NL v Frankel 2017 JDR 1105 (GJ)

Citation	2017 JDR 1105 (GJ)
Court	Gauteng Local Division, Johannesburg
Case no	29573/2016
Judge	C Hartford AJ
Heard	May 22 - 23, 2017
Judgment	June 15, 2017
Appellant/ Plaintiff	NL PD GR K R DM LW SR MS
Respondent/ Defendant	Sydney Lewis Frankel Minister of Justice and Correctional Services Director of Public Prosecutions, Gauteng The Trustees for the time being of the Women's Legal Centre Trust The Teddy Bear Clinic Lawyers for Human Rights

Summary

Criminal law — Sexual offences — Prescription of — Exclusion from prescription of only rape and compelled rape by s 18 of Criminal Procedure Act 51 of 1977 — Arbitrary, irrational and unconstitutional in relation to not only children but to all persons.

Judgment

Hartford, AJ:

A. INTRODUCTION

[1] This is an application in terms of which the first to eighth applicants (hereinafter referred to as "*the applicants*") applied for an order on 26 August 2016 in the following terms:

> *"1. 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;*

> *2. Directing the Third Respondent to consider whether to institute a prosecution in respect of charges of indecent assault and/or sexual assault against the First Respondent*

3. Costs against any respondent who elects to oppose this application.

4. Further and/or alternative relief." [1]

[2] The first respondent (hereinafter referred to as "*Frankel*") filed a Notice of Intention to Oppose the application on 5 September 2016 and the second respondent (hereinafter referred to as "*the Minister"*) filed a Notice of Intention to Oppose on 8 September 2016. The Minister withdrew his Notice of Intention to Oppose and filed a Notice of Intention to Abide the Decision of the Court on 7 November 2016. The third respondent similarly chose to abide the court's decision. Frankel filed his Answering Affidavit on 26 September 2016 and the applicants filed their Replying Affidavit on 28 November 2016. In their Replying Affidavit, the applicants stated that "*to the extent that the primary relief is in any way unclear in this regard, we suggest that an alternative order to the primary relief sought in the Notice of Motion may be granted. In this regard we suggest that for the sake of absolute certainty the following order (alternative order) be made"*:

> *"Declaring section 18 of the Criminal Procedure Act No 51 of 1977 to be inconsistent with the Constitution, 1996 and invalid to the extent that it bars in all circumstances the right to institute 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*." [2]

[3] The applicants also invited the respondents, in the event that they sought to object to the alternative order, to file a further affidavit in which they set out their reasons for doing so, and in such further affidavit explain what exactly their concerns were with the alternative order. [3]

[4] On 25 January 2017, in his rejoinder affidavit, Frankel advised the court that he did not persist in opposing the relief sought in the amended prayer 1 to the Notice of Motion but maintained his opposition to the relief sought in prayer 2 on the basis of the principle of legality. [4]

[5] Thus, as at 25 January 2017, the applicants had narrowed down their relief claimed from a declaration of invalidity relating to all sexual offences against all persons ("*the broader relief*"), to one confined to a declaration of invalidity in relation to children only ("*the alternative narrow relief*").

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[1] Pp 1-2

[2] P 292, para 9.

[3] P 293. para 10.

[4] Pp 301-302, paras 9 and 10.

[6] On 18 May 2017 this Court, wrote to all the parties requesting that the parties make written submissions dealing with, *inter alia*, what remedy the parties suggested the court should devise in order to make section 18 of the Criminal Procedure Act constitutionally sound, if the court should deem it necessary to do so.

[7] he applicants replied in an email dated 19 May 2017, and suggested, in addition to its amended prayer 1, the following additional order be made:

> *"A declaration that section 18(f) of the Criminal Procedure Act 51 of 1977 is to be read as though the following words: 'indecent assault against children' appear after the words Amendment Act, 2007."*

No suspension was sought for any declaration of invalidity by the applicants.

[8] The *amici* also made certain suggestions. What they were all unanimous on was that any declaration of constitutional validity should not be confined to sexual offences against children only. The Minister concurred with the applicants that any relief should be confined to children.

[9] In a nutshell, all the parties submitted that section 18 of the CPA was inconsistent with the Constitution, including Frankel, but sought various permutations of relief flowing therefrom.

[10] Frankel died shortly before the hearing of this matter and the court received an email dated 24 April 2017 from the applicants that they would no longer be proceeding with the relief in prayer 2 of their Notice of Motion but only in terms of prayers 1, 3 and 4 thereof. At the hearing a Notice of Substitution was handed in by Frankel's counsel substituting Frankel with the Estate Late Frankel. For convenience I shall continue to refer to the first respondent as "*Frankel*".

[11] It is incumbent upon this Court to first determine the question of whether section 18 of the Criminal Procedure Act 51 of 1977 ("*the CPA*") is indeed inconsistent with the Constitution and I will thereafter deal with the varied forms of relief which the parties submit should be granted.

[12] I am mindful of the fact that the underlying *lis* and defining of the facts between the parties are those as between the applicants and the respondents, and that the *amici* were joined by the order of Lamont J in February 2017.

