

# Isimemo sokugqibela ‘somThetho wezona zigwebo ziphantsi’

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## 1 INTSHAYELELO

‘Ngokoluvo olusebenzayo nolungagxeki ngokupheleleyo, abantwana bangumzekelo wethemba loluntu kunye nesiphiwo salo kwikamva lalo.’<sup>1</sup>

Ubu-ethe-ethe bolu luvo busenokungabi yonyani ngokupheleleyo, ingakumbi eMzantsi Afrika apho bekusenzeka rhoqo izenzo zolwaphulo-mthetho ezinobundlobongela obenziwa lulutsha.

‘Isiphumo esayanyaniswa noku siye sathetha ukwanda okukhula ngokumandla kumabanjwa alulutsha alindele ukuthethwa kwamatyala. Izizathu zoku ziquka inqanaba eliphezulu kakhulu lamatyala axhalabisayo afanele ukuvalelwa ejele kunye neendlela zokubona eziqinisiweyo zoluntu kubaphuli-mthetho abo.’<sup>2</sup>

Ukusukela ngoko inkqubo yezobulungisa iye yambeswa lilifu lokungamkelwa. Isisombululo esikhokelayo nesindululwayo esinxulumene nengxaki yokusa abaphuli-mthetho abaselula entolongweni kukunxaxha. ‘Ukunxaxha yinkqubo echazwa njengenkqubo apho umaphuli-mthetho oselula avela phambi kwegosa elisesihlalweni kubume bendawo engandilisekanga xa kuthethwa ityala, endaweni yokuba avele phambi kwegosa elisesihlalweni xa kuthethwa ityala nalapho igosa elo lisesihlalweni liphumeza ezinye iindlela. Kukho ugxininiso olukhulu kule nto.’<sup>3</sup> Ukunxaxha kwaziswa kwinkqubo yobulungisa bolwaphulo-mthetho ekuqaleni kweminyaka ye-1990, kwaye iye yaba luphawu olungagungqiyo ukusukela ngoko. Kuye kwenziwa umthetho kutshanje komThetho wezoBulungisa babaNtwana, kunye nobume bezomthetho wokunxaxha kunye nezinye iinkqubo ezinje ngovavanyo. Kuye kwakho ezinye iindlela zomthetho ezithintelayo eziye zaziswa ukuze kupheliswe ukwenziwa kolwaphulo-olukhohlakeleyo olwenziwa ngabaphuli-mthetho abasebatsha nabadala.<sup>4</sup> Umzekelo obonakala kwasekuqaleni kukwaziswa komThetho wesona sigwebo sincinane.<sup>5</sup>

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1 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC) para 37.

2 Muntingh L ‘Alternative Sentencing’ in Sloth-Nielsen J & Gallinetti J (eds) *Child Justice in Africa: A guide to good practice* (2004) chap 8.

3 *Ibid.*

4 Ngembali emfutshane yokutshintsha komthetho kunye nomThetho wezoBulungisa baBantwana, jonga u-Gallinetti J ‘What happened to the Child Justice Bill? The process of law reform relating to child offenders’ (2006) 17 *SA Crime Quarterly* 7-12 and Skelton A & Gallinetti J ‘A long and winding road: The Child Justice Bill, civil society and advocacy’ (2008) 25 *SA Crime Quarterly* 3 – 9.

5 Criminal Law Amendment Act 105 of 1997.

Eli nqaku licacisa ngemeko ethathwe zizixhobo zobulungisa zehlabathi xa kugqaliselwa kumba wokohlwaya abaphuli-mthetho abasebatsha. Ukwatika kunye nolunye utoliko lomgaqo-siseko wokuba kufuneka bephathwe njani na abaphuli-mthetho abasebatsha. Ukwachaphazela ngokukodwa umngeni womgaqo-siseko oziswe ngokuhambelana 'nomThetho wesona sohlwayo sincinane' malunga nokugwetywa kwabaphuli-mthetho abasebatsha ngaphantsi kwalo mThetho. Le ngxoxo iquka ukuphononongwa kwembali yalo mThetho kunye nomngeni womgaqo-siseko. .

## 2 UBUME BOMTHETHO WEHLABATHI NOWOMGAQO-SISEKO OMALUNGA NAMALUNGELO ABAPHULI-MTHETHO ABANGABANTWANA

### 2.1 Umthetho wehlabathi

Nangona kukho iqela lamagatya omthetho kwiNgqungquthela yeZizwe eziManyeneyo emalunga namaLungelo aBantwana (CRC) adala ubume bokuphatha abantwana kwinkqubo yezobulungisa kulwaphulo-mthetho, eli nqaku liza kuphonononga ngokufutshane amagatya akwisigqibo 2 nelama-37 eCRC ngokumayelana nokugwetywa kwabantwana.

