What about the Child? Preventing the Publication of Children's Names After the Age of 18

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Abstract

Children are afforded a number of different protections when they encounter the criminal justice system. The need for special protection stems from the vulnerable position they occupy in society. When children form part of the criminal justice system by being an offender, a victim or a witness they may be subjected to harm. To mitigate against the potential harm that may be caused, our law provides that criminal proceedings involving children should not be open to the public, subject to the discretion of the court. This protection naturally seems at odds with the principle of open justice. However, the courts have reconciled the limitation with the legal purpose it serves. For all the protection the law offers and the lengths that it goes to in order to protect the identity of children in this regard, it appears there is an unofficial timer dictating when this protection should end. The media have been at the forefront of this conundrum to the extent that they believe that once a child (an offender, victim, or witness) turns 18 they are free to reveal the child's identity. This belief, grounded in the right to freedom of expression and the principle of open justice, is at odds with the principle of a child's best interests, the right to dignity and the right to privacy. It also stares incredulously in the face of the aims of the *Child Justice Act* and the principles of restorative justice. In the context of the detrimental psychological effects experienced by child victims, witnesses, and offenders, this article aims to critically analyse the legal and practical implications of revealing the identity of child victims, witnesses, and offenders after they have turned 18.

Keywords

Children's rights; child justice; best interests of the child; protection of identity; freedom of expression; open justice.

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1 Introduction

It is imperative to view the history of children's rights against the backdrop of the ever-present tension between the need for the protection (of children) and the recognition of (their) autonomy. Furthermore, there is a need to recognise that there has been and must continue to be mechanisms in place to deal with children differently from adults in certain respects of the criminal justice system.[1] This has been recognised by our courts:

> The Constitution[2] draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.[3]

The view espoused here by Cameron J indeed encapsulates the thrust of the extensive body of international, regional, and national legislation and case law regarding the treatment of children exposed to the criminal justice system.

When viewing the traditional objects of the criminal justice system, i.e. deterrence, incapacitation, rehabilitation (restorative justice) and restitution,[4] The author is of the opinion that it may seem from a merely superficial examination that restorative justice outweighs the other objects of the criminal justice system where children are concerned. This assumption derives from the legislative framework and case law dealing with child offenders. It is assumed that the younger the offender, the more likely it is that he or she can be rehabilitated.[5]

If the rationale behind affording children a separate criminal justice system is to shield them from the rigours of the criminal justice system and to promote the aims of restorative justice, the question must then be asked when, or whether, such protection should cease to exist. The face of the

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1 Burchell and Milton *Principles of Criminal Law* 364-369; Snyman *Criminal Law* 178-181; Sloth-Nielsen 2001 *LDD* 59.

2 The *Constitution of the Republic of South Africa*, 1996 (the Constitution).

3 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 26.

4 Skelton and Batley 2008 *Acta Criminologica* 45.

5 *S v Steyn* 1986 ZASCA 75 (30 May 1986).

world has changed. The world has ushered in the digital age where information is but a mouse-click away. The instant availability of the print and electronic media now poses a problem which indeed was not an issue a century ago when the "child-saving"[6] movement began. The debate is now whether the protection regarding the privacy of a child offender, victim or witness afforded regarding legislation should be forfeited once that child becomes an adult i.e. turns 18 years old. This article will, *inter alia*, investigate the extent to which the provisions in the *Child Justice Act* 75 of 2008 (*Child Justice Act*)[7] and the *Criminal Procedure Act* 51 of 1977 (*Criminal Procedure Act*) protect the privacy of child offenders, victims and witnesses after they turn 18 years old. What seemed like unchartered territory now begs exploration in part due to the story of Zephany Nurse.

The practical and legal implications of identifying a child offender, victim or witness in South African law have recently come to the fore in the light of some disturbing trends in the media. One need only look at the impact of the circumstances surrounding Zephany Nurse to get a glimpse of the extent of the problem. Zephany Nurse (known as KL in the court documents)[8] discovered at the age of 17 years and 9 months that she had been kidnapped as a baby from the Groote Schuur Hospital in the Western Cape. The media subsequently sought to reveal her identity when she turned 18. However, as she did not want her identity to be revealed, with the assistance of the Centre for Child Law (CCL) she launched an urgent court application which resulted in an order that protected her identity until at least all appeals had been exhausted.[9] If one is to a conduct a search on Google for the term "Zephany Nurse", fifteen-thousand-nine-hundred results would appear from that search alone.[10] It would appear that the media interest in the Zephany Nurse story has yet to subside. Nevertheless, it is important to note that *Centre for Child Law v Media 24 Limited*[11] not only looks at Zephany Nurse but also at several other children (now adults) who would be (or have already been) adversely affected if their names were

6 According to Feld *Bad Kids* 51 "child-savers" were welfare-oriented individuals and organisations who founded reformatories and schools of industry during the nineteenth century as alternatives to prison or deportation for children who committed crimes.

7 The *Child Justice Act* 75 of 2008 (the *Child Justice Act*) came into operation on 1 April 2010.

8 The contents of which will be explored in later paragraphs.

9 *Centre for Child Law v Media 24 Limited* 2018 JOL 40507 (SCA) paras 42-46; CCL 2018 https://www.up.ac.za/news/post_2724762-statement-by-ups-centre-for-child-law-on-judgment-protecting-the-identifies-of-child-victims-witnesses-and-offenders-.

10 Google 2017 https://www.google.co.za/search?q=zephany+nurse&oq=zephany+&aqs=chrome.1.69i57j0l5.4940j0j8&sourceid=chrome&ie=UTF-8.

11 *Centre for Child Law v Media 24 Limited* 2018 JOL 40507 (SCA) (the SCA decision).

to be revealed to the public by the media.[12] This article looks not only at the legal position, but also at the impact that supporting evidence (provided by the applicants in this case) has in highlighting the realities of the child offenders, witnesses, and victims. This case necessitates the consideration of the possibility of protection being extended to a child beyond the age of 18. In addition to the provisions of the abovementioned statutes, there are several constitutional provisions which also come into play. Such constitutional provisions include (but are not limited to) the right to freedom of expression, the principle of open justice, the right to a fair trial, the principle of the best interests of the child, and the rights to privacy and dignity. Thus, this article will also seek to explore the tension between the need for open justice and freedom of the press against promoting the best interests of the child.

2 Background

The CCL (the applicants) brought an application in two parts to the North Gauteng High Court against the media respondents.[13] The media respondents in this matter were a number of publishing and broadcasting media houses: Media 24 Limited (Media 24); Independent Newspapers (Pty) Ltd; Times Media Group Limited; Infinity Media Networks (Pty) Ltd; TNA Media (Pty) Ltd; Primedia (Pty) Ltd; South African Broadcasting Corporation; e.tv (Pty) Ltd; Electronic Media Network (Pty) Ltd; the Citizen (Pty) Limited; and Mail and Guardian Media Limited (collectively referred to as the media respondents).

