REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: CC08/2018

In the matter between:

THE STATE

And

ELTON LENTING AND 19 OTHERS **ACCUSED**

JUDGMENT – 14 SEPTEMBER 2023

LEKHULENI J

[1] This is an application in terms of sections 170A, 153, 154, and 158 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The State sought an order directing that two witnesses it intends to call testify through the assistance of an intermediary via a close circuit television or a similar means of electronic media. The State also sought an order that the identity of these witnesses should not be disclosed to the public. In addition, the State also applied that should the court find that the two witnesses it intends to call are mentally above the age of 18, the court must declare

sections 153(5) and 164(1), and 170A of the CPA unconstitutional to the extent that these sections do not provide ongoing protection for minor children who witnessed a commission of an offence as minor children and who have since reached the age of majority at the time they are called to testify in court.

[2] The State contends that if this court finds that the scientific evidence it presented is not conclusive regarding the mental age of the two witnesses being under the age of 18, then section 170A will not apply, nor will section 153(5) or 164(1) despite the mental anguish and stress being evident. This is so because these sections only afford protection if the additional requirements of mental age are met as set out in section 170A of the CPA. To this end, the State requests that this court declare sections 153(5), 164(1), and 170A of the CPA unconstitutional and read in provisions that remedy the defects until the legislature amends the sections.

[3] The relevant counts in these applications are counts 111 - 113. These counts involve a charge of Murder, Possession of an Unlicensed Firearm, and Possession of Ammunition. These counts implicate accused 1, 2, 8, and 9. The State's applications also relate to counts 120 - 123. These counts involve a charge of Housebreaking with intent to commit Murder and Murder, Murder, Possession of Unlicensed Firearm, and Possession of Ammunition. These counts (120 - 123) implicate accused 1, 2, 3, and 9.

[4] As stated in my previous judgment dealing with section 158(2) application (see *S v Lenting and 19 Others* CC08/2018[2023] ZAWCHC 168 (24 July 2023), the accused are facing various charges totalling 145. Their criminal trial is pending before

this court. The State intends to lead two witnesses who allegedly witnessed the commission of the offence in respect of counts 111 - 113, and 120 - 123. It is alleged that they were still minors when these witnesses saw the commission of these crimes. One was 13 years old, and the other was 15 years old. These witnesses have since reached the age of majority. The State relies on the paramountcy of the best interest of minor children entrenched in section 28(2) of the Constitution and contends that these witnesses should enjoy ongoing protection despite their age. The State further submitted that intermediaries be appointed for the two witnesses, regardless of their age, to assist them in presenting their evidence in court.

[5] In support of its contention, the State relied on the decision of the Constitutional Court in *Centre for Child Law and Others v Media 24 Limited and Others,*[1] in which the Constitutional Court held that ongoing protection must be afforded to child victims, witnesses, and accused. In the context of section 154(3) of the CPA, the court held that a child who has experienced trauma, be it as a victim, a witness, or an accused, does not forfeit the protection afforded by that subsection upon reaching the age of 18 and should not, as a result of turning 18, have their story and identity exposed without their consent or necessary judicial oversight.

[6] Notwithstanding, the State led viva voce evidence of Colonel Clark, a Clinical Psychologist, and tendered an affidavit of the investigating officer to support its application. Colonel Clark testified that she assessed the witness in respect of counts 111 - 113 and prepared a report, which was handed in by agreement as an exhibit in these proceedings. In her evidence, she testified that the witness in these counts

[1] 2020 (4) SA 319 (CC).

suffers from headaches and flashbacks of the shooting of his father. His eyes strain when he has a headache. Colonel Clark noted in her report that the witness was admitted to hospital for an apparent psychotic break in 2019. The witness is sad to have had auditory and visual hallucinations and flashbacks after witnessing the shooting of his father. The witness reported several symptoms of depression, like psychomotor agitation, suicidal ideation, and persistent inability to experience positive emotions. He had difficulty sleeping and attempted suicide by swallowing his mother's sleeping pills.

[7] According to Colonel Clark, if this witness were to testify in open court and start recounting the events of that particular incident, there is a great possibility that he would experience flashbacks on the stand, which would obviously make his narrative incoherent based on the fact that he has dissociated where he is. Colonel Clark further reported that the witness feared for his life, and to place him in such a situation would increase his distress. He could decompensate on the witness stand.