'Igatya elikwisigqibo 3 leNgqungquthela yeZizwe eziManyeneyo elimalunga namaLungelo oMntwana (CRC) likhankanya ngokungathandabuziyo ukuba kuzo zonke izenzo ezimalunga nomntwana, iinkundla zamatyala, abasemagunyeni olawulo okanye imibutho yezomthetho kufuneka zenze ukuba owona mtsalane ungcono womntwana ube lelona lungelo liphambili, kodwa kwaziswa ukuba inkcazelo ekhethwayo yemitsalane eyeyona ingcono kukuba bakhathalelwa ngokomzimba, ngokwemvakalelo nangokwengqondo, badale umtsalane wokuba bangene kangangoko ebudaleni ngaphandle kwezithintelo, imitsalane yokuzilawula, ingakumbi inkululeko yozikhethela esabo isimbo sobomi.<sup>6</sup>

Kulilishwa nje ukuba iCRC kunye nabasemagunyeni behlabathi bengabonakalisi ukuba kokuphi okwenza imitsalane eyeyona iyiyi yomntwana, kwaye oko kungumgangatho ongacacanga ncam. Kwangaxeshanye abasemagunyeni behlabathi bakwakhangeleka besohluka malunga nokuba yintoni na eyenza eyona mitsalane ingcono yomntwana.

Kunzima ukuchonga olona ludwe lokukhangela lungqongqo lokuba yintoni na eyenza eyona mitsalane ingcono yomntwana. Ukuvuleka okungapheliyo kweli binzana kundulula ngamandla ukuba imitsalane yabantwana ixhomekeke kwimeko nganye efana yodwa, kwanokuba kuyo nayiphi na imeko iimfuno zomntwana kufuneka zibe lilungelo lokuqala. Ukulunga kwegama 'imitsalane eyeyona ingcono yomntwana' ngokumayelana nesohlwayo sabaphuli-mthetho abangabantwana kubaluleke kakhulu njengoko kufuna indlela yokujonga umntu ngamnye ekohlwayeni, kwaye kukwaqwalasela nento yokuba ukuvallelwa entolongweni lolona khetho luthintelayo, kwaye oko akunqweneleki.

'Igatya lesigqibo 37(b) le(CRC) likhankanya ukuba akukho mntwana uza kuba phantsi kokuthuthunjiswa okanye enye impatho ekhohlakeleyo nengabonisi buntu okanye isohlwayo okanye ukugwetyelwa ukudilikelwa yijele ngaphandle kwethuba lokukhululwa,

6 Freeman M 'Article 3: The best interests of the child' (2007) Volume 3 of Alen A et al (eds) *A commentary on the United Nations Convention on the Rights of the Child*.

okuza kunyanzelwa ngamatyala enziwe ngabantu abangaphantsi kweminyaka eli-18. La magatya esigqibo akwanikezela ukuba ukuvalelwa komntwana entolongweni kuza kuba yindlela yokugqibela, kwaye ibe yeyelona xeshana lifutshane.<sup>7</sup> ImiThetho yeZizwe eziManyeneyo eyeyona mincinane yemiGangatho yoLawulo loBulungisa babaNtwana abangabaphuli-mthetho (imiThetho yaseBeijing) nayo ikwachaphazela ukugwetywa kwa-baphuli-mthetho abangabantwana, kwaye igxininisa kulingano lweemeko nakundiliseko lwetyala neemfundo zoluntu njengemiba ekufuneka ithathelwe ingqalelo xa kugwetywa abantwana.<sup>8</sup>

'UVan Buuren ucebisa ukuba umntwana kufuneka aboniswe indlela yokuxubana kakuhle noluntu. Ugxininiso olwenziwa yiNgqungquthela emalunga namaLungelo abaNtwana ilele ekuhlonipheni undiliseko lomntwana. Umthetho wehlabathi ubona ukubekwa kwabantwana kumaziko njengeyona ndlela incinane ithandwayo yokoluleka umaphuli-mthetho olulutsha kuba ukubekwa kumaziko kudala iziphumo ezingalunganga nezingafunwayo, kwaye akwenziwa ngendlela yokunyanga. Kungcono ukudibanisa abaphuli-mthetho abasebatsha eluntwini kuba ukubekwa kumaziko kuyabaphephetha eluntwini. Umthetho wehlabathi ufuna ukuba nayiphi na impendulo echasene nabaphuli-mthetho kufuneka isoloko ilinganiswa nemeko yomaphuli-mthetho ongumntwana kunye netyala alenzileyo. Umthetho-siseko ophambili kukuba ukuvalelwa komntwana kufuneka ibe yindlela yokugqibela kwaye kube kokwelona xeshana lifutshane.'<sup>9</sup>

Kuyakhuthaza ukubona ukuba bekukho ukuzibophelela okuqhubekayo okwenziwe ngumthetho wehlabathi wokuphatha abantwana ngendlela enciphisa umonakalo ekukhuleni komntwana neyandisa ukuhlonipha amalungelo abo.

