CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 36/08
[2009] ZACC 8

DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL	Applicant
versus	
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
ALBERT PHASWANE	Second Respondent
AARON MOKOENA	Third Respondent
CENTRE FOR CHILD LAW	First Amicus Curiae
CHILDLINE SOUTH AFRICA	Second Amicus Curiae
RESOURCES AIMED AT THE PREVENTION OF CHILD ABUSE AND NEGLECT (RAPCAN)	Third Amicus Curiae
CHILDREN FIRST	Fourth Amicus Curiae
OPERATION BOBBI BEAR	Fifth Amicus Curiae
PEOPLE OPPOSING WOMEN ABUSE (POWA)	Sixth Amicus Curiae
CAPE MENTAL HEALTH SOCIETY	Seventh Amicus Curiae

Heard on : 6 November 2008

Decided on : 1 April 2009

JUDGMENT

NGCOBO J:

Introduction

[1] Until recently, the law did not pay much attention to the stress that child complainants in sexual offence cases suffer when they testify in courts.[1] Child complainants in sexual offence cases were required to relive the horror of the crime in open court. The circumstances under which they gave evidence and the mental stress or suffering they went through while giving evidence did not appear to be the concern of the law. And, at times, they were subjected to the most brutal and humiliating treatment by being asked to relate the sordid details of the traumatic experiences that they had gone through. Regrettably, although there were welcome exceptions, the plight of child complainants was seldom the concern of those who required them to testify or those before whom they testified.

[2] The advent of our constitutional democracy must change all of that. Our constitutional democracy seeks to transform our legal system. Its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, introduce a new ethos that should permeate our legal system. Consistently with these values, section 28(2) of the Constitution requires that in all matters concerning a child, the child's best interests must be of paramount importance.[2] Recently, the Criminal Law (Sexual Offences and Related Matters)

[1] In 1991, the Criminal Law Amendment Act 135 of 1991 amended the Criminal Procedure Act 51 of 1977 by introducing section 170A which allows children to testify through intermediaries. Section 170A commenced on 30 July 1993.

[2] Section 28(2) provides:

Amendment Act[3] (the Sexual Offences Amendment Act) introduced certain amendments to the Criminal Procedure Act[4] (the CPA). The amendments that are relevant to these proceedings are those that concern the protection to be given to child complainants when giving evidence in criminal proceedings involving sexual offences.

[3] The central question presented in these consolidated cases is whether the provisions of the CPA that concern the protection to be given to child complainants in criminal proceedings involving sexual offences provide protection consistently with section 28(2) of the Constitution. In particular, the question presented is whether the provisions of sections 153(3) and (5) (proceedings *in camera*),[5] 158(5), (the duty to give reasons for refusing to allow a child to give evidence by means of closed circuit television),[6] 164(1) (testifying without taking an oath or the affirmation),[7] 170A(1) (testifying through an intermediary)[8] and (7) (the duty to give reasons for refusing to appoint an intermediary)[9] of the CPA are consistent with section 28(2) of the Constitution. These provisions will be referred to collectively as the invalidated provisions. This is an important constitutional question for it concerns persons who

---

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

[3] Act 32 of 2007.

[4] Act 51 of 1977.

[5] See [134] below.

[6] See [152] below.

[7] See [163] below.

[8] See [86] below.

[9] See [153] below.

are not parties to criminal proceedings but whose constitutional rights may be affected.

[4] There are two other equally important questions which arise from the manner in which the central question arose in these cases and the relief that the High Court granted. The first concerns the powers of a court to raise a constitutional issue of its own accord. The other concerns the power of the High Court to make declaratory and supervisory orders. The importance of these questions lies in the fact that they often arise in the context of child complainants in sexual offence cases, who are not parties to the proceedings in which they testify, yet who have constitutional rights that require protection. They also arise in the context of our adversarial system in criminal trials where those accused of crimes enjoy rights to a fair trial and where the presiding officer is neutral and may not take any side in the contest. They also arise in the context of a constitutional state where the Constitution is the supreme law and any law or conduct that is inconsistent with it is invalid.

[5] But, as the judgment of the High Court[10] and the submissions made by the parties in these cases amply demonstrate, behind these legal questions lies the core issue concerning the administration of justice. Specifically, two questions arise in this regard. First, whether the provisions of the CPA that were enacted to protect child complainants from the mental stress and anguish associated with testifying in criminal proceedings are being interpreted and implemented consistently with the Constitution.

[10] *S v Mokoena* 2008 (5) SA 578 (T).

Second, the duty of all superior courts including this Court (as the upper guardian of all minors) – if any – to investigate any failure to implement these provisions which deny child complainants the protection they constitutionally deserve, once any failure to do so is brought to the Court's attention. These cases are therefore fundamentally about the administration of justice in those courts in which child complainants of sexual offences appear to testify.

[6] It is these questions that we must answer.

[7] They arise out of the convictions of Messrs Phaswane and Mokoena (together referred to as the accused), who were each charged in a regional court, with the rape of a child. The High Court judge before whom these matters came for sentence, of his own accord, raised the constitutional validity of certain provisions of the CPA. He called upon the accused, the state (including government ministers) and various non-governmental organisations that look after the interests of children, to submit written argument on the constitutionality of certain provisions of the CPA including sections 153, 158, 164(1) and 170A. The court eventually found that sections 153(3) and (5), 158(5), 164(1) and 170A(1) and (7) were inconsistent with section 28(2) of the Constitution. It held that the protection they provide falls short of that required by section 28(2). It accordingly declared them invalid.[11] The court also issued declaratory and supervisory orders concerning the rights of child complainants and child witnesses.

[11] Id at para 185.

[8] The Director of Public Prosecutions, Pretoria (the DPP), who is supported by various amici, is seeking the confirmation of the orders of invalidity. The Minister is opposing the confirmation of those orders. The Minister is also appealing against both the orders of invalidity and the declaratory and supervisory orders. Both the amici and the DPP support the declaratory and supervisory orders. Mr Phaswane and Mr Mokoena are only opposing the confirmation of the order of invalidity as it relates to sections 170A(1) and (7) and 158(5) to the extent that it may negatively impact on their appeal. They are also appealing against the orders of invalidity 8in relation to sections 170A(1) and (7) and 158(5). They support the confirmation of the other orders.

[9] With this prelude, I now turn to the facts.

Factual background

[10] Mr Phaswane was charged in the regional court, sitting at Pretoria North, with the rape of a 13 year old girl. She was the younger sister of the woman that Mr Phaswane was living with as his wife. The alleged rape occurred on 29 January 2005. After a number of postponements, the trial eventually got underway on 3 March 2006. Mr Phaswane pleaded not guilty. The child gave her evidence *in camera*. She testified without the assistance of an intermediary, nor through the aid of closed circuit television (CCTV) or a similar device.

[11] Before she testified, she was questioned by the court in order to determine whether she understood the import of an oath, and if not, whether she understood what it meant to speak the truth. While the court was not satisfied that she understood the import of an oath, it nevertheless concluded that the child understood the difference between truth and falsehood. The child was accordingly admonished to speak the truth.

[12] At the conclusion of all the evidence, Mr Phaswane was convicted of the rape of the child. As the court found that the offence merited a sentence in excess of its jurisdiction in terms of the provisions of section 52(1) of the Criminal Law Amendment Act,[12] the court referred the case to the High Court in Pretoria for sentence in terms of section 52 of the Act.[13] In terms of section 52(1) an accused who

---

[12] Act 105 of 1997. Section 52(1) provides:

> "If a regional court, following on—
>
> (a) a plea of guilty; or
>
> (b) a plea of not guilty,
>
> has convicted an accused of an offence referred to in—
>
> (i) Part I of Schedule 2; or
>
> (ii) Part II, III or IV of Schedule 2 and the court is of the opinion that the offence concerned merits punishment in excess of the jurisdiction of a regional court in terms of section 51(2),
>
> the court shall stop the proceedings and commit the accused for sentence as contemplated in section 52(1) or (2), as the case may be, by a High Court having jurisdiction."

[13] Section 52(3) provides:

> "(a) Where an accused is committed under subsection (1)(b) of sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.
>
> (b) The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in section 51(1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice, he or she shall, without sentencing the accused,

is convicted in the regional court of an offence for which a minimum of life imprisonment is prescribed by section 51 of the Act read with Part 1 of Schedule 2 must be committed to the High Court for sentence. The rape of a child under the age of 16 is such an offence.

[13] Mr Mokoena was charged with the rape of an 11 year old girl. The rape was alleged to have taken place on 8 September 2005. After three postponements, the trial eventually got underway on 19 April 2006. Mr Mokoena also pleaded not guilty. The case was finalised on 7 July 2006 when Mr Mokoena was convicted of rape.

---

obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.

(c) If a judge acts under the proviso to paragraph (b), he or she shall inform the accused accordingly and postpone the case for judgment, and, if the accused is in custody, the judge may make such order with regard to the detention or release of the accused as he or she may deem fit.

(d) The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.

(e) Such Court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (b) may—

(i) confirm the conviction and thereupon impose a sentence as contemplated in section 51(1) or (2), as the case may be;

(ii) alter the conviction to a conviction of another offence referred to in Schedule 2 and thereupon impose a sentence as contemplated in section 51(1) or (2), as the case may be;

(iii) alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and thereupon impose the sentence the Court may deem fit;

(iv) set aside the conviction;

(v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit; or

(vi) make any such order in regard to any matter or thing connected with such person to the proceedings in regard to such person as the High Court deems likely to promote the ends of justice."

[14] Before the commencement of the trial, the state made an application in terms of section 170A(1) to lead the evidence of the child complainant with the aid of an intermediary. In support of the application, the state submitted that "if she testifies in open court she would be subjected to undue emotional stress." The application was based on the age of the child and the nature of the charges. A social worker had apparently interviewed the child after the rape and had recommended the appointment of an intermediary. The application was unopposed. An intermediary, Ms Sarah Novodia Mhlanga, an educator of some six years experience, who was readily available in court, was appointed. The child testified through the intermediary.

[15] Mr Mokoena's case too was referred to the High Court in Pretoria for sentence.

[16] These two cases came before Bertelsmann J in the High Court in Pretoria. He took the view that these cases raised similar constitutional issues pertaining to the protection of child complainants and child witnesses. He accordingly consolidated them and formulated the constitutional issues that he perceived the cases raised. These issues related to the constitutional validity of some 14 provisions of the CPA including the provisions of section 52 of the CPA. He formulated the constitutional issues in his directions of 15 August 2007 and called for "submissions from the affected parties or interested parties that may be admitted as amici curiae . . ." directing the attention of those invited to the fact that:

> "Submissions should deal specifically with the separate sections of the Criminal Procedure Act that affect child victims and child witnesses, such as sections 153, 154, 158, 161, 164, 165, 166, 167, 170A, 186, 191A, 192 and 194, examine their

> constitutional compatibility and potential amendment, adaptation or reinterpretation to adapt them to constitutional imperatives, if necessary."[14]

[17] He invited a wide-ranging number of non-governmental organisations to make written submissions on these issues.[15] The judgment of the High Court records that "submissions were received from virtually all"[16] those who were invited to make submissions. The Centre for Child Law, Childline South Africa, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), Children First, Operation Bobbi Bear, People Opposing Women Abuse (POWA) and the Cape Mental Health Society featured as amici in the High Court and in this Court (they are referred to collectively as the amici.) In addition, the High Court invited the Minister for Justice and Constitutional Development (the Minister), the Minister for National Education, the Minister for Safety and Security, the Minister for Social Development, the Minister for Correctional Services, the Minister for Health and the Commissioner of the South African Police Services to make written submissions. The Minister is the only one who featured as a party in both the High Court and in this Court.

[18] As is apparent from the above, the High Court raised these issues of its own accord. They were neither raised in the trial courts nor in the proceedings before the High Court. After hearing argument, the High Court took the view that not all the

[14] *S v Albert Phaswane and Aaron Mokoena* Case No CC192/2007, North Gauteng High Court, Pretoria, 14 August 2007, unreported.

[15] These organisations are The Centre for Child Law; The Centre for the Study of Violence and Reconciliation; The Tshwaranang Legal Advocacy Centre; People Opposed to Women Abuse; The Association of Regional Magistrates of South Africa; The Child Welfare Society; the National Council of Traditional Leaders; Child Line South Africa; the National Council of Religious Leaders of South Africa; BEE Court Wise; The Child Witness Research and Training Institute, Grahamstown; The South African Human Rights Commission; The Health Professions Council of South Africa; Molo Shongololo; and the Open Society Foundation.

[16] Above n 14.

issues that it had raised were relevant to the two cases. As a result, a number of these issues fell away and the court ultimately considered the constitutional validity of the invalidated provisions only. It found these provisions to be inconsistent with section 28(2) of the Constitution and declared them invalid. The confirmatory proceedings relate to this declaration of invalidity.

[19] In addition, the High Court made declaratory orders concerning the priority to be given to the investigation and prosecution of cases involving children; the assistance of intermediaries and the use of electronic devices for children testifying in courts; and the entitlement of children to trials conducted by court officials with adequate skills in dealing with children to handle cases involving children. Furthermore, the High Court issued supervisory orders against the Minister, the National Commissioner of South African Police Services and the Director of Public Prosecutions to address the matters dealt with in the declaratory orders and to report to it a year later on the steps taken in that regard.[17]

[20] These cases were thereafter referred to this Court for confirmation of orders of invalidity in terms of section 172(2)(a) of the Constitution. Hence the confirmatory proceedings and the appeal by the Minister. The Minister lodged the notice of appeal as well as the application for leave to appeal against the declaratory and supervisory orders late. Each of these requires a condonation application. None was sought in

[17] These orders are set out fully in n 125 and 129 below.

respect of the notice of appeal; one was sought in respect of the leave to appeal. This is dealt with below in paragraphs 28 to 29.

[21] The DPP and amici presented factual material to both the High Court and this Court on the current status of the implementation of the invalidated provisions. This material focused on: the availability of intermediaries and the adequacy of their training; the training of prosecutors; and the lack of court facilities for child complainants in sexual offence cases. This material raises some concern about the proper implementation of the invalidated provisions, and, in particular, the role of this Court to investigate these factual allegations. Counsel for the Minister was invited to address argument in this regard and the desirability of a structural injunction, if need be.

[22] To complete the narrative, I should refer to events that took place subsequent to the referral of the orders of invalidity to this Court and those that occurred subsequent to the hearing in this Court. In the course of oral argument in this Court, it emerged for the first time that the judge who had referred the orders of invalidity to this Court had, in the meantime, confirmed the conviction of Mr Mokoena and thereafter postponed his case for sentence. Counsel for the DPP kindly undertook to furnish us with a transcript of those proceedings and the judgment, if one was available. Indeed, subsequent to the hearing she furnished us with the transcript of the proceedings held on 24 October 2008 and more recently, with a copy of the judgment of the High Court

on the conviction of Mr Mokoena. Neither the counsel who appeared on behalf of the DPP nor the counsel who appeared for the accused took part in those proceedings.

[23] On the information furnished to us these matters were re-enrolled for hearing on 1 July 2008 at the instance of the judge. As both accused did not appear in court on that date, these cases were postponed to 24 October 2008. On 24 October 2008 only Mr Mokoena appeared; Mr Phaswane did not and was reported to be at his home in Mozambique. The court then dealt with the case of Mr Mokoena. After hearing oral argument on whether his conviction should be confirmed, the court, in an *ex tempore* judgment, confirmed the conviction of Mr Mokoena and postponed the case to 6 February 2009 for sentence. The *ex tempore* judgment was signed by the judge on 9 February 2009 and, as indicated above, was only made available to this Court some time after that date by the DPP. I shall refer to this judgment as the second judgment.

[24] It is apparent from the second judgment that the judge was fully aware that he had referred the orders of invalidity to this Court for confirmation. He was also fully aware that unless the constitutional issues that he had referred to us would have no effect on the conviction of Mr Mokoena, he could not proceed to consider the conviction of Mr Mokoena without a decision of this Court on the invalidated provisions. As the judgment makes plain, he took the view that he could confirm the conviction without our decision on the constitutional issues that he had referred to us. This rendered it unnecessary for him to wait for the decision of this Court on the

constitutional issues. In effect, therefore, the High Court concluded that a decision on the constitutional issues that it had referred to this Court was not necessary to confirm the conviction of Mr Mokoena.[18]

[25] It is apparent from the second judgment that when the High Court was considering whether to proceed and consider the conviction of Mr Mokoena, it was concerned about the delay that had already occurred in these matters. The constitutional issues that it had itself raised and which had contributed to the delay were no longer its concern as it took the view that our decision on those issues was not necessary to confirm the conviction. The consideration of the constitutional issues by the High Court and the referral of the orders of invalidity have resulted in an unnecessary delay in the finalisation of a matter which could have been finalised during 2006, or at the very latest, 2007. Moreover, this resulted in this Court having to consider a matter which, on the judge's own view, did call for a decision on the constitutional issues. And despite all this, the judge did not consider it desirable to draw our attention to any change in his view on the need to decide the constitutional issues in the case of Mr Mokoena. This could have been done by sending a copy of his judgment to our Registrar.

[18] The court concluded that there was nothing preventing it from considering the credibility of the complainant and the reliability of her evidence. And it recorded that neither the defence nor the state objected to it doing so. While noting that the regional court had been "singularly insensitive to the child's feelings and the child's interests in not being identified as a victim of a sexual assault", the court concluded that the "irregularities did not redound to the accused's detriment." (*S v A Mokoena and A Phaswane* Case No CC7/07, North Gauteng High Court, Pretoria, 24 October 2008, unreported at p 22.) This largely related to the fact that the proceedings were open to the public after the child had completed her testimony. (Above n 10 at para 3(j)-(n).) It found the complainant to be a credible witness and accordingly confirmed the conviction.