[8] In addition, the witness reported symptoms of Post-Traumatic Stress Disorder ("PTSD") due to recurrent, involuntary, and intrusive distressing memories and recurrent distressing dreams. Colonel Clark testified that the witness is not intellectually impaired, and his intellectual capacity is functioning within the range of borderline intelligence. In Colonel Clark's view, intellectually impaired people have an Intelligence quotient (IQ) below average. Her clinical judgment is that the witness suffers from psychotic disorder after witnessing the incident. It is possible that if the witness testifies in open court, this would provoke a psychotic break and negatively affect the mental health of the said witness in the long term.

[9] In her opinion, the witness would need someone to assist him if he goes psychotic, and it must be someone who can see that the witness is decomposing to psychosis. Furthermore, the witness experiences visual and auditory hallucinations, which may be exacerbated when the witness recounts what happened in the accused's presence. Colonel Clark stated that the determination of mental age is a contentious issue for many psychologists working within the forensic field. However, in her clinical opinion, the witness in these counts has a diminished mental age compared to his chronological age. In her view, this witness functions at 17 years old.

[10] Concerning the witness in counts 120 – 123, Colonel Clark testified that at the time of assessment, the witness was 19 years old. He assessed this witness and prepared a report, which was also handed in by agreement as an exhibit in these proceedings. Colonel Clark testified that the witness in these counts also reported symptoms of PTSD. The witness was assessed and was found to suffer a mild intellectual impairment. In light of the mild intellectual impairment, in her opinion, the mental age of the witness is below the age of 18. According to Colonel Clark, the witness's symptoms of PTSD may have impacted his performance during the assessment test. The witness was visibly distressed when he told her how he witnessed his mother being shot and killed by her assailants.

[11] Moreover, Colonel Clark stated that the witness also displayed symptoms of depression such that, at some stage, he wanted to shoot himself. The witness exhibits symptoms of PTSD and may be re-victimised and re-traumatised by testifying in open court in the presence of the accused. Colonel Clark recommended that the witness be permitted to testify via closed circuit television or other similar media, with the

assistance of a court-appointed intermediary. She asserted that if the witness were to testify in an open court, this would increase the severity of the witness's symptoms of PTSD.

[12] The State also tendered evidence of the Investigating officer, Sergeant Van Wyk, in the form of affidavits in both applications. In both applications, Sergeant Van Wyk supported the State's application that the witnesses testify in camera through a close circuit television due to the nature of the case and the vulnerability of the witnesses and that their identity in both applications should remain anonymous in respect of the proceedings in court in terms of section 153(2) of the CPA.

Submissions by the Parties

[13] Mr Damon, who appeared for the State, contended that the evidence of Colonel Clark and Sergeant Van Wyk that the two witnesses' mental age is below 18 is uncontroverted. Counsel implored the court to invoke the provisions of section 170A and 158(2) of the CPA that the two witnesses testify in camera through a closed circuit television with the assistance of a court-appointed intermediary.

[14] In addition, Counsel argued that section 170(A) of the CPA does not provide for witnesses/victims that saw the commission of crimes when they were children and have since reached the age of majority when they are called to testify. Furthermore, if assessed by a clinical or medical professional and it is concluded that the witness, although mentally and biologically above the age of 18 years, still would require the services of an intermediary to testify due to mental anguish, the witness would not be

able to testify through a court-appointed intermediary because the court's discretion has been removed.

[15] Mr Damon submitted that the court has a discretion to appoint an intermediary in terms of section 170A if the child or person with a mental age below 18 years would suffer mental anguish without the service of an intermediary. Counsel further submitted that the court does not have that discretion despite clinical evidence indicating the appointment of an intermediary in the ongoing protection scenario. A witness or victim qualifying for ongoing protection in section 28(2) of the Constitution would, therefore, have to convince the court that he/she is below the mental age of 18 for the court to exercise its direction to appoint an intermediary because of their biological age.

[16] Counsel further submitted that the ongoing protection of minor children (witnesses) should be consistent with the ongoing protection accorded to accused 9, who was a child when the alleged offences were committed. Mr Damon argued that accused 9 still enjoys protection despite achieving the age of majority. Even if he should be convicted of any or all of the offences he is charged with, the minimum sentence of life imprisonment will not apply because he was a minor when the crimes were allegedly committed. The witnesses he intends to call do not enjoy the same protection or enjoyment of their rights as children, similar to those enjoyed by the accused, who do not forfeit the ongoing protection upon attaining the age of majority. The delay in bringing the case to court was not due to their (the witnesses) fault and should not be held against them.

