IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No: 871/2017
HC Case No: 23871/2015

In the matter between:

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

and

MEDIA 24 LIMITED	1st Respondent
INDEPENDENT NEWSPAPERS (PTY) LTD	2nd Respondent
TIMES MEDIA GROUP LIMITED	3rd Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	4th Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	5th Respondent

APPELLANTS' HEADS OF ARGUMENT

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I INTRODUCTION

1 Children who are victims, witnesses, or accused of crime are in an acutely vulnerable position. If their identities are revealed in the media or in other public forums, they face severe and life-long harms.

2 For this reason, section 154(3) of the Criminal Procedure Act[1] protects the anonymity of children in the criminal justice system. It provides that:

> *"No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused 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 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."*

3 Section 154(3) of the CPA thus makes anonymity the default position for children. Its protections may only be lifted with the permission of a court on a case-by-case basis, where the court concludes that it is "*just and equitable*" to do so.

4 This appeal raises two questions concerning the scope and duration of the protection afforded by this provision:

4.1 First, does section 154(3) permit the media to publish the identity of children who are victims of crimes, but have not yet testified or are not called to testify at trial? If so, is this consistent with the Constitution?

4.2 Second, does the protection afforded by section 154(3) of the CPA terminate as soon as a child victim, witness, or accused turns 18? If so, is this consistent with the Constitution?

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[1] Act 51 of 1977 (the CPA).

5 The importance of these issues is demonstrated by the case of the second appellant, KL. She is known to the public as Zephany Nurse, although that is not her real name.[2]

5.1 KL was abducted from hospital on 30 April 1997, when she was just 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.

5.2 KL's case highlights the need for clarity on the protections afforded by section 154(3) of the CPA. As a victim of crime who had at that stage not yet testified at trial, there was uncertainty whether section 154(3) protected KL's anonymity. Furthermore, some members of the media took the position that any protection afforded to KL under section 154(3) of the CPA would automatically terminate on her 18th birthday in April 2015.[3]

6 But KL's case is not unique. As the evidence makes clear, many other vulnerable children also face the risk of being identified in the media and the harms that flow from this because of the current lack of clarity over the application of section 154(3).

7 The appellants contend that, on a proper interpretation of section 154(3), this provision protects child victims, such as KL. Furthermore, children who are protected by this provision do not automatically forfeit this protection as soon as they turn 18. To the extent that section 154(3) does not confer these protections on children, the appellants submit that this provision is constitutionally invalid.

[2] This is the name given to KL at birth. KL has grown up with and is known by a different name.
[3] FA para 74, Record vol 1 p 41. See in particular Annexure AMS 17, Record vol 1 p 142.

8 The Minister of Justice and Correctional Services supports the appellants' interpretation of section 154(3) and abides the decision of this Court on the alternative constitutional challenge.[4]

9 By contrast, the media respondents resist both the interpretative arguments and constitutional challenge.

9.1 They contend that unless the child victim manages to approach a court to persuade it to grant her anonymity protection, there is no statutory bar to her being named and photographed unless and until she has actually testified.

9.2 They also contend that any protection that is afforded by the section to child victims, child witnesses and accused children automatically disappears when these children turn 18 – unless the child concerned somehow manages to approach a court to persuade it to grant her protection.

10 In the High Court, Hughes J held that section 154(3) does indeed protect child victims such as KL and issued a declaratory order to that effect.[5] She held also that section 154(3) does not continue to protect child victims, witnesses and accused after they turn 18 and she dismissed the appellant's alternative constitutional challenge.[6] Both issues form the subject of this appeal, with the appellants and the media respondents each having been granted the requisite leave to appeal.

11 In what follows, we deal with the following issues in turn:

11.1 The relevant factual background;

11.2 The constitutional rights at stake;

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[4] Minister's Answering Affidavit ("Minister's AA") paras 3 – 6, Record vol 4 pp 728 – 732.
[5] HC Judgment paras 51 – 60 & para 1 of the order, Record vol 6 pp 980 – 981, 984.
[6] HC Judgment paras 61 – 70 & para 2 of the order, Record vol 6 pp 983 – 984.

11.3 Why section 154(3) of the CPA must be interpreted to protect children who are victims of crime or, alternatively, must be declared unconstitutional;

11.4 Why section 154(3) of the CPA must be interpreted to protect child victims, witnesses, accused and offenders after they turn 18 or, alternatively, must be declared unconstitutional; and

11.5 The appropriate remedy.

12 Before doing so, three over-arching points must be made.

13 First, the appellants do not seek an absolute ban on the identification of the children concerned. Indeed, the appellants and the media respondents agree that the protection of children's anonymity requires a case-by-case determination by a court.

13.1 The nub of the appeal centres on what default position should exist before a court has decided on a case-by-case basis whether the best interests of a child require anonymity or publicity.

13.2 On the media's approach, the default position was that KL had no legal protection under section 154(3) of the CPA from February 2015 (when her story broke) until April 2015 (when an interim interdict was granted to protect her identity). During this period, her identity could be freely disclosed by the media, at a time when over 250 articles were being published about her case.[7] The media further contend that any protection KL may have had fell away when she turned 18 at the end of April 2015.

13.3 By contrast, on the approach of the appellants and Minister, KL's anonymity would be automatically protected by law. This would be so until the media or

[7] FA para 69, Record vol 1 39.

other interested persons approached a court and it directed, after considering her best interests and the interests of justice, that she could be identified.

14 Second, the papers are replete with extensive evidence of the harms that are caused by identifying child victims, witnesses and accused persons, both before and after they turn 18, and that would flow if anonymity were not the default position. This evidence includes expert evidence and testimonies of individuals. Yet this evidence is essentially unanswered by the media respondents.

15 Third, the approach urged by the media respondents is out of step with the protection afforded by a number of comparable open and democratic societies to their children.

15.1 Canada, New Zealand, Australia and the United Kingdom all provide some form of statutory protection for child victims, irrespective of whether they testify at trial.[8]

15.2 Moreover, Canada, New Zealand and Australia have all embraced the need for indefinite anonymity protections for children, that extend into adulthood.[9]

15.3 Yet the media respondents would have it that our Constitution, despite its unprecedented constitutional entrenchment of children's rights, does not demand at least the same protection. This is a surprising conclusion.

[8] See Appendix 1 to these heads of argument.
[9] See Appendix 2 to these heads of argument.

II FACTUAL BACKGROUND

KL's case

16 KL was 17 years old and in matric when she was "found" by her biological parents.[10] The woman that KL knew to be her mother was promptly arrested.[11]

17 A media frenzy followed.[12] While the initial coverage did not reveal KL's identity, reports suggested that the media could identify KL when she turned 18, at the end of April 2015.[13] Journalists were stationed outside KL's school and her home, forcing her into hiding.[14]

18 In March 2015, the Centre for Child Law addressed correspondence to the various media houses requesting an undertaking that they would not reveal KL's identity.[15] None of the media houses provided the undertaking.[16] Instead, some expressly stated that the protection afforded by section 154(3) of the CPA would lapse when KL turned 18 and the media would be permitted to reveal KL's identity.[17]

19 On 21 April 2015, the High Court granted an urgent interim interdict to protect KL's anonymity pending the finalisation of the present proceedings.[18] Despite this, KL has faced constant threats of being identified in the media:

19.1 In July 2015, KL's legal representative discovered by chance that a book on KL was due to be published, with a picture of KL on its front cover. The

