IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

11/7/2017
Case Number: 23871/15
Reportable: Yes
Of interest to other judges: Yes
Revised.

In the matter between:

CENTRE FOR CHILD LAW	1st APPLICANT
KL	2nd APPLICANT
CHILDLINE SOUTH AFRICA	3rd APPLICANT
NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE REINTEGRATION OF OFFENDERS	4th APPLICANT
MEDIA MONITORING AFRICA TRUST	5th APPLICANT

and

MEDIA 24 LIMITED	1st RESPONDENT
INDEPENDENT NEWSPAPERS (PTY) LTD	2nd RESPONDENT
TIMES MEDIA GROUP LIMITED	3rd RESPONDENT
INFINITY MEDIA NETWORKS (PTY) LTD	4th RESPONDENT
TNA MEDIA (PTY) LTD	5th RESPONDENT
PRIMEDIA (PTY) LTD	6th RESPONDENT
SOUTH AFRICAN BROADCASTING CORPORATION	7th RESPONDENT
E.TV (PTY) LTD	8th RESPONDENT
ELECTRONIC MEDIA NETWORK (PTY) LTD	9th RESPONDENT
THE CITIZEN (PTY) LTD	10th RESPONDENT
MAIL AND GUARDIAN MEDIA LIMITED	11th RESPONDENT
SOUTH AFRICAN NATIONAL EDITORS FORUM	12th RESPONDENT
MINISTER OF JUSTICE AND CORRECTIONAL	13th RESPONDENT

SERVICES
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 14th RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] It is our Constitutional duty as society and the courts to protect the rights of children as is enshrined in the Bill of Rights and the Constitution of South Africa. Though the best interest of the child is of paramount importance this does not trump other rights as protected by the Bill of Right and the Constitution.

Introduction

[2] It is common cause that this application deals with the limitations posed by section 154 (3) of the Criminal Procedure Act 51 of 1977 (the CPA). The applicants by virtue of a declaratory order sought, propose to either read into or add to section 154 (3).

[3] To this end the applicants seek in their notice of motion the relief as set out below:

"1. An order declaring that, on a *proper interpretation, the protections afforded by section 154 (3) of the Criminal Procedure Act 51 of 1977 (the CPA) apply to victims of crime who are younger than 18 years of age;*

2. In the alternative, an order declaring section 154 (3) of the CPA unconstitutional and invalid to the extent that it fails to confer its protection on victims under 18, as well as an order to remedy the defect;

3. An order declaring that, on a *proper construction of the provision, child victim,*

witnesses, accused and offenders do not forfeit the protections of section 154 (3) when they reach the age of 18;
4. In the alternative, an order declaring section 154 (3) of the CPA unconstitutional and invalid to the extent that children subject to it forfeit the protection of section 154 (3) when they reach the age of 18, as well as *an order to remedy the defect."*

Background

[4] On 21 April 2015, Bertelsmann J granted the applicants an interim interdict to protect the anonymity of the 2nd respondent, KL. The preceding interim interdict formed Part A of the application, the applicants now seek a declaratory order in terms of Part B of the aforesaid application.

[5] KL, also referred to in the media and public as "Zephany Nurse", was seventeen years of age when she was informed that she had been abducted from her biological mother at Groote Schuur Hospital, by the woman whom she thought was her mother who raised her.

[6] The story of the abduction created a frenzy and took centre stage in both the media and public domain. KL was informed that the woman who she had assumed was her mother, had in fact abducted her from her biological mother. This woman was criminally charged and prosecuted for the abduction. Obviously, KL was to be a potential witness in the criminal proceedings. As such KL would gain protection of anonymity in terms of section 154 (3) as a witness. However, the problem was that even before the commencement of the criminal proceedings, KL would have turned eighteen on 28 April 2015. Thus, in terms of section 154 (3) the media were at liberty to disclose and publish her true identity. With the grant of the interim order sought in Part A of the five applicant's application, KL's anonymity was duly granted ensuring her anonymity remained in place even after she attained eighteen until the conclusive determination of Part B and any appeals thereto.