[17] Counsel further contended that section 153(5) of the CPA explicitly protects witnesses under the age of 18 and does not extend the same protection to witnesses who witnessed the commission of a crime while they were minors and are called to testify after they have reached the age of majority. As a result of turning 18, so the argument went, neither the two witnesses' inability to take the oath and be admonished to tell the truth will be considered and may be considered as incompetent to testify, as they are not included in section 164(1) of the CPA. To this end, Mr Damon submitted that these sections, 153(5), 164(1), and 170A, are unconstitutional because they do not provide ongoing protection for such witnesses.

[18] Mr De Villiers, who appeared for accused 1, 2, and 3, did not oppose the application of the State in terms of sections 170A if the court finds that the witnesses satisfy the jurisdictional facts in section 170A. However, he submitted that the section only applies to children under the biological or mental age of 18.

[19] Mr Badenhorst, appearing for accused 9, opposed both applications and argued that accused 9's right to a fair and open trial, as embodied in the provisions of section 35 of the Constitution, to be heard in an open court, would materially be infringed if he and everyone else that has an interest in the accusers of the accused, on the two murder charges, would not be able to observe the state witness testifying in an open court. As in the previous application, Mr Badenhorst relied on the Constitutional Court case of *S v Shinga (Society of Advocates (Pietermaritzburg) as Amicus Curiae; S v O' Connell and Others,*[2] where the Constitutional Court found that closed court proceedings carry within them the seeds for serious potential damage to

[2] 2007 (2) SACR 28 (CC).

every pillar on which every constitutional democracy is based. Counsel argued that these witnesses must testify in open court so that their version could be tested.

[20] On the State's application for the declaration of invalidity, Counsel submitted that section 170A(1) should be afforded its ordinary unambiguous meaning. Mr Badenhorst submitted that section 170A(1) clearly reflects the legislature's intention to apply to any witness under the biological or mental age of 18 years. Counsel further submitted that it would not be incumbent upon this court to declare the provisions of the section unconstitutional until it is amended. Counsel argued that the evidence of Colonel Clark in support of both applications falls significantly short of substantiating any basis for extended protection to the witnesses in both murder charges.

[21] Although their clients are not implicated in these charges, on invitation by the court, Mr Klopper and Mr Strauss submitted heads of argument on the Constitutional question raised by the State. I want to thank them for the comprehensive arguments raised in their heads of argument. Mr Strauss argued that the constitutional rights of both children and witnesses who are children are protected by both the CPA and the Constitution. On the State's submission that if ongoing protection is not afforded to the now adult witnesses, they will suffer prejudice, Mr Strauss submitted that if one reads section 170A(1), the legislature intended to deal with the undue mental stress or suffering which witnesses may endure at the time of testifying. In his view, section 170A(1) was written to deal with the age of a witness at the time he or she is giving evidence in court. The legislature intended to specifically deal with witnesses under the biological or mental age of 18 when giving evidence in court. This does not extend to adult witnesses. When the section was amended, Counsel argued, the legislature

expressly did not include adult witnesses with a mental age of 18 in section 170A(1) when they testify in court.

[22] Mr Klopper shared the same sentiments and further submitted that section 170A was never enacted to apply to adult witnesses but to apply exclusively to children. On the parallel reasoning the State drew between the sentencing of an accused person who was a minor at the time of the commission of the crime and a witness who witnessed a crime while a minor, Counsel argued that there was no such correlation. In Counsel's view, the sentencing of a child offender who has become an adult relates to the focus being on age at the time of committing the offence. It is a reflection upon and a consideration of a past event.

[23] Regarding a witness in section 170A, Counsel argued that the focus is on stress or anxiety at the time of testifying. It is a reflection upon and a consideration of a present event. Counsel contended that the relevant questions are whether the witness will suffer stress while testifying now or whether the witness is younger than 18 or has a mental age of under 18 now at the time of testifying.

[24] Mr Klopper further contended that the State's argument requires the application of a state that will not exist at the time of testifying just because the witness was a child at some stage in the past. Relying on *S v ZF,*[3] Counsel submitted that section 170A is about the present and presenting evidence now and not a past situation. The submission was that the section was designed for children and could only be applied to children at the time of testifying.

[3] [2016] 1 AII SA 296 (KZP).

The Legislative Framework

[25] Section 170A of the CPA was introduced in 1993 to protect child witnesses. This was pursuant to a research by the South African Law Reform ("SALRC") Commission, which investigated and recommended that child witnesses must be protected and that they should testify in a child-friendly environment as opposed to the traditional courtroom with attired court officials, which resulted in children being afraid and confused.[4] At the time, the SALRC lamented the adversarial system, which allowed aggressive cross-examination and its effect on a child, and noted it as a matter of concern. The accused's right to a fair trial, which included the right to see and hear witnesses, traumatised the child. Furthermore, the commission noted that such children would often be unwilling to testify and, therefore, poor witnesses.