[10] FA para 53, Record vol 1 p 34.
[11] FA para 54, Record vol 1 p 34; KL's affidavit para 3, Record vol 1 p 59.
[12] FA paras 46, 69, Record vol 1 pp 30, 39.
[13] Annexure AMS 7, Record vol 1 pp 114 – 119.
[14] KL's affidavit para 17, Record vol 1 p 62.
[15] Annexure AMS 9, Record vol 1, pp 122 – 124.
[16] FA para 60 - 65, Record vol 1 pp 35 – 38.
[17] Annexure AMS 10, Record vol 1 pp 125 – 126.
[18] Annexure AMS 24, Record vol 2 pp 222 – 224.

publishers were eventually persuaded to change the cover only after the threat of legal action.[19]

19.2 In March 2016, the *Daily Voice*, owned by the second respondent, published a series of articles including photographs of KL in which her face was partially obscured by pixellation. KL's legal representatives brought a complaint to the Press Ombudsman, who held that the articles breached the court order and the Press Code. While KL succeeded, the ruling brought her no direct relief, apart from an apology.[20]

19.3 In June 2016, *YOU* Magazine (published by the first respondent) carried a story in which it included pictures of KL's biological sister, despite the fact that it had been reported that KL and her sister look very similar, a fact that was repeated in the *YOU* article concerned.[21]

19.4 In August 2016, the *New Age* newspaper carried a story on its website reporting that KL was pregnant. The article referred to her aunt by name.[22] A number of other publications picked up and reported on the New Age story[23] and at least two also included the name of KL's aunt in their articles.[24]

20 We emphasise that, on the media respondents' interpretation, KL obtains no protection from section 154(3) of the CPA at all.

20.1 The media contends that it was free to identify her until she was formally called as a witness at the criminal trial, because she was at that stage merely a child victim of crime, not yet a witness.

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[19] Reply, Record vol 4 pp 750 – 752, para 34.5; Annexure AMS 40 – 41, pp 864 – 865.
[20] Reply, Record vol 4 pp 757 – 757 (1), para 43.2.; Annexure AMS 46, pp 873 – 876.
[21] Reply, Record vol 4 p 757, para 43.1.
[22] Supplementary affidavit, Record vol 5 pp 910 - 911, para 8; Annexure SA3, pp 921-923.
[23] Annexure SA8, Record vol 5 pp 933-4
[24] Annexure SA9, Record vol 5 p 935 and Annexure SA12, Record vol 5 p 940-941.

20.2 The media contends also that by the time she testified, in August 2016, it was too late for her to benefit from section 154(3) as she had turned 18 and had lost any protection under the section, because she was no longer a child.

20.3 This means that, on the media's interpretation, despite being an acutely vulnerable child victim of crime, KL obtains no protection at all from section 154(3) of the CPA. Indeed, even if the High Court ultimately directed that her evidence be heard in camera (as it did),[25] this would not have helped her. This is because during the period March 2015 (when the story broke) to August 2016 (when she testified), the media would have been free to reveal her name and photograph at will.

20.4 Thus, it was only the interim interdict granted in this case – and obtained with the assistance of an extensive team of child law experts, attorneys and counsel – that protected KL's identity. Without this, her identity would have been widely published, with considerable harm being suffered by her as a consequence.

Other affected children and young adults

21 KL has been relatively fortunate, in that her anonymity has been largely protected by the interim interdict. This is in contrast to MVB, another child victim of crime.

21.1 MVB's family was murdered by an axe-wielding assailant in their home and MVB was left with severe injuries.

[25] Annexure SA 2, Record vol 5 pp 919 – 920.

21.2 The media proceeded to publish MVB's name, photographs, details of the institutions where she was receiving treatment, and the name of her school.[26] This was without her consent, as she was in a coma at the time.[27]

21.3 On her release from hospital, the media continued to follow her and to publish intimate details about her life. This included paparazzi style photographs of MVB's first public outings after she left hospital.[28]

21.4 Quite remarkably, the media respondents sought to use MVB as an example of how identification in the media can be beneficial for the victims of crime.[29]

21.5 But this argument proved entirely self-defeating. MVB's curator, Louise Buikman SC, has explained that MVB in fact endured great stress and potential danger due to the media's continued interference in her life.[30] Moreover, despite a court order and complaints to the Press Council, the media have also continued to publish MVB's name, photograph and intimate details of her life.[31]

22 The need for ongoing protection, after a child turns 18, is highlighted by the examples of PN, DS and MO. These children were initially protected by section 154(3), but the media proceeded to reveal their identities as soon as they turned 18.

22.1 PN was 15 at the time he was charged with murdering Eugene Terre'blanche. His trial was held *in camera* and great efforts were made to protect his anonymity. PN turned 18 the day before judgment. He was acquitted of murder, but the media proceeded to publish his name and photograph. This

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[26] Adv Buikman SC's affidavit para 7, Record vol 5 p 809.
[27] Adv Buikman SC's affidavit para 9.1, Record vol 5 p 810.
[28] Annexure LB 2, Record vol 5 pp 835 – 836.
[29] AA para 53.3, Record vol 3 p 429.
[30] Advocate Buikman SC's Affidavit paras 31 – 34, Record vol 5 pp 818 – 820.
[31] Adv Buikman SC's affidavit paras 16 – 30, Record vol 5 pp 813 – 818.

occurred in a context of racially charged protests in PN's home town of Ventersdorp and exposed PN to great danger. PN has left Ventersdorp and cannot be traced.[32]

22.2 DS was also 15 when he was arrested on charges of murder and rape. His case attracted substantial media attention, but his identity was largely protected throughout the trial. He turned 18 two days after sentencing. The day before his 18th birthday, posters announced that his identity would be revealed the next day. On his birthday, the media published his name and photographs, under headlines such as "*Meet [DS], the Griekwastad Killer*".[33]

22.3 MO was 17 years old when he first appeared on charges of culpable homicide. He turned 18 during the trial and the magistrate ordered that his identity should not be revealed. Despite this order, local newspapers proceeded to publish his name and other identifying information.[34]

23 These experiences stand in contrast with two young women, P and X.[35] They were both child offenders, convicted of very serious offences. Despite widespread media coverage of both cases, neither P nor X were named by the media. This appears to have been largely fortuitous — P and X turned 18 long after their court proceedings had concluded, when media interest had subsided. As a result, they were spared the ordeal of being identified in the media when they reached adulthood.

23.1 Their experiences show that anonymity can allow child victims, witnesses and offenders the opportunity to overcome trauma and live productive lives.

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[32] SFA paras 33 – 44, Record vol 1 pp 169 – 172; William Bird's affidavit paras 19 – 28, Record vol 2 pp 359 – 362.
[33] SFA paras 45 – 52, Record vol 1 pp 171 – 175; DS's affidavit, Record vol 2 pp 269 – 274.
[34] SFA paras 53 – 60, Record vol 1 pp 175 – 178; MO's affidavit, Record vol 2 pp 394 – 398.
[35] SFA paras 61 – 75, Record vol 1 pp 178 – 182; P's affidavit, Record vol 2 pp 290 – 295; X's affidavit, Record vol 2 pp 310 – 316.

23.2 However, their examples also indicate that this anonymity remains precarious so long as the media believes that section 154(3) does not protect child victims, witnesses, accused and offenders into adulthood.

24 These examples are consistent with the extensive evidence of four leading experts:

24.1 Professor Ann Skelton, director of the Centre for Child Law, member of the UN Committee on the Rights of the Child, and an expert on child justice;[36]

24.2 Dr Giada Del Fabbro, a psychologist with considerable clinical, assessment and therapeutic experience in the field of child and adolescent psychology;[37]

24.3 Ms Joan van Niekerk, former director of Childline and a social worker who has worked with thousands of child victims and many child offenders;[38] and

24.4 Ms Arina Smit, manager of NICRO's clinical unit, who has worked with over a thousand child offenders over the past 17 years.[39]

25 We deal with their evidence below. For now, we emphasise only that their evidence of the harms that are caused by identification, and that would flow if anonymity were not the default position, is effectively unanswered by the media respondents.

