

**Making a case for the continued protection of identity of young offenders who
turn 18 during criminal proceedings under South African Law, compared with the
law of England and Wales**

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Table of Contents

1.1 Chapter 1

1.2	Introduction.....	1
1.3	Terminology.....	2
1.4	Methodology.....	3
1.5	The relevance of this study.....	4

2. Chapter 2

South African Legislation

2.1	Child Justice Act 75 of 2008	6
2.2	Criminal Procedure Act 51 of 1977.....	9
2.3	Case Law.....	13
2.4	Conclusion.....	15

3. Chapter 3

3.1	The Constitution of South Africa.....	16
3.2	International Instruments.....	17
3.3	Conclusion.....	19

4. Chapter 4

A comparative consideration of the law of England and Wales

4.1	England and Wales legislation and case law.....	20
4.2	Conclusion.....	29

5. Chapter 5

	Prospect of success of an appeal in the case of Centre for Child Law and Others v Media 24 and others.....	31
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6. Chapter 6

Conclusion and Recommendations..... 38

7. Bibliography..... 40

CHAPTER 1

1.1 Introduction

In South Africa child offenders are dealt with under the Child Justice Act.¹ Prior to the implementation of the Child Justice Act² and the ratification of the United Nations Convention on the Rights of the Child (CRC), South Africa never had a “...*separate, self-contained and compartmentalised system for dealing with child offenders.*”³

The Child Justice Act⁴ came into operation in April 2010 and the main features of the Act focus on special mechanisms, processes and procedures when children are in conflict with the law.⁵ The Act was designed to protect children and the emphasis is on reform and re-integration.

However, on the issue of identification of child offenders by the media, the Child Justice Act cross references Section 154(3) of the Criminal Procedure Act which makes it an offence for any person to publish (in any manner) any information which reveals or may reveal the identity of an accused under the age of 18 years. The rule is not absolute – it is accompanied by a proviso that judicial officers may authorise the publication of as much information as he or she may deem fit if the publication thereof would in their opinion be just and equitable in the interest of any particular person.

This section has become controversial, because the media interprets it to mean that identity protection falls away once the offender reaches the age of 18 years. Children’s rights lawyers take a different view, insisting that the protection of the identity of child offenders would be meaningless if it does not continue into adulthood. In South Africa, this dispute has given rise to a recent test case *Centre for Child Law and others v Media*

¹ Act 75 of 2008.

² Act 75 of 2008.

³ Skelton A “*From Cook County to Pretoria: A Long Walk to Justice for Children*” 2011 6(2) *Northwestern Journal of Law and Social Policy* 413.

⁴ Act 75 of 2008.

⁵ Skelton A and Courtenay MR “*South Africa’s New Child Justice System*” in Winterdyk J (ed) *Juvenile Justice: International Perspectives, Models and Trends* CRC Press: Boca Raton (2014).

24 Limited and others.⁶ It is notable that the same issue has also been brought before the courts in England and Wales, creating an opportunity for mutual learning.

The purpose of this mini-dissertation is to make a case for the continued protection of the identity of young offenders who turn 18 during criminal proceedings under South African Law, compared with the law of England and Wales. The scope of this mini-dissertation has been limited to only include child offenders and not child witnesses and to further focus on the publication of the identity of these child offenders in the media, rather than on closed proceedings for the protection of privacy.

The central research question is whether a compelling case can be made for the continued protection of the identity of young offenders who turn 18 during criminal proceedings under South African Law. In order to support the central question, subsidiary research questions will include what the aim and scope is of the Child Justice Act, as set out in the pre-amble of the Act, does the breaching of the child's right to the protection of his identity when he or she turns 18 during trial, leave space for the interpretation that the protection is absolute? How do the Constitution of South Africa and relevant domestic and international instruments apply to children and young offenders in conflict with the law? Can the continued application of the child's right to privacy, dignity, the child's best interest, limitation of rights and the competing rights of the media, be justified after the age of 18 years, when the young person is no longer a child? Although there has been a recent judgment⁷ in the High Court which goes against the case being made here, there will be an appeal and therefore the researcher is of the opinion that a case can still be made.

1.2 Terminology

The following terminology will be used in this mini-dissertation:

⁶ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

⁷ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

The term “young person” as per the Children and Young Persons Act 1933 is someone who has attained the age of 14 but not 18.⁸

The term “child” as per the Child Justice Act 75 of 2008 means any person under the age of 18 years at the time of arrest, written notice or summons and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).⁹

The term “young offender” refers to a person who turned 18 years during the course of criminal proceedings.

The term “child offender” means a person who is younger than 18 years and who is accused or convicted of an offence.¹⁰

The term “identity” includes, but is not limited to, the child’s picture, name, address, school and any other particulars that can lead to the child’s identification.

1.3 Methodology

In addition to the usual sources in journal articles and books, reliance will be placed on news articles, blogs and social media as these sources are topical, relevant and their inclusion justifiable because of the nature of the subject matter as it relates to the media. The study is based on a comparative approach. The law of England and Wales is used as a comparator because the legislation on this issue is very similar in the two jurisdictions, and has been the subject of recent legal challenges in both. It is proposed that both jurisdictions may learn from each other’s emerging jurisprudence. However, it is important to note that South Africa is a constitutional democracy in which the courts have the power to strike down legislation that does not comply with the Constitution. This is not the case in England and Wales, and therefore the outcome of a case in that jurisdiction will not necessarily result in the same outcome in South Africa.

⁸ Section 107 of 1933 Act.

⁹ Child Justice Act 75 of 2008.

¹⁰ Section 43(3)(c) of Child Justice Act 75 of 2008.

1.4 The relevance of this study

There is a substantial amount of literature by South African authors on the Child Justice Act 75 of 2008,¹¹ guiding principles¹² and interpretations¹³ of the Act. However, very little has been written specifically about the protection of the identity of child offenders.¹⁴ Less still has been written about the specific problem of the protection of the identity of young persons who turn 18 during their trials.¹⁵ The international literature from the comparative jurisdiction of England and Wales show that the topic is similarly under-researched.

Child offenders' identities are protected for various reasons and confirmed in International Law. The protection is designed to allow minors to carry on with their lives while the court case is still pending.¹⁶ The problem is that recently the media has started revealing the identity of young offenders who turn 18 during their trials. In order to make the case for continued protection beyond 18, the study will analyse and compare the different interpretations of applicable sections of the Child Justice Act,¹⁷ the Criminal Procedure Act¹⁸ and the Children and Young Persons Act 1933 that deal with the protection of the identity of children and whether these protections should continue when they turn 18 during their trials.

The need for the study has arisen because in both jurisdictions, journalists have interpreted the law to mean that they can identify child offenders or child witnesses who turn 18 during the course of a trial. This has caused children's rights advocates to take cases to the courts, in an attempt to ensure an interpretation of the law that will provide for the ongoing protection of identity beyond the age of 18 years.

¹¹ Gallinetti J "*Child Justice Alliance: Getting to know the Child Justice Act*" 2009; Badenhorst C "*Second year of the Child Justice Act's Implementation: Dwindling numbers*" 2012.

¹² Badenhorst C "*Overview of the implementation of the Child Justice Act*" 2008.

¹³ Skelton A "*From Cook County to Pretoria: A Long Walk to Justice for Children*"; Milo D "*Musings on Media*" Webber Wentzel blog 2014; Skelton A and Courtenay MR "*South Africa's New Child Justice System*" 2014.

¹⁴ Badenhorst C "*Overview of the implementation of the Child Justice Act*" 2008.

¹⁵ *Independent Newspapers Ltd v The National Prosecuting Authority & MOD* 2011 A281 (CJC).

¹⁶ Hamman A & Nortje W "*Die bekendmaking van die identiteit van anonieme minderjariges by meerderjarigheid: regverdigbaar of nie?*" LitNet Akademies (Regte) 2016-08-12 p. 2.

¹⁷ Act 75 of 2008.

¹⁸ Act 51 of 1977.

The cases have not been remarkably successful thus far; in fact, this dissertation is being completed at a time when a case brought by the Centre for Child Law, which aimed to extend the protection of identity beyond 18 as one of its objectives, has failed in that regard. There will be an appeal of this judgement, so there is an important opportunity to make the case for the protection beyond 18 approach.

In the article “*Die bekendmaking van die identiteit van anonieme minderjariges by meerderjarigheid: regverdigbaar of nie?*”,¹⁹ the writers Hamman and Nortje analysed the differences between two cases, one about a victim²⁰ and the other about a convicted offender.²¹ The writers are of the opinion, irrespective of the minor being a victim, witness or offender, that all attempts should be made to protect a youth’s identity in cases where future emotional damage may occur for such a youth. This confirms that one of the reasons for protecting a young offender’s identity is linked to emotional harm. The rationale for the study is linked to the idea that child offenders should be given a chance to put their crimes behind them and grow up to be law abiding adults. Revealing their identities because they turn 18 during the trial takes away the opportunity, even though the reasons for the delay in the trial may be beyond their control. The emotional harm referred to by Hamman and Nortje will make it less likely that such offenders will be fully rehabilitated.