[26] Against this background, I now turn to consider the questions presented in these cases. In view of the number of issues that must be considered in these cases, it will be convenient to set out the reasoning of the High Court and the contentions of the parties under each issue. For now, it will suffice to set out the questions.

[27] Before doing so, let me dispose of the issue of condonation.

Condonation

[28] The judgment of the High Court was delivered on 12 May 2008. The Minister lodged a notice of appeal against the orders of invalidity in this Court on 10 June 2008. In terms of Rule 16(2), the notice of appeal should have been lodged on 2 June 2008. It was therefore late by eight days. No condonation was sought for this lateness. On 29 July 2008, the Minister lodged an application for leave to appeal against the declaratory and supervisory orders. This application was also late as it should have been lodged on 2 June 2008. There is an application for an order condoning this non-compliance with the rules. The explanation for the delay is utterly unsatisfactory. It boils down to a failure to read the rules of this Court carefully. This is unacceptable.

[29] In the view I take of the merits, the application for condonation should nevertheless be granted despite the unsatisfactory explanation for the delay. If the orders of invalidity are not confirmed, it would be odd to leave the declaratory and supervisory orders in place. Similarly, despite the absence of an application for

condonation in respect of the late filing of the notice of appeal against the orders of invalidity, this too should be condoned. The orders of invalidity are, in any event, before this Court for confirmation. In addition, the delay was only eight days. There is no prejudice to the other parties. These special circumstances weigh in favour of granting condonation. What must be stressed, however, is that this should not be viewed as condoning what has become common practice for litigants demonstrating a blatant disregard for the rules of this Court.

[30] And now to the questions presented.

Questions presented

[31] The questions presented in these cases are the following:

(a) May a court raise, of its own accord, a constitutional issue?

(b) If so, was it appropriate for it to do so in these cases?

(c) If it was inappropriate for the High Court to raise any of the constitutional issues, should this Court nevertheless proceed to consider whether or not to confirm the orders of invalidity?

(d) Should we confirm the order of invalidity in relation to:

i) Section 153(3);

ii) Section 153(5);

iii) Section 158(5);

iv) Section 164(1);

v) Section 170A(1); and

vi) Section 170A(7)?

(e) Was it appropriate for the High Court to make the declaratory and supervisory orders?

(f) Given the concerns raised by the factual material presented by the DPP and the amici about the proper implementation of the provisions of the CPA that provide protection to child complainants, should this Court investigate these concerns, and if found to be valid, should a supervisory order be issued?

[32] I deal with these issues in turn.

May a court raise, of its own accord, a constitutional issue?

[33] The High Court took the view that it is entitled to raise a constitutional issue of its own accord and referred to our decision in *Potgieter*.[19] In that case, the High Court, of its own accord, raised the constitutionality of a statutory provision and thereafter declared it invalid. This Court, without commenting on the power of the High Court to raise a constitutional issue of its own accord, confirmed the order of invalidity. All the parties relied on this case too and approached the matter on the footing that the High Court was entitled to raise on its own a constitutional issue. In the light of the facts and circumstances of these cases, it is desirable to consider the question in some detail.

[19] *Potgieter v Die Lid van die Uitvoerende Raad: Gesondheid Provinsiale Regering Gauteng en Andere* [2001] ZACC 4; 2001 (11) BCLR 1175 (CC); *S v Williams* [1995] ZACC 6; 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC).

[34] The supremacy clause of the Constitution declares that the Constitution is the supreme law; any law or conduct that is inconsistent with it is invalid.[20] Like other branches of government, the judiciary must uphold and protect the Constitution.[21] And section 8(1) of the Constitution provides that the Bill of Rights is binding on the judiciary as well as on the legislature and the executive. In addition, section 39(2) provides that when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. In the light of these provisions of the Constitution, a court cannot enforce a law that is inconsistent with the Constitution. It follows that a court may raise, of its own accord, the unconstitutionality of a law that it is called upon to enforce.

[35] In *Carmichele*, we considered the obligation of courts to develop the common law and concluded that "where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation."[22] In addition, we also held that the duty of judges to develop the common law consistently with the Bill of Rights "arises in respect of both the civil and the criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2)."[23] And we added that "there might be circumstances where a court is obliged to raise the matter on its own and require

[20] Section 2 of the Constitution.

[21] Section 165(2) read with item 6 of Schedule 2 of the Constitution.

[22] *Carmichele v Minister of Safety and Security* (Centre for Applied Legal Studies Intervening) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 33.

[23] Id at para 36.

full argument from the parties."[24] And most recently, and in the context of whether an appeal court can, of its own accord, raise a law point, we held that "[w]here a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, of its own accord, to raise the point of law and require the parties to deal therewith."[25]

[36] The rationale for permitting a court to raise, of its own accord, a constitutional issue is rooted in the supremacy of the Constitution.[26] Apart from this, our Constitution contemplates that there will be a coherent system of law based on the Constitution, in particular, the Bill of Rights. Courts have a crucial role to play in developing this system of law with the Constitution as their guide.[27] It is the duty of all courts to uphold the Constitution and a court may thus raise a constitutional issue of its own accord.[28]

[37] The real question in this case therefore is: when may a court raise, on its own, a constitutional issue?

---

[24] Id at para 39.

[25] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (1) BCLR 1 (CC) at para 68. See also *Matatiele Municipality v President of RSA (No 1)* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67; *Alexkor Ltd v The Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 44.

[26] As we pointed out in *Matatiele 1*, this would be contrary to the supremacy clause of the Constitution which proclaims the supremacy of the Constitution and declares law or conduct inconsistent with it invalid. *Matatiele 1* at para 67 and *Alexkor* at para 43.

[27] *Daniels v Campbell and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at para 45.

[28] *CUSA* per O'Regan J above n 25 at para 132.

[38] In deciding these constitutional cases, the High Court held that before a court can decide a constitutional issue, "it must be clear that the particular constitutional question must arise from the facts of the case."[29] The High Court also referred to the general principle that constitutional issues should not be decided prior to a decision on factual issues or matters of law with which have no constitutional implication, "unless the decision on the constitutional issue is necessary for a proper assessment of the non-constitutional issues at stake."[30] It took the view that "the constitutional matters [it had raised] needed to be decided before the questions of the correctness of the convictions could be addressed."[31] And concluded that "[t]hese are several aspects of the evidence given by the complainants and the manner in which such evidence was given, that needed to be addressed before a final decision on the correctness of the convictions could be pronounced."[32] In effect therefore the High Court found that the correctness or otherwise of the conviction could not be decided without first deciding the constitutional issues. In addition, it held that as the constitutional issues raised were of relevance to matters in which child complainants and child witnesses are

[29] Above n 10 at para 19.

[30] Id at para 24; See also *De Kock NO and Others v Van Rooyen* 2005 (1) SA 1 (SCA).

[31] Above n 10 at para 25.

[32] Id at para 26. The High Court identified these as:

> "(a) Whether evidence that was given in a fashion that might be regarded as unconstitutional should be received.
>
> (b) Whether the lengthy postponements had a telling effect upon the children's evidence.
>
> (c) Whether the conduct of the proceedings was constitutionally appropriate and, if not, what remedy there might be—i.e. should the matter be remitted to the regional magistrate with an instruction to re-hear the evidence of the complainant in the Phaswane matter through an intermediary?
>
> (d) If not, could the evidence pass muster if it was held that it was tainted by unconstitutionality?"

involved, it was in the public interest and the interests of justice that they be dealt with.[33]

[39] In our adversarial system, courts are required to be impartial and ordinarily only decide issues that the parties have properly raised and are properly before the court in terms of its factual underpinnings. This principle is subject to an exception. A court is not always confined to issues of law explicitly raised by the parties.[34] If a litigant overlooks a question of law which arises on the facts, a court is not bound to ignore the question of law overlooked.[35] Another equally relevant principle in this regard is that of the separation of powers. Courts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the legislature. Ordinarily, therefore, they should raise and consider the constitutionality of laws that are properly engaged before them and where this is necessary for the proper resolution of the dispute before them.[36]

[40] The High Court correctly identified the circumstances in which a court may, of its own accord, raise and decide a constitutional issue. There are two situations in which a court may, of its own accord, raise and decide a constitutional issue. The first is where it is necessary for the purpose of disposing of the case before it, and the

[33] Id at para 28.

[34] *Alexkor* above n 25 at para 44; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at p 23-4.

[35] *Paddock Motors* above n 34 at p 24B-D.

[36] *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC); *President of the Republic of South African and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC); *Ex parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

second is where it is otherwise necessary in the interests of justice to do so. It will be necessary for a court to raise a constitutional issue where the case cannot be disposed of without the constitutional issue being decided. And it will ordinarily be in the interests of justice for a court to raise, of its own accord, a constitutional issue where there are compelling reasons that this should be done. The first of these instances does not give rise to any problem. It is the second that requires some attention.

[41] It is neither necessary nor desirable to catalogue circumstances in which it would be in the interests of justice for a court to raise, of its own accord, a constitutional issue. This is so because this depends upon the facts and circumstances of a case. An example that comes to mind is where the issue has become moot between the parties but its immediate resolution will be in the public interest and the matter has been fully and fairly aired before the court.[37] There are others, but they need not be set out here.

[42] In *Matatiele 1*, this Court raised, on its own, the constitutional validity of the legislative process followed by a province in approving a constitutional amendment that had the effect of altering its boundary. On the papers before the Court, there were

[37] In *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11, this Court held that:

> "This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues."

doubts as to whether the constitutional amendment had been enacted in accordance with the Constitution. A question then arose as to whether this Court should investigate the issue. The Court held that the issue raised important constitutional questions and concluded that "[i]t is in the interests of justice that these important issues, which may well have a bearing on the validity of Twelfth Amendment, be investigated."[38]

[43] It must be stressed that the constitutional issue sought to be raised must arise on the facts of the case before the court. In addition, the parties must be afforded an adequate opportunity to deal with the issue. A court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of the case in which the issue is sought to be raised. A court may therefore, of its own accord, raise and decide a constitutional issue where (a) the constitutional question arises on the facts; and (b) a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so. The question is whether these requirements were met in these cases. It is to that question that I now turn.

Was it appropriate to decide these constitutional issues?

Mr Mokoena

[38] *Matatiele 1* above n 25 at para 68.

[44] On the facts, the constitutional issues raised and decided by the High Court did not arise in this matter.[39] Before the evidence of the complainant was led, the state applied for the appointment of an intermediary citing the complainant's age and the nature of the charge as the basis for the application. The application was granted. An intermediary was readily available in court and assisted the child to testify. On these facts, the issue of the validity of sections 170A(1) and 170A(7) did not arise. Nor did the validity of sections 153(3) and 153(5) (the *in camera* provisions), section 158(5) (the CCTV provisions) and section 164(1) (the oath provisions) arise on the facts. When the child testified, the proceedings were *in camera*.

[45] Any doubt as to whether it was appropriate for the High Court to raise and decide the constitutional issues in the Mokoena case is immediately removed by the confirmation of the conviction of Mr Mokoena.

[39] The High Court identified the following constitutional issues:

(a) The compellability of the child to testify, either with or without the assistance of an intermediary.

(b) The child witnesses' entitlement to the services of an intermediary.

(c) The child witnesses and complainant's entitlement to testify *in camera.*

(d) The child witnesses entitlement to testify via an electronic device or closed circuit television.

(e) The need for the child witness to be admonished to speak the truth.

(f) The competence of the child to testify if it does not understand the concept of telling the truth.

(g) Whether, therefore, ss 153, 158, 164 and 170A are constitutionally compatible in their present form.

(h) Whether the present availability of intermediaries and electronic devices to enable a child to testify otherwise than in the presence of the alleged perpetrator is constitutionally compatible.

(i) Whether a child witness or victim is entitled to the presence of a support person.

(j) The constitutional implications of systemic delays affecting the child witness or the child victim.

(k) The existing deficiencies in the process should be addressed."

[46] The second judgment of the High Court makes it plain that the requirements set out above were not met. The High Court took the view that if the conviction or otherwise of Mr Mokoena could be confirmed without our decision on the constitutional issues raised by it, it was "obviously in the interest of the victim and of the accused that the next step in the proceedings should be taken as soon as possible."[40] It concluded that the conviction could be confirmed without our decision on the constitutional issues that it had raised. In effect, the High Court held that a decision on the constitutional issues that it had of its own accord raised and decided, was not necessary to confirm the conviction of Mr Mokoena. This conclusion by the High Court is in stark contrast to the finding it made in its reported judgment, namely, that the "constitutional matters needed to be decided before the questions of the correctness of the convictions could be addressed."[41]

[47] Apart from this, the High Court was rightly concerned about the delay in this matter. When the matter was referred to the High Court a great deal of delay had already occurred. And when the High Court raised the constitutional issues and heard argument on them, there was a further delay which the High Court candidly acknowledged.[42] A decision on the constitutional issues was bound to result in further delays as it carried with it the possibility of a referral of orders of invalidity to this Court for confirmation which, in itself, would have resulted in a further delay. Having regard to this and to the fact that a decision on those issues was not necessary to

[40] Above n 18 at p 19.

[41] Above n 10 at para 25. See also paras 26-8.

[42] Id at paras 15-8.

confirm the conviction of Mr Mokoena, it cannot be said that it was in the interests of justice for the High Court, of its own accord, to raise and decide the constitutional issues.

[48] For all these reasons the conclusion that it was inappropriate for the High Court to raise the constitutional issues in relation to the Mokoena matter is irresistible. If anything, Mr Mokoena's case demonstrates the need for courts to be astute in raising and deciding constitutional issues. Unless they do, the result may be an unnecessary delay in finalising a case in circumstances where, as here, the decision on the constitutional issues was not necessary for the determination of the case before the court. As the High Court stated itself, elsewhere in its judgment, constitutional matters should not be addressed prior to deciding non-constitutional issues "unless such decision [on the constitutional issue] is necessary for a proper assessment of the non-constitutional issues at stake."[43] Regrettably, the High Court did not apply this principle in the case of Mr Mokoena.

[49] It was therefore inappropriate for the High Court to raise the constitutional issues that it raised in the Mokoena matter.

Mr Phaswane

[50] The only issue that the High Court could - on the facts - validly have raised is the constitutional validity of sections 170A(1) and 170A(7) (the intermediary

[43] Id at para 24.

provisions). The child complainant was about 13 years old when she testified. No application was made to lead her evidence through an intermediary, nor did the trial court enquire into the desirability of the appointing of an intermediary. The question whether an intermediary should have been appointed in the light of the provisions of section 28(2) of the Constitution therefore arose on the facts. It may therefore have been appropriate for the High Court to raise the issue of the validity of sections 170A(1) and 170A(7). Whether a decision on the constitutional validity was necessary to confirm the conviction of Mr Phaswane is another matter. In view of the conclusion that I reach in the next question, it is not necessary to reach any firm conclusion in this regard.

[51] However, it is not clear how the oath provision (section 164(1)) arose on the facts. As pointed out earlier, the child was questioned by the court to establish whether she understood the import of an oath and, secondly, whether she understood the difference between truth and falsehood. The court was not satisfied that the child understood the import of the oath, but was satisfied that the child knew what it meant to speak the truth. The child was therefore admonished to speak the truth. On these facts, the question whether the provisions of section 164(1) exclude from testifying a child who does not understand the difference between truth and falsehood simply did not arise.

[52] Nor did the *in camera* provisions (section 153(3) and (5)) arise. The proceedings were held *in camera*. This issue was raised by the trial court in view of

the age of the complainant and the nature of the offence. Section 153(3) was not engaged. Nor was section 153(5) engaged as the child was not a child witness, but a child complainant in a sexual offence case. The same goes for the CCTV provision (section 158(5)). When the complainant testified, she was 13 years old. No request was made by the state for her to give evidence through the aid of a CCTV or similar device, and there was therefore no refusal of any application in terms of section 158(5). In any event, had section 158(5) been in operation at the time, it would have required reasons to be given immediately in respect of this complainant.

[53] In addition, there is much to be said for the further argument advanced on behalf of the Minister that some of the sections that were considered by the High Court were not yet in operation at the time of the trial and, therefore, they could not have been relevant to the proceedings. The Sexual Offences Amendment Act effected certain amendments to some of the sections in issue in these cases. It added subsection (5) to section 158; substituted subsection (3) in section 153; substituted subsection (1) in section 164; substituted subsection (1) in section 170A; and added subsection (7) to section 170A. The effect of the amendment to subsection 170A(1) was to insert the words "biological or mental" before the words "age of eighteen years."

[54] The Sexual Offences Amendment Act was signed into law on 13 December 2007 but came into operation on 16 December 2007.[44] Therefore, sections 153(3),

[44] Above n 3.

158(5), 164(1) and 170A(7), in their amended form, only came into operation after these two cases had been finalised by the regional courts and had been referred to the High Court in terms of section 52(3) of the Criminal Law Amendment Act. It must be recalled that these cases had been referred to the High Court by 15 August 2007, this being the date when the High Court, of its own accord, raised the constitutional issues. As at that date, the amendments were still in bill form. Therefore, the invalidated provisions in their amended form were not and could not have been in issue in the trials of the two accused and in the proceedings before the High Court.[45]

[55] In relation to sections 153(3), 158(5), 164(1) and 170A(7), it was therefore inappropriate for the High Court to have raised the constitutionality of these provisions as they were still in bill form at the time when the court raised and considered their constitutional validity. In terms of section 167(4) of the Constitution,[46] only this Court may decide the constitutional validity of a

[45] It is true that in *Khosa* this Court held that a court may make an order concerning the constitutional invalidity of an Act of Parliament that has not yet been brought into force. (*Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at paras 90-3.) In that case, we reasoned that in terms of section 81 of the Constitution, a bill that has been signed by the President becomes an Act of Parliament and in terms of section 172(2)(a) of the Constitution a court may make an order concerning the constitutional validity of an Act of Parliament. (Id at paras 90 and 138.) The problem in these cases is that the Sexual Offences Amendment Act was only signed by the President on 13 December 2007, a year and a half after Mr Mokoena was convicted (7 July 2006), and more than a year after Mr Phaswane was convicted (22 September 2006). Indeed, this was after the matter had been referred to the High Court for sentence and after the High Court had raised the constitutional issues.

