

Revisiting section 170A of the Criminal Procedure Act 51 of 1977

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OPSOMMING

'n Herbesinning oor artikel 170A van die Strafproseswet 51 van 1977

In hierdie artikel word aangevoer dat die reg tot redelik onlangs nie ag geslaan het op die spanning en trauma wat kinderklare en -getuies in gevalle van geslagsmisdade (seksuele misdrywe) ondervind wanneer hulle in 'n hof getuie is. Daar word aangevoer dat dit nou algemeen aanvaar word dat kinders wat slagoffers en getuies is besonder kwesbaar is en spesiale beskerming, ondersteuning en bystand nodig het ooreenkomstig hulle ouderdom, vlak van volwassenheid en ander eiesoortige behoeftes ten einde onnodige trauma te voorkom wat gewoonlik met hulle deelname aan sake wat met seksuele mishandeling verband hou gepaard gaan. Dit word aangevoer dat die Suid-Afrikaanse regering as gevolg van hierdie aangeleenthede genoop was om wetgewing en prosesse daar te stel wat op kinderslagoffers van misdad en kindergeuies in strafsake van toepassing is. Artikel 170A is spesifiek gepromulgeer ten einde die trauma van kindergeuies te verlig deur daarvoor voorsiening te maak dat 'n tussenganger aangestel kan word waardeur ondervraging en kruisondervraging van die kindergeuie kan plaasvind. Die Konstitusionele Hof se beslissing in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* word bespreek en verwelkom. Daar word aangevoer dat hierdie beslissing die korrekte benadering tot die toepassing van artikel 170A daarstel.

1 INTRODUCTION

Over the years, whenever children were required to give evidence in courts, no attention was paid to the trauma or stress suffered by such children.¹ The law was indifferent to the mental stress and indignity suffered by child witnesses or complainants of sexual abuse. In most cases, they were required to give evidence in the presence of the accused.² The result is that child witnesses or complainants of sexual abuse were usually subjected to the most brutal and humiliating treatment by being required to relate the abuse suffered in the most intimate detail.³

It is now generally accepted that children who are victims or witnesses are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent

1 See *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 7 BCLR 637.

2 *Ibid.*

3 Muller and Tait "Little witnesses: A suggestion for improving the lot of children in court" 1999 *THRHR* 241–242; see also Songca and Le Roux "The evidence of young children: Establishing the truth in South African criminal courts" 2004 *SACJ* 310 311.

further hardship and trauma that may result from their participation in cases involving sexual abuse.⁴ This empathy towards child witnesses prompted professionals and countries such as South Africa to review, amend and or craft legislation and policies that address key issues related to child victims and witnesses of crime.⁵ For example, section 170A⁶ was inserted into the Criminal Procedure Act. Its aim is to prevent children from undergoing “undue mental stress or suffering” while giving evidence in court.⁷ It does this by allowing children to testify through an intermediary.⁸ Moreover, countries such as South Africa are expected to implement international conventions on the rights of children which they have ratified.⁹ In fact, South Africa has a reputation for complying with its international obligations. The country’s legislation on children and section 28 of the Constitution were inspired by regional and international conventions on the rights of children.

Although section 170A was intended to protect child witnesses or complainants of sexual abuse, the courts interpret the provisions of the section differently, resulting in continued stress or trauma being suffered by these children.¹⁰

In this paper the writer looks at how the Constitutional Court has interpreted section 170A of the Criminal Procedure Act 51 of 1977 (CPA)¹¹ and also discusses other measures which have been used by South African courts to protect child witnesses or complainants of sexual offences. It is argued that these measures should be applied whenever children are required to give evidence in court.

2 INTERPRETATION OF SECTION 170A OF THE CRIMINAL PROCEDURE ACT

South Africa follows the adversarial system which entitles the accused to be present at his trial and to cross examine any witness who gives evidence against him

4 See UN Economic and Social Council (ECOSOC) Resolution Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime 2005/20 of July 2005.

5 Recent legislation on the protection of children’s rights includes the Children’s Act 38 of 2005; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and the Child Justice Act 75 of 2008.

6 Of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Law Amendment Act 135 of 1991; s 170A commenced on 30 July 1993.

