



CONSTITUTIONAL COURT OF SOUTH AFRICA

Centre for Child Law and Others v Media 24 Limited and Others

CCT 261/18

Date of hearing: 7 May 2019
Date of judgment: 4 December 2019

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 4 December 2019 at 10h00 the Constitutional Court handed down judgment in an application concerning the scope of protection provided by section 154(3) of the Criminal Procedure Act, 51 of 1977 (CPA) for the anonymity of child victims, witnesses and accused (collectively referred to as child participants) in criminal proceedings. The application arose from a judgment of the Supreme Court of Appeal (SCA). Firstly, the SCA had declared section 154(3) to be constitutionally invalid to the extent that the provision does not protect the identity of child victims in criminal proceedings. That order of invalidity had to be confirmed by the Constitutional Court in terms of section 172(2) of the Constitution. The application for confirmation was opposed and in this regard, an application to cross-appeal had to be considered. Secondly, the SCA dismissed the appeal in respect of the relief relating to ongoing anonymity protection to child participants once they turn 18 years of age. This led to an application for leave to appeal against that part of the SCA order.

In 1997, the second applicant, KL, was taken from her biological parents whilst in the maternity ward at a hospital. She was raised by the woman who abducted her, who she understood to be her mother. In 2015 when KL was 17 years old she was found by her biological parents. Her abductor was criminally charged and prosecuted, and KL was a potential, but unconfirmed, witness in the trial. The trial was scheduled to begin after KL's 18th birthday. KL's story caused a media frenzy. Concerned by the media attention, KL approached the first applicant, the Centre for Child Law (CCL), for legal support. The CCL wrote to all major media houses and sought an undertaking that they would not reveal KL's identity. That undertaking was not provided. This prompted the

applicants to initiate urgent litigation, for an interim order prohibiting the publication of any information that would reveal KL's identity, against Media 24, Independent Newspapers and the Times Media Group (media respondents).

The High Court of South Africa, Gauteng Division, Pretoria (High Court) granted the interim relief. The applicants also sought a declaration that section 154(3), when properly interpreted, protects the anonymity of child victims of crime. Alternatively, they sought a declaration that section 154(3) was constitutionally invalid for failing to provide victim protection. The applicants also sought a declaration that section 154(3) provides ongoing protection for child participants, and alternatively that section 154(3) was constitutionally invalid for failing to do so. The High Court held that section 154(3) could be purposively interpreted to extend identity protection to child victims in criminal proceedings, but section 154(3) should not be interpreted to provide ongoing protection to child participants once they turn 18 years of age.

The applicants appealed to the SCA on the issue of ongoing protection. The media respondents cross-appealed on the issue of victim protection. The majority held that section 154(3) does not extend to child victims in criminal proceedings and is therefore constitutionally invalid. However, the majority dismissed the appeal in respect of ongoing protection. The minority agreed that section 154(3) is unconstitutional for failing to protect child victims but would have granted ongoing protection for child participants.

The applicants approached the Constitutional Court for confirmation of the SCA's declaration of constitutional invalidity of section 154(3). The applicants also applied for leave to appeal the SCA's finding that dismissed their claim that section 154(3) fails to provide ongoing protection. The media respondents opposed the applications. The media respondents asserted that the two extensions of section 154(3) are constitutionally impermissible, as they are in conflict with the rights to freedom of expression and the principle of open justice. Furthermore, statutory exceptions to the open justice principle sufficiently provide identity protection to children on a case-by-case basis; extending section 154(3) would breach the separation of powers principle, as doing so would contravene the will of the legislature to draw a line between child and adult offenders.

The first judgment penned by Mhlantla J and concurred in by Mogoeng CJ, Khampepe J, Ledwaba J, Madlanga J, Nicholls J and Theron J, held that the overarching purpose of section 154(3) of the CPA is child protection; protection from the potentially harmful effects of publication of their names and identities as a result of being implicated in criminal proceedings. Since this protection is only afforded to child accused and witnesses, there is a lacuna in the law as it pertains to protecting child victims in criminal proceedings. The first judgment held that the exclusion of child victims in section 154(3) limited the right to equality, as it constitutes an arbitrary differentiation that does not offer equal protection and benefit of the law. This lacuna also infringes the best interests of the child and their rights to privacy and dignity, which limitations were neither reasonable nor justifiable. It declared section 154(3) constitutionally invalid to the extent that it does not protect the identity of child victims in criminal proceedings. Accordingly,

the declaration of invalidity was confirmed. Parliament was given 24 months to cure the defect. In the interim, a reading-in to section 154(3) was made.

