THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 871/2017

In the matter between:

CENTRE FOR CHILD LAW	**FIRST APPELLANT**
KL	**SECOND APPELLANT**
CHILD LINE SOUTH AFRICA	**THIRD APPELLANT**
NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE REINTEGRATION OF OFFENDERS	**FOURTH APPELLANT**
MEDIA MONITORING AFRICA TRUST	**FIFTH APPELLANT**

and

MEDIA 24 LIMITED	**FIRST RESPONDENT**
INDEPENDENT NEWSPAPERS (PTY) LTD	**SECOND RESPONDENT**
TIMES MEDIA GROUP LIMITED	**THIRD RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**FOURTH RESPONDENT**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIFTH RESPONDENT**

Neutral citation: *Centre for Child Law & others v Media 24 Limited & others* (871/17) [2018] ZASCA 140 (28 September 2018)

Coram: Maya P and Willis, Swain, Van der Merwe and Mocumie JJA

Heard: 7 September 2018

Delivered: 28 September 2018

Summary: Section 154(3) of the Criminal Procedure Act 51 of 1977 – declaration of constitutional invalidity because of a failure to protect the anonymity of children as victims of crime at criminal proceedings.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance):

1 The appeal is dismissed.

2 The cross-appeal is upheld to the extent that para 1 of the order of the court a quo is set aside, and replaced with the following orders:

‘(1)(a) It is declared that the provisions of s 154 (3) of the Criminal Procedure Act 51 of 1977 are constitutionally invalid to the extent that they do not protect the anonymity of children as victims of crimes at criminal proceedings.

(b) Parliament is to remedy the aforesaid constitutional invalidity within 24 months of the date of this order.

(c) Pending Parliament's remedying of the aforesaid constitutional invalidity, s 154(3) of the Criminal Procedure Act 51 of 1977 is deemed to read as follows:

'No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of 18 years or of a victim or of a witness at criminal proceedings who is under the age of 18 years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.'

(d) In the event that Parliament does not remedy the aforesaid constitutional invalidity within 24 months of this order, paragraph (c) shall become final.

(e) The orders of constitutional invalidity are referred to the Constitutional Court for confirmation.'

3 The date of the order of constitutional invalidity will be the date of this order.

4 The appellants and the respondents are ordered to pay their own costs in respect of the appeal and cross-appeal.

JUDGMENT

Swain JA (Maya P and Van der Merwe JA concurring):

[1] This appeal originates in an order granted in the Gauteng Division of the High Court, Pretoria, on 21 April 2015 in which an interim interdict was granted to protect the anonymity of the second appellant, one KL. On the return day of the order the appellants sought declaratory orders in the following terms:

(a) Declaring that the protection of anonymity afforded by s 154(3) of the Criminal Procedure Act 51 of 1977 (the CPA) applied to victims of a crime who were under the age of 18 years;

(b) In the alternative, an order was sought declaring this section of the CPA unconstitutional and invalid to the extent that it failed to confer protection on victims of a crime who were under the age of 18 years;

(c) Declaring that children subject to this section of the CPA do not forfeit the protection offered by the section upon reaching the age of 18 years;

(d) In the alternative, an order was sought declaring this section of the CPA unconstitutional and invalid to the extent that children subject to the section forfeit the protection afforded by it upon reaching the age of 18 years.

[2] The court a quo granted an order declaring that the protection afforded by s 154(3) of the CPA applied to victims of crime who were under the age of 18 years. It, however, also held that the section does not continue to protect child victims,

witnesses and accused after they turn 18 years and dismissed the appellants' alternative constitutional challenges. The court a quo thereafter granted to the appellants leave to appeal and to the respondents leave to cross-appeal, against the orders granted.

[3] To place the appeal in context, the circumstances of KL that required her anonymity to be protected, were that she was abducted from hospital on 30 April 1997, when she was two days old. She was 'found' in February 2015, when she was 17 years old. Her case and the ensuing criminal trial have been the subject of intense media scrutiny, both in South Africa and abroad.

[4] The provisions of s 154(3) of the CPA provide as follows:

'No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.'

[5] The appellants therefore sought two extensions to the provisions of the section:

(a) The first was to extend the publication ban to the identification of any child victim of crime and;

(b) The second was to extend the duration of the ban on the identification of children indefinitely into adulthood.

[6] The appellants and the first, second and third respondents (the media respondents), agree that the protection of children's anonymity requires a case-by-case determination by a court. However, they do not agree on two central issues in the appeal. The first issue is whether there should be any limitation of the media's right to impart information concerning the identity of child victims (the victim extension) and children who forfeit the protection of their anonymity on attaining the age of 18 years (the adult extension). If there is to be a limitation, the second issue

that arises is the nature and extent of the limitation, before a court may determine whether anonymity or publicity is in the best interests of a child in a particular case.

[7] As set out above, the appellants sought as primary relief declaratory orders based upon an interpretation of the section. It was submitted that the section properly interpreted protected child victims and continued to protect them after they had attained their majority. Based upon a 'purposive manner of interpretation' of the section, the court a quo declared that the protection it offered applied to victims of crime who were under the age of 18 years.

[8] The interpretation advanced by the appellants as regards the victim extension, was based upon the submission that the section gives expression to the State's positive duties to protect children's rights and to secure their best interests in the criminal process. Accordingly, when interpreted in the light of this protective purpose, the phrase 'witness at criminal proceedings' in the section was reasonably capable of an interpretation that applied to all child victims of crime. It was submitted that there was no basis for thinking that Parliament wanted, or was prepared to allow, such arbitrary treatment of vulnerable child victims. The fourth respondent, the Minister of Justice and Correctional Services, confirmed this was never the intention and that the section should be interpreted as applying to all child victims.

[9] The media respondents' answer was that the proper approach to statutory interpretation, was to consider from the outset the context and the language together, in the light of the Constitution. Since the violation of the section carried a criminal sanction, its interpretation had to be informed by the presumption that it ought to be interpreted strictly in favour of individual liberty. The language did not include a victim who was not a witness in the criminal proceedings. The purpose was to protect children who participated in criminal proceedings against the disclosure of their identities. On this basis the appellant's wider interpretation of the section was not correct.

[10] The appellants' submissions as regards the adult extension, were that on a proper interpretation of the section, children who were subject to its protection did not lose this protection when they turned 18. This was because the section had to be

interpreted in line with what was described as 'the principle of ongoing protection'. This principle was said to be one in which 'childhood actions or experiences that are felt in adulthood are also the proper concern of s 28(2) of the Constitution'. According to the appellants an interpretation that ensured ongoing protection, better promoted s 28(2) and protected child victims, witnesses, accused and offenders from the severe harm of identification.

[11] The media respondents' answer was that on a proper interpretation of the section it only prohibited publication of the identity of an accused or witness in criminal proceedings, who at the date of publication was under the age of 18 years. This was the ordinary meaning of the prohibition, the purpose being to protect children against the glare of publicity during their participation in criminal proceedings. In addition, there was no legal basis for the so-called 'principle of ongoing protection'.

[12] In my view, the language of the section is unambiguous and the interpretation contended for by the appellants, whether in respect of the victim extension or adult extension, is unduly strained. The section is an exception to the open justice rule and by virtue of the fact that it carries a criminal sanction, it must be interpreted in favour of individual liberty. This is particularly so where the right to freedom of expression is implicated. The court a quo accordingly erred in the interpretation it placed upon the section, in respect of the victim extension. Indeed, counsel for the appellants did not pursue this ground of relief with any vigour.

[13] I turn to consider the alternative submission by the appellants. This was that the section must be declared unconstitutional and invalid to the extent that it does not afford protection to child victims, and because it does not afford ongoing protection to children who are protected by the section, but who forfeit this on attaining the age of 18 years.