7 See *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 637 669B.

8 *Ibid.*

9 Eg, South Africa ratified the United Nations Convention on the Rights of the Child on 16 July 1995; the African Charter on the Rights and Welfare of the Child on 7 January 2000, and the United Nations Convention on the Rights of Persons with Disabilities on 30 November 2008. The Convention elaborates in detail the rights of persons with disabilities, including children, under international law and sets out a code of implementation for governments. Children with disabilities have a prominent place in the Convention. They are recognised as a distinct constituency, deserving special attention due to the particular vulnerabilities they face as a result of their youth. A full discussion on the Convention is beyond the scope of this article.

10 See *K v The Regional Court Magistrate* 1996 SACR 434(E); *S v Stefaans* 1999 1 SACR 182(C); *S v F* 1999 1 SACR 571 (C).

11 In 1991, the Criminal Law Amendment Act 135 of 1991 amended the Criminal Procedure Act 51 of 1977 by introducing s 170A, allowing children to testify through intermediaries. S 170A commenced on 30 July 1993.

or her. It is argued that this system has contributed to the trauma and plight of

child witnesses in sexual offence cases.¹² It is for that reason that the South African Law Commission in 1989 instituted an investigation into the plight faced by child witnesses. It recommended that a procedure of “translated” cross-examination be used to curtail the negative aspects of the adversarial system. Following these recommendations, section 170A was inserted into the Criminal Procedure Act.¹³ It made provision for the appointment of an intermediary to enable a witness to give evidence through that intermediary and through whom examination and cross-examination is conducted.¹⁴ South African courts adopted different approaches when interpreting section 170A. Although it has generally been accepted that the section has alleviated some of the stresses experienced by child witnesses, courts have until recently interpreted the provisions of the section differently, resulting in suggestions that some sections of the statute be amended.¹⁵ Consequently, the original section 170A was amended in 2001 and it now provides 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 evidence through that intermediary.¹⁶

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

(b) The intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place—

- (a) which is informally arranged to set the witness at ease;
- (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.”

In addition, the first portions of the Children’s Act¹⁷ came into operation in July 2007. The Act is expressly aimed at recognising children’s rights in practice.¹⁸

12 See Key “The child witness: The battle for justice” 1988 *De Rebus* 54 55; see also Muller and Tait 1999 *THRHR* 241–242; Songca and Le Roux 2004 *SACJ* 311.

13 Criminal Law Amendment Act 135 of 1991. It entered into effect in 1993.

14 The use of an intermediary in criminal proceedings is also sanctioned by s 61(2) of the Children’s Act of 2005.

15 Muller and Tait “The child witness and the accused’s right to cross-examination” 1997 *TSAR* 519; Holley and Muller “The child witness: A need for court preparation” 1999 *Obiter* 368 369; see also Songca *Aspects of sexual abuse of children: A comparative study* (LLD Thesis UP 2003) 268 (hereafter Songca Thesis).

16 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 inserted “the biological or mental” before the age of eighteen years.

17 38 of 2005.

18 See *S v Albert Phaswane and Aaron Mokoena* NGHC 24-10-2008, case CC7/07 (unreported).

In its Preamble, the Act reiterates and recognises rights provided for in section 28 of the Constitution. The Act further states that in all matters concerning the protection, care and well-being of the child, the child's best interest must always be of paramount importance.¹⁹ The Act recognises the fact that children are human beings and individuals and should have a say in matters that affect them.

Moreover, the Act recognises the special needs of children because of their uniqueness and vulnerability. It does so by requiring that court proceedings be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.²⁰ The Act also requires proceedings of the children's court to be held in a locality specifically adapted to put children at ease and be conducive to informal proceedings.²¹

For its part, the Criminal Law (Sexual Offences and Related Matters) Amendment Act²² added a few provisions to the Act.

The Child Justice Act²³ establishes a criminal justice system for children in conflict with the law and makes provision for diverting matters involving children who have committed crimes away from the criminal justice system. Children whose matters are not diverted are to be dealt with in the criminal justice system in child justice courts.²⁴ In its Preamble the Act recognises that before the advent of our constitutional democracy in 1994, many children, especially black children, were denied the opportunity to live and act like children and also that

19 S 9 Children's Act.

20 S 60(3).

21 S 42(8).

22 32 of 2007: "(7) The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings.