B. <u>THE FACTS</u>

[13] I turn now to deal with the case made out by the applicants in their affidavits. The applicants have brought this application in their own interest as well as in the public interest. [5] The applicants, who at the time of the alleged

[5] Founding Affidavit p 50, para 44; p 58, para 63.

offences were between the ages of 6 and 15 years, and were both male and

female, have accused Frankel of having habitually "*indecently and/or sexually assaulted"* them between 1970 and 1989. [6] The alleged abuse occurred at different locations in and around Johannesburg and in various ways.

[14] In terms of section 18 of the CPA, in all these cases, the alleged indecent assault offences prescribed between 1999 and 2011. [7] Only between June 2012 and June 2015 did the applicants acquire "*full appreciation of the criminal acts committed by the first respondent*". [8] The applicants opened a criminal case and instituted a civil claim against Frankel. [9]

[15] The third respondent declined to prosecute the cases against Frankel. [10]

[16] At the time the alleged offences were committed, which was long before the Criminal Law (Sexual Offences and Relation Matters) Amendment Act 32 of 2007 came into effect (hereinafter referred to as "*SORMA*"), the crimes allegedly committed were the common law crimes of indecent assault.

C. <u>THE APPLICANTS' AND THE FIRST SECOND AND THE THIRD AMICI'S LEGAL CHALLENGES TO SECTION 18 OF THE CPA AS READ WITH THE MINISTER'S LEGAL SUBMISSIONS</u>

[17] The applicants submit that section 18 of the CPA is unconstitutional and invalid. It reads as follows:

> ***"18. Prescription of right to institute prosecution.***
>
> *The right to institute a prosecution for any offence, other than the offences of-*
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> *(a) murder;*

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[6] Pp 15-47, paras 30-37.

[7] Founding Affidavit p 49, para 43.

[8] Founding Affidavit p 47, para 38.

[9] Founding Affidavit p 47, para 39.

[10] Founding Affidavit pp 47-48, para 41: pp 107-114 Annexure "PD10" to "PD17".

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

(g) the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of The Rome Statute of the International Criminal Court Act, 2002;

(h) offences as provided for in section[s] 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; 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."

[18] The applicants submit that, in that the effect of section 18 is that it affords no discretion as to whether a prosecution ought to be instituted or not but constitutes an absolute bar to the criminal prosecution of all sexual offences other than rape or compelled rape after 20 years, section 18 of the CPA in its current form, *inter alia*:

18.1 Is irrational because it makes arbitrary distinctions in respect of the gravest of crimes;

18.2 Violates the applicants' rights to

18.2.1 human dignity;

18.2.2 equality and non-discrimination;

18.2.3 to be protected from abuse as children;

18.2.4 to be free from all forms of violence from both public and private sources;

18.2.5 access to courts;

18.2.6 a fair trial; and that

18.3 The limitation that section 18 of the CPA imposes is not justifiable under section 36 of the Constitution.

[19] The three *amici* have also mounted several legal challenges to the constitutional validity of section 18 of the CPA. To a large extent the legal challenges overlap, whilst some of the *amici* make broader legal challenges than the applicants. The Minister, who abides the decision of the court, himself points to legal difficulties similar to those raised by the applicants and the *amici*. Frankel no longer opposes the alternative narrow relief.

[20] I will commence by outlining the history of the amendments to section 18 of the CPA, and then deal with the powers of the NPA. I will then examine whether it is competent for this Court to grant the broader relief initially sought by the applicants, or only the alternative narrow relief. Thereafter, for the avoidance of repetition, I will deal with the pertinent legal challenges under their various headings in one section, as mounted by all the parties.

D. THE HISTORY OF THE AMENDMENTS TO SECTION 18 OF THE CPA FROM 1977 TO 2007

[21] In order to have an understanding as to how the CPA has been developed and amended over the past 30 years I deal briefly therewith.

[22] The 1977 version of section 18 of the CPA provided that:

> *"(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."*

[23] Thus in the 1970's, if the offence was serious enough to warrant the imposition of the sanction of the death penalty, the prescription period of 20 years did not apply to the Offence. In 1997, and as a result of the death penalty being declared unconstitutional, section 18 of the CPA was amended to include a list of offences that were considered to be particularly serious. These included child stealing and rape. These offences were subject to the minimum sentences regime of the Criminal Law Amendment Act 105 of 1997.

[24] Thus, by 1997, the amendment had removed the link between the stipulated offences with the sanction to be imposed, namely the death penalty, and instead merely set up six separate offences to which prescription did not apply. The Minister advises that, by 1997, the nature of the offence as well as the requirements of the Constitution determined whether a sexual offence should be subject to the 20 year limitation or not. [11]

[25] In 2007, pursuant to SORMA, the definition of rape was extended to include all forms of sexual penetration. The crimes of, *inter alia*, compelled rape, human trafficking and using a child or person who is mentally disabled for pornographic purposes were also introduced as exclusions to the prescription period of 20 years.

[26] The current section 16 of the CPA (also referred to as the "*impugned provision*") now reads, in relation to sexual crimes, that the prescription

[11] Para 19 Minister's Affidavit p 361.

period does not apply to "*rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 respectively*," nor to, *inter alia*, the sexual offences defined in paragraphs (g), (h) and (i) of the section.