[14] The extension of the anonymity protection for children, whether by way of the victim extension or the adult extension, is in conflict with the rights to freedom of expression and freedom of the press and other media, entrenched in s 16(1)*(a)* of the Constitution. It is also in conflict with the open justice principle. The correct

approach to resolving a conflict of this nature was dealt with in *Johncom Media Investments Ltd v M & others* [2009] ZACC 5; 2009 (4) SA 7 (CC). At para 19 the following was stated:

'Section 16 of the Constitution confers upon everyone the right to freedom of expression. The section itself limits the right. This does not, however, mean that the right is insulated against the general limitation contemplated in s 36 of the Constitution. Nor does the Constitution accord hierarchical precedence to any particular right entrenched in the Bill of Rights over other rights referred to therein.'

In para 21 the following was added:

'Section 16 thus defines the ordinary bounds of the right to freedom of expression. But over and above that defined scope, there may be limitations placed on the right, provided that they meet the requirements of s 36 of the Constitution.'

[15] For present purposes, I will refer to the right to freedom of expression which includes freedom of the media, as well as the principle of open justice, as the right of the media to impart information. In determining whether the victim and adult extensions to s 154(3) of the CPA, constitutionally violate the right of the media to impart information, a two-stage test has to be applied. This was described in *Coetzee v Government of the Republic of South Africa; Matiso & others v Commanding Officer, Port Elizabeth Prison & others* 1995 (4) SA 631 (CC) para 9 in the following terms:

'This Court has laid down that, ordinarily, one adopts a two-stage approach for determining the constitutionality of alleged violations of rights in chap 3 of the Constitution . . . If so, the second stage calls for a decision whether the limitation can be justified in terms of s 33(1) of the Constitution.'

As pointed out in *Johncom* para 22, although this case was concerned with the interim Constitution, the final Constitution is structured in the same way and requires the same approach.

[16] The crucial issue is whether the limitation of the right of the media to impart information, whether in terms of the victim or adult extensions to the section, are reasonable and justifiable in terms of s 36 of the Constitution. The section provides as follows:

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic

society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[17] In *Johncom* para 24, the enquiry envisaged by s 36 of the Constitution was described in the following terms:

'The process of determining whether a limitation is reasonable and justifiable within the contemplation of s 36 involves the balancing of competing interests. It entails taking account of the considerations enumerated in s 36. This process has been described as a proportionality analysis.'

[18] In *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) para 35, the proportionality analysis was described in the following terms:

'The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; *and the nature and extent of the limitation*. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose *as well as the existence of less restrictive means to achieve this purpose*.' (Emphasis added.)

[19] The proportionality analysis requires that the right of the media to impart information in an open and democratic society based on human dignity, equality and freedom, be considered together with the nature and extent of the limitation of this right and then balanced against the purpose of the limitation, which in the case of the adult extension, is the protection of the anonymity of children on reaching the age of 18 years. Whether the purpose of the proposed limitation may be achieved by less restrictive means, also has to be considered. An examination of the nature and

extent of the limitation of the media's right to impart information, reveals that it is unlimited and has no exceptions. As a result, according to the media respondents, the following types of publications will be prohibited:

(a) An autobiography about someone who was a victim or witness of crime as a child, or was a child offender, published in their adulthood;

(b) News articles that disclose the identity of adults who were child victims, and that celebrate the recovery of victims from the trauma of their experiences as children; that publicise their stories as sources of inspiration to others and that present them as role-models and people taking control of their lives;

(c) News articles that celebrate the rehabilitation and reintegration of young offenders, which may motivate and inspire others to overcome adversity in their own lives; and

(d) News articles about the conviction and sentences of former child accused, which draw attention to miscarriages of justice and important social and political issues.

[20] Willis JA in his judgement, recognises that difficulties lie in casting any protection (and therefore the nature and extent of any limitation) with precision, and that vague generalities would be inimical to the rule of law. In addition, he recognises that it will be difficult to strike an appropriate legislative balance in some cases, but believes these problems may be overcome by public debate and by affording Parliament sufficient time to remedy the situation.

[21] I disagree with the approach of Willis JA. Only once the constitutional validity of s 154(3) of the CPA has been determined, may Parliament be afforded the opportunity to remedy the situation. Willis JA, however, relies upon certain dicta of Mogoeng CJ in the case of *My Vote Counts NPC v Minister of Justice and Correctional Services & another* [2018] ZACC 17; 2018 (8) BCLR 893 (CC) as support for the proposition that it is sufficient for this court to articulate the proposed limitation on the right of the media to impart information in broad terms, but with sufficient clarity to give Parliament a fair sense of what is required of it. The justification he advances for this is that the detailed formulation of the limitation of the right was best left to Parliament.

[22] However, the remarks of the Chief Justice in *My Vote Counts* were not uttered in the context of an *a priori* determination of whether the Promotion of Access to Information Act 2 of 2000 (PAIA), was inconsistent with the Constitution and invalid. The complaint was that PAIA did not allow for the continuous and systematic recordal and disclosure of information, as to the private funding of political parties. Having determined the constitutional invalidity of PAIA in this respect, the Constitutional Court then ordered Parliament to amend the act to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties, within a period of 18 months. It was in the latter context that these remarks were made. Quite clearly, they do not absolve a court from its primary responsibility of examining the nature and extent of the limitation, and taking this aspect into account as an essential part of the proportionality analysis.

[23] As regards whether the purpose of the proposed limitation may be achieved by less restrictive means, the indeterminate nature and extent of the limitation, as well as the wide diversity of factual situations to which it could be applied, precludes a meaningful examination of this issue. The importance of the factual matrix, in carrying out the proportionality analysis was described in the following terms in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa & another* 2008 (5) SA 31 (CC) para 161:

'As in all proportionality exercises, the factual matrix will be all-important, and the court concerned will itself have to make an order based on its enquiry into the specific way in which constitutionally protected interests interact with each other, and particularly with the intensity of their engagement.'

[24] As part of the proportionality analysis, I turn to examine the right of the media to impart information in an open and democratic society based on human dignity, equality and freedom. The importance of the right to freedom of expression was described in *Islamic Unity Convention v Independent Broadcasting Authority & others* 2002 (4) SA 294 (CC) para 27, in the following terms:

'Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours".'

[25] As observed in *Johncom* supra para 28, the limitation of the right to freedom of expression not only affects the media but also affects the right of members of the public to receive information. In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 6, the following was stated:

'It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interests of the press. As pointed out by Anthony Lewis, in a passage that was cited by Cameron J in *Holomisa v Argus Newspapers Ltd*: "Press exceptionalism – the idea that journalism has a different and superior status in the Constitution – is not only an unconvincing but a dangerous doctrine." The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself.'

[26] Not only the right to freedom of expression is implicated by the proposed adult extension, but also the open justice principle. In *Independent Newspapers* paras 43 and 45-46, it was affirmed that 'the default position is one of openness' and that:

'In each case, the court will have to weigh the competing rights or interests carefully with the view to ensuring that the limitation it places on open justice is properly tailored and proportionate to the end it seeks to attain. In the end, the contours of our constitutional rights are shaped by the justifiable limitation that the context presents and the law permits . . .

At the end of the day, a court is obliged to have regard to all factual matter and factors before it in order to decide whether the limitation on the right to open courtrooms passes constitutional muster.'

[27] It is clear that the adult extension severely restricts the right of the media to impart information and infringes the open justice principle. In the absence of any limitation on the nature and extent of the adult extension, the relief sought by the appellants is overbroad and does not strike an appropriate balance between the rights and interests involved. Accordingly, the proposed limitation on the right of the media to impart information is neither reasonable nor justifiable, in terms of s 36 of the Constitution. The constitutional challenge to the provisions of s 154(3) of the CPA on this basis, must accordingly fail.

[28] I turn to consider the victim extension. The constitutional challenge to s 154(3) of the CPA, is that the section does not extend anonymity protection to children under the age of 18 years, who are the victims of a crime. The nature and extent of the limitation on the right of the media to impart information is clear. It is limited to prohibiting the publication of the identity of a victim at criminal proceedings, who is under the age of 18 years. The purpose of the limitation, as in the cases of an accused and a witness under the age of 18 years, is to protect children at criminal proceedings from the glare of publicity. The reason for this is self-evident.