(8) An intermediary referred to in subsection (1) shall be summoned to appear in court on a specified date at a specified place and time to act as an intermediary; and

(9) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court—

(a) is for any reason absent;

(b) becomes unable to act as an intermediary in the opinion of the court; or

(c) dies,

the court may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor—

postpone the proceedings in order to obtain the intermediary's presence

summons the intermediary to appear before the court to advance reasons for being absent;

direct that the appointment of the intermediary be revoked and appoint another intermediary; or

direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of the intermediary.

(10) The court shall immediately give reasons for any direction or order referred to in subsection (9)(iv), which reasons shall be entered into the record of the proceedings."

23 75 of 2008. The Act came into effect on 11 May 2009.

24 In its guiding principles the Act enjoins those implementing it to recognise the rights and obligations of children in international and regional conventions, in particular the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. In addition it compels triers of fact to address children in a language and in a manner appropriate to their age and intellectual development. The Act may also be invoked where a child in a sexual molestation case is the alleged perpetrator.

some children as a result of the circumstances in which they find themselves have come into conflict with the law.

3 OTHER MEASURES TO PROTECT CHILD WITNESSES AND COMPLAINANTS OF SEXUAL OFFENCES

After the democratic elections in 1994, the government undertook not only to improve the lives and rights of children but also to transform our legal system. Our state's foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law, introduce a new ethos that should pervade our legal system.²⁵ In terms of the supremacy clause, the Constitution is the supreme law, any law or conduct that is inconsistent with it is invalid.²⁶ The executive, legislature and judiciary are bound by the Constitution, all these organs of state are required to exercise their role and perform their functions subject to the Constitution. Moreover, section 39(2) of the Constitution provides that, when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights.²⁷

Resonating with the above constitutional provisions, section 28(1)(d) states that every child has the right to be "protected from maltreatment, neglect, abuse or degradation" and section 28(2) provides that "a child's best interests are of paramount importance in every matter concerning the child". The Constitution enjoins the triers of fact to protect children whenever they are required to give evidence in court, either as witnesses or complainants. It is the writer's view that section 28 places a burden on the state and its organs to intervene on behalf of a child witness or complainant once a *prima facie* case of abuse has been established.

International and human rights conventions such as the United Nations Convention on the Rights of Children²⁸ and the African Charter on the Rights and Welfare of the Child²⁹ have played an important role in guiding policy in South Africa in relation to children and embedding a children's rights ethos in the Republic. It is now common practice for courts to refer to international instruments and South Africa has integrated some international conventions into domestic law. For instance, the Convention on the Rights of the Child has helped state parties, including South Africa, to develop a culture of listening to children and being sensitive to their needs. In addition, the Convention has created new rights under international law for children where no such rights previously existed. For example, sexual abuse was not expressly prohibited under international law until the adoption of the Convention.³⁰ Secondly, the Convention put into place rights

25 See *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 7 BCLR 637; see also s 1 of the Constitution of the Republic of South Africa, 1996.

26 S 2 of the Constitution, 1996.

27 See also Ngcobo J in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 650F–G.

28 The Convention came into force on 2 September 1990. South Africa ratified the Convention in June 1995.

29 It came into force on 29 November 1999, and was ratified by South Africa on 7 January 2000.

30 Van Bueren "Child sexual abuse and exploitation: A suggested human rights approach" 1994 *IJCR* 45 46; see also Songca Thesis 98.

which were initially acknowledged or applied under regional human rights treaties, but are now enshrined in a global treaty. These rights include the child's right to be heard either directly or indirectly in any judicial or administrative proceedings and to have their views taken into account.³¹ Thirdly, the Convention has created standards, which before it came into effect were only non-binding recommendations. Fourthly, the Convention requires state parties not to discriminate against children in their enjoyment of the Convention's rights.