The following chapters (Two and Three) will focus on applicable legislation from South Africa. Subsidiary questions with regards to how the Constitution of South Africa and relevant International Instruments apply to children and young offenders in conflict with the law, will also be addressed. Chapter Four will focus on England and Wales court’s interpretation of a youth offender’s identity when he or she turns 18 during his trial. The last two chapters will conclude the case study by discussing the prospect of success of an appeal in the case of *Centre for Child Law and others v Media 24 and others* and possible recommendations.

¹⁹ Hamman A & Nortje W “*Die bekendmaking van die identiteit van anonieme minderjariges by meerderjarigheid: regverdigbaar of nie?*” LitNet Akademies (Regte) 2016-08-12 p.1; 3.

²⁰ *Centre for Child Law and 4 Others v Media 24 Limited and 13 Others* 2015 23871 HC.

²¹ *The State v DD* 2012 NCHC 46.

CHAPTER 2

THE SOUTH AFRICAN LEGISLATION

2.1 Child Justice Act 75 of 2008

The analysis of the Child Justice Act focuses on sections 4, 63(5), 63(6), 76(1) and 76(2) read with section 154(3) of the Criminal Procedure Act²² that directly impact on children's right not to be identified when they turn 18 during their trials.

The objects of the Child Justice Act, are very clear and specifically state that the rights of children as per the Constitution of the Republic of South Africa and the spirit of *Ubuntu* should be protected. *Ubuntu* is best described by Archbishop Desmond Tutu in his book about the Truth and Reconciliation Commission (TRC)²³ where he states that *Ubuntu* "speaks of the very essence of being human." According to Tutu, to give someone very high praise one would say that he/she has *Ubuntu*, this means "they are generous, hospitable, friendly, caring and compassionate." He also explains how *Ubuntu* is directly linked to forgiveness.²⁴ In the case of *S v Makwanyane*²⁵, Langa J stated inter alia that: "[Ubuntu] ...suggests a change in mental attitude from vengeance to an appreciation of the need of understanding; from retaliation to reparation and from victimisation to *Ubuntu*."²⁶

The preamble of the Child Justice Act describes in part what the purpose is: "...to establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic;...".

Section 2 of the Child Justice Act deals with the objects of the Act. The objectives are mainly to protect the rights of children as per the Constitution of the Republic of South

²² Act 51 of 1977.

²³ Tutu D "No Future without Forgiveness." London: Rider 1999.

²⁴ Skelton A "Restorative Justice as a Framework for Juvenile Justice Reform" A South African Perspective Brit.J. Criminol 2002 42, p 499.

²⁵ *S v Makwanyane* 1995 (3) SA 391 (CC).

²⁶ Freddy KS "South Africa: Judging Ubuntu and Africanisation of the Child Justice Act" 2013 <<http://www.allafrica.com>> (accessed 10 February 2015).

Africa and to foster children's sense of dignity and worth. Further objectives are to promote a restorative justice response supporting reconciliation, encourage the reintegration of children into their families and communities, provide for the special treatment of children in our child justice system in order to break the cycle of crime and to encourage the children to become law-abiding and productive adults. The Act aims to prevent exposing children to the adverse effects of a formal criminal justice system by using processes, procedures and services that are child-centric and in line with our Constitution.

The South African courts have echoed these ideas in their judgements. In *J v National Director of Public Prosecutions*, the Constitutional Court indicated that stigmatisation of children as "criminals" is to be avoided.²⁷ This case dealt with child sex offenders not having their names automatically added to the National Register of Sex Offenders, but it is submitted that this approach is equally applicable to the issue under discussion in this mini-dissertation. These children should be given a chance to overcome the errors that they made and therefore the protection of the identity of the child when he turns 18 during his trial, should continue.

Section 4 of the Child Justice Act sets out the application of the Act and makes provision for persons who were under the age of 18 years when handed a written notice in terms of sections 18 (written notice to appear at preliminary inquiry) or section 22²⁸ (release of child on written notice into care of parent, appropriate adult or guardian before first appearance at preliminary inquiry), served with a summons in terms of section 19²⁹ or was arrested in terms of section 20.³⁰ This section is very relevant to the issues being examined in this mini-dissertation, because it provides a clue as to which children and young people are to be accorded all the protections of the Child Justice Act.

The protection afforded to child offenders should also be awarded to young offenders who are now over 18 but were younger than 18 when the offence was committed.

²⁷ *J v National Director of Public Prosecutions* CCT 114/13 par 44.

²⁸ Child Justice Act 75 of 2008.

²⁹ Child Justice Act 75 of 2008.

³⁰ Child Justice Act 75 of 2008.

Technically, the relevant date is the date on which the offender is arrested, or served with a notice or a summons – but in all those cases he or she would clearly have been under 18 at the time of the commission of the offence.³¹ Section 63 of the Child Justice Act deals with child justice courts and the conduct of trials involving children,³² section 63(5) deals specifically with who and who may not be present at a sitting of a child justice court. Should a person's presence not be necessary in connection with the proceedings of a child justice court, or if the presiding officer did not grant a person permission to attend, no person shall be allowed to be present at any sitting of a child justice court. Although closed proceedings is obviously also aimed at the protection of identity and should also continue beyond the young offender's 18th birthday, it is not the focus of this mini-dissertation, which deals only with the publication of the offender's identity.

Section 63(6) makes reference to section 154(3)³³ of the Criminal Procedure Act, which deals with the publication of identity and states that this section applies to the changes pertaining to the publication of information of a child offender. In essence, this means that when applying section 154(3)³⁴ it should be done through the lens of the Child Justice Act. The concern with the current interpretation of section 154(3) is that the section only provides for anonymity until the accused reaches the age of eighteen. The Child Justice Act prescribes the procedure of criminal proceedings involving an accused under the age of eighteen and should section 154(3) be interpreted with the Child Justice Act in mind, the protection afforded to offenders under the age of eighteen should be extended after they turn 18. This mini-dissertation operates from the premise that a cogent argument can be made that the application should continue after the child turns 18.

³¹ *Mpofu v Minister for Justice and Constitutional Developments* 2013 (2) SACR 407 (CC).

³² Child means a person below the age of 18 but 10 years or older who has criminal capacity.

³³ *"No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person"*.

³⁴ Criminal Procedure Act 51 of 1977.

Media houses will beg to differ with this statement and interpret section 154(3) of the Criminal Procedure Act as an “escape clause” that allows them to publish youth’s names after they turn 18.³⁵

The central question is whether some of these rules should continue to apply and protect the identity of young offenders who turn 18 during their trials. The law is ambiguous but one can motivate for an interpretation of the law that provides a continuation of the protection.

There are competing rights at play. The child’s rights in terms of privacy, dignity and a fair trial versus the media’s right to freedom of expression and the undermining of the principle of open justice. The media’s right to freedom of expression exists and they should be able to report newsworthy events, but not to the detriment of the minor.³⁶ Some writers are of the view that the protection of the privacy of a young offender lapses when he turns 18.

2.2 Criminal Procedure Act 51 of 1977

Section 154(3) lies at the heart of the dispute that is the subject of this mini-dissertation. The problem with the law is that it is open to different interpretations. Different aspects of this section give rise to problems in that it only provides for the protection of the accused’s identity until the child is 18. One can argue that a purposeful interpretation of section 154(3) is to ensure the protection, privacy and dignity of the child and that the section was enacted to warrant the best interest of the child, where an argument for a strict interpretation reflect that the language used in the section is clear and only offers protection up to the age of 18.³⁷

Problems with the current interpretation are that the media is of the opinion that the strict interpretation of section 154(3) should be followed and as such only allows for the protection of the identity of an accused who is under the age of 18 and that the protection

³⁵ <<http://www.news24.com/SouthAfrica/News/Media-now-free-to-name-Griekwastad-killer-20140815>> (accessed 4 February 2015).

³⁶ Hamman A & Nortje W “ *Die bekendmaking van die identiteit van anonieme minderjariges by meerderjarigheid: regverdigbaar of nie?*” LitNet Akademies (Regte) 2016.

³⁷ *Centre for Child Law and 4 Others v Media 24 Limited and 13 Others* 2015 23871 HC.

lapses once the accused reaches the age of 18. The media uses this strict interpretation to justify why they can publish a young accused or offender's identity once they turn 18. The Media's strict interpretation does not take into account the psychological harm, like trauma, regression, stigmatisation, shame and the fear of the young offender to be identified by the publication of their identities.³⁸ Other writers are of the opinion that section 154(3) should be interpreted purposefully and it then clearly shows that the purpose of the section is to uphold the best interest of the child in criminal proceedings and that the protection of the identity of the accused younger than 18 should apply after they turn 18 during criminal proceedings.

