ANNEXURE A

COMMENTS IN RESPECT OF THE AMENDMENT OF SECTION 45(2) OF THE CHILDREN’S ACT 38 OF 2005

PROPOSAL:

It is submitted that section 45(2) (a) should be retained with the following amendments:

(2) A children’s court –

(a) may notwithstanding the provisions of section 52(1) of this Act, try or convict a person for non-compliance of an order of a children’s court or contempt of such order.

(b) may not try or convicta person in respect of a criminal charge other than in

terms of paragraph (a)

(c) [**must**] may order any person to report **[refer]** any criminal matter arising from the non-compliance with an order of such court or a charge relating to any offence contemplated in section 305 to the South African Police Services [**a criminal court having jurisdiction.].**

ANNEXURE B

COMMENTS IN RESPECT OF THE AMENDMENT OF SECTION 45(2) OF THE CHILDREN’S ACT 38 OF 2005

MOTIVATION:

It is submitted that the proposed amendment of section 45(2)(a) that *“a children’s court must refer any criminal matter arising from the non-compliance with an order of such court or a charge relating to any offence contemplated in section 305 to a criminal court having jurisdiction”*  should not be included in the proposed amendments for the following reasons:

1. It is not clear from the proposed amendment what will be referred to the criminal court. (Is it contemplated that the Presiding Officer will compile a report and submit it together with the transgressor to the criminal court – who is the criminal court?) It must be kept in mind that a person can only come before a criminal court in terms of the provisions of section 38 of the Criminal Procedure Act, Act 51 of 1977.
2. It is furthermore submitted that a Presiding Officer (Court) cannot refer a matter to a criminal court for adjudication. Section 179(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. The prosecution of a matter falls solely within the discretion of the prosecution and only a prosecutor may decide to put a matter on the roll for adjudication (see Commentary on the Criminal Procedure Act, Du Toit, De Jager, Paizes Skeen and van der Merwe pages 1-29 to 1-52). The matter cannot be referred to the Prosecution either. Criminal matters are investigated by the police and once the investigation is finalised, submitted to prosecution for a decision whether to prosecute or not. Prosecution will only place a matter on the roll if there is a prima facie case for an accused person to answer to.
3. Courts must be independent and impartial. It must be kept in mind that the presiding officer will still have to attend to an application or enquiry which is pending before the court. If the presiding officer has to refer (report)criminal matters arising from the non-compliance with an order of such court or a charge relating to any offence contemplated in section 305 to another court or even the police it may be perceived that the presiding officer is not impartial. It may also affect the objectivity of the presiding officer. The proposed amendment may cause a number of unintended consequences. It may for example be argued that the presiding officer was biased and mala fide. Presiding officers may face unnecessary and numerous court cases which will interfere with the proper functioning of the administration of justice. It will also create a challenge for Presiding Officers at smaller offices. Once the Presiding Officer recuses from the matter as a result of perceived bias when referring a matter to the criminal court, there may be no Presiding Offer to attend to the matter before either the Children’s Court or the Criminal Court, once recused the Presiding Officer is barred from attending to any matter or any further applications in respect of the particular children’s court or criminal matter.
4. It is submitted that such amendment will be unconstitutional as it impinge on the independency of the judiciary.
5. It is unfortunate that orders of the children’s courts are ignored with impunity. The provisions of section 35 of the Children’s Act and section 106 of the Magistrate’s Court Act, 32 of 1944 are toothless provisions. It is my experience that even if such matters are reported to the police it is as a rule not prosecuted. I have not seen a single successful prosecution of a contempt of court matter in terms of section 106 of the Magistrate’s Court Act, 32 of 1944, during the past 37 years. The police and/or prosecution have limited exposure to investigate or prosecute matters dealing with the Children’s Act. There is a perception that the police and/or prosecutors are reluctant to deal with family law matters.
6. The statistics for 7 courts within the Ekurhuleni Central Sub Cluster indicate the effect the implementation of the Children’ Act had on the functioning of the Children’s Court. The Children’s Court at Germiston for example dealt with 1898 matters in 2003 and spent a total of 393:55 hours attending to children’s court matters. In 2020, despite the implementation of the National State of Disaster, the Children’s Court at Germiston attended to 8187 matters and spent 2208:56 hours attending to these matters. It is submitted that a large percentage of those matters deals specifically with the non-compliance with the provisions of section 35 of the Children’s Act. I hope that you can imagine what will happen to vulnerable children in Germiston if the Presiding Officers have to refer a 1000 or 2000 matters to the criminal courts. The Presiding Officer will have little time to do anything else than refer matters to the criminal courts. A Presiding Officer must adjudicate and not participate in the proceedings. Children may suffer irreparable harm if children’s court matters are not attended to because there are pending matters in the criminal courts.
7. It is submitted that the children’s court have the power to conduct (civil) contempt hearings in the same manner as provided for in the High Courts. The proposed Rules for the Children’s Courts provides that a children’s court may by way of an application of notice of motion consider a committal for contempt of court in order to ensure that orders of the children’s courts are complied with. The proposed Rule was premised on the basis that section 45(2) allows for such applications.