The African Charter on the Rights and Welfare of the Child has three principles: first, the best interest of the child principle, similar to that of section 28 of the Constitution.³² The Charter states that in all actions concerning children, whether undertaken by private or public institutions, the best interest of the child shall be the primary consideration.³³ Second, the principle of non-discrimination is established as an overriding principle. In terms of this principle, children are entitled to equal enjoyment of the rights under the Charter irrespective of who they and their parents are.³⁴ Third, the supremacy of the Charter over harmful practices and customs recognises the fact that culture and tradition play an important role in the lives of African people. Nevertheless, the Charter asserts its own primacy above culture and customs that are prejudicial to the health or the life of a child or discriminatory to the child on the basis of sex.³⁵

The common denominator between the African Charter on the Rights and Welfare of the Child, the Convention on the Rights of the Child and section 28 of the Constitution is the right of the child to be a child and his or her right to enjoy special care.³⁶ The writer supports the view that courts are now under an obligation to look at the effect their decisions will have on the rights and interests of children.³⁷ Courts are bound to give effect to the provisions of section 28 of the Constitution and to refer to regional and international instruments on the protection of children.³⁸

The section below is a critical appraisal and discussion of section 170A of the Criminal Procedure Act. It discusses the section in light of a recent Constitutional Court decision.

4 DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL V MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT³⁹

The Constitutional Court was recently called upon to give proper interpretation and content to section 170A of the CPA. To this end the Constitutional Court established the correct approach in the accused's cases. In the case of Phaswane, the accused was charged with the rape of a thirteen year-old girl. The complainant was the younger sister of the accused's common law wife. Phaswane pleaded

31 Van Bueren 1994 *IJCR* 46.

32 Of 1996.

33 A 4 of the African Charter on the Rights and Welfare of the Child (1991).

34 Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to child law in South Africa* (2000) 214 219.

35 *Id* 220.

36 See *S v Albert Phaswane and Aaron Mokoena* Case 7/07 (T) and 192/07 (T).

37 See *Director of Public Prosecutions, Transvaal* 662C-F.

38 *Ibid*.

39 2009 7 BCLR 637.

not guilty to the charge. The complainant testified without the assistance of an intermediary and without the aid of a closed-circuit television (CCTV) or similar device. The case of Mokoena concerned the rape of an eleven year-old girl. The complainant testified through an intermediary. Both accused were found guilty of rape. Their cases were sent to the High Court for sentencing.

In the High Court Bertelsman J was of the view that the two cases raised similar constitutional issues pertaining to the protection of child complainants and child witnesses. He accordingly consolidated the cases and formulated the issues that he understood to have arisen.⁴⁰ He raised the constitutional validity of certain provisions of the CPA (including section 170A) and found them inconsistent with section 28(2) of the Constitution in that the protection they provided fell short of that which is required by section 28(2). He declared them invalid.⁴¹

The Director of Public Prosecutions (DPP), Pretoria, supported by various *amici*, sought confirmation of Bertelsman's findings in the Constitutional Court, whereas the Minister for Justice opposed the confirmation of the findings. The two accused also opposed the confirmation of the findings of invalidity in so far as it related to section 170A and to the extent that the findings may have a negative impact on their appeal. They also appealed against the findings of invalidity in relation to, among others, section 170A.

In the High Court, Bertelsman J had held that section 28(2) of the Constitution requires the child to be exposed to as little stress and mental anguish as possible.⁴² He found that the requirement of undue mental stress or suffering demands "an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon".⁴³ The High Court further found that the subsection requires that the child witness should first be exposed to "undue" stress or suffering before an intermediary may be appointed. It thus concluded that this requirement places a limitation upon the best interests of the child that is neither rational nor justifiable. The High Court further held that this limitation constitutes discrimination against the child and infringes the child witnesses' right to equal treatment, dignity and to a fair trial,⁴⁴ concluding, based on these observations, that the subsection is inconsistent with section 28(2) of the Constitution.

Before the Constitutional Court, while supporting the reasoning of the High Court, the DPP focused its attention on the absence of a definition of undue mental stress or suffering in the legislation. The DPP argued that the *lacunae* and the unbridled discretion given to judicial officers whether or not to appoint an intermediary resulted in inconsistencies in the meaning given to the phrase and its application.⁴⁵ It was further argued that the discretion given to judicial officers to make the appointment of the intermediary dependent upon how judicial officers exercise that discretion and that this added to the inconsistency in the application of section 170A.⁴⁶ The DPP averred that the inconsistent manner in which judicial officers have interpreted the phrase "undue mental stress and suffering",

40 646B–C.