The rule in South African law prevents the identification of young offenders under the age of 18.³⁹ This prohibition does not prevent the media from reporting on the trial.⁴⁰ In the supplementary founding affidavit to the *Centre for Child Law and others versus Media 24 Ltd and others*,⁴¹ Prof Skelton discusses two cases where the media reported extensively on the trials of the young offenders, without divulging their identity. The media also have the right to apply to the court to allow them to identify the young offender, hence the prohibition is not absolute.

The media's current interpretation of section 154(3) of the Criminal Procedure Act is not done through the lens of the Child Justice Act.⁴² In recent years, the media has started regularly revealing the identity of child offenders who turn 18 during their trials.

The most publicised case involving a minor, who turned 18 during his trial, is probably the murder case of the young offender, Don Steenkamp.⁴³ He was convicted on charges of murder, rape and obstructing the ends of justice; all crimes committed while he was a minor.

³⁸ *Centre for Child Law and 4 Others v Media 24 Limited and 13 Others* 2015 23871 HC.

³⁹ Section 154(3) of the Criminal Procedure Act.

⁴⁰ AM Skelton, Supplementary Founding Affidavit, *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC par 15 and 16.

⁴¹ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC par 62.

⁴² Act 75 of 2008.

⁴³ *The State v DD* 2012 NCHC 46.

The case was labelled the “Griekwastad murder case” in the media. Throughout the trial, the media did not publish his identity due to the fact that he was not 18, but prior to the completion of his trial, he turned 18. On 15 August 2014, News 24⁴⁴ published an article with the heading “Media now free to name Griekwastad killer”. The *Star*, *Beeld* and *Volksblad* newspapers all identified the offender by publishing his name and picture on his eighteenth birthday.⁴⁵ The article specifically stated that *The Star* newspaper was of the opinion that the court order preventing them from publishing the minor’s identity was lifted when he turned 18.⁴⁶

Media Expert, Dario Milo⁴⁷ expressed the opinion that the media’s interpretation of the Child Justice Act⁴⁸ and the Criminal Procedure Act⁴⁹ justifies the identification of the young offender. *The automatic lapsing of the protection...makes sense because the right to freedom of expression and the principle of open justice require that statutory restrictions on court reporting are interpreted as narrowly as possible. Those newspapers who decided today [Friday 15 August 2014] to name the Griekwastad convicted murderer will therefore, in our view, have a solid basis to argue that this decision was justifiable*.⁵⁰

If this interpretation is correct does it also mean that all the protections offered by the Child Justice Act lapse once the offender turns 18? One case that may assist in answering this question is *The State v S J Melapi*.⁵¹ In the Melapi case, the boy was younger than 18 at the time of the commission of the offence but he was 18 at the time of the conviction and sentencing. In this case, Tolmay J cited a Constitutional Court judgement⁵² where it was held that children’s rights are of the utmost importance in our society and that courts are to distinguish between children and adult offenders and that

⁴⁴ <<http://www.news24.com/SouthAfrica/News/Media-now-free-to-name-Griekwastad-killer-20140815>> (accessed 4 February 2015).

⁴⁵ *Idem*.

⁴⁶ <<http://www.news24.com/SouthAfrica/News/Media-now-free-to-name-Griekwastad-killer-20140815>> (accessed 4 February 2015).

⁴⁷ <<http://www.blogs.webberwentzel.com>> (accessed 8 November 2014).

⁴⁸ Act 75 of 2008.

⁴⁹ Act 51 of 1977.

⁵⁰ <<http://www.news24.com/SouthAfrica/News/Media-now-free-to-name-Griekwastad-killer-20140815>> (accessed 4 February 2015).

⁵¹ *S v Melapi* 2012 HC SH74 (G).

⁵² *Mpofu v Minister for Justice and Constitutional Developments* 2013 (2) SACR 407 (CC).

the sentencing court must apply section 28 of the Constitution.⁵³ Regardless of the child offender in the Melapi case being 18 at the time of the judgement, Tolmay J sentenced him to a Child and Youth Care Centre because she felt that the relevant age that should determine the sentence should be the offender's age at the time of the offence. This reinforces the argument that other protections, such as the protection of the identity of a young offender who reaches the age of 18 during criminal proceedings, should also be linked to the age of the commission of the offence and not the age when criminal proceedings are concluded.

In a further article by News 24⁵⁴ in March 2015, the newspaper reported on talks between the National Prosecuting Authority and Don Steenkamp's lawyers about his right to an automatic appeal. The newspaper makes reference to the fact that because Don Steenkamp was a minor at the time of the judgement and sentencing he should have had the right to an automatic appeal without having to make an application, as provided for in the Child Justice Act.⁵⁵ Even though the media is only reporting on the arguments discussed by Don Steenkamp's attorney and the NPA, it seems as if the news article is going along with the logic that protections under the Child Justice Act should continue after an offender turns 18 years, but this approach is inconsistent with the media's approach to the publication of identity.

However, when it comes to revealing the identity of a child offender who turns 18 years of age during proceedings it seems as though the media prefers to interpret section 154(3) of the Criminal Procedure Act in whatever way it benefits the media and does not take into account the spirit of section 154(3) of the Criminal Procedure Act read with the Child Justice Act.

⁵³ Referring to the best interest of the child.

⁵⁴ <<http://www.news24.com/SouthAfrica/News/Steemkamps-appeal-to-be-moved-20150302>> (accessed 15 March 2016).

⁵⁵ Act 75 of 2008.

2.3 Case law

A review of case law leaves space for the interpretation that the protection of the identity of a child who turns 18 during his trial, should and can continue and precedent must be sought in the case law.

In the case of *S v N*⁵⁶ the court had to deal with the principles of sentencing of a child offender. In this case the accused was only 9 months shy of his 18th birthday in 2004 when he committed the offence, the appeal was only heard in 2008 in which time the accused had turned 18. Despite this fact, Cameron J confirmed that when the offence was committed the accused was Constitutionally still a child and he should be treated differently to adult offenders. Similarly Maya J confirmed that a reason to treat children differently to adults is that their character still needs to be formed, they can act on impulse or show immature judgement and should be allowed to change their criminal ways. This case illustrates that even though the offender has turned 18 during the criminal proceedings he was a child when he committed the offence and the principles of sentencing of children should be extended.

In the case of *Centre for Child Law v Minister of Justice and Constitutional Development and Others*⁵⁷ the court explained why it is important to distinguish between the treatment of adult and child offenders. The court stated in paragraphs 26-9 “*Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults*”. This reiterates the point that the protection of privacy of a young offender who turns 18 during his trial, should be extended in order to support the principle of rehabilitation.

In the *Johncom Media Investments Ltd v M and others*⁵⁸ case, the Constitutional Court confirmed that the identities of children and vulnerable parties should not be disclosed and only upon authorisation granted by the respective courts in exceptional cases. In the

⁵⁶ *S v N* 2008 (2) SACR 135 (SCA).

⁵⁷ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC).

⁵⁸ *Johncom Media Investments Ltd v M and Others* 2009 (4) SA 7 (CC).

*Centre for Child law case*⁵⁹ the court agreed with this but stated that it was only applicable to cases where the Constitutional court found it to be just and equitable to do so.

In the case *Mpofu v Minister for Justice and Constitutional Developments*⁶⁰ the applicant applied for leave to appeal against his lifelong prison sentence based on the fact that he was a minor when the crimes were committed and that this was not taken into account when he was sentenced. The court stated: “In the sentencing of a child, every court must take into account the contents of section 28. This includes treating as paramount the best interests of the child and imprisoning a child only as a matter of last resort and for the shortest appropriate amount of time.” The judgement in the *Mpofu*⁶¹ case confirmed the principles of sentencing and that the relevant time to determine what sentencing approach should be followed, is the age of the child at the time of the commission of the offences, and not the age of the child on the date of sentencing.

The Child Justice Act recognises the best interest of the child principle⁶² in matters relating to youth criminal justice.⁶³ The child’s best interest is an important consideration in the interpretation of any statutory provisions that will affect a child offender.⁶⁴

In the case of *J v National Director of Public Prosecutions and Others*⁶⁵ the court found certain sections of the Criminal Law Amendment Act 32 of 2007 inconsistent with the Constitution, in so far that it limits the rights of child sex offenders to have their best interests considered. The court held that the “best-interest” principle as per section 28(2) of the Constitution⁶⁶ creates a right that is independent from other children’s rights in the Constitution and victimisation of child offenders should be avoided. The *J* case is very important because the protections (against automatic inclusions in the National Register

⁵⁹ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC par 65.

⁶⁰ *Mpofu v Minister for Justice and Constitutional Developments* 2013 (2) SACR 407 (CC).

⁶¹ *Mpofu v Minister for Justice and Constitutional Development* 2013 (2) SACR 407 (CC).

⁶² Section 28(2) Constitution of the Republic of South Africa 1996.

⁶³ Terblanche SS “*The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders*”. 2012 15(5) P.E.R p 445.

