

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

Case No: 20427/22

In the matter between:

CAROLINE PETERS

Applicant

THE TRUSTEES FOR THE TIME BEING OF THE First Intervening Applicant
MEDIA MONITORING AFRICA BENEFIT TRUST

CAMPAIGN FOR FREE EXPRESSION NPC Second Intervening Applicant

And

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES First Respondent

MPUMELELO DERRICK GCAKASI Second Respondent

THE CLOONEY FOUNDATION FOR JUSTICE *Amicus Curiae*

APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. The applicant, Ms Caroline Peters, challenges the constitutional validity of the following two sections of the Criminal Procedure Act 51 of 1977 (the CPA), both of which concern the publication of information relating to sexual offences:¹
 - 1.1. the first is s 154(2)(b), which concerns the prohibition against the publication of any information relating to a charge involving a sexual offence (or extortion) before the accused has pleaded; and
 - 1.2. the second is s 335A, which concerns the prohibition against publication of the identity of persons towards or in connection with whom a sexual offence has been committed.
2. More specifically, Ms Peters' challenge concerns s 154(2)(b) and s 335A, insofar as they relate to the offences referred to in s 153(3)(a) and (b) of the CPA: *viz* any sexual offence and/or any act for the purposes of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32, 2007 (SORMA).
3. The intervening applicants challenge the constitutional validity of s 154(2)(b) insofar as it relates to the offence of extortion (that is, an offence referred to in s 153(3)(c) of the CPA). That challenge is not addressed in these submissions.
4. The core of the applicant's challenge is twofold: firstly, she challenges s 154(2)(b) on the basis that, read with s 154(5), it criminalises the publication of the identity

¹ Amended NoM: Record p 583.

of a person charged with committing a sexual offence before such person has pleaded to the charge; and secondly, she contends that both s 154(2)(b)² and s 335A are inconsistent with the Constitution because they criminalise the publication of any information that might reveal the identity of a victim of a sexual offence even where such victim voluntarily discloses her own identity or authorises another person to do so.

5. While the final remedy on how to cure the constitutional defects in the impugned provisions will lie with the Constitutional Court and/or the legislature in due course, the applicant proposes that, with suitable amendments to s 335A, that section will adequately cover any remaining legitimate purpose to be served by s 154(2)(b) in relation to sexual offences.
6. The applicant, therefore, recognises the inherent utility of s 335A insofar as it seeks expressly to protect the identity of victims of sexual offences.
7. The challenge to s 335A was introduced by way of an amendment to the Notice of Motion, which amendment was authorised on 19 September 2024 in the judgment and order of Molefe AJ.³ The premise underpinning this part of the challenge is that, although s 335A is expressly aimed at protecting a complainant's identity (and not that of the person accused of committing the offence), it ignores the complainant's agency to reveal her own identity without a court order or to give

² To the extent that this section also seeks to prohibit the publication of a victim's identity.

³ Judgment Interlocutory Application in terms of Rule 28(4): Record pp 568 – 582.

consent to a third party to do so. A contravention of the section by a victim, or any person authorised by her to disclose her identity, is a criminal offence.⁴

8. To the extent that s 335A has the aforesaid effect, it is plainly irrational and unconstitutional.
9. The first respondent, the Minister, appears to agree.
10. As appears from the Minister's further answering affidavit, she abides the challenge to ss 154(2)(b) and 335A insofar as these sections do not permit complainants to reveal their own identity.⁵
11. The Minister, thus, accepts that both sections, properly construed, prohibit and criminalise the disclosure by a complainant of his/or her own identity.
12. Despite the concession by the Minister, it remains necessary for this Court to independently satisfy itself that the provisions are inconsistent with the Constitution. In this regard, the Constitutional Court held the following in relation to confirmation proceedings in terms of s 172(2)(a) of the Constitution:

*“A thorough investigation of the constitutional status of a legislative provision is obligatory in confirmation proceedings. This is so even if the proceedings are not opposed, or even if there is an outright concession that the section under attack is invalid.”*⁶

⁴ Applicant's Replying Affidavit paras 30-34; Record p 433-435

⁵ Minister of Justice's Further Answering Affidavit at para 9.2; Record p 876

⁶ *Phillips v Director of Public Prosecutions* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 8; most recently reaffirmed in *Democratic Alliance v Minister of Home Affairs and Another* (CCT 184/23) [2025] ZACC 8; 2025 (7) BCLR 779 (CC); 2025 (4) SA 323 (CC) (6 May 2025) para 2.

13. Of necessity, the principle applies equally to a High Court considering such a challenge as the court of first instance. S 172(2)(a), read with ss 167(5) and 172(1)(a), creates a framework through which the constitutionality of a statute must first be heard in and determined by a High Court or court of similar status.
14. The role of the Constitutional Court in confirmation proceedings would be subverted if, contrary to the quoted passage above, a High Court was relieved of conducting a similar investigation in unopposed proceedings concerning the constitutional validity of a statute.
15. Accordingly, it is respectfully submitted that, notwithstanding the above concession by the Minister, this Court is required to evaluate and be satisfied that the impugned provisions are inconsistent with the Constitution to the extent that they do not permit complainants to reveal their own identity.
16. In addition, the applicant persists with her contention that s 154(2)(b) unjustifiably prohibits the publication of an accused's identity before he has pleaded. To the extent that it does so, the purpose is to protect the accused and not the complainant. Thus, the section is inconsistent with the Constitution on this basis, too.
17. The Minister opposes this part of the applicant's challenge and contends that s 154(2)(b) is not aimed at protecting the identity of an accused charged with having committed a sexual offence. The Minister contends that the section serves two purposes: (a) it creates a holding position until such time that a court may

make an order in terms of section 153(3) of the CPA; and (b) it serves to protect the identity of complainants in relation to the offences listed in section 153(3).⁷

18. For the reasons discussed later in these submissions, the applicant disagrees with the Minister's contention on this score. She points out that, even if the section were amended to allow a complainant to reveal her own identity, the section will continue to prohibit and criminalise the publication of the accused's identity before he has pleaded.⁸
19. Accordingly, this Court is required to evaluate and determine whether the impugned provision (a) prohibits the publication of information that will reveal the identity of an accused charged with a sexual offence; and (b) if it does, whether the impugned provision is inconsistent with the Constitution to the extent that it does so.
20. To sum up, the issues to be determined in Ms Peters' application are the following:
 - 20.1. whether s 154(2)(b) prohibits the publication of the identity of an accused charged with a sexual offence and whether it is inconsistent with the Constitution to the extent that it does;
 - 20.2. whether ss 154(2)(b) and 335A are inconsistent with the Constitution insofar as they do not permit complainants in matters involving sexual offences to reveal their identity; and

⁷ Answering Affidavit para 7.2: Record p 264.

⁸ Further Replying Affidavit para 48: Record p 1045.

20.3. the nature and extent of the remedy to be granted if any of the above questions are answered in the affirmative.

21. Before dealing with each of these issues in turn, it is necessary to set out the background which led to the institution of this application.

BACKGROUND

22. As a result of her own experience with sexual violence, the applicant has dedicated her life to assisting and supporting victims of sexual violence.⁹

23. In August 2021 the applicant became aware that the second respondent (the accused) had been charged with the rape of one Ms MN (the complainant).¹⁰

24. During October and November 2021 the applicant accompanied the complainant to the accused's appearances in the criminal proceedings in the Wynberg Court.¹¹ Following the appearances, the applicant posted photographs of the accused's back as well as the court roll to her Facebook page.¹²

25. On both occasions the accused had not yet pleaded to the charges of rape.

26. On 15 November 2021 the applicant became aware that the accused had made a criminal complaint against her for the alleged contravention of s 154(2)(b) of the CPA.¹³ It is these charges that prompted the applicant to launch this application and challenge the constitutional validity of that section.

⁹ Founding Affidavit (FA) paras 13 - 20: Record p 14 - 15

¹⁰ FA para 46; Record p 22

¹¹ FA para 52: Record p 23

¹² FA paras 52 – 64: Record p 23 - 25

¹³ FA paras 65 – 69: Record p 26

27. At that stage, the relief was limited to a declaration that s 154(2)(b) is unconstitutional and invalid to the extent that it criminalises the publication of any details of a person charged with committing a sexual offence before such person has pleaded to the charge. Recognising that the section also served (indirectly) to protect the identity of a complainant, the applicant contended (and still does) that that purpose is better served by making appropriate amendments to s 335A. An aspect to which we return in due course.
28. In the Minister's first answering affidavit, the then-Minister disavowed any reliance on a legislative intent to protect the identity of persons charged with a criminal offence. Instead, the then-Minister contended that the sole intention and purpose behind s 154(2)(b) is to protect the identity of complainants in matters concerning sexual offences. The current Minister persists with that contention.
29. In response, the applicant disputed the correctness of the Minister's interpretation. She further contended that, even on the Minister's interpretation, s 154(2)(b) would be unconstitutional to the extent that it criminalises the publication by a complainant of her own identity. That criticism, which arose from the Minister's attempt to justify s 154(2)(b), applies equally to s 335A.
30. This, then, led to the amendment of the Notice of Motion to include the additional challenge to s 335A in the public interest.
31. The applicant's standing to bring either of the challenges is not disputed.

32. It is now necessary, in order to establish a proper context for the relief sought, to discuss:

32.1. the rationale and importance of protecting the identity of victims of sexual offences for as long as they want their identity to be concealed;

32.2. the importance of encouraging and creating space for victims, activists and members of the public to perpetrators of sexual violence. We pause here to point out that the remedy proposed by the Minister¹⁴ will continue to criminalise the publication by a complainant of the identity of the accused. We shall return to this issue when we deal with remedy.

RATIONALE AND IMPORTANCE OF PROTECTING A VICTIM'S IDENTITY

33. It has long been the practice of the criminal justice system to prohibit the publication of the identity of victims in order for them to be protected from public scrutiny and judgement. This is based on a societal understanding that the nature of sexual offences is deeply personal and a legal acceptance that sexual violence offends against the constitutionally enshrined rights of equality, dignity, privacy and the right to be free from all forms of violence.

34. While it is acknowledged that in a perfect world where victims of sexual violence do not fear discrimination, experience feelings of shame, or get blamed for the sexual violence perpetrated against them, victims may be comfortable with their identities being published (after all, it is the perpetrators who have caused the

¹⁴ Further Answering Affidavit: Record p 911

harm, while victims continue to shoulder the burden and consequences of the offence).

35. The Minister has presented extensive evidence on the rationale for protecting victims of sexual offences from having their identities revealed before they are ready.
36. Ironically, the need for such protection reinforces and perpetuates the stereotypes that being a victim of sexual violence is indeed something about which to be ashamed and hidden from the public. It is a sad reality.
37. But victims of sexual violence also need to feel heard, believed and supported by communities and the criminal justice system.
38. The Minister now acknowledges that if a complainant chooses to forgo the protections contained in ss 154(2)(b) and/or 335A, their agency must be legally recognised and they should be entitled to do so.¹⁵ The concession arises from the acknowledgment that there is no rational connection between the purpose of protecting complainants and a prohibition which prevents them from revealing their own identity. The legislative history suggests that the basis for limiting a complainant's autonomy was to prevent the media from 'buying' a complainant's consent.¹⁶ The approach is tantamount to silencing women 'for their own good' and is unjustifiable. The Minister agrees.

¹⁵ Further Answering Affidavit para 29: Record p 884

¹⁶ Ibid at para 28: Record p 884

CREATING SPACE TO EXPOSE SEXUAL VIOLENCE

39. Here, too, the Minister and the applicant appear to be in agreement that there is no place in our society for a law that seeks, as its objective, to protect the identity of persons accused of committing sexual offences (the point of contention being whether s 154(2)(b) is such a law).
40. To this extent, the Minister's renunciation of any such objective aimed at protecting the identity of an accused charged with a sexual offence is consistent with the Government's general approach to addressing the scourge of sexual violence in our country.
41. The founding affidavit demonstrates that, since 2013, the message from the Government has been to encourage victims of sexual violence and members of the public to "*Report gender based violence!*" and "*...Stand up against gender-based violence. Report all cases of rape, sexual assault or any form of violence to a local police station...*", and stating that "*...perpetrators should not be protected but reported so that the law can take its course and justice can be served*".¹⁷
42. After reflecting on the Government's public stance on naming perpetrators of sexual violence, the applicant posited that s 154(2)(b) '*is a relic of a time when women were silenced and misogynistic men's reputations were protected*'. As we discuss later in these submissions, there is support for this proposition in the legislative history which resulted in the eventual enactment of s 154(2)(b).

¹⁷ Founding Affidavit paras 83 – 109; Record pp 30 – 36.

43. The founding affidavit further addresses the benefits of naming the person accused of committing a sexual offence before they have pleaded.¹⁸ Three of the most profound benefits are that:

43.1. it may encourage other victims to come forward;

43.2. it may enhance the quality of investigations; and

43.3. it may alert women to the dangers of associating or coming into contact with the particular accused sexual offender.

THE NATURE, PURPOSE AND EFFECT OF S 154(2)(b)

44. S 154(2)(b) of the CPA provides the following:

No person shall at any stage before the appearance of an accused in a court upon any charge referred to in section 153(3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information relating to the charge in question.

45. S 154(5), in turn, provides that:

Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153 (2), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both such fine and

¹⁸ Founding Affidavit paras 154 – 161: Record pp 50 – 54.

such imprisonment if the person in respect of whom the publication or revelation of identity was done, is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

46. As explained above, the genesis of this application is the applicant's contention that s 154(2)(b) unjustifiably seeks to protect the identity of an accused before he has pleaded.
47. The Minister disagrees and contends that it exists for the protection of the complainant and not the accused.
48. The first step in determining whether s 154(2)(b) is consistent with the Constitution, therefore, requires an interpretation of the impugned provision. As the Constitutional Court recently reiterated in *VVC v JRM*¹⁹, the interpretation must consider the text in context and have regard to the statute as a whole. The Court also recognised that the historical background to the impugned provision is an important part of the context and the interpretive exercise.²⁰
49. In *University of Johannesburg v Auckland Park Theological Seminary and Another*²¹ the Constitutional Court, with reference to the oft-cited case of *Endumeni*²² stated the following:

¹⁹ *VVC v JRM and Others* (CCT202/24) [2026] ZACC 2 (21 January 2026) at

²⁰ *VVC v JRM* paras 33 – 38.

²¹ *University of Johannesburg v Auckland Park Theological Seminary and Another* (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) (11 June 2021)

²² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA)

“[64] The Supreme Court of Appeal famously set out the position in the following widely quoted statement in its decision in *Endumeni*:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the

purpose of the provision and the background to the preparation and production of the document.”

[65] This approach to interpretation requires that “from the outset one considers the context and the language together, with neither predominating over the other”. In Chisuse, although speaking in the context of statutory interpretation, this Court held that this “now settled” approach to interpretation, is a “unitary” exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

[66] The approach in Endumeni “updated” the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous.

50. The Minister has gone to great lengths in all her pleadings to persuade the Court that the purpose and legislative intention of the impugned section is for the sole purpose of protecting a complainant and her identity.
51. The Minister does so, not with reference to the text of s 154(2)(b), but to the legislative history that ultimately culminated in the current version of the CPA and the introduction of s 154(2)(b). It is useful to recap the history on which the Minister relies:²³

²³ Answering Affidavit paras 9 – 16: Record 267 – 270; Further Answering Affidavit paras 18 – 36: Record pp 881 – 886.

- 51.1. s 220*bis* of the Criminal Procedure and Evidence Act 31 of 1917 prohibited the publication of any information relating to the trial involving an indecent act, unless the presiding officer, *after having consulted the person against or in connection with whom the offence charged is alleged to have been committed*, has given consent to such publication;
 - 51.2. s 69(5) of the 1917 Act contained similar provisions in relation to a preparatory examination;
 - 51.3. ss 386 and 64(5) of the Criminal Procedure Act 56 of 1955 contained provisions substantially similar to those contained in the 1917 Act.
52. Whatever patriarchal agenda motivated the introduction of these sections at the time, what is immediately apparent is that they all permitted publication of the otherwise prohibited information after consultation with the victim. Thus, while the nature of the information that was subject to the prohibitions was broadly framed, the requirement of consultation with the victim made it clear that the purpose was to conceal information that, if published, might be detrimental to the victim.
53. The earlier provisions also did not have an arbitrary cut-off date linked to the accused's plea.
54. In the current iteration of the CPA, ss 154(2)(a), 154(3)(a) and 335A all contain internal textual limitations which leave the subject of their protection in no doubt.

- 54.1. ss 154(2)(a) and 335A expressly prohibit the publication of any information which might reveal the identity of a complainant;
- 54.2. s 154(3)(a) prohibits the publication of any information which may reveal the identity of an accused, a witness or a complainant who was under the age of 18 years at the time of the alleged commission of an offence.
55. What this demonstrates is that, where the legislature intends to limit the protection of a particular section for the benefit of a complainant, it does so clearly and expressly.
56. But s 154(2)(b) contains no such textual limitation.
57. The Minister tries to get around this obvious anomaly by stating simply that:
- “While the section has the unintended, and indirect, effect of protecting the reputation of accused persons from spurious complaints, the legislative history of the provision makes it clear that it was not enacted for that purpose.”*²⁴
58. Admittedly, the statement was made in the context of dealing with a similar concern raised by the Law Commission, but the choice of words is, nevertheless, quite telling.
- 58.1. Firstly, because the section does not only protect the reputation of accused persons from ‘spurious complaints’. It protects the identity of accused persons in all complaints.

²⁴ Answering Affidavit para 30: Record p 276.

58.2. Second, and more fundamentally, the Minister's own explanation illustrates that protecting the reputation of accused persons in matters involving sexual offences does not serve any legitimate government purpose. If, as the Minister contends, the section serves the legitimate purpose of concealing the identity of a complainant only, then there is an obviously less restrictive means by which the legislature could and would have done so: the prohibition could expressly have been limited to information which may reveal the identity of the complainant. That, after all, is precisely what ss 154(2)(a) and 335A do.

59. As the Supreme Court of Appeal recently reaffirmed in *Tridevco*²⁵:

[22] The section must be looked at in a 'holistic or continuous sense'. The words used must be objectively assessed in their context, for it is their context that confers a specific meaning. Specific words attain their meaning in the wider context of the section or the group of sections and the statute as a whole. The purpose of the statute, too, plays a prominent role in obtaining the meaning of the words used... The intention of the legislature is ascertained by undertaking the exercise. In doing so, the actual words used by the legislature should not be easily departed from, for they were chosen by the legislature to express its intention. It is thus a fundamental principle of interpretation that:

²⁵ *Tridevco (Pty) Ltd and Another v Minister of Agriculture, Land Reform & Rural Development and Others* (62/2024) [2025] ZASCA 110; 2026 (1) SA 147 (SCA) (23 July 2025)

‘ . . . [T]he Court must not alter words in an Act of Parliament merely to give it a meaning such as it thinks those who framed it would have done, if the question had presented itself to them. ’

60. That Court also reinforced the general principle that, where the legislature uses different terminology in the same section, group of sections or statute as a whole, the legislature must be understood to have used the different terminology to connote different meanings.²⁶
61. In the circumstances, whatever the legislative history might have been, it cannot be ignored that the legislature deliberately adopted a much wider terminology in s 154(2)(b) than it did in any other section in which it sought to protect the identity of a specified person or class of persons.
62. That legislative choice is also not without historical context.
63. As the applicant points out in her further replying affidavit with reference to the legislative history presented by the Minister,²⁷ in 1971, a Commission comprised of judges interpreted the then extant provisions of the 1955 Act as “*clearly intended to protect the interests of the complainant and not those of the accused*”. The conclusion must be correct because, as already discussed, the prohibition could be lifted only after consultation with the victim.
64. What is interesting about the 1971 Commission is that proposals were made to it to consider the prohibition of the publication of the name and any other identifying

²⁶ *Tridevco* para 26.

²⁷ Further Replying Affidavit paras 33 – 38: Record pp 1041 – 1043.

particulars of an accused charged under the Immorality Act 23 of 1957. As a panel of judges, the Commission was strongly opposed to the proposal.²⁸

65. The observation is interesting because, having regard to the Commission's views – both on the interpretation of the earlier sections and the judges' resounding rejection of the proposals to protect the identity of an accused – the introduction of s 154(2)(b) by *Parliament* just so happened to be framed widely enough to protect the identity of an accused – albeit only until he entered a plea. It also removed the power of the presiding officer to lift the prohibition after consultation with the complainant.
66. These material deviations from the earlier provisions, and the timing thereof, is too conspicuous to be mere coincidence. The widely framed s 154(2)(b) is all the more conspicuous when compared to the narrower framing of the immediately preceding s 154(2)(a) and also s 335A – both of which, as stated, are expressly aimed at protecting the identity of complainants.
67. Sinister as it may seem, the ineluctable conclusion is that the legislature, in the face of the Commission's views, sought to kill two birds with one stone, as it were, when it framed s 154(2)(b) in the manner that it did. On its face, they could claim the provision, as its predecessors, was aimed at protecting complainants, while also ensuring that the accused's identity would be protected until he could publicly admit or deny his guilt.

²⁸ Further Answering Affidavit Annexure SAA4: Report of the Commission of Inquiry into Criminal Procedure and Evidence p 52ff, para 11.18.1ff: Record pp 974 – 975.

68. The perverse result of this approach is that the purported protection of the victim's identity falls away automatically at the same time that the accused's protection falls away. After that, victims are left to their own devices and must then take active steps in order to reinstate any protection of their identity.
69. To that end, the Minister admits that s 154(2)(b) only operates until such time that the accused pleads and that '*thereafter, any person may publish information relating to the charges unless there are orders in terms of section 153(3) and 154(2)(b).*'²⁹
70. There is, as yet, no sensible explanation for why the protection against the publication of a complainant's identity is tied to the accused's plea. This state of affairs certainly does not promote a complainant's rights to privacy, dignity and psychological integrity as contended for by the Minister. The only sensible interpretation of s 154(2)(b) is the one offered by the applicant in these proceedings. The purpose is, at least in part, to protect an accused's reputation until he publicly admits or denies his guilt.
71. The fact that subsequent Ministers and commissions (and even courts) have interpreted section 154(2)(b) as having the same meaning and serving the same purpose as the earlier provisions in the 1917 and 1955 Acts does not make it so. That the drafters of the current CPA succeeded in their obfuscation cannot serve

²⁹ Answering Affidavit para 7.8: Record p 265.

as a basis for interpreting the section as having any other meaning or purpose than that which Ms Peters has illustrated in this application.

THE MINISTER'S 'HOLDING POSITION' ARGUMENT

72. The Minister contends that s 154(2)(b) serves as a 'holding position' until an order is made in terms of s 153(3).³⁰

73. Here, too, there are textual indicators which undermine the Minister's contention.

74. S 153(3) of the CPA provides that:

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

75. S 154(2)(a), in turn, provides that:

Where a court under section 153 (3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153 (3A) not admitted at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any

³⁰ First Respondent's Answering Affidavit para 7: Record p 263 – 266.

complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he is of the opinion that such publication would be just and equitable.

76. For this part of the analysis, it is essential to understand the purpose behind the various sections of the CPA that are in place to protect complainants of sexual violence.
77. In what follows, we provide a snapshot of the relevant provisions and the time frames within which they operate. In doing so, we identify at which points in the criminal process a complainant and/or accused are or are not protected from having their identity disclosed by publication.
78. **The first relevant section in the criminal process will be s 335A, which protects the identity of the Complainant NOT the Accused**
 - The section prohibits to publication of any information which might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed,
 - Time frame covered:
 - from commission of offence
 - during the investigation stage
 - until charges are put to the accused (either by way of summons or at first appearance after arrest)

- ‘criminal proceedings’ is commenced by the putting of charges to an accused

79. **154(2)(b) protects the identity of the Complainant AND the Accused**

- Prohibition to publish in any manner whatever any information relating to the charge in question.
- Time frame covered:
 - once the person has been charged (i.e. becomes ‘an accused’)
 - before the accused appears in court (arrest/summons before the first appearance)
 - after the accused appears in court for the first time
 - until the accused has pleaded to the charge

80. **154(2)(a) protects the identity of the complainant**

- Prohibits publication of any information any information which might reveal the identity of any complainant in the proceedings
- Time frame covered:
 - Where the court has directed, in terms of section 153(3), that a certain person or persons shall not be present at the criminal proceedings

- s 154(2)(a) is automatically triggered when an order is made in terms of s 153(3)
- notably, because s 154(2)(a) is tied to an order in terms of s 153(3), the prohibition on publication is only available when a court prohibits one or more persons from attending the criminal proceedings
- if a prohibition against attendance is not sought or granted, there is no further protection for a complainant

81. **GAP on prohibition of publication of complainant's identity**

- Time frame between the accused entering a plea of guilty or not guilty and a s 153(3) order being made (if at all)

82. The cumbersome inter-relationship between all the sections would be avoided if s 335A operated indefinitely but subject also to the right of a complainant to reveal her own identity – whether personally or by authorising another to do so. We return to this when we discuss remedy.
83. Nevertheless, for the purpose of addressing the Minister's 'holding position' contention, we proceed on the basis that each section serves its own discreet purpose.
84. As we indicated above, s 153(3) provides that the court before which criminal proceedings in relation to sexual offences or extortion is pending may, at the request of the victim, direct that certain persons shall not be present at the proceedings.

85. An automatic consequence of a direction made in terms of s 153(3) is the activation of s 154(2)(a) which prohibits the publication of any information which might reveal the identity of a complainant, with the proviso that a court may order the publication of such information if, in the court's opinion, it is just and equitable to do so.
86. However, in reality, a request and direction under s 153(3) – which activates s 154(2)(a) – may, and frequently does, occur long after an accused has pleaded. This will usually be the case where the particular complainant is not called upon to testify immediately after the accused has pleaded.
87. It is also so that a request and order in terms of s 153(3) may be made long before the accused has pleaded. For example, at a bail hearing or a preparatory examination. In those instances, the prohibition in s 154(2)(b) will continue to apply despite the activation of the protection offered by s 154(2)(a). If we accept the Minister's contention that s 154(2)(b) serves only to protect complainants, then the protection offered by that section would be rendered redundant if an order is made in terms of s 153(3) before the accused has pleaded.
88. Worse still, the ban on publication under s 154(2)(b) would continue to apply even if a presiding officer, acting in terms of the proviso in s 154(2)(a), lifted the ban on publication of the complainant's identity.
89. And for those cases in which a request is made in terms of s 153(3) after an accused has pleaded, why should protection against publication of the complainant's

identity only be available if there is one or more persons who are ordered not to attend the relevant proceedings?

90. For all these reasons, the contingent protection provided by s 154(2)(a), read with s 153(3), is no answer to the irrationality of having the automatic protection fall away simply because an accused has pleaded.
91. The Minister's contention that s 154(2)(b) serves as a 'holding position' until an order is made in terms of s 153(3)³¹ simply cannot be sustained.
92. The Minister's only answer on this score is that 'criminal proceedings' only commences after an accused has pleaded. The argument then goes that the reference in s 153(3) to 'criminal proceedings' means that the section is only available after an accused has pleaded.
93. The contention is plainly wrong – most clearly illustrated by the fact that bail proceedings are 'criminal proceedings'. To the extent that the Minister persists with this fallacious contention, we will point out various references in the CPA to 'criminal proceedings' which illustrate that such proceedings commence as soon as charges are put to an accused.
94. And if we are correct that s 153(3) may be invoked at any time before an accused has pleaded, then the 'holding position' argument cannot be correct.

³¹ First Respondent's Answering Affidavit para 7: Record p 263 – 266.

IS S 154(2)(b) INCONSISTENT WITH THE CONSTITUTION?

95. In this section, we proceed on the assumption that this Court agrees with our submission that s 154(2)(b), at least in part, aims to protect an accused by prohibiting the publication of his identity.
96. To the extent that it does so, the applicant's case is that such protection is inconsistent with the Constitution.
97. The first point to make is that the Minister has implicitly confirmed that protecting an accused, charged with a sexual offence, against the publication of his identity before he has pleaded is not part of any identifiable legitimate government purpose.
98. In a country where our courts frequently lament the high levels of sexual and violent crimes that are committed against women and children, it is inconceivable that there could ever be a legitimate government purpose in protecting the identity of such accused.
99. The impugned provision is, therefore, irrational to the extent that it prohibits the publication of an accused's identity.
100. In *DA v Minister of Home Affairs*³², the Constitutional Court summarised and endorsed the SCA's reasoning on the irrationality of the impugned provision then under consideration thus:

³² Democratic Alliance v Minister of Home Affairs and Another [2025] ZACC 8 (6 May 2025)

“[20] ... [The SCA] held that, to meet the standard of rationality, the Minister was required, in the first place, to explain the specific and legitimate purpose that the impugned provision was designed to foster. In the absence of specified reasons, the Court held that the impugned provision is arbitrary and irrational. The Court held that there is no rationale for why an individual adult citizen who applies for citizenship of another country must, by operation of law, lose their South African citizenship. Rationality is tested against substantively legitimate objects and not by saying that, because the power may be one that the state could exercise legitimately, its existence makes its exercise legitimate...”

101. The Constitutional Court went on to state that:

“[45] Legislation is constitutionally required to be rationally related to a legitimate government purpose – if not, it is invalid. The test imposes a relatively minimal requirement: an identification of a legitimate government purpose and a link between the adopted means and that purpose. In the case of the impugned provision there is no such link.”

102. Thus, on this basis alone, s 154(2)(b) is irrational and invalid to the extent that it prohibits the publication of an accused’s identity.

103. The applicant explains – and it can hardly be disputed – that it is predominantly women who reveal the identities of rapists and sexual abusers.³³ Victims of sexual offences are also predominantly women and girls. The result is that it is

³³ Founding Affidavit para 111: Record p 36.

predominantly women who are at risk of being charged with contravening s 154(2)(b) if they publish the identity of an accused charged with a sexual offence.

104. The effect of the prohibition, therefore, indirectly discriminates against women on the basis of their sex and gender, both listed grounds in terms of s 9(3) of the Bill of Rights.

105. In terms of s 9(5), discrimination on one or more of the grounds listed in s 9(3) is unfair unless it is established that the discrimination is fair. The burden rests on the state to prove that the discrimination is not unfair or that it is justifiable in terms of s 36 of the Constitution³⁴.

106. The Minister's only response to the constitutional challenge is that s 154(2)(b) serves to protect complainants. The Minister does not attempt to demonstrate, in any meaningful way, that criminalising a complainant's own conduct if she were to reveal the identity of her accused is fair or justifiable.

107. But even taking the protection of complainants as an attempt to justify the overly wide ambit of s 154(2)(b), the contention fails to pass a s 36 limitations analysis. That is so because, to the extent that s 154(2)(b) also serves the legitimate purpose of protecting complainants, there are far less stringent means of achieving that purpose.

³⁴ *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) paras 50 and 99.

- 107.1. The first would be to employ terminology in s 154(2)(b) which expressly protects the identity of complainants;
- 107.2. The further alternative would be to jettison s 154(2)(b) in its entirety and extend the scope of s 335A to operate indefinitely.
108. Accordingly, s 154(2)(b) infringes s 9(3) of the Constitution and is invalid on this ground, too.
109. Similarly, s 154(2)(b) infringes the rights of complainants, activists and members of the public to freedom of expression as entrenched in s 16 of the Bill of Rights. While the right is not unconditional, the infringement cannot be justified in circumstances where there is no good reason to restrict the publication of an accused's identity simply because he is charged with a sexual offence. On the contrary, the applicant has demonstrated the importance – both to victims and the broader government project of eradicating violence against women – of being able to speak out against perpetrators of sexual violence.
110. For all these reasons, it is submitted that s 154(2)(b) read with ss 153(3)(a) and (b) and 154(5) of the CPA is unconstitutional and invalid to the extent that it criminalises the publication of any details of a person charged with committing a sexual offence before such person has pleaded to the charge.

LIMITATION ON VICTIM'S AGENCY TO REVEAL HER IDENTITY

111. The next issue to be addressed is whether s 335A (and, so too, s 154(2)(b)) is inconsistent with the Constitution to the extent that it:

- 111.1. does not permit the person towards or in connection with whom the offence was committed to (a) publicise information that may reveal her own identity or (b) authorise any third party to do so; and
 - 111.2. criminalises the publication of such information by the person towards or in connection with whom the offence was committed or anyone authorised by such person to do so.
112. That these two sections have this effect is plain from their terms.
- 112.1. S 154(2)(b) admits of no exception to the prohibition against publication;
 - 112.2. S 335A, on the other hand, permits publication under the authority of *a magistrate granted on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed*. In this regard, it echoes the protective provisions that pertained under the 1917 and 1955 Acts.
113. The infringement on the autonomy of victims of sexual offences suffers the same constitutional deficiencies as those discussed above in relation to s 154(2)(b) specifically:
- 113.1. It serves no legitimate government purpose;
 - 113.2. It disproportionately affects women; and
 - 113.3. It limits victims of sexual offences' right to freedom of expression.

114. The Minister has offered no justification for these infringements. Quite the opposite, in relation to this challenge, the Minister agrees that the sections are inconsistent with the Constitution.

115. We turn now to address the issue of remedy.

REMEDY

116. The applicant proposes the following orders:

1. *It is declared that s 154(2)(b) read with ss 153(3)(a) and (b) and 154(5) of the Criminal Procedure Act 51 of 1977 (CPA) is unconstitutional and invalid to the extent that it criminalises the publication of any details of a person charged with committing a sexual offence before such person has pleaded to the charge.*
2. *It is declared that section 335A of the CPA is unconstitutional and invalid to the extent that, in relation to any offence referred to in section 153(3)(a) and (b), it:*
 - 2.1. *Does not permit the person towards or in connection with whom the offence was committed to (a) publicise information that may reveal her own identity or (b) authorise any third party to do so; and*
 - 2.2. *Criminalises the publication of such information by the person towards or in connection with whom the offence was committed or anyone authorised by such person to do so.*
3. *A declaration that s 154(2)(b) does not apply to offences referred to in s 153(3)(a) and (b) of the CPA.*

4. *Severing the following words from s 335A of the CPA “until the prohibition in terms of s 154(2)(b) of the publication of information relating to the charge in question commences”.*
 5. *In addition to the severance referred to in prayer 4 above, reading into s 335A the text underlined below:*
 - (1) *No person shall with regard to any offence referred to in section 153(3)(a) and (b), as from the date on which the offence in question was committed or allegedly committed, publish any information which might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed, except:*
 - (i) *the person towards or in connection with whom the offence was committed;*
 - (ii) *with the express consent of and authorisation of the person towards or in connection with whom the offence was committed; or*
 - (iii) *with the authorisation of a magistrate granted on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed.*
117. In relation to the declarations of invalidity, the Minister proposes simply that ss 154(2)(b) and 335A be declared to be inconsistent with the Constitution and invalid.
118. An order in such simple terms is not what s 172(1)(a) of the Constitution contemplates. That section expressly requires a court dealing with a constitutional

matter to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.³⁵

119. This Court is, therefore, required to specify the extent to which any one or more of the impugned provisions is found to be inconsistent with the Constitution.

120. As regards the remainder of the relief proposed by the applicant, s 172(1)(b) of the Constitution authorises any court hearing a constitutional matter to:

b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

121. It is correct, as the Minister contends, that the Constitutional Court has held that, because a declaration of invalidity has no force, pending confirmation by the Constitutional Court, there is nothing for a High Court to suspend.³⁶

122. The applicant, in any event, does not seek suspension of the orders of invalidity.

123. The additional relief proposed by the applicant falls under the general authority granted to this court to make any order that is just and equitable in terms of s 172(1)(b).

³⁵ See also *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 (21 September 2022) paras 91 – 93.

³⁶ *Blind SA* para 98.

124. Again, it is so that any orders made by this court in terms of s 172(1)(b) will have no force pending confirmation by the Constitutional Court. That result, however, does not relieve this Court of the duty to assist the Constitutional Court by considering and determining what a just and equitable order might be in the circumstances.

125. A Full Court of this division in *Public Protector of South Africa v Speaker of the National Assembly*³⁷ confirmed the following in relation to the purpose of the order it made in terms of s 172(1)(b):

“[71]... The court's reasoning In this regard would then be before the Constitutional Court when the latter court considers the confirmation of this judgment.

...

[73]As noted, the relevant orders are not selfstanding and do not exist separately and independent of each other. The section 187.6 order is ancillary to, and a consequence of, the section 187.5 order. In any event, even if the orders were stand-alone orders and the order granting just and equitable relief was not a consequential or an ancillary order, both orders still have to be referred for confirmation. This was made clear by the Constitutional Court in Dawood when it stated that:

³⁷ *Public Protector of South Africa v Speaker of the National Assembly and Others* (8500/2022) [2022] ZAWCHC 197; [2023] 1 All SA 256 (WCC); 2023 (4) SA 205 (WCC) (11 October 2022)

'It is not only the direct order of unconstitutionality itself that must be confirmed but all the orders made by the High Court that flowed from that finding about unconstitutionality. If this court were to find that the High Court's conclusion that a section 26(9)(b) (of the Aliens Control Act 96 of 1999) is inconsistent with the Constitution is incorrect, none of the orders made consequent upon that finding would stand.'

126. The soundness of this authority was not upset by the Constitutional Court's judgment in the subsequent confirmation proceedings.³⁸

127. On the nature of a court's power under s 172(1)(b) the Constitutional Court in *Hoërskool Ermelo*³⁹ declared that:

"A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the

³⁸ *Democratic Alliance and Another v Public Protector of South Africa and Others* (CCT 251/22; CCT 252/22 ;CCT 299/22 ;CCT 251/22 ;CCT 252/22; CCT 299/22) [2023] ZACC 25; 2023 (11) BCLR 1281 (CC); 2024 (3) SA 1 (CC) (13 July 2023)

³⁹ *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) para 97.

parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution.”

128. In well near every matter in which provisions of a statute are declared unconstitutional, the High Court and/or SCA fashion a just and equitable remedy for the Constitutional Court to consider at the confirmation stage. The utility of this approach is obvious. It would be undesirable for the Constitutional Court to consider and determine a just and equitable remedy as a court of first and last instance.
129. In the circumstances, and notwithstanding that this Court’s orders will have no force pending confirmation by the Constitutional Court, this Court is required to consider an appropriate remedy flowing from the declarations of constitutional invalidity it makes.
130. To that end, the remedies of severance and reading-in are recognised remedies in matters concerning the constitutional validity of legislation.⁴⁰
131. That applicant’s proposed remedy is an amalgam of severance and reading-in. The rationale is simple, the clumsiness of the legislation created by s 154(2)(b) will be

⁴⁰ *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC); 2002 (2) SACR 222 (CC) (11 June 2002) para 88.

most neatly resolved if s 335A applied indefinitely but subject to the complainant's right to reveal her own identity or to authorise a third party to do so.

132. The Minister's proposed temporary relief does not have the same effect. The Minister proposes an order that:

"The prohibitions contained in sections 154(2)(b) and 335A(1) of the CPA will not apply to a complainant who elects to reveal their own identity, or consents to a third party doing so."

133. Whereas the proposed remedy cures the defect in s 335A, it does not do so in respect of s 154(2)(b). That is because it still prohibits the publication of any other information relating to the charge in question – including the identity of the accused.

134. If this Court is going to grant temporary relief in terms of s 172(2)(b), which is encouraged, then such relief must also permit the publication of any information relating to the charge in question by or at the instance of the complainant.

CONCLUSION

135. For all the above reasons, and those set out in the applicant's affidavits which have not been expressly incorporated herein, we submit that ss 154(2)(b) and 335A are inconsistent with the Constitution to the extent set out in the applicant's Amended Notice of Motion.

136. We, accordingly, submit that the applicant has made out a case for the relief sought in her Amended Notice of Motion, including the costs of two counsel, where so employed, on scale C.

AG CHRISTIANS

B PITHEY

AJ JANTJIES

Legal Representatives for the Applicant

30 January 2026