## 2.2 Umgaqo-siseko waseMzantsi Afrika

EMzantsi Afrika icandelo 28 loMgaqo-siseko lizinikela kukhuseleko lamalungelo abantwana. Icandelo 28(1) lichaphazela ngokukodwa ukuvalelwa, injongo yoko kukubeka umthwalo kurhulumente wokuqinisekisa ukuba abantwana abavalelwa ngendlela eqhelekileyo, ngaphandle kokuba oko yindlela yokugqibela.<sup>10</sup> Eli gatya ligqibelisayo litolika umgangatho omiselwe kwindlela yahlabathi kwaye liwusa kuMgaqo-siseko waseMzantsi Afrika.

Umthetho-siseko wokuvalala njengendlela yokugqibela neyexeshana elifutshane ubutolikwa ngeendlela ngeendlela, ingakumbi ngokumayela nokubekwa kwezigwebo ezixhonyiweyo okanye ukuvalelwa kwabantwana abangaphantsi kweminyaka eli-18. *S v Kwalase* iNkundla ithe

7 USchaba uthi ukungenelela kwinkululeko yomntu, njengomba obalulekileyo ekukhuleni komntwana kufuneka kuncitshiswe kangangoko ngenxa yesizathu sokunqanda ukuhluthwa kwenkululeko. Lowo ngumongo wemigangatho eyahlukeneyo yehlabathi we-UN owenziwe ngo-1980 no-1990, nogxininisa imfuneko yokuphathwa okuthile kwabantwana. Nakuphi na ukunciphisa okujongiweyo kwenkululeko yomntu kufuneka kuphumelele uvavanyo oluthile lwempembelelo, ngenjongo yokunciphisa umonakalo ekukhuleni komntwana nokwandisa ukunika amalungelo akhe imbeko. Schabas W & Sax H (2006) Volume 3 of Alen A et al (eds) 'Article 37: Prohibition of torture, death penalty, life imprisonment and deprivation of liberty' (2006) *A commentary on the United Nations Convention on the Rights of the Child*.

8 UN Standard Minimum Rules for the Administration of Juvenile Justice Article A/RE/40/33.

9 Van Buuren G *The international law on the rights of the child* (1998) 183.

10 Icandelo 28(1)(g) limisa ukuba: Wonke umntwana unelungelo – lokuba angavalelwa ngaphandle kokuba yindlela yokhetho lokugqibela, kulo meko, ukongeza kumalungelo, umntwana awonwabela ngaphantsi kwamacandelo 12 nelama-35, umntwana angavalelwa kuphela ngelona xeshana lifutshane lifanelekileyo...

'indlela yezomthetho malunga nokugwetywa kwabaphuli-mthetho abangabantwana kufuneka ivavanyelwe ukuphuhlisa impendulo eyeyomntu ngamnye, engalingani kuphela nemeko nobungqongqo betyala kunye neemfuno zoluntu, kodwa ekwalungileyo kwiimfuno nemitsalane yomaphuli-mthetho ongumntwana. Ukuba kuyenzeka, ukugweba okwenziwa ligosa lezomthetho kufuneka lakhe isohlwayo ngendlela yokuphuhlisa ukudibana komaphuli-mthetho ongumntwana lowo kunye nosapho okanye noluntu lwakhe.<sup>11</sup>

Imfuneko eboniswe kwicandelo 28(1)(g) loMgaqo-siseko, nelithi abantwana kufuneka bavalelwe kuphela njengendlela yokugqibela nangexeshana elifutshane elifanelekileyo, ikwafunyanwa kwiNqaku 37(b) leCRC. Ukusukela ekuqaleni kweNkqubo yamaLungelo iinkundla zethu zamatyala ziye zanyanzeleka ukuba ziqaphele umthetho wehlabathi xa zitolika amagatya eNkqubo yamaLungelo. Oku kuthetha ukuba iNkqubo yamaLungelo inokutolikwa ngendlela yezixhobo zehlabathi ezinje ngeCRC kunye nemiThetho yaseBeijing. Isiphumo soku kukuba indlela yezomthetho ekugwebeni abaphuli-mthetho abangabantwana kufuneka iphuculwe ukuze kuphuhlise indlela yomntu ngamnye nekhathalele ukulinganisela iimfuno nemitsalane yomaphuli-mthetho ongumntwana kwakunye neyoluntu ngokubanzi.