In Part A the applicants sought interim relief for the child known as Zephany Nurse. As she is referred to as "KL" in the court papers, she shall henceforth be referred to as KL.[14] The applicants sought to prohibit the publication of any information which would reveal the identity of KL (who was also an applicant to these proceedings). Furthermore, the applicants sought an interdict to prevent the media respondents from publishing any information which revealed or might reveal the identity of KL.[15] The situation was alleged to have been necessitated by the failure of the media respondents to provide undertakings that they would not identify KL upon her 18th birthday, the prospect of which had been causing KL stress.[16]

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12 This matter was first heard in the high court in the matter of *Centre for Child Law v Media 24 Limited (Part A and B)* 2017 2 SACR 416 (GP) (the HC decision).

13 Notice of Motion dated 1 April 2015 (on file with the CCL).

14 Notice of Motion dated 1 April 2015 (on file with the CCL) 2-3.

15 Notice of Motion dated 1 April 2015 (on file with the CCL).

16 Founding Affidavit para 76. In her supporting affidavit, KL described how the media would *inter alia* camp out outside her house, and an incident in which a television crew went to her school. In identifying the women who kidnapped her, they

In Part B of the application, the applicants sought an order to be granted by the court with the following terms:[17]

1. The protections afforded by section 154(3) of *the Criminal Procedure Act* should also apply to victims of a crime who are under the age of 18 years.[18]

2. Alternatively, that section 154(3) of the *Criminal Procedure Act* be declared unconstitutional and invalid to the extent that it does not confer its protections on victims of a crime who are under the age of 18 years. To remedy the defect the applicants proposed that the court read in a provision so that section 154(3) of the Criminal Procedure Act is deemed to read as though it provides the following:

> 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 authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.[19]

3. Children should not forfeit the protections afforded by section 154(3) of the *Criminal Procedure Act*, read together with section 63(6) of the *Child Justice Act*[20] (to the extent applicable) upon reaching the age of 18 years.[21]

4. In the alternative to prayer 3 above, the court should declare section 154(3) of the *Criminal Procedure Act*, read together with section 63(6) of the *Child Justice Act* to the extent applicable, unconstitutional and invalid to the extent that children subject to the section forfeit the protections afforded by it upon reaching the age of 18 years. To

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potentially may have led to her identification, as they shared a surname (CCL 2015 http://www.centreforchildlaw.co.za/images/files/Press%20Release/2015.03.03_CCL%20requests%20the%20protection%20of%20the%20identity%20of%20the%20child%20identified%20as%20Zephany%20Nurse.pdf). Furthermore, some publications had also released the name of KL's school (Dixon 2015 https://www.latimes.com/world/africa/la-fg-south-africa-missing-child-20150306-story.html).

17 Notice of Motion dated 1 April 2015 (on file with the CCL) 4-5. Also see *Centre for Child Law v Media 24 Limited* 2018 JOL 40507 (SCA) para 1.

18 Notice of Motion dated 1 April 2015 (on file with the CCL) para 1.

19 Notice of Motion dated 1 April 2015 (on file with the CCL) para 2.

20 Section 63(6) of the *Child Justice Act* states that "section 154(3) of the Criminal Procedure Act applies with the changes required by the context regarding the publication of information."

21 Notice of Motion dated 1 April 2015 (on file with the CCL) para 3.

> remedy the defect, the applicants proposed that section 154 of the *Criminal Procedure Act* be deemed to contain an additional section 154(3A) of the *Criminal Procedure Act* which provides:
>
> Children subject to subsection (3) above do not forfeit the protections afforded by the section upon reaching the age of 18 years.

On 21 April 2015 the court granted the relief sought by the applicants in respect of Part A of the application.[22] Furthermore, the court granted an order declaring that the protection afforded by section 154(3) of the *Criminal Procedure Act* applied to victims of crime who were under the age of 18 years.[23] This is the so-called "victim extension".[24] The matter went on to the Supreme Court of Appeal, which held that section 154(3) of the *Criminal Procedure Act* is constitutionally invalid to the extent that it does not protect children as victims of crimes in which there are criminal proceedings and to the extent that any protection that they receive in terms thereof does not extend beyond their reaching the age of 18 years.[25] This aspect of the judgment is favourable in so far as it protects child victims. The critique which is the focus of this article is the refusal[26] of the court to extend the protection granted in terms of section 154(3) of the *Criminal Procedure Act* to protect child victims, witnesses and accused after they turn 18 years. This is the so-called "adult extension".[27]

3 Aims of child justice at a glance

There was a need to create a system separate from that of the formal criminal justice system to steer children away from the harmful effects thereof.[28] The child justice movement (in South Africa) is said to have emerged in the early 1990's, culminating in the enactment of the *Child Justice Act* in 2010.[29] An examination of the Preamble, the objects[30] and

22 HC decision para 70.
23 SCA decision para 2.
24 SCA decision para 6.
25 SCA decision para 104.
26 SCA decision.
27 SCA decision para 6.
28 Preamble of *Child Justice Act* paras 3, 5.
29 This legislation gives effect to the requirements of Art 40 of the *United Nations Convention of the Rights of the Child* (1989) (UNCRC). Art 40 of the UNCRC provides that "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."
30 Section 2 of the *Child Justice Act*.

the guiding principles[31] of the *Child Justice Act* reveals the necessity of such an act coming into operation. A separate system and legal reform should envisage a departure from the norm. Under this new system, the traditional pillars of punishment, retribution and deterrence are replaced with a continual emphasis on the

> need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care and correcting errant actions as far as possible by diversion, community-based programs, the application of restorative justice processes and reintegration of the child into the community.[32]

The objects of the *Child Justice Act* are, among other things, to protect the rights of children as provided for in the Constitution and to provide for the special treatment of children.[33] The need for special protection stems from the vulnerable position children occupy in society. There is a fundamental focus on restorative justice throughout the *Child Justice Act*. This, however, does not detract from the principle that children in conflict with the law must be held accountable for their actions.[34] Gallinetti and Sloth Nielsen have stated the revolutionary impact that the *Child Justice Act* has had not only on the criminal justice system in South Africa but particularly on children in conflict with the law.[35] The *Child Justice Act* provides a set of objectives in its application which include preventing the stigmatisation of the child, promoting the child's dignity and well-being, and promoting the development of his or her feeling of self-worth and ability to contribute to society.[36]

Therefore, any act which would result in the undoing of the rehabilitation of a child (directly or indirectly affected by the criminal justice system) seems counterproductive to the aims of the child justice system as a whole. Expert evidence[37] presented in this matter by four experts[38] explains how the identification of children in the media can have catastrophic effects on the child concerned. The experts identify four types of psychological harm that can be caused by identification in the media, namely trauma and regression,

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31 Section 3 of the *Child Justice Act*.
32 *S v CKM* 2013 2 SACR 303 (GNP) para 7.
33 Sections 2(a) and (c) of the *Child Justice Act*.
34 Preamble of *Child Justice Act*.
35 Sloth-Nielsen and Gallinetti 2011 *PELJ* 74; Gallinetti 2006 *SACQ* 12.
36 Section 51 of the *Children's Act* 38 of 2005.
37 SCA decision paras 52-54; applicant's heads of argument paras 70-97.
38 Professor Ann Skelton – child justice expert and Director at the CCL; Ms Joan van Niekerk – social worker and former director of CHILDLINE; Ms Arina Smit – manager at NICRO clinical unit; and Dr Glada De Fabbro – child and adolescent psychologist. A report compiled by the aforementioned experts will be discussed in para 5 below.

stigma, shame and the fear of being identified.[39] The experts insisted that the psychological trauma persists even after the age of 18.[40]

4 Restorative justice

An important starting point for this debate would be to revisit the general purpose of criminal justice. In doing so we must examine the traditional theories of punishment, namely deterrence, retribution, rehabilitation, and incapacitation.[41] When children encounter the criminal justice system, do we merely adhere to the traditional theories of punishment, or should the law seek to address the matter in a different manner?