[27] Thus nine categories of offences currently fall to be excluded from the prescription period of 20 years (hereinafter referred to as "*the excluded offences"*). What did not appear in the final amendment to section 18 of the CPA under the excluded offences were other crimes of a sexual nature.

E. THE POWERS OF THE NATIONAL PROSECUTING AUTHORITY

[28] The NPA has a discretionary power whether to institute or to decline to institute criminal proceedings on behalf of the State. This power is conferred on it by section 179(2) of the Constitution as read with section 20 of the National Prosecuting Authority Act 32 of 1988, the NPA Code of Conduct and the NPA Prosecution Policy Directives. [12]

[29] According to the NPA Policy Directives, [13] 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. [14]

[30] 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 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 considerations which would dictate against prosecution in the public interest, such as the personal circumstances of the accused and relevant sentencing principles. [15]

[31] Section 18 of the CPA thus bars the NPA from exercising its discretionary

[12] LHR Heads of Argument p 18, para 39.

[13] Dated 27 November 2014 and revised in June 2013, p 5.

[14] LHR Heads of Argument p 18, para 40.

[15] LHR Heads of Argument p 19 para 41.

powers as above to institute and conduct criminal proceedings in all cases relating to offences not excluded therein.

F. WHETHER IT IS COMPETENT FOR THIS COURT TO GRANT THE BROADER RELIEF SOUGHT BY THE *AMICI* TO INCLUDE ALL PERSONS OR ONLY THE ALTERNATIVE NARROW RELIEF SOUGHT BY THE APPLICANTS AND THE MINISTER FOR OFFENCES AGAINST CHILDREN ONLY

[32] All the applicants were children at the time the offences were allegedly committed, and it appears to be for this reason that the applicants sought, in

their alternative narrow relief, that any order should be limited to dealing with children only. The Minister too sought that any relief be confined to children.

[33] The applicants relied, for their submissions that any relief ought to be confined to children only, on the case of *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae*) 2007 (5) SA 30 (CC) where Nkabinde J stated: [16]

> *"29. The facts of the present case deal with penetration of the anus of a young girl. The issue before us then is whether the current definition of rape needs to be developed to include anal penetration within its scope. The facts do not require us to consider whether or not the definition should be extended to include non-consensual penetration of the male anus by a penis ... This Court has stressed that it is not desirable that a case should be dealt with on the basis of what the facts might be rather than what they are*." [my emphasis]

[34] The applicants' counsel, whilst making it clear that the applicants did not oppose the broader relief sought by the *amici*, submitted that, as the facts on the affidavits related to offences committed when the applicants were children, the applicants could not seek the broader relief to include adults, as they had in fact done originally in prayer 1 of their Notice of Motion.

[35] The pertinent question is whether, merely because the applicants were children when the offences were committed, any relief granted must be confined to dealing with children only. There are two reasons why I find that it need not.

[36] Firstly, section 18(f) of the CPA which is challenged in this application, itself makes no distinction, in excluding from prescription the crimes of rape and compelled rape, between children as opposed to adults. It simply reads:

> *"18(f) Rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, respectively."*

In that section 18(f) is a blanket exclusion from prescription for all persons, it

[16] At para 29, p 46.

would not make sense for this Court, in determining the constitutional invalidity of section 18(f), to confine such invalidity to children only when section 18(f) of the CPA itself provides for no such limitation.

[37] Secondly, the facts herein relate to the common law crime of indecent assault against the applicants. The common law definition of indecent assault itself, at the time of the commission of the alleged offences, was not confined to one against children only. Indecent assault was defined as the unlawful and intentional assault of another with the object of committing an indecent act. This broad definition of indecent assault describes a breadth of conduct

ranging from touching a person inappropriately to a sexual act that does not include penetration. [17]

[38] Thus indecent assault could be committed against adults or children. To contend, as the applicants and the Minister do, that merely because the applicants were children when the alleged indecent assault occurred must therefore limit any declaration of constitutional invalidity on these facts to children only, would result in this Court creating an artificial restriction that was never contemplated by the legislature in relation to these crimes. To confine any invalidity to children in these circumstances merely because they were children at the time would be the equivalent to confining the invalidity to children with green eyes, if the facts had demonstrated all the applicants had green eyes. Accordingly, to my mind, nothing turns on the fact that the applicants happened to be children when the alleged crimes of indecent assault were committed against them.

[39] Langa CJ, in a minority judgment, noted in *Masiya's* case *supra* that:

> *"Even if this may be a slight departure from the facts of the case, it is not unusual for this Court to give orders, either when developing the common law or determining the validity of statutes, that go beyond the exact facts but are necessitated by the underlying constitutional principles involved*." [18]

[40] Whether the applicants were children or not at the time the alleged offences of indecent assault were committed makes no difference to whether the crime of indecent assault occurred or not, as that crime itself did not require, as a necessary element for the offence, that it be committed against children.

[41] In that neither section 18(f) itself nor the common law definition of the crime

[17] Minister's Affidavit page 368, para 44

[18] Para 90. p 64 Langa CJ with Sachs J concurring.

of indecent assault distinguishes between adults and children, and in that the factual matrix set out by the applicants satisfies the requirements for the common law crime of indecent assault, for these reasons I am of the view that there is nothing confining this Court to restricting a declaration of invalidity to children only.