Phambi koMgaqo-siseko kwakungekanqweneleki ukuphatha abantwana ngendlela efanayo neyabantu abadala. Umthetho oqhelekileyo uye wamkela ubutsha bomaphuli-mthetho njengomba onamandla ekuqwalaseleni ukungqinelana okusesikweni kwalowo utyholwayo. Nangona kunjalo, okokoko kwaqalisa uMgaqo-siseko, ukulingana, phakathi kwezinye izinto kuyafuneka xa kugwetywa bonke abantu abatyholwayo.<sup>12</sup>

Ngenxa yokuqukwa kwamagatya omthetho anxulumene nabaphuli-mthetho abangabantwana kuMgaqo-siseko, le mithetho-siseko ilandelayo iye yandululwa xa kugwetywa umaphuli-mthetho ongumntwana:

- (i) Naphi na apho kunokwenzeka isigwebo sokuvalelwa kufuneka sinqandwe ingakumbi xa umba lowo umalunga nomaphuli-mthetho oqalayo.
- (ii) Ukuvalelwa kufuneka kuqatshelwe njengendlela yokugqibela apho esinye isigwebo singenakubonwa sifanelekile. Ulwaphulo-mthetho oluxhalabisayo noluhambisa umzimba luza kungena phantsi kolu didi.
- (iii) Apho ukuvalelwa kubonwa kufanelekile, kufuneka kube kokwelona xeshana lifutshane, kuqwalaselwa uhlobo nondiliseko lwetyala kunye neemfuno zoluntu kwakunye neemfuno nemitsalane ethile yomaphuli-mthetho ongumntwana.
- (iv) Ukuba oko kuyenzeka, igosa lezomthetho kufuneka liqulunqe isigwebo ngendlela yokuphuhlisa ukubuyisela kwimeko yesiqhela kunye nokuphinda kudityaniswe umntwana lowo kusapho okanye kuluntu lwakhe.
- (v) Isigwebo sobomi entolongweni kufuneka siqwalaselwe kuphela kwiimeko ezizodwa. Ezo meko zinjalo ziza kubakho apho umaphuli-mthetho eyingozi eluntwini kwaye kungekho themba lililo lokuba abuyiselwe kwimeko yakhe yesiqhelo.<sup>13</sup>

11 *S v Kwalase* 2000 (2) SACR 135 (C) para 139G – H.

12 Friedman A, Pantazis A & Skelton A 'Childrens rights' in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* Vol 3 2ed Chapter 47.

13 *S v Nkosi* 2002 (1) SA 494 (W).

Kuyonwabisa ukufumanisa ukuba izixhobo zehlabathi zizimisele ekungandeni abaphuli-mthetho abasebatsha ekubeni baphelele entolongweni.<sup>14</sup> Imibutho enyanzelisa umthetho isenoluvo lokuba abantwana kufuneka baphathwe ngamandla afanayo nalawo abaphuli-mthetho abadala, kwanokuba kufuneka bohlwaywe ngamatyala abawenzayo. Kukho ukusilela kwemfundo malunga namalungelo abantwana kwinkqubo yezomthetho. Kuyakhuthaza ukubona ukuba kukho ukuzibophelela okungagungqiyo okwenziwa ngumthetho wehlabathi ekuphatheni abantwana ngendlela enciphisa ukonzakala ekukhuleni kunye nokwandisa intlonipho yamalungelo abo. Icandelo 28(1)(g) loMgaqo-siseko lifuna ukukhusela umntwana kuso nasiphi na isohlwayo esingqongqo somntu omdala, kwaye ukuza kuthi ga ngoku oko kukhangeleka kuhambelana nomgangatho wehlabathi wokukhusela imitsalane yomntwana kunye nokwenza ukuba le mitsalane yabantwana ibe yeyona ilungileyo. Inzululwazi ngemithetho emalunga namalungelo abantwana eMzantsi Afrika nayo ithanda umba wemitsalane eyeyona ilungileyo yomntwana ingakumbi xa kucingwa ngokuba ukuvalelwa kufuneka ibe yindlela yokugqibela.

### 3 UMNGENI WOMGAQO-SISEKO

#### 3.1 Uhlaziyo olufutshane lomThetho wesona sigwebo sincinane'

'UmThetho wesona sigwebo sincinane wonyaka' we-1997 (umThetho) uqalise ukusebenza ngomhla woku-1 kuMeyi 1998. Uye wamisela izigwebo ekufuneka iinkundla ziziwise kumatyala athile.<sup>15</sup> Ekuqaleni lo mThetho wawenzelwe ukuba ube yindlela yexeshana elifutshane, kodwa waphela usandiswa ngurhulumente. Icandelo elifanelekileyo lale ngxoxo licandelo 51, elibe ilicandelo elixoxisa kakhulu, kuphela ngenxa yokuba belimisela izigwebo ezizezona zincinane kubaphuli-mthetho abangabantwana. Eli candelo ladwelisa iinkqubo zamatyala ekufuneka abe ngaphantsi kwezigwebo ezithile kubaphuli-mthetho abaqalayo, kwabaphinda okwesibini kunye nabalandelayo abebengabantu abadala okanye abantwana. Nangona kunjalo, ukwenziwa kwalo mthetho kuye kwaneengxaki ngenxa yotoliko olwahlukeneyo lwecandelo 51. Iinzululwazi ngemithetho yeenkundla zethu