[36] FA, SFA and Replying Affidavit.
[37] Dr Del Fabbro's report, Record vol 2 pp 331 – 349; Annexure AMS 50, Record vol 5 pp 889 – 893.
[38] Ms Van Niekerk's affidavit, Record vol 2 pp 296 – 309.
[39] Ms Smit's affidavit, Record vol 2 pp 317 – 330.

III THE BALANCE BETWEEN COMPETING RIGHTS

26 Protecting the anonymity of child victims, witnesses and offenders involves the balancing of two sets of rights and interests. On the one side of the scales are the constitutional rights of children. On the other, the right to freedom of expression and the principle of open justice.

Children's rights

27 The starting point is section 28(2) of the Constitution which provides that the best interests of the child are of "*paramount importance in every matter concerning the child."*

28 This provision is both a constitutional principle and a self-standing right.[40] It requires that children's interests are to be afforded the "*highest value*",[41] meaning that their interests are "*more important than anything else"* albeit that "*everything else is [not] unimportant.*"[42]

29 A key element of this right is that the protection afforded by the section 28(2) does not terminate when a child turns 18. We will refer to this as the **"***principle of ongoing protection***"**. This principle entails that the life-long consequences of a child's actions or experiences are also the proper concern of section 28(2), even if those consequences are only felt in adulthood.

30 The Constitutional Court has consistently adopted this approach:

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[40] *J v NDPP* 2014 (2) SACR 1 (CC) at para 35 ("*J v NDPP*"). See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) (Fitzpatrick) at para 17;
[41] *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) at para 42.
[42] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at para 29 ("Centre for Child Law").

30.1 In ***J v NDPP***,[43] the Court struck down a statutory provision which required the compulsory inclusion of children who committed sexual offences on the Sexual Offences Register.

30.2 The Court held that, while the consequences of registration would largely be experienced in adulthood, those consequences were the proper concern of section 28(2):

> *"[T]his 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. So, in the case of J, the fact that he was a child when the offence was committed means that his rights as a child are implicated, albeit that the consequences of registration will, for the most part, only be felt as an adult."*[44]

30.3 ***J*** affirmed and made explicit the principle of ongoing protection that was implicit in the Court's previous judgment in ***Centre for Child Law***.

30.4 In ***Centre for Child Law***[45] the Court held that the application of minimum sentencing laws to offenders who were 16 and 17 years old at the time of the offence was unconstitutional, even if those offenders were over the age of 18 at the time of sentencing.

30.5 Most recently, in ***MEC for Health v DZ*****,** the Court directed a minor child with a claim for damages had to have his identity kept confidential:

> *"[T]he minor victim in this case ought to be anonymous. This is in the best interests of the child, not merely in light of the child's right to privacy, but because when the child 'becomes an adult the many physical disabilities suffered by the [child] will result in vulnerability.'*[46]

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[43] *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC).
[44] Ibid at para 43 (emphasis added)
[45] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC).
[46] *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) at fn 1

30.6 The effect of these decisions is that, for the purposes of section 28(2), what matters is not when the consequences are felt, but whether those consequences flow from actions or events occurring during childhood.

31 The underlying reasons for this principle have equal application to all children, including victims and witnesses of crime.

31.1 As the Constitutional Court has recognised, the consequences of childhood experiences and conduct that are felt in adulthood tend to be more severe, because of the greater physical and psychological vulnerability of the child.[47]

31.2 Moreover, the Court has acknowledged that a child has lesser moral responsibility for what they do or what happens to them in childhood. For this reason, it is impermissible to unduly punish an offender for actions in their childhood. There is equally a need to protect child victims and witnesses from the consequences of crimes committed against them or in their presence, for which they are blameless. These victims and witnesses must be given the same prospect of "*hope and possibility"* that is afforded to child offenders.[48]

32 The section 14 right to privacy is also implicated when a child victim, witness or accused is stripped of their anonymity. Where a child has been a victim, witness or perpetrator of a crime, that child's identity will be a deeply private fact, the disclosure of which would cause mental distress and injury to any reasonable person in their position.[49]

33 A child's right to privacy is closely intertwined with the section 10 right to human dignity. As the Constitutional Court has explained in a case concerning children,

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[47] Ibid at paras 26 – 27.
[48] Ibid at para 27.
[49] *National Media Ltd and Another v Jooste* 1996 (3) SA 262 (A) at 270I-J.

"*[a]n individual's human dignity comprises not only how he or she values himself or herself, but also includes how others value him or her.*[50] The Court has consistently held that public shaming, stigma and humiliation of children are antithetical to the right to human dignity.[51]

34 The anonymity protections afforded by section 154(3) of the CPA also implicate other constitutional rights, including the section 9 right to equality and the section 35(3) fair trial rights. We return to discuss these rights in greater detail below.

35 We emphasise that the state has a duty to take effective legislative and other measures to protect these constitutional rights:

35.1 In ***Glenister II***, the Court held that "*Implicit in section 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.*[52]

35.2 In ***S v M***,[53] the Court explained that section 28(2) of the Constitution requires the law to make the "*best efforts*" to minimise harms to children and maximise their opportunities for a good life;

> *"No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. … [S]ection 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk…*"

36 Thus, in considering whether section 154(3) meets the constitutional standard, this Court will consider whether this provision and other legal mechanisms provide

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[50] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para 56.
[51] *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC) at para 44.
[52] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 189.
[53] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at paras 19 – 20.

"*effective*" protection of the children concerned and make the "*best efforts*" to minimise harms to them. As we demonstrate, on the media respondents' interpretation, this is certainly not the case.

Freedom of expression and open justice

37 The importance of freedom of expression and open justice in our constitutional scheme cannot be doubted. But the Constitutional Court has consistently recognised that anonymity protections are not a significant incursion into either principle. Instead, anonymity enables these rights to be balanced against the rights of vulnerable people.

38 The Constitutional Court has itself imposed anonymity protections as a means to hold the balance between freedom of expression, open justice, and the rights of vulnerable groups.

38.1 ***Johncom Media v M***,[54] concerned a challenge to section 12 of the Divorce Act, which prohibited the publication of any information arising from divorce proceedings, but allowed for publication of the names of parties to the proceedings, including affected children.

38.2 The Constitutional Court held that this blanket prohibition on any information arising from these proceedings was an unjustified limitation of the right to media freedom, a component of freedom of expression.

38.3 The Court therefore struck down section 12, but substituted it with an order in the following terms, closely resembling section 154(3) of the CPA:

> *"Subject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that may reveal the*

[54] *Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC).

> *identity of, any party or child in any divorce proceeding before any court is prohibited."*[55]

38.4 The Court held that this anonymity protection struck the best possible balance between freedom of expression, on the one hand, and the rights to privacy and best interests of the child on the other.[56]

38.5 Furthermore, the Court stressed that by allowing courts to have the final say on whether to lift these anonymity protections, this was in keeping with the court's role as upper guardian of the child.[57]

39 As was alluded to in ***Johncom***, the use of anonymization has become a standard practice in judgments where children are involved.[58] This allows the courts to protect the rights of children while still allowing the media to report fully on the facts and circumstances of the case, insofar as they do not identify the child.

40 Anonymization is also a requirement of Children's Court proceedings. Section 74 of the Children's Act 38 of 2005 establishes automatic and indefinite anonymity protections which may only be lifted with the permission of the court:

> *"No person may, without the permission of a court, in any manner publish any information relating to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings."*

41 This demonstrates that anonymity protections are already a common feature of our law and are the preferred means to protect vulnerable individuals without unduly interfering with media freedom and open justice.