The *Child Justice Act* (at the time that it came to the effect) is said to have ushered in a new child justice system which saw South Africa not only attempting to comply with its constitutional and international law obligation relative to children but also incorporating norms relating to the treatment of children in criminal proceedings.[42] Of these, restorative justice is of great importance to this article. The Preamble of the *Child Justice Act* makes specific reference to restorative justice. It states, among other things, that the child justice system created under the *Child Justice Act* will aim to:

> expand and entrench the principles of restorative justice (while ensuring children's responsibility and their accountability for crimes committed) and minimise the potential for re-offending through placing increased emphasis on the effective rehabilitation and reintegration of children.[43]

4.1 What is restorative justice?

The widely accepted definition is that restorative justice is

> any process in which the victim and the offender - and where appropriate, any other individual affected by the crime - participate in the resolution of matters arising from the crime, usually with the help of a facilitator.[44]

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39 HC decision para 16.

40 See para 5 below (Case for the applicants).

41 Muthaphuli and Terblanche 2017 *Acta Criminologica* 17; *S v Draai* 2014 JDR 2485 (FB) para 9.

42 Sloth-Nielsen and Gallinetti 2011 *PELJ* 63-64.

43 Sloth-Nielsen and Gallinetti 2011 *PELJ* 65. S 2(b)(iii) of the *Child Justice Act* provides that one of the objectives of the Act is to "promote the spirit of ubuntu in the child justice system through supporting reconciliation by means of a restorative justice response."

44 Article 2 of *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2002); Skelton and Batley 2008 *Acta Criminologica* 38.

Restorative justice is both backward-looking, in that it includes dealing with the "aftermath of the offence", and forward-looking, in that it is a process that looks at the implications for the future.[45]

The South African legislature has defined restorative justice on two occasions. The first time was in the *Probation Services Act* 116 of 1991 (as amended by the *Probation Services Amendment Act* 35 of 2002), where it was defined as "…the promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child's parents, family members, victims and the communities concerned."[46] The second time was in the Child Justice Bill.[47] The definition of restorative justice in this Bill is as follows:

> An approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.[48]

4.2 Restorative justice in South African jurisprudence

Restorative justice has also been dealt with and developed by our courts.[49] Sachs J stated that the key elements of restorative justice had been identified as encounter, reparation, reintegration and participation.[50] In *S v M (Centre for Child Law as Amicus Curiae)*[51], which dealt with the duties of a sentencing court when sentencing a primary caregiver of children, Sachs J characterised correctional supervision as providing better opportunities for a restorative justice approach.[52] He found that restorative justice recognises that the community, rather than the criminal justice agencies, is the most effective agent to control crime.[53] He also spoke about how "restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing."[54]

S v Saayman[55] appears to offer some insight into how the courts view the concept of "shaming" and its place in the South African criminal justice

45 Skelton and Batley 2008 *Acta Criminologica* 47.
46 Section 1(d) of the *Probation Services Act* 116 of 1991. Also see Skelton and Batley 2008 *Acta Criminologica* 38.
47 Child Justice Bill [B49B-2002]. It was passed by the National Assembly on 25 June 2008.
48 Skelton and Batley 2008 *Acta Criminologica* 38.
49 Skelton and Batley 2008 *Acta Criminologica* 42.
50 *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 114.
51 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).
52 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 59.
53 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 62.
54 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 72.
55 *S v Saayman* 2008 1 SACR 393 (E).

system. In this case restorative justice was examined in regard to the concepts of "shaming" and the constitutional right to dignity.[56] In this judgment Pickering J agreed with the writings of Mike Batley, in which he stated that: "the dignity and worth of both victims and offenders are integral to restorative justice".[57] Mike Batley furthermore stated:

> The tragic backgrounds of many offenders, their consequent low levels of self-esteem and inability to manage their feelings of shame in constructive ways are often significant factors in their anti-social and criminal behaviour and their inability to break out of these patterns. To further humiliate and degrade them will likely reinforce these patterns, not change them, however satisfying they may appear to members of the public and judiciary caught up in the high tide of popular punitiveness.[58]

The above statement brings us squarely to some of the misgivings of revealing the names of child victims, witnesses and (especially) offenders after they turn 18. Shame is but one detrimental psychological effect that has the potential to undo the work done in the restorative justice process.

5 Case for the applicants

Sections 153 and 154 of the *Criminal Procedure Act* provide for the anonymity of persons[59] involved in criminal proceedings. The applicants contend that this protection must be extended to child witnesses, victims and offenders even beyond the age of 18.[60] The applicants were at pains to illustrate the psychological harm that may be caused through identification and the adverse effects it may have on the rehabilitation and reintegration of the child concerned.[61] For the purposes of this article, some of the main points of the applicant's argument will be explored.

5.1 Public interest versus what is interesting to the public

In the English case of *Lion Laboratories Ltd v Evans*, the court stated, among other things, that "there is a wide difference between what is

56 Skelton and Batley 2008 *Acta Criminologica* 42.
57 *S v Saayman* 2008 1 SACR 393 (E) para 12.
58 Batley "Restorative Justice" 20-21.
59 This includes an accused under the age of eighteen years or a witness at criminal proceedings who is under the age of eighteen years (s 154(3) of the *Criminal Procedure Act* 51 of 1977). The protection is also afforded to any person, other than an accused, who is likely to suffer harm if he testifies at criminal proceedings (s 153(2) of the *Criminal Procedure Act* 51 of 1977) – no age restriction is provided for in this regard.
60 HC decision para 15.
61 HC decision para 18.

interesting to the public and what is in the public interest to make known."[62] Furthermore, that

> the media have private interests of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners, and they are peculiarly vulnerable to the error of confusing the public interest with their interest ...[63]

In the case of KL, the applicants stated that it was not in the interest of the public to know her real name.[64] The public interest may refer to the fact that an offence has attracted widespread attention and as such the public is entitled to know who committed the crime. However, as the applicants rightly pointed out, one can still publish all the facts of a case and use a pseudonym.[65] A prime example of this would be *NM v Smith*.[66] In this case, the court rejected the suggestion that there was a public interest in naming three HIV-positive women in a book, holding that the respondents "could have used pseudonyms instead of the real names of the applicants. The use of pseudonyms would not have rendered the book less authentic."[67]

In very much the same manner, the media has been able to publish numerous articles about KL without using her real name. The use of a pseudonym does not negate the facts of a story. The only incentive there would be in revealing her real name to the public now would be to scratch the itch of curiosity. In the author's opinion it adds no new value to the story other than perhaps the promise of selling more newspapers and magazines. What then remains of the child victim, witness or offender once his or her name is in the public domain?