[46] Section 167(4) provides:

> "Only the Constitutional Court may—
>
> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
>
> (c) decide applications envisaged in section 80 or 122;

parliamentary bill, and, even then, this Court may only do so where the President refers the bill to this Court pursuant to the provisions of section 79(4)[47] of the Constitution. As section 167(4)(b) makes clear, the High Court did not have jurisdiction to consider the constitutionality of the provisions of the bill.

[56] This Court has held that the Constitution contains clear and express provisions which preclude any court from considering the constitutionality of a parliamentary bill save in the limited circumstances referred to in section 79 of the Constitution.[48] The fact that at the time when the High Court judgment was delivered the Sexual Offences Amendment Act had been promulgated, matters not. What matters is that when the High Court raised the constitutionality of these provisions, they were in bill form. As we pointed out in *Doctors for Life*, the "crucial time for determining whether a court has jurisdiction is when the proceedings commenced."[49] In the context of constitutional issues raised by the court of its own accord, the crucial time for determining jurisdiction is when the court raises the issue. Therefore the question

---

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144."

[47] Section 79(4) provides:

"If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality."

[48] *Van Straaten v The President of the Republic of South Africa and Others* [2009] ZACC 2, 24 February 2009, as yet unreported, at paras 4-5; *Doctors for Life* above n 36 at para 43 and 1419A-C; *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 26.

[49] Above n 36 at para 57 and 1422H-A.

whether the High Court had jurisdiction must be determined at the time when the High Court raised the issues.

[57] The High Court was mindful of the fact that the amendments were still in their bill form when it heard argument.[50] It did not, however, address its jurisdiction to consider these amendments. It had none. Given the need to respect the separation of powers in a constitutional democracy, this is unacceptable. Courts must be astute not to assume jurisdiction they do not have.

[58] Section 170A(1) stands on a different footing. However, in the light of the conclusion I reach in the next question, it is not necessary to determine this issue.

[59] The next question is whether this Court should proceed to consider whether to confirm the orders of invalidity in respect of all the provisions that were declared invalid by the High Court.

Should this Court consider the confirmation of the invalidated provisions?

[60] In the *Ordinary Court Martial*[51] case this Court considered the scope of its obligations in confirmatory proceedings in the context of mootness. In that case, the question was whether this Court was obliged under section 172(2) to consider the declaration of invalidity of a provision that had been declared invalid by a High Court

[50] Above n 10 at paras 71-4.

[51] *President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 8.

but had subsequently been repealed. It held that section 172(2) does not require it to consider confirmation of invalidated provisions in all circumstances. It held that where the provision that had been declared invalid has subsequently been repealed, this Court has a discretion whether or not it should deal with the matter.[52] What should be considered in such a case is "whether any order it may make will have any practical effect either on the parties or on others."[53] The same principle should apply where, as here, the High Court has raised a constitutional issue in circumstances where it should not have done so. The Court has a discretion whether to confirm the orders of invalidity made in relation to the invalidated provisions. This discretion, however, must be exercised with due regard to what is in the interests of justice.

[61] Section 172(2) of the Constitution has two clear purposes: the first is to ensure that it is only this Court that has the power to declare invalid provisions in national or provincial legislation on the grounds that they are inconsistent with the Constitution. This purpose flows from the express language of section 172(2). The second purpose, perhaps less plain from the text, is the constitutional purpose of avoiding disruptive legal uncertainty. This second purpose was recognised as an important constitutional purpose as long ago, albeit against a different constitutional backdrop, as *Zantsi*[54] where Chaskalson P noted that although the issue referred to this Court for constitutional adjudication was not in fact relevant to the case which had to be decided by the High Court, the effect of judgments of the Ciskei High Court relating to the

[52] Id at para 16.

[53] Id and above n 37 at para 9.

[54] *Zantsi v Council of State, Ciskei, and Others* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 8.

issue had given rise to legal uncertainty. It was the need to avoid legal uncertainty which was the basis upon which this Court decided to deal with the issue. This reasoning was endorsed in *Zondi*[55] in the context of section 172(2).

[62] Similar reasoning is to be found in the *Ordinary Court Martial*[56] case where Langa CJ reasoned as follows:

> "The answer to that question depends upon a proper interpretation of section 172(2). The subsection does not expressly provide that this Court is obliged to determine such appeals or matters which come for confirmation. It is clear that the function of the confirmation and appeal proceedings provided for in section 172(2) and regulated by Rule 15 is to provide certainty in circumstances where a High Court has declared a provision of an Act of Parliament (or conduct of the President) to be constitutionally invalid and that *generally, therefore, this Court will be required to hear and determine* such proceedings." (My emphasis.)

[63] This message strongly suggests that the only circumstances in which a court may not deal substantively with an application for confirmation is where no uncertainty will arise from the court's not doing so. The *Ordinary Court Martial* case is not authority for a general discretion as to whether to confirm or not; only a limited one where the provision has been repealed. That this is the rationale of the *Ordinary Court Martial* case becomes more plain when one reads the test for mootness which is narrower than mootness in other contexts. The Court said "where the relevant legislative provision has been repealed after the High Court has made the order of

[55] *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 35

[56] Above n 51 at para 14.

invalidity . . . the *need for certainty may well fall away.*"[57] The Court went on to say that where the provision has subsequently been repealed the court need not consider whether the declaration of invalidity should be confirmed but has a discretion whether to do so or not. In exercising that discretion, the court will take into account "whether any order it may make *will have any practical effect either on the parties or on others.*"[58] (My emphasis.) This is a very broad understanding of mootness.[59]

[64] In my view, therefore, the important question to be considered first is whether, if we refuse to consider the question whether the orders of invalidity made by the High Court, legal uncertainty would arise. In my view, the answer to this question is clear: The High Court has declared a range of provisions to be inconsistent with the Constitution. Our refusal to confirm that order would mean the order would have no force or effect; but the reasoning of the Court would, in the circumstances of this case, leave grave doubts as to whether the provisions are consistent with the Constitution or not. It is true that someone else could challenge the provisions and bring them to this Court, but that may well take some considerable time during which the state of uncertainty would remain. That is most undesirable. It is also true that the High Court should probably not have done this; but it has made a mistake, something which courts sometimes do. The consequence of that mistake, if we refuse to consider confirmation, will be legal uncertainty. I am unable to agree with the proposition that

[57] Id at para 15.

[58] Id at para 16.

[59] See also above n 37 at para 11.

it would be constitutionally appropriate to leave that uncertainty in place, simply because the High Court should not have dealt with the issue.

[65] There are further considerations which weigh in favour of us considering the orders of invalidity. First, the issues raised by the High Court are issues that affect child complainants of sexual offences who are not parties to criminal proceedings but who nonetheless possess constitutional rights. The fact that they are not parties to the proceedings limits their ability to vindicate their constitutional rights in court proceedings in which they are called as witnesses. There is a need, therefore, to protect the rights of the complainants of crime, in particular, child complainants in sexual offence cases. And in the case of children, section 28(2) of the Constitution requires that their best interests should be "of paramount importance" in every matter concerning them. A criminal trial in which a child complainant testifies, is indeed a matter concerning that child. It concerns the violation of the dignity of the child. Moreover, children are regularly called upon to give evidence in our courts on a daily basis. While any order we make may not have any practical effect on the accused and the complainants in these two cases, it will nevertheless have a practical effect on future criminal proceedings involving child witnesses.

[66] Second, there is an appeal by the Minister against both the orders of invalidity and the declaratory and supervisory orders granted by the High Court. This appeal highlights the dispute between the Minister and the DPP. Apart from this, a number of non-governmental bodies that specialise in the area of child abuse have challenged

the constitutionality of these provisions. They are therefore likely to challenge these provisions in future. The Minister is understandably and commendably concerned not to breach his constitutional obligation and therefore requires clarity on the constitutional validity of the invalidated provisions. It is therefore in the public interest that there should be clarity on the constitutional validity of the invalidated provisions. To decline to confirm would deny him that; and would almost certainly cause grave difficulties in the administration of justice in many criminal matters as judicial officers and lawyers would struggle to know whether the statutory provisions are unconstitutional or not. This result does not seem to be in the interests of justice, even if we can refuse to hear the appeal, something about which I have grave doubts.

[67] Finally, we cannot ignore the fact that, on the facts, section 170A(1) was engaged, as the child complainant testified without the assistance of an intermediary. And, moreover, the amendment has now not only been signed into law but it has also been brought into operation. In addition, these issues were fully argued in this Court and we have a fully reasoned judgment of the High Court.

[68] It does not follow that this Court will consider the constitutional validity of a legislative provision in every case where the High Court ought not to have decided the question simply because of the uncertainty that results from the existence of an unenforceable High Court order. As is apparent, other important considerations tip the scale in this case in favour of deciding the constitutional validity of the provisions concerned. However, it must be emphasised that, in future cases, it may be

appropriate for this Court not to consider whether the High Court was wrong in coming to the conclusion that a legislative provision is constitutionally invalid. If this were to be so, this Court might refuse to confirm the High Court declaration of invalidity without more, and simply on the basis that the High Court ought not to have decided the invalidity issue. This is not a matter that has to be decided in this case.

[69] For all these reasons, it is in the interests of justice to consider the constitutional validity of the invalidated provisions.

The constitutionality of the invalidated provisions

[70] The question of whether the invalidated provisions provide protection to child complainants of sexual offences consistently with section 28(2) of the Constitution, turns upon their proper construction. They must be understood in the context of the Constitution, the Sexual Offences Amendment Act and the CPA. The exercise is essentially one of statutory interpretation. The starting point is section 28(2), which provides the constitutional context within which the invalidated provisions must be understood and construed.[60]

The constitutional context – section 28(2) of the Constitution

[71] Section 28(2) proclaims:

> "A child's best interests are of paramount importance in every matter concerning the child."

[60] Above n 27 at para 45.

[72] Section 28(2) must be interpreted so as to promote the foundational values of human dignity, equality and freedom.[61] These founding values are given effect in the Bill of Rights, which is the cornerstone of our constitutional democracy. Section 28(2), which is part of the Bill of Rights, protects the dignity of the child and advances the child's equal worth and freedom by proclaiming that "[a] child's best interests are of paramount importance in every matter concerning the child." The reach of section 28(2) extends beyond those rights enumerated in section 28(1): it creates a right that is independent of the other rights specified in section 28(1).[62] But as we said in *S v M*, "the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited."[63]

[73] It is neither necessary nor desirable to define with any precision the content of the right to have the child's best interests given paramount importance in matters concerning the child. It is, as we put it in *Sonderup*, "an expansive guarantee" that a child's best interests will be paramount in all matters concerning the child.[64] This provision thus imposes an obligation on all those who make decisions concerning a

---

[61] Section 39(1)(a) provides:

> "When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

[62] *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.

[63] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 26.

[64] *Sonderup v Tondelli and Another* [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) at para 2.

child to ensure that the best interests of the child enjoy paramount importance in their decisions. Section 28(2) provides a benchmark for the treatment and the protection of children.

[74] Courts are now obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child sensitive.[65] As we held in *S v M*, statutes "must be interpreted . . . in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights."[66] Courts are bound to give effect to the provisions of section 28(2) in matters that come before them and which involve children. Indeed, section 8(1) of the Constitution makes it plain that the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state."

[75] In the course of argument, we were referred to international and regional instruments on the protection of the child. International and regional instruments are relevant considerations because section 39(1)(b) of the Constitution requires us to "consider international law" when interpreting a provision in the Bill of Rights, such as section 28(2). In addition, under section 233, when interpreting any legislation, as we are called upon to do in these cases, we are required to prefer "any reasonable interpretation of the legislation that is consistent with international law". International law therefore provides a useful interpretative tool in the interpretation of the rights in

[65] Above n 63 at para 15.

[66] Id.

the Bill of Rights. The international and regional instruments on the rights of the child therefore provide a framework within which section 28(2), and ultimately the invalidated provisions, can be evaluated and understood.[67]

[76] Section 28(2) was no doubt inspired by international[68] and regional instruments[69] on the protection of the child, in particular, the United Nations Convention on the Rights of the Child[70] (the CRC) and the African Charter on the Rights and the Welfare of the Child.[71] In a language substantially similar to section 28(2), Article 3 (1) of the CRC proclaims that "[i]n all actions concerning children, whether undertaken by public or private social institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child will be a primary consideration." The African Charter on the Rights and the Welfare of the Child, in similar terms, proclaims that "in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration."[72] Our country, as a State Party to these instruments, is obliged to give

[67] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at paras 34-5.

[68] These include the United Nations Universal Declaration of Human Rights (ratified by South Africa in 1995), in particular, Article 25 (childhood is "entitled to special care and assistance"); United Nations Convention on the Rights of the Child (ratified by South Africa on 16 July 1995), in particular, Articles 3 and 39; United Nations Convention on the Rights of Persons with Disabilities (ratified by South Africa on 30 November 2007), in particular, Article 7.2 ("In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration."); Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime issued by the United Nations Economic and Social Council (the recommendation was made by South Africa to adopt it in May 2005).

[69] The African Charter on the Rights and Welfare of the Child (ratified by South Africa on 7 January 2000), in particular, Article 4.

[70] This Convention was adopted by the General-Assembly on 20 November 1989 and entered into force on 2 September 1990.

[71] This Charter was entered into force on 29 November 1999. See also *S v M* above n 63 at para 16 and *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA); [2006] 1 All SA 446 (SCA) at para 13.

[72] Article 4(1).

effect to these instruments and to take all appropriate legislative and other measures to give effect to these articles.

[77] Article 3 of the CRC sets out the principle that the best interests of the child are a primary consideration in all actions concerning the child. This principle was introduced because children "[b]y virtue of their relative immaturity . . . are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect them, while taking account of their views and evolving capacities."[73] The article specifically refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". The United Nations' Committee on the Rights of the Child has commented as follows on Article 3(1):

> "The article refers to actions undertaken by 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children."[74]

[78] The Economic and Social Council of the United Nations has developed Guidelines on Justice Matters involving Child Victims and Witnesses of Crime

[73] General Comment No. 7 (2005) of the United Nations' Committee of the Rights of the Child at para 13.

[74] General Comment No. 5 (2003) of the United Nations' Committee of the Rights of the Child.

(Guidelines). The main objective of these Guidelines is to "set forth good practice on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles." These Guidelines provide a useful guide to the understanding of the rights of the child to have his or her best interests given primary consideration in all matters concerning the child. They provide that child complainants and witnesses should receive special protection and assistance that they need in order to prevent hardship and trauma that may arise from their participation in the criminal justice system.[75] In particular, in the context of the best interests of the child, the Guidelines set forth the following principle:

> "(c) While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:
>
> (i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;
>
> (ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development".[76]

[75] These Guidelines include the right of child victims and witnesses to be treated with dignity and compassion (para 10); the right to be informed of the availability of protective measures (para 19); the right to be protected from hardship during the justice process (para 29), including the use of child sensitive procedures, modified court environments to take the child victim into consideration (para 30(d)); and in giving evidence out of sight of the alleged perpetrator (para 31(b)).

[76] Para 8(c)(i) and (ii) of the Guidelines.

[79] It is apparent from the CRC and the Guidelines that courts are required to apply the principle of best interests by considering how the child's rights and interests are, or will be, affected by their decisions. The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings. Child complainants and witnesses should testify out of sight of the alleged perpetrator and in a child-friendly atmosphere.[77] This means that, where necessary, child witnesses should be assisted by professionals in giving their testimony in court. However, each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected.[78] Children must be treated with dignity and compassion.[79] In my view, these considerations should also inform the principle that the best interests of the child are of paramount importance in all matters concerning the child as envisaged in section 28(2) of the Constitution.

[80] It is within this constitutional context that the invalidated provisions must be understood and construed.

[81] Before turning to consider the constitutionality of the invalidated provisions, there is one more matter to consider. Over the years, this Court has developed the proper approach to statutory interpretation that is inspired by section 39(2) of the

[77] Para 30(d) and 31(b) of the Guidelines.

[78] Para 11 of the Guidelines.

[79] Para 10 of the Guidelines.

Constitution.[80] Section 39(2) issues an injunction to all courts to interpret legislation so as to "promote the spirit, purport and objects of the Bill of Rights." Regrettably, a review of lower court decisions (including the High Court in these cases) in which the provisions of section 170A(1) have been considered, shows that courts do not appear to have followed the proper approach to statutory construction. It is therefore worth repeating that approach here.

The proper approach to statutory interpretation

[82] In *Hyundai*, we considered this approach under the Constitution and sketched it out as follows:

> "The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[81]

[83] And in *Daniels*, we elaborated on this approach and said:

---

[80] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72; *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35; *Olitzki Property Holdings v State Tender Board and Another* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA); 2001 (8) BCLR 779 (SCA) at para 20; *S v Dzukuda and Others; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 37(a); *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (*Hyundai*) [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-6; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 23-4; *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85; and *Bernstein and Others v Bester and Others NO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 59.

[81] *Hyundai* above n 80 at para 22.