The Issue

[7] The manner in which proceedings are conducted in criminal cases is enunciated in the CPA sections 150 to 178. The section pertinent to this application as alluded

to above is section 154 (3), which I set out below for easy reference:

"154 Prohibition of publication of certain information relating to criminal proceedings

(3) No person shall publish in any manner whatsoever any information which reveals or may reveal the identity of an accused under the age of eighteen years of age or of a *witness at criminal proceedings who is under the age of eighteen years of age: Provided that the presiding judge or judicial officer may authorize 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."* [My emphasis]

[8] The existing CPA protects the identity of an accused and a witness, under the age of eighteen, who participates in criminal proceedings. This protection may be uplifted by the court, if it is just and equitable to do so, and is in the interest of a particular person. Failure to adhere to the protection afforded to these children, that being an accused or witness under the age of eighteen and involved in criminal proceedings, is a criminal offence, in terms of section 154 (5) of the CPA, which attracts a sanction of a fine or imprisonment for a period not exceeding five years, or both a fine and imprisonment.

[9] In the current situation as is set out above, the applicants propose two areas of concern as regards section 154 (3):

(a) That from a reading of section 154 (3), the child victim under the age of eighteen involved in criminal proceedings, is not afforded the anonymity, like that which is afforded to the child accused and child witnesses. The applicants submit that, if this is indeed so, then this would be inconsistent with the Constitution;

(b) Section 154 (3) only provides anonymity until the child accused or witness. turns eighteen, thereafter the anonymity falls away, and as such, this too is not consistent with the Constitution.

[10] The applicants together with the 13th and 14th respondents (the Minister) agree, that anonymity protection under this section is afforded to the child accused

and witnesses. Once afforded such protection, same ceases to exist once the child attains the age of eighteen. On the other hand, the 1st to 3rd respondents (the Media) submit that the protection is only afforded to the child accused and witnesses, and is forfeited when the child attains age eighteen.

[11] Simplistically, this application encompasses ascribing an interpretation to section 154 (3), to include the anonymity protection of child victims involved in criminal proceedings. Further, that this protection of anonymity ought not to cease at age eighteen.

The case of the applicants

[12] The default position is that the anonymity protection afforded by section 154 (3) is for the child accused and witnesses involved in criminal proceedings, so the applicants contend. This protection is not absolute, for the court is empowered to disallow the protection, if it is just and equitable and in the interest of any particular person.

[13] The applicants state that the Child Justice Act 75 of 2008 (CJA) comes into play and it dictates the procedure of criminal proceedings involving children. Thus in addition to the CPA criminal proceedings are conducted in terms of the CJA. That protection afforded to children under the age of eighteen, as accused or witnesses, is extended in criminal trial proceedings conducted in terms of the CJA. Reference is had to section 63 (6) specifically:
"63 (6) Section154 (3) of the Criminal Procedure Act applies with the charges required by the context regarding the publication of informant."

[14] The applicants submit that, as the protection of anonymity is granted to a child witness in criminal proceedings, it stands to reason that the said protection be awarded to a child victim, even though that child victim may not be a witness in the criminal proceedings. It follows, that as the child accused or witness is provided with such protection, same protection ought to be extended to a child victim. The reason advanced for such, is that the child victim could be a potential witness and if not, the child victim could be a complainant who is unable to partake in the

proceedings himself/herself. The applicants seek that the child victim be able to claim the protection afforded under section 154 (3).

[15] The applicants acknowledged that the provisions of section 153 and 154 of the CPA provide for anonymity of those involved in criminal proceedings but they submit that these provisions are not adequate for child victims, offenders and witnesses.

[16] The applicants campaign for the protection to remain in force even after the age of eighteen. To this end various experts such as: Professor Ann Skelton, an expert on child justice; Dr Giada Del Fabbro, a psychologist in the field of child and adolescent psychology; Ms Joan van Niekerk, a social worker and former director of CHILDLINE and Ms Arina Smit, a manager of NICRO clinical unit, submitted expert reports outlining the harm caused by identification by the press in cases of children. Such are:
Trauma and regression; Stigma;
Shame; and
The fear of being identified.

[17] It was submitted that Dr Giada Del Fabbro, went further in her expert report to state, that these vulnerabilities persist even after the age of eighteen.