5.2 Expert evidence

The applicants presented expert evidence illustrating the harmful effects of identification in the form of three key experts: Joan van Niekerk,[68] Arina

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62 *Lion Laboratories Ltd v Evans* 1984 2 All ER 417 (CA) para 464C.

63 *Lion Laboratories Ltd v Evans* 1984 2 All ER 417 (CA) para 464C. Collett JA cited *Lion Laboratories Ltd v Evans* in *Financial Mail (Pty) Limited v Sage Holdings Limited* 1993 2 SA 451 (A).

64 Founding Affidavit para 106.

65 Founding Affidavit para 38.3.

66 *NM v Smith* 2007 5 SA 250 (CC). In this case, a biography of Ms Patricia de Lille authored by Ms Smith (first respondent) disclosed the names of three women who are HIV positive. The applicants alleged that their names had been published in this book without their prior consent having been obtained (para 1 *in casu*).

67 Founding Affidavit paras 45-46.

68 Ms van Niekerk is a social worker with over 27 years' experience. She has worked closely with some of the child offenders who provided evidence in the applicant's case. She was previously the director of Childline and is also the third applicant (Founding Affidavit para 78.1).

Smit[69] and Dr Giada Del Fabbro.[70] Three of the key areas focussed on by the applicants regarding the effects of identification were psychological harms, the impact on witnesses and victims, and the harm experienced by accused and offenders (particularly the impact of identification on their trials and the process of rehabilitation and reintegration).[71]

5.3 Psychological harms

In her supporting affidavit, Arina Smit (Smit Supporting Affidavit) stated that identification of child offenders when they turn 18 might undo all the therapy that was provided before the children turned 18.[72] She also stated that the children might regress in respect of their self-esteem, relationships and occupational functioning.[73] Furthermore, the children may suffer secondary trauma when they have to explain their circumstances to people repeatedly, e.g. if looking for employment or meeting new people.[74]

A Psychological Report prepared for the applicants by Dr Del Fabbro (Psychological Report) drew on her professional experience as well as considering existing literature and available data on the subject. The Psychological Report[75] details some detrimental consequences to identifying/naming child offenders/victims/witnesses which include (but are not limited to) diminishing chances for rehabilitation and reform,[76] social stigma,[77] re-living of the original offence or trauma,[78] feelings of intimidation and humiliation,[79] and anxiety over possible identification.[80]

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69 Ms Smit has worked with over a thousand child offenders over the past 17 years. She is the manager of the clinical unit of National Institute for Crime Prevention and Reintegration of Offenders (NICRO). She is also the fourth applicant (Founding Affidavit para 78.2).

70 Dr Del Fabbro is a psychologist with considerable clinical, assessment and therapeutic experience in the field of child and (adolescent psychology) (Founding Affidavit para 78.3).

71 As in fn. 38 above. Smit Supporting Affidavit para 19.

72 This is also supported in Dr Del Fabbro's expert report (Founding Affidavit para 84.1).

73 Smit Supporting Affidavit para 30.

74 Smit Supporting Affidavit para 31. Trauma and regression are not limited only to victims and witnesses, but also affect child offenders. The Psychological Report stated that "…juvenile offenders are also frequently traumatised by their actions as well as their involvement in the criminal justice system" (Smit Supporting Affidavit para 6).

75 This is reiterated in her supporting affidavit (Del Fabbro Supporting Affidavit) dated 1 April 2015.

76 Psychological Report paras 34-39.

77 Psychological Report paras 15-18.

78 Psychological Report paras 6-12.

79 Psychological Report paras 13-14.

80 Psychological Report paras 40-43.

5.4 Supporting evidence by child offenders

As stated in the Psychological Report, one can draw on general psychological principles and research on a range of related topics to understand the psychological impact of identifying child victims, offenders and witnesses.[81] However, perhaps the most compelling indication of the impact of identification comes straight from the mouths of those children who were affected (or could be affected) by identification. In addition to KL's supporting affidavit (KL Supporting Affidavit) to the applicant's Founding Affidavit (Founding Affidavit),[82] the evidence brought forth in the Supplementary Founding Affidavit touched on instances in which the media had identified children involved in criminal proceedings after they turned 18, which had had adverse effects for the children concerned. The difference in impact on a child will be illustrated by the antithetical tales of PN and DS (who were identified by the media) and P and X (who have fortunately not been identified by the media). The evidence provided by these child offenders seems to be in line with the evidence provided by the expert witnesses.

5.4.1 PN[83]

PN was 15 years old at the time of the murder of Afrikaner Weerstandsbeweging (AWB)[84] leader Eugene Terreblanche. PN and his co-accused (an adult) were charged with the crime.[85] It was a high profile case which garnered much public attention because it involved a controversial public figure and highlighted issues of racism and abuse.[86] PN was eventually acquitted of the murder but found guilty of housebreaking with intent to steal.[87] Media Monitoring Africa (MMA)[88] was granted leave to appear as *amicus curiae* as Media 24 and other media outlets launched an

81 Psychological Report para 2. This approach is also necessitated by the acknowledgment that there has been limited research that specifically addresses the psychological harms resulting from media coverage, although the risks of media identification are widely accepted; Jones, Finkelhor and Beckwith 2010 *Journalism* 347-367.

82 Founding Affidavit para 76.

83 SCA decision para 65.

84 A South African right-wing organisation that first came into prominence in the 1970s whose aim was, *inter alia*, to create a Boer state based on the old Afrikaner republics. SA History 2019 http://www.sahistory.org.za/article/afrikaner-weerstandsbeweging-awb.

85 Supplementary Founding Affidavit para 33.

86 Supplementary Founding Affidavit.

87 *S v Mahlangu* 2012 ZAGPJHC 114 (22 May 2012).