[26] Pursuant to the SALRC's rigorous and exhaustive research, section 170A was introduced on 30 July 1993 in terms of the Criminal Law Amendment Act 135 of 1991, which allowed child witnesses to testify in a child-friendly room with the assistance of an intermediary. The section was essentially introduced to balance the need to protect a child witness in the adversarial system and ensure that an accused is given a fair trial. The section has been found to pass constitutional muster by the Constitutional Court in *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others.*[5]

[4] See *The Protection of the Child Witness: Project 71* (April, 1989).
[5] 2009 (2) SACR 130 (CC).

[27] The Constitutional Court held that section 170A aims to prevent a child from undergoing undue mental stress or suffering while giving evidence. It does this by permitting the child to testify through an intermediary.[6] The intermediary is required to convey the general purport of questions put to the child. More importantly, the court noted that section 170A(3) allows the child who testifies through an intermediary to give evidence in a separate room away from the accused and in an atmosphere designed to set the child at ease. The court further observed that this provision ensures that the court and the accused can see and hear the child and the intermediary through electronic or other devices.

[28] The section has been amended over the years. Before 05 August 2022, the relevant parts of this section provided as follows:

> "(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.
> (2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary…."

[29] This section was amended by the Criminal Law Amendment Act 12 of 2021, which took effect on 05 August 2022. The amendment made significant changes to the section. Subsections 1 and 2(a) were amended, and new subsections 11, 12, and

[6] *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC) at para 94.

13 were added to the section which introduced new innovations. Currently, the relevant parts of this section provides as follows:

> "(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness—
> (a) under the biological or mental age of eighteen years;
> (b) who suffers from a physical, psychological, mental or emotional condition; or
> (c) who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006), to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary…"

[30] It is well established that a child witness must be protected from undue mental stress or suffering while giving evidence. Evidence through intermediaries is widely recognised as an effective procedure in criminal proceedings to protect a child witness or complainant. Prior to the amendment, the intermediary service was available to a child witness or complainant in criminal proceedings. The intermediary service was not available to any other witness or complainant who may be exposed to similar undue mental stress, trauma, or suffering. The intermediary service was also not available for any proceedings, other than criminal proceedings. Youth was the focus of the inquiry for the appointment of an intermediary. Most cases that dealt with this provision in the courts, involved persons under the biological or mental age of 18 years.

[31] However, the amendment stated above gave the section a new complexion. The amendment brought about by the Criminal Law Amendment Act 12 of 2021 significantly increased the power of the courts to appoint intermediaries in two respects. The list of witnesses who might qualify for this purpose now goes beyond

young persons. It includes two other classes of witnesses: namely, any person 'who suffers from a physical, psychological, mental, or emotional condition. This category of witnesses is not age-bound or limited. In other words, regardless of age, an intermediary can still be appointed for witnesses who suffer from a psychological, mental, or emotional condition, even if that witness is older than 18 years.

[32] The second category introduced by the recent amendments is a witness who is an older person as defined in section 1 of the Older Persons Act 13 of 2006. In terms of section 1 of the Older Persons Act, an older person is a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older. Furthermore, before August 2022, an appointment for an intermediary for a witness under the biological or mental age of eighteen years could be made only if it appeared that testifying in an open court would expose the witness to 'undue stress or suffering'. The amended section now provides that the court may order the use of intermediary service if it appears to the court that the proceedings would expose such a witness to undue psychological or emotional stress, trauma, or suffering if he or she testifies at such proceedings. This is in addition to undue ‘mental stress or suffering’, which was provided for in the section before it was amended. I pause to mention that the amendment also introduced the services of intermediaries to proceedings other than criminal matters.[7] Witnesses in civil matters who meet the threshold set out in the respective sections, may testify through the assistance of an intermediary.

[7] See sections 51A and 51B of the Magistrates Court Act 32 of 1944, and sections 37A and 37B of the Superior Courts Act 10 of 2013.

[33] Before the amendment to this section, the intermediary service was not available to an adult witness or complainant who were exposed to undue mental stress, trauma, or suffering. As amended, section 170A(1) lists various categories of witnesses for whom an intermediary may be appointed. A careful reading of the section clearly indicates that these subsections must be read disjunctively. Subsection 1(b) uses the word "or" which distinctly demonstrates that the category of witnesses envisaged in subsection 1(a) and (b) are different from those envisaged in subsection (c). For all intents and purposes, the legislature intended to extend the services of intermediaries to witnesses older than 18 years who suffer either from a psychological, mental, or emotional condition and to older persons. A court must determine if a witness falls into one or more of the various categories envisaged in the subsections.