[42] It is significant that the applicants themselves claimed invalidity in the broader sense *ab initio* in their Notice of Motion and only chose to reduce it to the alternative narrow relief in their Replying Affidavit, seemingly due to criticisms levelled by Frankel in his Answering Affidavit. I now turn to deal with the challenges to section 18 of the CPA.

G WHETHER SECTION 18 OF THE CPA IS IRRATIONAL AND ARBITRARY

[43] All the parties have submitted to this Court that section 18 of the CPA, by excluding only the sexual offences of rape and compelled rape from the statutory prescription period of 20 years, is irrational and arbitrary.

[44] Section 1(c) of the Constitution provides for the supremacy of the Constitution and the Rule of Law.

[45] The applicants submit that there is no rational basis for distinguishing rape and compelled rape from other forms of sexual offences. They state that, objectively determined, the question that arises is whether there is a rational basis on which to include rape and compelled rape as excluded offences in section 18 of the CPA but to exclude all other forms of sexual offences.

[46] It was pointed out by the applicants that some of the offences in section 18 fall under Schedule 1 of the CPA but section 18 does not include all of them; [19] that the offences in section 18 have different minimum sentences applied to them; [20] and that it appeared that the section 18 excluded offences were identified based on the perceived seriousness and their impact on the victims. [21]

This Court must thus determine whether, objectively, a 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. As stated in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC), the State "*should not regulate in an arbitrary manner or manifest 'naked preferences'*

[19] Para 35.1, p 15 Applicants' Heads of Argument

[20] Para 35.2, p 16 Applicants' Heads of Argument.

[21] Para 35.3, p 16 Applicants' Heads of Argument

that serve no legitimate government purpose, for that would be inconsistent

with the rule of law and the fundamental premises of the constitutional state". [22]

[47] On irrationality, the applicants argued that the exclusion of sexual offences other than rape or compelled rape disproportionately and unfairly impacts on women. They submitted that, whilst it has always been accepted that rape is, as appears from *Masiya's* case above, "*the most reprehensible form of sexual assault"*, that nevertheless the *dictum* of Nkabinde J that it constitutes a "*humiliating, degrading and brutal invasion of the dignity and the person of the survivor. It is not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifestly male supremacy over females"* [23] also applies to other forms of sexual abuse. There the court also recognised that women and young girls are "*the most vulnerable group*". [24]

[48] In *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) Ackermann et Goldstone JJ noted that few things can be more important to women than freedom from the threat of sexual violence and that sexual violence is the single greatest threat to the self-determination of South African women. [25]

The applicants submit that these *dicta* find no less application in relation to cases constituting sexual offences other than rape and compelled rape, and I

concur with their submission that it is accordingly irrational to make the distinction that section 18 of the CPA does in this regard.

[49] I turn now to examine the rationality of imposing a prescription period of 20 years on other sexual offences in light of the cogent evidence placed before this Court documenting the reasons why there is often delayed disclosure in relation to all sexual offences and not just in relation to those of rape and

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[22] Para 25.

[23] *Masiya v DPP, Pretoria and Another* 2007 (5) SA 30 at para [36].

[24] *Masiya v DPP, Pretoria and Another* 2007 (5) SA 30 at para [37].

[25] At para 62.

compelled rape.

[50] In regard to delayed disclosure by victims of sexual offences committed against them, the applicants placed before this Court an expert report entitled "*The Disclosure Process in Cases of Child Sexual Abuse*" prepared by Karen Muller and Karen Hollely of the Institute for Child Witness Research and Training. [26] This report documents fully the delays encountered in disclosure of sexual abuse in children and the reasons therefor. The important findings were:

50.1 that immediate disclosure after one abusive incident is the exception rather than the rule, [27] that the majority of abuse disclosures are delayed, [28] that it is a gradual process where the abuse may have taken place months or years before [29] and that

disclosure of child sexual abuse is more typical in adulthood than in childhood; [30]

50.2 that child abuse is an expression of power and authority; [31]

50.3 that there are four trauma-causing factors in child abuse, namely traumatic sexualisation, betrayal, powerlessness and stigmatisation; [32]

50.4 that further facts playing a role in the disclosure process include the nature of the abuse, the impact of the abuse on the child, parental support and family and community support; [33]

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[26] Founding Affidavit "PD18", p 115.

[27] At para 10.1. p 161.

[28] At para 10.1. p 161.

[29] Para 5, p 144.

[30] Para 11, p 192.

[31] P 122, para 3.

[32] P 123, para 3.1.1.

[33] P151, para 7.

50.5 that the child is pressurised to remain silent by the perpetrator, secured by *inter alia*, threats by the perpetrator, a fear of the consequences of the disclosure, denial by the perpetrator and feelings of loyalty towards the perpetrator; [34]

50.6 that there are further traumatic consequences which delay disclosure, including disassociation; [35]

50.7 that once disclosure occurs, a victim may respond according to whether he or she receives a positive social reaction or a negative one. Negative social reactions may result in secondary victimisation that may prevent further disclosure and in effect silence the victim; [36]

50.8 that male victims have additional unique barriers, such as shame being exacerbated, in wanting to disclose, [37] and that there are other uniquely male fears delaying disclosure. [38]

[51] I concur with the applicants that in light of all the expert evidence adduced by Muller and Hollely, in relation to the delayed reporting of all sexual offences, 11 is irrational to distinguish between rape and compelled rape and other sexual offences for purposes of prescription.