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[55] Ibid at para 45.
[56] Ibid at para 42.
[57] Ibid at para 43.
[58] See, for example, *J v National Director of Public Prosecutions and Another* 2014 (2) SACR 1 (CC) at fn 3; *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* 2008 (3) SA 183 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

IV PROTECTION OF CHILD VICTIMS

42 The media respondents assert that child victims who do not testify at trial should receive no protection under section 154(3). On this approach, a 16-year-old boy who viciously beats his 16-year-old girlfriend could not be identified in the media, but the 16-year-old girl could be freely named and photographed.

43 To avoid this anomaly, we submit that the protection of section 154(3) must extend to child victims. This ensures that the courts, rather than individuals or media houses, have the power to determine whether to lift this anonymity protection on a case-by-case basis.

The need to protect child victims

44 The expert evidence shows that children who are victims of crime suffer a range of psychological harms by being identified in the media, including further trauma, stigma, shame, and fear.[59]

45 These psychological harms affect child victims' ability to recover and return to normal life:

45.1 Dr Del Fabbro, an expert in child psychology, explains that identification can re-traumatise children and undo the long-term healing process.[60]

45.2 The fear of identification can also prevent child victims from reintegrating into their communities. The media frenzy surrounding KL in early 2015 forced her to move to a safe house and required her to hide from journalists camped

[59] SFA paras 83 – 107, Record vol 1 pp 185 – 194.
[60] Dr Del Fabbro's Report paras 27 – 38, Record vol 3 pp 340 – 341.

outside her school.[61] MVB was tailed by photographers at her first public outings and the pictures were published in *You* and *Huisgenoot*.[62]

45.3 The threat of being identified in the media can also prevent a child victim from trusting those around her and from obtaining adequate family support.[63] This is what happened to KL when private photographs of her first meeting with her biological family were leaked to the *Daily Voice*. This has complicated KL's relationship with her biological family.[64]

46 The threat of being identified in the media can also discourage the reporting of crimes against children and discourage child victims from cooperating with investigators. In ***AB v Bragg***,[65] the Supreme Court of Canada reviewed the literature on anonymity protections for child victims and concluded

> *"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 authorities."*[66]

47 This is confirmed by Ms Joan Van Niekerk, a former director of Childline with 27 years' experience working with child victims.[67]

48 The media respondents concede the vast majority of this expert evidence on the harms of identification:

48.1 They do not dispute the evidence on the different forms of psychological harm arising from identification.[68]

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[61] KL's affidavit para 17, Record vol 1 p 62.
[62] Affidavit of Louse Buikman SC para 14, Record vol 5, p 812; Annexure LB 2, Record vol 5 pp 835 – 836.
[63] Dr Del Fabbro's Report para 23, Record vol 3 p 338.
[64] Reply para 43.2, Record vol 4 p 757; Annexure AMS 46, Record vol 5, pp 873 – 876.
[65] *AB v Bragg* [2012] 2 SCR 567.
[66] Ibid at para 26.
[67] Ms Van Niekerk's affidavit para 12, Record vol 2 p 299.
[68] AA para 149.1, Record vol 3 pp 484 – 485.

48.2 They also admit that victims of sexual offences and child abuse would generally suffer severe harms if identified by the media.[69]

49 However, the media respondents deny that child victims suffer harm as a result of having their identities revealed in the media or other public forums. They contend that "*it is not generally true that it is harmful to be known as a victim of a crime*".[70]

49.1 The respondents put up no expert evidence of their own to support these sweeping claims and denials. Instead, these claims are made by a deponent with no expertise in this area – she is a legal editor[71] – who merely relies on a collection of press clippings. This is plainly unsustainable:

> *"[W]here one party has put forward cogent expert documentary evidence indicating that the impugned provisions do not pass constitutional muster, the party seeking to uphold the validity of those provisions must advance evidence of a similar nature if he or she is to have any hope of success…."*[72]

49.2 Sweeping statements by an unqualified deponent, hypothetical examples and press clippings are not "*evidence of a similar nature*" in response to expert evidence. The appellants' expert evidence is therefore unchallenged.

The absence of effective alternative protection

50 There is no adequate or effective alternative to section 154(3) of the CPA to protect the anonymity of child victims such as KL and MVB.

51 The common law remedy of an interdict against publication is an extraordinarily difficult and unrealistic prospect in the vast majority of cases.

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[69] AA para 49, Record vol 3 pp 425 – 426.
[70] AA para 45, Record vol 3 p 424.
[71] AA para 2, Record vol 3 p 405.
[72] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para 96.

51.1 First, as KL's case further demonstrates, the time, effort, and resources necessary to launch an application for interdictory relief against large media organisations are substantial, putting this remedy beyond the reach of all but the rich or the fortunate few who have access to free and sufficiently skilled legal assistance.[73] This is especially the case given that there is no general system of legal aid for civil litigation in this country.[74]

51.2 Second, there is no way for a child to know in advance that a particular media house or set of media houses may be considering identifying her. KL and MVB were never given advance notice of the publication of identifying information. KL did not know that a book on her life was being prepared for publication, including identifying information. It was only by chance that this was discovered before publication.[75]

51.3 Third, in bringing litigation to prevent publication, litigants often expose themselves to greater publicity and media attention.

52 It is therefore unrealistic and inconsistent with the Constitution to place the onus and the risk on some of the most vulnerable members of society to bring an application to court to obtain protection. Indeed, in ***Johncom***, the Court rejected this very approach:

> *"[It] would require, in many cases, the party to be prejudiced to place the relevant arguments before the High Court so that a decision can be made. The applicant's position would thus unduly favour the publisher and place no responsibility on those intending to publish. It would not accord appropriate protection to the indigent litigant."*[76]

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[73] SFA para 150, Record vol 2 pp 209 – 211.
[74] SFA para 150.6, Record vol 2 p 210.
[75] Reply para 34.5, Record vol 4 pp 750 – 751; Annexure AMS 40, Record vol 5 pp 864.
[76] *Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC) at para 38. See also *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) at para 37:
"*It might be argued that this remedy is already available, since no provision precludes the family from approaching a court with an urgent application… Although this may be true in a formal sense, it is not true in a functional sense. It is unfair for the law to empower the state to initiate the removal*

53 If a child victim does not obtain an interdict and publication of the identifying information occurs, all that is then left is a common law damages claim.[77] But a damages award can never undo the harm that is done to a child by identification.

54 The remaining provisions of section 153 and 154 of the CPA also offer little or no protection for child victims. also offer little or no protection for child victims. They only restrict publication in a limited range of circumstances where criminal trials are held *in camera*. They do not protect the anonymity of all child victims.[78] They also offer no protection before the trial or if the trial does not proceed.

55 Finally, self-regulation under the voluntary Press Code offers limited protection to child victims:[79]

55.1 The Press Code only applies to print and online media organisations that have voluntarily agreed to be bound. It has no application to news outlets, such as *The New Age,* that are not members or social media.[80]

55.2 The provisions of the Code which deal with child victims of crime do not expressly protect all child victims of crime from being identified.[81]

55.3 The complaints procedure under the Press Code is only backward-looking and does not offer any immediate way to prevent harmful publication from occurring. Both KL and MVB have both brought complaints about being

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of a child from her or his family, but to place the onus on the affected family to initiate the review of that removal. By requiring the family to bear, at least initially, the cost of pursuing review proceedings, the impugned provisions are too restrictive of children's rights protected under section 28(1)(b) and (2), as well as the right of access to courts in section 34".