[34] For certainty, section 170(1)(a) deals with young witnesses. In contrast, section 170A(1)(b) applies to witnesses who suffer from a physical, psychological, mental or emotional condition (regardless of age). Section 170A(1)(c), on the other hand, applies to witnesses who are older persons as defined in the Older Persons Act. As previously stated, these amendments came into effect on 5 August 2022. In my view, these amendments are procedural in nature. They are designed to govern how rights are enforced and do not affect the substance of those rights.

[35] The general rule is that a statute is as far as possible to be construed as operating only on facts that come into existence after its passing.[8] Despite this general rule, it has been held that a distinction must be drawn between those amendments that are merely procedural in nature, and those that affect substantive rights. New

[8] *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 65.

procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights.[9] Such legislation is presumed to apply immediately to both pending and future cases. Therefore, the amendment of section 170A of the CPA does not impact on substantive rights and is presumed to apply immediately to both pending and future cases.[10] In other words, the provisions of section 170A, as amended, are applicable in all proceedings from the date the section came into operation.

[36] In considering an application in terms of section 170A, the court must engage in a two-pronged approach. The court must first determine whether the witness is one defined either in subsections 1(a) to (c) of section 170A as amended. For instance, the court must determine whether the witness has a physical condition or has a mental age below 18. Once the court has made a finding in this regard, the court must decide whether the proceedings would expose such a witness to undue psychological, mental, or emotional stress, trauma, or suffering if he or she testifies at such proceedings without the assistance of an intermediary. If the court is satisfied that the witness meets the two requirements, the court may appoint an intermediary to enable such witness to give his or her evidence through that intermediary.

[37] It must be stressed that the principles applied by the courts in determining the need for the appointment of an intermediary concerning children and people with a mental age below 18 remain relevant and apply with equal force to the new categories. However, each case must be determined on its merits. I find the principles espoused

[9] See *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another, and Similar Matters* 2020 (1) SA 623 (GJ) at para 9.
[10] See *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others* 1999 (4) SA 1 (SCA) para 16 – 24.

by the Constitutional Court in *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others,*[11] *("DPP Transvaal")* apposite. The court stated:

> "The nature of the enquiry that is required is not akin to a civil trial which attracts a burden of proof. It is an enquiry which is conducted on behalf of the interests of a person who is not party to the proceedings but who possesses constitutional rights. It is therefore inappropriate to speak of the burden of proof being placed upon a party to an application for an intermediary, as some High Courts have done."

[38] The court went further and stated:

> "Judicial officers are provided with discretion to ensure that the principles and values with which they work can be applied to the particular cases before them in order to achieve substantive justice. Discretion is a flexible tool which enables judicial officers to decide each case on its own merits. In the context of the appointment of an intermediary, the conferral of judicial discretion is the recognition of the existence of a wide range of factors that may or may not justify the appointment of an intermediary in a particular case."[12]

[39] I am mindful that the court in *DPP Transvaal*, dealt with the application of section 170A in respect of children, however, I am of the view that the principles expressed in that case, apply with equal force in this matter and in matters involving the new categories of witnesses envisaged in subsection 1(b) and (c) of the amendment. In *DPP Transvaal,* the court was concerned with the best interests of children as enshrined in section 28(2) of the Constitution. In the same way, the category of witnesses envisaged in subsections 1(b) and (c) as amended, have a right to equal protection and benefits of the law and to have their dignity respected and protected as entrenched in section 9 and 10 respectively, of the Constitution. To allow

[11] 2009 (2) SACR 130 (CC) at para 114.
[12] Para 115.

them to be subjected to undue mental stress and suffering would offend against these constitutional rights. To enable them to give a full account of the acts complained of with ease and to ensure that justice is done, courts have to apply these principles discussed above conscientiously and determine what the interests of justice demand.

[40] For greater certainty, in determining whether a witness is protected by the section, a birth certificate for a child witness should be provided to the court to prove the age of a child witness at the date that the witness is scheduled to testify. In my view, a psychologist's report should be provided to the court to determine whether the witness has a mental age below 18. An identity document or a similar document for older persons as defined in section 170A(1)(c) must be provided to the court to prove the older person's age as defined in the Older Persons Act.