⁶⁴ Terblanche SS “*The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders*”. 2012 15(5) P.E.R p 445.

⁶⁵ *J v National Director of Public Prosecutions and Others* 2014 (2) SACR 1 (CC).

⁶⁶ Constitution of the Republic of South Africa 1996.

of Sex Offenders) continue beyond the age of 18, which is similar to the continued protection for which this mini-dissertation makes a case.

2.4 Conclusion

As this chapter has shown, the South African law about the protection of identity of children in criminal proceedings is ambiguous in relation to child offenders who turn 18 during a trial. This mini-dissertation will later explore a South African High Court Judgement⁶⁷ that found that the protection of the identity of the young offenders should not continue after they turn 18 during criminal proceedings. However, an appeal by the Centre for Child law still leaves scope for a case to be made for the extension of the protection beyond the age of 18. The next chapter will explore whether there are Constitutional, international or regional law arguments that can motivate the extension.

⁶⁷ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

CHAPTER 3

3.1 The Constitution of South Africa

The Constitution of South Africa is seen as the supreme law of the Republic of South Africa and affords everyone, including children, specific rights. The Bill of Rights⁶⁸ section 7(1) states: “*This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom*”. Specific sections are particularly relevant to the subject of this mini-dissertation.

These mentioned sections include section 10, which affirms that every person has the right to have their dignity respected and protected. Section 14 is clear that everyone has the right to privacy. Competing rights are at play in cases where young offenders turn 18 during their trials. The rights mentioned above must be weighed against the media’s right to freedom of expression. Section 36(1) deals with the limitation of rights and it is clear that rights may only be limited if the reason for the limitation is reasonable and justifiable.

One of the most important protections for children is dealt with in section 28(2) which provides that a child’s best interest is of paramount importance in every matter concerning the child. The principle of the “best interest of the child” is indirectly related to the question at hand. When a child turns 18 during his trial he or she is no longer seen as a child and the question arises if the “best interest” principle can still be invoked? The researcher believes that the principle should still apply based on similar arguments mentioned in cases such as *Mpofu*⁶⁹ and *J v NDPP*.⁷⁰ In the *Mpofu* case, the Constitutional Court indirectly engaged with the principle that the age at the time of the conviction, and not the age at the time of sentence, was the relevant age. The Court made it clear that if the offender had convinced them that he was under 18 when the crime was committed, he would have been treated as a child offender for purposes of sentencing. Although *Mpofu*’s trial pre-dated the Child Justice Act, it can be argued that this approach is compatible with

⁶⁸ Constitution of the Republic of South Africa 1996.

⁶⁹ *Mpofu v Minister for Justice and Constitutional Developments* 2013 (2) SACR 407 (CC).

⁷⁰ *J v National Director of Public Prosecutions and Another* 2014 (7) BCLR 764 (CC).

the idea that the benefits of childhood can continue after the age of 18. In *J v NDPP*, which was handed down after the Child Justice Act came into operation, the Constitutional Court viewed the stigmatizing effects of automatic registration on the National Register for Sex Offenders to be contrary to the aims of the Child Justice Act. The Court was concerned that crimes committed by a person while still a child should not follow him or her into adulthood. These two cases can therefore be built upon to argue that a child's best interests can, to some extent, continue to have an effect after the child turns 18.

3.2 International Instruments

International documents also make provision for the protection of children younger than 18 and are very adamant that court and other hearings of a child in conflict with the law, should be conducted behind closed doors and exceptions should be limited. The Interpretation of the CRC⁷¹, General comment 10 of the CRC⁷² and the ACRWC⁷³ can be used to motivate that these protections should stay in effect when the child turns 18 during criminal proceedings.

Article 16 of the CRC gives children the right to privacy and that the law should protect them from attacks against their way of life, their good name, their families and their homes. Article 40 of the CRC deals with juvenile justice and confirms that children who are accused of breaking the law have the right to legal help and fair treatment in a justice system that respects their rights. In 2007 the CRC issued a general comment⁷⁴ in relation to articles 16 and 40(2)(b)(vii) of the CRC referring to the following: The right of the child to have his/her privacy fully respected during all stages of the proceedings. In the context it is meant to avoid harm caused by undue publicity or by the process of labelling. No information shall be published that can identify a child offender, that can impact the child's ability to have access to education, work, housing or to be safe. Normally children only start working and owning property once they have reached the age of majority, hence the researcher is of the view that the intention is to extend the abovementioned protections

⁷¹ Convention of the Rights of the Child.

⁷² Convention of the Rights of the Child.

⁷³ African Charter on the Rights and Welfare of the Child.

⁷⁴ General Comment 10 "Children's Rights in Juvenile Justice" Un Doc. Crc/C/Gc/10 (2007) par 64.

beyond 18 years. A public authority should be reluctant with press releases and limit these to very exceptional cases. Measures must be taken to guarantee that the child is not identifiable in these press releases.

General Comment 10⁷⁵ also recommends that the automatic removal of the child offender's name from public records should take place upon the child offender's 18th birthday. In the researcher's opinion the recommendation supports the fact that a young offender who turns 18 during his trial should be afforded ongoing protection of his/her identity. Furthermore, one can argue that when a child turns 18 during his trial, one can argue that "*all stages of the proceedings*" have not been completed; for example, sentencing or appeal procedures might still be in process. The continuation of the protection of the identity should then also remain in place.

The ACRWC is a regional document compared to the global CRC document and focusses on provisions specific to situations in Africa.⁷⁶ Supporting article 16 of the CRC, is article 10 of the African Charter on the Rights and Welfare of the Child (ACRWC) that deals with the protection of privacy. The two articles both address the child's right to privacy but the CRC provision is stronger as the ACRWC's text limits the child's right: "...*to the extent of the right of parents and legal guardians to exercise reasonable supervision over the conduct of children.*"⁷⁷ Article 17 of the ACRWC deals with the administration of Juvenile Justice. The article states that every child accused shall have the right to special treatment. This include the child's sense of dignity and worth. Article 17 also confirms that the aim of the juvenile justice system is to ensure that the treatment of every child, not only during the trial but also if found guilty, will be the child's reformation, reintegration into their families and social rehabilitation.

⁷⁵ General Comment 10 "Children's Rights in Juvenile Justice" UN Doc. Crc/C/Gc/10 (2007).

⁷⁶ Ekundayo O "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC" 2015 7(1) International Journal of Humanities and Social Science Vol 5.

⁷⁷ Brems E "Human Rights: Universality and Diversity" 2001 p 139.

3.3 Conclusion

This chapter has considered whether the South African Constitution and International and Regional Law provide support for the case being made. The South African Constitution contains a powerful best interests protection but at first glance this seems to be inapplicable in the case of those who have turned 18. However, the Constitutional Court judgments in *S v Mporfu* and *J v NDPP* are useful in suggesting that the protections can continue. With regards to the international and regional instruments, the relevant articles do not expressly say that the protections must continue beyond 18 but the instruments are relevant to make a case for the continued protection of the identity of a young offender who turns 18 during his/her trial, if one considers the protections holistically. In particular General Comment no 10 makes it clear that protection of identity should continue through all stages of the case. An interpretation of the wording of the relevant articles in the CRC, General Comment 10 of the CRC and the ACRWC support the case that the protection of a child's identity should not cease upon them reaching the age of 18.

CHAPTER 4

A comparative consideration of the law of England and Wales

4.1 England and Wales Legislation

The law of England and Wales is not codified. The Law is set out in statutes and common law and these are interpreted through case law which sets binding precedents. The United Kingdom does not have a written or formulated constitution, they only have what is referred to as an “uncodified constitution”.⁷⁸ The Courts operate according to the principle of open justice but where children are concerned the exception applies and closed court is the default position. The law of England and Wales has applicable legislation protecting a child’s identity up to the age of 18 years and the court have, in specific instances, allowed for the continued protection of these children after they reached the age of 18 years.

A comparison between South-Africa and England and Wales is relevant considering that in both jurisdictions, the continued protection of young offenders’ identities who turn 18 during their trials have been brought before the courts and in both jurisdictions the courts did not uphold the protection of the identities of young offenders beyond 18 years.

Children and Young Persons Act 1933 and Youth Justice and Criminal Evidence Act 1999

Section 39 of the Children and Young Persons Act 1933 provides for the prohibition of the publication of a child or young person’s⁷⁹ identity, including victims, witnesses and defendants, under the age of 18 years. The section specifically states that no picture shall be taken and no newspaper report shall reveal the name, address or school or any particulars that might lead to the identification of a child or a young person concerned with the proceedings, except where the court has granted permission to do so.

⁷⁸ Brick A and Blackburn R, Centre for Political and Constitutional Studies, King’s College London, 2012.

⁷⁹ Section 107 of the Children and Young Persons Act 1933 states that a young person is someone who has attained the age of 14 but not 18.