[77] SFA, Record vol 2 p 211, paras 150.7 – 150.9.
[78] See Reply paras 59 – 64, Record vol 4 p 762 – 766.
[79] Reply paras 66 – 73, Record vol 4 pp 766 – 770.
[80] Reply para 72, Record vol 4 p 769.
[81] Reply para 67, Record vol 4 p 766 – 767.

identified in the media. However, these complaints were unable to prevent the harm from occurring.[82]

55.4 Self-regulation under the Press Code is thus no replacement for statutory protection, as the media respondents' expert, Mr Krüger, concedes.[83]

56 The only conclusion that can be drawn is that if section 154(3) does not protect the rights of child victims, there is no effective mechanism that does so.

The proper interpretation of section 154(3)

57 Section 39(2) of the Constitution mandates that statutes be interpreted in light of the Constitution. This requires that statutory provisions must be interpreted in a way that avoids limiting rights. They must also be interpreted in a manner that best promotes rights, provided that interpretation is not unduly strained.[84]

58 Section 154(3) of the CPA gives expression to the state's positive duties to protect children's rights and to secure their best interests in the criminal process.

59 When interpreted in light of this protective purpose, the phrase "*witness at criminal proceedings*" in section 154(3) is reasonably capable of an interpretation that applies to all child victims of crime.

60 All victims are "*witnesses*" to the crimes they have suffered, and all child victims could potentially be called as witnesses at the trial or in future criminal proceedings. The mere fact that a child victim has not yet been called to testify at trial does not change this.

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[82] KL's complaint: Reply para 43, Record vol 4 p 757; Annexure AMS 47, Record vol 5 pp 877 - 881. MVB's complaint: Adv Buikman SC's affidavit para 21, Record vol 5 p 815.
[83] Affidavit of Franz Krüger, para 29, Record vol 4 pp 715 – 716.
[84] *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA) at para 10; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at paras 87-89.

61 The phrase "*at criminal proceedings*" merely serves as confirmation that section 154(3) applies to criminal matters. This phrase does not entail that the protection afforded by section 154(3) only applies from the moment that a child victim takes the stand at trial. Such an approach would give rise to extraordinary and arbitrary anomalies:

61.1 It would allow the media to freely identify child victims at any time before they are called as witnesses at the criminal proceedings.

61.2 It would also mean that where a victim was willing and able to testify, but the trial does not run, the accused pleads guilty, or the victim's evidence is not ultimately required, the victim then obtains no confidentiality protection.

61.3 Similarly, if the victim is deemed too young or vulnerable or too traumatised to testify, the victim also obtains no confidentiality.

62 There is no basis for thinking that Parliament wanted or was prepared to allow such arbitrary treatment of vulnerable child victims. Indeed, the Minister confirms that this was never the intention and that section 154(3) should be interpreted as applying to all child victims.[85]

The constitutional challenge

Limitation of rights

63 If this Court nevertheless finds that section 154(3) cannot be reasonably interpreted as applying to child victims of crime, we submit that section 154(3) is unconstitutional to the extent that it excludes these children.

[85] Minister's AA para 3.5, Record vol 3 p 730.

64 First, this exclusion breaches section 28(2) of the Constitution.

64.1 In light of the extensive harms of public identification, it is not in the best interests of child victims to offer them no protection under section 154(3) of the CPA while affording full, automatic protection to accused and witnesses, irrespective of the severity of the crimes.

64.2 Therefore, the law must protect child victims of crime as a default position, just as it protects these other vulnerable categories of children, by providing anonymity protection as a default measure.

64.3 It is not in the best interests of child victims to place the full burden and onus on these children to approach a court to obtain legal protection. Their best interests are properly protected by making protection of anonymity the default, unless the media approaches a court to lift this protection.

65 Second, this exclusion breaches the rights to human dignity and privacy in sections 10 and 14 of the Constitution. Children who are victims of crimes should not be forced to carry the public stigma and shame of victimhood throughout their lives. Nor should they be required to have their private concerns and matters rendered generally accessible to the public. The law must protect the dignity and privacy of child victims of crime, just as it protects the dignity and privacy of other child witnesses and children accused of committing crimes.

66 Third, this exclusion is also irrational and in breach of section 9(1). The exclusion of child victims is not rationally connected to the protective purpose of section 154(3). Child victims are as vulnerable, if not more so, than accused and witnesses and are

therefore as deserving as protection. The irrational denial of equal protection to individuals who are equally vulnerable limits section 9(1) of the Constitution.[86]

No justification under section 36 of the Constitution

67 There is no discernible purpose for excluding child victims from the protection afforded by section 154(3), particularly as protection is granted automatically and unconditionally to all children accused of crimes. Indeed, the Minister has effectively conceded this point, as he supports the appellants' interpretation of section 154(3) and abides the decision of this Court on the constitutional challenge.

68 It is only the media respondents that seek to justify the limitation. They contend that it is permissible to limit child victims' rights in order to promote media freedom and open justice.

69 But denying child victims the protection of section 154(3) has little role in promoting media freedom or open justice. The media is capable of attending criminal trials and reporting fully and accurately on events without using the names of child victims.

69.1 The media is fully capable of reporting on crimes involving children by using pseudonyms or other devices to protect their anonymity. KL's case is a good example. For the most part, journalists have avoided revealing her identity, yet her case has been covered in extensive detail in the media and has attracted enormous public interest.

69.2 The Constitutional Court has noted that pseudonyms are an appropriate means to protect vulnerable persons. In ***NM v Smith***, the Court addressed a breach of privacy claim brought following the naming of three HIV-positive women in a book. The Court held that the respondents could have used

[86] *Sarrahwitz v Maritz NO and Another* 2015 (4) SA 491 (CC) at para 49.

pseudonyms instead of real names as the *"use of pseudonyms would not have rendered the book less authentic*".[87]

69.3 The media asserts that the names and photographs of victims give stories "*human interest value*".[88] But, this Court has repeatedly distinguished between what the public finds interesting and what is in the public interest:

> *"Prurient or morbid public curiosity, no matter how widespread, about things which are ordinarily regarded as private or do not really concern the public cannot be the test [for public interest]."*[89]

70 There is also a less restrictive means available to advance media freedom and open justice while protecting the rights of these children. That less restrictive means is already contained in section 154(3): the anonymity of child victims should be protected by default, while allowing the courts to lift this protection where reporting on a child's identity is found to be in the public interest. The Constitutional Court reached this conclusion in ***Johncom*** when it held that anonymity protections in divorce proceedings struck the best possible balance between these rights.[90]

71 The Supreme Court of Canada has repeatedly held that anonymity protections do not impose any significant constraint on media freedom or open justice.

71.1 In ***Canadian Newspapers Co v Canada***[91] the Court upheld a ban on the publication of the identities of victims of sexual offences, holding that:

> *"While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by [prohibiting identity disclosure] on the media's rights are minimal. . . . Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct*

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[87] *NM v Smith* 2007 (5) SA 250 (CC) at paras 45-46
[88] AA paras 79 – 90, Record vol 3 pp 444 - 456. Reply paras 74 - 80, Record vol 4 pp 770 – 774.
[89] *Independent Newspapers Holdings Ltd and Others v Suliman* [2004] 3 All SA 137 (SCA) at paras 42– 43.
[90] *Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC) at paras 30, 42.
[91] *Canadian Newspapers Co v Canada (Attorney General)* [1988] 2 SCR 122.

of the trial. Only information likely to reveal the complainant's identity is concealed from the public."[92]

71.2 In ***FN (RE)***[93] the Court acknowledged that anonymity protections for children are among the permissible exceptions to the open justice principle, adding that the identity of a child is a mere *"sliver of information"* that does not significantly advance reporting.[94]

71.3 In ***AB v Bragg***,[95] the Court concluded that anonymity protections for children are a "*minimal*" incursion on freedom of expression and open justice.[96]

72 Other open and democratic societies have imposed explicit and automatic anonymity protections for child victims. Canada, New Zealand, Australia and the United Kingdom all provide some form of statutory protection for child victims, irrespective of whether they testify at trial. The relevant statutory provisions are described in **Appendix 1** to these heads of argument.