[52] Although all the above reasons for delayed reporting and other factors described by Muller and Hollely relate to children, and arise not only from rape or compelled rape but from other forms of sexual abuse, there appears to me to be no reason why these same traumatic symptoms and pressures would not apply equally to persons who are not children at the time of the commission of the offences.

[53] Indeed it would be entirely irrational, in my view, to accept that these delayed disclosure processes would apply to a child abused at the age of 17

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[34] Pp 151-152, para 7.1.

[35] P155, para 7.4.

[36] Pages 192-193, para 11.2.

[37] Page 194, para 11.3.

[38] Page 195, para 11.3.

years and 364 days old, but not to an adult aged 18 years and one day old. There is thus no reason to confine a finding on the irrationality of the prescription period in section 18 of the CPA to children.

[54] Further, in relation to rationality, the first *amicus*, the Women's legal Centre ("*the WLC*") also submits that section 18 is irrational and arbitrary in treating certain sexual offences differently from others. Its arguments include:

54.1 That excluding certain categories of offences from prescription based upon the seriousness of the offence is not an appropriate or rational basis as the trauma suffered by victims varies independently of the seriousness of the offence based on harm and moral gravity; [39]

54.2 that patriarchal notions assume that penetrative sexual offences are more serious than non-penetrative sexual offences and that these notions no longer accord with the Constitution; [40]

54.3 that there is no clear link between the type of sexual offence and the level and extent of trauma experienced; [41]

54.4 that the perceptions of crime seriousness varies across individuals and cultures and that seriousness is not an appropriate criterion for determining prescription in sexual

offences as seriousness should not be linked to outdated notions of moral gravity but must accord with constitutional values and norms; [42]

54.5 that some victims experience as much trauma in non-penetrative as penetrative offences. The WLC refers [43] to the expert report of Higgins [44] who states that the frequency and severity of child abuse is more

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[39] WLC Heads of Argument p 5, para 3.4.2.

[40] WLC Heads of Argument p 5, para 3.4.3.

[41] WLC Heads of Argument p 29, para 70.3.

[42] Founding Affidavit page 38, para 68 and *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5, 2015 (3) SA 479 (CC} at para [69] to [70].

[43] WLC Heads of Argument p 29 para 70.

[44] Higgins, D. 2004 Differentiating between child maltreatment experiences. Family

useful than classifying a type of abuse;

54.6 that the National Institutes of Mental Health Intramural Research Programme [45] shows that different factors psychologically play a role in addition to the physical act, such as the duration, frequency, relationship to the abuser, age of onset and presence of physical and other forms of violence and there is therefore no clear link between the type of sexual offence and extent of trauma experienced;

54.7 that, as further expert reports referred to by the WLC such as that of Ullman etc [46] demonstrate, trauma impacts the mental

health of victims in numerous ways and effects vary on a case-by-case basis. [47]

54.8 that neither the physical injuries suffered by the victim resulting from the sexual attack nor the relationship between the victim and the offender were significant predictors of post-traumatic stress disorder. [48]

[55] Thus the WLC submits that, as the trauma suffered is independent of the seriousness of the sexual offence, particularly with regard to whether it involved penetration, or did not, treating certain sexual offences differently to others is entirely irrational.

[56] The second *amicus*, The Teddy Bear Clinic ("*the TBC*") supports the above with additional expert evidence. The TBC submits that the distinction between sexual assault and rape in respect of the nature of the harm is arbitrary, with reference to the expert evidence of Woollett who explains that:

> *"Victims' 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*

Malted No 69, pp 50-55.

[45] Putnam FW, Trickett PK

[46] Ullman etc "*Psychosocial Correlates of PTSD Symptom Severity in Sexual Assault Survivors Journal of Traumatic Stress* Vol 20 No 5 October 2007, p 821.

[47] WLC Heads of Argument p 30, para 70.4.

[48] Ullman *supra* at p 363 and WLC Heads of Argument p 30, para 70.5.

lesser, similar to, or worse, than the incidents of rape." [49]

[57] The TBC thus submits that the protection afforded to rape survivors compared to that afforded to those of sexual assault is arbitrary and discriminates against victims of sexual assault, resulting in an unequal application of the law. [50] The TBC submits that 20 years is not cognisant of the nature and process of sexual assault disclosure, that it is not a single event, occurs over a lengthy period of time and is impacted by numerous factors. [51]

[58] The third *amicus* ("*the LHR*") submits that the distinction between sexual offences effected by section 18 of the CPA does not accord with the theory of punishment as a principle of criminal law and that it serves to irrationally immunise certain sexual offenders against the interests of a society. The LHR submits that it simply does not make sense within the current South African context to punish certain sexual offences more than 20 years after they were committed, thereby fulfilling the functions of punishment, prevention, retribution and deterrence, whilst other sexual offences go unpunished due to an arbitrary distinction and an arbitrary time period imposed by section 18 of the CPA. [52]

[59] The Minister, in his submissions, emphasised that the applicants were all children at the time of the offences, [53] that the seriousness of non-penetrative sexual offences, especially against children, can no longer be overlooked, and that the perpetuation of this policy distinguishing between

penetrative and non-penetrative sexual offences is untenable and unfair against children. [54] The Minister states that it is not "*unusual for the court,*

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[49] Nataly Woollett p 80. para 28

[50] TBC Heads of Argument p 6, para 11.