[29] There is, however, an additional purpose to the limitation. That is to ensure that s 154(3) of the CPA complies with the equality provisions of s 9 of the Constitution. Although the section grants anonymity to an accused and a witness at criminal proceedings who are under the age of 18 years, it offers no protection at all to the victim at criminal proceedings, who is also under the age of 18 years. The exclusion of child victims from the provisions of s 154(3) of the CPA, is irrational and in breach of s 9(1) of the Constitution, which guarantees the right to equal protection and benefit of the law to everyone. The denial of equal protection to child victims, who are equally vulnerable, cannot be justified.

[30] The importance of the right of the media to impart information and the nature and extent of the limitation of this right, when balanced against the dual purpose of the limitation of this right, leads to the conclusion that the limitation on the right of the media in this instance, is reasonable and justifiable in terms of s 36 of the Constitution. The constitutional challenge to s 154(3) of the CPA, on the basis that it

does not extend anonymity protection to children under the age of 18 years who are the victims of a crime, must accordingly succeed.

[31] In reaching these conclusions I have not relied upon foreign jurisprudence to which we were referred, by the parties. In *City of Cape Town v South African National Roads Authority Limited & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) para 31 the following was stated:

'A court attempting to transplant a rule from a foreign jurisdiction should of necessity have regard to the differing constitutional contexts between that country and this. The Constitutional Court recently affirmed that the following principles apply in considering the use of foreign law:

"*(c)* The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours.

(d) Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values."

All law in this country must be grounded in constitutional values and respect must be given to the fundamental rights set out in the Bill of Rights. The adoption of a rule from another country must be considered in that context . . . .'

[32] I agree with the submissions made by the media respondents, that there is considerable variation in foreign statutes that provide for the extension of child anonymity protection into adulthood. The media respondents submit that numerous considerations (and qualifications and conditions) are brought to bear in constructing these extensions, in that;

(a) Foreign statutes variously protect offenders, victims and witnesses; first-time and repeat-offenders and deceased persons.

(b) Foreign statutes differ in how they regulate cases of emergency and endangerment and investigations.

(c) Foreign statutes impose different conditions for anonymity protection (for instance, the party's cooperation in the criminal proceedings and the quality of the evidence given).

(d) Foreign statutes differ in defining who may apply to the court for a lifting of the publication ban.

For these reasons, I have not placed reliance upon foreign jurisprudence.

[33] I sympathise with the objective of the appellants in seeking to protect the anonymity of children as victims, witnesses and offenders of crime, once they reach adulthood. However, whether the law requires amendment and if so, the nature and extent of any such amendment, is a task more appropriately left to the Legislature. The Minister of Justice and Correctional Services supports the victim and adult extensions to the protection of the anonymity of children. The Minister is therefore able to take the appropriate steps to receive representations from interested parties and facilitate public debate on this issue, with a view to possibly introducing appropriate legislation in Parliament.

[34] The appellants have been unsuccessful in their appeal against the dismissal by the court a quo of the adult extension. The media respondents have also been substantially unsuccessful in their cross-appeal against the order by the court a quo declaring that the protection offered by s 154(3) of the CPA applies to victims of crime, who are under the age of 18 years. Although the declaratory order of the court a quo to this effect falls to be set aside, it will be replaced by a declaration of constitutional invalidity and a reading in to the section, pending its amendment by Parliament, which has the same practical effect. For this reason the appellants in respect of the appeal and the media respondents in respect of the cross-appeal, should each pay their own costs. The order preserves the order made by the court a quo on 21 April 2017, to protect the identity of the second applicant KL, pending the outcome of any appeal to the Constitutional Court.

[35] I grant the following order:

1 The appeal is dismissed.

2 The cross-appeal is upheld to the extent that para 1 of the order of the court a quo is set aside, and replaced with the following orders:

‘(1)(a) It is declared that the provisions of s 154 (3) of the Criminal Procedure Act 51 of 1977 are constitutionally invalid to the extent that they do not protect the anonymity of children as victims of crimes at criminal proceedings.

(b) Parliament is to remedy the aforesaid constitutional invalidity within 24 months of the date of this order.

(c) Pending Parliament's remedying of the aforesaid constitutional invalidity, s 154(3) of the Criminal Procedure Act 51 of 1977 is deemed to read as follows:

'No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of 18 years or of a victim or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.'

(d) In the event that Parliament does not remedy the aforesaid constitutional invalidity within 24 months of this order, paragraph (c) shall become final.

(e) The orders of constitutional invalidity are referred to the Constitutional Court for confirmation.’

3 The date of the order of constitutional invalidity will be the date of this order.

4 The appellants and the respondents are ordered to pay their own costs in respect of the appeal and cross-appeal.

K G B Swain
Judge of Appeal

Willis JA (Mocumie JA concurring):

The issues with which this appeal is concerned

[36] This appeal is concerned with the constitutionality of the provisions of s 154(3) of the Criminal Procedure Act 51 of 1977 (CPA). The subsection reads as follows:

'No person shall publish in any manner whatsoever any information which reveals or may reveal the identity of an accused person under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.'

[37] The difficulties raised by this case are not unique to South Africa. For example, in some Commonwealth countries such as Australia, Canada, New Zealand and the United Kingdom of Great Britain and Northern Ireland, similar provisions apply, the distinguishing feature being that the protection extends not only to child witnesses and offenders but also to children as victims, without their necessarily being witnesses.[1] In a number of instances, the protection extends even after the child has attained the age of 18 years, unless having reached adulthood, that person consents to publication or the court authorises such publication.[2] In all these countries, the protection seems to apply only 'in connection with criminal proceedings' or similar circumstances.[3] In other words, there may be a pervasive *lacuna* when it comes to children who have been the victims of crime but where no criminal proceedings have been instituted.

[38] Invoking the 'best interests of the child' provisions of s 28(2) of the Constitution, the appellants have sought an order either that the protection in the s 154(3) of the CPA, relating to the identity of accused persons and witnesses in

[1] See for example s 15A(1) of the New South Wales Children's Criminal Procedure Act 1987 in Australia; s 111(1) of Canada's Youth Criminal Justice Act 2002 (S.C. 2002, C.1); s 438 of New Zealand's Children, Young Persons and Their Families Act 1989 and s 204 of New Zealand's Criminal Procedure Act 2011 of No 81; s 49 of the United Kingdom's Children and Young Persons Act 1933 c.12, 23 and 24 Geo 5 and s 45 of that country's Youth Justice and Criminal Evidence Act 1999 c.23. See also *Lindon v R* [2014] NSWCCA 112. *R v DH; R v AH* [2014] NSWCCA 326.
[2] Ibid.
[3] Ibid.

criminal proceedings, who are under 18 years of age, extends to all persons who were victims of crime at a time when they were under the age of 18 years or, alternatively, that there should be a reading-in of such additional terms. Moreover, the appellants seek an order that the prohibition is to apply, indefinitely, after the victim attains the age of 18 years.

[39] Put differently, the following questions have been raised in this appeal: (a) does s 154(3) permit publication in the media of the identity of persons who were victims of crime at a time when they were children but who have not yet testified in criminal proceedings or are not to be called so to testify; (b) if so, does this survive constitutional scrutiny and (c) whether the protection which may or may not be afforded under s 154(3) terminates once the child turns 18 years of age and (d) if so, whether this, in turn, survives constitutional scrutiny?

[40] The appellants have been astute to emphasise that they do not seek an absolute prohibition on the identification of the children with which this appeal may be concerned. They are content that the qualification in s 154(3) that a judge or judicial officer may, in appropriate circumstances, authorise publication should remain. The difficulty is that, self-evidently, this qualification relates only to cases that are actually before the judge or judicial officer concerned. What is to happen where a child is a victim but there is no case pending before a court, relating to those particular circumstances?

[41] The appellants contend that the protection which they seek should be the default position and that each situation should be decided on a case-by-case basis. Practical difficulties, making the law cumbersome and burdensome, may arise if the net, requiring court authorisation of publication of the identity of the child victim is too widely cast.