> "Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation to 'promote the spirit, purport and objects of the Bill of Rights.' Consistent with this interpretive injunction, where possible, legislation must be read in a manner that gives effect to the values of our constitutional democracy. These values include human dignity, equality and freedom. Thus where legislation is capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred."[82]

[84] We cautioned, however, that an interpretation that seeks to bring a provision within constitutional bounds should not be unduly strained.[83] With this caution in mind, we held that courts "must prefer the interpretation of [a provision] that will bring it within constitutional bounds over those that do not", and added "provided that such an interpretation can be reasonably ascribed to the section."[84] The invalidated provisions must therefore be construed consistently with section 28(2) and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with the principle of the best interests of the child.

[85] With this approach in mind, I now turn to consider the invalidated provisions. It will be convenient to deal with section 170A(1) first in view of its central role in the protection of child witnesses and the number of inter-related issues that it raises.

Section 170A(1)

[82] Above n 27 at para 43.

[83] *Hyundai* above n 80 at para 24 and *Daniels* above n 27 at para 46.

[84] *Hyundai* above n 80 at para 23 and *Daniels* above n 27 at para 46.

[86] Section 170A(1) must be understood and construed in the context of section 170A as a whole, in particular, sections 170A(2) and 170A(3), which provide:

> "(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.
>
> (2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.
>
> (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.
>
> (3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place—
>
> (a) which is informally arranged to set that witness at ease;
>
> (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
>
> (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony."

[87] The provisions of section 170A(1) apply to all children who are witnesses in criminal trials. These cases before us are concerned with the protection of child complainants in sexual offence cases. This judgment will therefore pay more attention to these children.

[88] The High Court held that section 28(2) "demands that a child should be exposed to as little stress and mental anguish as possible".[85] It found that the requirement of "undue" stress or suffering in section 170A(1) demands "an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon."[86] The court reasoned that the subsection therefore requires that the child witness should first be exposed to "undue" stress or suffering before an intermediary may be appointed.[87] This requirement places a limitation upon the best interests of the child that is neither rational nor justifiable, the High Court found. It held that this constitutes discrimination against the child and also infringes the child witnesses' right to equal treatment, dignity and to a fair trial. It therefore concluded that the subsection is inconsistent with section 28(2).[88]

[89] While supporting this reasoning of the High Court, the DPP and the amici directed their attack at the absence of the definition of the phrase "undue mental stress or suffering" in the legislation, and the discretion given to the judicial officers whether or not to appoint an intermediary. Three inter-related arguments were advanced in this regard. First, the absence of a definition of the phrase has resulted in inconsistency in the meaning given to the phrase, with some courts placing a narrow meaning on the phrase and thereby denying the child complainant the protection contemplated in the subsection. In this regard, they drew our attention to the decision

[85] Above n 10 at para 78.

[86] Id at para 79.

[87] Id.

[88] Id at paras 79-80.

of the High Court in *S v Stefaans*[89] where the court held that "undue connotes a degree of stress greater than the ordinary stress to which witnesses, including witnesses in complaints of offences, of a sexual nature are subject to."[90]

[90] Second, it was submitted that giving a discretion to the judicial officers makes the appointment of the intermediary dependent upon how judicial officers exercise that discretion, and this adds to the inconsistency in the application of section 170A(1). The subsection is triggered by an application by the state, and, if the state does not apply its mind to the need for an intermediary, the subsection does not come into play, so the argument went. Even in those instances where the state applies and leads evidence, for example, by the mother that the child was emotionally and mentally fragile after the rape and expert evidence that testifying in the presence of the accused might very well aggravate the distressful state, the appointment of the intermediary is not guaranteed – it depends upon the discretion of the court which might refuse the appointment of an intermediary.[91]

[89] 1999 (1) SACR 182 (C).

[90] Id at 188. Our attention was also drawn to a research study that was conducted in which two magistrates, who deal with sexual offences in Port Elizabeth were interviewed and gave different meanings of the phrase. (Muller & Tait "Little Witnesses: A Suggestion for Improving the Lot of Children in Court" (1999) 62 *THRHR* 241 at 245-6). One magistrate suggested that the phrase means "excessive emotional stress and intimidation." It was submitted that this raised the bar too high and makes it almost impossible to meet the requirement of the section. Yet, another magistrate suggested that it means "stressful circumstances in which a minor has to testify amongst strangers in an intimidatory environment like a court of law and reveal intimate or violent conduct against her"(at 246). It was submitted that by contrast, this view lowers the bar and makes it possible for a child victim to testify through an intermediary as almost all child victims would fall within this definition of "undue mental stress or suffering".

[91] In this regard, our attention was drawn to the case of *S v F* 1999 (1) SACR 571 (C) in which the state applied for the appointment of an intermediary and in support of its application led the evidence of the mother of the child as well as a psychiatrist. The evidence of the mother of the child was to the effect that after the alleged rape, the child had become mentally and emotionally fragile. This evidence was corroborated to a significant extent by a psychiatrist who examined the child and expressed the opinion that the child was suffering from a partially unresolved post-traumatic stress disorder as a result of the rape. In addition, the psychiatrist expressed the opinion that testifying in an open court would have an adverse effect upon her psychiatric condition and that the procedures adopted for her to testify in court should be softened or mediated so as to assist her.

[91] The combined effect of the lack of consistency amongst judicial officers on the meaning of the phrase "undue mental stress or suffering" and the inconsistency with which courts exercise this discretion has led to an inconsistent application of the subsection by various courts across the country, with the consequent inconsistent protection being afforded to child witnesses, so the argument went. In this regard, our attention was drawn to the observation by the South African Law Reform Commission that one of the practical difficulties experienced by the intermediary system is the inconsistency with which the court's discretion to appoint an intermediary is exercised.[92]

[92] These contentions and the reasoning of the High Court require us to determine the following four inter-related questions:

(a) What is the object of section 170A(1)?

(b) What is the proper meaning of the phrase "undue mental stress or suffering"?

(c) Is the subsection capable of being implemented in a manner that is consistent with the Constitution?

Despite all of this, the court refused the appointment of an intermediary holding that the crucial question is not whether the child was mentally or emotionally fragile after the alleged rape, but what impact, if any, testifying in court in the presence of the accused is likely to have upon her. What the court found significant was that the psychiatrist did not say that the mere presence of the accused would bring about stress, although the court was mindful of the psychiatrist's evidence to the effect that testifying in the presence of the accused might very well aggravate her distressed state. (at p 584). The court concluded that mere testifying about the alleged rape even through an intermediary would prove extremely distressful to the child. It therefore concluded that there is very little difference between her testifying through an intermediary and testifying in an open court. It accordingly declined to appoint an intermediary.

[92] South African Law Reform Commission Project 107 "Sexual Offences" *Report: December 2002* at p 147.

(d) Is the subsection unconstitutional to the extent that it gives discretion to the judicial officer whether or not to appoint an intermediary?

The object of section 170A(1)

[93] The subsection was introduced into the CPA by the Criminal Law Amendment Act.[93] It was subsequently amended by the Sexual Offences Amendment Act which inserted the words "biological or mental" before the words "age of eighteen years." The CPA and the Sexual Offences Amendment Act must therefore be read together in order to ascertain the object of section 170A(1).

[94] As section 170A(1) makes plain, it is aimed at preventing a child from undergoing "undue mental stress or suffering" while giving evidence. It does this by permitting the child to testify through an intermediary. The intermediary is required to convey the general purport of questions put to the child.[94] This is crucial to enable the child to understand the questions. More importantly, section 170A(3) allows the child who testifies through an intermediary to give evidence in a separate room away from the accused and in an atmosphere that is designed to set the child at ease. At the same time, this provision ensures that the court and the accused are able to see and hear the child and the intermediary through the medium of electronic or other devices.

[95] The subsection was no doubt enacted to protect child complainants in sexual offence cases and other child witnesses from undergoing undue mental stress or

[93] Act 135 of 1991.

[94] Section 170A(2)(b) of the CPA.

suffering that may be caused by testifying in court. This object is consistent with the principle that the best interests of children are of paramount importance in criminal trials involving child witnesses. This is apparent from the preamble to the Sexual Offences Amendment Act which acknowledges that children are among the particularly vulnerable members of our society. But perhaps more importantly the preamble recognises that "the Bill of Rights in the Constitution of the Republic of South Africa . . . enshrines the rights of all people in the Republic of South Africa, including . . . the rights of children . . . to have their best interests considered to be of paramount importance".

[96] Section 170A(1) recognises the context in which a child complainant testifies in court. It accepts that testifying in court carries with it a certain degree of mental stress or suffering. Its objective is to reduce to the minimum the degree of stress and create an atmosphere that is conducive for a child to speak freely about the events relating to the offence committed against him or her. The provision of an intermediary is intended to create this atmosphere. The child conveys his or her experiences to a person skilled in dealing with children. This person knows how to communicate with a child and to do so in a manner that is neither intimidating nor embarrassing to the child. But at the same time, this person is able to communicate what the child has conveyed to him or her to the adults in court. In short, this person acts as a link to bridge the communication gap between the child and the court.

[97] Section 170A(1) read with section 170A(3) also recognises that children are often intimidated by the courtroom environment, especially if they must confront their alleged abuser. The presence of the perpetrator can be very upsetting to a child and can affect the child's testimony. As a result of these concerns, section 170A(3) allows a child, who testifies through an intermediary, to be shielded in some way from the accused, typically by testifying in another room via CCTV, or by sitting behind a one-way screen that blocks the child's view of the accused but allows the child to be seen. Read together, these sections therefore contemplate that a child who testifies through an intermediary will not ordinarily testify in the presence of the accused but will testify from a separate room "which is informally arranged to set [the child complainant] at ease."[95]

[98] Section 170A(1) must therefore be construed so as to give effect to its object to protect child complainants from exposure to undue mental stress or suffering when they give evidence in court. This objective is consistent with the objective of section 28(2) as understood in the light of Article 3 of the CRC to ensure that a child's best interests are of paramount importance in all matters concerning the child. In particular, it conforms to the Guidelines which proclaim the right of child complainants to be protected from hardship and trauma that may result from their participation in the criminal justice system.[96] As these Guidelines make clear, the protection of child complainants includes modified court environments, making them child-friendly, allowing the child complainant to testify out of sight of the alleged

[95] Section 170A(3)(a) of the CPA.

[96] Paras 29-31 of the Guidelines.

perpetrator and testifying with the assistance of a professional, such as an intermediary.

[99] The meaning of the phrase "undue mental stress or suffering", and the manner in which discretion conferred by the subsection must be exercised, must be informed by the objective of section 170A(1) identified above. The question is whether the subsection is capable of being interpreted and applied so as to achieve this objective. If the subsection is capable of a reasonable interpretation that will bring it within constitutional bounds, that interpretation should be preferred over an interpretation which will not.

The meaning of the phrase "undue mental stress or suffering"

[100] The CPA does not define the phrase "undue mental stress or suffering." The meaning of the phrase must therefore be understood in the context of the objective of section 170A(1), as informed by section 28(2) of the Constitution, and the atmosphere in which a child testifies in court. That objective is, as I have pointed out above, to protect children from undue mental stress or suffering that may be caused by testifying in court.

[101] A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child sits alone in the witness stand, away from supportive relatives such as a parent. The child has to testify in the presence of the alleged abuser and other strangers including the presiding judicial officer, the

accused's legal representative, the court orderly, the prosecutor and other court officials. While the child may have met the prosecutor before – at least one assumes that the prosecutor would have interviewed the child in preparing for trial – the conversation now takes place in a context that is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom that they refuse to say anything are not unknown.[97]

[102] The child would be questioned by the judicial officer in order to satisfy himself or herself that the child understands that he or she is under a duty to speak the truth or understands the import of the oath. Regrettably this questioning, although well-meaning, is often theoretical in nature and may increase the child's sense of confusion and terror. The child may wonder why he or she is being subjected to this questioning. That is not all.

[103] The child is obliged to give evidence in the presence of the accused. This is what happened in the Phaswane matter. The accused will be a few paces from the child, and will invariably be staring at the child while the child gives evidence. Perhaps the accused will have threatened the child with death or physical harm if he or she should tell anyone about what the accused had done to him or her. At this stage the child may wonder whether he or she will be punished for speaking the truth that

[97] Key "The Child Witness: The Battle for Justice" (1988) No 241 *De Rebus* 54 at 55.

the judicial officer had admonished him or her to speak. This may put the child to an unfortunate choice: either testify and risk the accused carrying out his or her threat, or say nothing. In these circumstances, it would not be surprising for the child to refuse to testify.

[104] If the child decides to speak, then the prosecutor will take him or her through his or her evidence. The questioning of a child requires special skills, similar to those required to run day care centres or to teach younger children. Questioning a child in court is no exception: it requires a skill. Regrettably, not all of our prosecutors are adequately trained in this area, although quite a few have developed the necessary understanding and skill to question children in the court room environment. If the questioning by the prosecutor is not skilled, the result is what happened in the Phaswane matter. The following exchange between the prosecutor and the interpreter illustrates the point:

> "PROSECUTOR: What did you mean when you said that he had slept with you?
> – He had raped me.
>
> What do you mean with rape, we must know what you understand under rape?
>
> – Yes I personally do not know what rape is, I heard from people who say that there is a thing called rape.
>
> Okay but we need to know what happened, you were tripped and then you fell on the ground and he took out a condom. We must know why do you say you have been raped, what did he do to you?
> – Rape is sexual intercourse.
>
> What is sexual intercourse?
> – Sexual intercourse is when one person has sex with another person.
>
> But we do not know what that means, we need to know what you think what happened, not what you think. You must tells us why do you say that you have been

> raped and why did you say that the accused had sexual intercourse with you. What did he do, did he take his finger and scratch you on your ear or what did he do, why do you say it is sexual intercourse?
> INTERPRETER: I think with the permission of the court of course, I do understand what the state wants to elicit from the witness, it is just that the Prosecutor does not have proper words which can be cut down to the level of the understanding of this. All the question the words that come, I saw a pitch high. The state does not have proper words which are curtailed to the level of the understanding of this, and I do understand what she is saying but I am just afraid to say what she did not say, because I end up being testifying."

[105] The child is then cross-examined with the sole purpose of discrediting the child. If the accused is not legally represented, the accused may conduct the cross-examination. The effect of this on the child can be terrifying especially where the accused is an adult relative of the child. The child may agree with questions put by the accused for fear of punishment if he or she disagrees. If the cross-examination is conducted by the legal representative, the child will be taken through his or her evidence in the most minute detail. The cross-examination may bring out facts that were so grotesque that the child could never have imagined being forced to recount them. The child will be taken to task for placing events, often months after they had occurred, out of sequence and for not being able to remember important details concerning the events. In this intimidating and bewildering atmosphere, the child complainant is required to relive and reveal sordid details of the horror that he or she went through.

[106] And moreover, the child has been telling the same story to several adults by now, most of whom are strangers: first, to a relative to whom the report was first

made; then to a mother; then to a social worker, if she or he has been lucky to have been referred to one; then to a district surgeon or a medical practitioner – this time, the story-telling is accompanied by physical examination; then to a police officer at the charge office where the offence is reported; then to the investigating officer who will now be in charge of the case, where more details are now required; and then perhaps to the public prosecutor for a pre-trial interview, if the child is lucky to have one or if the public prosecutor has the time to conduct one. At times, the abuse may have been discovered by a caring teacher at a day-care centre or at school, and this adds to the list of people to whom the story is told. Then to the court, before an audience of strangers and in the atmosphere described above.

[107] Those who know more about child behaviour from a professional point of view tell us that children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten their sense of shame and guilt at what happened to them.[98]

[108] A child complainant who relates in open court in graphic detail the abusive acts perpetrated upon him or her and in the presence of the alleged perpetrator, will in most cases experience undue stress or suffering. This experience will be exacerbated when the child is subjected to intensive and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the emotional and

[98] Id at 56.

psychological well-being of the child complainant as the original abusive act was. Indeed, High Courts have come to accept that the giving of evidence in cases involving sexual offences exposes complainants "to further trauma possibly as severe as the trauma caused by the crime."[99] It is precisely this secondary trauma that section 170A(1) seeks to prevent.

[109] Having regard to this, it must be accepted that a child complainant in a sexual offence who testifies without the assistance of an intermediary faces a high risk of exposure to undue mental stress or suffering. The object of section 170A(1) read with section 170A(3) is precisely to prevent this risk of exposure. It does this by making provision for the child to testify through the intermediary away from the accused and in a child-friendly room. Thus construed, the problem becomes one of implementation as the cases to which our attention is drawn demonstrate.

Implementation of section 170A(1)

[110] Contrary to the reasoning of the High Court and the submissions of the amici, the subsection does not require that the child first be exposed to undue mental stress or suffering before the provision may be invoked. As I have held above, the object of the subsection is to prevent the child from being exposed to undue mental stress or suffering as a result of testifying in court. A construction of the subsection that requires the child to be exposed to undue mental stress or suffering first, before an intermediary may be appointed, is therefore inimical to the objectives of the both

[99] Above n 89 at 187F-G; *K v The Regional Court Magistrate NO and Others* 1996 (1) SACR 434 (E) at 442C-443F; See also *S v Manqaba* 2005 (2) SACR 489 (W) at paras 30-1.

section 28(2) and section 170A(1). Indeed, it is inconsistent with Article 3(1) of the CRC. It must therefore be rejected.

[111] What the subsection contemplates is that a child will be assessed prior to testifying in court in order to determine whether the services of an intermediary should be used. If the assessment reveals that the services of an intermediary are needed, then the state must arrange for an intermediary to be present in court when the accused goes on trial. At the commencement of the trial, the state must then apply under the subsection for the appointment of an intermediary. Indeed, this is the procedure that was followed in the Mokoena matter. The child was assessed by a social worker prior to testifying in court. Following that assessment, the social worker recommended that an intermediary should be appointed. On the date of the trial, and before the child testified, the state applied for the appointment of an intermediary.