14 Jonga isicatshulwa esisuka ku-Van Buuren G (ku-n 9 apha ngasentla) 183 ucatshulwe kwisicatshulwa ku- n 9.

15 Ishedyuli 2 Isiqendu I: Ukubulala okwenziwe ngumntu, liqela labantu okanye iqela labantu abadibene ngolwaphulo-mthetho elisebenzela ukwenza okanye ukuqhuba injongo efanayo okanye icebo eliyimfihlo lokwaphula umthetho.

Ishedyuli 2 Isiqendu II: Amatyala akule shedyuli aquka ukubulala nokubamba inkunzi okuneemeko ezixhalabisa ngapha kokuqonda. Iinkundla ePhakamileyo okanye iNkundla yeNgingqi inokunyanzelisa iminyaka eli-15 kumaphuli-mthetho oqalayo, iminyaka engama-20 kumaphuli-mthetho ophinda okwesibini, kunye neminyaka engama-25 kumaphuli-mthetho ophinda okwesithathu okanye umaphuli-mthetho ophindaphindayo.

Ishedyuli 2 Isiqendu III: Amatyala aquka ukudlwengula, uhlaselo ngokwesondo kodwa olunelodlwengulo kumntwana ongaphantsi kweminyaka eli-16, kuquka ukudala ingozi emzimbeni, kunye nokuhlasela ngeenjongo zokonzakalisa umzimba kumntwana ongaphantsi kweminyaka eli-16. Iinkundla yeNgingqi okanye iNkundla ePhakamileyo inokunyanzelisa iminyaka eli-10 kumaphuli-mthetho oqalayo, iminyaka eli-15 kumaphuli-mthetho ophinda okwesibini, okanye iminyaka engama-20 kumaphuli-mthetho ophinda okwesithathu okanye ophindaphindayo.

zamatyala zibonisa iingxaki ezifunyanwayo ngokumayelana nabaphuli-mthetho abangabantwana, ingakumbi amatyala kaS ephikisana noB noS ephikisana noMalgas noS ephikisana noNkosi.

Kwityala likaMalgas iNkundla eyeyona iPhakamileyo yeziBheno itolike icandelo 51 njengelineli futhe lilandelayo:

'Inkundla yamatyala egwebayo kufuneka iqwalasele izigwebo ezikulo mThetho njengendawo yokuya phambili. Ezi zigwebo zimiselweyo kufuneka zinyanzelwe ngokuqhelekileyo zingalahlwa ukusuka kokulula. Kuphela kuxa ukunyanzelwa kwesigwebo esimiselweyo sinokukhokelela kukungabikho kobulungisa apho inkundla yamatyala inokunyanzela isigwebo esingaxhalabisi kangako.'<sup>16</sup>

Kwityala likaNkosi<sup>17</sup> 'umaphuli-mthetho oneminyaka eli-16 ngelo xesha lokugunyaziswa kwetyala bekuthetha ukuba ebengaphantsi kodidi lokubulala ebe limisela isigwebo sobomi entolongweni. Inkundla yamisa ukuba bekunyanzelekile ukunyanzela isigwebo sobomi entolongweni emntwaneni ngaphandle kokuba bekukho iimeko ezibalulekileyo nezinyanzelisayo eziba sisizathu sokunyanzela isigwebo esincinane noko. Ekuvavanyeni ukulunga kwesigwebo esinyanzelwe yinkundla uCachalia J ujonge kuMgaqo-siseko nakulo mThetho. Wayekhohlelwa ukuba: ityala

'nangona inkundla yamatyala inyanzelekile ukuba inyanzelise isigwebo esisesona sincinane ngaphandle kokuba kuboniswa izizathu ezibalulekileyo nezinyanzelisayo, oku akukhange kukhankanywe kwicandelo 51 (3) xa kugwetywa abaphuli-mthetho abangabantwana abaphakathi kweminyaka eli-16 neli-18. Izizathu eziphuhliswa yinkundla zokunyanzela uhlobo oluthile lwesigwebo kufuneka zirekhodishwe. Inkundla yaqhubeka nokuthi akukho zithintelo kubulumko beenkundla obunokuthelakelelwa kulo mThetho, kodwa kukuba abaphuli-mthetho abasebatsha banokuphathwa ngobulunga obungaphaya. Inkundla ikhululekile ukuba inyanzele inqobo yokugweba eqhelekileyo mayela nabaphuli-mthetho abangabantwana abaphakathi kweminyaka eli-16 neli-18.'