The facts of this case

[42] The facts of this case evoke strong emotions. The second appellant, widely known to the public as ‘Zephany Nurse’, although this is not her real name, had been abducted from hospital when she was two days old. She was ‘found’ in February 2015, when she was 17 years’ old. The person whom she had grown up believing

was her mother was prosecuted in a criminal trial. The matter was news not only in South Africa but also abroad. Journalists camped outside the second appellant's home and school. She was forced to go into hiding.

[43] Questions then arose as to the extent and duration of the second appellant's anonymity. In March 2015 the first appellant, the Centre for Child Law, wrote to various prominent media houses, requesting an undertaking that they would not reveal the second appellant's identity. None of them agreed to do so. Some contended that the protection would lapse, once the second appellant attained the age of 18 years.

[44] On 21 April 2015, the high court granted an urgent interim interdict, protecting the identity of the second appellant until the proceedings in this case had been finalised.

[45] In the meantime, in July 2015, it was discovered that a book on the story of the second appellant's life was due to be published, bearing a photograph of the second appellant on its cover. The threat of legal action dissuaded the publisher from proceeding to publish the book with the photograph on the cover. In March 2016, *The Daily Voice*, owned by the second respondent, Independent Newspapers (Pty) Ltd, published a series of articles about the story, carrying 'pixellated' photographs of the second appellant. A complaint to the Press Ombudsman was successful. He held that the articles breached the court order and the Press Code.

[46] In June 2016, *You Magazine*, published by the first respondent, carried a story in which it included photographs of the second appellant's biological sister, reporting on the widely circulated perception that the sisters were very similar in appearance. In August 2016, *New Age* newspaper published a story on its website that the second appellant was pregnant, mentioning her aunt by name. The story was 'relayed' by at least two other publications. When photographs of the second appellant's first meeting with her biological parents were published in the *Daily Voice*, this complicated her relationship with them.

[47] The appellants have put before the court examples of several 'real-life' instances, where the media, contending that the protection of minors, whether as witnesses or perpetrators of crimes, is lost once they attain their majority, have gone ahead and published details of identity, as soon as the age of 18 has been reached. In any event, the media contend that s 154(3) affords the second appellant no protection at all, as she is neither an accused person nor a witness to a crime.

The decision of the high court and the stance of the relevant organs of state

[48] The Gauteng Provincial Division of the High Court in Pretoria (Hughes J), issued a declarator that the provisions of s 154(3) applied to victims of crime who were under the age of 18 years but refused to extend the protection, once the victim has attained what is effectively the age of majority in South Africa.[4] The high court directed that each party was to pay its own costs in the proceedings. The appellants sought leave to appeal against the refusal to extend the protection beyond the age of majority, as well as the order as to costs. The respondents sought leave to cross-appeal against the declarator that was issued. Leave, both to appeal and to cross-appeal to this court, was granted by the court a quo.

[49] Both the Minister of Justice and Correctional Services and the National Director of Public Prosecutions (NDPP), the fourth and fifth respondents respectively, have supported the appellants' contentions both in this court and the high court and have agreed to abide the decision of this court. For convenience, I shall refer to the first, second and third respondents, all of whom have substantial media interests, as 'the media respondents'.

The appellants' contentions

[50] The appellants have reasoned that protecting the anonymity of child victims, witnesses and offenders involves a balancing of two sets of rights and interests that may, from time to time, compete with one another. The appellants contend that, on the one hand of the scales are the constitutional rights of children and, on the other, the right of freedom of expression, together with the principle of open justice.

[4] See the Age of Majority Act 57 of 1972.

[51] The appellants argue that the starting point is s 28(2) of the Constitution, which provides that the best interests of the child are of 'paramount importance in every matter concerning the child'. Referring to *J v National Director of Public Prosecutions*,[5] (*J v NDPP*) they submit that this is not only a constitutional principle but also a self-standing right.[6] That right requires, moreover, so the appellants contend, that the interests of children are afforded the 'highest value'[7] and that, accordingly, their interests are 'more important than anything else,' even though this does not, of course, relegate everything else to unimportance.[8]

The expert evidence in support of the appellants' contentions

[52] The appellants filed the affidavits by the following experts, in support of their contentions: Professor Ann Skelton, director of the Centre for Child Law, a member of the Committee on the Rights of the child and an expert on what may be described as 'legal justice for children'; Dr Giada Del Fabbro, a psychologist having wide experience in clinical psychology, including the assessment and therapeutic experience of young children and adolescents; Ms Joan Van Niekerk, a former director of Childline and a social worker who has worked with thousands of child victims and child offenders and Ms Arina Smit, a manager at the clinical unit of the South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), who has worked with more than one thousand child offenders over the past 17 years.

[53] The expert evidence shows that children who are victims of crime tend to suffer from a range of psychological harm as a result of being identified in the media. The harm includes further trauma, stigma, shame and fear, affecting the child victim's ability to recover and return to normal life. Dr Del Fabbro explained that, in general, identification can re-traumatise children and undermine the long-term

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[5] *J v National Director of Public Prosecutions & another* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014(7) BCLR 764 (CC) (*J v NDPP*) para 35.
[6] *J v NDPP* (supra) para 35. See also *Minister of Welfare and Population Development v Fitzpatrick & others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 para 17.
[7] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) para 42.
[8] See *Centre for Child Law v Minister of Justice and Constitutional Development & others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (2) SACR 477 (CC); 2009 (11) BCLR 1105 (CC) (*Centre for Child Law v Minister of Justice*) para 29.

healing process. The fear of identification may also prevent child victims from reintegrating into their communities. The threat of being identified in the media may also prevent a child victim from trusting those around her, which is necessary to obtain adequate family support.

[54] More generally, the threat of being identified in the media has the pervasive effect of discouraging not only the reporting of crimes against children, but also child victims co-operating with the investigators. These facts were recognised by the Supreme Court of Canada in *AB v Bragg*.[9] There it said as follows:

'Studies have confirmed that allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures and inhibit cooperation with the authorities.'[10]

These aspects received strong emphasis in the evidence of Ms Van Niekerk.

The media respondents' contentions

[55] The media respondents do not dispute the expert evidence of the appellants but contend that it is not necessarily true that it is always the case that it is harmful to be known as the victim of a crime. Moreover, the media respondents have argued that the relief sought by the appellants is far-reaching, indiscriminate and without precedent anywhere in the world. They submit that it does not strike an appropriate balance between the rights of children, on the one hand, and the right of freedom of expression and open justice, on the other. The 'open justice principle' is, in their view, summarised in the provisions of s 152 of the CPA which provides that 'all criminal proceedings in any court shall take place in any court' except 'where otherwise expressly provided for by this Act or any other law'.

[56] The media respondents contend that s 32 of the Superior Courts Act 10 of 2013 encapsulates the principle that should apply in this case. The section provides that:

'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except insofar as any such court may in special cases otherwise direct, be carried out in open court.'

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[9] *AB v Bragg* [2012] 2 SCR 567.
[10] Para 26.

In similar vein, the media respondents have referred to the affirmation in the Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services & another: In Re Masethla v President of the Republic of South Africa & another*[11] that 'the default position is one of openness'.[12] So too, they have referred to the speech in the United Kingdom's House of Lords in *In re S* (*A child*)[13] in which the 'general and strong rule' in favour of openness and general public access to information concerning court proceedings was affirmed.[14] There can be no question that, as general principles, these are to prevail in our country.