88 A non-profit organisation which aims to promote ethical and fair journalism. MMA 2018 https://mediamonitoringafrica.org/.

application to allow them access to the trial.[89] The submissions made by the *amicus* ensured that PN's interests would be protected while allowing the media limited access.[90]

When PN turned 18, the media subsequently published his name and photographs of him.[91] This in effect undid all the work put in to protect PN *inter alia* by attempts made by his legal counsel to keep his name from the press, as per the court order. It also put his life in danger in the heated racial climate in Ventersdorp[92] surrounding the murder.[93] In his supporting affidavit (Bird Supporting Affidavit), William Bird[94] of MMA stated that he was dismayed that the media no longer considered themselves bound by the protections conferred by section 154 (3) of the *Criminal Procedure Act* after the child turned 18 and believed that they were free to publish information identifying the victim/offender/witness concerned.[95] At the time of this article PN's whereabouts are still unknown.[96]

5.4.2 DS[97]

DS was accused of and charged with the murder of his family at Griekwastad in 2012. He was 15 years old at the time of the murder.[98] The media were given access to the trial, and while it was understood that they could not identify the child, photographs were taken of him during the trial.[99] Articles were also published at that time that alluded to who the murderer could be.[100] One such article involving DS garnered the attention of the ombudsman of the Press Council of South Africa (PCSA)[101] (Press Ombudsman). A complaint was lodged with the Press Ombudsman[102]

89 *Media 24 v National Prosecuting Authority: In re S v Mahlangu* 2011 2 SACR 321 (GNP).
90 Supplementary Founding Affidavit paras 36, 37.
91 Supplementary Founding Affidavit para 40.
92 The town in in the North West Province, South Africa where Eugene Terreblanche's murder took place.
93 Supplementary Founding Affidavit para 34.
94 Director of the Media Monitoring Africa and the fifth applicant in this matter.
95 Bird Supporting Affidavit para 25.
96 Supplementary Founding Affidavit para 44.
97 SCA decision para 66.
98 Supplementary Founding Affidavit para 45.
99 Supplementary Founding Affidavit para 47.
100 Supplementary Founding Affidavit para 47.
101 Part of an independent, co-regulatory mechanism set up by print and online media. The PCSA was adopted by the South African Press Code to provide *inter alia* impartial, expeditious and cost-effective adjudication to settle disputes between the press and members of the public over the editorial content of publications (PCSA and Interactive Advertising Bureau Date Unknown https://presscouncil.org.za/ContentPage?code=PRESSCODE).
102 *Media 24 Holdings (Pty) Ltd v The Chairman of the Appeals Board of the Council of South Africa* (unreported) case number 19001/2014 of 28 August 2014.

regarding a *Huisgenoot* (which is a magazine published by Media 24) article published on 14 November 2013 which identified DS as the minor charged with the Griekwastad murders.[103] The ensuing matter before the PCSA found that there had been a violation of section 8.3 of the Code of Ethics and Conduct for South African Print and Online Media (Press Code), which states that "The press shall not identify children who have been victims of abuse, exploitation, or who have been charged with or convicted of a crime, unless a public interest is evident and it is in the best interest of the child."[104] The sanction imposed against Media 24 was a severe reprimand. The Press Ombudsman also directed that Media 24 (Huisgenoot) publish an apology, on its front page, with the words "Griekwastad: Press Ombudsman severely reprimands Huisgenoot".[105]

DS was eventually found guilty and sentenced to 20 years' imprisonment for his offences. On his 18th birthday the media released his name and photographs taken throughout the course of his trial. The selling point of the newspapers/magazines was advertising that they would reveal his name in their next issues.[106] According to his supporting affidavit (DS Supporting Affidavit), the media coverage had severe adverse effects on DS. DS states that among other things he suffered trauma as a result of the immediate identification.[107] Furthermore, he stated that the media harassed the people around him[108] and that he is fearful that identification will affect his prospects of employment and of leading a normal life upon release.[109]

5.4.3 P and X – child offenders who were not identified by the media

Both P and X were convicted of serious offences when they were below the age of 18. P and X turned 18 some time after their court proceedings had been concluded. By then, the media interest in their cases had largely subsided.[110] This contrasts with KL, PN and DS who turned 18 when media interest in their cases was at fever pitch. P and X's stories demonstrate how rehabilitation of child offenders can work in practice and how anonymity can achieve restorative justice. This progress, however, could all be undone

103 "Griekwastad: Huisgenoot By Don Steenkamp Se Voog – Oom Bennie oor seun – moet niemand dan lief wees vir hom?"

104 Which was effective up until 31 December 2015.

105 *Media 24 Holdings (Pty) Ltd v The Chairman of the Appeals Board of the Council of South Africa* (unreported) case number 19001/2014 of 28 August 2014 para 4.

106 Supplementary Founding Affidavit para 49. Also see paras 11-21 of DS Supporting Affidavit. *You* magazine article (dated 15 August 2014) "on his 18th birthday, the South African media are officially allowed to identify the teenager dubbed the Griekwastad killer."

107 DS Supporting Affidavit para 26.

108 DS Supporting Affidavit para 27.

109 DS Supporting Affidavit para 9.

110 Supplementary Founding Affidavit para 62.

should the media be allowed to reveal information identifying them to the public.

P was 12 at the time that she was charged with the murder of her grandmother. The case garnered intense media attention. However, by the time she had reached adulthood, she had long since served her sentence, and the media interest had subsided. As a result, P was left alone to lead a normal life.[111] She now has a family. It was explained by both P and the social worker who worked closely with P (Joan van Niekerk – who also worked with X below) that her anonymity aided in her rehabilitation and healing.[112] Despite the seriousness of her crime she is fully rehabilitated. She lives in constant fear of identification, however – particularly for the sake of her children, and the fear of being stigmatised.[113]

X (who was both a victim of crime and a child offender) was 16 years old when she was convicted of being an accessory after the fact to the murder of her parents. X's 28-year-old boyfriend committed the murder.[114] She served her sentence of correctional supervision in a children's home without having been identified. She passed matric with four distinctions and went on to study at university. She is now married with children.[115] She, too, shares the same concerns as P regarding her children and stigmatisation.[116] X's situation, however, has the added element of danger, as the man who killed her parents may try to find her, should he be paroled.[117] X credits anonymity with having played a vital role in her rehabilitation. She states that she was able to live a normal life and transition successfully into adulthood.[118]

6 Case for the respondents

Much of the criticism levied by the media respondents against the applicants relates to the perceived far-reaching implications that their application (if granted) would have on the principle of open justice, media freedom and the public interest. The media respondents continuously mischaracterised the relief sought by the applicants as a "publication ban".[119] This formulation was contested (by the applicants) as being an incorrect interpretation of section 154(3) of the *Criminal Procedure Act,* as the prohibition on the

111 Supplementary Founding Affidavit paras 63-65.
112 Supplementary Founding Affidavit para 66.
113 P's supporting affidavit paras 23-24.
114 Supplementary Founding Affidavit para 69.
115 Supplementary Founding Affidavit paras 71-73.
116 X's Supporting Affidavit para 20.
117 Supplementary Founding Affidavit para 75.
118 X's Supporting Affidavit para 14.
119 Answering affidavit for the first to third respondents (Answering Affidavit) paras 9-11 (dated 26 August 2015).

publication of information which may reveal the identity of a child witness, victim and/or offender does not prevent the media from reporting on the trial.[120] The prohibition is not absolute and the courts have the discretion to permit the publication of identities if "just and equitable and in the interest of any particular person". A brief analysis of (some of) the arguments made by the media respondents *inter alia* in their Answering Affidavit will now be explored.