41 643H–644A.

42 See *S v Mokoena* 2008 5 SA 578 (T).

43 667A.

44 667B–C.

45 See *S v Stefaans* 1999 1 SACR 182 (C); *S v F* 1999 1 SACR 571 (C); see also *Director of Public Prosecutions, Transvaal* 667C–E.

46 See *Director of Public Prosecutions, Transvaal* 667F.

coupled with the inconsistency in which courts exercise this discretion, have led to an inconsistent application of the subsection by the different courts, with the consequent inconsistent protection being afforded to child witnesses.⁴⁷

In addressing the arguments raised above, the Constitutional Court, per Ngcobo J, applied a four-pronged approach which sought to resolve the following issues. Firstly, the Constitutional Court had to determine the object of section 170A(1). Secondly, the Court had to determine the proper meaning of the phrase “undue mental stress or suffering”. Thirdly, the Court had to determine whether the subsection is capable of being implemented in a manner that is consistent with the Constitution. Fourthly, the Court had to investigate whether the subsection is unconstitutional to the extent that it gives discretion to the judicial officer whether or not to appoint an intermediary.⁴⁸

The Court traced the trajectory of section 170A(1). It was introduced into the CPA by the Criminal Law Amendment Act,⁴⁹ and subsequently amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act⁵⁰ which included the phrase “biological or mental” before the words “age of eighteen years”. Ngcobo J concluded that it is imperative that the CPA and the Sexual Offences Amendment Act should be read together to ascertain the object of section 170A(1).⁵¹

According to the Constitutional Court, the principal aim of section 170A(1) is to protect the child witness or complainant from mental stress or suffering when giving evidence in court.⁵² The provision affords this protection by allowing children to testify through an intermediary. An intermediary is an expert who possesses the necessary skills in dealing with children. The intermediary helps the child to communicate his or her experiences in a manner that is in keeping with the child’s age. The intermediary conveys the child’s experiences to the court and this person knows how to communicate with a child and does so in a manner that is neither intimidating nor embarrassing to the child.⁵³ The section also recognises the fact that giving evidence in court, before adults, the accused and other strangers is a stressful experience for children, which often results in a child being unable to relate his or her side of the story. An intermediary acts “as a link to bridge the communication gap between the child and the court”.⁵⁴

In addition, the provision allows the child to give evidence in a separate room, thereby obviating the need to confront the alleged perpetrator. Section 170A strikes a neat balance between the competing rights of the child and the alleged perpetrator by allowing the child to give evidence in another room via CCTV or a one-way mirror that blocks the child’s view of the accused, but allows the child and the intermediary to be seen.⁵⁵ Ngcobo J⁵⁶ correctly states, in the writer’s view, that section 170A(1) must be interpreted so as to give effect to its object of

47 667F–668A.

48 668D–F.

49 135 of 1991.

50 32 of 2007, hereafter referred to as the Sexual Offences Amendment Act.

51 669A–B.

52 669B–C; see also *K v The Regional Court Magistrate* 1996 1 SACR 434.

53 669C–D.

54 669I.

55 See 669G–670B.

56 670C.

protecting child witnesses or complainants from exposure to mental stress or suffering when giving evidence in court. Ngcobo J stated that this objective resonates intimately with section 28(2)⁵⁷ and article 3,⁵⁸ which both require that the child's best interests are of paramount importance in all matters concerning the child.⁵⁹

In determining the meaning of the phrase "undue mental stress or suffering" Ngcobo J evaluated the circumstances under which children are required to give evidence in court. Usually children are not prepared for the hostile atmosphere intrinsic to court procedures under an adversarial system.⁶⁰ Children do not understand the purpose for which questions are being asked in court⁶¹ and the role they are expected to play therein. The child also experiences problems with the language used in the courtroom.⁶²