[57] The media respondents have described the relief sought by the appellants as 'victim extension' and 'adult extension'. They reason that if the arguments of the appellants prevail, the prohibition on the disclosure of identity would apply even when the identification of the child is harmless or for the benefit of the child, it would effectively prohibit identification of the child's family because their identification will ordinarily have the effect of revealing the identity of the child. The ban, in the media respondents' submission, would apply not only to the so-called 'mass media' but also to academic journals and publications; it would apply even where a guardian or a child, after attaining the age of majority, has consented to the publication; it would cover situations, such as motor accidents, where it may be uncertain whether the child is the victim of criminal conduct such as culpable homicide. The media respondents cautioned against the so-called 'chilling effect' of the limitations on disclosure of identity for which the appellants have argued. The media respondents also referred us to the decision in the United Kingdom in *R* (*on the application of JC*) *v Central Criminal Court*[15] in which, while acknowledging the difficulty of the question, it was held that the protection of the identity of persons under the age of 18 years did not extend into their adulthood. Persuasive though the reasoning may have been, it will, of course, not necessarily prevail under our own constitutional dispensation.

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[11] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services & another: In Re Masethla v President of the Republic of South Africa & another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC).
[12] Para 43.
[13] *In re S* (*A Child*) (HL) [2004] UKHL 47 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683; [2005] EMLR 11.
[14] Para 15.
[15] *R* (*on the application of JC*) *v Central Criminal Court* [2014] EWCA Civ 1777.

[58] The following scenarios were sketched by the media respondents: a child is injured in a motor accident as a result of another's reckless and negligent driving but the child's school may not make the matter known in its newsletter or at an assembly, neither may the church pray for her recovery; so too, where the child is a victim of a robbery at home or in a motor vehicle hi-jacking incident; a child displays extraordinary bravery in the face of a crime but no one may publicly commend the fact; even once a child dies, whether in childhood or in later adulthood, the ban would remain.

[59] In summary, the media respondents contend that, although there may be a few exceptional instances where the law does not adequately protect persons who were the victims of crime at a time when they were children, the extensions that the appellants require are neither constitutionally permissible nor constitutionally required. The media respondents have pointed out that in terms of s 4(1)*(b)* of the Child Justice Act 75 of 2008 (the CJA), the prosecution of all persons who are under the age of 18 years at the commencement of the proceedings against them must take place in the child justice courts and, in terms of s 63(5) thereof, must take place in camera. In addition, the media respondents have drawn attention to the fact that in terms of s 153(1) of the CPA, presiding officers in criminal prosecutions have a wide discretion to direct that proceedings be held behind closed doors, more particularly, in terms of s 153(2) thereof, in order to protect witnesses and may, in terms of s 154(1) thereof, direct restrictions on publication.

[60] Moreover, we were reminded that, in terms of ss 153(3), 153(3A), 154(2)*(a),* 170A and 335A(1) of the CPA, special protections are afforded to victims of sexual offences and extortion and, in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others*,[16] the Constitutional Court held that s 28(2) of the Constitution obliges both prosecutors and the court *mero motu* to consider the application of ss 153(3) and 170A of the CPA to protect child complainants and witnesses.[17] The media respondents also drew our attention to the fact that s 154(3) of the CPA prohibits, without the authorisation of the court, the disclosure of the identity of an accused person who is under the age of 18 years. In

[16] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC).
[17] Para 144.

similar vein, we were reminded that s 4(1)(*b*) of the CJA applies to all children who were under the age of 18 years and that in terms s 63(5) of that Act (the CJA), all proceedings in child justice courts must be held in camera.[18]

[61] It is true that s 153(3) of the CPA protects the disclosure of the identity of victims of sexual offences and extortion.[19] It is also true that s 154(3) of the CPA prohibits, without the authorisation of the court, the disclosure of the identity of an accused person who is under the age of 18 years. Furthermore, it is true that trials of accused persons who are children must be conducted in camera by specialist courts. Legislative protection of the identity of children in criminal matters is not derelict but it does not, as a general rule, protect those children who are or have been victims of crimes, without them being called as witnesses in particular cases relating thereto.

[62] A child who is the victim of a crime perpetrated by an adult is not protected by the CJA precisely because the trial will take place in the ordinary criminal courts. There is also the problem of 'leaks' to the media – an ever-present reality in a world of electronic social media devices. Counsel for the media suggested that the law of defamation would adequately protect persons from disclosure of identity in instances such as this. This submission fails adequately to take into account not only the huge

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[18] '. . . was 10 years or older but under the age of 18 years when he or she was—
(i) handed a written notice in terms of section 18 or 22;
(ii) served with a summons in terms of section 19; or
(iii) arrested in terms of section 20, for that offence.'

[19]

'(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit
(a)
any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;
(b)
any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or
(*c)* extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,
the court before which such proceedings are pending may, at the request of such other person or, if he is a minor,
at the request of his parent or guardian, direct that any person whose presence is not necessary at the
proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings:
Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.'

expense of civil litigation, which most ordinary citizens will find difficult, if not impossible to afford, but also that a defamation action in itself attracts further publicity. Additionally, there is the sheer power of the social media and its 'multiplier effect' as a mathematical and social reality.

[63] There are crimes, other than those relating to sexual offences and extortion where disclosure of the identity of children, as victims, may be especially harmful to them.

The animating principle in this matter

[64] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another*[20] is authority, in clear and emphatic terms, that 'children merit special protection legislation that guards and enforces their rights and liberties'.[21] It also affirmed that the provision in s 28(2) of the Constitution that a child's best interest are of paramount importance in every matter concerning the child, creates 'both a self-standing right and guiding principle in all matters affecting children'.[22]

Some concrete examples of the complexity of the issues

[65] The appellants presented us with some concrete examples of the complexity of the issues in contention. The first example was PN, who was 15 years' old when he was charged with the murder of the leader of the Afrikaner Weerstandsbeweging (AWB), Eugene Terre'blanche. The AWB has been a controversial organisation, stirring up passions when it comes to the issue of 'race'. PN's trial was held in camera and much effort was made by the State, the court and his family to protect his identity. PN turned 18 years of age the day before the verdict was handed down. He was acquitted of the murder but his name and photograph were thereupon published in the media. In Ventersdorp, the home town of both PN and Eugene

[20] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC); 2013 (12) BCLR 1429 (*Teddy Bear Clinic*).
[21] Para 1. See also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & others* 2004 (1) SA 406 (CC); 2003(2) SACR 445; 2003 (12) BCLR 1333 para 63.
[22] Para 65. See also *Minister of Welfare and Population Development v Fitzpatrick & others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 paras 17-18.

Terre'blanche the racially charged atmosphere there became intense. PN was in danger of his life. He left Ventersdorp as a result and has disappeared without trace.

[66] The second was of DS, who also was 15 years' old when he was charged with murder and rape. Although the case attracted much media attention, his identity was largely protected for the duration of the trial. He turned 18 years of age two days after he had been sentenced. On the day before his eighteenth birthday posters advertised that his identity would be made known the next day. This indeed happened with the media publishing his name and photographs under headlines such as: 'Meet [DS], the Griekwastad Killer'.

[67] The third was MO, who was 17 when he was arraigned in court on charges of culpable homicide. The magistrate had ordered that his identity could not be revealed. MO turned 18 years of age during the trial. Notwithstanding the magistrate's order, local newspapers went ahead and published his name and other identifying information upon MO having attained his majority.

[68] Vastly much more complex than the cases of PN, DS and MO is that of MVB, a child victim of crime. The trial court found that her family was murdered by her brother and that she too was a victim of her brother's attack, having been severely injured but not killed. The case received huge media publicity. Almost unavoidably, the media published information concerning her identity in their reportage of the case but the media's intrusiveness into her dignity and privacy was extensive. MVB's name, her photographs, details of the institutions at which she had been receiving treatment and the name of the school which she attended were published. Upon her release from hospital, she was pursued by the media with intimate details about her life and her experiences. MVB's curator, an advocate, Louise Buikman SC, filed an affidavit detailing the great stress and harm that MVB suffered. Despite a court order and complaints to the Press Council, these intimate details have continued to be published in the media.

Conclusions concerning the constitutional adequacy of the protection of the identity of children as victims of crime

[69] The history of incidents involving children as victims, as outlined above, makes it plain that the voluntarily adopted Press Code is not capable of adequately protecting these persons. In any event, the Press Code applies only to those print and online media organisations that have agreed to be bound by it. The complaints procedure is retrospective (applying 'after the horse has bolted') in the sense that it applies only once the damage has been done and not in anticipation of it.