[112] This is the procedure that should ordinarily be followed in all matters involving child complainants in sexual offence cases. If this procedure were to be followed as a matter of practice, this would ensure that the objectives of both the subsection and section 28(2) are achieved. This should become a standard pre-occupation of all criminal courts dealing with child complainants in sexual offence cases. To the extent that current practice may fall short in this regard, proper regard for constitutional rights of children means that in every criminal trial in which a child complainant in a sexual offence case is to testify, the court must enquire into the need for the

appointment of an intermediary where the state does not raise the issue.[100] If necessary, the presiding judicial officer must initiate an enquiry into the desirability of appointing an intermediary.

[113] What must be stressed here are two points already made: first, that the provisions of sections 170A(1) and 170A(3) were enacted to protect the child from the stress and trauma that may arise from testifying in court. The second is that section 28(2) is an injunction to courts to apply the principle that the best interests of the child are of paramount importance in all matters concerning the child. It is incumbent upon all those who are responsible for the administration of justice to apply the principles of our criminal law and criminal procedure so as to protect child complainants in sexual offence cases from secondary trauma that may arise from testifying in court. Judicial officers are therefore obliged to apply the best interests principle by considering how the child's rights and interests are, or will be, affected by allowing the child complainant in a sexual offence case to testify without the aid of the intermediary. It follows from this, therefore, that where the prosecutor does not raise the matter, the judicial officer must, of his or her own accord, raise the need for an intermediary to assist the child complainant in a sexual offence case in giving his or her testimony.[101]

[114] Properly construed, therefore, section 170A(1) read with section 170A(3) contemplates that in every trial in which a child is to testify, the court will enquire into

[100] Above n 63.

[101] According to para 19(e) of the Guidelines, a court is obliged to draw the attention of the parent or guardian of the child victim to the availability of protective measures.

the desirability of appointing an intermediary. This is even more so because the child complainants are not parties to the proceedings but have constitutional rights which must be protected by the court. The nature of the enquiry that is required is not akin to a civil trial which attracts a burden of proof. It is an enquiry which is conducted on behalf of the interests of a person who is not party to the proceedings but who possesses constitutional rights. It is therefore inappropriate to speak of the burden of proof being placed upon a party to an application for an intermediary, as some High Courts have done.

[115] In *S v F*,[102] for example, the court equated an enquiry into the desirability of appointing an intermediary with a trial in which the state bears the burden of proof to establish the need for the appointment of an intermediary on a balance of probabilities.[103] I am unable to agree with this view. This approach to the enquiry overlooks the objectives of the enquiry. The overriding consideration at that enquiry is to prevent the child from exposure to undue stress that may arise from testifying in court. What is required of the judicial officer is to consider whether, on the evidence presented to him or her, viewed in the light of the objectives of the Constitution and the subsection, it is in the best interests of the child that an intermediary be appointed.

[116] Following the approach outlined here not only protects child complainants from unnecessary trauma, it helps to ensure that the trial court receives evidence that is more freely presented, more likely to be true and better understood by the court.

[102] Above n 91.

[103] Id at 583G-I.

Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures. In my view, these special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all.

Is section 170A(1) unconstitutional to the extent that it gives judicial officers discretion whether to appoint intermediaries?

[117] The DPP and the amici also challenged the constitutionality of the subsection on the grounds that it leaves the appointment of the intermediary to the discretion of the judicial officer. This is impermissible because it leads to inconsistency in the application of the subsection and this does not afford the children the protection contemplated in section 28(2) of the Constitution and the subsection, it was argued. Reduced to its essence, the contention is that because the discretion is likely to be exercised incorrectly by some judicial officers, the subsection is therefore unconstitutional.

[118] The conferral of discretion on judicial officers cannot be unconstitutional simply because some judicial officers may exercise the discretion incorrectly. The question, therefore, is whether the subsection is unconstitutional merely because it confers discretion on judicial officers whether to appoint an intermediary.

[119] This Court has recognised that there are obligations in the Bill of Rights that are placed upon the judicial branch that will be violated if placed at the discretion of a

court. In *Zuma*,[104] the Court examined the constitutionality of the presumption relating to the admissibility of confessions in criminal trials. Kentridge J stated that "[t]he presumption of innocence [in section 35(3)(h) of the Constitution] cannot depend on the exercise of discretion."[105] On the other hand, the Court has often endorsed the exercise of discretion by judicial officers as compatible with the applicable constitutional obligation at issue.[106]

[120] The importance of judicial discretion cannot be gainsaid. Discretion permits judicial officers to take into account the need for tailoring their decisions to the unique facts and circumstances of particular cases. There are many circumstances where the mechanical application of a rule may result in an injustice. What is required is individualised justice, that is, justice which is appropriately tailored to the needs of the individual case. It is only through discretion that the goal of individualised justice can be achieved. Individualised justice is essential to the proper administration of justice. As Dean Pound pointed out some fifty years ago:

> "in no legal system, however minute and detailed its body of rules, is justice administered wholly by rule and without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the case before him."[107]

---

[104] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

[105] Id at para 28.

[106] See for example *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 50; *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 30; and *Shabalala and Others v Attorney-General of the Transvaal and Another* [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 55.

[107] Cited in Davis *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge 1969) at 17.

[121] However, discretion must be confined, structured and checked. This is the function of the Constitution and the law.

[122] In *Dawood*, albeit in a different context, we held that discretion "permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."[108] Judicial officers are provided with discretion to ensure that the principles and values with which they work can be applied to the particular cases before them in order to achieve substantive justice. Discretion is a flexible tool which enables judicial officers to decide each case on its own merits. In the context of the appointment of an intermediary, the conferral of judicial discretion is the recognition of the existence of a wide range of factors that may or may not justify the appointment of an intermediary in a particular case.

[123] What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion.[109] This means that the child must "be treated in a caring and sensitive manner."[110] This requires "taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity".[111] In short, "[e]very child should be treated as an individual with his or her own individual

[108] *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 53.

[109] Paras 10-4 of the Guidelines.

[110] Para 10 of the Guidelines.

[111] Id.

needs, wishes and feelings."[112] Sensitivity requires the child's individual needs and views to be taken into account.[113] The exercise of judicial discretion in the appointment of an intermediary allows a judicial officer to assess "the individual needs, wishes and feelings" of each child. This, in my view, conforms to the principle that the best interests of the child must be of paramount importance in matters concerning the child.

[124] In a matter involving a child, the conferral of judicial discretion enables courts, on a case-by-case basis, to determine whether the services of an intermediary are required. What must be emphasized is that section 170A(1) deals with witnesses generally who are under the age of 18 years. This includes complainants in sexual offence cases, child witnesses to sexual offence cases and witnesses to other offences generally. The nature of the evidence that the witnesses contemplated in the subsection will give, will therefore vary according to the offence in respect of which they testify. So too will the stress of giving the evidence. This variation will invariably influence the necessity or otherwise of appointing an intermediary. Other factors that are relevant include the level of maturity of the child, the age of the child, the nature of the offence, the independence of the child and the feelings and wishes of the child.

[125] A child who is 17 years old who is outspoken and assertive may consider it an affront to his or her dignity to suggest that he or she should testify through an

[112] Para 11 of the Guidelines.

[113] Para 9(d) of the Guidelines.

intermediary. Similarly, it would be absurd to expect a child of that age whose only testimony relates to identifying his or her stolen cellular phone to testify through an intermediary. Yet a child who is of the same age who is a complainant in a rape case, who is shy and was severely traumatised by the rape, may need the services of an intermediary. The exercise of judicial discretion enables the court to apply the provisions in a flexible manner bearing in mind that the primary objective is to give effect to the provisions of section 170A(1) and section 28(2) of the Constitution.

[126] The exercise of discretion conferred by section 170A(1) is, however, circumscribed. Its exercise is constrained by the Constitution, in particular, section 28(2). As has been observed, "[t]he spirit and the tenor of [a] constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."[114] It is also constrained by the purpose for which it was conferred: to safeguard the best interests of children. The discretion in the subsection must therefore be exercised with due regard to the objective to protect a child from undue stress or suffering that may arise from testifying in court.

[127] In my view, the answer to the problems identified by the amici and the DPP does not lie in making the appointment of an intermediary compulsory in every sexual offence case in which a child complainant is involved. It would not be in the best interests of the child who wishes to confront his or her abuser in court to impose an intermediary on that child. This would ignore the child's needs, wishes and feelings.

[114] *S v Acheson* 1991 (2) SA 805 (NmHC) at 813.

Nor does the answer lie in making the appointment compulsory unless the circumstances of the child dictate otherwise. This may well undermine the right of the child to be treated as an individual with his or her individual needs, wishes and feelings. A child who wishes to testify on his or her own may have to convince the court of this fact.

[128] The answer, in my view, lies in the proper interpretation and application of sections 170A(1) and 170A(3). These subsections contemplate that in all cases of sexual offences involving a child complainant, the court will enquire into the desirability or otherwise of appointing an intermediary. This enquiry must be conducted with due regard to the principle that the child's best interests are of paramount importance in criminal proceedings concerning a sexual offence against a child.

[129] For all these reasons, the discretion conferred on the judicial officers on whether to appoint an intermediary is not inconsistent with section 28(2). It follows, therefore, that the challenge based on discretion must be rejected.

[130] To conclude, therefore, section 170A(1) is designed to ensure the paramountcy of the best interests of the child complainant in criminal proceedings in which the child testifies. Properly interpreted and applied in the light of section 28(2) of the Constitution and its objective, as it must be, the subsection achieves that end. It does not exclude the protection that section 28(2) requires to be afforded to children.

[131] If the objective of section 28(2) is not achieved, then the fault lies not in the provision itself but in the manner in which it is interpreted and implemented. An incorrect interpretation or implementation of a statute does not render the provisions unconstitutional. If the provisions are interpreted and implemented in an unconstitutional manner, the solution lies in making judicial officers and prosecutors aware of their constitutional obligations to ensure that the best interests of children are of paramount importance in criminal trials involving child complainants, and are protected as required by section 28(2) of the Constitution and section 170A(1) of the CPA. In this context, judicial education in this area may be of vital importance given our new constitutional dispensation and its ethos. So too is the training of prosecutors and other officials who deal with victims of sexual offences, for prosecutors have a special responsibility in relation to section 170A(1). This is so because the first assessment on whether an intermediary is to be used is made by the prosecutor.

[132] For all these reasons, I conclude that section 170A(1) is not unconstitutional.

[133] It will be convenient to deal with section 170A(7) later when I deal with section 158(5) as these provisions raise similar issues.

Section 153(3) and (5)

[134] The relevant provisions of section 153 are subsections (3), (3A), (4) and (5). These subsections provide:

"(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit—

(a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;

(b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or

(c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (*a*) and (*b*) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person *in loco parentis*, requests otherwise.

(4) Where an accused at criminal proceedings before any court is under the age of eighteen years, no person, other than such accused, his legal representative and parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court."

[135] Sections 153(3) and 153(5) deal with holding proceedings *in camera* (the exclusion of the public from the proceedings). Section 153(3) provides that the public may be excluded from criminal proceedings relating to a charge of any sexual offence or any of the offences mentioned in section 153(3) upon the request of the complainant or the guardian or parent of a minor complainant. However, the decision whether to exclude the public from the proceedings lies within the discretion of the judicial officer. Section 153(5) deals with other child witnesses, and places the discretion to hold proceedings *in camera* solely in the hands of the court. By contrast, proceedings involving a child accused are always held *in camera*. The High Court held that these subsections make a differentiation particularly in the case of sexual offences which "appears to be lacking in rational justification and therefore discriminates unfairly between a child accused and child victims and child witnesses."[115]

[136] In attacking the declaration of invalidity in respect of sections 153(3) and 153(5), the Minister, in oral argument, relied heavily on the provisions of section 153(3A). It was submitted that this subsection protects the child complainant in sexual offence cases by requiring that the child testify *in camera*. The Minister further submitted that the discretion given to courts to decide whether proceedings should be held *in camera* is necessary to enable courts to weigh up competing interests. The competing interests involved were said to be the requirements of open

[115] Above n 10 at para 108.

justice on the one hand, and, on the other hand, the need to protect the child by holding proceedings *in camera* where necessary.

[137] The criticism directed at the High Court's failure to have regard to the provisions of section 153(3A) is misplaced. So too is reliance on that provision to answer the High Court's difficulty with section 153(3). Section 153(3A) concerns the exclusion of the public from criminal proceedings involving a sexual offence while the child complainant is giving evidence. This subsection does not require proceedings to continue *in camera* after the child complainant has completed his or her testimony. The exclusion of the public from the entire proceedings is regulated by section 153(3) which makes the exclusion dependent upon a request by the parent or guardian of the child complainant. It is this subsection which was the target of the High Court and the amici.

[138] Section 153(3) provides that the court has a discretion whether to "direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings"[116] (emphasis added). By contrast, section 153(3A) provides that the public shall not be present at criminal proceedings involving a sexual offence while the complainant is giving evidence. But the subsection does not require the entire proceedings to be held *in camera*: it requires only that the proceedings be held *in camera* "while [the complainant] is giving evidence". Its sphere of operation is therefore limited to the

[116] Section 153(3) of the CPA.

stage when the complainant is giving evidence, and it is plain from the wording of the subsection that the court has no discretion. However, once the complainant has given his or her evidence, the proceedings cease to be *in camera*.

[139] If the parent or guardian of a child complainant wishes the proceedings to be *in camera* after the child complainant has testified, the parent or guardian must make a request under section 153(3). And as pointed out above, the court has a discretion whether to grant the request. In the case of a child witness, section 153(5) provides that the court may direct that the public be excluded from the proceedings. The subsection also contemplates that the presiding officer will act on his or her own initiative. This is probably what happened in the Phaswane matter, where the court, of its own accord, excluded the public from the proceedings. In the case of child witnesses, the court has a discretion. By contrast, in the case of a child accused, section 153(4) provides that the public must be excluded from the proceedings. The presiding officer has no discretion.

[140] It is this differentiation between, on the one hand, child complainants and child witnesses and, on the other hand, a child accused, which the High Court found unconstitutional. It held that this differentiation is irrational and discriminates unfairly against child complainants and child witnesses.

[141] It is not clear whether the High Court found these provisions to be inconsistent with the equal protection clause (section 9(1)) or the anti-discrimination clause

(section 9(3)), for it found that the differentiation is both irrational and constitutes unfair discrimination. The High Court did not conduct the limitation analysis. This Court has, in the past, emphasised the importance of identifying the specific provision of the Bill of Rights that has been infringed. The question of whether a right in the Bill of Rights has been violated generally involves a two-pronged enquiry. The first enquiry is whether the invalidated provision limits a right in the Bill of Rights. If the provision limits a right in the Bill of Rights, this right must be clearly identified. The second enquiry is whether the limitation is reasonable and justifiable under section 36(1) of the Constitution.[117] Courts considering the constitutionality of a statutory provision should therefore adhere to this approach to constitutional adjudication.

[142] The child complainant and the child accused are not similarly situated. What distinguishes the child accused from the child complainant is that the child accused must remain in court throughout the proceedings. The child accused is entitled to hear all the evidence against him or her so as to confront it. Indeed, one of the fair trial rights of an accused is the right "to be present when being tried." To the extent that the child accused is obliged to remain in court throughout the entire proceedings, the proceedings must be *in camera*. By contrast, child complainants are not so obliged.

[117] Section 36(1) provides:

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

They are not required to remain in the courtroom after they have completed their testimony. However, while the child complainant in a sexual offence case is giving evidence, the public must be excluded. In these circumstances, the differentiation that the subsections make between, on the one hand, child complainants in sexual offence cases and, on the other hand, the child accused, is rationally related to the duration of time that each is required to spend in the proceedings.

[143] Nor does the differentiation amount to unfair discrimination. The protection accorded to each child is related to the amount of time each spends in court. While both remain in court, the public are excluded from the proceedings. And, if for any reason, the child complainant is required to remain in court after completing his or her evidence, the public may be excluded under section 153(3).

[144] Another constitutional defect that the High Court found in section 153(3) is that it makes the exclusion of the public from the proceedings dependent upon a request by, or on behalf of, the minor complainant's parent or guardian. A court is not obliged to draw the attention of the parent or guardian to this provision and the protection available to the child if the proceedings were *in camera*, it was argued. As pointed out earlier, the principle that the best interests of the child are of paramount importance in all matters concerning the child imposes an obligation on presiding officers to draw the provisions of section 153(3) to the attention of the complainant's parent or guardian. Paragraph 19 of the Guidelines makes it plain that child complainants and their parents or guardians have a right to be informed of the

availability of protective measures. The same considerations require the presiding officer to provide any other child witness the protection contemplated in section 153(5). This is more so because the subsection contemplates that the presiding officer shall act of his or her own initiative.

[145] It is true that, in the case of other child witnesses, it is not peremptory that they testify *in camera*. The matter is left to the discretion of the court. Child witnesses stand on a different footing from child complainants in sexual offence cases. Child witnesses may be called to testify on a wide variety of offences ranging from assault, murder, theft to malicious injury to property. Similarly, the nature of the evidence that they may be called upon to give may differ remarkably from one case to another. A boy of 15 years may be called upon to testify that he saw an accused remove a bicycle from a neighbour's house. A 17 and a half year old girl may be called upon to give evidence to the effect that she received a credit card from an accused and swiped it through a credit card machine. Yet another child may be called upon to testify on some gruesome murder or sexual offence. The identity of the child complainant is protected from disclosure by section 154(3). That provision prohibits the disclosure of the identity of a child complainant.