Ngaphakathi koS noB iNkundla eyeyona iPhakamileyo yeziBheno yamisa ukuba

'into yokuba umaphuli-mthetho wayengaphantsi kweminyaka eli-18 nangona engaphezu kweminyaka eli-16 ngelo xesha letyala, inkundla yasuka yanika ubulumko kwinkundla egwebayo, bokujonga izigwebo ezizezona zincinane zimiselweyo. Ngoko ke xa inkundla inyanzela isigwebo iqala ekuqaleni ize inyanzele izigwebo ezimiselweyo ebe zinefuthe elinamandla.'<sup>18</sup>

Ukusukela kwityala likaS ephikisana noV iinkundla ngoko zayeka ukusebenzisa 'umThetho wezigwebo ezizezona zincinane' kubaphuli-mthetho abangabantwana.

Ngomhla wama-31 kwinyanga kaDisemba 2007, urhulumente wephondo wazisa umThetho oLungisiweyo womThetho woLwaphulo-mthetho (Ukugweba) 38 wonyaka wama-2007 (UmThetho oLungisiweyo) oye wenza igatya lezigwebo ezizezona zincinane zeminyaka emi-5, 10, 15 nengama-20, kunye nokuvallelwa ubomi entolongweni ngamanye amatyala awenziwe ngabantwana ababengaphakathi kweminyaka eli-16 neli-17. Le nguqulelo yayifana naleyo yaphunyenziwa ngo-1997; nangona kunjalo yayingaquqlathanga

16 *S v Malgas* 2001 (1) SACR 469 (SCA).

17 2002 (1) SACR 135 (WLD).

18 *S v B* 2006 (1) SACR 311 (SCA), [2005] 2 ALL SA 1 (SCA) para 24.

iingxaki zotoliko ezanika iinkathazo kumThetho we-1997.<sup>19</sup> Njengesiphumo, iZiko lomThetho wabaNtwana lazisa isicelo ngenxa yomtsalane walo kwiinzame zokuxhasa amalungelo abantwana, nangomtsalane walo eluntwini. Esi sicelo saqala ukusiwa phambi kweCandelo leNkundla ePhakamileyo yePhondo laseTransvali ngelo xesha.<sup>20</sup> Ingxoxo eyaziswa ngaphambili leli Ziko yayigqalisele kumba wokuba umThetho oLungisiweyo waphula amagatya ecandelo 28 loMgaqo-siseko, njengoko yenza ukuba izigwebo ezizezona zincinane zisebenze kubantwana abaminyaka ingama-16 nabaminyaka ili-17 ababanjelwe ukwenza amatyala axhalabisa kakhulu. Eli Ziko laxoxa ngokuba ifuthe lomThetho oLungisiweyo yayikukuba libeka abaphuli-mthetho abangabantwana kwizigwebo ezinde kakhulu zokuvallelwa entolongweni njengokhetho lokuqala, kube ke ngoko kophulwa igunya lomgaqo-siseko lokuba ukuvallelwa kufuneka ibe yindlela yokhetho lokugqibela, neyiyeyexeshana elilelona lifutshane elifanelekileyo. Eli Ziko laqhuba nokuxoxa ukuba umThetho oLungisiweyo uphelise indlela eyalandelwa kuS ephikisana noB, apho inkundla yamisa ukuba, xa ujongene nokugweba abaphuli-mthetho abangabantwana abaphakathi kweminyaka eli-16 neli-17, kufuneka uqale ekuqaleni. Le ndlela ibithetha ukuba, apho inkundla igweba umaphuli-mthetho ongumntwana, imgwebela ityala elixhalabisa kakhulu, inokukhululeka ukuba inyanzele nasiphi na isigwebo, ekubeni ikhokelwa ngumthetho-siseko womgaqo-siseko wokuba xa uphetha abaphuli-mthetho abangabantwana, ukuvallela entolongweni yindlela yokhetho lokugqibela kwaye kube lelona xeshana lifutshane lifanelekileyo. Ukuphikisana nesi sicelo, uMphathiswa wezoBulungisa noPhuhliso loMgaqo-siseko wagxininisa ukuba umThetho oLungisiweyo awukhabani nomgaqo-siseko, kuba iinkundla zisagcine ubulumko bazo bokugweba, kwaye umThetho oLungisiweyo awufaki abantwana kubungqongqo obufanayo nobo busetyenziswa kubaphuli-mthetho abadala. Le ngxoxo ibingqonge ungquzulwano lokuba iinkundla zisoloko zikhululekile ukuba ziqwalasele ubutsha njengomba onciphisayo xa kunyanzelwa isigwebo; ngoko ke umbuzo wokuba ingaba iinkundla “ziqala ekuqaleni” okanye hayi ngokulula unobumfundo.<sup>21</sup>