This argument is further supported by the provisions of Section 65(3)(c) which provides that:

“*enforce compliance with the order, if necessary through criminal prosecution in a magistrate’s court* ***or*** *in terms of section 45(2)”*

If section 45(2)(a) is amended it will also impact on the effective monitoring of court orders in terms of section 65.

1. **It is proposed that section 45(2)(a) should be amended to remove any doubt that the children’s court may conduct (civil) contempt of court proceedings.**
2. The proposed Rules for the Children’s Court were recently submitted to the full Board of the Rules Board for approval. The proposed Rules providesinter alia for the procedures to be followed for contempt of court proceedings, the monitoring and non-compliance of courts orders and proceedings for the committal of contempt of a court order.

Rule 65 provides that:

*“(1) Any person who deliberately, wilfully and mala fide disobeys an order of the court may be held to be in contempt of the order made by the court.*

*(2) An application for committal for contempt of order of court must be brought on a form corresponding substantially with Form 3 of the Annexure, accompanied by an affidavit and a certified copy of the court order.*

*(3) The applicant must prove beyond reasonable doubt that the—*

*(a) court has granted an order;*

*(b) order has been served upon the respondent or that the respondent is aware of*

*the contents of the order;*

*(c) respondent wilfully failed to comply with the said order of the court.*

*(4) There is an evidentiary burden on the respondent to advance evidence that the non-*

*compliance of the order was not willful and mala fide.*

*(5) If the respondent fails to advance evidence that establishes a reasonable doubt as to*

*whether non-compliance was willful and mala fide, contempt will have been*

*established beyond reasonable doubt.*

*(6) The application must be lodged with the clerk of the children’s court who must*

*immediately submit the application and affidavit to the presiding officer.*

*(7) Where the circumstances allow for the application to be brought ex parte the*

*provisions of rule 13 apply.*

*(8) The presiding officer must as soon as is reasonably possible allocate a date for the*

*consideration of the application, which date must be within 30 days from the day the*

*matter was referred to the presiding officer.*

*(9) The clerk of the children’s court must, immediately after the presiding officer has*

*assigned a date for the hearing and at least 15 days before the date of the hearing—*

*(a) notify the parties to attend the hearing on a form corresponding substantially*

*with Form 4 of the Annexure;*

*(b) annex the application and affidavits to the Form 4 to be served on the*

*respondent;*

*(c) draw the respondent’s attention to the right to file an opposing affidavit on the*

*clerk of the children’s court at least 15 court days before the date of the hearing;*

*(d) serve a copy of the opposing affidavit on the applicant at least 15 court days*

*before the date of the hearing.*

*(10) The applicant may file a replying affidavit on the clerk of the children’s court at least*

*10 days before the date of the hearing;*

*(11) The clerk of the children’s court must serve a copy of the replying affidavit on the*

*respondent at least 5 days before the date of the hearing;*

*(12) Where both parties are legally represented the parties may serve the notice and*

*affidavits referred to in subrules (9)(a), (10), and (11) on their legal representatives.*

*(13) The court must direct the further conduct of the hearing.”*

1. It is submitted that the proposed amendment will severely erode and undermine the effective application of the Children’s Act. If section 45(2) is amended as proposed the children’s court will have no effective remedy to monitor or enforce compliance of the orders of the children’s courts. The amendment may have far reaching consequences and the orders of the children’s court may become worthless “pieces of paper”. Criminal prosecutions may take many months or years to be finalised, while some may never be finalised. Children will inevitably be at the short end of the stick. The proposed Rules 63, 64 and 65 will address the vacuum that exists at present. It is submitted that it is a speedy process that does not have the effect that a parent has to face criminal prosecution and possible conviction of a criminal offence which will affect the parent’s ability to find employment and cause irreparable harm to the child concerned.
2. Should the police fail to investigate a complaint or the prosecution decline to prosecute parties will be forced, or may choose, to litigate in the High Courts. The purpose of establishing Children’s Courts were to make the courts accessible to all and especially for the poor. The civil contempt proceedings will speedily address the refusal of a party or an organ of state to comply with an order of the children’s court while parties will still have the option to lodge a complaint with the South African Police Services.
3. It is my plea that the proposed amendment should be disregarded. Section 45(2)(a) must be amended to clarify the position of the children’s courts to conduct (civil) contempt hearings in the same manner as provided for in the High Courts.