[146] Given this wide-ranging nature of the evidence that child witnesses in general may be called upon to give, and the wide-ranging ages of child witnesses, it is desirable that the question whether proceedings should be held *in camera* should be answered on a case-by-case basis. Indeed, it is desirable that courts should have the

discretion in each case to assess whether, having regard to the nature of the evidence to be given and the age of the child, the proceedings should be held *in camera* or whether the child should testify *in camera*. However, these considerations must always be balanced against the need for all witnesses to testify in an open court and for all proceedings to be held in an open court consistently with the principle of open justice.

[147] The principle of open justice is an important one which this Court has recognised.[118] In *Shinga*, this Court said the following of and concerning the principle of open justice:

> "Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy."[119]

[148] And this brings me to the role of judicial discretion in sections 153(3) and 153(5).

---

[118] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) at paras 39-42; *Shinga v The State (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell and Others v The State* [2007] ZACC 3; 2007 (4) SA 611 (CC); 2007 (5) BCLR 474 (CC) at para 26; and *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 32.

[119] *Shinga* above n 118 at para 26.

[149] Both sections 153(3) and 153(5) give the court discretion whether to hold the proceedings *in camera*. Section 153(3) applies to all complainants in offences involving any sexual offences or extortion, or any of the offences mentioned in the subsection. This includes a child complainant in a sexual offence case. This is of course subject to the provisions of section 153(3A) which requires the public to be excluded while a complainant in a sexual offence case is giving evidence. Section 153(5) applies to other child witnesses. The subsections are aimed at protecting the identity of the complainants in those offences.

[150] The exercise of discretion is necessary in deciding whether to hold criminal proceedings *in camera*. As pointed out earlier, open justice requires that all criminal proceedings be held, and all witnesses testify, in open court. The decision whether proceedings should be held *in camera* involves the weighing up of competing interests, namely, on the one hand, the right to open justice and, on the other hand, protecting children and the identity of witnesses. Discretion is a tool which enables courts to mediate between these competing interests.

[151] For all these reasons, the finding that the differentiation between a child accused, on the one hand, and child complainants or child witnesses, on the other hand, is irrational, cannot be sustained. Nor can the finding that sections 153(3) and 153(5) discriminate unfairly against child complainants and child witnesses be sustained. It follows therefore that sections 153(3) and 153(5) are not unconstitutional.

Section 158(5) and section 170A(7)

[152] Section 158 provides:

> "(1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.
>
> (2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
>
> (b) A court may make a similar order on the application of an accused or a witness.
>
> (3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would—
>
> (a) prevent unreasonable delay;
>
> (b) save costs;
>
> (c) be convenient;
>
> (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
>
> (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.
>
> (4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.
>
> (5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings."

[153] Section 170A(7) provides:

> "The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings."

[154] Section 158 makes provision for a witness or an accused to give evidence by means of CCTV or similar electronic media. This can be done at the request of the state, witness, accused, or at the court's initiative. An order to this effect may be made if the facilities are readily available. Section 158(5) requires the court to furnish reasons for refusing to make an order in terms of this subsection where a child complainant, who is under the age of 14 years, is involved, and to give those reasons immediately. Section 170A(7) deals with refusal to appoint an intermediary and provides that in the case of a child under the age of 14 years, the court must immediately give reasons for refusing to appoint an intermediary.

[155] The High Court found that sections 158(5) and 170A(7) discriminate between children under the age of 14 years and those over the age of 14 years. It held that the subsections are irrational and discriminatory and therefore unconstitutional.[120]

[156] The finding of unconstitutionality appears to rest on the assumption that the court is not required to give reasons where the refusal relates to a child over the age of

[120] Above n 10 at paras 75-8 and 115-26.

14 years. This assumption ignores the principle of constitutional interpretation which requires courts, where possible, to construe a statute in a manner that promotes the rights in the Bill of Rights. The achievement of equality is one of the founding values of our constitutional democracy, a value echoed in the equality provision of the Bill of Rights (section 9). Section 158(5) must be read, if possible, to promote equality and not to promote inequality.

[157] To this must be added the principles of accountability, responsiveness and openness which are part of the founding values of our constitutional democracy.[121] These principles require that courts respond to requests for the use of CCTV or similar electronic media and to account for any decisions they make in this regard. Courts account by giving reasons for their decisions. The principle of accountability provides insurance against arbitrariness. The need to give reasons for a decision refusing the use of CCTV must be read as implicit in section 158(5) unless such a construction is inconsistent with the subsection. The same is true of section 170A(7).

[158] To construe sections 158(5) and 170A(7) as not requiring the court to furnish reasons for refusing the use of CCTV or to appoint an intermediary for children over the age of 14 years, as the case may be, would render these subsections inconsistent with the Constitution. Consistent with the settled principle of constitutional construction, the construction which will bring these subsections within constitutional bounds must be preferred to that which will not. The importance of the guarantee of

[121] Section 1(d) of the Constitution.

equality, and the principles of accountability and responsiveness in our constitutional democracy, cannot be gainsaid. These values should therefore be enforced unless it is clear that the legislature has expressly or by necessary implication enacted that they should not apply. For stronger reasons, this approach should apply when construing a statutory provision in order to determine its constitutionality.

[159] Sections 158(5) and 170A(7) are capable of being read in a manner that is consistent with the Constitution. It is that construction that must be preferred to any other construction that would render the subsection unconstitutional. These subsections must be construed to require that a court must give reasons for refusing to allow the use of CCTV or to appoint an intermediary in respect of children below 18 years of age, as the case may be.

[160] The fact that these subsections require the court to give reasons for refusing the application for the use of a CCTV or the appointment of an intermediary in the case of a child under the age of 14 years, as the case may be, does not in itself exclude the need for reasons in the case of a refusal in respect of a child over the age of 14 years. The issue is one of emphasis rather than one of exclusion. What the subsections emphasise is that the younger the child, the more the need exists for protection. Selecting the age of 14 years may perhaps be perceived to be arbitrary. So are all choices relating to age. This, however, does not detract from the fact that the subsections recognise that younger children may need the protection more than older children. As pointed out earlier, the protection that is given to children must be

appropriate to their age, level of maturity and unique needs. These subsections recognise this. They also recognise that vulnerability decreases with age.

[161] In the light of the above, and flowing from sections 158(5) and 170A(7), the distinction lies in the fact that those subsections require a presiding officer to give reasons for refusing to appoint an intermediary or the use of CCTV, as the case may be, where the child is below the age of 14 years "immediately upon refusal." Where the child is 14 years or older, the presiding officer need not give reasons immediately upon refusal, but may give reasons at a later stage or at the end of the case. This distinction is neither irrational nor unfair. It serves merely to remind presiding officers of the greater vulnerability of younger children. It does not, however, mean that an intermediary should not be appointed or CCTV should not be used, as the case may be, for children who are 14 years or older.

[162] Sections 158(5) and 170A(7) are, therefore, not unconstitutional.

Section 164(1)

[163] Section 164 provides:

> "(1) Any person who, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.
>
> (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable

> as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence."

[164] Section 164(1) allows a court to allow a person, who does not understand the nature or the importance of an oath or a solemn affirmation, to give evidence without taking an oath or making an affirmation. However, the proviso to the subsection requires the presiding officer to admonish the person to speak the truth. It is implicit, if not explicit, in the proviso that the person must understand what it means to speak the truth. The High Court was concerned about a child who is unable to distinguish between the concepts of truth and falsehood. If the child does not understand what it means to speak the truth, the child cannot be admonished to speak the truth and is therefore an incompetent witness.[122] The child cannot testify. Such a child was the concern of the High Court. The problem with the subsection, the court held, is that it does not take into account that a child who, because of his or her age, may not be able to understand the abstract concepts of truth and falsehood, but may nevertheless be perfectly able to convey what happened to him or her.[123]

[165] The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result

[122] *S v V* 1998 (2) SACR 651 (C) at 652G-653B.

[123] Above n 10 at para 139.

is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else.

[166] The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a pre-condition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth.[124] The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of section 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.

[124] Above n 122 at 654B-I.

[167] When a child, in the court's words, cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children; in particular, younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.

[168] As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have this skill, although there are some who, over the years and because of their constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Childline was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their

integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account.

[169] The conclusion by the High Court that the proviso to section 164(1) violates section 28(2) of the Constitution cannot, therefore, be sustained.

Conclusion on orders of invalidity

[170] I conclude, therefore, that properly construed, the invalidated provisions are not inconsistent with the Constitution. It follows that the orders of invalidity cannot be confirmed.

[171] What now remains to be considered is whether the declaratory, mandatory and supervisory orders made by the High Court should be set aside as contended for by the Minister.

Declaratory orders in paragraphs 8–10

[172] In addition to orders of invalidity, the High Court made further declaratory orders in paragraphs 8–10 of its order. [125] These related to priority to be given in the

[125] Paragraphs 8–10 of the order provide:

> "8. It is declared that criminal trials in which children are involved as complainants or witnesses must, in terms of section 28(2) of the Constitution, be given as much priority in the investigative and prosecution phases as the available resources permit;
>
> 9. It is declared that children who appear as complainants or witnesses in criminal trials have the right, in terms of section 28(2) of the Constitution, to be assisted by an intermediary and to make use of electronic devices such as closed circuit television while giving evidence to the extent that available resources permit;
>
> 10. It is declared that children who are involved as complainants and witnesses in criminal trials are entitled to have these trials conducted by presiding officers, prosecutors, court

investigation and prosecution of criminal cases involving children,[126] the right to be assisted by an intermediary and to make use of electronic and other devices when giving evidence,[127] and the entitlement to have trials conducted by officials who have expertise in dealing with children.[128] In addition, it made mandatory and supervisory orders.[129] I will deal with the latter orders later.

[173] The Minister is also appealing against these orders. The Minister submitted that: first, these orders dealt with matters that were not before the High Court; second, the orders had no direct connection with the cases before the High Court; third, the scope of the orders went beyond issues that the parties had been required to deal with

---

staff and other participants who have adequate expertise to deal with children as such witnesses or complainants."

[126] Id at para 8 of the order.

[127] Id at para 9 of the order.

[128] Id at para 10 of the order.

[129] Paragraphs 11–16 of the order provide:

"11. It is noted that the Criminal Justice System faces critical systemic challenges;

12. The Minister of Justice is ordered to refer the matters addressed in paragraphs 8, 9 and 10 above to the Inter-Sectoral Committee responsible for the development of the National Policy Framework with the instruction to address the systemic shortcomings as part of such framework, where possible with the co-operation of such NGOs as are willing and able to assist the Committee;

13. The National Commissioner of the South African Police Services and the Director of Public Prosecutions are ordered to consider the matters addressed in paragraphs 8, 9 and 10 above as part of their directives to be issued in terms of section 66 of Act 32 of 2007 in order to eliminate existing shortcomings, where possible with the co-operation of NGOs willing and able to assist the Commissioner and the Director;

14. The Minister, the National Commissioner of the South African Police Services and the Director of Public Prosecutions are ordered to report to the court one year from the date of this order and inform the court and the parties and *amici* of the progress made in addressing existing backlogs;

15. The parties and the *amici* are given leave to approach the court within thirty days after receipt of such reports with a request to raise further issues with the court, should such be necessary;

16. This matter is referred to the Honourable Constitutional Court."

by the High Court; and fourth, they dealt with the policy that has yet to be formulated and they were thus in breach of the doctrine of the separation of powers.

[174] The legal basis for making these declaratory orders is not clear from the judgment of the High Court. The court had already made orders of invalidity in relation to the invalidated provisions as required by section 172(1)(a) of the Constitution. A court hearing a constitutional matter has wide powers to make an order that is appropriate.[130] The question is whether it was appropriate for the High Court to make the declaratory orders in paragraphs 8-10.

[175] As framed by the court, the question was whether the invalidated provisions are inconsistent with section 28(2) of the Constitution. The answer to this question turned upon the proper construction of section 28(2) and section 170A(1). It did not require a

---

[130] Section 38 provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

Section 172(1)(b) provides:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Fose v Minister of Safety and Security [1997] ZACC 6; 1997 (7) BCLR 851 (CC); 1997 (3) SA 786 (CC) at para 19 provides:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights." (Footnote omitted.)

declaration of rights. What the High Court was required to do was to declare, in terms of section 172(1)(a), that the invalidated provisions are inconsistent with the Constitution, as it did in the orders of invalidity. Once this was done, there was no need for any further declaratory order. This was therefore not a case in which the court should have exercised its discretion to make a declarator over and above the orders of invalidity.

[176] In these circumstances, paragraphs 8, 9 and 10 of the High Court order cannot stand.

Paragraph 11 of the order

[177] Paragraph 11 of the order reads: "It is noted that the criminal justice system faces critical systemic challenges." This is not an order. It therefore cannot stand.

Mandatory orders in Paragraph 12

[178] The mandatory orders ordered the Minister to refer the matter dealt with in the declaratory orders to the Inter-Sectoral Committee with "instructions" to that committee to address these matters as part of the National Policy Framework (NPF).[131] In addition, it ordered the National Commissioner of South African Police Services (the National Commissioner of Police) and the DPP to issue directions addressing matters dealt with in the declaratory orders.[132] The Minister and these state officials were ordered to address these matters with the co-operation of non-

[131] See above n 129 at para 12 of the order.

[132] See above n 129 at para 13 of the order.

governmental organisations that were willing and able to assist. The supervisory order called upon the Minister, the DPP and the National Commissioner of Police to report to court within a year, the progress made in addressing the mandamus dealt with in the mandatory and supervisory order.[133]

[179] As is apparent from the mandatory orders, they were made in order to give effect to the declaratory orders. If the declaratory orders cannot stand, the mandatory orders cannot stand either. However, in making the mandatory orders, the High Court relied upon the existence of the structure to develop the NPF dealing with, among other matters, services for victims of sexual offences under section 62 of the Sexual Offences Amendment Act. It held that—

> "the existence of the structure to develop this policy framework does enable the court, however, to go further than to issue a mere declaratory order of constitutional invalidity, but also to consider a mandamus".[134]

[180] It is not clear from the judgment of the High Court why this is so. The Minister contended that these orders are in breach of the principle of the separation of powers.

[181] The importance of the principle of the separation of powers in our constitutional democracy cannot be gainsaid. It is required by the very structure of our Constitution. While there are no bright lines that separate the role of the courts from those of other branches of government, "there are certain matters that are pre-

[133] See above n 129 at para 14 of the order.

[134] Above n 10 at para 95.

eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation."[135] (Footnote omitted.) Courts too must observe the constitutional limits of their authority. Thus, in *Doctors for Life* we emphasised that:

> "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."[136]

[182] It is unquestionably the constitutional province of the executive to develop and implement policy.[137] Consistently with this, section 62 of the Sexual Offences Amendment Act requires the Minister to adopt the NPF, among other things, "to guide the implementation, enforcement and administration of the Act."[138] The NPF must be

---

[135] *Minister of Health and Others v Treatment Action Campaign and Others (No. 2)* [2002] ZACC 15; 2002 (10) BCLR 1033 (CC); 2002 (5) SA 721 (CC) at para 98; *Doctors for Life* above n 36 at para 199 and 1462E-F.

[136] *Doctors for Life* above n 36 at para 39 and 1417C-E.

[137] Section 85(2)(b) of the Constitution provides:

> "(2) The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> (b) developing and implementing national policy."

[138] Section 62(1)(b) provides:

> "(1) The Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, adopt a national policy framework, relating to all matters dealt with in this Act, to—

adopted and tabled in Parliament within a year of the promulgation of the Act. The Act also establishes the Inter-Sectoral Committee for the Management of Sexual Offences Matters (the Committee). The DPP and the National Commissioner of Police are empowered to issue national instructions dealing with, among other things, the manner in which sexual offences must be investigated and prosecuted and the training of those involved in the investigation and prosecution of these offenders.

[183] Under our constitutional democracy, courts have no power to supervise or interfere with the exercise by the executive or legislature of its functions unless the circumstances amount to a clear disregard by the executive of the powers and duties conferred upon it by the Constitution. Where there is such a disregard, courts are not only entitled but obliged to intervene. But judicial review under our constitutional democracy does not give courts the power to exercise executive or legislative functions. It permits courts to call upon the executive and legislature to observe the limits of their powers but does not permit courts to exercise those powers themselves. Courts therefore have the duty to patrol the constitutional borders defined by the Constitution. They cannot, therefore, cross those borders.

[184] Here the High Court ordered the Minister to refer matters dealt with in the declaratory orders to the Committee and to instruct the Committee to address the systematic shortcomings as part of the NPF. In effect, the order dictates to the Minister, whose duty it is to develop the policy, what shall be included in the policy.

(b) guide the implementation, enforcement and administration of this Act".

Not only that, the Minister is ordered to instruct the Committee on what to do. The court is, therefore, taking part in the formulation and adoption of the policy. In my view, the order interferes with the executive function. Indeed, it amounts to an exercise of an executive function. This in my view constitutes an impermissible intrusion into the domain of the executive.

Mandatory order in paragraph 13

[185] The same is true of paragraph 13 of the order. It ordered the National Commissioner of Police and the DPP "to consider the matters addressed in [the declaratory orders] as part of their directives". The Sexual Offences Amendment Act now empowers these officials of the executive to issue directions or policy dealing with the functioning of their respective departments. The effect of the order is to tell them what should form part of these directives or policy. It is not ordinarily the function of the court to tell the executive how to formulate policy. To do so is to interfere in the functioning of the executive. The function of the courts is to ensure that the executive observes the limits on the exercise of its power. Here too the High Court impermissibly intruded into the domain of the executive.

[186] The High Court was no doubt faced with a lamentable situation concerning child witnesses in criminal proceedings involving sexual offences. It had serious concerns about the manner in which justice was being administered in relation to child victims of sexual offences. As will appear below, these concerns had a strong factual foundation. The High Court was understandably and commendably motivated by the

desire to perform its duty to uphold the Constitution and to implement the provisions of section 28(2) by providing appropriate remedies. The manner in which the court set about providing these remedies, however, was not appropriate. The remedy lay, not in attempting to recast the statute book, but in the proper interpretation and implementation of the invalidated provisions. There was no legal basis for the orders made by the High Court in paragraphs 12 and 13 of its order.