[18] The applicants were at pains to bring it to my attention that the deferent forms of psychological harm, as alluded to in the various expert reports, was conceded by the Media respondents. They conceded further that the Media respondents identification or disclosure of child offenders would *"hinder rehabilitation and reintegration of offenders, and may engender feelings of shame and stigma".* It was acknowledged by the applicants that even in the face of the aforesaid concessions the Media respondents contended that *"it is not generally true that it is harmful to be known as* a *victim of crime".*

<u>The case of the Minister</u>
[19] The representative for the Minister, which includes the National Prosecution

Authority (NPA) being the 14th respondent, supports the applicant's case. They choose to abide by the decision of this court. However, the Minister contends that a wide interpretation ought to be ascribed to section 154 (3). Further, that in establishing the intention of the legislature, in the enactment of section 154 (3), consideration must be had of section 154 as a whole. The Minister pointed out that a child victim may be a witness in criminal proceedings, however he/she may not in all instances be called to testify as such in these proceedings.

[20] The explanation advanced by the Minister, which is highlighted by an illustration, is that a young child is a victim of physical or sexual abuse. The young child remains a victim, however the young child is represented by his/her parents in legal proceedings. The Minister argues that, it might be that the young child is not a witness or the complainant, *visa* the age of the child, and his/her competency to testify. As such, can the child victim be penalised and not receive the protection afforded, just because he/she is not an accused, witness nor a complainant?

[21] The Minister submitted that it was not the intention of the legislature not to provide for the child victim. The Minister further contended that section 154 (3), even though not expressly stated, should be interpreted to include the protection of the child victim, whether he/she participates in the relevant criminal proceedings or not.

[22] The Minister stated that on a reading of section 154 (4) mention is made of "a *person against whom...the offence in question was alleged to have been committed".* Although in general terms a person against whom an offence was committed is a complainant, that person could also be known as a victim. Nonetheless, the argument is that a child victim may not necessarily be a complainant. The associated analogy being, that it could be that a child victim of rape may not necessarily be a complainant.

[23] The suggestion advanced by the Minister, for the protection to remain in force even after the age of eighteen is premised on the basis that prejudice would be suffered by the child accused, victim or witness, if the anonymity is taken away at

eighteen.

The case for the Media

[24] The Media respondents contends that there is no merit in the declaratory relief sought by the applicants. A proper interpretation of section 154 (3) only covers a child accused and witness during criminal proceeding not exceeding eighteen years of age.

[25] In light of the fact that legislation (being section 153 and 154 read with the common law and the Press Code where one could seek an interdict or claim damages) does exist in order to protect the public at large against abuse by the press. It is submitted that the declaratory sought by the applicants is not appropriate and justified. This is so as it does not strike a balance between the rights of the media and the public to open justice, freedom of expression and the rights of the children. This would even curtail the freedom of expression of the child, the empowering representation of the child and their voice and stories in the media, so the Media respondents submit.

[26] The Media respondents contend that by virtue of the fact that they are bound by the common law together with the Press Code, they are required to exercise special care and consideration in matters of rights of dignity, privacy and reputation. They further contend that even when the child attains the age of eighteen, they are not free to reveal and publish the identity of the child. In order to do so they have to ensure that they have an overriding legitimate public interest that justifies that disclosure that impacts the rights of privacy, dignity and reputation.

[27] The Media respondents submits that open justice is the default position and that it is not for the courts to impose exception on open justice, as this falls in the domain of parliament. This indicates that exceptions to open justice rule would be permitted only on a case to case basis and where there is sufficient evidence to justify the publication.

[28] Exceptional cases have been advanced to substantiate the applicant's case, such as that of KL. However, the Media respondents contend that the relief sought is not in proportion with the various problems advanced in the cases referred to on behalf of the applicant's case. In fact, it is contended by the Media respondents, that it is exactly that common law relief, in the unusual and or exceptional case of KL, where the said relief was sought and granted.

The Rights of the parties at play

[29] *In casu* it is common cause that a number of constitutional rights are at play against each other. On the one hand are the rights of the child, especially that found in section 28 (2) being the child's best interest being paramount, the right to dignity found in section 10, the right to equality in section 9, the right to privacy in section 14 and the right to a fair trial found in section 35 (3) of the Constitution. Whilst on the other hand, the rights of the media and the public, such as the right to freedom of expression in terms of section 16 of the Constitution and the right to open justice in terms of section 152 of the CPA.