[70] Subject to certain qualifications, freedom of expression, when reporting on incidents in which children have been victims of crime, may fulfil important social functions. For example, where children have been the victims of accidents, reporting thereon may lead to greater public awareness of the need for special care and protection. Reporting on incidents such as the one that has been directly relevant in this case may be conducive to greater vigilance and supervision at hospitals. Media coverage of cases where children have been the victims of sexual and other abuse may deepen society's awareness of the problem, how to look out for it and to prevent it.

[71] Lord Reith, the founding father of the British Broadcasting Corporation (BBC) famously said, in a rather different context, that the function of the broadcaster was 'to inform, to educate and to entertain'.[23] When it comes to children who are victims of crime, information and education are critically relevant. There is, however, to be no 'entertainment' in such matters. Prurience is resolutely to be discouraged. The appellants do not seek a blanket ban on reporting on the victims of crime. What they ask for is protection of their identity. It is this protection of identity – rather than a total ban on news reporting – that is so important and which strikes the balance between the freedom of expression, on the one hand and the aggregate of the rights to dignity, privacy and the best interests of the child, on the other.[24] Anonymisation has,

[23] See for example https://www.cps.org.uk/files/reports/original/111027112808-20090324PublicServicesToInformEducateAndEntertain.pdf (Accessed 10 September 2018).
[24] See for example *Johncom Media Investments Limited v M & others* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 paras 42-45.

for example, become the standard practice in judgments where children are involved.[25] This principle is also apparent in s 74 of the Children's Act 38 of 2005.

[72] This sense of balance was apparent in *Johncom Media Investments Limited v M & others*[26] (*Johncom*) in which Jafta AJ, delivering the unanimous judgment of the Constitutional Court, said that any limitation of rights contained in the Bill of Rights of the Constitution, as contemplated in terms of s 36 thereof, involves the balancing of competing interests in a process that has been described as a 'proportionality analysis'.[27] In *Johncom* the Constitutional Court held that the effectively blanket prohibition on the publication of news reporting of divorce proceedings, even where these involved the best interests of minor children, could not be justified under our Constitution.[28] Counsel for the respondents submitted that the result in *Johncom* supported their contention that the interests of freedom and expression and open justice prevailed over the protection for children sought by the appellants. In my opinion this is not correct. Not only are divorce proceedings qualitatively different from criminal proceedings, but Jafta AJ pertinently said that one way to strike a balance between these contending interests would be to 'prohibit publication of the identity of the parties'.[29] He went on to say:

'If that were to be done, the publication of the evidence would not harm the privacy and dignity interests of the parties or the children, provided that the publication of the evidence that would tend to reveal the identity of any of the parties or the children is also prohibited. The purpose could be better achieved by less restrictive means.'[30]

It bears repeating that the appellants have not sought an absolute ban on news reporting in which children have been victims, but something very much less restrictive: publication which may disclose their identity. Of especial importance is

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[25] See for example *Johncom v M* (*supra*); *J v NDPP* (*supra*) fn 3*; AD & another v DW & others* (*Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party*) [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC); *S v M* (*Centre for Child Law as Amicus Curiae*) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) 1312 (CC).

[26] *Johncom Media Investments Limited v M and others* [2009] ZACC 5; 2009 (4) SA 7 (CC) ; 2009 (8) BCLR 751 (CC).

[27] Para 23.

[28] Paras 30-31.

[29] Para 30.

[30] Ibid. See also *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 15 para 35.

that the freedom to 'speak one's mind', 'the open market-place of ideas' is in no significant way affected by the relief which the appellants have sought.[31]

The question of the ongoing protection or the so-called 'adult extension': should the protection against disclosure of identity in criminal matters extend once the child attains his or her majority?

[73] A critical question is whether the rights of a child and the protection afforded by s 28(2) terminate upon a child turning 18 years of age. The appellants refer to this as 'the principle of ongoing protection', the media respondents as 'adult extension'. In other words, do the experiences and acts of a child, protected in terms of s 28(2), extend life-long?

[74] The constitutional rights to dignity and privacy introduce balance into the equation in which the freedom of expression is to be measured against the interests of a child, even after that child has attained adulthood. These rights to dignity and privacy provide the bridge across the divide of the respective submissions of the contending parties. Section 10 of the Constitution enshrines every person's right to dignity and s 14 everyone's right to privacy. In *Bernstein and others v Bester and others NNO*[32] Ackermann J said that a person's right to privacy extends only to these aspects in regard to which a legitimate expectation of privacy can be harboured.[33] He went on to say that a high level of protection is given to the individual's intimate personal sphere of life and the maintenance of that sphere's basic preconditions.[34]

[75] It is well-established in our law that, insofar as privacy is concerned, this right becomes more powerful and deserving of greater protection the more intimate the personal sphere of the life of a human being which is at issue.[35] There is, moreover, a connection between a person's rights both to privacy and to dignity. As the

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[31] *Islamic Unity Convention v Independent Broadcasting Authority & others*; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 para 27; *S v Mamabolo (eTV & others Intervening*) [2001] ZACC17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 paras 28 and 37.
[32] *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449.
[33] Para 75.
[34] Para 77.
[35] See, for example, *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Limited and others v Smit NO and others*; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079.

Constitutional Court said in *Teddy Bear Clinic:* 'Privacy fosters human dignity insofar as it is premised on and protects an individual's entitlement to a "sphere of private intimacy and autonomy".' [36]

[76] A person's rights to dignity and privacy have been strengthened under the Constitution but it may assist our understanding of the depth of their vitality if we remind ourselves that, at common law, every person had the right not only to *dignitas* (inner tranquillity) but also to *fama* (reputation), which were protected.[37] Melius De Villiers in 1899 in *The Roman and Roman-Dutch Law of Injuries: A Translation of Book 47, Title 10, of Voet's Commentary on the Pandects*,[38] described dignity as a 'valued and serene condition' and went on to say that 'Every person has an inborn right to the tranquil enjoyment of his peace of mind. . .' Reference, with approval thereto, has frequently been made by our courts.[39]

[77] There have been indications in the Constitutional Court that the protection afforded to children as children (for acts and experiences qua minors) should extend even into their adulthood. In *Centre for Child Law v Minister of Justice and Constitutional Development & others (National Institute for Crime Prevention and the Re-Integration of Offenders as Amicus Curiae*),[40] the majority of the Constitutional Court decided it was constitutionally impermissible to apply the minimum sentencing provisions to persons for crimes committed while they were children because, as children, they had needed 'special protection'.[41] In *J v National Director of Public Prosecutions & another*[42] the Constitutional Court unanimously decided that there was a need to protect a person as an adult from being on the register of sexual

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[36] Para 64.
[37] See, for example, *Khumalo and others v Holomisa* [2002] ZACC12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 paras 17, 18 and 19.
[38] Juta's: Cape Town at p24.
[39] See, for example, *Minister of Police v Mbilin*i 1983 (3) SA 705 (A) at 715G-716A; *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 542C-E; *Argus Printing and Publishing Company Limited v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 585E-G; *Argus Printing and Publishing Company Limited v Esselen's Estate* 1994 (2) SA 1 (A) at 23D-H. See also *Teddy Bear Clinic v Minister of Justice* (supra) para 56.
[40] *Centre for Child Law v Minister of Justice and Constitutional Development & others (National Institute for Crime Prevention and the Re-Integration of Offenders as Amicus Curiae*) [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (2) SACR 477 (CC); 2009 (11) BCLR 1105 (CC).
[41] Paras 24-38.
[42] *J v National Director of Public Prosecutions & another* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC).

offenders for crimes committed as a child.[43] The Constitutional Court has also directed that the anonymity in a claims for damages arising from injuries experienced as a child extended even once that child became an adult.[44]

[78] This principle of extending the protection of children, as children, even once they had attained adulthood, has indeed found application in other parts of the world. In *R v McDonald,*[45] the New Zealand High Court concluded that 'an order for permanent suppression of Jane's identity is appropriate in this case'.[46] 'Jane' had been raped and murdered. In Australia in New South Wales, s 15A(1) the Children's Criminal Procedure Act 1987 prohibits the subsequent publication of the identity of a person who 'was a child' at the time to which the proceedings relate.

