

FIGHT TO PROTECT THE IDENTITIES OF CHILD VICTIMS, WITNESSES AND OFFENDERS HEADS TO THE CONSTITUTIONAL COURT

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The Constitutional Court will today hear arguments in a case dealing with the protection of the identities of child victims, witnesses and offenders before and after they turn 18 years. The Centre for Child Law (Centre) will argue on behalf of Zephany Nurse, Media Monitoring Africa, Childline and NICRO that the protection of the identities of children involved is necessary in order to prevent significant and lifelong harm that comes from revealing their ‘true identities’. This means that section 154(3) of the Criminal Procedure Act should be found to be unconstitutional and invalid. Therefore, it must be amended to provide for such protection.

The case started when Zephany Nurse discovered, at the age of 17 years and 9 months old, that she had been kidnapped as a baby. She noticed that the media said they would reveal her ‘true’ identity when she turned 18 years. Zephany did not want to have her identity revealed. She asked the Centre for assistance. An urgent High Court application resulted in an order, granted in April 2015, which protected her identity – which remains protected until all appeals in this case are exhausted.

The order protecting Zephany’s identity, part 1, was followed by part 2 of the case in which we argued that the identities of all child victims, child witnesses and child offenders should be protected from the harm of exposure in the media and that such protection should continue beyond the age of 18 years. The High Court agreed that protection should be granted before the children turn 18 years but did not agree with the extension of such protection after they turn 18 years. The matter was appealed to the Supreme Court of Appeal (SCA).

On 28 September 2018 the SCA (*majority judgment as well as minority judgment*), found that section 154(3) was unconstitutional because it does not protect the anonymity of children as victims of crimes at criminal proceedings. The SCA ruled that Parliament must remedy this within 24 months and in the meantime the section would read as follows in order to protect child victims, witnesses and offenders:

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

Unfortunately, the majority of the SCA (made up of 3 of the 5 justices), decided not to extend the protection to after the children turn 18 years. The majority held that the adult extension severely restricts the right of the media to impart information and infringes the open justice principle.

The SCA minority judgment (made up of 2 of the 5 justices), however held the view that there was a necessary logic in extending the protection of child victims into their adulthood. The facts that warrant the protection of a child, do not change after that child becomes an adult, they remain constant. The victim

of a crime cannot change the fact of their victimhood and it would be unacceptable for victims to have to bear the onus to obtain an injunction against allowing disclosure. If disclosure should be allowed, the onus must rest on the person wishing to make the disclosure (i.e. the media). A constitutional right, even one as important as freedom of expression, may be limited – especially taking into account the best interest of the child as well as the right to privacy and dignity.

The Centre appealed the second part of the judgment to the Constitutional Court. The Centre is of the view that for children to fully benefit from having their identity protected when they are under 18 years, this protection should extend to after they turn 18 years of age in order to prevent significant and life-long harms. Evidence shows that identification of children's identities can have a catastrophic impact on their lives. The following harms can result: trauma and regression; stigma; shame; and the fear of being identified. The Centre does not discourage the media from reporting on cases. It discourages reporting that identifies child victims, witnesses and offenders before and after they turn 18 years old as such reporting has long lasting negative consequences.

Ends.

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