Kwisigqibo sayo, iNkundla ePhakamileyo yamisa ukuba 'umThetho weziGwebo ezizezona zincinane' wenza isigwebo esisesona sincinane njengokhetho lokuqala kubaphuli-mthetho abaminyaka ili-16 ne-17, kwaye ke ngoko wawungangqinelani necandelo 28(1)(g) loMgaqo-siseko.<sup>22</sup>

Xa isigqibo seNkundla ePhakamileyo sisisiwa ezantsi, sathunyelwa kwiNkundla yoMgaqo-siseko ukuze samkelwe. Ekuzeni kwisigqibo sayo kulo mba, iNkundla yoMgaqo-siseko yaphonononga imbali yomthetho wesona sigwebo sincinane, kwakunye nenzululwazi yomthetho yeenkundla zethu mayelana namagatya omThetho wonyaka we-1997. Ebhekisela kuS

19 Ngidi R 'Minimum sentences legislation for child offenders found unconstitutional' (2008) 10:3 *Article 40* 1 – 3.

20 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (11214/08TPD) para 26.

21 Ngidi R (n 19 above) 1 – 3.

22 *Centre for Child Law* (n 20 above) para 26.

ephikisana noMalgas, uCameron J waveza ukuba isigqibo ekwafikelelwa kuso kwelo tyala saba neziphumo ezimbini. Okokuqala, kukuba izigwebo ezizezona zincinane ezimiselweyo zaziza kunyanzelwa ngokuqhelekileyo ziinkundla; okwesibini, kukuba nokuba izigwebo ezizezona zincinane bezinganyanzelwanga ngenxa yokubakho kwezizathu ezibalulekileyo nezinyanzelisayo, nangona kunjalo umthetho 'ubunefuthe elinamandla'.<sup>23</sup> Ukulunga kwale ntetho yayikukuba umthetho ubunefuthe elinamandla nakubantwana. Inkundla yamisa ke ngoko yaza yaphonononga icandelo 28 loMgaqo-siseko, yaza yafumanisa ukuba lenza uthintelo kwiPalamente, kumagosa nakumagosa ezobulungisa wokuba kufuneka babaphathe njani na abantwana.

Inkundla yamisela ukuba icandelo 28 loMgaqo-siseko libanga ukwahluka phakathi kwabantwana nabantu abadala ngenxa yezizathu eziphathekayo eziquka phakathi kwezinye, ukuba abantwana banokonzakala ngokomzimba nangokwengqondo. Inkundla yaqhuba yakhankanya ukuba abantwana ngokubanzi banako ukuba babuyiselwe kwimeko yesiqhelo kunabantu abadala.<sup>24</sup> Inkundla yabonisa unxibelelwano phakathi kwecandelo 28 kunye nokugwetywa kwabaphuli-mthetho abangabantwana ngokomThetho oLungisiweyo, yaza yaqhuba yathi, ukungakwazi kwabantwana kusukela kukungabi nasakhono ngokumayelana nokwenza izigqibo ezizizo nokuqika, nto ezo zifuna ukukhuselwa ngokomgaqo-siseko kubungqongqo besohlwayo somntu omdala. UJustice Cameron waqaphela ukuba umyalelo ogunyazisayo womgaqo-siseko wokuba 'imitsalane eyeyona ingcono' yomntwana ibaluleke kakhulu kuyo yonke imiba emayela nomntwana, awunqandi ukusiwa komntwana entolongweni. Nangona kunjalo, ekutolikeni umThetho oLungisiweyo ngokwemvelaphi yecandelo 28, inkundla yagxininisa ukuba umthetho-siseko othi ukuvalelwa kufuneka ibe yindlela yokhetho lokugqibela kwaye kuphela ngelona xeshana lifanelekileyo elilelona lifutshane, wawuthetha ukuba icandelo 28 (1)(g) lifuna impendulo eyeyomntu yezobulungisa yokugweba, eyayifuna ugqaliselo oluthile emntwaneni ogwetywayo endaweni yokuqala engagungqiyo nefunwa ngumThetho oLungisiweyo. Injongo yokugqibela yesigwebo yayikukuzikhusela kweenkundla.<sup>25</sup> Uvavanyo lweemfuno zesigwebo somntwana ngamnye sasigcinelwe ukuze sinike isiphumo esithobelayo semfuno yemitsalane eyeyona ingcono yomntwana.