[30] Adv. Budlender SC, for the applicants, contended that the aforesaid rights need to be considered in the context of section 7 (2) of the Bill of rights, which states that: *"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."* He submitted that it is the state's duty to respect, protect, promote and fulfil the rights entrenched in the Bill of Rights. The provision of section 154 (3) is just that, which holds the state accountable to fulfil its constitutional obligation in protecting the rights and best interest of the child.

[31] Mr Budlender further submitted, that the starting point in matters concerning a child is section 28 (2) which states:

“A *child's best interest* are *of paramount importance in every matter concerning the child".*

Mr Budlender further submitted that the 'best interest right' is a self standing principled right and its 'paramountcy' stands head and shoulders above other rights in the Constitution pertaining to the child. To this end he relied on the *dicta* in **J v NDPP 2014 (2) SACR 1** (CC) **at para (35]:**

"[T]he 'best-interest' or 'paramountcy' principles creates a *right that is independent and extends beyond the recognition of other children's rights in the Constitution."*

[32] Mr Budlender stated that this right was to be afforded the *"highest value"* and that the interest of children were *"more important than anything else albeit* that *everything is [not] unimportant"* and he referred to **S v M 2008 (3) SA 232 (CC) at para [42)** and **Centre for Child Law v Minister of Justice and Constitutional Development and Others 2009 (6) SA 632 (CC) at para (29).**

[33] Mr Budlender argued that the protection afforded by section 28 (2) make provision for the *"principle of ongoing protection"* to children. This protection does not then cease when the child attains the age of eighteen, as the lifelong consequences of the child's action and experience are felt in adulthood. He referred to **J v NDPP** *supra* **at para [43]:**

"...The impact of registration is reduced in practical terms and varies according to the particular child's circumstances and age. However, this court has held that consequences for the criminal conduct of a child that extend into adulthood (such as *minimum sentences) do implicate children's rights."*

[34] The crux of Mr Budlender's submissions, in my view, is that the right entrenched in section 28 (2) was favoured over other rights in cases concerning children. It is of merit to point out that, the fact that children are the most vulnerable in our society, both physically and psychologically, there is a paramount need to guard and enforce the protection of children's rights through legislation. Legislation in turn must allow for application not on a blanket scale, in respect of these children's rights, but rather on a case to case basis in respect of each individual child being looked at individualistically.

[35] I am mindful of the warning issued by Sachs J in **S v M at para [25] and [26]** as regards the thrust of the operation of section 28 (2):

"[25]...This cannot mean that the direct or indirect impact of a measure or action

on children must in all cases oust or override all other considerations ...

[36] This court, far from holding that s28 acts as an overbearing and unrealistic trump of other rights, has declared that the best-interest injunction is capable of limitations ...In De Reuak v Director of Public Prosecution, Witwatersrand Local Division, and Others 2004 (1) SA 406 (CC) at para 55, in the context of deciding whether the definition and criminalisation of child pornography were constitutional, this court determined that s28 (2) cannot be said to assume dominance over other constitutional rights. It emphasised that '...constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This court has held that s28 (2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s36.' "

[36] Adv. Trengrove SC, for the Media respondents, pointed out that section 28 (2) not only aided with the interpretation of other rights but was a right on its own. He stressed that this right did not trump other rights nor was it an absolute right. He referred me to **S v M** *supra* **at para (25) to [26).**

[37] Mr Trengrove submitted that through the media the respondents could exercise their fundamental right to freedom of expression, this right was limited in comparison to the open justice principle. He further submitted, that the principle of open justice in criminal cases had even led to individual rights yielding to the principle of open justice. He stated that the Constitutional court in **Shinga v The State and Another 2007 (4) SA 611 (CC) at para [26]** stated:

"...open justice is an important principle in a democracy".

[38] Section 152 of the CPA encompasses the open justice principle stating:

"152 Criminal Proceedings to be conducted in open court
Except where otherwise expressly provided by this Act or any other law, criminal proceedings in any court take place in open court, and may take place on any day."