[41] Meanwhile, scientific evidence in my view, must be placed before the court before an intermediary can be appointed for a witness envisaged in section 170A(1)(b) of the amended section. The CPA and the amendments do not define the psychological, physical, mental, and emotional condition set out in section 170A(1)(b). In my view, consistent with the tenets of statutory interpretation, these words must be given their grammatical meaning unless doing so would result in an absurdity.[13] This should be done consistent with the three interrelated riders to this general principle, namely: that statutory provisions should always be interpreted purposively; the relevant statutory provisions must be properly contextualised; and that all statutes must be construed consistent with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

[13] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

[42] For a court to satisfy itself that a witness is suffering from a psychological condition, a psychologist's report must be filed before a court can invoke the provisions of this subsection to appoint an intermediary for that witness. In my opinion, a psychologist's report would also suffice for a witness alleged to be suffering from an emotional condition. The amendment also envisages the application of the section in cases of witnesses suffering from a physical condition. The Act does not explicitly define physical condition or the level of impairment of the body. However, the grammatical meaning of physical condition would refer to the state of the body or bodily functions. For instance, a physical condition may refer to a person who is visually impaired or suffering from speech disorders. Courts would ordinarily require a medical report explaining the detail of such impairment and the extent to which the witness would suffer undue psychological, mental, or emotional stress or trauma if the witness testifies in such proceedings without the assistance of a court-appointed intermediary.

[43] Giving this section its ordinary grammatical meaning, it becomes evident that it is no longer limited to the protection of children but applies to older persons and people suffering from mental, physical, and psychological conditions. In my opinion, the new categories of persons introduced in the recent amendments negate the age limitation envisaged in section 170A(1)(a). A child witness who has reached the age of majority but suffers from a psychological, mental, or physical condition can still be allowed to testify through the assistance of an intermediary. This section can still protect witnesses experiencing emotional issues if it can be established that they will suffer undue psychological, mental, or emotional stress or trauma if they testify in the proceedings without the assistance of an intermediary.

[44] Other notable observations of the new amendment are the requirements introduced in subsections 11, 12, and 13 to the section and the amendment of subsection 7. Section 170A(7), which required a court to provide reasons for refusing an application by the State for the appointment of an intermediary immediately upon refusal in respect of a child under the age of 14 years, was amended. This section was amended to remove reference to a child under the age of 14 years. The amended subsection now provides that the court shall provide reasons immediately upon refusal of any application for the appointment of an intermediary. The furnishing of reasons is not only limited to applications involving children under the age of 14 years. In my view, the purpose of this amendment is to ensure that the protective measure covers every witness referred to in this section.

[45] Subsection 12 envisages a competence enquiry that the court must conduct before a person can be appointed as an intermediary. Among others, the enquiry must include, but not limited to, qualifications, the fitness of a person to be an intermediary and his or her experience, which has a bearing on the role and functions of an intermediary. The enquiry must also include the person's experience, which has a bearing on the role and functions of an intermediary, the language, and communication proficiency. Importantly, the court must inquire about the ability of the intended intermediary to interact with a witness under the biological or mental age of 18 years or, a witness who suffers from a physical, psychological, mental, or emotional condition, or a witness who is an older person as defined in section 1 of the Older Persons Act.

[46] The amendment did away with the one size fits all approach and introduced a specialisation requirement for each category. Persons destined to be used as intermediaries will not necessarily be able to be intermediaries for all categories envisaged in subsection 1. The amendment also ensures that different skills are employed to cover witnesses with different needs. Intermediaries appointed before this section's amendment must also undergo a competence test to determine their suitability to act as intermediaries for the relevant categories. Crucially, the court must inquire about their language and communication proficiency. In my view, this is critical because there is a vast potential prejudice against a witness if the intermediary is not well-versed in the language the witness speaks. Before an intermediary is appointed, in my view, the court must be satisfied that such an intermediary is competent and proficient in the witness's language to prevent such prejudice to the witness.

[47] Subsection 13 enjoins a head of court as the most senior judicial officer, namely, a Regional Court President for the Regional Courts, a Chief Magistrates for the District Courts, and the Judge Presidents for the High Court after holding an enquiry contemplated in section 12 to issue a certificate of competence to a person whom he or she has found to be competent to appear as an intermediary in the court concerned. Before the head of court issues the certificate of competence, he or she must cause the persons found competent to be appointed as an intermediary to take the oath or make the affirmation.