72.1 In these countries, the 16-year-old girl who is beaten by her 16-year-old boyfriend and who does not testify would receive automatic anonymity protection. But under section 154(3), as the media interprets it, she would receive no protection at all.

72.2 None of these other countries have an entrenched constitutional right like section 28(2) of our Constitution. Given this, the obligation to create similar protections for child victims in South Africa is much greater.

73 If the media's interpretation of section 154(3) is correct, the section is unconstitutional.

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[92] Ibid at 133 (emphasis added).
[93] *FN (RE)* [2000] 1 SCR 880.
[94] Ibid at para 12.
[95] *AB v Bragg* [2012] 2 SCR 567.
[96] Ibid at para 28.

V ONGOING PROTECTION AFTER A CHILD TURNS 18

74 A child's need for protection from public identification does not stop when they turn 18. Ongoing protection is needed under section 154(3) in order to ensure that their rights are secured into adulthood.

The need for ongoing protection

75 The expert evidence outlines three important reasons for protecting the anonymity of all child victims, witnesses and offenders into adulthood:

75.1 First, the vulnerabilities of childhood persist after 18, particularly where a child's psychological development has been disrupted by the combined traumas of crime and participation in the criminal process.[97]

75.2 Second, childhood traumas leave deep and lasting psychological wounds that may be reopened in adulthood.[98] As a result, a child victim, witness or offender who is publicly identified in adulthood will generally experience greater psychological harm than an adult victim, witness or offender who is publicly identified.[99]

75.3 Third, the threat of identification after turning 18 directly harms children. A child who fears being identified in the media when they turn 18 may experience added stress and trauma, as is clearly expressed in KL's affidavit. As a result, ongoing protection into adulthood is needed in order to reassure and protect children while they are still under the age of 18.[100]

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[97] Dr Del Fabbro's report para 25, Record vol 2 p 340.
[98] Dr Del Fabbro's report paras 27 – 33, Record vol 2 pp 340 – 341.
[99] Dr Del Fabbro's report paras 26, Record vol 2 pp 340.
[100] SFA para 84.2, Record vol 1 p 186.

76 The risk of identification in adulthood threatens to undermine the lifelong healing process for victims and witnesses who have suffered childhood trauma. It also creates a further obstacle to child victims or witnesses coming forward to report crimes or to cooperate with the authorities.[101]

77 Child offenders are also at risk of substantial harm if they are identified after turning 18. The media respondents concede all of the expert evidence on this issue.[102]

78 Child offenders face the problem of the "ticking clock", as they are at risk of being identified when they turn 18, as happened to PN, DS, and MO.[103]

78.1 This creates great pressure on the child's legal practitioner to seek to conclude the trial as quickly as possible, before the child turns 18.[104]

78.2 This can compromise the right to a fair trial because speed, rather than the full exploration of the facts and the legal defences, may seem to be of the essence in order to bring proceedings to an end before the child turns 18.[105]

78.3 The threat of being identified in the media at 18 also creates a difficult environment for a child accused who must attend court during the trial. This can significantly hinder a child's ability to participate in criminal proceedings.[106]

79 The long-term rehabilitation and reintegration of child offenders is also directly harmed by identification in the media in adulthood.[107]

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[101] Ms Van Niekerk's affidavit para 12, Record vol 2 p 299.
[102] AA paras 102, 151; Record vol 3 pp 456, 487 – 488.
[103] SFA paras 117 – 124, Record vol 2 pp 197 – 200.
[104] SFA para 119, Record vol 2 p 198.
[105] SFA para 120, Record vol 2 p 198.
[106] SFA paras 122 – 123, Record vol 2 pp 199 – 200.
[107] SFA paras 125 – 139, Record vol 2 pp 201 – 205.

79.1 As the Constitutional Court acknowledged in ***Centre for Child Law***,[108] the law treats child offenders differently to adult offenders because it recognises that children have a greater capacity for rehabilitation. In ***J v NDPP***,[109] the Court further recognised that a child offenders' rehabilitation and reintegration is undermined when a child is publicly branded as an offender in adulthood.

79.2 The expert evidence indicates that stigmatisation and shame are among the most significant barriers to a child's successful rehabilitation.[110] Publication of a child's identity brands them as a criminal in the eyes of the public.[111] Publicity can also cause an offender to internalise their portrayal as a criminal, adding a further obstacle to the rehabilitation process.[112]

79.3 Identification in the media can also impede the therapy process that is necessary for rehabilitation. This process will often continue well into adulthood:[113]

79.4 The long-term prospects of reintegration into the community are also severely threatened if the child offender's anonymity is removed in adulthood.[114]

80 As the cases of P and X demonstrate, continued anonymity into adulthood can make rehabilitation and reintegration possible. Both children remained anonymous and were able to finish their schooling. Both are now married and have their own children. This was made possible because they were able to control who knew about their past, allowing them to maintain positive relationships and trust.[115]

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[108] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at para 27.
[109] *J v NDPP* 2014 (2) SACR 1 (CC) at para 44.
[110] SFA paras 127 – 131, Record vol 2 pp 201 – 202.
[111] Ms Smit's affidavit para 13, Record vol 2 pp 321 – 322.
[112] Dr Del Fabbro's report paras 17 – 18, Record vol 2 p 337.
[113] SFA paras 129 – 130, Record vol 2 pp 201 – 202.
[114] SFA paras 133 – 139, Record vol 2 pp 203 - 205; Ms Smit's affidavit para 25, Record vol 2 p 326.
[115] P's affidavit para 19, Record vol 2 p 293. See also the observations of Ms Van Niekerk on P's case, para 20, Record vol 2 p 305. Affidavit of X paras 13 – 15, Record vol 2 p 314.

The absence of effective alternative protection

81 The inadequacies of alternative protections have been addressed in detail in considering the need for protection for child victims. Again, it is clear there is no adequate or effective alternative to section 154(3) of the CPA to protect the child victims, witnesses, accused and offenders after they turn 18.

82 There are three deficiencies in the protections afforded by the other provisions of the CPA to child victims, witnesses, accused and offenders after they turn 18.

82.1 First, the provisions of section 153 and section 154 do not provide tools to protect the anonymity of child victims, witnesses and offenders after they turn 18 and while the trial is ongoing.

82.1.1 For child offenders, the only available protection is an order under sections 153(1) and 154(1) of the CPA, declaring the proceedings in camera and making a specific order that the accused's identity should not be revealed. But section 154(1) makes clear that an accused's identity should ordinarily be revealed, requiring the child to demonstrate special circumstances for ongoing anonymity.

82.1.2 In the case of child victims who do not testify at the trial, sections 153 and 154 offer no specific anonymity protections at all, except in cases of sexual offences and extortion (153(3) read with 154(2)). The only possibility available is to declare the proceedings in camera in their entirety, however, even then only information arising from the proceedings would be restricted.

82.1.3 Finally, in the case of witnesses, the Court may use section 153(2) to prevent publication of the witness's identity either indefinitely or "*for a*

particular period" if it appears that there is a likelihood of harm. However, this protection is dependent on the court and the parties being alive to the need for this protection.

82.2 Second, these other CPA provisions only provide protection for so long as the criminal proceedings are ongoing. They do not provide protection once the proceedings have closed. As a result, adults such as P and X would not receive any protection under these provisions.

82.3 Third, these other CPA anonymity protections are blunt instruments that require the proceedings to be declared in camera before a person's anonymity can be protected. That is a more severe restriction of the rights to media freedom and open courts than the far more limited section 154(3).