[39] Mr Trengrove argued that absent statutory exception the default position that stands is open justice. He stated that this has been endorsed by the highest court in the land and courts around the world. Open justice as a default rule was 'a *general and strong rule in favour of unrestricted publicity of any proceedings in a criminal trial'.*

[40] **In re S (FC)(A Child) [2005] 1 AC 593 para 15** reference was had to European Court of Human Rights case *Diennet v France* (1995) 21 EHRR 554, at para 33 where in the court of appeal Hale LJ pointed out the following from *Diennet:*

"The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the court can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a *fair trial, the guarantee of which is one of the fundamental principles of any democratic society..."*

The prescripts of Interpretation

[41] The principles of interpretation are aptly stated by both those representing the applicants and the Media. I find that it is summed up eloquently by Majiedt AJ in **Cool Ideas v Hubbard 2014 (4) SA 474 (CC) at para [28]**:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
(a) that statutory provisions should always be interpreted purposively;
(b) the relevant statutory provision must be properly contextualised; and
(c) all statutes must be construed consistently with the Constitution, that is where reasonable possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

[42] In addition to the aforesaid, I am also mihdful of the mandatory caveat of interpreting statutes, that the provisions of section 39 (2) ought to be initiated, and as such, I am duty bound to promote the spirit, purport and objects of the Bill of rights. See **Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC) at para [88]**.

[43] I need not lose sight of the fact that I am tasked to interpret a statute that within it carries a statutory offence. In doing so If it transpires that in my effort to do so the statutory offence is either vague or ambiguous, it is pertinent to remember that the statutory presumption ought to favour individual freedom as per the edicts of our Constitution which can never ever be taken lightly. See S v Coetzee and Others 1997 (3) SA 527 (CC) at para (14].

Interpretation of section 154 (3) of the CPA

[44] The applicants argue that on a proper interpretation of section 154 (3), it can be interpreted that the section protects the child victims from the harm of publication of their identity. In the alternative, they argue that if it does not protect the child victim, then to the extent that it does not protect the anonymity of the child victim, it is unconstitutional.

[45] The Media respondents contend that in terms of section 152 of the CPA, criminal court proceedings are to be conducted in open court. An exception to the open justice principle is section 154 (3) which affords protection to an accused and a witness, under the age of eighteen, taking part in criminal proceedings.

[46] The applicants argue that if one interprets section 154(3) purposefully it emerges that the purpose of the section is to ensure the protection, privacy and dignity of the child, which culminates in the section having been enacted to warrant the best interest of the child in criminal proceedings.

[47] The applicants contend that the default position provided by section 154 (3) is that the rights of all children, be they an accused, witness or victim in criminal proceedings, are protected as the rights of the child are paramount.

[48] The Media contend that a strict interpretation ought to be ascribed when interpreting section 154 (3). The language used is clear and unambiguous that the protection under the aforesaid section is only afforded to an accused or witness under the age of eighteen at criminal proceedings.

[49] The Media argue that the language used does not include a victim who is not a witness in criminal proceedings. The default position proposed by the Media lies in section 152, the open justice principle, meaning criminal proceedings are to be held in open court. The exception of the open justice principle lies in section 154 (3) and 153 (3), which cater for victims of sexual offences and related cases. Other than the aforesaid the open justice principle should prevail. The Media submit that as reference is had to *"towards or connection with any other person "* in section 153 (3) (a), this in itself is reference to the victim in sexual offences and related cases. The further submission made is the protection afforded in these exceptional cases, that is sections 154 (3) and 153 (3), is only during criminal proceedings.

[50] It is prudent, in my view, to appreciate that section 154, which encompasses the relevant subsection section (3), must be read with section 153 (1) of the CPA and section 63 (5) of the CJA. Section 63 (5) states:

" *63 (5) No person may be present at any sitting of* a *child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present."*

[51] Firstly, in my view, on a reading of section 63 *supra,* it covers the proceedings in the child justice courts, the procedure and conduct of trials in these courts which involve children.