6.1 Children adequately protected

The media respondents contended that the relief sought by the applicants was unreasonable to the extent that the provisions of sections 153 and 154 of the *Criminal Procedure Act* and "other existing mechanisms" (common law claims for damages, interdicts and the Press Code) that protect against abuses by the press exist.[121] The media respondents were of the opinion that these abovementioned mechanisms strike a balance between the rights to open justice and freedom of expression, and the rights of children. The applicants countered this with the argument that an award for damages and/or apology did very little, as the harm to the child (now an adult) had already been caused.[122] The onus was placed on the child to show why s/he needed protection from the media.[123] One could further argue that it would be easier for the media respondents to approach courts than a person from vulnerable group of society, who certainly might not have access to the legal resources that the media had.[124] Courts would also not be overburdened (as alleged by the media respondents)[125] as there was no suggestion that section 154(3) of the *Criminal Procedure Act* currently overburdened courts, and the extension of protection was unlikely to result in any unjustifiable increase in the courts' workload.[126] The media had demonstrated in the past that they could approach a court and request access to a trial involving a child or an adult[127] – a prime example being the Eugene Terreblanche trial.

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120 SCA decision above para 71.

121 Answering Affidavit para 15.2.

122 Supplementary Founding Affidavit para 96.

123 SCA decision para 84. The Applicants' Replying Affidavit (Replying Affidavit) para 156 (dated 18 May 2016).

124 The media respondents attempted to demonstrate the burden they would face in having to approach courts to seek "pre-publication permission" from the court (Answering Affidavit paras 91-99). In para 105 of the Answering Affidavit, it is suggested that "where extended anonymity protection is sought, the person that seeks such protection can apply to the Court for an interdict, and motivate for the appropriate period".

125 Answering Affidavit para 106.

126 Replying Affidavit para 157.2.

127 In *Multichoice (Pty) Ltd v National Prosecuting Authority, in re: S v Pistorius, In re Media 24 Ltd v Director of Public Prosecutions North Gauteng* 2014 1 SACR 589 (GP), the media brought an application to the North Gauteng High Court requesting permission to broadcast the Oscar Pistorius murder trial live.

Therefore it was difficult to reconcile the notion that requesting the media to approach the court to uplift the default position (i.e. preventing the media from publishing information which could identify vulnerable groups of people) amounted to "an unjustifiable burden on the courts and the administration of justice."[128]

Furthermore, there the assertion had been made that an extension of the protection afforded by the *Criminal Procedure Act* would result in a "blanket ban" which would not only be contrary to the principle of open justice, but would also serve as an exception to the rule that applications heard in terms of section 154 of the *Criminal Procedure Act* must be heard on a case-by-case basis.[129] This assertion was devoid of truth. The applicants supported the idea of a case-by-case analysis by a court to determine whether anonymity or publicity was in the best interests of the individual children concerned.[130]

6.2 Best interests of the child

The media respondents asserted that media identification was generally beneficial to children.[131] No evidence was provided by the media respondents, however, to suggest that this was true. Instead what followed was a series of stories which purported to serve as proof of their alleged benefit with no supporting or contextual evidence supplied.[132] One such alleged example was the Van Breda family murder. MVB was the survivor of a family murder which took place on 27 January 2015 in Stellenbosch.[133] The Media Respondents alleged that MVB has received "overwhelming support" from the community following the publicity of the crime,[134] thus demonstrating how MVB benefitted from the identification. The supporting affidavit of Louise Buikman SC (Buikman Supporting Affidavit), who was the court-appointed curator *ad litem* for MVB, painted an entirely different picture, however. The Buikman Supporting Affidavit expressed the view that the intense media coverage had not been in the best interests of MVB.[135] It was alleged that the media went to great lengths to obtain information to publish regarding MVB, including harassing her at school.[136] So intense was

128 Answering Affidavit para 108.
129 Answering Affidavit paras 104, 105.
130 Replying Affidavit paras 25.5, 95.2; Supplementary Founding Affidavit para 147.5.
131 Answering Affidavit para 52.
132 Answering Affidavit para 53.
133 SCA decision para 68. Buikman Supporting Affidavit para 6. MVB (who was 16 years old at the time of the murders) sustained serious head injuries.
134 Answering Affidavit para 53.3. The Media Respondents cited a Timeslive article titled "Axe attack survivor Marli van Breda visits her school" (dated 3 May 2015) as authority.
135 Buikman Supporting Affidavit para 34.1.
136 Buikman Supporting Affidavit para 32.3.

the invasion of MVB's privacy and the media's failure to adhere to the provisions of the Press Code[137] that her curator had to obtain a court order against the media.[138] The court order, which was framed along the lines of the Press Code, had still not been complied with by the media.[139] The Buikman Supporting Affidavit further stated that MVB had been distressed about the on-going media attention.[140] Reconciling "distress" with best interests was difficult. It was also particularly difficult to determine how knowing that a teenage girl was enjoying a rugby match at her school was of any interest to the public.[141]

6.3 Self-regulation

As briefly referred to in paragraph 5.4.2 above, the Press Code is a code of ethics and conduct for South African print and online media, i.e. a tool for governing ethical behaviour among journalists.[142] The Constitution of the PCSA (as effective 1 February 2018)[143] makes it clear that the PCSA and its constituent associations have established a voluntary independent co-regulatory system[144] premised on a voluntary independent mediation and arbitration process to address complaints from the public about journalistic ethics and conduct.[145]

The media respondents were at pains to emphasise the importance of self-regulation.[146] This was a baffling stance to adopt, as the applicants had not

137 Para 8.1 of the Press Code requires special care in reporting on children: "[The press must] exercise exceptional care and consideration when reporting about children. If there is any chance that coverage might cause harm of any kind to a child, he or she shall not be interviewed, photographed or identified without the consent of a legal guardian or of a similarly responsible adult and the child (taking into consideration the evolving capacity of the child), and a public interest is evident."

138 Buikman Supporting Affidavit para 10.

139 Replying Affidavit para 17. Furthermore, in demonstrating the refusal to comply with the court order, para 14 of Louise Buikman's affidavit detailed how Huisgenoot magazine (owned by Media24) on 21 May 2015, published an article titled "Stilstil aan die heel word". The article featured a series of paparazzi-style photographs taken of MVB at a school rugby match. This was one of her first public outings since her discharge from the rehabilitation centre (Buikman Supporting Affidavit para 14.1).