Ngcobo J observed that the atmosphere in the courtroom is usually intended to be imposing. It is an atmosphere that is intimidating to the child. Cross-examination is often hostile and frequently used to intimidate and confuse the child witness or complainant.⁶³ Although the right to cross-examine a witness in full is regarded as a fundamental right of an accused, in reality cross-examination is aimed at eliciting information that is favourable to the accused, and to cast doubt upon the evidence given by the child witness or complainant. During cross-examination the child is taken through his or her evidence in the most intimate detail.⁶⁴ In addition, the child will be bullied by placing events, often months after they occurred, out of sequence and be accused of not being able to remember important details concerning an event. Moreover, the child will be subjected to the trauma of relating in the minutest detail the particulars of the sexual abuse. In some cases, the child's dilemma is exacerbated by the fact that she might be required to give evidence in the presence of the accused, as was the case in *Phaswane*. The accused will probably have threatened the child with death or severe physical harm if she tells anyone about what has been done to the child.⁶⁵

Narrating events leading up to and about sexual abuse might also be traumatic for the child. The child may have told different adults of her experience. She might first have confided in a relative or friend, then to a sister or mother and so on. Professionals have since established that children are reluctant to relate their experiences to several people, repetition tends to heighten their sense of shame or guilt at what had happened.⁶⁶

Ngcobo J then arrived at the conclusion, based partly on the above, that a child who testifies in court in the presence of the accused about abusive acts perpetrated upon her will invariably experience undue mental stress or suffering.

57 Constitution of the Republic of South Africa, 1996.

58 United Nations Convention on the Rights of the Child.

59 *Director of Public Prosecutions, Transvaal 670D*.

60 See Key 1988 *De Rebus* 54.

61 See Muller and Tait 1997 *TSAR* 519.

62 Brennan and Brennan "The battle for credibility" 1993 *New LJ* 623.

63 6701.

64 672D–G; see also Key 1988 *De Rebus* 54.

65 *Director of Public Prosecution, Transvaal 670H–671F*; Key 1988 *De Rebus* 54 55; see also Songca Thesis 291.

66 Ngcobo J 672J–673A.

The child's ordeal will be heightened when she is subjected to intensive, aggressive cross-examination by the accused or his representative. These experiences will be as traumatic and devastating to the psychological well-being of the child as the abusive act was.⁶⁷ The interpretation of Ngcobo J of "undue mental stress or suffering" deviates from the one adopted by Mitchell AJ in *S v Stefaans*.⁶⁸ In the latter case the accused was convicted in the Regional Court of the rape of a sixteen-and-a-half year-old girl. On appeal, the accused requested the court to expound on the correct approach to the application for the appointment of an intermediary. Mitchell AJ stated that the court must satisfy itself that the witness might suffer stress if required to testify and that there needs to be a real danger of the child suffering from undue mental stress if required to give evidence in an open court. The judge stated further that the stress should be in excess of ordinary stresses.

On the other hand, Ngcobo J's point of departure when interpreting the provisions of section 170A(1) was to state explicitly that the section does not require that the child must first be exposed to undue mental stress or suffering before the provision may be invoked.⁶⁹ He stated that the objective of the section is to prevent a child from being exposed to undue mental stress or suffering as a result of testifying in court. He was of the view that a construction of the section that requires the child to be exposed to undue mental stress or suffering before an intermediary may be appointed is contrary to the objects of section 28(2) of the Constitution and section 170A(1) of the CPA and should be rejected.⁷⁰

Ngcobo J argued that what the section contemplates is that a child should be assessed by a professional (eg a social worker) to determine whether the services of an intermediary are required. This process should occur before the child testifies in court. Following such an assessment, the social worker may then recommend that an intermediary be appointed. On the date of the trial and before the child testifies, the state should apply for the appointment of an intermediary.⁷¹ The judge is of the view that section 170A(1), read with section 170A(3), contemplates that, in every trial in which a child is to testify and where an application for an appointment of an intermediary is not made by the prosecution, the court should enquire *mere motu* into the desirability of appointing an intermediary. The purpose of this enquiry is to prevent the child from exposure to undue mental stress or suffering that may arise from testifying in court.

Ngcobo J was also enjoined to determine the constitutionality of section 170A(1) in so far as it confers a discretion on judicial officers whether or not to appoint an intermediary. The judge dismissed the argument that the subsection is unconstitutional because some judicial officers are likely to exercise their discretion incorrectly. Ngcobo J was of the view that the question to be determined is whether the subsection is unconstitutional merely because it confers discretion on judicial officers whether to appoint an intermediary.⁷²

Ngcobo J was at pains to explain that discretion allows judicial officers to apply a case-by-case approach to cases of a sexual nature involving children. The judge argued that is only through discretion that the goal of individualised justice

67 673A–C.