[52] It is thus judicious to define the child justice court. In the CJA under definitions the following definition is ascribed to the child justice court:

"Child justice court"*·means any court provided for in the Criminal Procedure Act,*

dealing with the bail application, plea, trial or sentencing of a child;"

[53] Section 154 makes provision for a court in terms of section 153 (1) which in turn make provision for a court in terms of section 63(5).Thus, this fortifies my view that section 154 and 153 of the CPA and section 63 (5) of the CJA are to be read together. For easy reference section 153 (1) and 154 (1) read as follows:

"Circumstances in which criminal proceedings shall not take place in open court

153 (1) In addition to the provisions of section 63 (5) of the Child Justice Act, 2008, [if] it appears to any court that it would, in any criminal proceedings pending before the court, be in the interest of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be presented at such proceedings or any part thereof ...

Prohibition of publication of certain information relating to criminal proceedings

154 (1) Where a court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings or part thereof, the court may direct that no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever: Provided that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of its direction under section 153(1), in which event the court may direct that such part shall not be published."

[54] I am of the view that section 153 (1) when read with section 154 (3) and 63(5) provision is made for proceedings involving a child in a criminal court to be closed to the public unless permission is sought from the presiding officer to have same in open court. Notably section 154 places reliance on section 153 (1) " *154 (1)*

Where a *court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings ...";* and section 153 places reliance on section 63 (5);
"153(1) In addition to the provisions of section 63 (5) of the Child Justice Act,2008,[if] it appears to any court that it would, in any criminal proceedings ... be held behind closed doors ..."

[55] Noticeably, when read together, the aforementioned sections do not differentiate whether the child referred to is an accused, a witness, a complainant or a victim. The emphasis, as I gather, from the aforesaid is that the protection is afforded within the realm of criminal proceedings involving a child.

[56] Having come to the conclusion above I find that there is sufficient as I have set out *supra* to read into section 154 (3), if one applies the purposive manner of interpretation, that the child victim is therefore covered in section 154 (3). Critically though I find that the restriction to be found in section 154 (3) in fact relates to criminal court proceedings. In my view this restriction cannot be used as a blanket clause in other legal insistences, but for criminal proceedings.

[57] The purpose of chapter 22, sections 150 to 178, regulates the conduct of criminal proceedings, hence my emphasis above that the interpretation given pertains to proceedings only of a criminal nature. Thus, I find no course to declare section 154 (3) unconstitutional in the circumstances.

[58] If I am wrong in concluding as I have done above; another view is, having regard to section 28 (2), the best interest of the child, in conjunction with section 154 (3), the protection afforded is such that, in my view, other rights as proposed by the media, such as the right to freedom of expression and open court policy, would be limited, to afford the protection sought from section 154 (3) in order to accent the best interest of the child in terms of section 28 (2) of the Bill of rights. This is so because from my understanding, the purpose found in section 154 (3) is such that it heralds the best interest of the child, whether the child is an accused, complainant, witness or victim in criminal proceedings, it is that purpose that

highlights the scope of the right to be found within section 154 (3). Yet again it cannot be said that this section can be considered as being unconstitutional.

[59] Without being repetitive, I reiterate the *dicta* of Cameron J in **Centre of Child Law** at [29] *supra* with which I concur that 'the best Interest of the child' means that the child's interest are more important than anything else, but not that everything else is unimportant.

[60] My analysis of placing accent upon the best interest of the child in relation to the specific section is in light of the child's need for protection and nurturing both physically and psychologically. As adults, protectors and more so the upper most guardian of children, we are duty bound to do so in terms of the Constitution, which we hold onto so dearly.

The child's anonymity continuing even beyond eighteen years

[61] I now turn to deal with the second issue being the anonymity of the child (accused, victim, complainant and/or witness) until only age eighteen. The applicants firstly argue that one could read into the said section as inferring that it is extended beyond the age of eighteen, and that if this cannot be construed, section 154 (3) is thus unconstitutional. Whilst, the media argues that the applicants seek to overreach in their pursuit to extend the age stipulated in the statute.

[62] The long and short of this argument is that as the courts we do not have the power to change the age as stipulated in the section. That function is ascribed to the legislature. The fact that section 154 (3) provides protection until the age of eighteen as enacted by the legislature can however be declared unconstitutional as it is not just and equitable.