Contravention of section 39 will lead to a criminal offence.⁸⁰ Section 39 does not specifically state when an order made under this section will expire.⁸¹ This section found application in criminal cases, civil and family cases, but as from 13 April 2015 section 39 orders only apply to civil and family cases.⁸² The amendment was made to distinguish between the anonymity protection for defendants compared to victims and witnesses. Reporting restrictions applicable to children and young persons under the age of 18, involved in criminal proceedings (other than the youth court), are dealt with by section 45 of the Youth Justice and Criminal Evidence Act 1999.⁸³ Section 45A of the Act⁸⁴ makes provision for the restriction on reporting of criminal proceedings for the lifetime of witnesses and victims under the age of 18. Section 39 still applies to Anti-Social Behavior Orders, Criminal Behavior Orders and Civil Injunctions.

A comparison between South-Africa and England and Wales is relevant because the judgement of the appeals case *The Queen on the Application of JC, RT v The Central Criminal Court, The Crown Prosecution services*⁸⁵ did not uphold the protection of identity beyond 18 years, and was weak in respect of young offenders as opposed to young victims or witnesses. In the JC and RT case,⁸⁶ the court also dealt with the question with regards to competing rights at play in terms of Article 8⁸⁷ that deals with the right to respect private and family life versus the Article 10⁸⁸ right that deals with freedom of expression relating to the media's competing right.

⁸⁰ Leggett Z “*The Effect of s. 39 of the Children and Young Persons Act 1933 when a Person Attains the Age of 18*”. 2014 78 JCL 368.

⁸¹ Leggett Z “*The Effect of s. 39 of the Children and Young Persons Act 1933 when a Person Attains the Age of 18*”. 2014 78 JCL 369.

⁸² As amended by sections 78-80 *Criminal Justice Courts Act 2015*.

⁸³ Youth Justice Legal Centre “*Changes to anonymity for children in criminal cases*” 9 April 2015 <<http://www.yjlc.uk/changes-to-anonymity-for-children-in-criminal-cases>> (accessed 4 July 2017).

⁸⁴ Youth Justice and Criminal Evidence Act 1999.

⁸⁵ *The Queen on the application of JC, RT v The Central Criminal Court, The Crown Prosecution Service* [2014] EWCA Civ 1777, 2014 WL 5834009.

⁸⁶ *The Queen on the Application of JC, RT v The Central Criminal Court, The Crown Prosecution Service* [2014] EWCA Civ 1777.

⁸⁷ European Convention on Human Rights.

⁸⁸ European Convention on Human Rights.

This chapter will focus on the law of England and Wales and several cases where the Courts dealt with section 39 of the Children and Young Person's Act.

In the case of *JC and RT v The Central Criminal Court*⁸⁹ the court of England and Wales had to deal with the question whether the protection of the identity of a defendant younger than 18 should last forever or if it expires upon the child turning 18. The automatic lapsing of a section 39⁹⁰ order once any young offender reaches the age of 18 was addressed in this case. The facts of the case are as follows: three minor defendants were 17 years old when they appeared before the Recorder of London at the Central Criminal court. They were charged with an offence of joint possession of an explosive substance. One of the defendants faced a further charge under the Terrorism Act 2000. All three of the defendants was awarded protection under section 39 of the Children and Young Persons Act 1933, protecting their identity. Two defendants pleaded guilty and were subsequently sentenced while the third defendant's trial proceeded. A retrial was ordered in the third defendant's case. At the time of the retrial, all three of the defendants were now over 18 years of age. The two defendants, JC and RT, who were previously sentenced as minors, sought review of the decision that the order, in lieu of the protection of their identities, expired on their 18th birthdays.

The charity, Just for Kids Law, supported JC & RT and the BBC, supported by other media organisations, opposed the application. The relief sought was that the granting of the Recorder's order in November 2013 for the anonymity of JC and RT, while they were minors, should be, in effect, indefinite and the ruling that in law section 39⁹¹ would expire on the offender's 18th birthdays should be quashed. The court analysed section 39 of the Children and Young Persons Act 1933 and considered whether the provision was still relevant in terms of the United Kingdom's human rights obligations. The court acknowledged that there were strong arguments for a provision that could give a court discretion to extend the protection of the identity of a child or young offender once they turn 18, but in the end found that section 39,⁹² as it stands, does not allow for the

⁸⁹ *JC and RT v The Central Criminal Court* [2014] EWHC 1041 (QB).

⁹⁰ Section 39 of the Children and Young Persons's Act.

⁹¹ Children and Young Persons Act 1933.

⁹² Children and Young Persons Act 1933.

discretion to extend, and specifically mentioned that only Parliament can change the section and not the court. The court held, dismissing the application that an order under section 39 of the Children and Young Persons Act 1933, could not be extended into adulthood and should not apply once the defendant reached the age of 18. The defendants in the criminal proceedings then appealed the decision and the appeal was heard in November 2014.

In the appeals case *The Queen on the Application of JC, RT v The Central Court, The Crown Prosecution services*⁹³ Lord Justice Laws discussed the provisions of section 39 and stated that no newspaper shall publish a picture, reveal the name, address, school or include any particulars that can lead to the identification of any child or young person that is part of the criminal proceedings, unless permitted by the direction of the court. Lord Justice Laws referred to the relevant statutory provisions that played a part in the parties' submissions. Section 49(1) of the 1933 Act⁹⁴ applies to proceedings in the Youth Court and provides that no report and/or photo shall be published that will or can reveal the name, address or school of any child that is part of the proceedings. Section 46 of the Youth Justice and Criminal Evidence Act 1999 allows for an application to be made for reporting restrictions of a witness who is older than 18 years and in need of protection and Lord Justice Laws stated that this direction lasts for life but does not assist anyone under the age of 18.

Section 45 of the 1999 Act⁹⁵ provides that: "*The court may direct that no matter relating to any person concerned in the proceedings shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings.*" Even though the 1999 Act⁹⁶ is 15 years old, section 45 has never been brought into force. It was intended that section 45 will replace section 9 of the 1933 Act.⁹⁷ Lord Justice Laws call the state of affairs bizarre, because of the fact that section 45 has not been brought into force and because of the contrast

⁹³ *The Queen on the application of JC, RT v The Central Criminal Court, The Crown Prosecution Service* [2014] EWCA Civ 1777, 2014 WL 5834009.

⁹⁴ Children and Young Persons Act.

⁹⁵ Youth Justice and Criminal Evidence Act 1999.

⁹⁶ Youth Justice and Criminal Evidence Act 1999.

⁹⁷ Children and Young Persons Act.

between sections 46 (protection to adult witnesses) and 45 (protection to child defendants only while they are children or young persons). Subsequent to this case section 45 was brought into force with a 45A amendment. The court also dealt with the question with regards to competing rights at play in terms of Article 8,⁹⁸ that deals with the right to respect private and family life and states that no interference by a public authority will be allowed unless it is in the interests of national security, public safety, prevention of a crime, protection of health and morals or for the protection of the rights and freedoms of others versus the Article 10⁹⁹ right, that deals with freedom of expression relating to the media's competing right. The court then discussed the following cases where the courts have passed judgments upon the temporal reach of section 39¹⁰⁰ and Article 8 and 10 of the European Convention of Human Rights.

In the 2001 case of *R v Central Criminal Court ex p W, B and C*¹⁰¹ three defendants were found guilty of murder while still under the age of 18. Lady Justice Rose raised the question that if the court would make an order for anonymity under section 39¹⁰² it would only last until the offender turned 18 and she found that the section 39 order will expire once the offender turns 18.

In another 2001 case, *Venables v News Group Newspapers Ltd*¹⁰³ the claimants were convicted of murder when they were still children. At the conclusion of the trial the judge lifted the reporting restrictions and allowed the media to name the claimants and their backgrounds but he imposed injunctions restricting the publication of any further information. The case continued to attract media attention and the media kept on labelling the claimants as monsters, even years after the fact. When the claimants were due to be released on parole, they sought a permanent order protecting their new identities. Dame Elizabeth Butler-Slows proceeded on the basis that the section 39 order will expire on its subject's 18th birthday. The Court found that exceptional circumstances were proven in

⁹⁸ European Convention on Human Rights.

⁹⁹ European Convention on Human Rights.

¹⁰⁰ Children and Young Persons Act 1933.

¹⁰¹ *R v Central Criminal Court ex p W, B and C* [2001] Cr App R, par 38.

¹⁰² Children and Young Persons Act 1933.

¹⁰³ *Venables v News Group Newspapers Ltd* [2001] Fam 430, par 28.

this case and placed the claimants' right to privacy above the right of the media to publish information about them.

The 2003 case *T v Director of Public Prosecutions & North East Press Ltd*¹⁰⁴ were concerned with section 49¹⁰⁵ orders and Sullivan J referred to the *Venables* case and stated that “A purposive interpretation of section 49(1) would therefore lead one to the conclusion that any restriction on reporting applies only for so long as the person concerned in these proceedings continues to be a young person as defined in the Act.”

