envisaged by the Act is not a blank cheque to a child in conflict with the law. In essence, the child has to freely and voluntarily consent to diversion. Failure to meet the latter requirements will leave the inquiry magistrate with no option but to refer the case to a Child Justice Court for a trial.

[126] *S 51* of the Child Justice Act.

A matter may only be diverted if there is a *prima facie* case against a child (which includes criminal capacity).It would be unjust to divert the matter of a child who cannot be prosecuted because he or she lacks the necessary criminal capacity. This is even more important if one takes into account that failure to comply with a diversion order may result in the prosecution of the child, in which case the acknowledgement of responsibility by the child may be recorded as an admission by the child, or it may result in a more onerous diversion order against the child. Again, certainty about the child's criminal capacity is essential before diversion of a case because a diversion order from the level two (2) diversion options can run for a period of up to 24 months (if the child is under the age of 14 years) and it will be totally unacceptable, unfair and unlawful to expect a child, who does not have the necessary criminal capacity to comply with an order for such a long period of time.[127]

In addition, the diversion of a child who did not have the necessary criminal capacity to begin with, may also reduce the chances that the child would comply with the diversion order and may result in a perception by the prosecution and magistrates that diversion is not effective. Such a perception will have a serious impact on the successful implementation and application of the Act since it could result in prosecutors and magistrates becoming wary of diverting matters and decide to rather opt for the prosecution of these matters. It will also expose the child, who should not be in a diversion programme in the first place, to children who did commit crimes and this may have a negative influence on the child.

Diversion has been part of the criminal justice system before the advent of the Child Justice Act, since the early 1990s. However the manner in which it had been used leaves much to be desired because it is informal and depends on the discretion of the Prosecutor and is regulated by Prosecutorial guidelines.[128] The application of the discretion was to a large extent inconsistent because in rural areas there were no service providers. Furthermore, because it was not part of the law it was ignored by some prosecutors.

[127] A Skelton: *Proposals for the review of the minimum age of criminal responsibility,* SACJ (2013) 3
[128] J Gallinetti*,* Diversion*, Chapter 6, Child Justice in Africa,* A Guide to Good Practice.

Prosecutors unfortunately prosecuted cases that could have been diverted.[129] The latter was evident in the case between *M versus Senior Public Prosecutor Randburg*[130] an unreported case in which the discretion of the Prosecutor was challenged for not considering diversion at the time he was making a decision to prosecute a young and first offender who was charged and convicted for a crime of theft.

The Child Justice Act solved most of these problems by introducing diversion as part of the statutory system. However, the issue of determining criminal capacity in the context of diversion is not clearly explained in the law. Therefore, the problems that were described that relate to guilty pleas apply to diversion as well.

4.6 SUMMARY

In conclusion, the requirements of guilty pleas and the test used by our courts and different cases were discussed. This is relevant because of the considerations regarding criminal capacity in the context of guilty pleas that are similar to those in the context of diversion.

It has been pointed out that the assessment of a child must be conducted before the preliminary inquiry, and the preliminary inquiry of an arrested and detained child, as a general rule, has to be conducted within 48 hours after the arrest in terms of the Child Justice Act.

Where there is a dispute whether the child has criminal capacity, all parties should be allowed to present information to support their view. It must be borne in mind that if the prosecution intends to enter into a guilty plea[131] or diverting the child, criminal capacity must be proved. If the prosecution did not intend to divert the child, the issue of criminal capacity should not have arisen at the preliminary inquiry as it is a trial issue. Therefore, the scenario one is looking at is where the choice is between diverting the child or not

[129] J Gallinetti, Diversion*, Chapter 6, Child Justice in Africa,* A Guide to Good Practice.
[130] *M versus Senior Public Prosecutor Randburg* 3284/2000 unreported case.
[131]Section 112 of the Criminal Procedure Act.

proceeding against the child at all. That is, has the requirement of *prima facie* case been met?

This chapter further demonstrated that the child's criminal capacity prior to diversion is very important. If the child does not take responsibility for the criminal offence, the matter may not be diverted and the child who did not have criminal capacity at the time of the commission of the offence may not want to take such responsibility. In these cases the prosecutor must proceed with a trial in the child justice court if the matter is not withdrawn. Even if the child takes responsibility for the offence and the matter is diverted, the child still needs to successfully comply with the diversion order before the matter can be finalized. If the child does not comply, the prosecutor may decide to proceed with the trial and the child's acknowledgement of responsibility will be noted on the record as an admission. It will then be too late to consider the criminal capacity of the child at the time of the commission of the offence, at this stage of the proceedings.[132]

It has been established that the Child Justice Act is silent on the issue of guilty pleas and criminal capacity. A generalized statement that the child had the ability to distinguish between right and wrong, apart from not carrying very much weight, does not focus on the important question whether the child had the capacity to determine the extent to which the child was entitled to use force against his/her father in the particular circumstances of the case, and to act in accordance with that appreciation.[133]

The next and final chapter will provide an answer to the research question and provide recommendations on how courts should approach the issue of guilty pleas and diversion in line with the requirements of the criminal capacity. The extent to which the law reform is required will also be demonstrated.