83 The limitations of interdictory relief and other common law remedies have already been addressed in extensive detail above.[116]

84 Similarly, the Press Code is insufficient by itself to provide adequate protection. After a child has turned 18, the various protections afforded to children are no longer available.[117] When this is combined with the backward-looking nature of the complaints mechanism, the inadequacy of the remedies available, and the fact that the Press Code only covers some members of the print and online media, it is clear that the Press Code is no adequate safeguard.

The proper interpretation of section 154(3)

85 On a proper interpretation of section 154(3), we submit that children who are subject to its protection do not lose that protection when they turn 18.

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[116] See paragraphs 50-55 above, at pages 20-22.
[117] See paragraph 8 of the Press Code, quoted in AA para 71, Record vol 3 p 441.

85.1 The section must be interpreted in line with the principle of ongoing protection explained above: the principle that the consequences of childhood actions or experiences that are felt in adulthood are also the proper concern of section 28(2) of the Constitution.[118]

85.2 When read in this light, section 154(3) is certainly capable of an interpretation that does not strip children of protection as soon as they turn 18.

85.3 The text of section 154(3) states that persons "*under the age of eighteen years*" receive automatic protection of their anonymity. This age-based qualification determines when a person receives this protection. It does not prescribe when this protection ends.

85.4 An interpretation that ensures ongoing protection better promotes section 28(2) of the Constitution. It protects child victims, witnesses, accused and offenders from the severe harms of identification addressed above.

86 Furthermore, when read with the Child Justice Act, it is clear that section 154(3) must continue to apply to child offenders and accused.

86.1 Section 63(6) of the CJA makes section 154(3) of the CPA applicable to proceedings in the child justice courts "*with the changes required by the context regarding the publication of information*". The courts have held that when a child offender is tried in terms of the Child Justice Act, the trial must continue under that Act even after the child turns 18.

86.2 For example, in ***S v Melapi***,[119] the Court emphasised that section 4(1) of the Act makes it clear that the Act applies to any offender who was under the age

[118] *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC) at para 43. See the analysis at paragraph 29, page 12 above.
[119] 2014 (1) SACR 363 (GP).

of 18 years when he or she was handed a written notice, served with a summons, or arrested, even if they are over the age of 18 at the time of the trial. The Court held that to strip a child of the protections of the CJA would render section 4(1) nugatory, as well as depriving children of their constitutional rights.[120] This approach has been followed in a range of other High Court cases, including ***S v SN***[121] and ***T and Another v S***.[122]

86.3 When section 154(3) of the CPA is read in the context of the expansive protections of the CJA, it is clear that the anonymity protections afforded by section 154(3) must also continue to apply to child offenders after they turn 18. This is a change "*required by the context*" of the CJA.

87 If the protections under section 154(3) of the CPA apply to child offenders after they turn 18, then these protections must self-evidently also apply to child victims and witnesses. Any other result would be anomalous.

The constitutional challenge

Limitation of rights

88 If, as the media respondents contend, section 154(3) does not continue to provide protection to child victims, witnesses and offenders after they turn 18, this would be a limitation of constitutional rights.

89 First, section 154(3) would breach section 28(2) of the Constitution.

89.1 In light of the principle of ongoing protection, the harms of identification that may occur in adulthood are also the concern of the section 28(2).

[120] Ibid at para 52.
[121] *S v SN* [2015] ZAWCHC 5 (9 January 2015)
[122] *T and Another v S* [2015] ZAFSHC 214 (5 November 2015).

89.2 In addition, a child's fear of being identified after turning 18 is a concrete harm that affects children here and now and is also protected by section 28(2).

89.3 Stripping a child of all protection on turning 18 also makes the protections afforded by section154(3) entirely arbitrary. Comparing the experiences of PN and DS with those of P and X, it is clear that a child's anonymity is made dependent on factors beyond their control. If a child is lucky and has a speedy trial that concludes before they turn 18, their anonymity may remain intact. However, if the trial is delayed by circumstances beyond their control and they turn 18 during the trial, then they will be exposed to heightened risks of being identified. Such arbitrariness is at odds with the best interests of the child.

90 Second, stripping children of all protection under section 154(3) of the CPA also limits their right dignity.

90.1 Children who are victims or witnesses of crimes should not be stigmatised and re-traumatised throughout their adult lives. Similarly, children accused or convicted of crimes should be spared the lifelong brand of criminality.

90.2 Identification in the media is one of the surest ways in which this stigma and shame is caused and aggravated. Section 154(3) serves to protect children against this stigma and the need for this protection does not fall away when a child reaches 18.

91 Third, this would also breach the right to privacy of the children concerned, in terms of section 14 of the Constitution.

91.1 The fact that a person was a victim, witness, accused, or offender during childhood is a deeply personal fact, the publication of which threatens an intimate core of a person's private life.

91.2 It should be left to the individual to decide to whom and when they reveal this fact as part of the long-term process of healing and rehabilitation.

92 Finally, it would breach the right to a fair trial of the accused and offenders, in terms of section 35(3) of the Constitution. The "ticking clock" created by the threat of identification on turning 18 may cause children to plead guilty or to curtail the trial in other ways, thus denying the child the benefit of a full and fair trial. This threat may also inhibit a child's participation in the trial. This undermines the procedural and substantive fairness of the trial process.

No justification under section 36 of the Constitution

93 The importance of the rights at stake and the severity of the harms provide compelling reasons for declaring these limitations to be unjustified under section 36 of the Constitution. Yet, the Minister again implicitly concedes that there is no justification for these limitations of children's rights.

94 The media respondents continue to assert that the denial of ongoing protection is somehow necessitated by open justice and media freedom. This justification rings hollow for all the reasons stated above:[123]

94.1 First, the identification of child victims, witnesses, and offenders in adulthood does not substantially advance media freedom or open justice. In the vast

[123] See paragraphs 68-72.2 above, at pages 25 - 28.

majority of cases, a person's identity is a mere "*sliver of information*" that does little to add to the story.

94.2 Second, there is a less restrictive means available to advance media freedom and open justice: children's anonymity should be protected by default, while allowing the courts to lift this protection in appropriate cases.

94.3 Third, other countries, including Canada, New Zealand and Australia, have embraced the need for indefinite anonymity protections for children extending into adulthood, as is set out **Appendix 2** to these heads.

95 Stripping children of the protection that they enjoy under section 154(3) merely because they have reached the age of 18 is thus unconstitutional

VI REMEDY

96 If this Court concludes that section 154(3) of the CPA protects child victims and that children who are subject to the protection of section 154(3) do not forfeit their protection when they turn 18, then a mere declaratory order to this effect will suffice.

97 However, if this interpretation is not accepted, section 154(3) must be declared unconstitutional and invalid to the extent that it does not afford this protection.

98 The appellants accept that any order of invalidity should be suspended for a period of 24 months to allow Parliament to remedy the defects.

98.1 However, it is then necessary to grant interim relief to ensure that vulnerable people, such as KL, MVB, P and X, are protected while Parliament works on suitable amendments.[124]

98.2 During the period of suspension:

98.2.1 Section 154(3) of the CPA should be deemed to read:

> *"(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years or of a victim of a crime under the age of eighteen years: 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."*

98.2.2 Section 154 of the CPA should also be deemed to contain an additional section 154(3A) which provides:

> *"(3A) Children subject to subsection (3) above do not forfeit the protections afforded by the section upon reaching the age of 18 years."*

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[124] *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) at para 84

98.3 If the period of suspension elapses and Parliament has not yet corrected the defect, the interim reading-in order should become final.