140 Buikman Supporting Affidavit para 34.1.

141 Buikman Supporting Affidavit para 14.1.

142 PCSA 2012 http://www.presscouncil.org.za/Reports/View/press-freedom-commissions-report-5.

143 PCSA Date Unknown http://www.presscouncil.org.za/ContentPage?code=CONSTITUTION.

144 PCSA Date Unknown http://www.presscouncil.org.za/ContentPage?code=CONSTITUTION - the Preamble thereof.

145 PCSA Date Unknown http://www.presscouncil.org.za/ContentPage?code=CONSTITUTION clause 3.1.4.

146 Answering Affidavit para 75 and supporting affidavit of Mr Franz Kruger.

contested its value.[147] The applicants stated that self-regulation, in conjunction with appropriate protections under the *Criminal Procedure Act*, had value.[148] However, self-regulation alone was not sufficient to prevent and address the harms caused to child victims, witnesses and offenders as a result of being identified in the media.[149] The complaints procedure under the Press Code was only backwards-looking and did not offer any immediate way to prevent a harmful publication from occurring.[150] As upper guardians of all children, it was appropriate that the courts should have the ability to assess whether the best interests of the child were adequately respected on a case-by-case basis. This was more in keeping with the Constitution than a position where the media made this assessment for themselves.[151] The media had on numerous occasions demonstrated an inability to assess when something was in the best interests of the child – including a flagrant disregard of court orders to that effect.[152]

The media respondents stated that the primary function of the press was, among other things, to provide the public with accurate, reliable, and current information.[153] It was unclear how the accuracy of stories would be diminished by using pseudonyms.[154] The bigger issue seemed to be a belief by the media that self-regulation and legal provisions were mutually exclusive. The media respondents, therefore, viewed the need to approach a court for an application allowing them to print information regarding a person who was a child witness, victim or offender as an "unjustifiable burden".[155] This allegation was perhaps an attempt to detract from the real motive - i.e. the profit motive.[156]

7 The judgment at a glance

In the HC decision it was found that "the adult extension sought [by the Applicants] falls to be dismissed for it is neither permissible nor required by

147 Replying Affidavit states that "protection under section 154(3) and greater self-regulation are not mutually exclusive" para 66.2.

148 Replying Affidavit para 137.

149 Replying Affidavit para 137.

150 SCA decision para 69. Replying Affidavit para 35.

151 Replying Affidavit para 25.5.

152 A court order was granted on 30 June 2015 protecting MVB from certain intrusions by the media. Despite MVB's curator *ad litem* personally bringing the court order to the attention of media publications, YOU magazine and Huisgenoot proceeded to violate the court order and the Press Code in an article titled "Henri's no murderer", published on 27 August 2015 - Buikman Supporting Affidavit paras 17-20.

153 Answering Affidavit para 92.

154 Founding Affidavit paras 45-46.

155 Answering Affidavit para 79.

156 "Stories of crimes committed against anonymous children, to whom the readers cannot establish any emotional connection, will simply not compete for readers' attention" (Answering Affidavit para 88).

the Constitution".[157] This was further echoed in the SCA decision which held, *inter alia*, that

> the adult extension severely restricted the right of the media to impart information and infringed the open justice principle. In the absence of any limitation on the nature and extent of the adult extension, the relief sought by the appellants was overbroad and did not strike an appropriate balance between the rights and interests involved.[158]

Criticism of this judgment can be levied for several reasons. To be succinct, this article will address three main points: the role of the legislature, the role of section 36 of the Constitution, and a failure by the court to take cognisance of the expert evidence presented by the applicants.

7.1 The role of the legislature

The central purpose of the separation of powers, as conceived by Montesquieu,[159] was that it would prevent tyranny and protect liberty.[160] The separation of powers in the South African context envisages a separation between the branches of government, i.e. the executive, the legislature and the judiciary. As correctly pointed out by Ackermann J in *S v Dodo*,[161] there is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive functions on the other.[162] Ackermann J goes on to further state that:

> Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly, such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case.[163]

Against this background it is therefore disappointing that in the HC decision so much of the judgment hinged on the argument that the courts do not have the power to change the age as stipulated in section 154(3) of the *Criminal Procedure Act*.[164] By focussing on the literal meaning of the definition of a "child" in the *Child Justice Act*,[165] the court, with respect, failed to interpret the intention of the *Child Justice Act* as a whole. It is the writer's

157 HC decision paras 61-70.
158 SCA decision para 27.
159 Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (commonly known as Montesquieu) was a French political thinker who lived during the Age of Enlightenment.
160 O'Regan 2005 *PELJ* 124.
161 *S v Dodo* 2001 3 SA 382 (CC).
162 *S v Dodo* 2001 3 SA 382 (CC) para 22.
163 *S v Dodo* 2001 3 SA 382 (CC) para 26.
164 HC decision para 62.
165 Section 1 of the *Child Justice Act* states that "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 terms of s 4(2).

understanding that the applicants did not seek to change the definition of "child" to include a person over the age of 18, but rather that the protection which the child (now an adult) received by virtue of being in contact with the criminal justice system should endure beyond the age of 18. The following example could explain this line of reasoning: a doctor may have to adjust the dosage of medication for a disease/illness that started during childhood and endured into adulthood. The doctor would not recommend that the patient suddenly discontinue the use of the medication when s/he reached the age of 18 but would either taper the patient off the medication over a period or adjust the dosage according to the patient's specific needs.

In very much the same manner, while a person ceases to be a child upon reaching the age of 18, the person concerned does not immediately become divorced from the impact that the crime and the exposure to the criminal justice system had and continues to have on his/her psyche.[166] This view is precisely validated by the evidence presented by the experts in this case. The tenets of restorative justice as articulated in the *Child Justice Act* do not cease because the legal status[167] of the person concerned has changed.

It would therefore not be beyond the realm of possibility for the court to have taken cognisance of this purposive interpretation of section 154(3) of the *Criminal Procedure Act*. In so doing, the court would have been able to declare section 154(3) of the *Criminal Procedure Act* unconstitutional – pending confirmation by the Constitutional Court. This would therefore not have amounted to an intrusion into the functions of the legislature.

The SCA seems at the very least not to have launched into an extensive debate on this topic. Both the majority and the minority judgments acknowledge the role that the legislature must play in this matter (if any).[168] They differ, however, in their opinion regarding the form in which this conundrum must be brought before parliament. Willis JA in his judgment appears to have believed that section 154(3) of the *Criminal Procedure Act* must first be declared unconstitutional and that a detailed formulation of the limitation of the right was best left to Parliament.[169] To the contrary, Swain JA held that only once the constitutional validity of section 154(3) of the *Criminal Procedure Act* had been determined by the court might Parliament be afforded the opportunity to remedy the situation.[170] The majority held that the primary responsibility of the court was to examine the nature and extent

166 *J v National Director of Public Prosecutions* 2014 2 SACR 1 (CC) para 43.
167 The sum total of a legal subject's rights, duties and capacities (Boezaart *Law of Persons* 7).
168 SCA decision paras 96-97.
169 SCA decision paras 20, 96.
170 SCA decision para 21.

of the limitation and take this aspect into account as an essential part of the proportionality analysis.[171]

7.2 Limitation of rights

In *National Media Ltd v Bogoshi*[172] (a case dealing with the right to privacy versus the right to freedom of expression) the court stated that it would be wrong to regard either of the competing interests as being more important than the other.[173] In that case the court held that where two competing constitutional rights come into conflict – each invoked by different parties, and seeking to intrude on the other's right – a court must reconcile them.[174] There are a number of constitutional rights at play in this case which must be reconciled as far as is reasonably possible. Of particular interest to the discussion will be the rights to privacy[175] and dignity[176] and the best interests of the child[177] versus the freedom of expression[178] of the media and the open justice principle.

In paragraph 67 of the HC decision, Hughes J states the following:

> 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.