[48] The certification by the judicial head is an alternative to the one that the presiding officer must do during trial proceedings. If the intermediary is certified by the judicial head and sworn in, it is not necessary in my view, for a presiding officer to

conduct a competency test again, once he/she is satisfied that the intermediary is certified to be an intermediary for that category of witnesses. The submission of certified copies of the certificate of competence and oath or affirmation taken will be sufficient.

[49] Ordinarily, an enquiry into the competency of a person to be appointed as an intermediary and taking the oath by intermediaries take up valuable court time. In various courts, the same person served as an intermediary numerous times. In order to ensure the competence of the intermediary, the court had to conduct an inquiry and the intermediary was required to take an oath or affirmation every time she appeared in court. Unfortunately, this process consumed valuable court time. The certification by the head of court is intended to alleviate this problem. It aims to save time during court proceedings and promote functional efficiency. However, the head of court's certification does not prohibit a judicial officer presiding over proceedings from holding an enquiry regarding a person's competence to act as an intermediary at any stage of the proceedings.

[50] Importantly, section 11 of the Act obligates any person who is found to be competent to be appointed as an intermediary to take an oath or make such affirmation before commencing with her functions in terms of the section. The intended intermediary must confirm that to the best of her ability, she will perform her functions as an intermediary and will convey properly and accurately all questions put to witnesses and, where necessary, convey the general purport of any questions to the witness, unless directed otherwise by the court.

Application of this section to the present matter

[51] In the present matter, the evidence of Colonel Clark, the Clinical Psychologist, remains uncontroverted. The defence did not present any scientific evidence to counter the evidence of Colonel Clark. She assessed the witness in counts 111 - 113 and noted that this witness has been experiencing visual and auditory hallucinations since 2016. She used multifaceted tests to measure the mental age of the witness. Colonel Clark further stated that the two witnesses are suffering from PTSD. According to Colonel Clark, the witness in counts 120 - 123 displayed symptoms of depression, so much so that he wanted to shoot himself.

[52] Her evidence was that the witness in counts 111 - 113, whom the State intends to call, is not intellectually impaired but is functioning cognitively on the border between average intelligence and mild impairment. It was her evidence that if these witnesses were to be called to testify in court without the assistance of a court-appointed intermediary, they may decompensate during their evidence. In my view, it is evident from the evidential material placed before this court that the two witnesses suffer from psychological and emotional conditions as envisaged in the amended section 170A (1)(b).

[53] Evidently, they will suffer undue psychological, trauma, and mental stress if they testify without the assistance of an intermediary. In my view, the two witnesses fall squarely within the purview of section 170A as amended. The two witnesses are exhibiting symptoms of PTSD, and one is functioning within the range of mild intellectual impairment. Colonel Clark stated that the witness in count 120 - 123 felt

numb and depressed. The witness was visibly distressed as he narrated the events he witnessed. These witnesses will break down if an intermediary does not assist them. They fear the accused. It was reported that as the victims are experiencing symptoms of PSTD, they may be re-victimized and re-traumatized by testifying in open court. Colonel Clark recommended that the witnesses be permitted to testify via closed-circuit television or some other similar media with the assistance of a court-appointed intermediary. In my view, these recommendations are unimpeachable and cannot be faulted.

[54] The two witnesses are said to have witnessed the gruesome killing of their parents committed in their presence. In my view, an intermediary with the knowledge of dealing with patients who have PTSD must be appointed for each witness when their evidence is tendered. I am further of the opinion that to allow them to give their evidence freely without fear of repercussions; their identity must not be revealed or published. Furthermore, their evidence must be rendered in camera and through a close circuit television.

The Constitutionality of sections 153(5), 164(1), and 170A of the CPA

[55] As far as the constitutional issues raised by the State are concerned, I am of the view that there are merits in the argument raised by the State. It must be borne in mind that the Bill of Rights in the South African Constitution is renowned for its extensive commitment to the protection of the rights of children in section 28, particularly section 28(2), which emphatically underscores the paramountcy of the child's best interests. The Constitution emphasises children's best interests while

envisaging the limitation of fundamental rights in certain circumstances. For brevity's sake, section 28(2) provides: 'A child's best interests are of paramount importance in every matter concerning the child.' Meanwhile, section 28(3) provides that 'in this section, child means a person under the age of 18 years.'