[79] In *JXMX v Dartford and Gravesham NHS Trust*[47] the English Court of Appeal recognised that when it came to the interests of children, the open justice principle had to yield in favour of anonymity when reporting on court proceedings in matters involving children and that courts should 'normally make an anonymity order . . . without the need for any formal application'.[48]

[80] In *R v Secretary of State for Justice*[49] the English Court of Appeal, after a careful review of the importance of the 'open justice principle' and the right of the public in 'knowing how difficult and sensitive cases of this sort are decided', made an 'anonymity order' protecting publication of the identity of an adult person who, as a young man, had murdered his former girlfriend and her boyfriend.[50]

[81] Moreover, there is, in my opinion, a necessary logic in extending the protection of child victims into their adulthood. It is the facts that give rise either to lawfulness or unlawfulness. Facts do not change with the passage of time. They remain constant. The effluxion of time may permit a change from unlawfulness to

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[43] Para 43.
[44] *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC); 2017 (12) BCLR 1528 (CC) fn 1.
[45] In *R v McDonald* [2015] NZHC 511.
[46] Para 93.
[47] *JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96.
[48] Para 34.
[49] *R v Secretary of State for Justice* [2016] UKSC.
[50] Paras 38-40.

lawfulness and vice versa (eg the ratification of a contract or prescription) but ordinarily there must be some additionally relevant act, either of commission or omission, for the change to occur. In other words, there must, in addition, have been the doing or not doing of an act by the holder of that right, which is relevant to the lawfulness thereof. As a general rule, the passage of time does not, in and of itself, change rights. There may, of course, be exceptions. Access to secret material ('classified information') in State archives would be an obvious example.

[82] The victim of a crime cannot change the fact of her victimhood. She may, however, perform an act that permits the publication of the fact of her victimhood. The most obvious example would, of course, be the giving of her consent thereto but without some additionally relevant fact (other than the mere passage of time), it would be offensive to first principles of law for her to lose her right to non-disclosure of her victimhood to a crime. Relevant among these first principles is that, in the absence of some compelling reason otherwise, the law prefers to come to the aid of the weak and vulnerable rather than the strong and powerful. This principle permeates the Bill of Rights in the Constitution and has been made plain, over and over again, by the courts since the advent of democracy.[51] Another relevant principle is that, unless an injustice would result, when it comes to lawmaking, simplicity is preferable to complexity.[52]

[83] A default position in law that allows for a retrospective intrusion into a person's victimhood of crime as a child would, in my opinion, violate that person's constitutional right to dignity.[53] The knowledge, as a child, that one's identity as a victim of crime may be revealed upon the attaining of one's majority, may haunt that child, causing her considerable emotional stress. In my opinion, it verges on cruelty to sanction torment such as this.

[84] A rule of law that, save in exceptional circumstances, the identity of a child who was victim of crime should be protected from disclosure for life would be easy for the people of this country to understand, remember, respect and apply. It would

[51] See especially s 9 of the Constitution.
[52] See for example International Bar Association (IBA) 'The rule of law and the law of rules' 14 February 2018 https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=7bd6542d-e5b1-43f4-9810-96344b2ccd35 (Accessed 12 September 2018)
[53] Section 10 of the Constitution.

be unacceptable for victims to have to bear an onus to obtain an injunction against allowing disclosure. If disclosure is to be permitted, the onus must rest on the person wishing to make the disclosure. Ordinarily this will be the media which, in the usual course of events, are very much better placed to obtain such an injunction than is a victim to obtain a converse order.

[85] A constitutional right, even one as important as freedom of expression, may be limited.[54] As Kriegler J pointed out, when delivering the majority judgment of the Constitutional Court in *Coetzee v Government of the Republic of South Africa; Matiso & others v Commanding Officer Port Elizabeth Prison & others*,[55] no right enshrined in the Bill of Rights in the Constitution is absolute.[56] There may be circumstances where the limitation of a right, even one of fundamental importance, may be justified.[57] Kriegler J went on to say that, in most instances: 'In making the determination [whether the limitation of the right is justified] . . . one really need not go beyond the test of reasonableness'.[58] Reasonableness depends on the facts of each particular case.[59]

[86] It is reasonable indeed not only that there should be protection of the identity of persons who have been victims of crime while they are children, but also that this and the other protections of them as witnesses and offenders should extend even when they reach adulthood. Their dignity and right to privacy require no less. The same applies to those who were witnesses to crime as children or were children when they were offenders. This entails no serious sacrifice of the principle of freedom of expression. Identity may be especially important in the sphere of public life and affairs. Children play no role in public life and affairs and, ordinarily, even once they have grown up, what happened to them as victims of crime, what crimes they witnessed and what crimes they may have committed are not, legitimately, publicly relevant.

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[54] See s 36 of the Constitution.
[55] *Coetzee v Government of the Republic of South Africa; Matiso & others v Commanding Officer Port Elizabeth Prison & others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382.
[56] Paragraph 11.
[57] Ibid.
[58] Ibid.
[59] See, for example, *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 45 and the authorities therein cited; *Za v Smith & another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA); [2015] 3 All SA 288 (SCA) para 24.

[87] Counsel for the media respondents have argued, fairly and correctly, that criminal proceedings are quintessentially in the public interest. In this regard they have referred to the judgment of the Constitutional Court in *S v Shinga* (*Society of Advocates* (*Pietermaritzburg*))*; O'Connell & others v The State*[60] and, yet again, to Lord Steyn's speech in the United Kingdom's House of Lords in *In re S (FC) (A Child)*.[61]

[88] In 1913 Lord Atkinson said in *Scott v Scott*:[62]

'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in a public trial is to be found, on the whole, the best security for the pure impartial and efficient administration of justice, the best means for winning for it public confidence and respect.'[63]

These values run deep among all those who hold dearly to the rule of law.

[89] Lawyers and others will also have been educated about dangers of secret trials in the history of the Court of the Star Chamber, a history which was crucial in shaping the principle of open justice. The importance of open justice was stressed in *City of Cape Town v South African National Roads Authority & others*.[64] Secret trials can easily be used to settle political scores and private vengeances. From this derives much of the general aversion among democrats to departures from the principle of open justice. Against this, it should be remembered that not only do children have no political scores to settle but also, although capable of telling lies, they generally lack the sophistication to sustain private vengeances long enough to deceive a court. Where children are victims but not witnesses, in criminal proceedings, the risk is even further reduced.

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[60] *S v Shinga* (*Society of Advocates* (*Pietermaritzburg*))*; O'Connell & others v The State* [2007] ZACC 3; 2007 (4) SA 611 (CC); 2007 (2) SACR 28 (CC); 2007 (5) BCLR 474 (CC) especially para 26.
[61] *In re S (FC) (A child)* (supra) para 30..
[62] *Scott v Scott* [1913] AC 417.
[63] At 463. See also *Attorney General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175 at 185.
[64] *City of Cape Town v South African National Roads Authority & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] All SA 517 (SCA); 2015 (5) BCLR 560 (SCA) especially paras 12-13, 18-19, 21 and 44-47.

[90] It is not only the open justice principle that needs to be considered. Sight must also not be lost of the fact that in *Midi Television (Pty) Limited t/a eTV v Director of Public Prosecutions (Western Cape)*,[65] this court held that: 'The constitutional promise [of freedom of expression] is made rather to serve the interest that all citizens have in the free flow of information'.[66]

[91] In *Glenister v President of the Republic of South Africa & others*[67] the Constitutional Court held that; 'Implicit in s 7(2) [of the Constitution] is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.'[68] In *S v M*[69] the Constitutional Court emphasised that s 28(2) of the Constitution requires that the law must make its 'best efforts' to minimise that harm that can come to children, to protect them from abuse and to maximise their opportunities to lead happy and productive lives.[70]

[92] In the light of the above, s 154(3) of the CPA falls short of what is constitutionally required not only in terms of protecting children as victims of crime but also insofar as this and the other protections of them as witnesses and offenders may affect them once they reach adulthood. In this narrow sense, the subsection is therefore 'unconstitutional'.