This paragraph, in its entirety, is problematic for several reasons. Firstly, there no explanation is given as to who these "other parties" are and the content of the rights that are supposedly being violated. Secondly, in attempting to illustrate how the child's freedom of expression would be limited in adulthood, the court relied on one of the examples[179] listed by the

171 SCA decision para 21.
172 1998 4 SA 1196 (SCA).
173 *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) para 17.
174 Carstens 2008 *Obiter* 297.
175 Section 14 of the Constitution.
176 Section 10 of the Constitution.
177 Section 28(2) of the Constitution.
178 Section 16 of the Constitution.
179 SCA decision para 58. Answering Affidavit para 97. The following scenarios were presented by the media respondents: a child is injured in a motor accident as a result of another's reckless and negligent driving but the child's school may not make the matter known in its newsletter or at an assembly, neither may the church pray for

media respondent.[180] There was simply no evidence brought forward to suggest that this would be the case. All the expert evidence presented illustrated the benefits of anonymity. The HC and SCA decisions, therefore, rely on an unsubstantiated claim made by the media respondents to invalidate the substantiated claims of the applicants. The media respondents also (inadvertently) pointed out the flaws in this line of thinking:

> While it is impossible to predict the future, the disclosure of KL's identity may serve the public interest if, for example, she decided to publicise her experience to motivate others to overcome adversity.[181]

The wording of this paragraph is indicative of the presumptuous and speculative nature of this argument. The applicants correctly pointed out that it could not be assumed that all activism or community interest was in the best interests of children.[182] Furthermore, there would be nothing preventing the child (now an adult) from approaching the court to lift the restriction on the publication for that child's (adult's) story. Moreover, to the extent that courts are required to exercise oversight, this was a requirement of their role as upper guardians of children and preferable to and more in keeping with the Constitution than a position where the media make this assessment for themselves.[183]

Lastly, the final two sentences of paragraph 67 of this judgment frankly amount to an untenable understanding of the limitation of rights. The wording of section 36 of the *C*onstitution is relevant in this regard:

> (1) The rights in the Bill of Rights may be limited only regarding the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and

her recovery; where the child is a victim of a robbery at home or in a motor vehicle hijacking incident; a child displays extraordinary bravery in the face of a crime but no one may publicly commend the fact; even once a child dies, whether in childhood or in later adulthood, the ban would remain.

180 Answering Affidavit para 99.

181 Answering Affidavit para 133.2.

182 Replying Affidavit para 149.2.

183 Replying Affidavit para 25.5.

> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The reasoning of the analysis made by the court presupposes that upholding the child's best interest principle (in section 28(2) of the Constitution), the right to dignity (in section 10) and the right to privacy (in section 14) would amount to a limitation of the individual's freedom of expression upon attaining adulthood. Also, this would limit the right to freedom of expression of the media and the right to open justice (section 152 of the *Criminal Procedure Act*). The HC decision, in the writer's view, did not suggest that an enquiry had been performed regarding the reasonableness and justifiability of this limitation. In so concluding that "one right [is] now thumping another" (sic), the HC decision failed to critically analyse the purpose of the limitation sought by the applicants, as illustrated by the expert evidence.[184] Furthermore, the HC decision failed to unpack the relation between the limitation and its purpose (which again can be substantiated by the expert evidence).[185] This is remedied to a large extent by the SCA decision, which did launch into an extensive discussion of the limitation of rights.[186] It is unfortunate, however, that the majority held that the proposed limitation on the rights of the media to impart information is neither reasonable nor justifiable in terms of section 36 of the Constitution.[187]

7.3 Disregard of expert evidence

Perhaps the most egregious transgression in this judgment is how little the court interacted with the evidence presented by the applicants. Even in the face of the concessions[188] made by the media respondents, it appears that the court was reluctant to engage with the evidence presented. The only

184 Section 36 (1)(b) of the Constitution.

185 Section 36(1)(d) of the Constitution – i.e., when limiting a right, there must be a good reason for the infringement (one that is reasonable and justifiable).

186 SCA decision paras 16-35.

187 SCA decision para 27

188 HC decision para 22*:* "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." Also see the SCA decision para 55.

concerted effort to engage with the expert evidence appeared in the minority judgement of the SCA decision.[189]

The court referred to *Johncom Media Investments v M*[190] in so far as the applicants had highlighted that the courts had time and again extended the protection of anonymity in respect of children even over the age of 18.[191] However, Hughes J concluded that this extension had been initiated in cases where it was just and equitable for the Constitutional Court to do so, as there was nothing available to cure the defect acting against the rights of the child.[192] If the expert evidence had been considered, it would have been difficult to understand why it would not be just and equitable, in any circumstance, to extend a child's anonymity beyond the age of 18. Furthermore, there was nothing available to cure the defect acting against the rights of the child as all the available remedies only assist when the harm to the individual has already been done. The inadequacies of these remedies were illustrated not only by the legal arguments brought forth by the applicants but were further bolstered by the impact of the evidence presented by the experts.

8 Conclusion

Through an affidavit by a newspaper editor with no expert knowledge on matters concerning children and child justice, the media respondents delivered arguments fraught with statements containing no supporting evidence and a mischaracterisation of the case. It is clear from the evidence provided by the expert witnesses that identification could cause devastating psychological effect and essentially undo all the rehabilitative work done. This fundamentally goes against the ethos of the *Child Justice Act* and what it aims to achieve. It is therefore quite unfortunate that despite this, the court ruled against the applicants in their bid to secure that a child's anonymity continues even beyond the age of 18 years old. The court also (erroneously) gave cognisance to one of the false arguments presented by the media respondents - that it would prevent adults from promoting awareness of their experiences.[193] Again, as indicated above, nothing prevents any interested party from approaching a court to ask that it allow publication of information which may identify a child witness, victim or offender. This would necessarily include the witness, the victim, or the offender him/herself.

189 HC decision paras 52-54.
190 *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC).
191 *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) para 64.
192 *Johncom Media Investments Limited v M* 2009 4 SA 7 (CC) para 65.
193 HC decision para 67.

The matter appeared before the Constitutional Court on 7 May 2019.[194] In the Constitutional Court the applicants sought confirmation of the SCA's declaration of the constitutional invalidity of section 154(3) of the *Criminal Procedure Act* in terms of the "victim extension". They also applied for leave to appeal the SCA majority's decision to dismiss the "adult extension". The matter was finally settled in *Centre for Child Law v Media 24 Limited*. The majority decision in the Constitutional Court held that section 154(3) of the *Criminal Procedure Act* was declared constitutionally invalid to the extent that the protection that children receive in terms thereof does not extend beyond their reaching the age of 18 years.[195] Furthermore, the court held that the declaration of constitutional invalidity would be suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.[196]

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List of Abbreviations

CCL	Centre for Child Law
LDD	Law, Democracy and Development

MMA	Media Monitoring Africa
NICRO	National Institute for Crime Prevention and Reintegration of Offenders
PELJ	Potchefstroom Electronic Law Journal
SACQ	South African Crime Quarterly
UNCRC	United Nations Convention of the Rights of the Child