In the 2005 appeals case *Re S* the court had to deal with an application for a section 39 order. In this instance, the mother was standing trial for the murder of her one son and the request was to not identify the remaining son who was not a party to the criminal proceedings. The court emphasised that neither Article 8 (right to respect for private and family life) or Article 10 (Freedom of Expression) of the European Convention on Human Rights take precedence over the other and that the proportionality test must be applied in order to balance each interest. The appeals court stated that they are not there to legislate but to construe section 39.¹⁰⁶ The court's primary drivers to determine their decision was based on the language and perceived objectives of the provisions, and giving consideration to the contrasting rights as articulated in Articles 8 and 10 of the European Convention on Human Rights. Subsequent to the judgement in the Divisional Court, Government enacted an amendment to the Youth Justice and Criminal Evidence Act 1999, to empower the Crown Court to impose a lifelong ban on publicity in favour of victims and witnesses but not defendants who are under 18 when the proceedings commence.

The court further stated that the United Nations Convention on the Rights of the Child is an unincorporated international Convention and should only serve as an aid when the domestic measure to be construed is ambiguous. The court acknowledged that there were strong arguments for a provision which can afford a court the discretion to extend

¹⁰⁴ *T v Director of Public Prosecutions & North East Press Ltd* [2003] EWHC (Admin) 2408.

¹⁰⁵ Children and Young Persons Act 1933.

¹⁰⁶ Children and Young Persons Act 1933.

section 39¹⁰⁷ but in the end found that as the section stands currently, it does not provide for such a discretion. The appeal was dismissed and conclusion reached by the Divisional Court was upheld.

In *Clayton v Clayton*,¹⁰⁸ a 2006 case, the father abducted the minor child during proceedings about the child's care. He concealed their whereabouts in Portugal for about 5 weeks; after the abduction the appellant was arrested. The case attracted wide media attention as the mother and the local police made a public appeal for information as to where her minor daughter might be. After the father's release from prison, the mother received an e-mail from BBC news that the father intended on publishing and discussing the events that led to the abduction and include an account of the 5½ weeks he spent with his daughter. In this case, Sir Mark Potter, President of the Court was concerned with section 97 of the Children Act 1989 and stated that the restrictive reading of this section may also apply to section 39 of the Children and Young Persons Act 1933.

He stated that by permitting a newspaper to report with no restraint on the identity of a child or young person in a case may have a "...*far more devastating effect*" on the child's Article 8 (right to respect for private and family life) rights.¹⁰⁹ Even if the restrictive interpretation of section 39¹¹⁰ is followed by judges in criminal cases they will have the power to make orders in terms of the child's Convention¹¹¹ rights. Sir Potter stressed that the court should strike a balance between the effect upon the Article 8¹¹² rights of the child and the Article 10¹¹³ (freedom of expression) rights of the media.

Taking all of the above into account in the case of *The Queen on the Application of JC, RT v The Central Court, The Crown Prosecution services*¹¹⁴ the court found that the order lapses once the young offender reaches the age of 18. This judgement has wide

¹⁰⁷ Children and Young Persons Act 1933.

¹⁰⁸ *Clayton v Clayton* [2006] Fam 83.

¹⁰⁹ European convention on Human Rights.

¹¹⁰ Children and Young Persons Act 1933.

¹¹¹ European Convention on Human Rights.

¹¹² European Convention on Human Rights.

¹¹³ European Convention on Human Rights

¹¹⁴ *The Queen on the application of JC, RT v The Central Criminal Court, The Crown Prosecution Service* [2014] EWCA Civ 1777, 2014 WL 5834009.

implications for several role players, including defendants, victims, witnesses and the media.

Subsequent to this judgement, in the 2016 case of *A and B versus Persons Unknown*,¹¹⁵ an application in the High Court of Justice Chancery Division, the court had to deal with an application by two adults, who were convicted of serious crimes while they were minors, who requested a permanent order preventing the press from publishing their identities. They based their application on their rights under Articles 2 (right to life), 3 (prohibition of torture) and 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR).

In this case, the two brothers, known as “A” and “B” were convicted of serious crimes in 2009 when they were aged 10 and 12. The case was labelled in the media as the “Edlington Case” and the press used nicknames such as the “Devil Boys” and “Hell Boys” at the time of the hearing. A and B were sentenced and the judge granted a section 39¹¹⁶ order to protect the children and their families from harm, backlash and to prevent any adverse impact on the children’s rehabilitation. A and B were released in 2016 while they were still minors, but one of the brothers would have turned 18 two days after this application was brought. As per section 39 of the Children and Young Persons Act 1933 both A and B had the protection of anonymity until they reached the age of 18.

Upon the release of the claimants the Parole Board was satisfied that there was no reason to further confine the applicants and both the applicants have changed their names in order to move forward with their lives. The applicants requested a renewed anonymity order. In this case several experts attested to the fact that rehabilitation seems to be a key factor in making a decision and by revealing the identity of a young offender when he turns 18, interferes with rehabilitation. Rehabilitation is a process which starts in childhood and does not end once a child becomes an adult. The court discussed previous case law and specifically stated that such an order can only be made as an “*absolute*

¹¹⁵ *A and B v Persons Unknown* [2016] EWHC 3295 (Ch).

¹¹⁶ Section 39 of the Children and Young Person’s Act.

necessity” and after consideration of exceptional circumstances. The court found that exceptional circumstances did exist in this instance and found in favour of the applicants.

The above case law in England and Wales show that the courts do allow for the extension of a section 39 order¹¹⁷ but only in exceptional circumstances as highlighted in the case of *A and B v Persons Unknown*.¹¹⁸

Carlisle Inquiry

The Carlisle inquiry was conducted in June 2014 and the report was titled: *Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court*. The inquiry was chaired by Lord Carlile of Berriew CBE QC. The report was produced to allow political parties to adopt the recommendations as part of their policies for law reform in Parliament. The report dealt with several concerns and recommendations with regards to the Youth Justice System. One of the panel’s concerns was the effect of criminal records on an individual after they reach majority and suggested changes to the rules so that job prospects and other life opportunities not be adversely affected by contact with the criminal justice system while still under the age of 18.¹¹⁹

One of the key recommendations in this report was that children who committed non-serious and non-violent offences and who have stopped offending, should have their criminal record expunged upon turning 18. Several submissions argued that criminal records were destructive and that this prevent children to achieve a positive and non-criminal identity.¹²⁰ The report in particular state that a criminal record may hinder education and employment prospects and ultimately rehabilitation. Witnesses expressed concern that the reporting of the identity of a child defendant can hinder efforts to cease criminal behaviour, specifically in light of the reach of social media that could mean that

¹¹⁷ Children and Young Persons Act 1933.

¹¹⁸ *A and B v Persons Unknown* [2016] EWHC 3295 (Ch).

¹¹⁹ Lord Carlile of Berriew CBE QC, *Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court*, 2014.

¹²⁰ Sharon Ereira JP; Eddie Isles, Kevin Wilkins, ACPO, Just for Kids Law, John Graham; David Chesterton; District Judges; Margaret Wilson; David Simpson; YJB; Just for Kids Law Youth Ambassadors; CRAE, *Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court*, 2014, p. 51.

the details can never be deleted once revealed. Research was discussed by the panel that showed that the rationale for “naming and shaming” children, the protection of the public, deterrence and the acceptance of responsibility are not evidence-based. Should the Media have free access to publish a child’s name upon turning 18 during their trials, it would defeat the purpose of allowing these young persons to move on with their lives without any stigmatisation. Strong support was raised for the automatic and lifelong anonymity for all children at every stage of the youth justice system.¹²¹

The recommendations of the Carlile Inquiry and several court cases influenced the UK parliament to address the issue of lifelong anonymity for witnesses and victims by amending section 45 of the Youth Justice and Criminal Evidence Act 1999 to include section 45A that deals with this specifically. Unfortunately the recommendation with regards to child offenders have not been concluded and the issue is still under examination by the Standing Committee on Youth Justice.

4.2 Conclusion

It seems as if the court in England and Wales will only uphold the ongoing anonymity after the young offender turns 18 as an exception. It further seems as if rehabilitation of these young offenders is a priority and that making any order to the contrary of lifetime anonymity will be to the young offender’s detriment.

South Africa’s Constitution is the starting point of why South African courts might come to a different conclusion. The Constitution is applicable to everyone in South-Africa, including children, who are afforded specific rights. One of these protections is found in section 28(2) which provides that a child’s best interest is of paramount importance in every matter concerning the child. The child’s best interest is an important consideration in the interpretation of any statutory provisions that will affect a child offender.¹²² In the case of *Mpofu v Minister of Justice and Constitutional Development*¹²³ the court dealt with an offender who was sentenced after he turned 18 but who was a child at the time of the

¹²¹ Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court, 2014.

¹²² Terblanche SS “*The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders*”. 2012 15(5) P.E.R p 445.