[51] TBC Heads of Argument p 12, para 27.

[52] Heads of Argument LHR p 10, para 18.

[53] Minister's Heads of Argument p 5, para 12.

[54] Minister's Heads of Argument pp 11-122, para 27.

when determining the validity of statutes, to give orders that go beyond the exact facts but are necessitated by the underlying constitutional principles involved" [55] and that "*the general principle of our law that constitutional remedies should give relief not only to the particular litigant but all those similarly situated should apply equally to the development of the common law*". [56] The Minister further submits that: "*The definitions of offences that do not prescribe in terms of the impugned provision is not informed by the government purpose that underpins the Sexual Offences Act*." [57]

[60] The Minister advises in his affidavit that the impugned provision in its current form is the product of the amendments effected in accordance with section 68(1)(b) and (2) of the Sexual Offences Act, that the objects of the impugned provision can only be understood within the context of SORMA and inquiry into its intention, and that the preamble to SORMA is thus critical, [58] as it makes it clear that the legislature intended to put an emphasis on the progressive development of a criminal justice system that is victim-centred, caring and responsive. [59] The Minister advises that SORMA provides for the development of a National Policy Framework on the Management of Sexual Offences (the NPF) to guide the integrated management of sexual offences

matters. [60] The NPF, which was gazetted on 6 September 2013, requires a developmental approach that allows for the progressive realisation of the aims and objects of SORMA through the principles contained therein. [61]

[55] Minister's Heads of Argument p 12, para 29.

[56] Minister's Heads of Argument p 13, para 29.

[57] Paragraph 30 Minister's heads of argument.

[58] Minister's Affidavit pp 371-372, para 54.

[59] Minister's Affidavit pp 373, para 55.

[60] Minster's Affidavit p 374, para 56.

[61] Minister's Affidavit p 375, para 59.

[61] On rationality, the Minister slates that the exercise of public powers has to be rational [62] and objectively viewed, a link is required between the means adopted by the legislature and the end sought to be achieved.

[62] The Minister points out that section 59 of SORMA seeks to import the above in criminal proceedings by providing that:

> *"In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.*' [63]

The Minister concludes: [64]

> *"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 sexual offences in relation to section 18 of the Criminal Procedure Act cannot pass constitutional muster.* [my emphasis]

2017 JDR 1105 p30

> *In the premises, the Second Respondent is of the view 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 Criminal Procedure Act, was not informed by the Government purpose that underpins the Sexual Offences Act.*
>
> *The Sexual Offences Act is sui generis in nature. It engenders an integrated approach to its enforcement and the continual monitoring and evaluation. Accordingly the Second Respondent's stance is also informed by the Department's duties in terms of the NPF, which include a duty to attend to legislative development, review and amendment. The grant of the relief sought by Applicants would present an opportunity to attend to this duty and ensure that the right to institute prosecutions in instances of sexual violence, especially against children is not restricted*." [my emphasis]

[63] Having regard to all the expert evidence provided to this Court pertaining to, *inter alia*, the delayed disclosure in relation to victims of sexual offences other than rape or compelled rape, the fact that the trauma suffered by victims may be worse in non-penetrative sexual offences than in penetrative sexual offences, that prescription is intended to penalise unreasonable inaction and not inability to act, [65] and having regard to the sound legal arguments adduced by the applicants, the *amici* and the Minister outlined above, I am of the view that section 18 is arbitrary and irrational and

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[62] Minister's Affidavit p 376, para 64.

[63] Minister's Affidavit p 377, para 66.

[64] Minister's Affidavit pp 378-379, paras 69-70.

[65] *Van Zjjl v Hoogenhout* 2005 (2) SA 93 (SCA) at para [19].

accordingly is inconsistent with the Constitution and invalid, in relation to not only children, but to all victims, including adults.

[64] Indeed, the position was canvassed in relation to prescription in a civil matter in *Bothma v Els* 2010 (2) SA 622 (CC) where Sachs J stated: [66]

> *"[48] A notable feature of recent decades has been the manner in which adult women have through newly discovered insight found themselves suddenly empowered to come to grips with and denounce sexual abuse they had suffered as children. In Van Zijl v Hoogenhout, the appellant, at the age of 48, sued her uncle for sexual abuse during 8 years of her childhood. The issue to be determined was the date from which civil prescription would run. The appellant argued that the prescription period ran not from the dates of the commission of the crime, but rather from the date on which she subjectively realised that a wrong had been done to her by her uncle. This contention was upheld in the Supreme Court of Appeal."*

And further that: [67]

> *"[49] Deciding that a victim of child or sexual abuse who acquired an appreciation of the criminal act during adulthood is able to sue the abuser within three years of gaining that appreciation, Heher JA observed:*

> *'Abused children have a right of recourse against their abusers. Until the 1980's the right was seldom invoked and in South Africa, probably not at all. Major reasons ware cultural or societal taboos (many abusers are close family members) and ignorance. Since then, the boundaries of understanding of the psyche of survivors of child abuse have been pushed back by expert studies of the problem and the true nature and extent of the effects of such abuse have ... become better appreciated. As survivors have become more informed about their condition and rights and have received support from public interest groups, there has been an upsurge in claims, many by adults who initiated proceedings years after the actual incidents of abuse."*

[65] Significantly the SCA found in *Van Zijl v Hoogenhout*, [68] that prescription penalises unreasonable inaction not inability to act. Heher JA listed several factors that contribute to victims being seriously inhibited by reason of his or her psychological condition from instituting action in a civil claim and dismissed a special plea of prescription as a result.