[56] From the apt reading of sections 153(5) and 170A, a child witness loses that protection when he or she reaches the age of majority. In *Centre for Child Law and Others v Media 24 Limited and Others,*[14] the Constitutional Court observed within the context of section 153(3), which fell short of protecting child victims, that the ongoing protection for children as the default position accounts for adequate protection as well as evolving capacities and fosters conditions that allow children to maximize opportunities and lead happy and productive lives. Importantly, the court found that a child who has experienced trauma, be it as a victim, a witness, or an accused, should not, as a result of turning 18, have their story and identity exposed without their consent or necessary judicial oversight. A lack of ongoing protection infringes on the rights of dignity, privacy, and the child's best interest. There, the court dealt with section 153. I do not understand the finding of the Constitutional Court on ongoing protection to be limited exclusively to matters relating to section 153.

[57] I must emphasise that witnessing a traumatic event may have long-term deleterious effects on a child even after reaching the age of majority. It cannot be said that the trauma or anguish that a child experiences after witnessing a horrific crime committed in his presence simply disappears when he reaches the age of majority. Seeing such a horrendous act has a long-lasting effect on a child. For instance, in this

[14] 2020 (4) SA 319 (CC).

case, it is alleged that the witnesses were minor children at the time they witnessed the killing of their parents. However, it is reported that pursuant to that, these witnesses suffer from PTSD even after reaching the age of majority. It was further reported that both wanted to commit suicide due to what they witnessed while they were minors. The effects of witnessing a gruesome crime are detrimental to the psychological well-being of a child even when he/she is of age.

[58] I share the view expressed by Block, who argues that witnessing a traumatic event may have a lasting effect on a child's mental health, educational progress, and personality development.[15] In my view, there are merits in the argument raised by the State that sections 170A, and 153(5) should provide for the ongoing protection of children who witnessed the commission of a crime while they were young and should testify after reaching the age of majority. I have some doubts, though, on section 164(1).

[59] Notwithstanding, I am mindful that this case stands on a different footing. More than once, the Constitutional Court has warned that when it is possible to decide a case without raising a constitutional issue, such a course is to be followed. In *S v Mhlungu & Others*,[16] Kentridge J, as he then was, emphasised this principle while dealing with the referral of a matter to the Constitutional Court, stating:

> 'Moreover, once the evidence in the case is heard it may turn out that the constitutional issue is not after all decisive. I would lay it down as a general principle that where it is

[15] Dora Block 'Witnessing adults' violence: the effects on children and adolescents' *Advances in Psychiatric Treatment* (1998), vol. 4, pp. 202-210.
[16] 1995 (3) SA 867 (CC) para 59. See also *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC) at para 13.

possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed…'

[60] In *Motsepe v Commissioner of Inland Revenue,*[17] the Constitutional Court quoted this principle with approval. Ackermann J, writing for the majority, noted:

'The referral may very well be defective for another reason. This court has laid down the general principle that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed, and has applied this principle specifically to s 102(1) referrals and *obiter* to applications for direct access. On an objective assessment of the present case it was unnecessary to decide the constitutional issue because Mrs Motsepe could, by following the objection and appeal procedures provided for in the Act, have avoided the barriers imposed by ss 92 and 94 of the Act and the sequestration application could have been decided in the light of the outcome of such procedures.'

[61] From the foregoing, I deem it unnecessary to consider further the constitutionality of the sections impugned by the State. I would leave that question to be decided on another day. This case can easily be decided without reaching a constitutional issue. In any event, I am of the opinion that any prejudice that may be suffered by child witness who have since reached majority is ameliorated by the new amendment to section 170A. The evidence that was presented, in my view, makes it abundantly clear that the two witnesses need protection from undue mental and psychological stress. They must be shielded from secondary trauma when they recount the evidence in court. They fear for their lives and must be protected to give a full and candid account of the acts complained of with ease. Both suffer from PTSD, which is a psychological condition envisaged in subsection 170A(1)(b). I am of the view that if the evidence of these two witnesses is heard in an open court, it would expose them to emotional, trauma or suffering. More so, it is most likely that these

[17] 1997 (2) SA 898 (CC) para 21.

witnesses would decompensate at the witness stand, particularly during cross-examination, if a court-appointed intermediary does not assist them.

Order

[62] In the result, the following order is granted:

62.1 The application of the State to have the two witnesses testify through the assistance of an intermediary in terms of section 170A of the Criminal Procedure Act 51 of 1977, is hereby granted. The intermediary must be a person who understands witnesses suffering from PTSD and psychological problems.

62.2 It is further ordered that the two witnesses would testify through a close circuit television in terms of section 158(2) of the CPA and that their evidence will be heard behind closed doors in terms of section 153.

62.3 The name and identity of the two witnesses in question in respect of the proceedings in court shall not be disclosed to the public.

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LEKHULENI J

JUDGE OF THE HIGH COURT