¹²³ 2013 (2) SACR 407 (CC).

offence. The court found that every court should take into account section 28(2) of the Constitution¹²⁴ when sentencing a child and that the best interest of the child is paramount and that sentencing should be based on the age of the child when commissioning the offence and not on the age of the child when sentencing takes place. Similarly in *J v National Director of Public Prosecutions and Others*¹²⁵ the court found that the “best-interest” principle as per section 28(2) of the Constitution is an independent right separate from other children’s rights. In this case the court dealt with the amendment of sections of the Criminal Law Amendment Act 32 of 2007 that deals with the automatic inclusion of the names of children in the sex offenders register and found that it was inconsistent with the Constitution as it limits the rights of child sex offenders to have their best interest taken into account. The court found that the protection continue beyond the age of 18. These two cases clearly fill the gap caused by the fact that an 18 year old is no longer a child but in specific instances will be dealt with as if they were still children. In South Africa, our courts may interpret the law in a constitutionally compliant way, and have the power to amend legislation through reading in or striking out, or they may suspend the finding of constitutional invalidity and refer suggested changes to legislation back to the legislature for review. It is this supremacy that allows any law or conduct that does not comply with the Constitution to be found invalid.¹²⁶ Section 39(1) of the Constitution states that the court must promote the values of an open and democratic society when interpreting the Bill of Rights, must consider international law and may consider foreign law.¹²⁷ This allows for the broader interpretation in context of international instruments like the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.¹²⁸ In England and Wales, this is not the case and the researcher is of the opinion that the judges are more conservative in their remedial approach.

¹²⁴ Best interest of the Child

¹²⁵ 2014 (2) SACR 1 (CC).

¹²⁶ Skelton A “*Constitutional Protections of Children’s Rights*” in Boezaart T (ed) *Child Law in South Africa*, JUTA (2009).

¹²⁷ Skelton A “*Constitutional Protections of Children’s Rights*” in Boezaart T (ed) *Child Law in South-Africa*, JUTA (2009).

¹²⁸ Skelton A “*Constitutional Protections of Children’s Rights*” in Boezaart T (ed) *Child Law in South-Africa*, JUTA (2009).

CHAPTER 5

Prospect of success of an appeal in the case of *Centre for Child Law and others v Media 24 and others*¹²⁹

In South-Africa many writers and commentators view our legal system as a true hybrid between English Common Law and civil Roman-Dutch legal principles.¹³⁰ South African Law is not codified and is similar to English Law in that the law is set out in statutes and common law and these are then interpreted through case law that set binding precedents.

The Constitution of South Africa is seen as the supreme law of the Republic of South Africa and also provides an overarching lens through which to interpret the law. As discussed in Chapter Four, by contrast, the United Kingdom does not have a written or formulated constitution. In both jurisdictions the courts operate according to the principle of open justice, except where children are concerned and closed court is the default position. Both jurisdictions also have applicable legislation protecting a child's identity up to the age of 18 years and specific case law, that allowed for the continued protection of these children after they reached the age of 18 years. The main question under investigation in this dissertation is whether a compelling case can be made for the continued protection of the identity of young offenders who turn 18 during criminal proceedings under South African law. The success of an appeal in the *Centre for Child Law and others v Media 24 and others*¹³¹ will have positive implications for all young offenders.

The Centre for Child Law¹³² brought an application to the High Court to obtain an order to declare that section 154(3) of the CPA,¹³³ read with section 63(6) of the CJA¹³⁴ to continue to afford protection upon reaching the age of 18; alternatively that these sections be declared unconstitutional. The requested order was different from those handed down

¹²⁹ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

¹³⁰ Barratt A and Snyman P "Researching South African Law" 2010
<http://www.nyulawglobal.org/globalex/South_Africa1.htm> (accessed 10 February 2015).

¹³¹ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

¹³² *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

¹³³ Criminal Procedure Act 51 of 1977.

¹³⁴ Child Justice Act 75 of 2008.

by the courts in England and Wales. The request was that the protection is granted automatically upon reaching the age of 18 and that the media can apply to the courts in exceptional cases that this automatic anonymity be waved.

The Centre for Child Law and others¹³⁵ sought an order that section 154(3) of the Criminal Procedure Act read together with section 63(6) of the Child Justice Act do not cease to apply once the child victim, witness, accused and offender reaches the age of 18. In the alternative they requested that section 154(3) of the Criminal Procedure Act be declared unconstitutional and invalid and to remedy the defect they suggested an additional section 154(3A) which provides: “*Children subject to section subsection (3) above do not forfeit the protections afforded by the section upon reaching the age of 18 years.*” Section 154(3) sets the default position on reporting but it does not prevent the media from reporting on the case or the facts, it only prohibits the media from naming the young offender.¹³⁶

The applicants requested the following relief: “*1. An order declaring that, on proper interpretation, the protections afforded by section 154(3) of the Criminal Procedure Act 51 of 1977 (the CPA) apply to victims of crime who are younger than 18 years of age;*

2. In the alternative, an order declaring section 154(3) of the CPA unconstitutional and invalid to the extent that it fails to confer its protection on victims under 18, as well as an order to remedy the defect; 3. An order declaring, that on a proper construction of the provision, child victim, witnesses, accused and offenders do not forfeit the protections of section 154(3) when they reach the age of 18; 4. In the alternative, an order declaring section 154(3) of the CPA unconstitutional and invalid to the extent that children subject to it forfeit the protection of section 154(3) when they reach the age of 18, as well as an order to remedy the defect.”

The application addressed two areas of concern, the protection of the identity of a victim under the age of 18 involved in criminal proceedings and the protection of the anonymity of a child accused or witness after they reach the age of 18. The applicants argued that

¹³⁵ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

¹³⁶ Supplementary Supporting Affidavit Prof AM Skelton par 15.

the court can read into section 154(3) to extend the protection of the identity of young offenders beyond the age of 18, alternatively that the section be declared unconstitutional. The Media argued that it was overreaching to extend the age beyond that specifically stipulated in the CPA.

Hughes J found that the courts do not have the power to change the age as stated in section 154(3) of the CPA and that this should be done by the Legislature. The court stated that the Legislature was specific in that the protection of the identity of a young offender only lasts up to 18 years. The court found that the child victim is covered by section 154(3) of the CPA and in terms of the second concern the court found that there could not be an ongoing and open-ended protection for children once they reach the age of 18. The court did state that in certain cases the privacy extension into adulthood should work in favour of some rights, like the right to privacy, but this should happen by exception.

In *The Centre for Child Law and others*¹³⁷ case, the researcher is of the opinion that the court did not properly consider the aspect of what should happen if a child is tried in the Child Justice Court; the trial does not move to an adult court when the accused turns 18 during their trial, it will be concluded in the Child Justice Court.¹³⁸ Should this protection not be afforded until completion of the trial and thereafter, irrespective if the young offender turns 18 during his trial?

The researcher does believe that the Centre for Child Law has valid grounds to appeal this judgement and South Africa's Constitution is the starting point for such analysis, and provides a cogent reason for why an appeals court might find differently. One of these protections is found in section 28(2) of the Constitution which provides that a child's best interest is of paramount importance in every matter concerning the child. Hughes J found that the crux of the applicant's submissions was that the right afforded to children in section 28(2) of the Constitution was favoured over other rights in cases concerning children and that legislation must allow for a case to case basis and not a blanket protection in respect of children's rights. Hughes J found that she was unable to interpret

¹³⁷ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

¹³⁸ Supplementary Supporting Affidavit Prof AM Skelton par 22.

section 154(3) of the Criminal Procedure Act¹³⁹ as requested by the applicants. In the researcher's opinion Hughes J should have then granted the alternative prayer and declare the section unconstitutional in order to allow the court to read in the changes. Not only does the South African Constitution offer protection to children, but specific legislation was enacted to cater for children's specific needs. When crimes are committed when young offenders are still children, they should be awarded ongoing protection under these specific legislations.

The purpose of the Child Justice Act is another distinguishing factor in the comparative analysis. Prior to the implementation of the Child Justice Act¹⁴⁰ and the ratification of the United Nations Convention on the Rights of the Child (CRC), South Africa never had a "...separate, self-contained and compartmentalised system for dealing with child offenders."¹⁴¹ The Child Justice Act¹⁴² provides for individualisation, rehabilitation and the pre-ambule of the Act is clear in terms of the purpose of the Child Justice Act. Rehabilitation is a key factor, and revealing the identity of a young offender when he turns 18 interferes with rehabilitation. Rehabilitation is a process which starts in childhood and does not end once a child becomes an adult. Several experts attest to this fact in the case of *Centre for Child Law and others v Media 24 Limited and others*.¹⁴³ The principles of child justice would be destroyed and the rules as set out in relevant legislation would be meaningless if they end when a child turns 18 during his trial.