[66] There seems to be no reason why these findings and observations would have any less cogency when applied to the question of prescription in criminal cases to the victims of sexual offences. For all the above reasons I conclude that section 18(f) of the CPA is irrational and arbitrary in excluding

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[66] At p 624. para [48].

[67] At p 624, para [49].

[68] *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) at para [19].

only rape and compelled rape from the prescription period of 20 years and not other sexual offences.

[67] To create a random cut off time of 20 years for prescription of sexual offences when vast swathes of evidence demonstrate that they inflict deep continuous trauma on victims, many of whom suffer quietly, and either never disclose the offences at all, enabling the perpetrator to escape all consequences, or disclose over varying lengths of time after the offences were committed, dependent on each victim's unique circumstances and emotional fragility, is entirely irrational and arbitrary.

[68] The law must encourage the prosecution of these nefarious offences, which are a cancer in South African society, and must support victims in coming forward, no matter how late in the day. The law should not smother a victim's ability to bring sexual offenders to book, as it presently does. Victims should not be hushed by section 18 of the CPA.

[69] Having found section 18 of the CPA is irrational and invalid and inconsistent with the Constitution, it is not strictly necessary for me to deal with the further attacks on the impugned provision. I shall nevertheless deal briefly with some of them.

H. ADDITIONAL CHALLENGES TO SECTION 18 Of THE CPA

[70] Section 7(2) of the Constitution states:

"*The State must respect, protect, promote and fulfil the rights in the Bill of Rights."*

[71] The applicants contend that the impugned provision violates their rights to

(a) human dignity;

(b) equality and non-discrimination;

(c) to 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. [69]

The applicants contend that the limitation that section 18 of the CPA imposes is not justifiable under section 36 of the Constitution.

[72] Section 36 of the Constitution entitled limitation of Rights restricts the manner in terms of which the rights in the Bill of Rights may be limited, whilst section 10 states that everyone has inherent dignity and the right to

[69] Applicants' Heads of Argument p 4, para 3.

have their dignity respected and protected.

[73] The right to dignity has been described by the Constitutional Court as one of the most important of all human rights and the foundation of many of the other rights in the Bill of Rights. [70]

[74] In its preamble, SORMA itself refers to the numerous rights it seeks to protect, 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 to be of paramount importance."

[75] Flowing from the SORMA preamble, the Minister points out that it is clear that the legislature intended to emphasise the progressive development of a criminal justice system that is victim-centred, responsive and caring [71] and stated that, in relation to the right to dignity:

> *"I submit that the delay in reporting the sexual abuse that is alleged to have occurred in this instance has created an uneasy tension between the right to dignity of both the victims and the alleged perpetrator. The right to dignity is recognised as universal, in that it provides that 'everyone has an inherent dignify and a right to have their dignity respected and protected' as recorded in section 10 of the Constitution. The preamble to the Sexual Offences Act reflects the policy position of the National Executive. This preamble seeks, inter alia, to promote the dignity of the victims of sexual offences by creating a uniform and coordinated approach to the scourge of sexual violence. Simultaneously, prosecutors are aware of the section 35 rights of accused persons, and the inherent dignity that those persons are*

> *entitled to under the Constitution, particularly where such accused person has yet to be prosecuted.*" [72]

Further O'Regan J in *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) [73] said:

> *"Human dignity informs constitutional adjudication and interpretation at a range of levels ... 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*

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[70] *S v Makwanyane and Another* 1995 (3) SA 391.

[71] Minister's Affidavit p 373, para 55.

[72] Ministers Affidavit p 380, paras 74-75.

[73] At para [35].

value fundamental to our Constitution, it is a justiciable right that must be respected and protected." [74]

[76] In my view, flowing from the evidence presented to this Court, the applicants' rights to human dignity have been breached by section 18 of the CPA, as their dignity is no less impaired by the fact that the sexual offences committed upon them were non-penetrative as opposed to penetrative, and consequently, in the limitations analysis in accordance with the factors as set out in section 36 of the Constitution, section 18 of the CPA is on this basis too inconsistent with our Constitution.

[77] The WLC submits [75] that the impugned provision violates the rights in section 9(1) of the Constitution which provides:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law."