99 In the circumstances we submit that:

99.1 In respect of the child victims issue, this Court should dismiss the appeal by the media respondents to paragraph 1 of the High Court order[125] or alternatively uphold the constitutional challenge by the appellants;[126]

99.2 In respect of the ongoing protection issue, this Court should uphold the appeal by the appellants to paragraph 2 of the High Court order[127] and grant the declaratory relief[128] or alternatively the constitutional challenge;[129] and

99.3 This Court should keep in place the interim order granted by the High Court on 21 April 2015[130] to protect the identity of KL pending any further applications for leave to appeal, appeals or confirmation proceedings

100 In relation to costs, we submit that the first to third respondents should be ordered to pay the costs of this appeal and the costs in the High Court. In the event that this appeal is unsuccessful, the appellants should not be ordered to pay costs, in accordance with the ***Biowatch*** principle.[131]

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19 February 2018

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[125] Judgment para 70(1), Record vol 6 p 984
[126] NOM Part B para 2, Record vol 1 p 4-5
[127] Judgment para 70(2), Record vol 6 p 984
[128] NOM Part B para 3, Record vol 1 p 5
[129] NOM Part B para 4, Record vol 1 p 5
[130] Annexure AMS 24, Record vol 2 pp 222 – 224.
[131] *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC).

APPENDIX 1: COMPARATIVE LAW ON THE PROTECTION OF CHILD VICTIMS

Canada

1 In Canada, the Youth Criminal Justice Act 2002 protects the anonymity of all child victims and witnesses where the offender is a youth offender. Section 111 provides:

> ***"Identity of victim or witness not to be published****. — (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person."*

2 This provision applies to child victims and witnesses where the offender is a youth offender,[132] and provides a blanket and mandatory ban on the publication of identifying details of victims and witnesses in such cases.[133]

New Zealand

3 In New Zealand, all children involved in criminal proceedings in the Youth Courts – as victims, witnesses or offenders – receive automatic and indefinite anonymity protection.[134] This is in terms of section 438 of the Children, Young Persons and Their Families Act 1989.

4 In general courts, child victims and witnesses now have extensive anonymity protections as a result of reforms introduced in 2011. Section 204 of the Criminal Procedure Act 2011 provides that in criminal proceedings outside of the youth courts, the identifying information of a complainant or witness under 18 years of age must not be published.

> *"(1) Unless the court, by order, permits publication, no person may publish the name, address, or occupation of a person who is under the age of 18 years who—*
>
> *(a) is the complainant; or*
>
> *(b) is called as a witness in any proceeding in respect of an offence.*

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[132] In cases involving adult offenders, these automatic protections do not apply. This lacuna was partially filled by the Victims Bill of Rights Act, 2015 which came into effect in July 2015. Courts are required to make an order protecting the anonymity of child victims, on application (see section 486.4(1) -(2) of the amended Criminal Code). However, this still leaves a disparity in the treatment of the victims of child offenders and the victims of adult offenders.

[133] This protection is only lifted if the victim or witness publishes that information themselves after they turn 18 (or before they turn 18, with the consent of their parents), or applies to court to allow publication and the court is satisfied that publication would be in the public interest (section 111(2) -(3)).

[134] The Youth Court deals with offences committed by children between 12 and 16 years of age, excluding certain serious offences.

> *(2) Despite subsection (1), the name, address, or occupation of a child who dies as a result of the offence may be published.*
>
> *(3) Nothing in subsection (1) prevents publication of the name of the defendant or the nature of the charge.*
>
> *(4) The court must make an order permitting any person to publish the name, address, or occupation of a complainant or witness, if—*
>
> *(a) the complainant or witness, having reached the age of 18 years, applies to the court for such an order; and*
>
> *(b) the court is satisfied that the complainant or witness understands the nature and effect of his or her decision to apply to the court for the order; and*

Australia

5 In Australia, the bulk of criminal law and procedure is legislated at state level. Australia's most populous state, New South Wales, has its most progressive regime for the protection of the anonymity of child victims.

6 Section 15A (1) of the New South Wales Children's' Criminal Procedure Act 1987 provides express protection for all children involved in criminal proceedings, including child victims. Section 15A (1) provides:

> *"(1) The name of a person must not be published or broadcast in a way that connects the person with criminal proceedings if:*
>
> *(a) the proceedings relate to the person and the person was a child when the offence to which the proceedings relate was committed, or*
>
> *(b) the person appears as a witness in the proceedings and was a child when the offence to which the proceedings relate was committed (whether or not the person was a child when appearing as a witness), or*
>
> *(c) the person is mentioned in the proceedings in relation to something that occurred when the person was a child, or*
>
> *(d) the person is otherwise involved in the proceedings and was a child when so involved, or*
>
> *(e) the person is a brother or sister of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed."*

7 It is clear that subsection (1)(a) covers both child offenders[135] and child victims.[136] Subsection (1)(c) covers witnesses.

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[135] See, for example, *R v DH; R v AH* [2014] NSWCCA 326.
[136] See, for example, *Lindon v R* [2014] NSWCCA 112.

8 The protection in section 15A is automatic and applies unless reporting is authorised under one of the exceptions provided for in the following sections.

9 Section 15D allows the publication of the name of a person otherwise protected with his or her consent if they are over 16 years old, or with the consent of the court if they are under 16 years of age. The court is not to give such consent unless it is satisfied that it is in the public interest that consent be given.

United Kingdom

10 In the United Kingdom, section 49 of the Children and Young Persons Act 1933 prohibits the publication of the name, address, school or any other matter that is likely to identify a person under 18 as being "*concerned in the proceedings*" before the Youth Courts.[137] A child or young person is "*if concerned in the proceedings*" they are a victim, witness or defendant.[138]

11 These examples show there is widespread recognition of the need for automatic anonymity protections for child victims.

[137] Children and Young Persons Act 1933, s 49

[138] In the general courts, the courts have a discretion to impose anonymity protections under section 45 of the Youth Justice and Criminal Evidence Act, 1999.

APPENDIX 2: COMPARATIVE LAW ON ONGOING PROTECTION

Canada

1 In Canada, the anonymity protections afforded to child victims, witnesses and offenders in the youth courts are indefinite and may only be lifted in prescribed circumstances.

1.1 Section 110(1) of the Youth Criminal Justice Act 2002 provides for automatic anonymity protections for child offenders.[139]

1.2 Section 111(1) prevents the publication of the identity of child victims and witnesses. This restriction on publication also continues after the child turns 18 years of age.

1.3 This protection may only be lifted if a child publishes that information themselves after turning 18 (or before, with the consent of their parents) or by order of court.[140]

New Zealand

2 In criminal matters heard in the Youth Court in New Zealand, child victims, witnesses and offenders receive automatic and indefinite anonymity protections. The anonymity protections provided by section 438 of the Children, Young Persons and Their Families Act 1989 do not terminate when a child turns 18.

3 With respect to victims and witnesses outside of the Youth Court, section 204 of the Criminal Procedure Act 2011 also provides ongoing protection after these children turn 18. Section 204(4) requires that in order for the automatic name suppression to be lifted, the victim or witness must apply to the court after they have reached the age of 18. By implication, the automatic suppression must otherwise remain in place.

Australia

As outlined in Appendix 1, the Australian state of New South Wales affords extensive anonymity protections for child victims, witnesses and offenders under section 15A (1) of the New South Wales Children's' Criminal Procedure Act 1987. These protections are indefinite and continue in force after a child turns 18.

[139] This is subject to exceptions in 110(2), where a child is sentenced to an adult offence, where a child has been convicted of a violent offence and a court orders the lifting of the anonymity protection, and where publication occurs in the course of the administration of justice.
[140] Section 110(3) -(4) (offenders) and Sections 111(2) – (3) (victims and witnesses).