[63] It is evident that the legislature is specific, in its application of the protection afforded, only up to the age of eighteen. The legislature has demonstrated in the very same act, the CPA, when it sought to widen this protection. This is evident in section 153(3) and 153(4). It has also brought this to the fore in the CJA where it

extends certain protection to a child above eighteen but below twenty one years of age. I agree with this argument of the media, in addition, this is borne out in the definition of a *'Child'* in the CJA.

'"Child' *means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in the terms of Section 4 (2)"*

Section 4 (2) reads as follows:
" The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public in terms of section 97 *(4) (a)(i) (aa), in the case of a person who-*
(a) is alleged to have committed an offence when he or she was under the age of 18 years; and
(b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b),
direct that the matter be dealt with in terms of section 5(2)to (4)."

[64] The applicants highlight that the court's including the Constitutional court have time and again extended the protection of anonymity in respect of children even over the age of eighteen. See **Johncom Media Investments v M and Others 2009 (4) SA 7 (CC).**

[65] The aforesaid is correct, but in my view, this is initiated in cases where it is just and equitable for the Constitutional court to do so, that is protecting the child, as there is nothing available to cure the defect acting against the rights of the child. That being said the section had to then be amended and not read into, as is sought by the applicants. See **J v NDPP** at para [56] & [57].

[66] The reading into debate advanced by the applicants also is contrary to the applicant's argument and the premise upon which their relief is sought. Their premise as regards anonymity, in my view, is on the notion that the protection for children is not adequate, in the statutes, by way of the common law and by virtue

of the Press Code. Thus the extension of the said section is sought.

[67] I am of the view that there cannot be open ended protection in favour of children, even into their adulthood. This in my view would violate the rights of other parties and the other rights of the children themselves when they are adults. For example, as a child, having been involved in a crime, either as an accused, victim, complainant or witness, as an adult that child might seek to highlight awareness of their experience with others. This would not be possible, whether it was to bring awareness to others or purely to highlight the plight of such experience, as there would be a gag on such publication, if the protection is open ended even into adulthood. This would simply amount to stifling the adult's right of freedom of expression. This in my mind takes away an individual's right as an adult. This situation results in one right now thumping another.

[68] In applying the purposive approach in interpreting what the real purpose is of section 154 of the CPA, from the heading of the section it is gleaned that the regulation of publications in criminal proceedings is intended. In this regulation process specific persons and situations are protected. In giving credence to the language used in section 154 (3) itself, its purpose and object, in my view, was to protect the child and only the child. Not the adults, as is sought by the applicants. This in itself speaks to section 28 (2) fortifying the best interest of the child being paramount. See **R (on the application of JC) v Central Criminal Court 2014 EWCA Civ 1777 at [26] & [42]**

[69] In conclusion, I take cognisance of the fact that in certain instances the extension would work in favour of some rights, like the right to privacy, whilst working against others, like the right to freedom of expression. In this instance I am not convinced that the extension sought is permissible nor required by our Constitution.

Costs

[70] In this case the first to third respondents opposed the application. The Minister filed papers concurring with the relief sought by the applicants. The matter is such

that it is of interest to the parties and individuals in similar situations. It is also a matter that gives credence to the scope of Constitutional jurisprudence. A further consideration is the fact that the result of the application is such that it is a partial win for both the applicants, the Minister and the first to third respondents. I find that this is an appropriated case to order that each party pay their own costs. See **Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC) at (23].**

Relief

(1) It is declared that the protections afforded by section 154 (3) of the Criminal Procedure Act 51 of 1977 apply to victims of crime who are under the age of 18 years;
(2) The adult extension sought falls to be dismissed for it is neither permissible nor required by the Constitution;
(3) It is directed that the order made by this Court of 21 April 2017 to protect the identity of the second applicant will remain in force during any confirmation proceedings, applications for leave to appeal and appeals arising from this judgment;
(4) Each party is to pay their own costs in respect of Part B of this application.

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W. Hughes
Judge of the High Court Gauteng, Pretoria

For the applicants: STEVEN BUDLENDER SC
NZWISISAI DYIRAKUMUNDA
CHRIS MCCONNACHIE

For the 1st to 3rd respondents: WIM TRENGROVE SC
JANICE BLEAZARD

For the 13th and 14th respondents: M D MOHLAMONYANE