The supplementary founding affidavit by Prof AM Skelton in the *Centre for Child Law and others* case,¹⁴⁴ sets out valid and relevant arguments which the researcher supports and which strengthen the arguments already mentioned, that an appeal should be successful. Prof Skelton highlights different cases where the media treated the relevant children differently and the extreme negative effect on the children that were named once they reached the age of 18. In two cases, where the children were not named, they could move

¹³⁹ Act 51 of 1977.

¹⁴⁰ Act 75 of 2008.

¹⁴¹ Skelton A "From Cook County to Pretoria: A Long Walk to Justice for Children". 2011 6(2) Northwestern Journal of Law and Social Policy 413.

¹⁴² Act 57 of 2008.

¹⁴³ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC par 62.

¹⁴⁴ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

on with their lives, built careers and productive family lives. Great emphasis is placed on rehabilitation. *“Children who have experienced, committed, or are accused of crimes are particularly vulnerable to harm if they are publicly identified. It is precisely for this reason that section 154(3) of the CPA affords these children heightened protection. However, the vulnerability of these children does not disappear when they turn 18. They remain at great risk of harm throughout their adult lives and their need for heightened protection is not extinguished.”*¹⁴⁵

It is clear from the expert affidavits that form part of this case, discussing the psychological harm, trauma and regression, shame, stigmatisation and the fear of being identified as main contributors that hinder young offenders from proper rehabilitation and the ability to move on with their lives, should the media have a carte blanche to name them once they turn 18. The court mentions the applicant’s expert affidavits in paragraph 16 and 17, but in the researcher’s opinion, does not seem to place sufficient emphasis on these affidavits that clearly prove the extensive harm that is caused by the identification by the media of the young offenders after they turn 18. The court does not make mention of the affidavits of the affected children who turned 18 during their trials or who turned 18 after their trials were completed.

The child offender always starts the criminal proceedings as a child, and if they turn 18 during their trials, the suggestion should be that this right be extended to them until completion of the criminal proceedings and even thereafter.

Not everyone agrees, South African Media expert, Dario Milo¹⁴⁶ discussed the protection of a young offender’s identity once he turns 18 during trial in light of the *JC and RT* case¹⁴⁷ and took the same approach as judgement in this matter. His relevant justificatory arguments include the agreement with the England and Wales Court that the protection of the identity of a minor lapses once he turns 18. Mr Milo proceeds to state the following: *“Upon attaining majority something akin to a legal exchange takes place: children gain*

¹⁴⁵ Supplementary Supporting Affidavit Prof AM Skelton par 76.

¹⁴⁶ <<http://www.blogs.webberwentzel.com>> (accessed 8 November 2014).

¹⁴⁷ *The Queen on the Application of JC, RT v The Central Criminal Court, The Crown Prosecution Service* [2014] EWCA Civ 1777.

various freedoms they did not enjoy immediately before they turned 18 (for instance, the right to vote or to drive a car) but they also lose certain special protections expressly reserved for children.” He suggests that restrictions on court reporting be interpreted as narrowly as possible and that special protections afforded to children should lapse when they turn 18.

Herman Scoltz,¹⁴⁸ in an article titled “*Jeugmisdadigers: Media mag nooit sê wie hul is*”, quoted the Minister of Justice saying that the media should never identify youth offenders, even after they turn 18. The minister supported the Centre for Child Law’s court case against Media 24 and others to prevent the identification of youth offenders after they turn 18 during trial. The minister based their suggestion to advance this protection beyond 18 years on the basis that prejudice will be suffered by a young offender should their identity be revealed once they turn 18.¹⁴⁹

The Centre for Child Law case asked for a default position but pointed out that the media still had the right to apply to the court that this default position be waived. The onus should be on the media, rather on a young child to request that they be named once they turn 18. The court had the view that the protection of the identity of the young offender should not be open-ended. The court stated that this will trump the rights of other parties and the rights of other children themselves, who for example wanted to share their story with the media after they turn 18 and would limit an individual’s right as an adult.¹⁵⁰ The applicants addressed this specific issue in their oral arguments and advised that it will still be the individual’s own choice, whether they want to allow the Media to release their identities and stories but that it should not be the default that the Media can publish their information without their permission.¹⁵¹ The most important reason why the Centre for Child Law and others¹⁵² case may win on appeal is the fact that Hughes J did not found in favour of the applicants’ alternative prayer.¹⁵³ Hughes J found that she was unable to

¹⁴⁸ <<http://www.netwerk24.com/Nuus/Hof/Jeugmisdadigers>> (accessed 10 January 2016).

¹⁴⁹ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC par 23.

¹⁵⁰ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC par 67.

¹⁵¹ As per confirmation from Prof A Skelton Director for the Centre for Child Law UP.

¹⁵² *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

¹⁵³ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC p. 1 par 3.3 and par 3.4.

interpret section 154(3)¹⁵⁴ to allow for child victims, witnesses, accused and offenders to not forfeit the protections offered in section 154(3)¹⁵⁵ when they turn 18. Hughes J should have declared the section unconstitutional and then the court could read in the changes, which a South-African court can do but England and Wales courts cannot do.

¹⁵⁴ Criminal Procedure Act 51 of 1977.

¹⁵⁵ Criminal Procedure Act 51 of 1977.

CHAPTER 6

Conclusion and Recommendations

This dissertation set out to make a case for the argument that the right to protection of the identity of a child who turns 18 during their trials should continue and only be limited by way of authorization from a suitable court and only in exceptional circumstances.

The Child Justice Act provides for individualisation and rehabilitation. The protections in the relevant legislation would be meaningless if they end when a child turns 18 during trial, because the principles of child justice would be destroyed. The purpose of the Child Justice Act is to protect the rights of all children as per the Constitution. Part of this is to encourage children to become law-abiding citizens and it is clear that rehabilitation and the ability to move on with one's life is severely hindered if a child offender has to deal with being publicly named in the media, once they turn 18. Once a child appears in the Child Justice court the whole process should be concluded in the child justice court and by implication all protections should be afforded as if the young offender is still a child, even after turning 18 during trial.

South African courts have the power to find the law unconstitutional irrespective if they can or cannot interpret the law to say that children over 18 years should be protected. This is the crux of the case that the High Court misunderstood in the *Centre for Child Law and others* case.¹⁵⁶ Should the appeal in *The Centre for Child Law*¹⁵⁷ against the judgement be successful the default position will be the protection of the identity of all young offenders, victims, accused and witnesses even after they turn 18, irrespective if their trials are concluded or not. Alternatively section 154(3) of the CPA would be declared unconstitutional and amended to include a provision that the identity of these children be protected after their 18th birthday. The Court can either amend the law itself, or suspend the order of invalidity and refer the matter to Parliament.

The mini-dissertation has attempted to provide support for the idea that the Centre for Child Law has a winning case. The Constitution of South Africa and relevant domestic

¹⁵⁶ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

¹⁵⁷ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

and international instruments justify the continued application of the child's right to privacy, dignity and the child's best interest, taking into account limitation of rights and the competing rights of the media. Case law leave space for an interpretation that the right to the protection of the identity of a youth offender continues when he is 18.

Hamman and Nortje¹⁵⁸ state that *"The disclosure of the identities of minor witnesses, victims and offenders on their attaining the age of 18 is a sensitive issue that must be handled with respect, privacy and care."* I am in agreement with Hamman and Nortje and believe that young offenders have the right to move on with their lives, and to not be branded by sensationalism in the media with no consequence as to the future rehabilitation of these minors.

International developments in terms of the *A and B v Persons Unknown* case¹⁵⁹ to allow for lifelong anonymity for offenders under the age of 18 on a case by case basis, the Carlisle Inquiry¹⁶⁰ recommendations that in part lead to the amendment of section 45 of the Youth Justice and Criminal Evidence Act 1999 to allow for the lifelong reporting restriction for victims and witnesses under the age of 18, the ongoing examination of the Standing Committee on Youth Justice¹⁶¹ on the disclosure and barring regulations and naming and shaming of young offenders after they turn 18 and an appeal from *The Centre for Child Law and others v Media 24*,¹⁶² will give direction and clarity and support the South African Minister of Justice's views. The researcher believes strong arguments exist for a successful appeal in *The Centre for Child Law* case¹⁶³ and the expert affidavits are clear that in terms of our Constitution and relevant legislation the protection of a child's identity, during and after they turn 18 during trial, should be protected.

¹⁵⁸ Hamman A & Nortje W " *Die bekendmaking van die identiteit van anonieme minderjariges by meerderjarigheid: regverdigbaar of nie?*" LitNet Akademies (Regte) 2016-08-12.

¹⁵⁹ *A and B v Persons Unknown* [2016] EWHC 3295 (Ch).

¹⁶⁰ Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court, 2014.

¹⁶¹ *The Michael Sieff Foundation update on Outcomes from the Carlisle Inquiry*, September 2015.

¹⁶² *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

¹⁶³ *Centre for Child Law and others v Media 24 Limited and others* 2015 SA 23871 HC.

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