Ukongeza, ekuboniseni umahluko ochasayo phakathi komThetho oLungisiweyo kunye neCandelo 28 loMgaqo-siseko, iNkundla yashwankathela inkqubo yomThetho:

'Okokuqala, iqhelisa igosa eligwebayo ekuqaleni kwenkqubo yokugweba kude kube kukhetho olungekuko ukuvalelwa. Okwesibini, yenza ukuba isigwebo singabi sesithile, ngendlela yokuba kumiselwa njengendawo yokuqala ixesha elifanelekileyo lokuvalela. Okwesithathu, nokuba azinyanzeliswa, izigwebo ezimiselweyo, zinegalelo kwizigwebo ezindana nezinzinyana xa kuqwalaselwa ukhetho.'<sup>26</sup>

23 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (supra) para 17.

24 At para 27.

25 At paras 31–44.

26 At para 46.



INkundla yoMgaqo-siseko yagxininisa ukuba iziphumo zokuqala ezibini zomThetho oLungisiweyo zachasana kunye nemiyalelo egunyazisiweyo yamagatya amalungelo abantwana. Ngenxa yoko iNkundla yoMgaqo-siseko yafumanisa ukuba umThetho oLungisiweyo waphule amagatya aboniswe kwicandelo 28.

#### 4 INGXOXO

Isigqibo ekufikelelwe kuso yiNkundla yoMgaqo-siseko sesona samkelwayo. Sigxininisa umthetho-siseko obaluleke kakhulu omayelana nabaphuli-mthetho abangabantwana, othi, ukuvalela entolongweni akusoloko kuzisisombululo kubaphuli-mthetho abangabantwana, kwanokuba xa abantwana bevalelwa, izimvo zokubuyisela kwimeko yesiqhelo zincinane kakhulu. Oku kufuneka kubonwe ngokwemvelaphi yoluvo loluntu olubona ukuba izinga lolwaphulo-mthetho luphezulu, ingakumbi ulwaphulo-mthetho olwenziwa ngabantwana. Nangona kunjalo, olu luvo aluthethi ukuba abantwana mabaphathwe, baze bavezwe kwiintlobo zesigwebo ezifana nezabantu abadala. Isigwebo seNkundla yoMgaqo-siseko, ngoko ke, sigunyazisa indlela ekufuneka ithatyathiwe xa kugwetywa abantwana ngokunxulumene neemeko zomntwana ngamnye, kwanokuba ukuvalela kufuneka kube yindlela yokhetho lokugqibela, kwaye ibe lelona xeshana lifanelekileyo lifutshane. Esi sigqibo sivakala isesilungileyo nesinengqiqo ngokomgaqo-siseko.

#### 5 ISIPHELO

Ukumisela ukuphakama komgaqo-siseko kulo naliphi ilizwe lentando yesininzi, kuza kusoloko kufuna ukuba uluntu luvuleleke ekwahlukeni kwaye luhlomphe imeko zabanye abantu. Isiseko sale ntetho sisukela kumba wokuba uMgaqo-siseko luxwebhu oluvulelekileyo olulungiselela bonke abathathi-nxaxheba abaphambili eluntwini, kwaye lukhusela imitsalane yabo. Abantwana ngokuqinisekileyo ziinkokheli zexesha elizayo zoluntu; ukubaphatha kakubi akunanjongo.

#### BIBLIOGRAPHY

- Centre for Child Law v Minister of Justice and Constitutional Development and Other* 2009 (2) SACR 477 (CC)
- Criminal Law Amendment Act 105 of 1997
- Freeman M Article 3: The best interests of the child (2007). (Volume 3 of Alen A et al (eds) *A commentary on the United Nations Convention on the Rights of the Child*)
- Friedman A & Pantazis A 'Children's rights' in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* Vol 3 2 ed 47
- Gallinetti J 'What happened to the Child Justice Bill? The process of law reform relating to child offenders' (2006) 17 *SA Crime Quarterly* 7
- Mutingh L 'Alternative sentencing' in Sloth-Nielsen J & Gallinetti J (eds) *Child justice in Africa: A guide to good practice*. (2004)

Ngidi R 'Minimum sentences legislation for child offenders found unconstitutional' (2008) 10:3 *Article 40* 1

*S v B* 2006 (1) SACR 311 (SCA)

*S v Kwalase* 2000 (2) SACR 135 (C)

*S v Malgas* 2001 (1) SACR 469 (SCA)

*S v Nkosi* 2002 (1) SACR 135 (WLD)

Schabas W & Sax H *Article 37: Prohibition of torture, death penalty, life imprisonment and deprivation of liberty* (2006). (Volume of Alen A et al (eds) *A commentary on the United Nations Convention on the Rights of the Child*)

Skelton A & Gallinetti J 'A long and winding road. The Child Justice Bill, civil society and advocacy' (2008) 25 *SA Crime Quarterly* 3

Van Buuren G *The international law on the rights of the child* (1998)