On the issue of ongoing protection, the first judgment held that the failure to provide ongoing protection renders section 154(3) unconstitutional and that the lack of ongoing protection infringes the intertwined rights of the best interests of the child, the right to privacy and dignity. It found that the fear and harm of identification to which child participants are exposed to while still being children directly impacts the best interests of the child, and that such harm runs contrary to the purpose of the impugned section and would render the initial protection futile. The first judgment also considered restorative justice, stigma and agency.

The first judgment, while endorsing the importance of freedom of expression and the principle of open justice, held that the default position of ongoing protection – not a blanket rule – would not severely encroach on media freedom. It held that the limitations arising from the failure to provide ongoing protection are not justified. It declared section 154(3) invalid and ordered an interim reading-in that entails that a person who is subject to the protection of the section does not forfeit the protections upon reaching the age of 18, but may consent to the publication of their identity after reaching adulthood or may approach a competent court.

The second judgment penned by Cameron J and Froneman J agreed with the first judgment on the issue of victim protection, but differed on the issue relating to ongoing protection. The second judgment considered the competing considerations to be closely matched, but held that the right to freedom of expression and the principle of open justice tip the scales in favour of a default regime in which anonymity protection ends when a child participant attains 18, unless a court expressly extends the protection. More particularly, Cameron J and Froneman J held that, in South Africa, default anonymity risks fuelling the stigma, shame and silence that society unjustly inflicts on those it rejects as other, whether on the basis of HIV status, sexual orientation, cross-border migrant status, race or any other basis. The second judgment thus warned that indefinite anonymisation could undermine our hard-won process protections, and unwittingly endorse stigma and shame rather than promote openness and knowledge.

A third judgment penned by Jafta J agreed with the first judgment that section 154(3) of the CPA is invalid to the extent that it differentiates child victims from child accused and witnesses in affording protection against publicity, thus being inconsistent with section 9(1) of the Constitution. The third judgment, however, disagreed with the conclusion that section 154(3) also violated the rights to privacy, dignity and the right guaranteed by section 28(2) of the Constitution. The third judgment held that the assessment of whether a statute is inconsistent with the Constitution is done with reference to its object and effect. And applying that standard in this matter, it could not be said that the purpose of section 154(3) was inconsistent with any provision of the Constitution. The third judgment further held that it was difficult to appreciate how the implementation of section 154(3) could be said to have had the effect of violating privacy, dignity or the best interests of a child. This was because the purpose of the section is to protect

children. Therefore its enforcement cannot harm the children whose rights and interests it was enacted to protect. The third judgment found that the way in which section 154(3) is framed coupled with its language make it impossible for the section to have an impact that is at variance with the protection of children who are active participants in criminal proceedings.

The third judgment further held that the conclusion that rights like dignity, privacy and the best interests of the child are infringed was also difficult to appreciate in the context of the ongoing protection. This was because the complaint was that section 154(3) omits to protect children when they turn 18 years of age hence the fear that the media were going to publish KL's identity when she turned 18. Otherwise before that she had been adequately protected by the section. Consequently, the omission suggests that there was a void in the section which should not have been there. The difficulty was that a void is not capable of limiting any of the rights concerned with here. They are not the sort of rights whose enjoyment depended on the existence of legislation that creates conditions which must exist before these rights may be exercised.

The third judgment further held that the complaint was not directed at the terms of the section. The real complaint was that the scope of the prohibition is narrow: the prohibition did not extend the existing protection to persons who have reached the age of 18 years or older. The third judgment found that when it comes to children's rights and interests, the Constitution limits their application to children under the age of 18 years. Similarly, section 154(3) limits the prohibition to children who are below 18 years. Consequently, there was nothing constitutionally objectionable in the scope of the prohibition concerned. The third judgment further held that this was not to suggest that there was no need for continued protection once a person turns 18. The evidence on record in this matter demonstrated the need to do so. However, facts could not justify an extension of the application of a statute beyond its limits. Nor could they constitute a ground for pulling down legislation passed by Parliament. The limitation of the right to dignity, privacy and the best interests of a child relied on in the first judgment was not grounded in the wording of section 154(3) or its effect. That being the case, it was not competent for the Court to declare the provision invalid in this regard.