Supervisory order in paragraph 14

[187] The supervisory order in paragraph 14 of the order of the High Court was made in order to give effect to the declaratory and mandatory orders. This is a matter to which I shall return in a moment.

[188] For all these reasons, the High Court should not have made these orders in paragraphs 8, 9, 10, 11, 12 and 13 of its order. These orders must accordingly be set aside.

[189] That, however, is not the end of the matter. As pointed out above, the record contains some disturbing information concerning the availability of intermediaries, the adequacy of their training and the lack of court facilities for child complainants in sexual offence cases. Indeed, grave concerns were expressed in the course of the hearing in this Court over this situation. This has serious consequences for the protection that both section 28(2) of the Constitution and the child protection

provisions of the CPA afford to child complainants, and for the administration of justice.

[190] In what follows, I set out these concerns, consider whether this Court as the upper guardian of all minors should investigate these concerns, and determine the appropriate order.

Concerns about the availability of intermediaries

[191] Our attention was drawn to cases where courts have ordered the appointment of intermediaries but because none were available, courts have had to postpone cases to the detriment of child complainants.[139] One case, for example, was postponed on 22 August 2007 for the appointment of an intermediary. One year later, an intermediary had not yet been appointed and the case had to be postponed further.[140] The situation poses a dilemma for concerned judicial officers. The dilemma they face has recently been described as follows by a Brits Regional Court Magistrate:

> "The dilemma is that none of the role players involved are certain as to who is responsible for ensuring that an intermediary is available on the trial date to assist these children. It is paramount that clarity be obtained in this regard. The delay in the demarcation process further contributes to the current dilemma since intermediaries from outside the Brits region are not willing to assist at this court as they complain that they are not being paid. The current situation at the local office of

[139] See for example *S v Kasebedile* Case No CC201/05, North West High Court, Mafikeng, 4 October 2005, unreported and the case of *S v Ronny Seboko* Case No SH84/06, Brits Regional Court, 2 September 2008, unreported, which was made available to this Court.

[140] *Seboko* above n 139.

> the Department of Social Development is that there is no social worker available to act as an intermediary due to a shortage of social workers."[141]

[192] This dilemma has taxed judicial patience to its limits. It has forced concerned regional magistrates to resort to orders in terms of section 342A of the CPA.[142] This section empowers a court to investigate any delay in the completion of a trial if the delay is unreasonable and is likely to cause substantial prejudice to the accused, the state or a witness. If the court finds that the delay is unreasonable, it may make any order "as it deems fit in order to eliminate the delay". In *Seboko*, the Regional Court Magistrate issued an order in the following terms:

> "[T]he matter be referred to [the] relevant authorities to make submission or come and testify before the court on the 21st October 2008 with regards to the following:
>
> > Who is responsible to secure the attendance of a suitable intermediary on the trial date.
> > What steps are going to be taken to make sure that an intermediary will be available to assist the children in the abovementioned cases.

---

[141] Id.

[142] Section 342A(1) provides:

> "(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness."

Section 342A(3)(f) provides:

> "(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order—
>
> > (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay."

> The case in question has been remanded until 21 OCTOBER 2008 for the relevant authorities to reply in writing to the court or to give oral evidence before this court i.t.o. section 342A of [the Criminal Procedure Act]."[143]

[193] The factual material submitted by the DPP and the amici reveals the following further disturbing facts.

Availability of sexual offences courts

[194] The DPP in Pretoria indicated that in February 2003, 29 specialist sexual offences courts were functioning. By February 2007 the statistics indicated that there were about 75 of these courts, but only 52 were still sitting and dealing only with sexual offence cases. This correlates with the findings of Reyneke and Kruger that 54 courts were operating in 2005.[144] This finding indicates that there has been a decline in the number of functioning sexual offences courts since 2005. The DPP has also deployed 68 court preparation officers to help prepare child witnesses for the procedures and rigours of testifying in court. While 71 more officers are to be appointed on a needs analysis, there is no indication of whether this supply is meeting the demand of the criminal justice system.

Facilities for the use of intermediaries

[195] The DPP in Pretoria also provided us with the results of several surveys undertaken to comply with the High Court's investigation into the constitutionality of

[143] *Seboko* above n 139.

[144] Reyneke & Kruger "Sexual Offences Courts: Better justice for children?" (2006) 31(2) *Journal for Juridical Services* 73.

the specific provisions of the CPA. These findings are the most disturbing. Only 14% of the approximately 450 Regional Courts nationwide are equipped with the necessary facilities to permit the use of intermediaries. Even for those courts with these facilities, a high percentage have continuing problems with broken or malfunctioning equipment. For example, the respondents from Lehurutshe, in the North-West province indicated that the equipment had *never* worked in their courts. A very low percentage of courts were equipped with one-way mirrors, and only slightly higher percentages of courts were reported to have separate waiting rooms in each province.

Training of intermediaries

[196] Almost half of the officials who responded to the DPP's surveys indicated their strong concerns over the current intermediaries. The issues they raised included language barriers that led the intermediary to fail to adequately convey what the child was stating; intermediaries' unfamiliarity with court procedures, leading them to act merely as interpreters or fail to perform their function of making the child more comfortable with the form and tone of the questioning; the difficulty expressed by prosecutors in obtaining intermediaries even on request; and the reliance by courts or prosecutors on interpreters over intermediaries merely because it involved a simpler process, despite almost 50% of the respondents indicating that interpreters had not been adequately sensitised to the needs of child witnesses.

Training of prosecutors

[197] Finally, the facts suggest that only a very small percentage of prosecutors had sufficient training in dealing with child witnesses, with only 450 prosecutors by 2007 having received specialist training in these areas, a very low proportion of all working prosecutors. The DPP itself conceded that high staff turnover meant that it was difficult to retain adequately trained staff to deal with these issues. Prosecutors also indicated that they felt magistrates required additional training to deal with cases involving child complainants.

[198] This is a disturbing state of affairs. It is utterly inconsistent with the statutory promise of an intermediary in section 170A(1). Indeed, it is inconsistent with the constitutional promise that the child's best interests shall be of paramount importance in all matters concerning the child. It reduces court orders giving effect to these promises to meaningless words. Indeed, if a court orders the appointment of an intermediary and the order cannot be carried out, the order will be ineffective. But yet, the Constitution requires the organs of state to assist and protect courts to ensure the effectiveness of courts.[145] And further declares that an order of court "binds all persons to whom and organs of state to which it applies."[146] Orders to appoint an intermediary plainly apply to the state.

Should the Court investigate these matters?

[199] What then should this Court, whose duty it is to uphold the Constitution, do in the light of this disturbing information? In *Matatiele 1*, we had occasion to consider

[145] Section 165(4) of the Constitution.

[146] Section 165(5) of the Constitution.

whether it was appropriate for this Court to investigate whether the procedures set out for the enactment of a constitutional amendment were complied with. We held that "where, on the papers before it, there is doubt as to whether a particular law or conduct is consistent with the Constitution, this Court may be obliged to investigate the matter."[147] And we added that "[t]his would be particularly so where . . . an important constitutional issue is involved."[148] O'Regan J, concurring, emphasised that "[i]t is this Court's constitutional task to ensure that the Constitution is upheld."[149] We concluded that it was in the interests of justice to investigate the issue.[150]

[200] The constitutional issues at stake here concern children who are complainants of sexual offences. They are some of the most vulnerable members of society. They are not parties to the proceedings, but they have constitutional rights: the right to have their best interests to be considered is of paramount importance in matters concerning them. Their status as non-parties severely limits, if not eliminates, their ability to vindicate their rights in those proceedings where they are called upon to testify. This makes them doubly vulnerable. They have to depend, for the vindication of their rights, on others including courts before whom they testify. The constitutional issues at stake here are therefore important, and affect the administration of justice. Their resolution may not have an impact on the child who testified without the aid of an intermediary in the Phaswane matter, but it will have an impact on many others whose

[147] *Matatiele 1* above n 25 at para 68.

[148] Id.

[149] Id at para 90.

[150] Id at para 68.

cases are pending in courts and those who will fall complainants of sexual abuse in the future.

[201] The record suggests a disturbing inconsistency between the promises that the laws make and the implementation of the laws. Compliance with the Constitution requires not only that laws be enacted to give effect to the rights in the Constitution, but also requires that these laws be implemented. Failure to implement laws that protect constitutional rights is a violation of the Constitution.

[202] Here Parliament has made laws to protect child complainants from undue mental stress or suffering that may result from testifying in court. To this end, sections 170A(1) and 170A(3) promise child complainants protective measures such as the appointment of an intermediary and the creation of child-friendly courts. But the subsections also contemplate that the state will commit the necessary resources in order to achieve the objects of the subsections consistently with section 28(2) of the Constitution and give effect to sections 170A(1) and 170A(3). The non-availability of these measures contemplated in the CPA is not only a breach of the relevant provisions of the CPA, but it is indeed a breach of the Constitution.

[203] As pointed out earlier, under sections 38 and 172(1)(b) of the Constitution, this Court has wide powers to make an order that is just and equitable and afford appropriate relief. As the facts set out above amply demonstrate, the rights of child

complainants in sexual offence cases are threatened by the non-availability of intermediaries and related child protection facilities.

[204] During argument, counsel for the Minister was asked why this Court should not make a supervisory order to address these concerns. He submitted that Parliament has created a mechanism for addressing this problem and further submitted that a structural interdict would do the same. Counsel had in mind the provisions of Part 3 of the Sexual Offences Amendment Act. This Part makes provision for the adoption of the NPF, among other things, "to guide the implementation, enforcement and administration of this Act".[151] This policy had to be adopted within a year after the coming into operation of this statute, namely by 16 December 2008. Having regard to the provisions of Part 3, it is not clear whether the policy framework will address the concerns raised by these cases. It will probably not as it is concerned with policy matters. In addition, we were not told whether the policy has been formulated, and if not, at what stage is the drafting process. In any event, whatever the mandate of the Committee might be, the supervisory order is concerned with the implementation of existing legislative provisions for the protection of children.

[205] The concerns raised in these cases require urgent attention. Addressing them cannot be deferred. Each child complainant who is denied the assistance of an intermediary while the policy framework is being developed has his or her

[151] Section 62(1)(b) of the Sexual Offences Amendment Act.

constitutional rights violated. In these exceptional circumstances, I consider it appropriate to call for information as a first step in this supervisory process.

[206] I consider that the Director-General for the Department of Justice and Constitutional Development should be requested to furnish the following information:

(a) A list of Regional Courts indicating how many intermediaries each Regional Court requires to meet its needs and how many intermediaries each Regional Court has.

(b) If the Regional Courts do not have the number of intermediaries required to meet their needs, the steps which are being taken to ensure that each Regional Court has the number of intermediaries necessary to meet its needs.

(c) A list of Regional Courts indicating which of them has the following facilities contemplated in section 170A(3) of the CPA:

    (i) separate rooms from which children may testify;

    (ii) closed circuit television facilities; and

    (iii) one-way mirrors.

(d) To the extent that there are Regional Courts that do not have all the facilities in (c) above, the steps which are being taken to provide these facilities to these Regional Courts.

[207] In these circumstances, the supervisory order in paragraph 14 of the order of the High Court should be set aside. So too should paragraph 15 of the order be set aside,

which gives the parties and amici leave to approach the High Court, with leave to raise further issues with the High Court should this be necessary. I believe that the order made in this Court is an appropriate remedy to address the threat to the rights of child complainants in sexual offence cases.

Conclusion

[208] In the result, I conclude that—

(a) the orders of invalidity made by the High Court in Pretoria should not be confirmed;

(b) the further declaratory, mandatory and supervisory orders made by the High Court in Pretoria should be set aside; and

(c) an order should be issued calling upon the Director-General for the Department of Justice and Constitutional Development to provide the information set out in paragraph 206 above. A period of 90 days should be sufficient to enable the Director-General to assemble and provide this information. The National Director of Public Prosecutions and the amici should be afforded the opportunity to comment on the information.

Order

[209] In the event, the following order is made:

(a) The failure by the Minister for Justice and Constitutional Development to comply with the rules for the filing of the notice of appeal and the application for leave to appeal is condoned.

(b) The appeal by the Minister for Justice and Constitutional Development is upheld.

(c) The orders of invalidity made by the North Gauteng High Court, Pretoria in respect of sections 153(3) and (5), 158(5), 164(1) and 170A(1) and (7) of the Criminal Procedure Act 51 of 1977 are not confirmed.

(d) The further orders that were made by the North Gauteng High Court, Pretoria in paragraphs 8–15 of its order are set aside.

(e) The Director-General for the Department of Justice and Constitutional Development is required to submit a report to this Court by no later than 1 July 2009 setting out the following information:

1. A list of Regional Courts indicating how many intermediaries each Regional Court requires to meet its needs and how many intermediaries each Regional Court has.
2. If the Regional Courts do not have the number of intermediaries required to meet their needs, the steps which are being taken to ensure that each Regional Court has the number of intermediaries necessary to meet its needs.

3. A list of Regional Courts indicating which of them has the following facilities contemplated in section 170A(3) of the CPA:

    (i) separate rooms from which children may testify;

    (ii) closed circuit television facilities; and

    (iii) one-way mirrors.

4. To the extent that there are Regional Courts that do not have all the facilities in subparagraph 3 of this order, the steps which are being taken to provide these facilities to these Regional Courts.

(f) The report contemplated in paragraph (e) of this order must be served on each of the amici and the National Director of Public Prosecutions, who, if so advised, may comment on the report by no later than 3 August 2009.

(g) Further directions dealing with, among other matters, argument or supervision of the execution of paragraph (e) of this order, as circumstances may require, may be issued.

Langa CJ, Moseneke DCJ, Mokgoro J, O'Regan J, Sachs J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo J.

SKWEYIYA J:

Introduction

[210] I have read the meticulous judgment of my colleague, Ngcobo J. I agree that this Court should not confirm the declarations of invalidity made by the High Court in Pretoria and I concur in his order. This judgment is written because, while I concur in his reasoning and the order he proposes in relation to section 170A(1) of the Criminal Procedure Act 51 of 1977 (CPA), I differ from him in relation to the reasons he advances for not confirming the declarations of invalidity in respect of sections 153(3) and (5), 158(5), 164(1), and 170A(7) of the CPA (the improperly raised provisions).[1]

[211] In my view, a broader range of factors should inform this Court's consideration of the interests of justice in confirmation proceedings when the impugned statutory provisions were never properly before the court below. These additional factors reveal that, in this case, the interests of justice would be better served by refusing to confirm the declarations of constitutional invalidity without addressing the constitutionality of the improperly raised provisions.

This Court's discretion in confirmation proceedings

[1] For reasons explained in this judgment, "the improperly raised provisions" do not include section 170A(1) of the CPA. I will refer to all six sections declared invalid by the High Court as "the invalidated provisions".

[212] Under section 172(2)(a) of the Constitution, any declaration of constitutional invalidity must be confirmed by this Court to have any force. It seems to me that section 172(2)(a), properly construed, does not compel this Court to entertain an application for confirmation in relation to provisions entirely irrelevant to the facts of the underlying case.

[213] In *Ordinary Court Martial*,[2] Langa CJ noted that—

> "section 172(2) does not require this Court in all circumstances to determine matters brought to it under that subsection. At least where the provision declared invalid by the High Court has subsequently been repealed by an Act of Parliament, the Court has a discretion to decide whether or not it should deal with the matter. In this regard, the Court should consider whether any order it may make will have any practical effect either on the parties or on others."

In my view, therefore, once a declaration of constitutional invalidity is made by a High Court and referred to this Court for confirmation, this Court can either pronounce upon the constitutionality of impugned provisions, or refuse to confirm the order without reaching the merits of the provisions. This Court has a discretion which it should exercise judiciously.[3] To find otherwise would effectively be to cede control over this aspect of our jurisdiction to lower courts.

---

[2] *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 16. See also, *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 32.

[3] The existence of a discretion in this regard is recognised by Ngcobo J at [60] and [68] above.

[214] In exercising this discretion, this Court must enquire into the interests of justice. Typically, the interests of justice require that we consider the validity of provisions declared unconstitutional by a lower court in order to avoid uncertainty as to their ongoing validity. When a dispute has become moot before reaching this Court, this concern is diminished. This is the reason that *Ordinary Court Martial* identifies mootness as a situation where this Court may not be required to determine the validity of provisions declared unconstitutional by a lower court.[4]

[215] *Ordinary Court Martial* suggests that there may well be other situations where this Court should exercise its discretion not to consider constitutional issues raised in confirmation proceedings.[5] We have never squarely confronted a situation in which the interests of justice caution us *not* to engage in a substantive evaluation of the provisions in question on the basis that the constitutional issues were improperly raised in the court below. As the analysis below demonstrates, this case presents such a situation.

What do the interests of justice require in this case?

[216] Three factors inform Ngcobo J's position that the interests of justice require this Court to consider the constitutional validity of the invalidated provisions of the CPA.[6] One of these factors – in his view the most significant of the three – is that if we do

[4] *Ordinary Court Martial* above n 2 at para 8.

[5] Id at para 16 where Langa CJ stated: "*At least* where the provision declared invalid by the High Court has subsequently been repealed by an Act of Parliament, the Court has a discretion to decide whether or not it should deal with the matter." (My emphasis.)