68 1999 1 SACR 182 (C).

69 *Director of Public Prosecutions Transvaal* 673F.

70 673G.

71 673H.

72 675G.

may be achieved, allowing courts to recognise that every child is unique and has his or her own individual dignity, special needs, wishes and feelings.⁷³ This, by extension enjoins those considering the proving of fact to treat the child in a “caring and sensitive manner”, special attention being given to the child’s background, level of maturity, gender or disability.⁷⁴ Moreover, the exercise of this discretion enables the court to apply the provisions of the Act in a manner that will give effect to the provisions of section 170A and section 28(2) of the Constitution.⁷⁵ Nevertheless, the judge stated that the discretion given to judicial officers is not unbridled – it must be exercised with the objective of protecting a child from undue mental stress or suffering that may arise from testifying in court.⁷⁶

The exercise of a judicial discretion in the appointment of an intermediary allows a judicial officer to take into account and examine the views and needs of each child. This, in the Ngcobo J’s view, gives effect to the principle that the best interests of the child are of paramount importance in matters concerning the child.⁷⁷ Ngcobo J concluded that the discretion given to judicial officers on whether or not to appoint an intermediary is not, given the above reasoning, inconsistent with section 28(2) of the Constitution.

5 CONCLUSION

South African courts have over the past fifteen years developed an ethos of children’s rights whereby children are recognised as individuals and are given the opportunity to express their views on matters that affect them. Most countries – including South Africa – recognise that in all actions concerning children, whether undertaken by private or public institutions, the best interests of the child must be the primary consideration. Courts recognise that children are vulnerable and need special protection and assistance from the alien courtroom environment and the trauma that may result from their participation in the criminal process.

These concerns prompted the South African government to develop policies, legislation and procedures to protect children who are victims of crime and witnesses in criminal proceedings. Section 170A was promulgated specifically to alleviate the trauma of children who give evidence in court by making provision for the appointment of an intermediary through whom examination and cross-examination are conducted. It allows the child to give evidence without having to face the accused.

The article analysed the Constitutional Court’s decision the above-mentioned case. It is envisaged that the case has finally established the correct approach regarding the application of section 170A, namely:

- Section 170A must always be interpreted as to give effect to its object of protecting child witnesses or complainants from exposure to mental stress or suffering when giving evidence in court.

73 See *Director of Public Prosecutions, Transvaal* 676F–G; see also ECOSOC Resolution 2005/20 July 2005 “Guidelines on Justice in Matters Involving Child victims and Witnesses of Crime”, para 10.

74 *Director of Public Prosecutions, Transvaal* per Ngcobo J 676F–G.

75 677E.

76 677G.

77 676G–677A.

- In determining the meaning of the phrase “undue mental stress or suffering”, courts should evaluate the circumstances under which children are required to give evidence in court. Children are usually not familiar with the hostile courtroom environment, courtroom procedures and the role they are expected to play therein. A child who testifies under these circumstances will invariably experience undue mental stress or suffering. Section 170A is meant to prevent this by making provision for children to testify through an intermediary, away from the accused and in a child-friendly room.
- The section does not require that the child must first be exposed to mental stress or suffering before it may be invoked. The objective of the section is to prevent a child from being exposed to undue mental stress or suffering as a result of testifying in court. An assessment of the child should be undertaken to determine whether the services of an intermediary is required. This process should take place before the child testifies. An application to this effect should be brought by the state. If not brought by the prosecution, the court should enquire *mere motu* into the desirability of appointing an intermediary.
- Regarding the constitutionality of section 170A in so far as it confers discretion on judicial officers whether to appoint an intermediary, the question to be determined is whether the subsection is unconstitutional merely because it confers discretion on judicial officers whether or not to appoint an intermediary. The discretion allows judicial officers to apply a case-by-case approach to cases of a sexual nature involving children. It is through discretion that the goal of individualised justice may be achieved. The exercise of discretion in the appointment of an intermediary allows a judicial officer to take into account and examine the views and needs of each child. This, in turn, gives effect to the principle that the child’s best interests are of paramount importance in matters concerning the child.