[93] The court a quo accordingly correctly found that the provisions of s 154(3) should apply to victims of crime who are under the age of 18 years but wrongly refused to extend the protection, once the victim has attained the age of 18 years.

[94] There may, of course, be situations where the public interest justifies disclosure of the fact that a person, who has become an adult, was once a victim, while still a child. These are aspects upon which Parliament may wish to receive representations before passing appropriate legislation.

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[65] *Midi Television (Pty) Ltd t/a eTV v Director of Public Prosecutions (Western Cape)*) [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA).
[66] Para 6.
[67] *Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).
[68] Para 189.
[69] *S v M* (*Centre for Child Law as Amicus Curiae*) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) 1312 (CC).
[70] Paras 19-20.

[95] I have had the privilege of reading the fine judgment prepared by my brother Swain. We both agree that a 'reading in', without further ado, of either the so-called 'victim extension' or 'adult extension' would be unduly strained and was, in any event, faintly argued by counsel for the appellants. We also agree that s 154(3) of the CPA falls short of meeting the constitutionally required standard when it comes to protecting the identity of children who have been the victims of crime. We agree that Parliament should be directed to remedy the situation.

[96] Swain JA and I disagree on whether that protection of childhood victims is constitutionally obligatory, even after a particular child victim has reached adulthood. Swain JA considers that a directive by this court to Parliament to apply the so-called 'adult extension' goes too far. Swain JA deals extensively with a so-called proportionality analysis in coming to his conclusions on this issue. In my opinion, in this particular case, the concept of a 'balancing exercise' may be more helpful, although we have both applied our minds to much the same idea. Like Swain JA, I have also referred to Kriegler J's judgment in *Coetzee* on the exercise that needs to be undertaken. In doing so, I come to a contrary conclusion.

[97] At first blush, it may seem that the difference between Swain JA and me is finely calibrated. Regrettably, we are separated by a philosophical ocean. In my opinion, when it comes to the disclosure of the identity of childhood victims of crime, logic, common sense and ordinary, everyday morality generate a constitutional imperative. It is that the relevant time, which is determinative of the issue, is the time that the person was a child and not the time from which the child has become an adult. In my opinion it is obvious that if, in balancing the competing interests at stake in this matter, the fulcrum is the question of onus, the scales must tilt in favour of those who have become adults but were the victims of crime at a time when they were children.

What should be done?

[98] The second appellant was a victim in a matter in which criminal proceedings had been taking place. It is not necessary for this court to decide what should happen where a child is a victim but there is no relevant court case. Protecting the

identity of a child victim in those circumstances is likely to be too difficult to monitor without the risk of injustice. In any event, it will be difficult to strike an appropriate legislative balance. There will be cases where obviously protection is necessary but, on the other hand, as the media respondents have fairly and correctly argued, there are dangers in being over-zealous and casting the net too wide. These are aspects from which the legal public, the media and the legal community will benefit from further debate with contributions coming especially from the academics and institutions such as the first appellant.

[99] In *S v M (Centre for Child Law as Amicus Curiae)*,[71] the Constitutional Court described the language of s 28 of the Constitution as 'comprehensive and emphatic' and said that 'statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children'.[72]

[100] In *Glenister v President of the Republic of South Africa & others*,[73] the majority of the Constitutional Court after having referred to s 7(2) of the Constitution which 'requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights' said that: 'Implicit in s 7(2) is the requirement that the steps the State takes to [do so] must be reasonable and effective.'[74].

[101] Parliament may wish to consider a wide range of representations, looking at this complex matter from different aspects, when it deals with the orders that follow. The difficulties lie in casting any protection with precision. Vague generalities would be inimical to the rule of law.[75] In *My Vote Counts NPC v Minister of Justice and Correctional Services and Another*,[76] Mogoeng CJ, delivering the unanimous judgment of the Constitutional Court, affirmed as a general proposition, that the absence of legislation adequately to deal with imperatives set out in the Bill of Rights of the Constitution should best 'be left to Parliament which bears the legislative

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[71] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA (CC).
[72] Para 15.
[73] *Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA (CC); 2011 97) BCLR 651 (CC).
[74] Para 189.
[75] See example Beinart B, 'The Rule of Law' 1962 *Acta Juridica* 99.
[76] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (8) BCLR 893 (CC).

authority of the Republic'.[77] He went on to say: 'Our duty is to articulate the unfulfilled obligation in broad terms, but with sufficient clarity to give Parliament a fair sense of what is required of it.'[78]

[102] The fact that the relevant Ministers have not opposed either the original application or this appeal has been most helpful. It not only removes any urgency from the matter but also facilitates the making of the appropriate order. If a generous amount of time is to be allowed for Parliament to remedy the situation, there will have to be a fairly substantial 'reading in' of provisions in s 154(3) of the CPA to afford protection in the meantime. The attitude of the Ministers has the consequence that the court may be less circumspect about the possibility of judicial overreach than might otherwise be the case, pending Parliament's consideration of the matter. Moreover, it will allow all interested persons to adopt a carefully considered approach to the whole question.

[103] In all the circumstances of the matter it is appropriate (a) to declare s 154(3) of the CPA constitutionally invalid to the extent that it does not protect children as victims of crime and also insofar as protection of them as victims, witnesses and offenders does not extend once they reach adulthood; (b) to afford Parliament a generous amount of time to effect the necessary amendments; (c) to 'read in' protection, pending Parliamentary review; (d) to set aside paragraph 2 of the court a quo (that which refused to extend the protection after children attain the age of 18 years); (e) to direct that costs should follow the result and (f) to refer the orders of this court to the Constitutional Court for confirmation. The parties agreed that if the matter is to be remedied by Parliament, it should be given 24 months in which to do so.

The order that would have been made if this was the majority judgment

[104] If this had been the majority judgment, the following order would have been made:

1 The appeal is upheld with costs.

2 The cross-appeal is dismissed with costs.

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[77] Paras 75-76.
[78] Para 76.

3 It is declared that the provisions of s 154(3) of the Criminal Procedure Act 51 of 1977 is constitutionally invalid to the extent that it does not protect children as victims of crimes in which there are criminal proceedings and to the extent that any protection that they receive in terms thereof does not extend beyond their reaching the age of 18 years.

4 Parliament is to remedy the aforesaid constitutional invalidity within 24 months of the date of this order.

5 Pending Parliament's remedying of the aforesaid defects, s 154(3) of the Criminal Procedure Act is deemed to read as follows:

''No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused person under the age of eighteen years or of a witness or of a victim at or in criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any person.'

(The underlined portion in the aforesaid deeming provision being that which is 'read into' the subsection.)

6 Pending Parliament's remedying of the aforesaid constitutional defects, s 154 of the Criminal Procedure Act is deemed to contain an additional provision, being s 154(3A), which reads as follows:

'(3A) Children subject to subsection 3 above do not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may, upon reaching adulthood, consent to publication of their identity.'

7 In the event that Parliament does not remedy the aforesaid constitutional defects within 24 months of this order, orders 5 and 6 above shall become final.

8 Paragraph 2 of the order of the court a quo is set aside.

9 The orders of this court are referred to the Constitutional Court for confirmation.

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N P WILLIS

Judge of Appeal

APPEARANCES:

For the Appellants:	S Budlender (with him, N L Dyirakumunda and C McConnachie) Instructed by: Centre for Child Law, Tshwane c/o Webbers Attorneys, Bloemfontein
For the First, Second and Third Respondents:	W Trengove SC (with him, J Bleazard) Instructed by: Cliffe Dekker Hofmeyr Inc, Sandton c/o Phatsoane Henney Attorneys, Bloemfontein
For the Fourth and Fifth Respondents:	D Mohlamonyane Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein