IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 170/17

In the matter between:

NICOLE LEVENSTEIN	First Applicant
PAUL DIAMOND	Second Applicant
GEORGE ROSENBERG	Third Applicant
KATHERINE ROSENBERG	Fourth Applicant
DANIELLA McNALLY	Fifth Applicant
LISA WAGNER	Sixth Applicant
SHANE ROTHQUEL	Seventh Applicant
MARINDA SMITH	Eighth Applicant

and

ESTATE LATE FRANKEL	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG	Third Respondent
TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	Fourth Respondent
TEDDY BEAR CLINIC	Fifth Respondent
LAWYERS FOR HUMAN RIGHTS	Sixth Respondent

In re:
The matter concerning the constitutional validity of section 18 of the Criminal Procedure Act, 51 of 1977.

APPLICANTS' WRITTEN SUBMISSIONS

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INTRODUCTION

1. There are two applications and an appeal to be considered.

2. The appeal is by the Estate of the Late Sidney Frankel, the first respondent, against the (partial) costs order made by the High Court against it.[1] The applicants abide the decision of this Court on the costs appeal.

3. There is an application to adduce further evidence by the fourth applicant, the Trustees of the Women's Legal Centre Trust.[2] The applicants similarly abide the decision on the further evidence application.

4. These written submissions deal with the applicants' application for confirmation[3] of the order made by the Gauteng Local Division, Johannesburg (Hartford AJ) on 19 June 2017.

5. The High Court made, *inter alia*, the following invalidity order:

> "***It is declared that section 18 of the Criminal Procedure Act, 51 of 1977, is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in sections 18(f), (h) and (i), after the lapse of a period of 20 years from the time when the offence was committed***."

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[1] The First Respondent noted the appeal in terms of section 172(2)(*d*) of the Constitution read with Rule 16(2) of this Court's Rules. Vol 7: pages 636 – 646.
[2] Supplementary Vol 1: pages 654 – 728 and Vol 2: pages 729 – 792.
[3] Made in terms of section 172(2)(*d*) of the Constitution, 1996 read with Section 8(1)(*b*) of the Constitutional Court Complementary Act, No. 13 of 1995, and Rule 16 of this Rules.

6. Because the High Court declared an Act of Parliament unconstitutional and invalid, this Court is required to consider confirmation of the declaration of invalidity.

7. As consequential just and equitable relief under section 172(1)(*b*) of the Constitution the High Court (in paragraph 2 of the order) suspended the declaration of invalidity for 18 months to allow Parliament to correct the defect and in paragraph 3 read words into section 18 of the Criminal Procedure Act. The temporary "reading in" is to occur "Pending the enactment of remedial legislation by Parliament, or the expiry of the period referred to in paragraph 2 above, whichever is the sooner,…"

8. The consequential orders also require confirmation.[4] The applicants do not support confirmation of the High Court's just and equitable orders (paragraphs 2 and 3), and do not apply for their confirmation.

9. In short, the applicants seek an order confirming the declaration of invalidity with costs of the confirmation proceedings to be borne by the Minister of Justice and Correctional Services, the second respondent.

10. In these written submissions the following issues are addressed:

    10.1 the background facts;

    10.2 the impugned provision, section 18 of the Criminal Procedure Act;

[4] Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others [2000] ZACC 8; 2000 (3) SA 936; (7 June 2000) at paragraphs [15] - [18].

10.3 the two bases of the challenge and finding of unconstitutionality;

10.4 why the applicants do not support confirmation of the suspension order;

10.5 a conclusion and remedy.

11. In addressing these issues, it is emphasized that the reasoning of the High Court is accepted - save for that on suspension of the declaration of invalidity – and the applicants submit the reasoning of the High Court ought to be accepted. There is no need for repetition, so the salient points only will be directly covered.

12. The applicants brought the application in their own interest as well as the public interest[5] to declare section 18 of the Criminal Procedure Act 51 of 1977 (**CPA**) unconstitutional and invalid.

13. The issue is primarily a legal one.[6] At its core, the relief underpinning the challenge to section 18 is a plea for adult survivors of sexual abuse perpetrated against them as children to be able to vindicate so severe a violation of their constitutional rights through a court of law despite the passage of more than twenty years.

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[5] Vol 1: FA, page 50, para 44 and Vol 1: FA, page 57, para 63. Section 38 of the Constitution. That the applicants are acting in the public interest, and also demonstrating the relative importance of this matter, are the applications in the High Court to be admitted as amici filed by Teddy Bear Clinic, Lawyers for Human Rights and Women's Legal Centre Trust. See *Centre for Child Law and Others v MEC for Education, Gauteng, and Others* 2008 (1) SA 223 (T) at 225B, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 165 and 253; and *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) at paras 16-17.

[6] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at par 25 to 30. The fact that Mr Frankel, the alleged perpetrator of the ugly deeds against the applicants, died before the hearing in the High Court was only relevant to the applicants' prayer (Notice of Motion, prayer 2, Vol 1: page 2) that the DPP reconsider whether to institute a prosecution in respect of charges of indecent assault and/or sexual assault against him.

Section 18 of the CPA precludes them from doing so.

14. The effect of section 18 is that it affords no discretion as to whether a prosecution may be instituted or not but constitutes an absolute bar to the criminal prosecution of sexual offences other than rape committed more than 20 years ago.

15. The applicants contend that in so doing, section 18 of the CPA, in its current (but as it applies to offences committed prior to the enactment of the Sexual Offences Act 32 of 2007)[7] form:

    15.1. Violates their rights to: (a) human dignity; (b) equality and non-discrimination; (c) be protected from abuse as children; (d) be free from all forms of violence from both public and private sources; (e) access to courts; and (f) a fair trial. The applicants contend that the limitation that section 18 of the CPA imposes is not justifiable under section 36 of the Constitution.[8]

    15.2. Is irrational because it makes arbitrary distinctions in respect of the gravest of crimes.

16. It is significant that neither the Minister of Justice and Correctional Services (who is the Minister in the executive responsible for the CPA) nor the Director

[7] The principle of legality means that a perpetrator cannot be tried for conduct that was not a crime at the time of the conduct. *Ius praevium* and *nulla poena* are reflected in sections 35(5))l) and (n) of the Constitution. See *Savoi v National Director of Public Prosecutions* 2014 (5) SA 317 (CC) at paras [73] – [81].

[8] Vol 1: FA, page 12, para 20.

of Public Prosecutions, Gauteng (the **State respondents**), have opposed this application for confirmation.

17. Significantly, neither have they appealed the High Court's declaration of invalidity.

18. This stance is appropriate, bearing in mind that neither of them proffered a justification in support of a limitation of the applicants' constitutional rights. Indeed, in an affidavit filed in the High Court on behalf of the Minister it was accepted and made clear that section 18 does not pass constitutional muster.[9]

19. This notwithstanding, this Court is duty-bound to consider the challenge on its merits and with respect to the separation of powers is implicated.

20. The issue, *viz*, the constitutionality of a provision of an Act of Parliament must be considered on an objective basis.[10]

BACKGROUND FACTS

21. The reported unfortunate events leading to this matter occurred nearly four decades ago.

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[9] Vol 4: page 361, para 68 where Mr Bassett explains:
"Given the serious nature of all sexual offences and the vulnerability of the victims of such offences, any policy position that seeks to distinguish between penetrative and non-penetrative sexual offences in relation to section 18 of the Criminal Procedure Act cannot pass constitutional muster".

[10] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at par 25 to 30.

22. The applicants, who at the time were children between ages 6 and 15, accused Mr Frankel of having habitually "*indecently and/or sexually assaulted*"[11] them. The alleged abuse occurred at different locations in and around Johannesburg in really indecent ugly ways.[12]

23. The right to institute a prosecution against Mr Frankel for the alleged indecent and/or sexual abuse lapsed:[13]

    23.1. In and during 1999 in respect of the first applicant; the sexual abuse is alleged to have occurred in the period between 1976 and 1979 when the first applicant was aged between 7 to 10.[14]

    23.2. In and during 2003 in respect of the second applicant; the sexual abuse is alleged to have occurred in the period between 1978 and 1983 when the second applicant was aged between 7 to 12.[15]

    23.3. In and during 2003 in respect of the third applicant; the sexual abuse is alleged to have occurred in the period between 1978 and 1983 when the third applicant was aged between 7 to 12.[16]

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[11] Vol 1: FA, page 49, paras 22 & 43.

[12] Vol 1: FA, page 8, para 4; page 13-47, paras 22-37 (setting out in detail the explicit details of the abuses suffered). These respective locations were: 18th 2nd Street, Abbotsford, Johannesburg, Ballifarm (a horse farm) situated in Crowthorn, Kyalami, Baobab Ridge (a game farm) situated in Buffelshoek, Arcadia Jewish Children's Home situated in Oxford Road, Parktown, Johannesburg, his place of work known as "Sidney Isaacs" and his home at 81 East Avenue, Athol, Johannesburg.

[13] Vol 1: FA, page 49, para 43.
[14] Vol 1: FA, page 15, para 30.1. read with para 43.1.
[15] Vol 1: FA, page 19, para 31.1. read with para 43.2.
[16] Vol 1: FA, page 23, para 32.1. read with para 43.3.

23.4. In and during 2008 in respect of the fourth applicant; the sexual abuse is alleged to have occurred in the period between 1980 and 1988 when the fourth applicant was aged between 6 to 14.[17]

23.5. In and during 1999 in respect of the fifth applicant; the sexual abuse is alleged to have occurred in the period between 1973 and 1979 when the fifth applicant was aged between 8 to 14.[18]

23.6. In and during 1998 in respect of the sixth applicant; the sexual abuse is alleged to have occurred in the period between 1972 and 1978 when the sixth applicant was aged between 8 to 14.[19].

23.7. In and during 2011 in respect of the seventh applicant; the sexual abuse is alleged to have occurred in the period between 1989 and 1991 when the seventh applicant was aged between 12 to 14.[20]

23.8. In and during 1996 in respect of the eighth applicant; the sexual abuse is alleged to have occurred in the period between 1970 to 1976 when the eighth applicant was aged between 6 to 12.[21]

24. Between June 2012 and June 2015, the applicants gained *"full appreciation of the criminal acts committed by the First Respondent"*.[22] This resulted in the applicants opening a criminal case and instituting a civil claim against Mr

[17] Vol 1: FA, page 26, para 33.1. read with para 43.4.
[18] Vol 1: FA, page 29, para 34.1. read with para 43.5.
[19] Vol 1: FA, page 32, para 35.1. read with para 43.6.
[20] Vol 1: FA, page 40, para 36.1. read with para 43.7.
[21] Vol 1: FA, page 44, para 37.1. read with para 43.8. The latter subparagraph incorrectly refers to the date of 1998; clearly it ought to have been 1996.

[22] Vol 1: FA, page 47, para 38.

Frankel, for general damages in respect of pain and suffering, loss of amenities of life and *contumelia*.[23]

25. The Director of Public Prosecutions, Gauteng (**DPP**) declined to prosecute the case against Mr Frankel.[24] The applicants contend that the DPP's decision was predicated on the expiration period contained in section 18 of the CPA, which if regard is had to, means their various claims were not prosecutable between the years 1996 to 2011, respectively.[25]

26. It is submitted that section 18 of the CPA (as currently framed) constitutes an irrational barrier to the prosecution of sexual offences (other than rape) subsequent to the twenty year period in all circumstances, without any regard at all to the facts of a particular case.

MR FRANKEL'S INITIAL OPPOSITION

27. Mr Frankel initially opposed the application on the basis that he has *"an interest in the outcome of the constitutional challenge"*. His interest in the matter was said:[26]

> *"… to ensure that the ashes of the past are not unduly raked, particularly where, as here, the applicants know that their complaints are based on alleged acts which occurred decades ago. An investigation into those allegations depends on fallibility of memory, reconstruction of scenes of alleged crimes, which would ordinarily have altered, and witnesses who would either no longer be available, or their memory no longer reliable. All of these and other factors*

[23] Vol 1: FA, page 47, para 39.

[24] Vol 1: FA, page 47, para 41; Vol 2: pages 107-114, Annexures "**PD10**" to "**PD17**".

[25] Vol 1: FA, page 49, para 43.

[26] Vol 3: AA, page 262, para 6.

manifest obvious prejudice which section 18 of the CPA was designed to prevent."

28. He may have been correct that the purpose of the prescribed period in section 18 was to mitigate against potential prejudice to the alleged perpetrator. He however, (in paragraph 6 of his answering papers)[27] conveniently ignores the fact that section 18 of the CPA carves out exceptions where, despite the effluxion of time, the legislature deemed it necessary to ensure that certain criminal acts – presumably based on their level of seriousness – cannot be barred by time.[28] This recognition undermines his opposition entirely, as he has failed to explain why, on his version, the crimes of rape are distinguishable from other crimes of a sexual nature (and therefore require an elevated status) for instance as now recognised in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the **Sexual Offences Act**) or under the common law prior thereto.

29. Mr Frankel's (initial) opposition to the declaration of constitutionality invalidity was articulated as follows:[29]

29.1. the applicants have not provided a clear basis upon which an order of unconstitutionality can be made;

29.2. the applicants have not explained why section 18 of the CPA is irrational;

[27] Vol 3: AA page 262, para 6.
[28] He does so, and yet, recognises this in Vol 3: AA, page 264, para 13.
[29] Vol 3: AA, page 267, para 21.

29.3. the applicants' complaints regarding the violation of their constitutional rights to dignity and to a fair trial are mere bald statements; and

29.4. the applicants have not provided evidence of policy considerations which militate against the principle that statutory offences cannot be enacted and applied retrospectively.

30. The issue of retrospectivity is considered under the chapter on conclusion and remedy. In responding to the remaining three arguments, two sub chapters follows:

30.1. First, a brief background to section 18; and

30.2. Secondly, submissions in respect of the grounds of unconstitutionality.

CRIMINAL PROCEDURE ACT: AMENDMENTS TO SECTION 18

31. Section 18 of the CPA has undergone various amendments from its original 1977 version (the **Original Version**) having been changed in 1994 (the **1994 Amendment**) and more recently in 2007 (the **Impugned Provision**).[30]

32. The Original Version read:

[30] The common law relating to prescription in criminal law and any legislation prior to 1977 does not have any bearing on the rationality of section 18 (See: S v De Freitas 1997 (1) SACR 180 (C)).

.

> *"(1) The right to institute a prosecution for any offence, other than an offence in respect of which the sentence of death may be imposed, shall, unless some other period is expressly provided by law, lapse after the expiration of a period of twenty years from time to time when the offence was committed.*
>
> *(2) The right to institute a prosecution for an offence in respect of which the sentence of death may be imposed, shall not be barred by lapse of time."*

33. The Original Version accordingly linked the question of lapsing to the sanction (the death penalty) that could be imposed for a particular offence.

34. Differently put, if the offence was serious enough so as to warrant the imposition of the death penalty, the lapsing period of twenty years did not apply to the offence. In this way, the Legislature delineated the category of offences to which lapsing did not apply in relation to the sanction that a particular offence attracted; the section found application consistently to all offences which, at the time could warrant the death sentence.

35. The 1994 Amendment read:

> ***"Prescription of right to institute prosecution***
>
> *(1) The right to institute a prosecution for any offence, other than the offences of:*
>
> *(a) murder;*
>
> *(b) treason committed when the Republic is in a state of war;*
>
> *(c) robbery, if aggravating circumstances were present;*
>
> *(d) kidnapping;*
>
> *(e) child-stealing;*
>
> *(f) rape,*

shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed."

36. The 1994 Amendment de-linked the stipulated offences from the sanction to be imposed. In its stead, it identified six separate and identical offences to which the lapsing of the right to prosecute does not apply.

37. In 2007, pursuant to the Amendment Act, the crime of rape was expanded upon to include "compelled rape" and the crimes of genocide, human trafficking and pornography of children and mentally disabled persons were also introduced.

38. The section now reads as follows:

*"**Prescription of right to institute prosecution***

The right to institute a prosecution for any offence, other than the offences of—

(a) murder;

(b) treason committed when the Republic is in a state of war;

(c) robbery, if aggravating circumstances were present;

(d) kidnapping;

(e) child-stealing;

(f) rape or compelled rape[31] as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively,

[31] Compelled rape does not cover indecent assault as in a sexual attack.

> *(g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 14 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002; or*
>
> *(h) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters (Amendment Act), 2007, or*
>
> *(i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters (Amendment Act), 2007,*
>
> *shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed."*
>
> *(Our Emphasis)*

39. This was a missed opportunity, in that other crimes of a sexual nature excluding rape and compelled rape, which in their nature are in no way less egregious or damaging to the victims,[32] were excluded from the exception to the lapsing period. [33]

40. The operation of the impugned provision has the result that the applicants' version and the veracity of Mr Frankel's (and others similarly situated) defence thereto, could and would never have been tested in a court of law – this constitutes a gross denial of the applicants' (and similarly placed

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[32] Vol 1: FA, page 50, para 45.

[33] The mootness doctrine, as articulated in *Publishing (Pty) Ltd and Another v Minister of Safety* 1997 (3) SA 514 (CC), even though section 18 has been amended, does not apply *in casu*. The validity of section 18, even in its amended form, cannot be regarded as wholly abstract, academic or hypothetical (see *JT Publication* at [15] – [16]) for two distinct reasons. First, in respect of sexual assaults committed after 2007, section 18 is unconstitutional for the reasons advanced by the applicants and accepted by the High Court. Secondly, section 18 in its unamended form still applies (on the legality principle) to sexual attacks committed before 2007. The constitutional interest in section 18 (both in its unamended and amended form) is <u>not</u> merely historic.)

persons) right of access to the courts. This, in all ways conceivable, is an unconstitutional travesty for all the parties.[34]

41. The effect of the impugned provision is, notwithstanding: (a) the seriousness of the offence; (b) the extent of the infringement of rights to bodily and psychological integrity, equality, the rights of the child and the rights of access to courts; and (c) the wide range of complex psychological factors that may have resulted in delayed reporting, a complainant of sexual abuse is precluded in <u>all circumstances</u> from pursuing a criminal charge that is brought more than twenty years after the alleged offence.

42. In terms of section 179(2) of the Constitution, the prosecuting authority has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings.

43. The National Prosecuting Authority Act No 32 of 1998 (the **NPA Act**) details the nature of the power of the NPA <u>to institute</u> and conduct criminal proceedings.

44. The effect of section 18 of the CPA is to limit this power of the NPA, in relation to offences that may not be prosecuted because of the lapse of a twenty-year period.[35]

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[34] Vol 1: FA, pages 57-58, para 63.

[35] Although the period has sometimes been referred to as a prescription period, it is not. It is a period of lapsing of a right to prosecute. The lapsing of a right is not the same as prescription.

45. The applicants submit that this limitation which does not extend to sexual offences beyond rape is arbitrary, unjustifiable and thus unconstitutional. The applicants also submit that it also constitutes an infringement of a range of the complainants' rights.

THERE IS NO RATIONAL BASIS FOR DISTINGUISHING RAPE AND COMPELLED RAPE FROM OTHER FORMS OF SEXUAL ABUSE

46. A useful starting point for probing the rationality for the exclusion from the lapsing period in section 18 of rape, but not the other forms of sexual assault is the following:

46.1. First, some of the offences listed in section 18 fall under Schedule 1 of the CPA; section 18 does not however include all of the offences listed in Schedule 1. The offences identified in section 18 are accordingly not consistent with Schedule 1 offences of the CPA.

46.2. Second, the offences referred to in section 18 do not attract the same minimum sentence as is apparent from a consideration of the Criminal Law Amendment Act No 105 of 1997 (the **Minimum Sentencing Legislation**). The offences identified in section 18 are accordingly not delineated in terms of the Minimum Sentencing Legislation.

46.3. Third, in the absence of any link to the prevailing legislative framework it appears – and the Minister takes this issue no further

> in Mr Bassett's affidavit - that the offences included in section 18 were identified in terms of: (a) the seriousness with which the legislature viewed them; (b) their attendant impact on the complainants of such offences.

47. Viewed in this light, the question – objectively determined - that arises is whether there is a rational basis on which to exclude rape (and compelled rape) from lapsing in section 18 of the CPA but not to exclude all other forms of sexual abuse.

48. The applicants submit not.

49. The differentiation brought into being by section 18 evinces no rational connection (objectively) for any possible governmental purpose in distinguishing between rape (and compelled rape), on the one hand and other forms of sexual abuse on the other.

50. For the appropriate test, reference is made to **Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) at par 25** in which this Court reiterated that the Constitutional State is bound to act in a rational manner. It stated:

> "It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."

51. In **Van der Merwe v RAF (Women's Legal Centre Trust as Amicus Curiae)** 2006 (4) SA 230 (CC) at para 49, this Court held:

> "[49] It is so that laws rarely prescribe the same treatment for everyone. Yet it bears repetition that when a law elects to make differentiation between people or classes of people it will fall foul of the constitutional standard of equality if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it. Absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under s 9(1) of the Constitution. This is so because the legislative scheme confers benefits or imposes burdens unevenly and without a rational criterion or basis. That would be an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the 'rational differentiation' standard set by s 9(1) thereof."

52. There is no rational reason,[36] for the differentiation between rape on the one hand and other forms of sexual abuse on the other for at least the following reasons:

52.1. First, the exclusion of sexual abuse other than rape from the exclusion of lapsing under section 18 of the CPA disproportionately and unfairly impacts on women. While it is accepted (as this Court recognised in **Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)** 2007 (5) SA 30 (CC)), that rape is "the most reprehensible form of sexual assault"; it is submitted that other forms of sexual abuse also

[36] The Minister does not advance any reason, let alone a rational one for the differentiation.

constitute “a humiliating, degrading and brutal invasion of the dignity and the person of the survivor”.

52.2. Second, as in the case of rape, so too in relation to other forms of sexual abuse, a woman/child’s rights to bodily and psychological integrity are infringed. That infringement was and is not necessarily less serious simply because the sexual violence did not constitute a rape.

52.3. Section 12(2) of the Constitution provides that **everyone** has the right to bodily and psychological integrity, which includes the right to security in and control over their body. That right is violated when a person is subjected to sexual abuse. In placing a lapsing time bar of twenty years to prosecuting that offence, the State is failing in its obligations under section 7(2) of the Constitution to respect, protect, promote and fulfil this right.

52.4. Third, the case of delayed reporting finds no less application in the case of sexual abuse other than rape. In **Bothma v Els** 2010 (2) SA 622 (CC) this Court commented that in assessing delay in a prosecution: (a) the length of the delay; (b) the reason the government assigns to justify the delay; (c) the accused's assertion of a right to a speedy trial; (d) prejudice to the accused; and (e) the nature of the offence are all considered to be relevant factors. In its assessment of the nature of the offence, the Court had particular regard to the

manner in which sexual abuse of children, especially if prolonged, can provoke delay in their later lodging complaints as adults about such abuse.

According to this Court, without placing the specific nature of the offence in the scales, the balancing exercise is itself unbalanced.[37] Indeed, according to the expert evidence in this matter:

52.4.1. The disclosure of sexual abuse is a gradual process which may take months or even years.[38]

52.4.2. Immediate disclosure is the exception rather than the rule; and according to a study the majority of abuse disclosures were delayed. [39]

52.4.3. Disclosure of child sexual abuse is more typical in adulthood than in childhood. [40]

52.5. Fourth, the non-exclusion of the crime of indecent/sexual assault from the ambit of section 18 ignores the significance of a delay in reporting, which was found to have been a relevant factor in the context of civil claims arising from allegations of sexual abuse of children.

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[37] In section 18 situations the Court (and the DPP) does not even get to conduct a balancing exercise.
[38] Vol 1 : FA, page 63, par 75.9.
[39] Vol 1 : FA, page 64, par 75.13.
[40] Vol 1 : FA, page 65, par 75.15.

52.6. In **Van Zijl v Hoogenhout** 2005 (2) SA 93 (SCA), the issue presented was an action for damages arising out of the sexual assault of the plaintiff (appellant) by her uncle between the years 1958 and 1967. The appellant attained majority in 1973 and the action was instituted in 1999. The respondent raised the special plea that the appellant's claim had prescribed. It was in this context that the SCA found (with due regard to expert evidence) that[41]:

(a) chronic child abuse is *sui generis* in the sequelae that flow from it;

(b) distancing of the victim from reality and transference of responsibility by the victim on to himself or herself are known psychological consequences;

(c) in the absence of some cathartic experience, such consequences can and often do persist into middle age despite the cessation of the abuse during childhood.

It was in this context that the SCA articulated the question as being:[42]

> "Does the applicable prescription statute accommodate a victim who manifests such sequelae, by either staying or suspending the running of prescription, if the victim is

[41] At par 14.
[42] At par 15.

> prevented or seriously inhibited, by reason of his or her psychological condition, from instituting action?"

In answering that question, the SCA found that prescription penalises unreasonable inaction, not inability to act.[43] Consistent with the finding of the SCA, the effect of section 18 is that it penalises a complainant from pursuing a charge even if circumstances where she manifestly lacks the ability to act for reasons found by the SCA. It makes little sense for these factors to be considered relevant in the context of prescription in a civil claim but to have no bearing whatsoever in relation to an absolute bar in the criminal context. Indeed, in dismissing a special plea of prescription, the SCA held in **Van Zijl**:

> "[44] In such circumstances, the room for the inference that counsel would have us draw must be very limited. The plaintiff obviously knew at all material times that the defendant was the physical agent of the abuse. Her expert witness expressly disavowed any possibility of suppression of her memory of the events. That, of course, does not mean that, in adult life, she was able to confront them willingly or with adequate comprehension. Nor does it prove that she knew or accepted that responsibility for the abuse lay with the defendant. The incidents in adulthood which counsel has cited are consistent with the plaintiff's knowledge that the defendant had abused her, but they were visceral reactions falling short of rational appreciation that he, rather than herself, was the culpable party. It is more likely that the plaintiff developed insight and, with it, the meaningful knowledge of the wrong that sets the prescriptive process in motion, only when the progressive course of self-discovery finally removed the blindfold she had worn since the malign influences which I have described took over her psyche. On the probabilities, that did not occur until some time in 1997.

[43] At par 19.

> The defendant's counsel did not submit, correctly given the facts, that (to use the language of s 5(1)(c)) the plaintiff might reasonably have been expected to have had knowledge of the wrong before she acquired actual knowledge."

52.7. Fifth, in the context of prescription (albeit in relation to civil claims), the Constitutional Court in **Mohlomi v Minister of Defence** 1997 (1) SA 124 (CC) at para 11 and following, has recognised the laudable purpose that prescription periods serve, but held that "(i)t does not follow, however, that all limitations . . . are constitutionally sound". Each prescription/lapsing period must be scrutinised in order to determine whether its "particular range and terms are compatible with the right which s 22 bestows on everyone". The Court recognised that, while there may be instances in which the right is denied altogether if a claim prescribes, this is a possibility in every case in which prescription periods exist. What matters, according to this Court, is "the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right", and "the availability of an initial opportunity to exercise the right".

52.8. Sixth, the Sexual Offences Act ought to inform the question of lapsing in relation to the CPA. The Sexual Offences Act repeals the common law offence of indecent assault and replaces it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent.

It also enacts comprehensive provisions dealing with the creation of new, expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation. The Sexual Offences Act, having regard to its long title, preamble and objects, was enacted to increase the scope of sexual crimes, and in doing so, to enhance and strengthen the protection of victims of sexual abuse(s). There is nothing in the architecture of that Act that suggests that it intended to divest potential claimants of their rights to prosecute cases against their perpetrators for abuse(s) suffered.

52.9. The objects of the Sexual Offences Act[44] are delineated as:

[44] The Sexual Offences Act defines the crime of sexual assault as follows in section 5:

> *"(1) A person ('A') who unlawfully and intentionally violates a complainant ('B') without the consent of B, is guilty of the offence of sexual assault.*
> *(2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault."*

The Sexual Offences Act defines compelled self-sexual assault as follows in section 7:

> *"A person ('A') who unlawfully and intentionally compels a complainant ('B'), without the consent of B, to—*
> *(a) engage in—*
> *i.masturbation;*

> "The objects of this Act are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic by:
>
> (a) Enacting all matters relating to sexual offences in a single statute;
>
> (b) criminalising all forms of sexual abuse or exploitation;
>
> (c) repealing certain common law sexual offences and replacing them with new and, in some instances, expanded or extended statutory sexual offences, irrespective of gender;
>
> (d) protecting complainants of sexual offences and their families from secondary victimisation and trauma by establishing a co-operative response between all government departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences…"

52.10. In their founding papers, the applicants defined the crime of indecent assault as consisting of unlawful and intentional assault of another with the object of committing an indecency.[45] This common law crime was effectively replaced and renamed as "sexual Assault" under the Sexual Offences Act. The lapsing period ought not to constitute a bar to the prosecution of each one these offences.

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ii. any form of arousal or stimulation of a sexual nature of the female breasts; or

iii. sexually suggestive or lewd acts,

with B himself or herself;

(b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or

(c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus,

is guilty of the offence of compelled self-sexual assault."

[45] Vol 1: FA, page 52, para 50.

52.11. Seventh, as to the alleged infringement of the accused person's fair trial rights it must be emphasised that the consequence a striking down of section 18 and the relief sought in this application is that it does not preclude an accused person from raising the issue of delay in the context of a permanent stay.[46] Differently put, by lifting the lapsing period an accused person may still seek a permanent stay of prosecution on account of pre-trial delay. As recognised by this Court in **Bothma**:

> "[76] In conclusion: the ordinary and expected effects of time lapse are taken care of by prescription, which establishes an irrebuttable presumption of unfairness or impropriety in proceeding with a prosecution. That is not to say, however, that prescription is the only relevant factor in relation to the effects of pre-trial delay on the fairness of a trial. ***Each case would have to be looked at on its merits***. The conduct of the prosecution could be highly relevant, particularly if it has led directly to the disappearance of crucial evidence. Loss of faculties to make a proper defence could be another factor. The dissipation of evidence through death of witnesses or disappearance of documents would also require consideration. Improper motives, such as a complainant having long delayed in initiating proceedings for purposes of blackmail or the making up of a stale misdemeanour purely to impede a competitor's career could impact so severely on the integrity of the administration of justice as to call for a stay of prosecution.
>
> [77] Society demands a degree of repose for its members. People should be able to get on with their lives, with the ability to redeem the misconduct of their early years. To prosecute someone for shoplifting more than a decade after the event could be unfair in itself, even if an impeccable eyewitness suddenly came forward, or evidence proved the theft beyond a

[46] Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC), Bothma v Els 2010 (2) SA 622 (CC), Zanner v Director of Public Prosecutions, Johannesburg 2006 (2) SACR 45 (SCA), Wild v Hoffert NO 1998 (3) SA 695 (CC).

> reasonable doubt. Everything will depend upon the circumstances. All the relevant factors would have to be weighed on a case-by-case basis. And of central significance will always be the nature of the offence. The less grave the breach of the law, the less fair will it be to require the accused to bear the consequences of the delay. The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us, 'Molato ga o bole' (Setswana) or 'ical'aliboli' (isiZulu) - there are some crimes that do not go away."

But in all section 18 cases (other than rape, compelled rape and the other named offences) there can be no consideration of the merits of the case at all.

52.12. Eighth, the impugned provision also violates the applicants' right to dignity; there is no distinction between this violation as arising from rape on the one hand and other sexual offences on the other.

The right to human dignity of a victim of sexual abuse is promoted by the legal recognition of their right to ensure that their perpetrators are brought to justice.[47] This Court in **Dawood** stated:[48]

> "Human … dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other things …. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a

[47] Vol 1: FA, page 58, para 63.

[48] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 35.

> justiciable right that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."

52.13. Finally, it is emphasised that by excluding other forms of sexual abuse (other than rape and compelled rape) from the section 18 lapsing period the NPA is still vested with a discretion as to whether to prosecute or not.

53. Indeed, some of Mr Frankel's actions, it cannot be gainsaid that after the coming into operation of the Sexual Offences Act would have been classified as rape and would not have been subject to the section 18 lapsing period.

Instead, under the common law, these actions were classified as indecent assault (now sexual assault).

These are crimes of a serious nature, which constitute an affront to a victim's dignity. There is no logical reason for differentiating between rape and sexual assault in the impugned provision, in as far as lapsing is concerned. The applicants seek the equality of treatment and protection of the law, for victims of sexual offences.

SUSPENSION OF THE DECLARATION OF INVALIDITY

54. The High Court suspended the declaration of invalidity, even though the Minister did not seek or adduce evidence demonstrating a need for a suspension, and there is no demonstrable need for a suspension.

55. Also, the High Court[49] stated that no suspension and an immediate *"reading in"* would close the door to Parliament reconsidering and amending section 18. The High Court went on to state that to grant an immediate order (of reading in) with no suspension thereof, would remove Parliament's right to assess which further sexual offences should prescribe or not prescribe,[50] and unnecessarily blur the line between the courts and the legislature.

56. But, this *"finality principle"* is not correct. Even if there is to be an *"immediate reading in"*, the court's choice of remedy is not final. Parliament exercises final control,[51] even in cases of an *"immediate reading in"* even were this Court to order a suspension of the declaration of invalidity, the High Court's *"suspension order"* is technically flawed.[52]

57. The technicality is that if Parliament does not enact remedial legislation with the 18-month period given to it, the declaration of invalidity becomes operative with no *"read in"* words. This is not just and equitable.

58. The better way to cure the defect is for the declaration of invalidity to have immediate effect, and to couple the declaration with a *"reading in"* as ordered by the High Court (in paragraph 3 of its order).

59. There can be no prejudice to any party were this approach to be adopted. Yet the rights of many would immediately be protected, even if only symbolically.

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[49] Vol 7: page 625, para 104 of the judgment.
[50] Vol 7: 625, para 105 of the judgment.
[51] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para [76].
[52] Applicants' application to this Court, Vol 7: page 573, paras 30 – 34, affidavit of Mr. Levitt, applicants' attorney.

THE WIDTH OF THE DECLARATION OF INVALIDITY

60. The applicants do not have a difficulty[53] with the declaration of invalidity applying to all forms of sexual offence, rather than just those in relation to offences against children.

61. The applicants did not submit that the declaration of invalidity must be *"limited"* to children only.[54]

62. What the applicants submitted was and is that whatever the Court decides, at the very least, any declaration of invalidity must relate to all sexual offences committed against children.

63. The High Court's reasoning as to why it made the wider order, is supported.[55]

64. But, were this Court to reject the High Court's wider declaration, the applicants stand by their submission that at a minimum there can be no constitutionally accepted lapsing of the right to prosecute those alleged to have committed sexual offences against children.

REMEDY

65. Section 18 is not capable of being read down in a manner that is consistent with the Constitution; it must accordingly be declared to be unconstitutional.

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[53] Vol 7: page 593, para 34 of the judgment.
[54] Vol 7: page 595, para 38 of the judgment.
[55] Vol 7: page 594 – 596, paras 35 – 42 of the judgment.

66. A court is obliged, once it concludes that a provision in a statute is unconstitutional, to declare that provision to be invalid to the extent of its inconsistency with the Constitution.[56]

67. In accordance with the doctrine of objective constitutional invalidity, a court's declaration of invalidity means, in the absence of any other judicial order, that the law or conduct is invalid from its inception (in the case of law that came into operation after the enactment of Constitution) or from the date on which the Constitution came into operation (in the case of law that predates the Constitution).

68. The relief sought by the applicants as contained in their replying affidavit has the effect of declaring section 18 of the CPA to be unconstitutional insofar as it bars in all circumstances the right to institute a prosecution for sexual offences suffered by children (other than rape and compelled rape), after the lapse of twenty years from the date of which the offence was committed.

69. When applied to the facts of this case, it would be that the unconstitutionality will apply from the date of coming into effect of the Constitution, being 4 February 1997. The result would be that all of the applicants in this matter would not be precluded from pursuing a criminal charge which the NPA would not be precluded from prosecuting.

70. But, in any event, issues of retrospectivity or otherwise, properly interpreted, do not arise because even if the declaration in relation to section 18 were to

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[56] Section 172(1)*(a)* of the Constitution.

only have prospective effect, persons similarly situated to the applicants could insist that prosecution be considered because it is only the limitation of the NPA's right to institute a prosecution after twenty years that is prohibited.[57] Not the continued existence of the crime. The crime is not extinguished after twenty years; it is only the right to institute a prosecution that lapses after twenty years.

CONCLUSION

71. The applicants submit the following orders fall to be granted:

(1) The declaration of invalidity made by the High Court that section 18 of the Criminal Procedure Act, 51 of 1977, is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in sections 18(f), (h) and (i), after the lapse of a period of 20 years from the time when the offence was committed is confirmed.

(2) Section 18(f) of the Criminal Procedure Act is to be read as though the following words *"and all other sexual offences, whether in terms of the common law or statute"* appear after the words *"the Criminal Law*

[57] Any complaint concerning for example, fair trial rights under section 35(1)(*d*) of the Constitution, can properly be dealt with by any trial court.

(Sexual Offences and Related Matters) Amendment Act, 2007, respectively".

(3) The first respondent is to pay the applicants' costs of the application in this Court for confirmation of the declaration of invalidity.[58]

ANTON KATZ SC

Applicants' Counsel

Chambers Cape Town

14 September 2017

[58] Malachi v Cape Dance Academy International (Pty) Ltd and Others (CCT 05/10) [2010] ZACC 24; 2011 (3) BCLR 276 (CC) (25 November 2010).

TABLE OF AUTHORITIES

LEGISLATION

1. Constitution of the Republic of South Africa, 1996.

2. Criminal Procedure Act 51 of 1977.

3. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

4. Criminal Law Amendment Act 107 of 1997.

5. National Prosecuting Authority Act 32 of 1998.

CASE LAW

6. Bothma v Els 2010 (2) SA 622 (CC).

7. Centre for Child Law and Others v MEC for Education, Gauteng, and Others 2008 (1) SA 223 (T).

8. Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC).

9. Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC).

10. Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC).

11. Malachi v Cape Dance Academy International (Pty) Ltd and Others (CCT 05/10) [2010] ZACC 24; 2011 (3) BCLR 276 (CC) (25 November 2010).

12. Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (5) SA 30 (CC).

13. Mohlomi v Minister of Defence 1997 (1) SA 124 (CC).

14. National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs 2000 (2) SA 1 (CC).

15. Prinsloo v Van der Linde 1997 (3) SA 1012 (CC).

16. Publishing (Pty) Ltd and Another v Minister of Safety 1997 (3) SA 514 (CC).

17. S v De Freitas 1997 (1) SACR 180 (C).

18. Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC).

19. Savoi v National Director of Public Prosecutions 2014 (5) SA 317 (CC).

20. Van der Merwe v RAF (Women's Legal Centre Trust as Amicus Curiae) 2006 (4) SA 230 (CC).

21. Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA).

22. Wild v Hoffert NO 1998 (3) SA 695 (CC).

23. Zanner v Director of Public Prosecutions, Johannesburg 2006 (2) SACR 45 (SCA).

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT: 170 / 17

HC CASE NO: 29573 / 2016

In the matter between:-

NICOLE LEVENSTEIN	First Applicant
PAUL DIAMOND	Second Applicant
GEORGE ROSENBERG	Third Applicant
KATHERINE ROSENBERG	Fourth Applicant
DANIELA McNALLY	Fifth Applicant
LISA WAGNER	Sixth Applicant
SHANE ROTHQUEL	Seventh Applicant
MARINDA SMITH	Eighth Applicant

and

ESTATE LATE FRANKEL	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG	Third Respondent
THE TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	First *Amicus Curiae*
THE TEDDY BEAR CLINIC	Second *Amicus Curiae*
LAWYERS FOR HUMAN RIGHTS	Third *Amicus Curiae*

FIRST RESPONDENT'S HEADS OF ARGUMENT

Contents

A INTRODUCTION

1. The first respondent (the Estate) appeals the costs order handed down on 19 June 2017 in the judgment of Hartford J in the court a quo under Constitutional Court Rule 16(2).[1]

2. The primary argument on appeal is that of the sanctity of an agreement reached between private parties and the application of the general rule that a court will enforce an agreement, save for circumstances where the enforcement would result in an outcome that is unfair or unjust.

3. Any power a court may have to violate and disregard an agreement between private individuals is therefore narrow.

4. The Estate has a direct interest in this Court upholding the sanctity of its agreement concluded with the applicants on 9 May 2017. In addition, there is a broader constitutional interest in clarifying whether the High Court's refusal to uphold the agreement and its decision to assume jurisdiction over an issue

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1 Vol 7: 636-646, First Respondent's notice of appeal in terms of section 172(2)(d) of the Constitution of the Republic of South Africa, 1996 (the Constitution)

that was no longer a live dispute between the parties, violated the principle of *pacta sunt survanda*. We argue that a court has no such general discretion to override a lawful agreement and is bound to enforce the terms thereof and give meaning thereto.

5. In the alternative, should the court find against the Estate in its primary position in this appeal, it is argued that the High Court misdirected itself in the exercise of its discretion when applying the **Biowatch** principles pertaining to costs in constitutional litigation.

6. Mr Frankel was an individual who, during his lifetime,[2] played no part in the promulgation of the impugned legislation, or the decision of the third respondent (DPP). As such, the Estate ought not be held liable for a costs order, when Mr Frankel was not involved in the promulgation of the legislation or decisions made pursuant thereto.

7. The Estate does not oppose and does not make any submissions on the two confirmation applications before this Court in terms

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2 Mr Frankel died on 13 April 2017, some five weeks prior to the hearing of the application on 22-23 May 2017

of Constitutional Court Rule 16(4) nor does it oppose the application by the trustees of the Women's Legal Centre Trust to adduce further evidence.[3]

8. On 15 June 2017 the High Court made the following costs order:

> "*4. The costs of the application shall be paid jointly and severally by the First Respondent and the Second Respondent until 20 January 2017, including the costs of two counsel, after which date the costs shall be paid solely by the Second Respondent."*

9. The costs order must be considered against the nature of the application instituted before the High Court:

9.1. The core constitutional complaint relates to the validity of an Act of Parliament and conduct of the third respondent (DPP) made pursuant to that Act.

9.2. The application thus had nothing to do with Mr Frankel as a private individual and Mr Frankel's alleged conduct. Rather,

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[3] Supplementary Vol 1 and 2

it was based on the decision of the DPP to issue a *nolle prosequi* certificate in relation to each applicant's institution of criminal proceedings against Mr Frankel.[4] Thus, Mr Frankel's alleged conduct is not the spark that initiated the application. (Of course, this is not to state that the alleged conduct would not be of central importance to any proceedings that may follow a declaration of constitutional invalidity.)

10. The High Court's decision to impose an adverse costs order against a private individual respondent in constitutional litigation, in circumstances where the application does not concern the private litigant and a lawful agreement abandoning any claim for costs against the private litigant has been concluded prior to the hearing of the application, falls outside a court's power and such an order falls to be set aside on appeal.

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4 Vol 1: 107 – 114, *Nolle prosequi* certificates in terms of section 7(2) of the Criminal Procedure Act, 1977

11. We note this Court's judgments in **Van Rooyen** and **Robertson**.[5] This Court has held that it can consider issues arising from orders other than those dealing with the declaration of constitutional invalidity if they are connected to constitutional matters and it is in the interests of justice to do so.[6] This is such a case and no party has opposed the appeal instituted under Rule 16(2).

12. In these submissions, the following is addressed:

12.1. Facts pertinent to the appeal;

12.2. The law relating to the enforcement of an agreement between private parties;

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5 **S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)** 2002 (5) SA 246 par [11]-[12] and **City of Cape Town and Other v Robertson and Other** 2005 (2) SA 323 (CC) par [2]

6 **Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and others** 2015 (6) SA 125 (CC) par [29] fn 40. See also the earlier judgment of **Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others** 2000 (3) SA 936 (CC) par 18 in which the Court confirmed:

"*For 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 of unconstitutionality. If this Court were to find that the High Court's conclusion that section 25(9)(b) is inconsistent with the Constitution is incorrect, none of the orders made consequent upon that finding could stand*."

12.3. The approach adopted by the High Court in relation to the agreement;

12.4. The approach to costs in a matter raising constitutional issues;

12.5. The manner in which the High Court misdirected itself; and

12.6. The appropriate remedy.

B FACTS PERTINENT TO THE APPEAL

13. The Estate initially elected to oppose the relief sought by the applicant, including the declaration of invalidity referenced in prayer 1 of the notice of motion directed at the provisions of section 18 of the Criminal Procedure Act, 1997, as amended ("the CPA").[7]

[7] Vol 1: 251, First Respondent's notice of intention to oppose 8 September 2016

14. The basis for opposing the constitutional relief sought (prayer 1) was based on the way in which the prayer was framed and understood by the Estate:

14.1. Prayer 1 provided:

> "*Declaring that Section 18 of the Criminal Procedure Act 51 of 1997 is inconsistent with the Constitution, 1996 and invalid to the extent that it bars in all circumstances the right to institute a prosecution for all offences as contemplated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, other than rape or compelled rape, after the lapse of a period of 20 years from the time when the offence was committed;*"[8] [emphasis added]

14.2. Prayer 1 was necessary relief in order to obtain the relief sought in prayer 2 – that the DPP reconsider whether to "*institute a prosecution in respect of charges of indecent assault and/or sexual assault against [Mr Frankel]*".[9]

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8 Vol 1: 2, Notice of Motion

9 Vol 1: 2, Notice of Motion

14.3. Prayer 1 ought therefore to have the effect of empowering the DPP to institute criminal prosecution against Mr Frankel.[10]

14.4. Prayer 1 was crafted only to cater for the removal of the 20-year period of prescription against statutory crimes set out in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 ("SORMA").

14.5. The alleged crimes occurred some 30 years before the introduction of the statutory crimes in SORMA.[11]

14.6. The relief sought in prayer 1 should be drafted so as to be capable of applying to common-law sexual offences, so as to make prayer 2 relevant to the circumstances pertaining to the applicants and Mr Frankel.[12]

15. The Estate's stance is borne out by the emphasis placed in the answering affidavit on principles of legality and the

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10 Vol 3: 269 par 28-29, Answering affidavit

11 Vol 1: 8 par 4, Founding affidavit. SORMA was promulgated in 2007 and came into force on 16 December 2007

12 Vol 3: 269 par 28, Answering affidavit

retrospectively of statutory offences.[13] Had common-law sexual offences been catered for in prayer 1, this excursus would not have been a relevant basis of opposition to prayer 1 and the Estate would not have opposed the constitutional relief sought.[14]

16. The applicants stated that there are no factual issues arising from the application[15] and, thus, the Estate's opposition to the relief sought was similarly not based on disputed facts but on the internal contradiction between prayers 1 and 2 of the notice of motion. The opposition was therefore based on legal principles.

17. In the applicants' replying affidavit dated November 2016, the applicants set out its alternative relief to prayer 1 of the notice of motion (the narrow relief), formulated as follows:

> "*declaring section 18 of the Criminal Procedure Act No 51 of 1977 to be inconsistent with the Constitution,*

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13 Vol 3: 269 par 28 and Vol 3: 270 par 31, Answering affidavit

14 The facts bare out that the Estate would have continued to oppose prayer 2: Vol 4: par 10, Rejoinder affidavit

15 Vol 1: 9 par 7, Founding affidavit; Vol 3: 263 par 10, Answering affidavit

> *1996 and Invalid to the extent that It bars in all circumstances the right to institute a prosecution for sexual offences suffered by children, other than rape or compelled rape, after the lapse of a period of 20 years from the time when the offence was committed*."[16]
>
> [emphasis added]

18. The narrow relief addressed the specific issue of concern to the Estate. The generic reference to sexual offences in this formulation and the removal of the reference to SORMA has the effect of making the relief applicable to both common-law and statutory sexual offences.

19. In so doing, the relief sought in prayer 2 is capable of application to the circumstances of the applicants and Mr Frankel.

20. In January 2017, following the proposed narrow relief, the Estate elected to withdraw its opposition to the amended prayer 1 of the notice of the motion.[17] (In e-mail communication on 19 May 2017, the Applicants proposed a further alternative

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16 Vol 3: 284 par 9

17 Vol 4: 288 par 9, Second Respondent's rejoinder affidavit; Vol 3: 284 par 9, Replying affidavit

to the amended prayer 1 of the notice of motion to insert the phrase "*indecent assault against children*".[18])

21. On 13 April 2017 Mr Frankel died.

22. On 9 May 2017, prior to the hearing of the application, the legal representatives of the applicants and the Estate concluded an agreement in terms of which the applicants undertook no longer to seek costs against the Estate.[19]

23. It is significant and relevant to the argument on appeal that the agreement was entered into in good faith by the applicants and the Estate for the specific purpose of the Estate avoiding an adverse costs order. The good faith nature of the agreement was not contested by any of the parties to the application or by the High Court.

24. The High Court noted that Mr Frankel withdrew his opposition to the constitutional relief,[20] agreed with the Minister's

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18 Vol 7: 583 par 7

19 Vol 7: 646, Agreement

20 Vol 7: 582 par 4, High Court judgment

proposal on costs,[21] and ordered that the Estate pay, on a joint and several basis, the costs of the applicants, until 20 January 2017.

25. The Court based its finding *inter alia* on the following:

25.1. The Court acknowledged, at the time of the alleged offences, that that alleged conduct constituted indecent assault and that SORMA is not applicable to the applicants.[22]

25.2. In considering prayer 1 and the narrow relief, the Court placed emphasis on the inclusion of the reference to children in the narrow relief. The Court did not have regard to the fact that the narrow relief was broader in law than prayer 1 as it catered for both statutory and common law sexual offences.[23]

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21 Vol 7: 629 par 117, High Court judgment

22 Vol 7: 585 par 16; Vol 7: 594 par 37 and Vol 7: 618 par 85, High Court judgment

23 Vol 7: 596 par 42, High Court judgment

25.3. The Court found that its discretion on costs was not limited by the agreement reached between the legal representatives of the applicants and the Estate on costs.[24]

25.4. The Court accepted that the Estate's opposition to the constitutional relief (prayer 1) was based on whether a case had been made out by the applicants.[25]

25.5. The High Court accepted that the *lis* between the applicants and the first respondent terminated on 13 April 2017 arising from Mr Frankel's death.[26]

25.6. The Court noted that Mr Frankel opposed the proceedings (in relation prayer 2) until his death and that he was fully aware that a costs order would be sought against him.[27]

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24 Vol 7: 633 par 128 High Court judgment

25 Vol 7: 632 par 124, High Court judgment

26 Vol 7: 631 par 122

27 Vol 7: 633 par 128, High Court judgment

26. Ultimately, the Court's order on costs appears to be based on the finding that it was not bound by the agreement concluded between the applicants and the Estate and that:

> "*… this Court has nevertheless found that the relief to be granted accords with the initial relief sought by the applicants in prayer 1 of their Notice of Motion.*"[28]

27. It is submitted that both these findings are incorrect.

C THE LAW RELATING TO THE ENFORCEMENT OF AN AGREEMENT BETWEEN PRIVATE PARTIES

28. The general principle is that courts will enforce contracts between private parties that are entered into freely, with *bona fides,* and as long as the agreement is consistent with constitutional values of dignity and autonomy.[29]

29. This is consistent with the general rule of public policy, as informed by the Constitution,[30] that contracts seriously entered

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28 Vol 7: 632 par 125, High Court judgment.

29 **Barkhuizen v Napier** 2007 (5) SA 323 (CC) par [57] and [87]

30 On the way in which public policy is rooted in constitutional values, see **Barkhuizen** (aupra) par [28]-[29] and [73]

into must be enforced (*pacta sunt survanda*), and the court's role in ensuring this is so.

30. The circumstances in which a court is precluded from enforcing a contractual term occurs where its enforcement would be unfair or unjust. The questions a court is to answer in such an inquiry are set out in **Barkhuizen**:

30.1. whether the clause itself is unreasonable; and

30.2. whether, if the clause is unreasonable, it should be enforced given the circumstances preventing compliance with it.[31]

31. In **SA Forestry**[32] the Supreme Court of Appeal noted that:

> "… *In addition, it was held in* Brisley *(supra) and* Afrox Healthcare *(supra) that – within the protective limits of public policy that the courts have carefully developed, and consequent judicial control of contractual performance and enforcement – constitutional values such as dignity, equality and*

31 **Barkhuizen** (aupra) par [57]-[58]

32 **SA Forestry Company Ltd v York Timbers Ltd** 2005 (3) SA 323 (SCA)

> *freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint.*"[33]

32. In **Gbengwa-Oluwatoye**, this Court considered the the importance of giving effect to agreements, solemnly concluded, by parties operating from the necessary position of approximate equality of bargaining power.[34] The Court recognised the important consideration of public policy in appeal, "*the need for parties to settle their disputes on terms agreeable to them. That need arises in their own interests, and the interests of the public*".[35] The Court concluded:

> "*The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none*

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33 **SA Forestry Company Ltd** (supra) par [27], referring to **Brisley v Drotsky** 2002 (4) SA 1 (SCA) par [93]; see also **Potgieter and Another v Potgieter NO and Others** 2012 (1) SA 637 (SCA) par [34]

34 **Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and another** 2016 (12) BCLR 1515 (CC)

35 **Gbenga-Oluwatoye** (supra) par [22]

> *should be lightly released from an undertaking seriously and willingly embraced*."[36]

33. The present application, although not a settlement agreement, comprised an undertaking between the parties removing, not only the issue in dispute as between the applicant and the Estate but, pertinently, the claim for costs as sought in the notice of motion.

34. The development of the court's approach to the enforcement of contracts entered into between private individuals, from **Brisley v Drotsky** to **Gbengwa-Oluwatoye** made plain that the courts do not hold general authority to assume jurisdiction to determine an agreement's enforceability or to invalidate contracts on the basis of judicially perceived notions of unjustness[37] but do have the authority, when presented with a dispute on the enforcement of an agreement, to determine whether the terms are unfair or unjust.

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36 **Gbenga-Oluwatoye** (supra) par [24]

37 **Brisley v Drotsky** (supra) par 6

35. On this approach, the applicants' undertaking in this matter and the Estate's agreement thereto must be upheld by the Court. The High Court was not conferred with the jurisdiction to determine costs as against the Estate and thus, was not in a position to exercise its discretion in relation to costs as against the Estate.

D APPROACH ADOPTED BY THE HIGH COURT IN RELATION TO THE AGREEMENT

36. The High Court held at paragraph 128:

> "… *This Court is not bound by agreements entered into between the applicant and Frankel in relation to costs entered into which affect third parties, such as the Minister in this case*."[38]

37. This finding is factually incorrect because the agreement was not that costs would be sought against a third party, in this case the Minister, rather the agreement was that the applicants would no longer seek costs against the Estate and abandon such

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38 Vol 7: 633

a claim.[39] As the applicants are *dominus litus* they are entitled to seek relief (and costs) against whichever party they elect.

38. The agreement does not affect the Minister as there is no guarantee as to how the Court would exercise its discretion on costs.

39. The approach and finding also amount to a misapplication of the law:

39.1. The High Court assumed it had the requisite power and jurisdiction to either (i) ignore the content of the agreement reached between the parties; alternatively, (ii) conclude that the agreement is not enforceable before the Court; and (iii) exercise its discretion in respect of costs against the Estate, in circumstances where the matter has been withdrawn (abandoned) as issue in dispute before the Court.

39.2. We have set out above the principles applicable to a court making a finding in respect of (i) and (ii) above. None of the

[39] Vol 7: 646 par 3

parties contended that the agreement was not freely and voluntarily made or that the terms of the undertaking were unreasonable or unjust, and therefore unenforceable.

39.3. As the enforceability of the agreement was not at issue before the High Court, the Court was obliged to uphold the terms of the agreement.

39.4. If this assertion is accepted, then the High Court did not have the authority to disregard the agreement and proceed on the fiction that the applicants persisted in their claim for costs against the Estate.

40. In analogous circumstances where litigant, prior to the hearing of an application, abandons a particular claim or relief set out in their notice of motion, a court in the ordinary course, will abide by that election and proceed to exercise its jurisdiction over the

issues the litigant states remain in dispute as live issues before the Court.[40]

41. There is no basis to distinguish such a case from one in which the abandonment takes the form of an agreement between litigants in respect of costs.

42. The High Court, therefore, misdirected itself in asserting that it was "not bound" by the agreement. The agreement did not seek to bind the Court or any other third party to its terms.

43. Instead, the agreement recorded the position of the applicants' and their election not to persist in seeking a costs order against the Estate. The determination by the Court nonetheless to assume jurisdiction was an error of law.

44. This Court may not find for the Estate on the above submissions. In that event, should this Court find that the High Court remained seized with the question of costs against the

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40 See for example, **South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others** 2017 (1) SA 549 (CC) par [34]

Estate as at the date of the hearing of the application, the alternative grounds of appeal are set out below.

E THE APPROACH TO COSTS IN A MATTER RAISING CONSTITUTIONAL ISSUES

45. The application is not one of private litigation in which the ordinary rules pertaining to costs orders apply. It is a matter of constitutional litigation.[41] Where the constitutional invalidity of a statute (or section thereof) is alleged, the sole respondent in the application, in truth, is the State in the representative capacity of the Minister.

46. The High Court's discretion on costs in constitutional litigation, therefore, must be exercised in accordance with the special rules relating to costs in such cases and, where necessary, this

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41 See, for example, **Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others** 2014 (3) SA 106 (CC) par [69] "*Constitutional litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the Constitution by establishing its meaning through contested cases.*"

may require that the common-law rules relating to costs be substantially adapted.[42]

47. The Constitutional Court has referred with approval to two basic principles in relation to costs as developed by the courts:[43]

47.1. The award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and is "*in essence a matter of fairness to both sides*";

47.2. The successful party, as a general rule, should have his or her costs.[44]

48. These principles "*are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation*".[45]

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42 **Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others (2)** 1996 (2) SA 621 (CC) par [3]

43 Ibid

44 It is accepted that the applicants are entitled to their costs in this application and that the applicants raised important constitutional issues. Vol 3: 274 par 45 and 55-56, Answering affidavit.

49. In applying these principles this Court, in the past, has ordered successful parties to pay the costs of unsuccessful parties because the matter involved important constitutional issues or because payment of costs by the unsuccessful party would undermine another important objective (such as the ventilation of the right of access to education).[46]

50. It is only the application of the first of these principles that is in issue in this appeal.

51. The discretion inherent in the decision to award costs is one that must be exercised judicially having regard to all the relevant considerations and the inquiry into what would be a just and equitable order of costs includes a determination of the reasonableness of the conduct of the parties in relation to the proceedings.[47]

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45 **Ferreira** (supra) par [3]

46 **Gory v Kolver NO (Starke & others intervening)** 2007 (4) SA 97 (CC) par [60] – [65]; **MEC for Education and Others v Pillay** 2008 (2) BCLR 99) para 118; **Lawyers for Human Rights v Minister in the Presidency and others** 2017 (1) SA 645 (CC) par [7]

47 **Affordable Medicines Trust and Others v Minister of Health of RSA and Another** 2006 (3) SA 247 (CC) par [138]; **Chonco and Others v President of the Republic of South Africa** 2010 (6) BCLR 511 (CC) par [6]

52. This Court has confirmed that an appeal court will not readily depart from the exercise of the discretion by a court of first instance:

> "[19] … *the ordinary approach on appeal to the exercise of the discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.*
>
> …
>
> [22] … *If the court takes into account irrelevant considerations or bases the exercise of its discretion on wrong legal principles, its judgment may be overturned on appeal. Beyond that, however, the*

> *decision of the court of first instance will be unassailable*"[48] [emphasis added]

53. The award of costs in a constitutional matter itself raises a constitutional issue and the starting point of the inquiry is therefore the nature of the nature of the issues ventilated.[49]

54. In **Biowatch**, this Court stated that the primary consideration is the character of the litigation and the conduct of the parties in pursuit of the causes advanced. The considerations that are not relevant to the court's discretion on costs include:

> "*Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order*

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48 **Giddey NO v JC Barnard and Partners** 2007 (5) SA 525 (CC); see also **South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others** 2007 (1) SA 523 (CC) par [39] and **Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and another** 2015 (4) BCLR 396 (CC) par [13]

49 **Lawyers for Human Rights** (supra) par [12]

would hinder or promote the advancement of constitutional justice."[50]

55. The Court proceeded to give the following guidance to courts exercising their discretion on the award of costs:

"*… courts should not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken.*"[51]

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50 **Biowatch Trust v Registrar, Genetic Resources, and Others** 2009 (6) SA 232 (CC) par [16]

51 **Biowatch** (supra) par [20]; see also **Limpopo Legal Solutions and others v Vhembe District Municipality and others** [2017] (9) BCLR 1216 (CC) par [19]

56. This approach is not unqualified and a court may depart therefrom if an application is frivolous or vexatious, or in any other way manifestly inappropriate.[52]

57. The approach to the exercise of discretion in constitutional litigation in which the State is the principle role-player in respect of the relief sought is:

> "… *the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct*."[53] [emphasis added]

58. In sum, this Court has made clear that the correct approach does not apply only to costs orders on the merits in

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52 **Biowatch** (supra) par [24]

53 **Biowatch** (supra) par [56]

constitutional cases but applies also to what may be described as ancillary issues raised in the matter and procedural mechanism used by the parties.[54]

59. Although a court may be slow to interfere with a lower court's exercise of discretion in relation to costs, there are circumstances where such interference is appropriate and necessary to ensure fairness of the proceedings and that the principle of fairness has not been threatened.[55]

60. The applicable considerations – to promote the advancement of constitutional justice, the full ventilation of the constitutional issue before the court, and to ensure fairness between the parties to the litigation is achieved – supports the contention that the cost order of the High Court is one that is unreasonable and falls to be set aside for the reasons set out below.

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54 **Lawyers for Human Rights** (supra) par [16]

55 **South African Broadcasting Corp Ltd** (supra) par 39. See for example, **Sanderson v Attorney-General, Eastern Cape** 1998 (2) SA 38 (CC) par 44

F THE BASIS UPON WHICH THE HIGH COURT MISDIRECTED ITSELF

i) The Court failed to give due regard to the applicants' email of 24 April 2017

61. The e-mail, addressed to the Court, stated that the applicants no longer sought to pursue prayer 2 of the notice of motion.[56] This communication was directed to the Court after the close of pleadings and some two months prior to the hearing of the application.

62. The effect of the e-mail communication is akin to the procedure provided for in Rule 41 of the uniform rules of court in that, in respect of the Estate, the proceedings against Mr Frankel had been withdrawn.

63. Mr Frankel had already withdrawn his opposition to prayer 1 of the notice of motion. Consequently, at 24 April 2017:

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56 Vol 7: 584 par 10, High Court judgment

63.1. No *lis* existed between the applicants and the Estate.[57]

63.2. The Estate had no interest in the application (which comprised prayer 1 and the amended prayer 1 in its narrow and wider form).

63.3. The Court was no longer seized with an issue in dispute between the parties at the time the application was heard.

64. The High Court, in making the costs order, thus conferred upon itself the jurisdiction to pronounce on the issue of costs as between parties to the litigation in which no live issue remained.

65. In this vein, the applicants' abandonment of a cost order against the Estate is not without significance. The importance is twofold: first, it shows that there was no longer a disputed issue

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57 The Canadian Supreme Court in In Re: Residential Tenancies Act, 1979 [1981] 1 SCR 714 at 743, in different context, described judicial power in the following terms: '. . . the hallmark of a judicial power is a lis between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality'. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole. **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others** 2008 (2) SA 24 (CC) par 208 fn 98

as between the applicants and the Estate, insofar as the applicants' constitutional complaints are concerned. Second, it should weigh heavily against a cost order of any kind against the Estate, when the beneficiary of such a cost order has already made it clear that it does not seek costs against it.

66. It matters not that the Court restricted the costs order to the period prior to the Estate's withdrawal of its opposition prayer 1. Rather, the misdirection occurred by the Court assuming a mandate to make an order in relation to costs as between the applicants and the Estate.

67. To the extent that relief sought in prayer 2 of the notice of motion directly implicated Mr Frankel, it was incumbent that the Estate persists in opposing this prayer. This fact does not and, arguably cannot, alter the nature of the application from that of a constitutional challenge to that of litigation between private litigants to which the ordinary rules of costs apply.

ii) Failure to give due regard to the primary consideration in constitutional litigation.

68. The Court failed to place sufficient weight on the approach to costs in constitutional litigation between a private party and the State, this being that if the private party is successful, it should have its costs paid by the State, while, if unsuccessful, each party should pay its own costs.[58]

69. In the case of **Malachi**, after receiving written submissions from the parties, the Court held:

> "*the challenge to the constitutionality of the impugned provisions is a contest not between Ms Malachi and her employers but between her and the Minister.*"[59]

70. In analogous circumstances, the Estate did not contest the applicants' challenge to the constitutionality of section 18 of the Criminal Procedure Act (rather the formulation of the relief in

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58 **Tebeila Institute** (supra) par [4]

59 **Malachi v Cape Dance Academy International (Pty) Ltd and Others** 2011 (3) BCLR 276 (CC) par [8] ("*Malachi II*")

prayer 1) and the true contest on the constitutional validity of the section was between the applicants and the Minister (the State).

71. The Court sought to distinguish Malachi on the basis that Mr Frankel (unlike the Cape Dance Academy) sought to "*defend the constitutional validity of the proceedings*".[60]

72. This is not correct. The opposition to prayer 1 of the notice of motion was not based on a defence of the constitutionality of section 18 but rather on whether the formulation of prayer 1 would effectively result in the relief sought by the applicants in prayer 2.[61]

73. The Estate at no stage in the pleadings defended the constitutionality of section 18 of the CPA (and, indeed, the Estate would have no legal basis on which to do so). Rather, the

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60 **Malachi II** (supra) par [7] and Vol 7: 630 par 119-120. The High Court held that "Frankel chose to continue to actively oppose these proceedings right up until his death" – Vol 7: 633 par 128

61 Vol 3: 267 par 21, Answering affidavit

opposition was limited to ascertaining the true ambit of the applicants' case insofar as it impacted on Mr Frankel.[62]

74. The hypothetical position of whether it would be appropriate for the High Court to depart from the Malachi principle had the Estate opposed the constitutional challenge (as contemplated in paragraph 7 of the **Malachi II**) simply does not arise.

iii) The Court's interpretation on the narrow relief

75. In the findings on the narrow relief in paragraphs 5 and 120 of the judgment, the Court failed to give due regard to the fact that the narrow relief spans a larger class of persons than that catered for in prayer 1 of the notice of motion.

76. The fact that the narrow relief extends protection to those persons who were victims of a sexual offence, whether under the SORMA or under the common-law, is critical to ensuring effective relief to the applicants in this application.

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62 Vol 3: 270 par 31, Answering affidavit

77. The formulation of the narrow relief in this manner is a consequence of the legal issues raised in the answering affidavit.[63]

78. Had the Court taken this into account, the reasonable exercise of the Court's discretion on costs would have militated against a costs order against the Estate.

79. This is evident by the Court's finding, in paragraph 125 of the judgment, that "*the relief granted accords with the initial relief … in prayer 1 of the notice of motion*".[64]

80. This finding is incorrect and ignores the role of the Estate in assisting in the ventilation of the constitutional issue under consideration. It also fails to acknowledge that the legal concerns raised by the Estate in the answering affidavit were of value and were ultimately incorporated in the Court's final order.

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63 Vol 3: 283-284 par 8-9, Replying affidavit

64 Vol 7: 632 par 125, High Court judgment

81. On this basis, the Estate achieve a degree of success in its opposition, a level of success that rendered its continued opposition to the narrow relief unnecessary.

82. It is therefore submitted that it is unreasonable for the Court to hold a private litigant liable any portion of the costs in the application and the Court's finding amounts to a material misdirection in the exercise of its discretion.

iv) The finding on the principle of legality

83. In paragraph 86 of the judgment, the Court correctly held that the principle of legality is not encroached on by the declaration of unconstitutionality of section 18.[65]

84. The Court however erred in failing to recognise that the reason that the basis the legality principle would not be infringed is that the wording of the narrow relief catered for "all sexual offences", regardless of the source of the offence in a statute (SORMA) or the common law.

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65 Vol 7: 618, High Court judgment

85. The Court's failure to recognise this underlying premise resulted in the Court's material misdirection in the exercise of its discretion on costs and the basis upon which the Estate raised the principle of legality and retrospectivity in its answering affidavit. These issues, raised in the answering affidavit, ceased to have relevance following the formulation of the narrow relief.

v) The Court's approach to the judgments of Malachi and Ex Parte Omar

86. Reference is made to the submissions set out above in part (ii) in relation to the **Malachi** judgment.

87. The High Court held the State's conduct in the application to be unhelpful.[66] This may be the case but the Court misdirected itself in failing to recognise that the impact of the State's approach in failing to file evidence before the Court by way of affidavit until after the close of pleadings and the filing of heads of argument constitutes unacceptable conduct on the part of a

66 Vol 7: 631 par 123, High Court judgment

State party in which the constitutional validity of provisions of a statute are challenged.

88. The conduct of the State in this application amounted to a breach of its duty to the Court; a duty described by this Court in **Ex Parte Omar**:

> "*Constitutional challenges to legislation adopted by Parliament are not mere formalities. Parliament was obliged to consider the constitutionality of the Domestic Violence Act before it was passed, and the state law advisors would presumably have certified the Act as being consistent with the Constitution. If the government takes the view that it cannot support the legislation then it ought to have explained to the Court the reasons for its attitude, and what it considered to be an appropriate order in the circumstances*."[67]

89. Where the duty has not been observed, this Court has stated:

> "*Furthermore, this Court has consistently expressed its displeasure at the failure, by organs of state, to participate in proceedings of a constitutional challenge*

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67 **Ex Parte Omar** 2006 (2) SA 284 (CC) par [5]

against the validity of statutory provisions that they administer or under which they function."[68]

90. In contrast, the Estate acted in accordance with its obligations to the High Court – to assist the Court in ventilating the constitutional issue before it and in determining the ambit and implications of the applicants' relief as prayed for in the notice of motion.[69]

91. The consequence of the State's conduct was that the High Court and all parties to the application did not have the benefit of evidence from the Minister, and without input from the executive arm of government until some three weeks prior to the hearing of the application.[70]

92. This was unsatisfactory because the Minister is the executive functionary who represents the lawmakers that promulgated the impugned provisions. He is the primary repository of the

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68 **Islamic Unity Convention v Minister of Telecommunications and Others** 2008 (3) SA 383 (CC) par [17]; see also **Tongoane and Others v Minister of Agriculture and Land Affairs and Others** 2010 (6) SA 214 (CC) par [120]; **My Vote Counts NPC v Speaker of the National Assembly and others** 2016 (1) SA 132 (CC) par [187]-[188]

69 Vol 3: 264 par 264-267, Answering affidavit; Vol 4: 288-290, Rejoinder affidavit

70 The parties submitted their heads of argument during March 2017 in accordance with the High Court directive of 9 February 2017.

necessary and relevant information, and the legal and constitutional considerations, firstly, to understand the impugned sections of the statute itself and the legislative history (to the extent that it is relevant) and, secondly, the State's view on how a court may craft an appropriate remedy.

G REMEDY AND CONCLUSION

93. Neither the applicants nor the second respondent has opposed this appeal application. Accordingly, in the event that the Estate is successful in the appeal, it does not seek to recover its costs from the second respondent.

94. In the event that the Estate is unsuccessful before this Court, the Court should exercise its discretion to make no order as to costs on the basis of the principles set out above in relation to litigation in the public interest.

95. In the light of the above submissions, it is submitted that the appeal should be granted and the following order should be made:

(1) The first respondent's appeal is upheld.

(2) The costs order contained in paragraph 4 of the order of the Gauteng Local Division, Johannesburg dated 15 June 2017 is set aside.

(3) No costs order of the proceedings in the court below is made against the first respondent"

Sha'ista Kazee

Chambers, Sandton

28 September 2017

FIRST RESPONDENT'S LIST OF AUTHORITIES

1. *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2006 (3) SA 247 (CC)

2. *Barkhuizen v Napier* 2007 (5) SA 323 (CC)

3. *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)

4. *Chonco and Others v President of the Republic of South Africa* 2010 (6) BCLR 511 (CC)

5. *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC)

6. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)

7. *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC)

8. *Ex Parte Omar* 2003 (10) BCLR 1087 (CC)

9. *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* (2) 1996 (2) SA 621 (CC)

10. *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and another* 2016 (12) BCLR 1515 (CC)

11. *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC)

12. *Gory v Kolver NO (Starke & others intervening)* 2007 (4) SA 97 (CC)

13. *Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC)

14. *Lawyers for Human Rights v Minister in the Presidency and others* 2017 (1) SA 645 (CC)

15. *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC)

16. *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2011 (3) BCLR 276 (CC)

17. *MEC for Education and Others v Pillay* 2008 (2) BCLR 99)

18. *My Vote Counts NPC v Speaker of the National Assembly and others* 2016 (1) SA 132 (CC)

19. *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA)

20. *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246

21. *SA Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA)

22. *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC)

23. *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and others* 2015 (6) SA 125 (CC)

24. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC)

25. *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC)

26. *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* 2017 (1) SA 549 (CC)

27. *Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and another* 2015 (4) BCLR 396 (CC)

28. *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 170/17

In the matter between:

NICOLE LEVENSTEIN	**First Applicant**
PAUL DIAMOND	**Second Applicant**
GEORGE ROSENBERG	**Third Applicant**
KATHERINE ROSENBERG	**Fourth Applicant**
DANIELA MCNALLY	**Fifth Applicant**
LISA WEGNER	**Sixth Applicant**
SHANE ROTHQUEL	**Seventh Applicant**
MARINDA SMITH	**Eighth Applicant**
and	
ESTATE LATE FRANKEL	**First Respondent**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Second Respondent**
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG	**Third Respondent**
TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	**Fourth Respondent**
TEDDY BEAR CLINIC	**Fifth Respondent**
LAWYERS FOR HUMAN RIGHTS	**Sixth Respondent**

SECOND RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1 This is an application for confirmation of the declaration of invalidity made by the Gauteng Local Division of the High Court, regarding section 18 of the Criminal Procedure Act 51 of 1977 (the CPA).

2 As appears from what follows, the second respondent (the Minister) did not ultimately oppose the declaration of invalidity sought by the applicants in the High Court.

3 Instead, the Minister filed an affidavit and presented argument explaining to the Court the respects in which he considered that section 18 was unconstitutional and dealing with the appropriate remedy. This was in keeping with what this Court has explained regarding the duties of a member of the executive who considers that a constitutional challenge ought to succeed.[1]

4 The role of the Minister before this Court is the same. The Minister's duty is to provide "*assistance*" to the Court regarding the decision to be made, the basis for the decision and the way the judgment may be expressed.[2]

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[1] *Phillips and Another v Director of Public Prosecutions and Others* 2003 (3) SA 345 (CC) at para 11

[2] *Phillips* at para 12

5 Given this role of the Minister and in order to avoid unduly burdening this Court, these heads of argument do not seek to repeat the arguments advanced by the applicants on the merits, which the Minister broadly endorses.

6 Instead, these heads of argument will deal briefly with only the following three issues:

6.1 The basis upon which this Court ought to confirm the finding of constitutional invalidity;

6.2 The question of an appropriate remedy; and

6.3 The issue of costs.

7 It ought to be borne in mind that, in terms of the directions of the Chief Justice, these heads of argument are being filed simultaneously with the heads of argument for the remaining respondents. To the extent that it proves necessary for the Minister to address issues arising out of those heads of argument, this will be dealt with in oral argument.

CONSTITUTIONAL INVALIDITY

8 As appears from what follows, the Minister supports the finding of the High Court that section 18, in its present form, is not consistent with the Constitution.

9 However, it is important to be clear on what the precise constitutional flaw in section 18 is. The is because if the constitutional flaw is identified incorrectly or framed too broadly, this would unnecessarily and impermissibly tie Parliament's hands in determining how section 18 is to be brought into conformity with the Constitution.

The constitutional position on time-bar provisions in a criminal context

10 In this regard, it is notable that for many years our law has provided, via statute, for a time-bar provision in respect of the right to institute criminal prosecution in respect of most offences. This has always been subject to an exception for the most serious offences.

11 As is explained in the Minister's affidavit:[3]

11.1 Section 388 of the Criminal Procedure Act 56 of 1955 provided that a 20 year time-bar applied to the prosecution of all offences – except murder.

11.2 Section 18 of the Criminal Procedure Act 51 of 1977 kept in place the general 20 year time-bar, but provided that it would not apply to "*an offence in respect of which the sentence of death may be imposed*".

[3] Minister's affidavit, v 4 p 343-345 paras 14 - 22

11.3 This method of separating the most serious offences from other offences was obviously no longer tenable following this Court's decision in *Makwanyane*.[4]

11.4 Accordingly, in 1997, section 18 was amended[5] to include a list of offences that were considered to be particularly serious. These offences included murder, treason committed when the Republic is in a state of war, robbery with aggravating circumstances, kidnapping, child stealing and rape.

11.5 In 2007, the enactment of the Sexual Offences Act[6] broadened the ambit of section 18 further. It extended the definition of rape to include all forms of sexual penetration and added the offences of compelled rape and using a child or person who is mentally disabled for pornographic purposes.

12 I submit that this general approach of subjecting all but the most serious offences to a time-bar provision is constitutionally permissible.

13 There is nothing inherently unconstitutional about time-bar provisions. Indeed, they can serve a valuable function. As this Court explained in one of its earlier decisions, *Mohlomi*:

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4 *S v Makwanyane and Another* 1995 (3) SA 391 (CC)

5 By the Criminal Law Amendment Act 105 of 1997

6 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

> *"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.*
>
> *It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which section 22 bestows on everyone to have his or her justiciable disputes settled by a court of law…."*[7]

14 While this was said in a civil context, similar risks arise from delays in a criminal context. This emerges from this Court's judgment in *Bothma*:[8]

> *"Society demands a degree of repose for its members. People should be able to get on with their lives, with the ability to redeem the misconduct of their early years. To prosecute someone for shop-lifting more than a decade after the event could be unfair in itself, even if an impeccable eyewitness suddenly came forward, or evidence proved the theft beyond a reasonable doubt. Everything will depend upon the circumstances. All the relevant factors would have to be weighed on a case-by-case basis. And of central significance will always be the nature of the offence. The less grave the breach of the law, the less fair will it be to require the accused to bear the consequences of the delay. The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us "Molato ga o bole" (Setswana) or "ical'aliboli" (isiZulu) – there are some crimes that do not go away."*

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[7] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at paras 11-12

[8] *Bothma v Els* 2010 (2) SA 622 (CC) at para 76

15 The decision in *Bothma* thus makes expressly clear that the Constitution permits – indeed arguably requires – a distinction to be drawn between different kinds of offences when it comes to the question of whether delays in prosecution should be countenanced.

16 In light of these decisions, I submit that it ought to be accepted that:

16.1 There is nothing inherently unconstitutional about a provision such as section 18, which provides that general offences are subject to a time-bar provision. That is especially the case when the time-bar is for a substantial period – 20 years in this case.

16.2 There is, moreover, nothing inherently unconstitutional about a time-bar provision which draws a distinction between more serious and less serious offences and which exempts more serious offences from its reach. Indeed, as the reasoning in *Bothma* makes clear, this is perfectly permissible.

17 It is therefore respectfully submitted that, in deciding this matter, this Court should not adopt any form of reasoning which suggests that time-bars in a criminal context are inherently unconstitutional or that it is inherently constitutionally impermissible for different kinds of offences to be treated differently by a time-bar provision.

The constitutional flaw in section 18

18 However, the mere fact that the Constitution in principle allows time-bar provisions in a criminal context and allows for distinctions to be drawn between different kinds of offences does not mean that the present formulation of section 18 passes constitutional muster. Instead the section is inconsistent with the Constitution for the reasons that follow.

19 The key constitutional flaw relates to the absence of a rational basis for the distinctions drawn by section 18 between different kinds of sexual offences.

20 As explained above, the Constitution permits Parliament to draw distinctions between different offences when it comes to a time-bar provision.

21 However, in drawing such distinctions, Parliament is of course obliged to act rationally. For a provision drawing such distinctions to survive constitutional challenge, it is necessary that the distinction be rationally connected to a legitimate governmental purpose. This obligation flows both from sections 1(c) and 9(1) of the Constitution, as this Court explained in *Print Media.*[9]

[9] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at paras 25 and 79 - 82

22 In the present case, section 18 creates two broad categories of sexual offences, which are dealt with in fundamentally different ways.

22.1 The first category consists of the sexual offences specified in section 18: rape or compelled rape;[10] and using a child or person who is mentally disabled for pornographic purposes.[11] These sexual offences are not subject to any time-bar in respect of criminal prosecutions.

22.2 By contrast, the second category consists of all other sexual offences. These are subject to the 20 year time-bar. This includes most notably the various forms of sexual assault[12] and numerous forms of sexual offences against children, including sexual exploitation of children;[13] sexual grooming of children;[14] exposure of children to pornography or child pornography;[15] and compelling children to witness sexual offences, sexual acts or self-masturbation.[16]

23 The sexual offences subjected to the time-bar provision plainly include offences of the most serious kind.

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[10] Section 18(f) of the CPA

[11] Section 18(i) of the CPA

[12] Sections 5 to 7 of the Sexual Offences Act

[13] Section 17 of the CPA

[14] Section 18 of the CPA

[15] Section 21 of the CPA

[16] Section 20 of the CPA

24 Yet, no party has been able to offer any explanation (still less a rational one) as to why these offences are subjected to the time-bar provision when other similar offences – such as using a child for pornographic purposes – are not.

25 In the absence of any rational explanation for this distinction, section 18 is unconstitutional to the extent that it imposes the time-bar on all non-listed sexual offences.

26 Indeed, the irrationality and impermissibility of the distinction is heightened by the recognition of this Court and the SCA that sexual offences, particularly children, demand an especially generous approach when it comes to time-bar provisions.

26.1 This is because, as had been demonstrated by expert evidence:

> *"(a) chronic child abuse was a crime of a very special kind, given the results that flow from it;*
>
> *(b) distancing of the victim from reality and transference of responsibility by the victim onto himself or herself were known psychological consequences; and*
>
> *(c) in the absence of some cathartic experience, such consequences could and often do persist into middle age despite the cessation of the abuse during childhood."*[17]

26.2 Given this and the seriousness of the offences concerned, one would expect that, if anything, many of the sexual offences

[17] *Bothma v Els* at para 52, summarizing *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA)

concerned would fit very appropriately in the category of offences to which the time-bar would not apply.

27 The Minister therefore supports the conclusion that the manner in which section 18 deals with sexual offences us unconstitutional.

28 One further point should be made.

28.1 There may well be a legitimate basis for applying the time-bar to certain limited sexual offences.

28.2 For example, a so-called "victimless crime" like a sexual act with a corpse[18] or offences such as consensual incest[19] or bestiality[20] might conceivably be of a different order to offences such as rape and sexual assault. If so, Parliament could permissibly apply the time-bar to such offences.

28.3 But for present purposes, this Court need not decide this issue. What is quite clear is that the wide range of sexual offences to which the time-bar applies, without any rational explanation, means that section 18 is unconstitutional in its present form.

[18] Section 14 of the Sexual Offences Act

[19] Section 12 of the Sexual Offences Act

[20] Section 13 of the Sexual Offences Act

REMEDY

29 The remedy granted by the granted by the High Court was to:

29.1 Declare section 18 unconstitutional and invalid and to the extent of its inconsistency;

29.2 Suspend the declaration of invalidity for 18 months; and

29.3 Grant an interim reading-in during the period of suspension.

30 The applicants have not appealed against the suspension order, but they apparently take issue with it before this Court.[21]

31 However, their criticism of the order is misplaced.

32 Because the suspension order is coupled with an interim reading-in, it causes no prejudice to the applicants or to other victims in their position. It means that, if the High Court order is confirmed, all victims of sexual offences will not be subject to the section 18 time-bar. Their rights will have been fully vindicated.

33 Moreover, the approach of the High Court is perfectly consistent with that of this Court in matters such as *Gaertner.*[22] There, this Court

[21] Applicants' heads of argument, paras 54-59

[22] *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC)

emphasised a preference for suspension coupled with interim reading-in, because of separation of powers concerns:

> *"Reading-in has been the object of some suspicion and courts must resort to it sparingly. The actual act of writing or editing legislation may constitute a possible encroachment by the judiciary on the terrain of the legislature and, therefore, a violation of the separation of powers.*
>
> *In Johncom Media Investments Ltd Jafta J held that a temporary reading-in is permissible and is just and equitable. In the court stated:*
>
> > *'(T)he only feasible way forward is reading-in. This course will not unduly intrude into the domain of Parliament because Parliament can amend the statute at any time.'*
>
> *Depending on its nature and extent, the remedy thus does not intrude unduly into the lawmaker's sphere. With interim reading-in, there is recognition of the legislature's ultimate responsibility for amending Acts of Parliament: reading-in is temporary precisely because the court recognises that there may be other legislative solutions. And those are best left to Parliament to contend with.*
>
> *Thus during the period of suspension, there is a need for a reading-in….."*[23]

34 I submit precisely the same caution applies here.

34.1 Without an order of suspension, this Court would be re-writing section 18 to provide that no time-bar provision applies to any sexual offence of any kind.

34.2 This would be so even in respect of crimes such as a sexual act with a corpse,[24] consensual incest[25] or bestiality[26] which, as

[23] At paras 82 – 85 (emphasis added)

[24] Section 14 of the Sexual Offences Act

[25] Section 12 of the Sexual Offences Act

explained above, might well be subject to a constitutionally permissible time-bar.

34.3 It is clear that deciding precisely which sexual offences ought to be subject to the time-bar (if any) and which not, is a complex matter that is best left to Parliament. The suspension order ensures that is Parliament that is left to craft this "*legislative solution*" rather than the Court purporting to do it on its behalf.

34.4 And just as in *Gaertner,* the interim reading-in protects victims' rights perfectly in the interim.

35 The Minister therefore submits that this Court should confirm the High Court order, but respectfully submits that it would be more appropriate for the period of suspension to be 24 months, rather than 18 months. This will allow the legislative process to run its course and, as indicated, the rights of victims are fully protected during this period.

COSTS

36 Two issues arise for determination in relation to the question of costs. Before dealing with those issues, it is necessary to briefly set out the stance of the Minister and Frankel in relation to this litigation before the High Court.

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[26] Section 13 of the Sexual Offences Acyt

37 In relation to the Minister:

37.1 A notice of intention to oppose was initially filed by the Minister on 12 September 2016.[27]

37.2 However, no answering affidavit was filed at that stage. Instead, on 10 November 2016, the Minister's opposition was withdrawn and a notice to abide was filed.[28]

37.3 Thereafter, an explanatory affidavit was then filed on behalf of the Minister, explaining that the Minister agreed that the applicants' constitutional challenge was well-founded.[29] The Minister also filed heads of argument in support of this stance.

37.4 In other words, at no stage did the Minister ever actively oppose the application or cause unnecessary costs to be incurred on the part of the applicants. No replying affidavit had to be filed by the applicants regarding the Minister and the Minister's heads of argument supported, rather than opposed, the applicant's case.

38 In relation to Frankel, the position was quite different:

38.1 On 5 September 2016, Frankel filed his notice of opposition.[30]

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[27] v 3, p 251-253

[28] v 3, p 254-256

[29] v 4, p 339-367

[30] v 3, pp 248-250

38.2 On 26 September 2016, Frankel filed his answering affidavit opposing the relief sought. He sought to have the application dismissed with costs.[31]

38.3 That in turn necessitated the filing of a replying affidavit by the applicants.

38.4 Thereafter, on 20 January 2017, Frankel filed a rejoinder affidavit.[32]

38.5 As the High Court correctly found, "*Frankel chose to continue to actively oppose these proceedings right up until his death*".[33]

38.6 It was only after his death that his estate withdrew his opposition.

Costs in the High Court

39 The High Court directed that the costs of the application be paid be jointly and severally by Frankel and the Minister until 20 January 2017, after which date the costs would be paid solely by the Minister.

40 The Minister has not sought to appeal that costs award. Frankel's estate, however, seeks to appeal the order insofar as it hold the estate liable for the costs up until 20 January 2017. It thus appears that

[31] v 3, pp 265-281

[32] v 4, pp 286 - 328

[33] High Court judgment, v 7 p 633 para 128

Frankel contends that the Minister should be liable for all of these costs.

41 I submit that the appeal by Frankel's estate is without merit.

41.1 The initial notice of motion made quite clear that costs would only be sought in the event of opposition.[34]

41.2 Knowing this, Frankel elected to oppose and did so vigorously, filing both an answering affidavit and rejoinder affidavit. It was only Frankel's death that led to a change of position – not any change of heart on his part.

41.3 Frankel was of course entitled to pursue his self-interest and to oppose the application in this regard. But having done so, his estate cannot escape liability for the costs involved and certainly cannot expect that the Minister (ie. the public) should pay the costs incurred by Frankel's ultimately unsuccessful opposition.

42 In the circumstances, I submit that this Court should dismiss the appeal by Frankel's estate.

43 The alternative would arise only if this Court concludes that the applicants waived their right to claim costs against Frankel's estate.

[34] Notice of Motion, v 1 p 2 prayer 3

43.1 The Minister does not seek to become embroiled in that debate. It suffices to draw attention to this Court's statement in a similar context in *Malachi* regarding a purported agreement as to costs:

> *"This Court is, however, not bound by that agreement. Costs are a matter which lies entirely within the discretion of this Court, to be exercised with due regard to the particular circumstances of each case."*[35]

43.2 However, if this Court concludes that it does wish to give effect to any waiver by the applicants of their right to claim costs against Frankel's estate, then it should direct that the Minister is only liable for 50% of the costs incurred up to 20 January 2017, with the applicants to bear the remaining 50% themselves.

Costs in this Court

44 The applicants rely on *Malachi* to contend that the Minister should be held liable for their costs in this Court.[36]

45 However, this Court has more recently recognised that it may be appropriate, in confirmation proceedings, for costs only to be paid where confirmation is opposed.

45.1 In *Tronox,* this Court held:

[35] *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC) at para 52

[36] *Malachi* at para 50

> *"Tronox needed to approach this court in any event to have the High Court's order confirmed; the MEC did not bring Tronox to this court. However, the MEC must pay the costs incurred by Tronox as a result of the MEC's appeal and opposition to the confirmation application."*[37]

45.2 This Court therefore directed the MEC to pay the costs of opposition to the confirmation proceedings – rather than all the costs.

45.3 In *University of Stellenbosch,*[38] this Court directed that the "*respondents who opposed confirmation of the order of constitutional invalidity made by the Western Cape Division of the High Court are ordered to pay the applicants' costs*".

45.4 In *McBride,*[39] this Court directed the Minister to pay the costs but did so because "*he still opposed the matter until late in the proceedings. The Minister's draft order was served and filed at the proverbial eleventh hour, after the parties had already finalised their preparation and incurred high costs.*"

46 In the present case, the Minister has not opposed the confirmation proceedings at any stage or in any form. Accordingly, the appropriate order would be for all parties to pay their own costs in this Court.

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[37] *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC) at para 60

[38] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) at para 212 (9)

[39] *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) at para 57

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29 September 2017

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Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No.: 170/17
Case No.: 29573/16

In the matter between:

NICOLE LEVENSTEIN	First Applicant
PAUL DIAMOND	Second Applicant
GEORGE ROSENBBERG	Third Applicant
KATHERINE ROSENBERG	Fourth Applicant
DANIELA MCNALLY	Fifth Applicant
LISA WEGNER	Sixth Applicant
SHANE ROTHQUEL	Seventh Applicant
MARINDA SMITH	Eighth Applicant

and

The Estate of the late SIDNEY LEWIS FRANKEL	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG	Third Respondent
THE TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	Fourth Respondent
THE TEDDY BEAR CLINIC	Fifth Respondent
LAWYERS FOR HUMAN RIGHTS	Sixth Respondent

FOURTH RESPONDENT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. The fourth respondent, the Women's Legal Centre Trust, supports the application for confirmation of the order of constitutional invalidity granted by the Gauteng Local Division, Johannesburg on 19 June 2017.[1] In doing so, the WLC seeks leave to adduce new evidence to assist this Court in determining the impact of the impugned section and the extent of the constitutional defect.[2]

2. The High Court ordered that section 18 of the Criminal Procedure Act 51 of 1977 ("CPA") is inconsistent with the Constitution and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in sections 18(f), (h) and (i) after the lapse of a period of twenty years from the time when the offence was committed.[3]

3. The WLC supports the findings and conclusions of the High Court that:

    3.1. Section 18 is arbitrary and irrational in that it excludes certain sexual offences (most notably, rape and compelled rape) from a period of prescription, but imposes a blanket time bar on the prosecution of all other sexual offences after a period of twenty years;[4]

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[1] The WLC participated as *amicus curiae* in the High Court but has since been cited as a respondent in these proceedings because of its direct and substantial interest in the order granted by Hartford AJ.

The order of Hartford AJ is at Vol 7, p634.

[2] The application to adduce further evidence is contained in Volumes 1 & 2 of the Supplementary Record.

[3] The sub-sections in section 18 that exclude certain sexual offences from prescription are:

- section 18(f): "rape or compelled rape as contemplated in section 3 of SORMA respectively";
- section 18(h) "trafficking in persons for sexual purposes by a person as contemplated in section71(1) and (2) of the SOMRA";
- section 18(i) "using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of SORMA."

[4] Vol 7, p596 – 611, paras 43 – 69, High Court Judgment.

3.2. The prescription of sexual offences arising from the operation of section 18 infringes the right to dignity and equality of survivors;[5] and

3.3. The operation of section 18 impedes the performance of the state's obligations under section 7 of the Constitution.[6]

4. In the High Court, the applicants narrowed their case to challenge the constitutionality of section 18 only to the extent that it imposed a twenty-year time period on the right to institute a prosecution for the offence of indecent assault against children. The WLC and other amici curiae urged the High Court to declare the section unconstitutional to the extent that it imposed a prescription period on all sexual offences committed against adults and children.[7] In these confirmation proceedings, the applicants support the broader order of constitutional invalidity granted by the High Court.[8] The WLC therefore aligns itself with the applicants' submissions on the confirmation of the declaration of constitutional invalidity.[9]

5. The WLC expands upon the applicants' submissions in two respects:

5.1. Firstly, the WLC advances four additional reasons why the differentiation between rape and compelled rape, and all other sexual offences, in section 18 is irrational.

5.1.1. The primary rationale for the differentiation between sexual offences in section 18 is that certain sexual

[5] Vol 7, p615, para 78, High Court Judgment.

[6] Vol 7, p623, para 98, High Court Judgment.

[7] Vol 5, p376, para 4, WLC Amicus Application.

[8] Para 60 – 63, Applicants' written submissions.

[9] para 52, Applicants' written submissions.

offences are more serious than others. The perceived harm or moral gravity of sexual offences in this context is clearly linked to the penetrative or non-penetrative nature of the offence.

5.1.1.1. WLC submits that there is no factual basis or policy reasons to support the view that sexual offences involving penetration are more traumatic or harmful than other sexual offences.

5.1.1.2. Secondly, the assumption that certain sexual offences are more morally offensive than others is imbued with outdated, patriarchal ideas about the moral gravity and harmfulness of different sexual offences.

5.1.2. Moreover, the exclusion of certain sexual offences from prescription but not others creates an artificial distinction between sexual offences, when in fact, the context and consequences of these offences is substantially the same. There is no rational basis to treat rape and compelled rape differently from other sexual offences for the purposes of prescription. This is so because:

5.1.2.1. all sexual offences occur within the same social and political context. Sexual offences are disproportionately committed against women and children. To the extent that the Legislature

considered it necessary for certain sexual offences to be excluded from prescription in order to achieve the objects of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") and to protect vulnerable groups, such a rationale must apply to all sexual offences.

5.1.2.2. The survivors of all sexual offences are faced with similar personal, social and structural disincentives to reporting the offence committed against them. This leads to delayed and under-reporting of all sexual offences. To the extent that the Legislature considered it necessary for certain sexual offences to be excluded from prescription in order to cater for the concerns of delayed reporting, such a rationale must apply to all sexual offences.

5.2. Second, the WLC submits that the bar on prosecution of certain sexual offences after twenty years unjustifiably hampers the state's fulfilment of its constitutional obligation to prosecute sexual offences in order to respect, protect, promote and fulfil the fundamental rights in the Bill of Rights;

5.3. In respect of remedy, the WLC submits that no suspension of the declaration of constitutional invalidity is necessary and that a reading in is required.

6. The Second Respondent, the Minister for Justice and Correctional Services, ("the Minister") through the Chief Directorate: Legislative Development, was responsible for the preparation and enactment of SORMA, and the subsequent amendments to the impugned section 18 of the CPA.[10] The Minister did not oppose the initial or amended relief sought by the applicants' in the High Court[11] nor attempt to defend or justify the irrationality, or the infringement of rights, arising from the operation of section 18 in relation to sexual offences.[12] Similarly, in these proceedings, the Minister not oppose the confirmation of the declaration of constitutional invalidity.

7. These heads of argument are organised as follows:

   7.1. First, we consider the manner in which section 18 differentiates between sexual offences, and the state's rationale for the differentiation;

   7.2. Second, we demonstrate that the differentiation between sexual offences (and particularly, between penetrative and non-penetrative offences) in section 18 is irrational;

   7.3. Third, we submit that the operation of section 18 hampers the state's fulfilment of their constitutional obligation to prosecute sexual offences;

   7.4. Fourth, we request this Court to grant the WLC leave to adduce the further evidence dealing with the impact of sexual offences on adults;

[10] Vol 4, p340, para 2.

[11] Vol 4, p341, para 8.

[12] Despite reference, in passing, to section 36 of the Constitution - Vol 4, p347, para 33.

7.5. Last, we deal with the question of remedy.

SECTION 18 DIFFERENTIATES BETWEEN SEXUAL OFFENCES

8. Section 18 provides that: "*The right to institute a prosecution for any offence … shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.*" At present, the section excludes nine categories of offences from the operation of prescription.[13] Of these nine excluded categories of offences, three of these categories are sexual offences:

8.1. rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;

8.2. offences as provided for in section 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013;

8.3. using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20 (1) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.[14] ("the excluded sexual offences")

[13] Section 18 of the Criminal Procedure Act was originally introduced in 1977. It was subsequently amended by SORMA in 2007. SORMA required an amendment of section 18 primarily because it expanded the offence of the common law of rape to include all forms of sexual penetration without consent.

Sub-sections (a) – (i) of section 18.

[14] Sub-sections (f); (h) and (i) of section 18

9. It is striking that it is primarily the non-penetrative sexual offences contained in SORMA that are not expressly excluded from the ambit of section 18 and which prescribe after 20 years. This includes offences such as sexual assault, compelled self-sexual assault, causing a person to witness a sexual offence or sexual acts, and exposure to child pornography.

10. The WLC has set out in its supporting affidavit a comprehensive list of these sexual offences in SORMA along with similar sexual offences under the common law and in other legislation.[15]

11. Apart from the offences occurring in the context of pornography using children or vulnerable people, and human trafficking, it is only sexual offences involving sexual penetration that can be prosecuted after twenty years.[16]

12. Mr Basset, the deputy chief state law advisor, who deposed to the Minister's affidavit, explains that the differentiation between sexual offences for the purposes of prescription was historically made on the basis that certain offences could attract the death penalty.[17] Thereafter, certain offences were excluded from the ambit of section 18 because they were regarded as

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[15] Supplementary Record, Vol 1, p675 – 682. The WLC's position that none of the current sexual offences in statute or common law should prescribe should not be considered a concession as to the constitutionality of the criminalisation of certain conduct and behaviour, or an endorsement of the prosecutions of certain of these offences. Indeed, there are certain sexual offences that the WLC considers to be inappropriate or unconstitutional. That issue is not before the Court today, and should not prevent this Court from confirming the declaration of invalidity.

[16] SORMA defines "sexual penetration" as:

> "*including any act which causes penetration to any extent whatsoever by-*
>
> *(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;*
>
> *(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or*
>
> *(c) the genital organs of an animal, into or beyond the mouth of another person*."

[17] Vol 4, p344, para 16.

"*particularly serious*"[18] and were subject to discretionary minimum sentences.[19] After the enactment of SORMA, the exclusions in section 18 were expanded to include "*all forms of sexual penetration*" along with compelled rape.[20] Mr Basset does not explain why the categories of sexual offences relating to pornography using vulnerable adults and children, and trafficking for sexual purposes in sub-sections 18(h) and (i) were excluded from the scope of the section 18 prescription period.

13. The stated purpose of the additional offences included in SORMA, and their corresponding inclusion in section 18, was to "*respond to the scourge of sexual violence*" and to "*give recognition to the constitutional prohibition against the invasion of privacy and dignity*."[21] Ultimately, the changes to the Sexual Offences Act 23 of 1957 ("SOA") sought to ensure the "*progressive development of a Criminal Justice System that is victim-centred, responsive and caring*"[22] and that is "*quick, more protective, least traumatising, more sensitive to the plight of victims, and promotes a cooperative response between all Government departments*."[23]

14. The Minister accepts that given the serious nature of all sexual offences and the vulnerability of the victims of such offences, any policy position that seeks to distinguish between penetrative and non-penetrative sexual offences in

[18] Vol 4, p344, para 18.

[19] Vol 4, p344, para 19.

[20] Vol 4, p345, para 20.

[21] Vol 4, p345, para 21.

[22] Vol 4, p356, para 55.

[23] Vol 4, p358, para 58.

relation to section 18 of the CPA cannot pass constitutional muster[24] and that such a position is not informed by the Government purpose that underpins the SOA and SORMA.[25] The WLC agrees.

THE DIFFERENTIATION BETWEEN SEXUAL OFFENCES IN SECTION 18 IS IRRATIONAL

15. One of the key rationales underlying the differentiation in section 18 is that rape and compelled rape are more 'serious' than other sexual offences and that their perpetrators should be prosecuted regardless of the fact that the period of twenty years has elapsed.

16. The grading of the severity of sexual offences in a manner that places penetrative sexual offences in a position as the 'most serious' is informed by the assumption that penetrative sexual offences are more harmful, or morally worse than other non-penetrative sexual offences.[26]

17. The differentiation in section 18 based on these assumptions is deeply problematic, wholly inappropriate and an irrational basis upon which determine which sexual offences should be excluded from the operation of section 18 because:

    17.1. All sexual offences cause trauma and harm at a level that is serious enough to warrant exclusion from prescription. The assumptions about the perceived 'harm' or 'trauma' suffered by survivors of sexual

[24] Vol 4, p361, para 68.

[25] Vol 4, p361, para 69.

[26] There are two ways in which seriousness of an act may be judged. Firstly, the moral gravity of committing the act which requires a normative evaluation of the act. Secondly, the act may be judged on the basis of the harm or damage that the act brings upon the victim.

offences reflected in the differentiation in section 18 are not supported by research which shows that the characteristics of the assault are only one factor (and often not the most important) when determining the trauma experienced by the survivor.

17.2. The positioning of ‘rape’ as the most serious sexual offence is based in outdated and patriarchal notions of the perceived moral gravity and harmfulness of different sexual offences, and in particular, that the perpetrators of such offences are more deserving of punishment than the perpetrators of other sexual offences.

18. Furthermore, the commonality in the context and consequences of all offences of a sexual nature, far outweigh any differences in the particular characteristics of the offence arising from social and legal definitions:

18.1. In the first instance, all sexual offences are committed within the same the social and political context. Sexual offences are disproportionately committed against women and children. These offences cause broader and more complex harm to both their direct victims, to communities and to society as a whole. This is the case whether or not the sexual offence involves penetration or not.

18.2. Secondly, all sexual offences have the same capacity to cause trauma, harm and long-lasting effects on the survivor. For this reason, the decision to not report, and delayed reporting, are key features of all sexual offences committed against both adults and children.

All sexual offences are traumatic and harmful

19. The distinction between sexual offences for the purposes of prescription cannot rationally be based on a gradation of the perceived trauma experienced by a survivor because there is no correlation between the type of sexual offence (as defined in the law) and the level and extent of trauma experienced by the survivor. Indeed, as the High Court found, the trauma suffered by victims may be worse in non-penetrative sexual offences than penetrative sexual offences.[27]

20. Ms Kathleen Dey ("Dey"), the Director of the Rape Crisis Cape Town Trust, highlights that physical harm or injuries are not necessarily an indication of the trauma arising from sexual violence.[28] Rape Trauma Syndrome, despite its name, refers to the response arising from all sexual violence regardless of how that offence is characterised by the law.[29]

21. A number of studies have explored the nature of the harm and trauma arising from the commission of sexual offences, and the factors that influence the severity of the trauma.

22. We highlight the primary findings of this research to demonstrate that the assumption that penetrative offences are more harmful is simply not supported by the research or evidence:

[27] Vol 7, p608, para 63, High Court Judgment.

[28] Supplementary Record, Vol 1, p687, para 10.

[29] Supplementary Record, Vol 1, p686, para 8.

22.1. In the first instance, physical and psychological trauma is an inherent and intentional aspect of sexual violence.[30] This is so regardless of whether the offence is characterised by the law as 'rape' or 'compelled rape'. Post-traumatic stress disorder ("PTSD") or Rape Trauma Stress Disorder is a common consequence of all sexual offences.[31]

22.2. The research reveals that the legal and social characterisation of a sexual offence, or the fact that the offence involved penetration, is not the primary indicator of the level of trauma or PTSD endured by the survivor.

22.2.1. Trauma has a complex impact and will manifest in a variety of ways including physical, behavioural and psychological symptoms. Its effects on a survivor will vary on a case by case basis depending on the many other environmental influences or past experiences.[32]

22.2.2. In two different studies Ullman examined the broad range of factors that may affect PTSD symptom severity in female survivors of sexual offences:

22.2.2.1. In the 2001 study, Ullman[33] found that neither the physical injury suffered by the victim resulting from the sexual attack nor the relationship between the

[30] Supplementary Record, Vol 1, p687, para 11.

[31] Ullman ES, Henrietta H. Filipas, Stephanie M. Townsend, and Laura L. Starzynski Psychosocial Correlates of PTSD Symptom Severity in Sexual Assault Survivors Journal of Traumatic Stress Vol. 20 No. 5 October 2007 p821.

[32] Supplementary Record, Vol 1, p688 – 691.

[33] Supplementary Record, Vol 2, p762 – 764 (Extract). Ullman ES, Filipas HH Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims Journal of Traumatic Stress, Vol. 14, No. 2, 2001 p 384

victim and the offender were significant predictors of PTSD.[34]

22.2.2.2. In a 2007 study, Ullman found that few sexual assault characteristics predicted symptom severity when controlling for trauma history and post assault factors.[35] Trauma history and child sexual abuse were more significant correlates to PTSD symptom severity than "*offender violence, assault severity, and victim-offender relationship*."[36]

22.2.3. In 1987 the National Institutes of Mental Health Intramural Research Programme[37] developed a conceptual framework which sought to integrate concepts of psychological adjustment to sexual abuse. Central to this model was the notion that characteristics of sexual abuse are complex and more than just the physical act. These characteristics include the duration of the abuse, the frequency of the abuse, the relationship to the abuser, the presence of physical and other forms of violence and the age of onset. It is these characteristics that play a major role in the degree of trauma experienced and the disclosure of abuse.

[34] Ibid at p383

[35] Supplementary Record, Vol 2, p758. Ullman (2007) at p828.

[36] Supplementary Record, Vol 2, p758. Ullman (2007) at p828.

[37] Supplementary Record, Vol 2, p779. Putnam FW, Trickett PK. The Psychobiological Effects of Child Sexual Abuse. New York; W.T. Grant Foundation 1987.

23. The research confirms that there are many factors that influence the trauma or harm arising from a particular sexual offence. The characteristics of the offence are only one factor. The fact that a particular offence involves sexual penetration does not automatically render it more harmful, more traumatic or more serious than other non-penetrative sexual assaults. The 'minimisation of trauma' through the assumption that penetrative sexual offences are more serious or harmful than other sexual offences is itself harmful to survivors.[38] The blanket differentiation in section 18 founded on the flawed assumption that offences that do not involve sexual penetration are automatically less traumatic or harmful is simply without any factual basis. The failure to include all sexual offences in the exclusions in sub-sections (a) to (i) of section 18 for this reason is irrational.

The role of patriarchy in the perception of rape as a more serious sexual offence

24. The assumption that rape and compelled rape are more serious and morally more reprehensible than other sexual offences requires careful interrogation in light of constitutional values and the objects of SORMA.

25. An unquestioning reliance on these assumption - originally incorporated into the Criminal Procedure Act in 1977 - permits the policy considerations and beliefs of an inherently patriarchal society to artificially determine the severity (and therefore prescription) of sexual offences. In this way, the law embodies and perpetuates the harmful gender relations found in society.

[38] Vol 6, p529, para 31, Affidavit of Nataly Woollet.

26. Historically patriarchy has dictated that women are seen as property of men, an asset that had reproductive value; the virginity of women was valued and protected by men as it assured men of the legitimacy of their children and continuation of their genetic line. The value of women depended on her ability to marry and to produce heirs. If a woman were raped, her value would be diminished in the eyes of men as it reduced the reliability of the progeny. The rape of a wife or daughter fundamentally undermined the notion of ownership of the woman by a man (husband or father), seen as stealing the property of another man, and reducing a woman's value. Therefore sexual intercourse in the traditional sense of penile penetration of the vagina is inextricably linked to the concept of rape; the very act of penetration led to the devaluation of women as it threatened ownership and the guarantee to produce legitimate heirs. A sexual offence that did not involve penetration therefore did not threaten the value of women as much as penetrative sexual offences, and in that way seen as not as serious.

27. These ideas of the 'harm' caused by penetrative sexual offences focus on the proprietary impact of the offence on men, rather than the psychological and physical impact on the survivors.

28. This distinction has remained today, entrenched in modern thinking and the analysis of the seriousness of various sexual offences. The WLC submits that these assumptions must be deconstructed to reveal the underlying patriarchal and misogynist principles informing them.

29. The differentiation in section 18 between rape and compelled rape, and the many other sexual offences contained in SORMA, based on outdated

assumptions that offences involving sexual penetration are inherently more serious and worthy of criminal censure than other offences, is irrational. It is simply not supported by fact or aligned with the principles and values of our constitutional democracy. Nor is the differentiation one that accords with the objectives of SORMA. The policy reasons for grading the severity sexual offences for the purposes of prescription must accord with constitutional values and norms.[39] In the present case, the failure to carefully deconstruct and challenge historical assumptions about sexual offences merely re-enforces "the stubborn persistence of patriarchy" in our society[40] and entrenches it in our legal system.

All sexual offences are disproportionally committed against women and children

30. The very high levels of sexual violence against women and children in South Africa, and their broader impacts, are well documented and recognised by this Court:

30.1. In *Carmichele*[41] this Court emphasised that:

> *"sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self–determination of South African women."*

30.2. In *Masiya* Justice Nkabinde reiterated the widely accepted notion that:

[39] Paulsen and another v Slip Knot Investments 777 (Pty) Ltd [2015] ZACC 5, 2015 (3) SA 479 (CC) at para 69 & 70; Barkhuizen v Napier [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 28 & 29. Carmichele at para 56.

[40] Gumede (Born Shange) v President of the RSA & others [2008] JOL 22879 (CC) at para 1.

[41] *Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) at para 62.*

"sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society."[42]

30.3. Indeed, in *F v Minister of Safety & Security* the Court stressed that:

"The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women."[43]

31. The preamble of SORMA recognises the prevalence of sexual offences in South Africa and the vulnerability of women and children in particular to these offences. It acknowledges South Africa's international and constitutional obligations, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered of paramount importance. Added to this, the preamble to SORMA commits to affording complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act, and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic.

32. The vulnerable position of women in South Africa has also been recognised internationally. The June 2016 report of the United Nations Special Rapporteur

[42] *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) at para 29.
[43] *F v Minister of Safety & Security & another (Institute for Security Studies & others as amici curiae) [2012] JOL 28228 (CC)* at para 57.

on Violence Against Women notes that the violence inherited from apartheid still resonates in South African society which remains dominated by deeply entrenched patriarchal norms and attitudes towards the role of women. This makes violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted social phenomenon.[44]

33. It is undisputed that sexual offences are overwhelmingly committed against women and children. The state is required to put in place legislative and other measures to prevent the violation of the rights of privacy, dignity and security of this vulnerable group. There is no reason that the special legal protection afforded to survivors of rape and compelled rape through the operation of the exclusion in section 18 should not afforded to all survivors of sexual violence.

Delayed and under-reporting is a feature of all sexual offences

34. Both the applicants and the Teddy Bear Clinic set out extensive argument, supported by research, of the reasons why children delay in reporting all forms of sexual offences.[45] This evidence also confirms that significant psychological harm, complex trauma and post-traumatic stress can follow from both sexual assault and rape.[46]

35. The WLC expands on this point and submits that delayed and under-reporting is a recognised feature of all sexual offences whether they are committed

[44] Supplementary Record, Vol 2, p729. 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/32/42/Add.2 14 June 2016

[45] Teddy Bear Clinic - Vol 6, p451 – 533. The affidavit of Nataly Woollet, (p518) and Shaheda Omar (p456).

[46] Vol 6, p520, para 8.

against adults or children. The further evidence adduced by the WLC provides a factual basis for this submission.[47]

35.1. We have demonstrated above that research reveals that serious trauma can arise from all sexual offences. Survivors of sexual violence experience symptoms of post-traumatic stress disorder on a physical, behavioural and psychological level.[48] These symptoms of rape trauma syndrome may last for long periods and even for the remainder of the survivor's life.[49]

35.2. While we do not know precisely how many sexual offences in South Africa go unreported, it is safe to say that there is massive under-reporting of gender-based violent crimes and sexual offences against adult women:

35.2.1. The 2011 report of the Medical Research Council and Gender Links provides statistics from a survey conducted in Gauteng. The research reveals that while 25% of women had experienced sexual violence in their lifetime, only 3.9% of women interviewed had reported these incidences of violence against them and only 4% of rapes had been reported.[50] There is serious under-reporting to the police. Sexual violence by an intimate partner was

[47] Supplementary Record, Vol 1, p668, para 18.

[48] Supplementary Record, Vol 1, p687, para 11.

[49] Supplementary Record, Vol 1, p692, para 16.

[50] Supplementary Record, Vol 1, p694, para 21. "The war @ home" Preliminary findings of the Gauteng Gender Violence Prevalence Study" Gender Links and the Medical Research Council (2011) is at p713.

least often reported, and half of all survivors never go to the police.[51]

35.2.2. The under-reporting of all forms of gender-based violence crimes is referred to as an "*unchallenged fact*" by the Special Rapporteur. [52]

35.2.3. The 2015/2016 Victims of Crime Survey[53] indicates that only 35.5% of individuals reported sexual offences to the SAPS. The proportion of rape victims who report their victimisation to the police decreased by 21% between 2011 and 2014 and by 27% between 2015 and 2016.[54]

35.2.4. Statistics South Africa reports that in 2015/16 only 35.5% of sexual offences are reported by the police. Earlier data shows that 56.2% of rape victims reported the offence.[55]

35.2.5. The statistics gathered by Rape Crisis show that only 52% of survivors of sexual offences report these sexual offences to the SAPS.[56]

[51] Supplementary Record, Vol 1, p717.

[52] Supplementary Record, Vol 1, p732, para 10.

[53] Supplementary Record, Vol 1, p720. Statistics South Africa "Statistical Release PO341" Victims of Crime Survey 2015/16 (2017).

[54] Supplementary Record, Vol 1, p719, National Victims of Crime Survey 2015/2016 STATS SA.

[55] Supplementary Record, Vol 1, p728. The Report "Quantitative research findings on Rape in South Africa" by Statistics South Africa (2000).

[56] Supplementary Record, Vol 1, p697, para 27.

35.2.6. The Special Rapporteur notes that there are significant societal and institutional barriers and powerful disincentives to reporting gender-based violence.[57]

35.2.7. South African studies indicate the high levels of dissatisfaction of the criminal justice system experienced by sexual offences victims, accounting for many victims withdrawing from the process[58] or not approaching the police at all out of the concern that the criminal justice system would cause them additional distress[59].

35.3. The reasons adult victims do not report sexual offences may apply for a number of years after the offence has occurred. For this reason, it is common for there to be delay in reporting of all sexual offences against adults:

35.3.1. Delayed reporting by victims of sexual offences is well documented in the literature.[60] Dey confirms that in her experience it is very common for adult survivors of sexual offences to delay for a period of time before disclosing

[57] Supplementary Record, Vol 1, p744, para 2.

[58] Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L., & Dunseith, O. (2008). *Tracking justice: The attrition of rape cases through the criminal justice system in Gauteng.* . Johannesburg: Tshwaranang Legal Advocacy Centre, The South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.

[59] Patterson, D (2009)

[60] Muller, KD and Hollely, KA 2000 Introducing the Child Witness; Chapter 4 Disclosure: a process of truth p124; Campbell, R., Dworkin, E., & Cabral, G. (2009). An ecological model of the impact of sexual assault on women's mental health. *Trauma, Violence & Abuse, 10*(3), 225-246; Campbell, R. (2010). The psychological impact of rape victims' experiences with legal, medical and mental health systems. *American Psychologist, 63*, 702-717;

P765 at 771, Patterson, D., Greeson, M., & Campbell, R. (2009). Understanding rape survivors' decisions not to seek help from formal social systems. *Health & Social Work, 34*, 127-136.

what happened to them and being in a position to report the sexual offence to the authorities.[61]

35.3.2. Ullman's research reveals that delayed disclosure was related to more severe current PTSD systems.[62]

35.3.3. Dey provides insight into the social reasons[63], personal reasons,[64] and structural reasons[65] for delayed reporting. Statistics South Africa confirms the main reasons for not reporting is fear of reprisals, a belief that the police would not be able to solve the crime and shame.[66]

35.4. Adult victims of sexual offences may report the offence after a long period. Dey confirms that she has witnessed this in her work. There are many reasons why this may occur. In particular, the personal circumstances of a survivor may change, or another person may report an offence by the same perpetrator.[67]

[61] Supplementary Record, Vol 1, p703, para 49.

[62] Supplementary Record, Vol 2, p758. Ullman (2007) at p828.

[63] Supplementary Record, Vol 1, p698, para 29 – 30.

[64] Supplementary Record, Vol 1, p699, para 34 – 39.

[65] Supplementary Record, Vol 1, p701, para 40 – 46.

[66] Supplementary Record, Vol 1, p728. The Report "Quantitative research findings on Rape in South Africa" by Statistics South Africa (2000)

[67] Supplementary Record, Vol 1, p702, para 48.

SECTION 18 HAMPERS THE FULFILMENT OF THE STATE'S CONSTITUTIONAL OBLIGATIONS

36. The High Court found that section 18 infringes the right to dignity and equality.[68] The WLC supports this finding and the submissions of the applicant that section 18 also violates the right to be protected from abuse as children, to be free from all forms of violence, access to courts and a fair trial.[69]

37. The WLC adds that the bar on prosecution unjustifiably hampers the state's fulfilment of its constitutional obligations under section 7(2) of the Constitution. The applicants advance a similar argument in these proceedings.[70]

38. The absolute bar to the prosecution of all sexual offences (except for the three categories expressly excluded) after 20 years infringes all these rights in a manner that is constitutionally unreasonable and unjustifiable. WLC submits that it is not possible to interpret section 18 in a manner that would render it constitutionally compliant, nor there is any justification for the blanket ban on the prosecution of sexual offences (other than the excluded categories) after 20 years.[71]

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[68] Vol 7, p614, para 76 (dignity); Vol 7, p615, para 78 (equality);

[69] Para 15, Applicants' Written Submissions.

[70] Para 52.3, Applicants' written submissions.

[71] The primary reason for the prescription of criminal offences arises from the constitutional imperative that an accused have a fair trial. The concern exists that accurate and reliable evidence may diminish after time, and that it makes it more difficult for the accused to locate and obtain evidence to support their defence. The accused should be able to be certain, after a clearly prescribed time, that they can no longer be prosecuted for the crime. Jurisdictions where no criminal statute of limitations exist address these concerns by ensuring that the accused is protected, for example by proving the right to bring an 'abuse of process' application.

39. The High Court correctly accepted the WLC's submissions that section 18 impedes the State's constitutional obligations in terms of section 7(2).[72] We do not repeat these arguments save to highlight the key points.

39.1. Sexual violence implicates a number of rights in the Bill of Rights including sections 9, 10, 11, 12 and 28.[73]

39.2. Section 7(2) of the Constitution imposes a duty on the state to "*respect, protect, promote and fulfil"* the rights in the Bill of Rights. This obligation is positive, direct, and powerful.[74] The state's duty extends beyond its own action, and it must also take steps to protect these rights against damaging acts that may be perpetrated by private parties.[75]

39.3. There are several specific aspects of the state's duty that are now well-entrenched in our constitutional jurisprudence:

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[72] Vol 7, p623, para 98, High Court Judgment.

[73]

- Section 9(1) and 9(2): *Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms*
- Section 10: *Everyone has inherent dignity and the right to have their dignity respected and protected.*
- Section 11: *Everyone has the right to life.*
- Section 12(1)(c); *Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources and not to be treated or punished in a cruel, inhuman or degrading way.*
- Section 12(2)(b): *Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.*
- *Section 28: Every child has the right to be protected from maltreatment, neglect, abuse or degradation. A child's best interests are of paramount importance in every matter concerning the child.*

[74] *S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC) at* para 11; *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 47; *Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC) at paras 44 to 45; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 20.

[75] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at para 27.

39.3.1. The state bears the primary responsibility to protect women and children against this prevalent plague of violent crime;[76]

39.3.2. The state is obliged "*directly to protect the right of everyone to be free from private or domestic violence*";[77]

39.3.3. The state is obliged to "*take appropriate steps to reduce violence in public and private life*";[78]

39.3.4. The state is obliged in certain circumstances "*to provide appropriate protection to everyone through laws and structures designed to afford such protection*" which may imply "*a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual*".[79]

39.4. One of the ways in which the state protects, promotes and fulfils constitutional rights is through the criminal justice system and particularly the prosecution of criminal offences by the National Prosecuting Agency.[80]

[76] F v Minister of Safety & Security & another (Institute for Security Studies & others as *amici curiae*) [2012] JOL 28228 (CC) at para 57.

[77] *Baloyi* 2000 at para 11.
[78] *Christian Education at* para 47.
[79] *Carmichele at* paras 44 to 45, citing with approval, *Osman v United Kingdom* 29 EHHR 245 at 305, para 115.
[80] S v Basson 2005 (1) SA 171 (CC) at para 31.

39.4.1. The state's power and responsibility to prosecute criminal offences arises directly from the Constitution in section 179.[81]

39.4.2. There is a "*constitutional duty of the state to initiate criminal proceedings.*"[82]

39.4.3. The power to prosecute "*enables the state to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens*".[83]

39.4.4. "*effective prosecution of crime is an important constitutional objective*";

39.4.5. "*The constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework*".[84]

40. Over and above this general duty, the WLC Trust submits that the state has a heightened constitutional obligation to ensure the prosecution of sexual offences against women and girl children.

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[81] Section 179(1) of the Constitution provides for a single National Prosecuting Authority structured in terms of an Act of Parliament. In terms of subsection (2) the Prosecuting Authority has the power to institute criminal proceedings on behalf of the State.

Section 179(2) of the Constitution confers on the state the authority to institute criminal proceedings and provides: "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

[82] S v Basson 2007 (1) SACR 566 (CC) at para 144.

[83] National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another [2014] JOL 32401 (GP) at para 13.

[84] S v Basson 2005 (1) SA 171 (CC) at para 32.

40.1. There is overwhelming evidence, and it is generally accepted, that women and children are disproportionately affected by sexual violence.

40.2. South Africa's obligation to protect the rights of women, particularly from violence, also arises from its international law duties. In particular, the duty to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent a violation of those rights.[85] These obligations were expressly recognised by the High Court.[86]

41. Section 18 places an absolute ban on the prosecution of sexual offences (other than the excluded categories) after 20 years. Section 18 therefore prevents the state's fulfilment of its constitutional obligations in respect of sexual offences that took place 20 years ago. We submit that the limitation and impediment on the state's fulfilment of its constitutional obligation is unjustifiable and constitutionally impermissible.

THE NECESSITY OF THE BROADER ORDER

42. The factual situation of the applicants meant that they required only the relief necessary for the prosecution of the offences of indecent assault that were committed against them as children more than twenty years ago. For this

[85] *Baloyi* para 13; Carmichele at para 62; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 15. See, Convention on the Elimination of All Forms of Discrimination Against Women Articles 2,3,6,11,12 and 16. General Recommendation No. 19; Universal Declaration of Human Rights and article 4(d) of the Declaration on the Elimination of Violence Against Women. U.N. GAOR, 48th Sess., art. 1 UN.doc. A/Res/ 48/104 (1994). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 3, 4 and 25. SADC Protocol on Gender and Development (South Africa has signed but not yet ratified the SADC Protocol on Gender and Development.)

[86] Vol 7, p623, para 99 – 100.

reason, the applicants sought only an order declaring section 18 unconstitutional to the extent that it does imposes a twenty- year time bar on the prosecution of the offence of indecent assault against children.[87]

43. The WLC and other amici curiae argued that any order of constitutional invalidity, and any remedy, should go beyond the factual circumstances of the applicants' case and that the High Court should declare the section unconstitutional in respect all sexual offences and regardless of whether the survivors were adults or children at the time of the offence.

44. The High Court agreed with these submissions and held that despite the fact that the applicants were children when the offences were committed, the relief granted need not be confined to dealing with children only because:

    44.1. The provision in question, section 18(f) of the CPA, makes no distinction between offences against children and those against adults;[88] and

    44.2. The common law offence of indecent assault was not an offence confined to children.[89]

45. There is no opposition to the broader order in these confirmation proceedings.[90]

46. The WLC supports this reasoning and submits that the High Court was permitted, and indeed required, to consider the broader constitutional question and grant the broader order for the following additional reasons:

[87] Vol 7, p593, para 34, High Court Judgment.

[88] Vol 7, p596, para 36, High Court Judgment.

[89] Vol 7, p596, para 37, High Court Judgment.

[90] Paragraphs 60 – 63, Applicants Heads of Argument.

46.1. The applicant's challenge was a direct, facial challenge to the constitutionality of section 18. The matter involved the exercise the Court's broader power to *"test legislation against the Constitution" and "to ensure that legislative provisions are constitutionally compliant."*[91] In such a case, Nkabinde J expressly stated in *Masiya* that this Court is "*at liberty to provide relief beyond the facts of the case".*[92]

46.2. The impact of section 18 on adults who have endured sexual abuse over 20 years ago is inextricably linked to the facts raised by the applicants. It is a "*separate but related issue*".[93] The determination of the constitutional defects in relation to these vulnerable people is clearly a matter of public importance.

46.3. The WLC submits that it was in the interests of justice for the High Court to consider and grant the expanded declaration so as to ensure the protection of adult survivors and survivors of all sexual offences.

46.4. This is, of course, in line with the Court's obligation under section 172 to declare that any law that is inconsistent with the Constitution is invalid "*to the extent of its inconsistency*."

46.5. The expanded constitutional challenge to section 18 was contemplated in the applicants' founding affidavit.[94] The original notice of motion

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[91] Masiya v Director of Public Prosecutions & others; Centre for Applied Legal Studies & another [2007] JOL 19790 (CC) at para 31.

[92] *Masiya* at footnote 68. Citing as examples: *Mabaso v Law Society, Northern Province and another 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) and Mohlomi v Minister of Defence 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC)."*

[93] *Coughlan NO v Road Accident Fund [2015] JOL 33137 (CC) at para 12.*

[94] Vol 1, p12; para 20 of the Founding Affidavit; Vol 4, p354, para 52 of the Minister's Affidavit.

requested a declaration that went beyond the facts of indecent assault against children to include all sexual offences in SORMA.

46.6. In any event, the facts before the High Court provided a sufficient factual basis for the broader order. The applicants were victims of sexual offences. Section 18 prevented the NPA from instituting a prosecution against the perpetrator because 20 years has passed. The broader declaration that prescription should not apply to any sexual offences (perpetrated against a person of any gender or age) falls within this factual matrix.

46.7. All the parties, including the Minister, were provided an opportunity to deal with the broader challenge both on affidavit, in written legal submissions, and at the hearing of the matter. The Minister noted that "the constitutional validity" of section 18 was challenged in the High Court proceedings[95] and that the "crux of the applicant's claim" is that there is no rational basis for distinguishing rape and compelled rape from other forms of sexual offences.[96] None of the parties were prejudiced by the consideration of the broader constitutional issue.

47. However, even if this Court finds that the High Court should not have entertained the broader challenge, we submit where the interests of justice require, this Court may exercise its discretion to confirm a declaration of invalidity made in relation to the invalidated provisions.[97] We submit that the

[95] Vol 4, p349, para 37.

[96] Vol 4, p354, para 52.

[97] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) (1 April 2009)* para 60.

Court should exercise its discretion in the present case to avoid uncertainty and to come to the aid of survivors of sexual offences committed more than twenty years ago.

THE APPLICATION TO ADDUCE FURTHER EVIDENCE

48. WLC applies in terms of Rule 31 of the rules of this Court for leave to adduce the evidence contained in:

    48.1. The affidavit of Kathleen Dey, the director of Rape Crisis Centre Cape town;[98]

    48.2. A number of reports and articles which were relied upon during the High Court hearing and which were expressly relied upon by the High Court.[99]

49. In finding that it was irrational to differentiate between rape, compelled rape and other sexual offences for purposes of prescription, the High Court relied on evidence placed before it by the applicants and *amici curiae* documenting the reasons why, in respect of children, there is often delayed disclosure in relation to all sexual offences and not just in relation to those of rape and compelled rape.[100]

50. The High Court also noted the evidence that demonstrates that sexual offences "*inflict deep continuous trauma on victims, many of whom suffer quietly, and either never disclose the offences at all, enable the perpetrator to escape all*

[98] Supplementary Record, Vol 1, p683.

[99] Supplementary Record, Vol 1 and 2, p713 to 792.

[100] Vol 7, p611, para 67, High Court Judgment. Para 16 of the Supporting Affidavit to the WLC's Application to Adduce Evidence.

consequences, or disclose over varying lengths of time after the offences were committed, dependent on each victim's unique circumstances and emotional fragility."[101]

51. The WLC has secured additional evidence to demonstrate that this is also true in respect of adult survivors of sexual offences.

52. There are three key requirements for admission of evidence under Rule 31(1)(a). The evidence must be relevant, it must not appear on the record, and it must either be common cause or incontrovertible, or it must be of an official, scientific, technical or statistical nature capable of easy verification.

    52.1. The evidence tendered by the WLC is relevant to the issues in this matter. The new evidence to be adduced by the WLC covers the same issues highlighted in the evidence before the High Court except that it is directed at the impact and effect of sexual offences against adults. It includes the personal, structural and social disincentives for reporting, and the psychological and physical reasons for delayed disclosure. [102] It is highly relevant to the confirmation of the High Court's declaration of constitutional invalidity and will assist the Court in its adjudication of the case.[103]

    52.2. There is no dispute as to the veracity or accuracy of the data or factual material to be adduced.[104] The evidence is incontrovertible and, in some cases, official and statistical in nature. It is easily verifiable, and

[101] Vol 7, p611, para 67, High Court Judgment.

[102] Para 22.1, Supporting Affidavit to the WLC's Application to Adduce Evidence.

[103] Para 22.2, Supporting Affidavit to the WLC's Application to Adduce Evidence.

[104] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 6.

generally accepted as reliable. It is not disputed by any party in the present proceedings, nor was it the subject of a factual dispute before the High Court.[105]

52.3. The evidence is from reliable and recognised sources.

52.3.1. Kathleen Dey, the director of Rape Crisis Cape Town Trust, has twenty-one years of experience dealing with adult survivors of sexual offences in South Africa. Her experience and expertise qualifies her as an expert on the matters on which she expresses an opinion in the affidavit.[106]

52.3.2. The reports are published by reputable non-governmental organisations and recognised bodies.[107]

52.4. There is no prejudice to any other party arising from the admission of the further evidence. The application to adduce the further evidence was filed on 28 July 2017. All parties have had ample opportunity to dispute or respond to the evidence if they deemed it necessary.

53. For these reasons, the WLC respectfully submits that the evidence contained in Annexures B to I to the Supporting Affidavit of the Application ought to be admitted under Rule 31.

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[105] Supplementary Record, Vol 1, p670, para 22.3, Supporting Affidavit to the WLC's Application to Adduce Evidence. The WLC's proposition, based on the evidence to be adduced, that there are high levels of underreporting and delayed reporting of sexual offences committed against adults was not an issue of factual dispute in the High Court. Nor was it disputed that many of the reasons why children delay in reporting sexual abuse apply to adults survivors.

[106] Ms Dey's CV is at Supplementary Record, Vol 1, p705.

[107] Supplementary Record, Vol 1, p671, para 22.5.

REMEDY

54. The High Court found that it was necessary to suspend the order of constitutional invalidity in order for Parliament to remedy the constitutional defects. The High Court provided immediate relief by reading in until such time as the legislative amendments were effected.[108]

55. In confirmation proceedings, the Court is obliged to exercise its remedial discretion in terms of section 172 of the Constitution afresh.[109]

56. The WLC submits that this is not a case where suspension of the declaration of constitutional invalidity is necessary. A final and operative order declaring section 18 unconstitutional should be accompanied by an order 'reading in' the necessary words to section 18 to remedy the constitutional defect. The final reading in should take the same form as the interim reading in ordered paragraph 3 of the High Court order.[110]

57. Mr Basset indicates that government has been attempting to "*infuse the changing norms, values and interests of society*" into pre-1994 statutory framework[111] and in this regard, advises that further amendments to section 18 are currently under consideration to include other offences relating to the trafficking of children and torture.[112] This work can continue in line with the reasoning of this Court's judgment, but without leaving survivors of sexual offences without recourse during this period.

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[108] Vol 7, p628, para 115, High Court Judgment.

[109] *Sibiya and others v Director of Public Prosecutions JHB and others* 2005(5) SA 315 (CC) at para 44.

[110] Vol 7, p634.

[111] Vol 4, p342, para 13.

[112] Vol 4, p349, para 38.

58. That being said, the WLC acknowledges that the issue of remedy is one that lies in the discretion of the Court. The WLC makes the submissions above in order to assist this Court, and does not resist or oppose an order of constitutional validity with an order of suspension provided that a limited time period is imposed within which Parliament should take the necessary action to remedy the unconstitutionality of section 18.

CONCLUSION

59. The WLC therefore submits that:

    59.1. The declaration of constitutional invalidity on the terms granted by the High Court should be confirmed;

    59.2. This Court should order a final reading in of section 18 in the same form as the interim reading in ordered paragraph 3 of the High Court order;

    59.3. The WLC should be granted to leave to adduce the new evidence as per its application to this Honourable Court.

60. The WLC abides by the decision of the Court on the first respondent's appeal on the issue of costs.

61. The WLC does not seek costs against any party, and submits that it should not be burdened with a costs order in the event that either the application for confirmation or the application to adduce further evidence is unsuccessful.[113]

[113] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

Frances Hobden

Bronwyn Pithey

Nada Kakaza (pupil)

28 September 2017

Chambers,
Johannesburg and Cape Town

TABLE OF AUTHORITIES

1. Paulsen and another v Slip Knot Investments 777 (Pty) Ltd [2015] ZACC 5, 2015 (3) SA 479 (CC)

2. Barkhuizen v Napier [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC)

3. Gumede (Born Shange) v President of the RSA & others [2008] JOL 22879 (CC)

4. S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC)

5. Christian Education SA v Minister of Education 2000 (4) SA 757 (CC)

6. Carmichele v Minister of Safety and Security 2001(4) SA 938 (CC)

7. Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)

8. Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA)

9. F v Minister of Safety & Security & another (Institute for Security Studies & others as amici curiae) [2012] JOL 28228 (CC)

10. S v Basson 2005 (1) SA 171 (CC)

11. S v Basson 2007 (1) SACR 566 (CC)

12. National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another [2014] JOL 32401 (GP)

13. Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA)

14. *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (5) SA 30 (CC)

15. Mabaso v Law Society, Northern Province and another 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC)

16. Mohlomi v Minister of Defence 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

17. Coughlan NO v Road Accident Fund [2015] JOL 33137 (CC).

18. Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others 2009 (4) SA 222 (CC)

19. Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

20. Sibiya and others v Director of Public Prosecutions JHB and others 2005(5) SA 315 (CC)

21. South African Municipal Workers' Union v Minister of Co-operative Governance and Traditional Affairs (CCT54/16) [2017] ZACC 7 (9 March 2017)

22. Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) SA 580 (CC)

23. Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 170/2017

In the matter between:

NICOLE LEVENSTEIN	First Applicant
PAUL DIAMOND	Second Applicant
GEORGE DIAMOND	Third Applicant
KATHERINE ROSENBERG	Fourth Applicant
DANIELA McNALLY	Fifth Applicant
LISA WEGNER	Sixth Applicant
SHANE ROTHQUEL	Seventh Applicant
MARINDA SMITH	Eighth Applicant

and

ESTATE LATE FRANKEL	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG	Third Respondent
TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	Fourth Respondent
TEDDY BEAR CLINIC	Fifth Respondent
LAWYERS FOR HUMAN RIGHTS	Sixth Respondent

FIFTH RESPONDENT'S WRITTEN SUBMISSIONS

Contents

INTRODUCTION

1. This is an application in terms of section 172(2)(d) of the Constitution for confirmation of the High Court's order of invalidity declaring that: "*section 18 of the Criminal Procedure Act, 51 of 1977, is inconsistent with the Constitution and invalid, to the extent that it bars in all circumstances, the right to institute a prosecution of all sexual offences, other than those listed in section 18(f), (h) and (i), after the lapse of a period of 20 years from the time when the offence was committed.*"[1]

2. The Teddy Bear Clinic ("TBC") was admitted as *amicus curiae* in the High Court and permitted to adduce evidence.[2] The Applicants have joined the TBC as the Fifth Respondent in this Court due to the TBC's direct and substantial interest in the matter.[3] No relief is sought against the TBC.[4]

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[1] The order was made by Hartford AJ in the South Gauteng High Court on 19 June 2017, Vol 7, pp 634- 635

[2] Order of Lamont J on 1 February 2017: "Subject to any ruling by [the court a quo] as to the nature and extent of such intervention – the TBC is granted leave to intervene as an *amicus curiae*, to make written submissions, to make oral submissions, and is permitted to adduce the evidence contained in its founding affidavit and annexures."

[3] Vol 7, p568, para 9

[4] As above

3. The TBC supports the declaration of invalidity and order made in the High Court, and supports the Applicants' position before this court, including its position on remedy, addressed below.

4. In amplification of the Applicants' argument, the TBC submits that section 18 of the CPA is inconsistent with the Constitution and invalid on two main bases.

5. First, the distinction between rape and sexual assault is arbitrary and unlawful because it fails to recognise that the nature of the harm of sexual assault is inherently comparable to that of rape; and, it fails to take cognisance that the nature of disclosure amongst adults survivors of child victims of sexual assault is complex and lengthy. The TBC relies on the expert evidence it submitted before the High Court addressing the nature of disclosure amongst adult victims of childhood sexual assault.[5]

6. Second, the exclusion of sexual assault from the listed exceptions in section 18 of the CPA infringes fundamental rights of victims of sexual assault and vitiates the State's duty to respect, protect, promote and fulfil the rights in the Bill of Rights. The TBC addresses the State's failure to protect with specific reference to its duty to

[5] The Applicants' evidence on the nature of disclosure primarily focuses on child disclosure and briefly deals with adult patterns of disclosure; the TBC focused on the disclosure process by adults who were child victims. Vol 6, p472, para 40

children, and demonstrates this particular duty in response to silent communities and failed systems of care.

7. In these submissions, the following issues are addressed in turn:
   a. The differentiation between rape and sexual assault in section 18 of the CPA is arbitrary and irrational;
   b. The State's Constitutional obligations and its duty to protect: children in particular;
   c. The 'broader relief'; and
   d. Appropriate remedy.

THE ARBITRARY AND IRRATIONAL DIFFERENTIATION BETWEEN RAPE AND SEXUAL ASSAULT

8. Section 18 of the CPA deals selectively with victims of sexual violence: it precludes some victims of sexual offences from access to criminal legal recourse, while protecting others. This differentiation is arbitrary and unlawful.

9. The High Court found that section 18(f) of the CPA created a distinction between rape and compelled rape and other sexual offences, and having done this, assessed the distinction against the test in *Prinsloo v van der Linde*[6] that:

   "the State should not regulate in an arbitrary manner which

[6] *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5

manifests 'naked preferences' that serve no legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premises of the Constitutional State".[7]

10. The High Court held that having regard to all the evidence that the trauma suffered by victims may be equivalent or more severe in some cases of sexual assault than rape, and delayed disclosure in relation to victims of sexual offences, that section 18 of the CPA is arbitrary and irrational and accordingly inconsistent with Constitution.[8]

The Nature of the Harm

11. The High Court held, as the Applicants and *amici* argued, that sexual assault is no less reprehensible, is no less humiliating, degrading or a violation of the dignity of an individual than rape or compelled rape.[9]

12. The Courts have already recognised that the consequences of rape and sexual assault cause great harm affecting a multitude of victims' rights.

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[7] *Prinsloo* para 25
[8] Vol 7, p 608, para 63
[9] As above

13. In *S v Chapman*[10] regarding the seriousness of the offence of rape, Mahomed CJ recognised that "*[r]ape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim*".[11]

14. This Court in *Masiya v Director of Public Prosecutions Pretoria and Another*[12] emphasised that "*sexual violence and rape [...] offends the privacy and dignity [of victims].*"[13] [Emphasis added]

15. In *Van Zijl v Hoogenhout*[14] the Supreme Court referred at length to the seriousness of childhood sexual abuse and the severe effect it has on the rights and psychological well-being of the individual.[15] On the serious effects of sexual abuse, the court included: distortion of a child's emotional and cognitive relationship with the world, stigmitisation which leads to feelings of badness, shame and guilt which can colour the self image of the child. In adults the effects of sexual abuse can result in aversion to sex, flashback to the molestation, and negative attitudes towards sexuality and their own

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[10] *S v Chapman* 1997 (2) SACR 3 (SCA)
[11] As above para 5
[12] *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC) (*Masiya)*
[13] As above para 29
[14] *Van Zijl v Hoogenhout [2004] ZASCA 84*
[15] As above paras 10 - 14

bodies.[16]

16. As the High Court recognised, referring to the expert evidence of the Applicants and WLC, as well as the affidavit of the TBC, these psychological effects on the victim occur in the context of rape and sexual assault, and the harm is comparable. Woollet explains that:

    a. *"[v]ictims' response to sexual assault and rape is nuanced, and victims respond differently. Long term sexual assault and grooming can lead to sustained post traumatic distress and degrees of dissociation, which in some circumstances can be lessor, similar to, or worse, than the incidence of rape."*[17]

17. The TBC's evidence also demonstrates that:

    a. Long term abuse can negatively impact the development of a minor;[18]

    b. Post-traumatic stress, Developmental Trauma Disorder and degrees of dissociation can be lessor, similar or greater than in cases of rape. There is no way to approximate more harm to one or the other as the effects are different and peculiar to the particular individuals involved in a given

[16] As above para 10
[17] Vol 7, pp 601-5, paras 51-57, High Court Judgment
[18] Vol 6, p 465, para 30.1.1

case;[19]

c. The impact of minimising of the trauma suffered by the survivor of a sexual offence can itself compound the harm experienced.[20]

18. The High Court accepted that the severity of the effects of sexual assault and rape are inextricably comparable.

19. As in *Chapman* where the 'seriousness' of the crime is based on the effect the offence has on the individual's rights and psychological wellbeing, not to consider sexual assault as serious a crime as rape, leads to an arbitrary distinction which is unlawful. For all of these reasons it is submitted that the High Court's finding of irrationality must be supported to the extent that section 18(f) of the Criminal Procedure Act creates an arbitrary hierarchy in harm.

20. The view of the High Court is thus supported as no legitimate government purpose was argued. The legitimate purpose that may be assumed in terms of differences in harm is not rational as there are no differences in harm between the types of sexual abuse. Further the law's approach to prescription ought to be tempered with an understanding of the nature of disclosure and not arbitrarily deny

[19] Vol 6, p 466, para 30.1.2; pp 473 – 476, paras 43 - 58; pp 525 - 529
[20] Vol 6, p 466, para 30.1.4

those otherwise deserving of protection from the law of such protection.

The Nature of Disclosure

21. The High Court recognised and relied on the wealth of evidence that the nature of sexual assault disclosure, like rape disclosure, is a complex and lengthy process.[21] The higher courts have already recognised this in civil claims for damages: in *Van Zijl* the court dealt with the nature of trauma and its effects on the memory of the victim of sexual abuse. The court held that:

> *"In short, the expert evidence demonstrates that:*
>
> *(1) chronic child abuse is* sui generis *in the* sequelae *that flow from it;*
>
> *(2) distancing of the victim from reality and transference of responsibility by the victim on to himself or herself are known psychological consequences;*
>
> *(3) in the absence of some cathartic experience, such consequences can and often do persist into middle age despite the cessation of the abuse during childhood."*[22]

22. It further recognised in the context of when the plaintiff became 'aware' of the sexual abuse against her that:

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[21] Vol 6, p 488, para 82
[22] *Van Zjil* para 14

"[t]he incidents in adulthood which counsel has cited are consistent with the plaintiff's knowledge that the defendant had abused her, but they were visceral reactions falling short of rational appreciation that he rather than herself was the culpable party. It is more likely that the plaintiff developed insight, and with it the meaningful knowledge of the wrong that sets the prescriptive process in motion, only when the progressive course of self-discovery finally removed the blindfold she had worn since the malign influences which I have described took over her psyche."[23]

23. This highlights the general complexity and contingency of the disclosure process for victims of sexual assault. A number of nuanced factors and specific and intersectional circumstances contribute to disclosure rates and timings, with a general trend indicating that the disclosure of childhood sexual assault is widely delayed until adulthood.[24] The prescription period of 20 years imposed by section 18 of the Criminal Procedure Act is insufficiently cognisant of the nature and process of sexual assault disclosure.

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[23] As above para 44
[24] Vol 6, pp 492-493, paras 97-99

24. The High Court relied on *Van Zijl v Hougenhout,*[25] where delays in the institution of civil proceedings were considered and it was determined that delayed disclosure cannot be held against a sexual abuse survivor. The High Court accepted that the purpose of prescription is to punish unreasonable inaction and not claimants who were unable to act.[26]

25. No evidence or explanation was placed before the High Court or this Court of a legitimate purpose sought to be achieved by the distinction in section 18(f) of the CPA between rape and compelled rape, and other sexual offences.

26. The Second Respondent does not oppose the confirmation application, nor did it oppose the application in the High Court. The Minister agreed that the exercise of public power has to be rational and objectively viewed, requires a link between the means adopted and the end sought to be achieved.[27] The Minister concedes that:

> *"the exclusion of sexual offences, other than rape and compelled rape, from the definitions of offences that do not prescribe in terms of section 18 of the CPA, was not informed*

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[25] *Van Zijl* para 19
[26] Vol 7, pp 608-610, paras 63 – 66, High Court Judgment
[27] Vol 4, p 359, para 64

by the Government purpose that underpins the Sexual Offences Act."[28] [Emphasis added].

27. For all of these reasons it is submitted that the High Court's findings can be accepted and this Court can objectively conclude that no rational basis exists for excluding rape and compelled rape from the prescription period of 20 years but including all other sexual offences within that time limit.

THE STATE'S CONSTITUTIONAL OBLIGATIONS AND THE DUTY TO PROTECT

28. As the High Court emphasised, section 7(2) of the Constitution imposes a duty on the State to "*respect, protect, promote and fulfil*" the rights in the Bill of Rights, and "*sexual violence, be it rape or other forms of sexual violence, results potentially in a breach of the rights in sections 9, 10, 12(1)(c), 12(2)(b) and 28 of the Bill of Rights.*" [29]

29. The Applicants and WLC address many of these rights. The TBC limits its argument here to s 28,[30] interpreted with section 12.[31]

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[28] Vol 4, pp 361-362, paras 69-70
[29] Vol 7, p 621, para 92, High Court Judgment
[30] Section 28 (1)(d): "Every child has the right – to be protected from maltreatment, neglect, abuse or degradation."
[31] Section 12: "*(1) Everyone has the right to freedom and security of the person, which includes the right—[…](c) to be free from all forms of violence from either public or private sources.*"

30. Sections 7 and 12 encompass both negative and positive duties on the State. These duties are implicated in different ways. Through enacting laws, policing, prosecution and the court process, the state exercises its duty to protect against the deprivation of security by others. The duty to protect is positive. It obliges the state to protect these rights from infringement by third parties.

31. In S v *Baloyi,*[32] this Court dealt with the constitutional requirement to deal effectively with domestic violence, directly applicable in this context:

> *"The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with section 7(2), section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of*

[32] *S v Baloyi and Others* 2000 (2) SA 425 (CC)

everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way."[33]

32. In *Carmichele* v *Minister of Safety and Security*[34] this Court held that the state is obliged in certain circumstances "*to provide appropriate protection to everyone through laws and structures designed to afford such protection*".[35]

33. Prosecuting sexual assault is an aspect of the state's duty to protect victims of sexual assault. Removing the application of a prescription period to criminal prosecution for sexual assault is such a measure which will afford greater protection to victims of sexual assault.

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[33] *As above* para 11
[34] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) *(Carmichele)*
[35] As above paras 44 - 45

The higher duty to protect children

34. The duty to protect creates a duty on the State to take legislative and other measures to protect vulnerable groups, such as children, from the violation of their rights. Section 28(2) is unequivocal: "*A child's best interests are of paramount importance in every matter concerning the child.*"

35. In *Christian Education South Africa v Minister of Education* this Court emphasised that the State is "*under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation.*"[36] This Court also emphasised this extended Constitutional duty on the State due to its ratification of the Convention of the Rights of the Child, and that by doing so, the State "*undertook to take all appropriate measures to protect the child from violence, injury or abuse.*"[37]

36. In *Grootboom* this Court held that State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in section 28, and held that:

"*This obligation would normally be fulfilled by passing laws*

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[36] *Christian Education South Africa v Minister of Education* (CCT 4/00) [2000] ZACC 11 (*Christian Education*)

[37] South Africa ratified the Convention in June 1995. *Christian Education* para 40

and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse and neglect or degradation, and the prevention of other forms of abuse of children."[38]

37. In *Bothma* this Court recognised the special public interest in taking action to discourage and prevent the rape of children.[39] This Court also recognised the importance of encouraging the reporting of child rape and supporting survivors who report their abuse:[40]

> *"there ... exist strong public policy reasons for allowing the nature of the crime to weigh heavily in favour of allowing these charges to be aired in court. Adults who take advantage of their positions of authority over children to commit sexual depredations against them, should not be permitted to reinforce their sense of entitlement by overlaying it with a sense of impunity... the knowledge that one day the secret will out, acts as a major deterrent against sexual abuse of other similarly vulnerable children."* [41]
>
> [Emphasis added]

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[38] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 (*Grootboom*)para 78
[39] *Bothma v Els* 2010 (2) SA 622 (CC) (*Bothma)* para 46
[40] As above paras 45-47
[41] As above para 65

38. The Children's Act 38 of 2005 and SORMA give some effect to the particular vulnerability of children, and create numerous offences against parents and caregivers if they abuse or deliberately neglect a child; create various obligations on certain professionals to report abuse of children when based on reasonable grounds; and create a duty on police officials to whom a report is made to ensure the safety and well-being of the child.[42]

39. The Children's Act also creates offences related to the sexual violation of children. This includes crimes such as trafficking in children[43] and failure to report the commercial sexual exploitation of the child.[44] Similarly, SORMA codified the historical common law sexual offences and went further to extend protection to children specifically in creating crimes such as contained under Chapter 3 of the Act which deals with sexual offences against children and includes: sexual exploitation,[45] grooming[46] and using children for or benefiting from child pornography.[47]

40. Despite this response to the obligation to take legislative measures to ensure the child's right to be protected from maltreatment, neglect,

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[42] Sections 303 & 110 of the Children's Act; Sections 17, 18 & 20 of SORMA
[43] Section 284 and 285 of the Children's Act
[44] Section 303(5) of the Children's Act
[45] Section 17 of SORMA
[46] Section 18 of SORMA
[47] Section 20 of SORMA

abuse and degradation, the State has failed to ensure that section 18(f) of the CPA is constitutionally valid in recognition of the child's right to be protected from maltreatment, neglect, abuse and degradation, or alternatively has failed to develop section 18(f) adequately in line with the values of the Constitution. No such protection exists in the CPA, and it ought to.

41. The failure of the legislature to acknowledge that rape and other sexual violations have comparable consequential harmful effects on the child constitutes a failure of the State to take legislative or other measures to protect children from, maltreatment, neglect, abuse and degradation.

The higher duty to protect children in 'silent communities' and failed systems of care

42. The TBC's uncontroverted evidence amply demonstrates that the potential for harm in failed systems of care facilities, places of safety and insular communities is rife:

i. In many instances survivors are coerced into silence by the perpetrator and the community or facility may prevent them from speaking due to their dependency for care.[48] Prescription on prosecution of sexual offences does a disservice to society

[48] Vol 6, p 466, 476-7

where it promotes secondary violation and victimisation of the most vulnerable groups by not allowing justice to be seen to be done, where there is a prohibition on prosecution

ii. The trauma that a victim endures results in displaced aggression which can be particularly relevant in isolated communities, youth centres, care homes and other facilities where they may be abused by the people who ought to protect them, and where children may be the victims of abuse from other survivors of abuse due to the power dynamics in those relationships and systems of support and reliance.[49] It is for this reason that these criminal actions must be sanctioned by the law, at whatever stage the disclosure may be made, in order for such perpetrators to be brought to justice, and removed from re-offending, particularly in such environments.

iii. Trauma is particularly escalated where a victim has no support structures. When a community fails to offer the support needed by the individual, and in some cases actively ostracises the individual, she may experience heightened levels of trauma over and above that of initial the sexual violation.[50] In such scenarios, the state ought to provide the victim with the recourse to the

[49] Vol 6, pp 467, 476-7, paras 30.2.2, 59-64
[50] Vol 6, p 467, para 30.2.3

criminal justice system, which was refused by the community, at whatever stage the victim comes forward.

43. The legal system to come to the aid of victims of abuse, at whatever stage, in order to restore trust in systems that are meant to protect them.[51]

44. In *Bothma v Els* this Court acknowledged that child rape is under reported as it is characterised by secrecy and denial; it held that because it occurs in settings where power relations are slanted against the child, all these factors may have a compounded silencing effect, and it is therefore important to encourage complainants to report.[52] This refers to creating an environment that encourages disclosure whenever the individual is able make it, and not obstructing that process with arbitrary time limits. Sexual abuse victims cannot be blamed for their delays where the very nature of the act committed against them had the effect of diminishing their appreciation (not knowledge) of what happened to them, thereby causing delays in reporting.[53]

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[51] Vol 6, p 487, para 81
[52] *Bothma* para 46
[53] As above paras 64-65

THE BROADER RELIEF

45. The TBC intervened as an *amicus* in the High Court in amplification of the Applicants' and the other amici's arguments, to further its interests in the public interest to protect the rights of children - in recognition of their particular vulnerability, and in line with the TBC's work.[54] While the TBC's evidence primarily references child victims, the remedy it proposed in the High Court, along with the other *amici*, was in respect of all victims of sexual assault, regardless of their age at the time of the offence.[55] This is in keeping with the TBC's commitment to ensuring protection for all victims of sexual abuse and their families, in recognition of its pervasive harm.[56]

46. The High Court made a finding of invalidity of section 18 of the CPA in respect of all victims of all sexual assault, irrespective of whether they we children or adults at the time of the offence. It did so on the basis that:

    a. Section 18 (f) of the CPA makes no distinction, in excluding from prescription the crimes of rape and compelled rape, between children as opposed to adults. The High Court reasoned it would accordingly not make sense for the

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[54] Vol 6, p 458, para 9
[55] Vol 7, p 589, para 19, High Court Judgment
The following references to the TBC's evidence are equally applicable to adult victims: Vol 6, pp 457, 460, 465-468, 472, 473; paras 6.1, 12, 29, 30, 41
[56] Vol 6, p 458, para 9

Court to confine the invalidity of the section to children only;[57] and

b. The Common law crime of indecent assault was not confined to one against children only. Limiting any declaration of invalidity to children only would create an artificial restriction that was never contemplated by the legislature in relation to these crimes.[58]

The TBC submits that this is correct.

47. Section 39(2) of the Constitution requires every court, when interpreting any legislation, and when developing the common law or customary law, to "*promote the spirit, purport and objects of the Bill of Rights*". This Court accordingly has a constitutional mandate to develop the common law where it finds a violation of any right in the Bill of Rights. This Court is empowered to ensure constitutional rights are enforced.

48. This Court is obliged to grant appropriate relief to those whose rights have been infringed or threatened. In *Fose v Minister of Safety and Security* Ackermann J said:

[57] Vol 7, p 594, para 36, High Court Judgment
[58] Vol 7, pp 594-595, paras 37-38, High Court Judgment

". . . I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal." [59]

49. As the High Court recognised, "*but for the strength of the applicants in bringing this application, section 18 of the CPA may have continued indefinitely.*"[60] If this Court does not confirm the broader relief, the impugned provision in respect of adult victims will stand until a fresh Constitutional challenge is brought by adult victims of sexual assault with great trauma and at great expense.

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[59] *Fose v Minister of Safety and Security 1997 (3) SA 786 CC*
[60] Vol 7, p 628, paras 113-114

50. In *Carmichele* this Court emphasised that *the* obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary: "*On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately … there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.*"[61]

51. *In Coughlan NO v the Road Accident Fund*[62] the enquiry before the High Court and the SCA was limited to the facts of the dispute between the curator and the Road Accident Fund.[63] The *amicus* urged this Court to broaden the enquiry and set a general principle [beyond foster care grants].[64] This Court considered the rights affected and accepted "*the invitation by the parties because child support grants are a matter of public importance, particularly to vulnerable people and children … in the interests of justice … although it is not part of the original dispute between the parties. Moreover, none of the parties … is prejudiced by dealing with [it]*."[65]

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[61] *Carmichele* para 39
[62] *Coughlan N.O. v Road Accident Fund 2015 (4) SA 1 (CC)*
[63] As above para 23
[64] As above para 26
[65] As above para 53

This case is on point with the present matter.

52. In the present matter, invalidating section 18 of the Criminal Procedure Act to remove prescription periods applying to the prosecution of all sexual offences, and taking the removal of prescription to its full logical conclusion, would produce a constitutionally and socially desirable result.

53. In *Masiya* [66] this Court recognised the distinction between clarification of the common law and creation of new common law offences. This Court is not being requested to create new common-law offences, but to address the irrationality of the scope of prescription to established offences.

REMEDY

54. This Court is enjoined by section 172(1)(a) of the Constitution to declare that section 18 of the CPA is inconsistent with the Constitution and invalid to the extent that it bars, in all circumstances, the institution of a prosecution for all sexual offences, other than rape or compelled rape, after the lapse of a period of 20 years from the time when the offence was committed.

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[66] *Masiya* para 52

55. Under section 172(1)(b) of the Constitution, it is then open to this Court to make any order that is just and equitable. Such order may include reading in to the provisions of section 18, or suspending the declaration of invalidity to give the legislature time to cure the defect.[67]

56. It is respectfully submitted that it would be appropriate for this court to read in to section 18 the words contained in bold below:

> *"18 Prescription of right to institute prosecution. The right to institute a prosecution for any offence, other than the offences of- ...*
>
> *(f) and rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,* ***and all statutory and common law offences of a sexual nature contained in any other law****, respectively; ...*
>
> *shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed."*

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[67] *Minister of Home Affairs and Another v Fourie and Another 2006* (1) SA 524 (CC) at para 118; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 paras 61-76

57. An immediate reading in will not detract from lasting legislative action, compliant with the Constitution, to amend the text.[68]

CONCLUSION

58. There is no legitimate government purpose differentiating between the harm and impact of sexual assault vis-à-vis rape, and it is accordingly arbitrary, irrational and unlawful. Further, the laws approach to prescription ought to take cognisance of how disclosure occurs and not arbitrarily deprive victims of sexual assault from the full protection of the law.

59. The State's duty to respect, protect, promote and fulfil the Bill of Rights enjoins it to recognise the prevalence and harm of sexual assault and take legislative and other measures to assuage the resultant violation of rights.

60. This Court is enjoined to declare section 18 of the CPA, to the extent that it hinders/impedes the right to institute a prosecution for all sexual offences other than those listed in sections 18 (f), (h) and

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[68] *National Coalition* para 76: "*It should also be borne in mind that whether the remedy a court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, "fine-tuning" them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.*"

(i) after the lapse of a period of 20 years from the time when the offence was committed, invalid and unconstitutional.

61. With deference to this Court's remedial discretion, it is submitted that Constitutional defect ought to remedied by a reading in to section 18(f) of the CPA the words "*and all other sexual offences, whether in terms of common law or statute*".

62. The TBC does not seek costs against any party. In the event that this Court does not confirm the High Court's order of invalidity, it is respectfully submitted that the *Biowatch* principle applies and there ought to be no cost order made against the TBC.[69]

Gina Snyman

Johannesburg

29 September 2017

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[69] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) para 43

LIST OF AUTHORITIES

- *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC)
- *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)
- *Bothma vs Els* (CCT 21/09) [2009] ZACC 27
- *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)
- *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1
- *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11
- *Coughlan N.O. v Road Accident Fund* 2015 (4) SA 1 (CC)
- *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)
- *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19
- *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9
- *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC)
- *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and* Others [1999] ZACC 17

- *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5
- S v Baloyi and Others 2000 (2) SA 425 (CC)
- *S v Chapman* 1997 (2) SACR 3 (SCA)
- *Van Zijl v Hoogenhout* [2004] ZASCA 84

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 170/2017

NICOLE LEVENSTEIN	First Applicant
PAUL DIAMOND	Second Applicant
GEORGE ROSENBERG	Third Applicant
KATHERINE ROSENBERG	Fourth Applicant
DANIELA McNALLY	Fifth Applicant
LISA WEGNER	Sixth Applicant
SHANE ROTHQUEL	Seventh Applicant
MARINDA SMITH	Eighth Applicant
and	
ESTATE LATE FRANKEL	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG	Third Respondent
TRUSTEES FOR THE TIME BEING OF THE WOMEN'S LEGAL CENTRE TRUST	Fourth Respondent
TEDDY BEAR CLINIC	Fifth Respondent
LAWYERS FOR HUMAN RIGHTS	Sixth Respondent

In re:
The matter concerning the constitutional validity of section 18 of the Criminal Procedure Act, 51 of 1977

SIXTH RESPONDENT'S SUBMISSIONS

CONTENTS

INTRODUCTION

1. This is an application for confirmation, in terms of section 172(2)(*a*) of the Constitution, of the order made by the South Gauteng High Court, Johannesburg (Hartford AJ) ("the High Court') on 19 June 2017.[1]

2. The sixth respondent, Lawyers for Human Rights ("LHR") supports the confirmation of the declaration of section 18 of the Criminal Procedure Act, 51 of 1977 ("the CPA") as invalid, as set out in paragraph 1 of the High Court order.

3. In support, these written submissions will address:

    3.1. the issue in terms of section 9(1) of the Constitution;

    3.2. the differentiation effected by the impugned legislation;

    3.3. the irrationality of such differentiation with reference to:

        3.3.1. the historical background of section 18 of the CPA;

        3.3.2. relevant principles of constitutional criminal law; and

        3.3.3. the protection afforded to accused persons within constitutional criminal procedure which renders section 18 superfluous.

4. We do not support confirmation of the consequential orders included in paragraphs 2 and 3 of the High Court's order. We agree with the submissions of the applicants in this regard.

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[1] Vol 7: p 634 – 635

5. LHR abide the decision of this Court on the application to adduce further evidence instituted by the fourth respondent[2], and also abide the decision on the appeal by the first respondent against the cost order against it by the High Court.[3]

THE ISSUE

6. Section 9(1) of the Constitution reads:

> *"Everyone is equal before the law and has the right to the equal protection of the law and benefit of the law."*

7. A constitutional state is expected to act in a rational manner. It is well-settled that where an impugned provision differentiates between categories of people, there must be a rational connection between a legitimate government purpose and such differentiation; otherwise the differentiation is in violation of section 9(1) of the Constitution.[4]

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2 Supplementary Vol 1: p 654 – 728 and Vol 2: p.729 – 792

3 As noted in terms of section 172(2)(d) of the Constitution. Vol 7: p.636 – 646

4 *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 25; *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) para 53; *Van der Merwe v RAF (Women's Legal Centre Trust as Amicus Curiae*) 2006 (4) SA 230 (CC) para 49; *Geldenhuys v National Director of Public Prosecution and Others* 2009 (2) SA 310 (CC) para 29; and

THE IMPUGNED PROVISION

8. The heading of section 18 of the CPA reads:

"18 Prescription of right to institute prosecution"

9. The term 'prescription' in section 18 is inaccurate. Crimes not listed in section 18 do not prescribe. They remain subject to possible private prosecution in terms of section 7 of the CPA. Section 18 rather limits the ability to prosecute certain crimes after the lapse of 20 years since the commission of the crime. In doing so, it differentiates between the crimes listed and those not included in section 18.

10. The necessary result is that section 18 also differentiates between the victims or complainants of crimes. Victims of offences other than those listed in section 18 have no recourse within the criminal justice system, other than a private prosecution, after the lapse of 20 years since the offence was committed, regardless of the circumstances of the matter.

11. In terms of sexual offences, section 18 has always differentiated in this manner between the offence of rape and other sexual offences and therefore between the victims of rape and the victims of other sexual offences.[5] It continues to do so, even after its amendment in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 ("SORMA"), which came into effect on 16 December 2017.

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[5] The amendments of section 18 since 1977 are discussed in the High Court's judgment (Vol 7: p 589 – 591, paras 21 - 27 of the judgment) and the applicant's Written Submissions, para 31 – 38

12. In its current form, section 18 includes the following SORMA offences, thereby differentiating these offences from other sexual offences: rape and compelled rape, trafficking for sexual purposes and the use of a child or mentally disabled person for pornographic purposes.[6] These offences are exempt from the 20-year period. In terms of section 18, all other sexual offences, whether in terms of common law or SORMA, must be prosecuted within 20 years from the commission of the offence regardless of the circumstances of the matter.

13. This matter involved instances of delayed reporting by the applicants who were children at the time of the commission of the offence. The delay as such was however not the differentiating factor in terms of section 18. The NPA declined to prosecute in this matter as it did not have the right to institute a prosecution after the lapse of 20 years for any sexual offence committed prior to SORMA other than the offence of a male having unlawful and intentional sexual intercourse with a female without her consent, in terms of the common law definition of rape. Such intercourse was limited to vaginal penetration in terms of common law until this Court extended the definition to include anal penetration of a woman in *Masiya v Director of Public Prosecutions*[7] in May 2007, shortly before the commencement of SORMA.

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6 In terms of sections 3, 4, 71(1) or (2) and sections 20 (1) and 26 (1) of SORMA

7 *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae*) 2007 (2) SACR 435 (CC) para 26 – 27 and 45

14. It must be borne in mind that section 18 would have applied in the same manner should the applicants have reported the assaults and a prosecution was not instituted, because, for example, they were not believed at the time or the perpetrator was not known to the applicants. The 20-year period indicated in section 18 runs from the commission of the crime irrespective of whether the victim or prosecuting authority were aware of the crime. It is interrupted by prosecution, not by reporting, unless the crime falls within one of the SORMA offences listed in the section. Then the 20-year period would not apply, regardless of the circumstances of the matter.[8]

15. Section 18 differentiates between categories of people due to the nature of the crime and not the nature of the victim. In doing so, it may very well operate unfairly against certain vulnerable groups, such as women and children. However, the basis for the differentiation and therefore the basis of our challenge remains the nature of the offence and whether it is included in section 18 or not.

16. Section 18 in its current form does effect a second tier of differentiation due to the expanded definition of rape in SORMA. We will return to this issue in submissions made in support of the broad relief granted by the High Court.

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8 *S v De Freitas* 1997 (1) SACR 180 (C) p 182

WHETHER SECTION 18 IS IRRATIONAL AND ARBITRARY

17. It is traditionally contended that prescription or statutes of limitation in criminal law serves to create certainty and to protect an accused from the prejudice of having to defend cases where exculpatory evidence may have gone lost over time and the best evidence is no longer available.[9]

18. While the mitigation of trial prejudice against an accused person may constitute a legitimate government purpose, it is our contention that there is no rational connection between such purpose and the differentiation between sexual offences and victims. Section 18 of the CPA therefore contravenes section 9(1) of the Constitution.

19. In support of this contention, we will focus our submissions on the arbitrariness and irrationality of the differentiation between sexual offences in terms of section 18 within the context of constitutional criminal law principles and procedure. Our submissions are broadly that:

    19.1. the historical rationale for differentiating between rape and other sexual offences is no longer valid;

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[9] This was indeed the basis for Frankel's initial opposition to the application as referred to by the Applicants in para 27 of their Written Submissions

19.2. differentiation between sexual offences does not fit with constitutional criminal law principles, including theories of criminalisation and punishment; and

19.3. accused persons are afforded ample protection in sexual offence cases within our constitutional criminal law and procedure which renders section 18 superfluous.

Section 18 of the CPA: The historical rationale for differentiation between sexual offences and victims

20. South African criminal law is a hybrid system, due to its Roman-Dutch and English roots. The present system is a mix of these roots, German influences and some unique South African elements.[10] The notion that the right to prosecute may lapse has its origins in Roman-Dutch law on prescription rather than English law where the doctrine of *nullem tempus occurit rei* (no lapse of time bars the King) has had the result that relatively few time limits are imposed on prosecutions in terms of English law. In terms of Roman Dutch common law principles, codified in during the 17th century, all crimes prescribed after a period of 20 years.[11]

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10 Burchell *Principles of Criminal Law* 4ed p 8

11 As recorded in by Mattheus (1601 to 1654) in his *De Criminibus* 48.19.4.1 and Carpzovius (1595-1666) in his *Verhandeling der Lijfstrafflijke Misdaade in Haare Berechtinge*

21. The common law and pre- and post- 1977 history of section 18 is set out in *S v De Freitas.*[12] It is clear from this history that there have been many changes over the years as to the crimes excluded from the period of 20 years. The list of crimes to which the death penalty was a competent sentence changed on many occasions before and after 1977, often reflecting the political and social context of the time. Rape was not always excluded from prescription in terms of common law. Also, when it was included in the list of offences for which the death penalty was a competent verdict, the rationale for the criminalisation of rape was very different. In *Masiya*, Nkabinde J held that:[13]

> *"It is evident from the history of the law of rape that the object of the criminalisation of rape was to protect the economic interests of the father, husband or guardian of the female survivor of rape, to perpetuate stereotypes, male dominance and power and to refer to females as objects."*

22. Snyman writes that the common law criminalisation of rape was based on the prohibition of vaginal penetration by a man's penis without consent in order to prevent the woman from becoming pregnant without her consent,[14] while Burchell refers to the Roman-Dutch and English law notions that the essence of rape was the employment of force to overcome a woman's resistance.[15]

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12 *De Freitas* p 182 – 186; The amendments post-1977 are discussed in the High Court judgment (Vol 7: p.589 – 591, paras 21 to 27 of the judgment) and in the applicants' written submissions, paras 31 to 38

13 *Masiya* para 24

14 See Snyman, *Criminal Law* 6th ed p4

15 See Burchell, *Principles of Criminal Law*, p.612

23. These notions of the crime of rape are clearly far removed from its current definition and the purposes of SORMA as set out in its preamble. There is therefore no rational basis for the exclusion of rape and compelled rape from the 20-year period in section 18 of the CPA, as opposed to other sexual offences such as sexual assault, to be found in the history of section 18. The historical differentiation between sexual offences stemmed from an archaic understanding of the nature and harm caused by rape as opposed to other sexual offences which has no place in modern society.

24. The 20-year period is in itself arbitrary and to our mind, irrational within the context of sexual offences. It is derived from Roman-Dutch common law principles codified in the 17th century. The fact that that this period has not changed over centuries, is indicative of the arbitrary development of the contents of section 18. There is no real rationale for this period within the context of modern constitutional criminal law and specifically within the context of the prosecution of sexual offences. The traditional justification for prescription in criminal cases based on certainty and the availability of exculpatory or best evidence, is often not relevant to the prosecution of sexual offences.

25. Where there is no physical evidence, prosecutions often entail proceedings without witness testimony other than that of the complainant and the alleged offender. Where there is physical evidence, there is no reason for the 20-year limit

within the context of technological advances in forensics and evidence gathering. It would, to our mind, be absurd to suggest that a serial sexual offender, whose conduct falls outside of the applicable definition of rape, could escape prosecution where authorities are in possession of, for example, DNA evidence linking the offender to historical sexual assault crimes because a period of 20 years, based on a period set in the 17th century, lapsed.

Relevant Constitutional Criminal Law Principles and Procedure

The "Living Nature" of Criminal Law

26. Burchell describes criminal law as having a "living nature" under the Constitution. He writes that the mixed system of South African criminal law requires its continuous testing against the Constitution and the re-evaluation of criminal law principles in terms of the Constitution and within the context of principles of restorative justice and fundamental fairness.[16]

27. This "living nature" is very evident when one considers the changes in the criminalisation and prosecution of sexual offences over the past decades in order to accommodate modern constitutional principles and to reflect the ever-growing understanding of these crimes and their victims, as acknowledged by this Court in *Masiya*.[17] For example:

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[16] See Burchell, *Principles of Criminal* Law 6th p 9

[17] *Masiya* para 28

27.1. he so-called marital rape exemption was abolished in 1993;[18]

27.2. the SCA held in *S v Jackson*[19] that the general application of the cautionary rule to complainants in sexual cases was based on an irrational and outdated perception which unjustly stereotyped complainants in sexual cases as unreliable;

27.3. there have been several changes regarding the admissibility of evidence of the character of a complainant in sexual offences in terms of section 227 of the CPA; and

27.4. our law no longer requires that for a complaint by a victim in a sexual offence to be admitted as evidence it had to have been made at the first reasonable opportunity, as was required on the basis of the archaic common law principle of "raising the hue and cry".[20]

28. We agree with the submission of the applicants that there is nothing in the contents and architecture of SORMA that suggests a logical rationale for the differentiation effected by section 18 of the CPA.[21] We also agree that the 2007 amendment of section 18 in SORMA, which again perpetuates differentiation between sexual offences and victims, constituted a missed opportunity.[22] SORMA did not end the

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18 In terms of section 5 of the Prevention of Family Violence Act 133 of 1993

19 1998 (1) SACR 470 (SCA) p 474 - 476

20 As confirmed by section 58 read with section 59 of *SORMA*

21 Applicant's Written Submissions, paras 52.8 – 52.9

22 Applicant's Written Submissions, para 39

"living nature" of criminal law pertaining to sexual offences. It remains to be tested against the Constitution in the manner stated by Burchell. We contend that, ten years on from the commencement of SORMA, the effective distinction between different sexual offences and victims in terms of section 18 of the CPA cannot pass such constitutional scrutiny.

Punishment

29. It is trite that in punishing criminal offences, courts must must consider the crime, the offender and the interests of society, the so-called "Zinn-triad".[23] The SCA has called for a balanced approach in considering these factors and also the objects of punishment. Heher JA stated in *S v RO & Another*[24] that:

> *"Sentencing is about achieving the right balance (or in more high flown terms, proportionality). The elements at play are the crime, the offender and the interests of society, or with different nuance, prevention, retribution, reformation and deterrence."*

30. The distinction between different sexual offences effected by section 18 of the CPA does not accord with these principles of punishment. It serves to irrationally immunise certain sexual offenders against the interests of a society. It simply does not make sense within the current South African context to punish certain sexual

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[23] *S v Zinn* 1969 (2) SA 537 (A) 540G

[24] 2010 (2) SACR 248 (SCA) para 30

offences more than 20 years after they were committed, thereby fulfilling the functions of punishment of prevention, retribution and deterrence, while other sexual offences go unpunished due to an arbitrary distinction and an arbitrary time period imposed by section 18 of the CPA.

31. We agree with the submissions of the applicants regarding delayed reporting of sexual offences and the High Court's findings in this regard.[25] There is no rational reason to distinguish between sexual offences on this basis. We contend further that there is no rational basis to punish some sexual offenders where the disclosure of crimes was delayed, while in effect, immunising other offenders in such situations.

32. The limitation of the right to institute prosecution is irrational and arbitrary if applied to any historic sexual offence. In *R v L (WK)*[26] the Canadian Supreme Court held correctly that:

> *"Establishing a judicial statute of limitations would mean that sexual abusers would be able to take advantage of the failure to report which they themselves, in many cases caused. This is not a result we should encourage. There is no place for an arbitrary rule."*

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25 Applicant's Written Submissions, paras 52.4 – 52.6; and Vol 7: p 999 to 602

26 [1991] 1 R.C.S. 1091 p 1101

Protection afforded within our constitutional criminal law

Section 35 of the Constitution and substantive trial fairness

33. All accused persons are afforded fair trial protection in terms of our Constitution. This protection extends beyond the specific fair trial rights set out in section 35(3) of the Constitution to encompass the concept of substantial fairness, as held by this Court in *S v Zuma*[27] and in many cases since.

34. An accused's fair trial rights are not solely infringed because of a lengthy delay in prosecution. It is the actual effect of the delay upon the fairness of the trial, not its length, that is relevant.[28] In *Bothma v Els*, Sachs J referred to the concept of substantial trial fairness as stated in *Zuma* and held that:

> *"In this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried with unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence."*[29]

35. There is no rationale for differentiating between sexual offences, as is effected by section 18 of the CPA, on the basis of the principle of substantive trial fairness or

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27 *S v Zuma and Others* 1995 (1) SACR 568 (CC) para 16

28 *R v L (WK)* p 1100; and *Bothma v Els* 2010 (1) SACR 184 (CC) para 34

29 *Bothma* para 35

specific fair trial rights set out in section 35(3) of the Constitution. The procedural and substantive protection of the Constitution applies to all accused persons equally. There is no added constitutional prejudice to an accused charged with a crime not included in section 18 of the CPA as opposed to, for example, an accused charged with historic rape such as in *S v Cornick*,[30] where two accused persons were convicted of a rape that occurred in 1983, 19 years before charges were laid. The High Court correctly held within the context of historic sexual offences that:

> *"These rights, which are protected, apply equally in prosecutions of rape, compelled rape or other sexual offences. It would be illogical for the accused's rights to be infringed by a delay in prosecuting sexual offences, but not be infringed by a delay in prosecuting rape or compelled rape, as I have already found that the former are no less serious than the offences of rape or compelled rape."*[31]

36. Delays within criminal procedure are governed by section 342A of the CPA. Section 342A provides remedies for an accused in the case of an unreasonably procedural delay, therefore from the start of the criminal prosecution, causing prejudice to the accused including the prejudice of weakening or lost evidence.[32] Section 342A does not differentiate between sexual offences, or indeed any other offences. The unreasonableness of the delay must be assessed within the specific circumstances of the matter. The same approach should be followed with regard

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30 2007 (2) SACR 115 (SCA)

31 Vol 7: p 616, para 81 of the judgment

32 Section 342A(2)(*f*) of the CPA

to the prosecution of all historic sexual offences within the context of the right to a substantively fair trial.

37. In *Bothma v Els*, Sachs J confirmed the need to balance the rights of the accused with public interest and held that in some cases the prosecution of historic crimes could be unfair. However, he also emphasised that a fair balance would depend on the circumstances of case and specifically the nature of the offence before concluding that *"there are some crimes that do not go away"*.[33]

38. No sexual offences should go away, at least not based on an irrational differentiation between rape and other sexual crimes or the implementation of an arbitrary 20-year period.

Rules of evidence

39. The rules of evidence are central to the protection of an accused's right to a substantively fair trial in that it serves to appropriately mitigate prejudice against the accused. The High Court relied in this regard on the New Zealand decision of *Anderson and Ors v Hawke* where it was held that:

> *"Such mitigation is largely achieved by the general rules of criminal procedure (particular as to onus and standard of proof) and careful evaluation by the trier of fact of the evidence which is adduced."* [34]

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[33] *Bothma* para 77

[34] 2016 NZHC 1541 para 18 – 20; Vol 7: p 610, para 87 of the judgment

40. In *R v L (WK)* the Canadian Supreme Court expressed a similar view in holding that:

> *"Witnesses and evidence may disappear in the short run as well as in the long, and the accused may have to be sought for a long or short period of time. Subject to such controls as are prescribed by the* Criminal Code*, prosecutions initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the Court on the evidence, which judges are entitled to weigh for cogency as well as credibility. The Court can call for an explanation of any untoward delay in prosecution and may be in a position, accordingly to assess the weight of some of the evidence."*[35]

41. There is, in principle, no difference between the evaluation of the cogency of the state's case, according to accepted constitutional criminal law principles,[36] and the assessment of the probative value of evidence, including the credibility of witnesses, in a historic case of rape, such as *Cornick*, as opposed to the application of these principles to other potential historic sexual offence cases. The rules of evidence protect any accused person against the admission of evidence where the probative value of such evidence is outweighed by its prejudicial effect. There is

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35 *R v L (WK)* p 1099

36 See for example *S v Van der Meyden* 1990 1 SACR 447 (W) p 448 and *S v Abader* 2010 (2) SACR 558 (WCC) para 27

therefore no rational basis to be found within the rules of evidence for the distinction between sexual offences effected by section 18 of the CPA.

42. The cautionary rule would apply similarly to all historic cases as it does to non-historic cases. While caution is no longer applied to sexual offence cases as a general rule,[37] the specific circumstances of a sexual offence case may still require a court to approach the evidence of complainants with caution, for example, where the complainant is a single witness to the offence alleged. A court would have to assess the credibility of the complainant's testimony within the context of all the circumstances of the case, including a delay in prosecution, and find whether there are sufficient safeguards, including possible corroboration, to allay the risk in attaching weight to such testimony. This is an element of most sexual offence cases, specifically in the absence of physical evidence.

43. Similarly, the provisions relevant to the admissibility of hearsay evidence, specifically section 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988, provides protection against the admissibility of hearsay evidence which may be specifically relevant in all cases of historic sexual offences. Section 3(1)(*c*) requires a court to balance probative value with prejudicial effect. Evidence is inadmissible should its prejudicial effect outweigh its probative value.

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[37] See section 60 of SORMA; and *Jackson* p 474 and 476

Legality

44. The exercise of public power must comply with the Constitution. The doctrine of legality, which is an incident of the rule of law, serves to control the exercise of public power.[38]

45. Within the context of criminal law, the principle of legality prescribes that the state can only inflict punishment for a contravention of a clearly defined crime created by law that was in force at the time of the contravention. The determination of liability and the passing of sentence must correspond with clear and existing rules. It therefore functions to protect accused persons against arbitrary liability and punishment. The principle of legality is specifically relevant within the context of historic sexual offences due to the many changes that have affected the prosecution of these offences, including the changes brought about by SORMA.

46. Legality embodies the principles that:

    46.1. a court may find an accused guilty of a crime only if the relevant conduct is recognised as a crime (the *ius acceptum* principle);

    46.2. a court may find an accused guilty of a crime only where the conduct was recognised as a crime at the time of its commission (the *ius praevium* principle);

[38] *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 (CC) para 49

46.3. crimes should not be formulated vaguely (the *ius certium* principle);

46.4. a court should interpret the definition of a crime narrowly (the *ius strictum* principle); and that

46.5. these principles must be applied to sentencing (the *nulla peona sine lege* principle).[39]

47. The principles of *ius praevium* and *nulla poena*, are incorporated in sections 35(3)(*l*) and (*n*) of the Constitution Act 108 of 1996. Section 35(3)(*l*) provides that there can be no conviction or punishment of conduct not previously declared a crime.

48. The rule against retrospectivity has been confirmed by this Court on several occasions.[40] In *Savoi and Others v National Director of Public Prosecutions and Another* this Court concluded that the rule against retrospectivity was no longer a tool of interpretation but rather constituted a fundamental right not to be subjected to retrospective criminal provisions. [41]

49. The principle of legality and the rule against retrospectivity applies equally to all sexual offences. It provides equal protection to all accuse persons. Its application

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39 Snyman *Criminal Law* 6th ed p 39

40 *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2006 (2) SACR 319 (CC) para 26; *Masiya* para 57; and *S and Another v Acting Regional Magistrate, Boksburg and Another* 2011 (1) SACR 273 (CC) para 16

41 *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (1) SACR 545 (CC) para 78

in this matter would have been as follows: Had Frankel been prosecuted; such prosecution could only be based on the common law offence of sexual or indecent assault. This would have also had implications for sentencing.

50. Section 35(3)(*n*) of the Constitution protects an accused, as part of his right to a fair trial, against the retrospective operation of sentences. The principle of *nulla poena* embodied by the principle of legality has the effect that:

50.1. the applicable sentence must have been determined with reasonable certainty at the time of the commission of the crime;

50.2. a court must interpret punishment narrowly; and

50.3. a court may only impose a sentence legally authorised in terms of the *nulla poena sine lege* principle.

51. In *Director of Public Prosecutions v Prins* the SCA reminded that courts cannot invent punishments. Wallis JA held that sentencing of common law crimes entailed the exercise of judicial discretion within the limits of such discretion at the time.[42] In *Cornick,* for example, two accused persons were convicted, in terms of common law, of rape which occurred in 1983. The SCA stated that in considering sentencing, these accused could not be sentenced to a period exceeding 10 years' imprisonment as the jurisdiction of the regional court was

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[42] *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) para 10 and 13

limited to the imposition of a maximum term of 10 years' imprisonment at the time of the offences.[43]

The role of the NPA

52. The NPA has the discretionary power to institute or to decline to institute criminal proceedings on behalf of the state. This power is conferred by section 179(2) of the Constitution read with section 20 the National Prosecuting Authority Act 32 of 1988 ("NPA Act") and the NPA Code of Conduct and NPA Prosecution Policy Directives issued in terms of section 179(5) of the Constitution and section 21 of the NPA Act.

53. According to the current NPA Policy Directives,[44] for a prosecution to ensue, it must be objectively clear that there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution with a reasonable chance of conviction. If so, a charge will normally be prosecuted unless public interest dictates otherwise.

54. The NPA's role is therefore to assess all the circumstances of the matter and to apply the principles of constitutional criminal law, procedure and evidence, as discussed, in a manner that balances the constitutionally protected interests of the victim with that of an accused person. The NPA must assess the sufficiency of evidence prior to instituting a prosecution and also whether there are

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43 *Cornick* para 43

44 Dated 27 November 2014 and revised in June 2013, p.5

considerations which would dictate against prosecution in the public interest such as the personal circumstances of the accused and relevant sentencing principles.

55. The decision to prosecute a historical sexual offence is not necessarily final. In terms of section 179(5)(*c*) and (*d*) of the Constitution and section 22(2)(*b*) and (*c*) of the NPA Act, the National Director of Public Prosecutions may:

55.1. intervene in any prosecution process when policy directives are not complied with; and

55.2. review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Representations and after taking representations from the accused, the complainant and any other relevant person.

56. It is our view that the proper exercise of the NPA's discretionary power in terms of the Constitution and the NPA Act in cases of historic sexual offences, in a constitutionally fair manner within the specific circumstances of a case, renders section 18 of the CPA superfluous.

RELIEF

The width of the declaration of invalidity

57. The High Court declared section 18 invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences other than

the SORMA offences listed after a period of 20 years lapsed since the commission of the crime.[45]

58. The High Court's finding and its reasoning as to why it made the wider order, is supported.[46]

59. The High Court correctly concluded that the differentiation between penetrative and non-penetrative sexual offences effected by section 18 of the CPA is arbitrary and irrational, thereby infringing upon section 9(1) of the Constitution.[47] This would be the case regardless of the age or gender of the victim.

Suspension and "reading in"

60. The submissions of the applicants in this regard are supported.[48]

61. It is important that any "reading in" contains the words *"and all other sexual offences, whether in terms of common law or statute"*, as included in paragraph 3 of the High Court order, so as to prevent any further arbitrary differentiation between SORMA offences and common law offences which may result from the expanded definition of rape in terms of section 3 read with section 1 of SORMA.

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45 Vol 7: p 634

46 Vol 7: p 592 – 596, paras 32 – 42 of the judgment

47 Vol 7: p 608, para 63 of the judgment

48 Applicant's Written Submissions para 54 - 59

COSTS

62. LHR does not seek costs against any party.

63. LHR participated in the High Court proceedings as *amicus curiae*. Although LHR has been cited by the applicants in this matter as a respondent in the confirmation proceedings, it remains a party litigating in the public interest and to assist this Court. LHR should therefore not be burdened by a costs order should the application for confirmation be unsuccessful.

CONCLUSION

64. LHR therefore submits that:

64.1. The declaration of invalidity of section 18 of the Criminal Procedure Act 51 of 1977 by the High Court should be confirmed on the terms granted by the High Court; and

64.2. This Court should further order that section 18(*f*) of the Criminal Procedure Act is to be read as though the words *"and all other sexual offences, whether in terms of the common law or statute"* appear after the word *"the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively."*

65. LHR abides this Court's decision on the first respondent's appeal on the issue of costs.

66. LHR does not seek costs against any party.

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28 September 2017

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