[6] At [60]-[69] above.

not consider their validity, uncertainty as to their constitutionality may linger. This concern is overstated and exaggerated. Although this Court acted in *Zantsi* to prevent uncertainty where the constitutional issues raised were irrelevant, the potential uncertainty in that case related to the jurisdiction of provincial and local divisions of the Supreme Court to enquire into the validity of Acts of Parliament passed prior to the enactment of the Constitution.[7] The uncertainty avoided was more substantial and potentially far-reaching than the uncertainty that could arise in this case.

[217] Furthermore, the language of sections 172(2)(a) and 167(5) of the Constitution does not indicate that confirmation proceedings are compulsory in all circumstances. It seems to me that if these sections were intended to impose on this Court an obligation to hear confirmation proceedings and prevent uncertainty in all instances, the language could easily have reflected this intention. Those sections also make clear that any declaration of invalidity will have *no force* unless confirmed by this Court. Legally, therefore, there is no uncertainty as to the effect of a declaration of invalidity that has not been confirmed by this Court: it has no force.

[218] Moreover, any concern about the manner in which these provisions will be applied in the future if the constitutionality of the provisions is not addressed by this Court can be overcome in ways that do not entail the constitutional review of provisions divorced from factual context. In this case, to prfevent any doubts as to the

[7] *Zantsi v Council of State, Ciskei and Others* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 8. See also *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC) at para 44; and *Van der Merwe v Road Accident Fund and Another* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 21.

continuing validity of the provisions, this Court's judgment could be sent to magistrates and judges so as to emphasise the continuing effect of the statutory provisions. It seems to me that such an approach addresses concerns about uncertainty without compromising the crucial principles raised in this judgment.

[219] In any event, Ngcobo J's factors are not exhaustive of the relevant factors in the interests of justice enquiry where constitutional issues were improperly raised by the lower court. It is to these additional factors that I now turn.

Constraints on judicial authority: the rule of law and the separation of powers

[220] In my view, the first additional factor that should inform our interests of justice enquiry in this case concerns the rule of law and the separation of powers. Although courts are independent and subject only to the Constitution and the law,[8] it is the judiciary's continued respect for these two principles that preserves its integrity and independence. As Cameron notes:

> "The institutional and substantive independence of the judiciary is of great importance. But it is a value only in its interrelation with other values: judicial independence is guarded because *it is meant to serve the public interest through the separation of powers and fidelity to the rule of law*."[9] (My emphasis.)

[221] In the tripartite division of public power, courts are entrusted with a specific and limited function. The judiciary is the ultimate guardian of the Constitution,

[8] Section 165(2) of the Constitution.

[9] Cameron "Judicial Accountability in South Africa" (1990) 6 *South African Journal on Human Rights* 251 at 264.

bearing "not only . . . the right to intervene in order to prevent [a] violation of the Constitution, but also . . . the duty to do so."[10] The discharge of this solemn duty necessarily entails the exercise of broad powers. However, in *Doctors for Life* this Court recognized:

> "Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."[11]

The consideration of constitutional issues *in vacuo* is typically entrusted to the legislature. This is so both because of the legislature's democratic legitimacy and also because of the particular competence of that branch of government in addressing polycentric issues.

[222] It follows, then, that the core responsibility of the judiciary is to resolve live disputes on the basis of evidence presented by opposing parties. Indeed, this Court in *Zantsi*, relying on the decision of the Supreme Court of Canada in *Borowski v Canada*, set out the rationale for this as follows:

> "First, in an adversary system, issues are best decided in the context of a live controversy. The second consideration is based on concern for judicial economy and the last is that it is generally undesirable and possibly an intrusion into the role of the

[10] *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 33.

[11] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 37; 2006 (12) BCLR 1399 (CC) at 1417D-E, cited with approval in *Glenister* above n 10 at para 34.

> legislature for a court to pronounce judgments on constitutional issues in the absence of a dispute affecting the rights of the parties to the litigation."[12]

[223] The Constitution does, however, make specific provision for courts to engage in abstract review of constitutional issues in at least two instances: the review of bills by this Court in rare circumstances,[13] and facial constitutional challenges to legislation brought in a competent court. Indeed, challenges of the nature pursued in this matter could have been brought under the broad standing provisions of section 38 of the Constitution.[14] Under this section, courts are empowered to grant appropriate relief when rights in the Bill of Rights have been infringed or threatened. In *Fose*, Ackermann J addressed the breadth of courts' jurisdiction under this section as follows:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."[15] (Footnote omitted.)

[224] The critical point is that our courts will consider facial challenges to legislation in a broad range of circumstances. This Court should thus not assume that there is no

---

[12] *Zantsi* above n 7 at fn 8, citing *Borowski v Canada (Attorney General)* [1989] 1 S.C.R 342 at 358-62 (a case which discusses this principle in the context of mootness).

[13] See sections 79 and 121 of the Constitution.

[14] See, for example, *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at paras 14-6.

[15] *Fose v Minister of Safety and Security and Another* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 19, (a case which dealt with the comparable provision in the interim Constitution, section 7(4)).

avenue open to parties asserting the rights of children in our legal system. Importantly, when a court engages in abstract constitutional review under section 38 of the Constitution, as when this Court engages in the review of bills, the authority of the judiciary is, in the words of this Court, "mandated by the Constitution."[16]

[225] In our constitutional order it is appropriate for litigants to launch facial challenges to the constitutionality of legislation, and for courts to hear such challenges where it is in the interests of justice. It is quite another thing for a judge, of his own accord, to raise questions about the constitutionality of provisions which do not arise on the facts of the case before him.

[226] Moreover, in the abstract review procedures authorised by the Constitution, the abstract challenge is the very dispute in the case. Consequently, the Court in those instances does not, while conducting such abstract review, neglect its core responsibility to resolve disputes before it. By way of example, when the President refers a bill to this Court for a decision on its constitutionality – a classic case of constitutionally contemplated abstract review – the constitutionality of the bill is the only live issue before the Court.

[227] Conversely, in a matter like the one before us, the live dispute – the criminal cases of Messrs Phaswane and Mokoena – was placed on hold while largely irrelevant constitutional issues took centre stage. Consequently, the core responsibility of the

[16] *Doctors for Life* above n 11 at para 37; 1417D-E.

lower court to resolve live disputes was neglected – not only to the detriment of the administration of justice but also arguably to the detriment of the two accused and the complainants in those cases, something which I address in greater detail below.[17]

[228] The separation of powers concerns extend further. Five of the six sections declared unconstitutional by the High Court, namely sections 153(3), 158(5), 164(1), 170A(1) and (7), were in bill form at the time the two criminal trials commenced. This much was acknowledged by the High Court.[18] However, the appointment of intermediaries forms the core of section 170A(1) and was (i) implicated on the facts of the Phaswane matter; (ii) on the statute books at the time of the offence; and (iii) not altered by the proposed amendment.[19] It would therefore be formalistic to hold that the provision was improperly raised.

[229] For these reasons, the concerns outlined in this judgment do not apply to section 170A(1) to the same extent as they do in respect of the improperly raised provisions. Consequently, I am in agreement with Ngcobo J that the interests of justice require that we evaluate the constitutionality of this provision. Furthermore, because Ngcobo J's analysis is limited to the unamended core of section 170A(1), and because I am persuaded by his evaluation of that section, I concur in his conclusion that section 170A(1) is not unconstitutional.

[17] At [237]-[241].

[18] *S v Mokoena* 2008 (5) SA 578 (T) at paras 71-4.

[19] The bill, which was eventually enacted as the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, added only three words to section 170A(1). Specifically, it allowed judicial officers to appoint intermediaries not only to assist child victims but also to assist victims under the "biological or mental" age of 18 years. Because the child victim in the Phaswane matter was only 13 years old when she testified, the new text could not have applied on the facts of the case.

[230] The consideration by the High Court of the other four provisions that were in bill form is far more troubling. Only this Court may enquire into the constitutionality of a bill.[20] This enquiry is limited in two respects. First, the bill must be referred by the President pursuant to section 79(4) of the Constitution, or by a Premier pursuant to section 121 of the Constitution, to this Court for consideration. Second, as this Court stated in the *Liquor Bill* case in relation to a request pursuant to section 79(4), it can only consider reservations that the President has expressed.[21] Moreover, as was made clear by this Court in *UDM*:

> "This power of abstract judicial review is exceptional and something quite distinct from the power, having found an enactment inconsistent with the Constitution, to strike it down and to grant appropriate consequential relief relating to its effect".[22]

This Court concluded that "on a proper reading of the Constitution, *no court* may, save as provided in [sections] 79 and 121, consider the constitutionality of a Bill before the National Assembly or a provincial legislature."[23] (My emphasis.)

The difficulties inherent in resolving irrelevant constitutional issues

---

[20] Section 167(4)(b) of the Constitution states:

> "Only the Constitutional Court may—
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121".

[21] *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) at para 16. See also *Van Straaten v President of the Republic of South Africa and Others* [2009] ZACC 2 (unreported) at para 4.

[22] *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 26.

[23] Id.

[231] The second additional factor that should inform our enquiry emerges from the manner in which this matter has come before us. It was inappropriate for the High Court to raise the constitutionality of sections that had no bearing on the resolution of the cases before it. The accused had no interest in defending the constitutionality of certain of the invalidated provisions. Their disinterest is confirmed by the fact that they do not appeal against several of the findings of constitutional invalidity.[24]

[232] Although several amici representing the rights of children have lodged submissions with this Court, such submissions cannot cure the problems that arise when the parties themselves are disinterested in the resolution of the matter. The rights of children are not the only rights implicated in the improperly raised provisions; the rights of accused persons are also at stake. The Court, in adjudicating provisions which seek to balance the competing needs of accused persons and complainants, does not have the benefit of argument from the accused parties before it.

[233] The evidence presented by the amici, although troubling, is largely irrelevant to the underlying criminal cases. Indeed, during the hearing, counsel for the third and seventh amici acknowledged that her clients "did not have the luxury of evidence in this case" and were essentially "piggy-backing" on the initiative of a high court judge.

[24] The accused do not oppose confirmation of the declarations of invalidity pertaining to sections 153(3), 153(5), 158(5) (except in so far as section 158(5) may have a negative effect on their appeal) and 164(1) of the CPA. By way of example, section 153(5) of the CPA grants discretion to a court to allow a child witness to testify in camera. However, this provision could not have arisen on the facts of the Mokoena and Phaswane matters, as both children who testified were child victims rather than simply child witnesses. Therefore, the discretion afforded to judicial officers in respect of child-witnesses could not have arisen.

Not having the "luxury of evidence" is no mere technicality. Without casting doubt on the validity of the evidence before us, I am uncomfortable evaluating the improperly raised provisions on the basis of evidence submitted by amici, not as a supplement to the factual evidence before us but as a substitute for it.

Institutional implications

[234] When conducting the interests of justice enquiry in this case, this Court should reflect upon the effects that its judgment may have on the manner in which cases are litigated and resolved in lower courts. This is the third additional factor which, in my view, must inform this enquiry. Our willingness to consider improperly raised constitutional matters may trigger unfortunate and unintended consequences.

[235] Foremost among these potential consequences is that judges may be encouraged to raise irrelevant constitutional issues, no matter how wide the gulf between the constitutional issues and the facts before the court, confident that almost any declaration of invalidity is entitled to constitutional assessment by this Court. This concern extends to the conduct of litigants and lawyers, who may burden the courts with constitutional issues not pertinent to their cases.

[236] The consideration of irrelevant constitutional issues threatens the right of parties to a judicial process limited by a threshold of relevance.[25] This right is vital in

[25] In court proceedings, relevance is a crucial principle that limits the admissibility of evidence, defines the boundaries of pleadings and informs the scope of the judicial function. Schwikkard and Van der Merwe locate the rationale for this foundational common law principle, at least in part, in "the undesirability of a court being

respect of accused persons, and is one protected by section 35(3)(d) of the Constitution.[26] In the present matter, the High Court put the trials of Messrs Phaswane and Mokoena on hold while it called for submissions from amici on provisions largely irrelevant to their criminal trials. Without deciding the point, delays of this kind may infringe section 35(3)(d) of the Constitution.

[237] Moreover, the right to a judicial process constrained by a threshold of relevance, at least in my view, applies equally to non-party participants such as victims of crime. Victims should not be subjected to additional and extended trauma occasioned by improper delays in the criminal justice system. In fact, the matter before us illustrates the harms that may befall victims when cases are delayed by the consideration of irrelevant issues.

[238] The complainant in the Mokoena case testified in the regional court as long ago as 19 April 2006. On 7 July 2006 the accused was convicted by the trial magistrate. Because of the seriousness of the offence, the conviction then fell to be confirmed in the High Court in terms of section 52 of the Criminal Law Amendment Act.[27] In August 2007, Mr Mokoena's case was consolidated by the High Court with that of Mr Phaswane for consideration of the constitutional issues identified by the High Court.

---

called upon to adjudicate matters which are not related to the litigation at hand [and] the risk that the real issues might become clouded". *Principles of Evidence* 2ed (Juta Law, Cape Town 2002) at 46.

[26] Section 35(3)(d) reads:

> "(3) Every accused person has a right to a fair trial, which includes the right—
>
> (d) to have their trial begin and conclude without unreasonable delay".

[27] Act 105 of 1997. At the time the offences were committed in the Phaswane and Mokoena matters, section 52(1) of the Act, read with section 51 and Schedule 2, required the commital of convictions in respect of certain crimes, including murder, rape and aggravated robbery, to High Courts for confirmation and sentencing.

The delay occasioned by the consideration of the irrelevant constitutional issues is clear and was acknowledged by the High Court in its judgment of 24 October 2008, confirming the conviction of Mr Mokoena:

> "When *the court* raised the constitutional issues set out above, the process of obtaining submissions, hearing argument, preparing judgment and referring the same to the Honourable Constitutional Court for confirmation *caused further delays*." (My emphasis.)[28]

[239] Later in the judgment, the High Court states: "It is clearly in the best interests of the victim that her moment of closure is not delayed any longer than is absolutely necessary."[29] However, the delay caused by taking submissions and hearing argument on irrelevant constitutional issues was wholly unnecessary in the first place.

[240] The interests of the complainant in the Phaswane case have been equally jeopardised. In its judgment of 24 October 2008, the High Court said:

> "The court sought, with the consent of the State and the defence, to ameliorate the negative effect of these further delays by releasing [Mr Mokoena] and Mr Phaswane on warning… While the accused duly attended subsequent trial dates, Mr Phaswane left the country for his native Mozambique…"[30]

[241] Mr Phaswane appears to have absconded. Any closure that the complainant in that case may have gained from his conviction has been lost. The delay occasioned by the suspension of the criminal proceedings undoubtedly aggravates the stress already

[28] *S v A Mokoena and A Phaswane* Case No CC7/07, the North Gauteng High Court, Pretoria, 24 October 2008, unreported at p 16.

[29] Id at p 19.

[30] Id at p 16.

suffered by the very complainant the High Court wished to protect. Even if Mr Phaswane returns, the complainant may have to testify again in order for the accused to be sentenced. The Constitution affords paramount importance to the best interests of the child.[31] It is apparent that the High Court's postponement of the matter pending decision on the constitutionality of the provisions was ultimately *not* in the best interests of the two complainants.

[242] This Court has specifically encouraged judges to raise constitutional issues of their own accord,[32] but has never declared open season for judges to address any and all constitutional matters, however irrelevant to the facts of the case. When, in confirmation proceedings, we are faced with a lower court judgment that issues declarations of invalidity in respect of irrelevant statutory provisions, this Court is naturally inclined to express its displeasure.

[243] This Court has reason to doubt the efficacy of relying on criticism alone to discourage improper actions. This Court recently described the routine violation of certain filing deadlines as a "growing trend".[33] This practice has developed, at least in part, because of our willingness at the outset of our constitutional democracy to condone late filing in the hope that harsh language would shame litigants into future compliance. This Court has now recognised that harsh language on its own is not

[31] See section 28(2) of the Constitution.

[32] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 36.

[33] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 33.

enough.[34] The impact of our judgments lies not in the sharpness of our critical dicta, but in the orders we issue or decline to issue, and in the arguments we consider or decline to consider.

[244] Ngcobo J criticises the High Court's inappropriate diversion into the constitutionality of irrelevant CPA provisions.[35] This is unlikely to act as a corrective. This Court, in my view, sends an inconsistent message by condemning the raising of irrelevant constitutional issues while nevertheless proceeding to evaluate the merits of the constitutional issues as though they were relevant and properly raised.

Conclusion

[245] In my view, the interests of justice are better served by not confirming the declarations of constitutional invalidity of the improperly raised provisions on the basis that they were not relevant to the proceedings before the court below.

[246] However, the amici's submissions have brought to our attention serious problems in the implementation of the protective measures of the CPA. These are distinct concerns which can be addressed without an evaluation of the improperly raised provisions. In consideration of our role as the upper guardian of children and for the reasons advanced by Ngcobo J, I agree that it is proper to call for reports

[34] Id. There, this Court said:

> "Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the Rules of Court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks."

[35] At [44] - [49] and [55] above.

regarding the availability of intermediaries and the provision of facilities contemplated in section 170A(3) of the CPA.

[247] I concur in the order made by Ngcobo J for the reasons given in this judgment.

For the Applicant:	Advocate HM Meintjies SC.
For the First Respondent:	Advocate V Soni SC and Advocate A Platt instructed by the State Attorney.
For the Second and Third Respondents:	Advocate PPJ de Jager SC and Mr Pieter Van R Coetzee instructed by the Legal Aid Board.
For the First and Second Amici Curiae:	Advocate AM Skelton instructed by the Centre for Child Law.
For the Third, Fourth, Fifth and Seventh Amici Curiae:	Advocate K Pillay and Advocate E Nel instructed by the Legal Resources Centre.
For the Sixth Amicus Curiae:	Advocate K Pillay and Advocate M Ioannou instructed by the Women's Legal Centre.