[132] Child Justice Alliance: Report of the Workshop on Criminal Capacity of Children Held on Wednesday, 4 May 2011 (University of Pretoria).

[133] S v T 2015 (1) SACR @ 504 E-F.

CHAPTER 5

5.1 CONCLUSION AND RECOMMENDATIONS

This dissertation has considered the difficulties in establishing criminal capacity in situations where the child tenders a guilty plea or where the child is being considered for diversion.

In the first chapter it was pointed out that there are some inconsistencies in our child justice system in that the State can make a decision to divert a child without considering whether the child has criminal capacity or not. In addition, it was explained that children who are in trouble with the law can go through the criminal justice system via the tendering of a guilty plea, and this occurs in a situation where no evidence is usually led. In practice, this has led to problems long before the Child Justice Act came into operation, because it the lower courts have been inconsistent in how they dealt with the difficulty of making findings about criminal capacity in such circumstances. This problem persists under the Child Justice Act, and there is a similar problem relating to diversion. Diversion, which was made statutory by the Act, is premised on acknowledgment of responsibility, and a prima facie case must be established. As criminal capacity is party of the prima facie requirements, the same kind of difficulties that were experienced in guilty pleas are now also experienced in relation to diversion.

The international instruments discussed in chapter two have had significant impact in the field of the child justice. It is also evident that the issue of criminal capacity is regarded as an important aspect by the relevant international instruments whose main objective is to protect the rights of children. The question of the minimum age arises in article 40(3) of the UNCRC and article 17(4) of the African Charter on the Rights and Welfare of the Child. The availability of the rights and protections afforded by the juvenile justice provisions to children in conflict with the law, and their effective implementation are

dependent on a clearly defined minimum age. In addition, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides that States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law.

South Africa has the obligation to establish a criminal justice for children, who are in conflict with the law and are accused of committing offences, in accordance with values underpinning the Constitution and the international obligations of the Republic as well as to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system. While it is up to each individual State Party to the UNCRC to decide how implementation of its provisions is to be achieved including through legislation, the passing of the laws compliant with the UNCRC is clearly an obligation, not a matter of choice.[134]

In chapter three, the past and current South African legal framework regarding the criminal capacity has been examined. There was a consideration of the rationale underpinning criminal capacity of children in South African law and an appraisal of the relevant case law handed down both before and after the commencement of the Act.

In chapter four, the requirements of guilty pleas and the test used by our courts and different cases were discussed. This is relevant because of the considerations regarding criminal capacity in the context of guilty pleas that are similar to those in the context of diversion. This chapter demonstrated the extent to which law reform is required.

It is concluded that not enough is being done in our criminal justice system to ensure that criminal capacity of children between ages 10 – 14 is proven when opting for diverting the matter involving this category of children or where a guilty plea is considered.

[134]Veerman and Gross "Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank and Gaza" (1995) 3 *The International Journal of Children's Rights* 296.

It is recommended that if the State is going to divert the matter involving a child offender or if the child offender pleads guilty to the charges put to him or her, an inquiry into his or her criminal capacity should be obligatory. In this regard, the Court must be satisfied that every element of the offence has been admitted. If the child pleads guilty and no specific reference is made into the criminal capacity of the child in the statement in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977, one can argue that not all the elements of the offence have been acknowledged.[135]

It is also recommended that the minimum age of criminal capacity should be applied consistently to all children in conflict with the law regardless of the nature or severity of the offence and should refer to the age of the child at the time of the offence.

It is further recommended that the Act be revised and amended, to provide for comprehensive guidelines on how to approach proving criminal capacity where diversion is an option or where the child offender pleads guilty to the offence. These will serve as a guide to the court and other professionals relevant in the evaluation and determination of the criminal capacity of children.

[135] A Skelton, 2006. Examining the age of Criminal Capacity. Children's Rights Project. Article 40. Vol 8 No. 1 July 2006. P. 1-5. Available at http://www.childjustice.org.za/publications/Art8_1.pdf. Accessed on 13 September 2017.

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