[78] In that section 18 of the CPA discriminates against persons who have endured sexual offences not falling into the category of rape or compelled rape by preventing them from pursuing a prosecution due to the effluxion of time, and in that it is amply demonstrated above by the evidence of experts that sexual offences other than rape or compelled rape are an equally egregious violation of a person's rights, and cause as much, and often more, trauma than the latter, I concur that section 18 is in breach of section 9(1) of the Constitution as the victims of other sexual offences do not get equal protection and benefit of the law. Thus the distinction between the protection afforded to survivors of rape and compelled rape by section 18 *vis-a-vis* the survivors of non-penetrative sexual assault, infringes, in my view, the right to equality in terms of section 9 of the Constitution.

[79] On the bases of these breaches of rights too, and in addition to my finding of irrationality, section 18 falls to be declared unconstitutional and invalid.

I. THE BALANCING ACT BETWEEN THE RIGHTS OF THE VICTIMS OF SEXUAL OFFENCES AND THOSE OF THE PERPETRATORS

[80] I turn now to the balancing acts that a court must engage in, in relation to the tension between the rights of the victims and those of perpetrators, as

set out in sections 35(3)(l) and (n) of the Constitution, which give every accused person a right to a fair trial. The balancing of competing interests must still take place.

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[74] *Dawood* para [35].

[75] WLC Heads of Argument p 38. para 88.

[81] The rights to a fair trial, coupled with the State's discretion on whether to prosecute or not, based on the cogency and reliability of the evidence at its disposal, seem to me to reduce any prejudice an accused might experience as a result of a delay in prosecution beyond 20 years. These rights, which are protected, apply equally in prosecutions for 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.

[82] Furthermore, as Sachs J states in *Bothma v Els supra*:

> *"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 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*

> *it will 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 ficat 'aliboli' (isiZulu) - there are some crimes that do not go away*." [76] [my emphasis]

Sachs J states further:

> *"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. On the contrary, the knowledge that one day the secret will out acts as a major deterrent against sexual abuse of other similarly vulnerable children*. [77]

[83] Balancing the competing interests of victims of sexual abuse with the rights of an accused as set out in the Constitution, and mindful of the aforesaid *dicta*, I am of the view that an accused's rights to a fair trial will be no more prejudiced in a prosecution after twenty years for sexual offences than his rights in a prosecution after twenty years for rape or compelled rape.

[84] I turn now to the question of legality. Under the well-established principles of legality in our law, in relation to the criminal justice system, the

principles of *ius acceptum*, *ius praevium, ius certium, ius strictrum* and *nulla*

[76] At para [77].

[77] At para [66].

peona sine lege apply. Thus the principle of legality prevents arbitrary punishment and ensures that criminal liability accords with clear and existing rules of law. Sections 35(3)(1) and 35(3)(n) of the Constitution enshrine these principles and the Constitutional Court in *Masiya's* case *supra* endorsed the rule against retrospectivity.

[85] On the facts presented by the applicants, Frankel could have been prosecuted for the common law offence of indecent assault as that was the crime in terms of the legislation in existence when he allegedly committed the offence.

[86] In that the sexual offences alleged to have been perpetrated by Frankel at the time already constituted criminal offences at common law (in this case indecent assault), there would be no criminalisation of conduct here, by making the constitutional invalidity of section 18 of the CPA retrospective, that was not already criminal at the time the alleged offences were committed. As such, the issue of the criminalisation of conduct that was not previously criminal does not arise in this case, whilst there must still be a balancing of the competing interests of the victims and the perpetrators as was set out in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. [78]

Indeed in *Bothma v Els, supra*, the Canadian case of *R v Carosella* 1997 (1) SCR 80 was quoted in a footnote by Sachs J, which included the statement of the minority by L'Heureux-Dube J that "*Still, society expects courts of law to ascertain that person's guilt or innocence by way of a trial, and, subject to the uncertainties inherent in any human enterprise, to render a verdict that is true and just. It is a crucial role which should not be abdicated except in the most extreme cases*". [79]

[87] I was also referred to the New Zealand decision of *Anderson and Ors v Hawke* [80] where it was held that:

> *"There is strong public interest in the courts facilitating and not frustrating prosecutions for historical sexual abuse ...' This is reconcilable with the fair trial guarantees in section 25 of the New Zealand Bill of Rights Act if, but only if, such prejudice is appropriately mitigated. Such mitigating is largely achieved by the general rules of criminal procedure (particularly as to the onus and standard of proof) and careful evaluation by the trier of fact of the evidence which is adduced. But it also usually requires the judge to take particular measures to reduce, as far as possible,*

[78] 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) at para [35]

[79] *Bothma v Els* 2010 (2) SA 622 at footnote 76 p 650.

[80] 2016 NZHC 1541 at paras [18] to [20].

the risk of delay-related prejudice."

[88] To my mind, having regard to the fact that the procedural and substantive protections of the Constitution apply to all accused persons

equally, there is no additional constitutional prejudice to an accused being charged with a sexual offence presently not excluded from section 18 of the CPA as opposed to the crime of rape and compelled rape, that is so presently excluded, with the prescription period being lifted retrospectively.

[89] As Sachs J stated in *Bothma v Els* 2010 (1) SACR 184 (CC), [81] 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.

[90] Further considerations that apply in deciding on the question of retrospectivity here, are the rules of evidence which protect an accused and the fact that ultimately the NPA has the discretionary power to institute or decline to institute criminal proceedings as set out in section 179(2) of the Constitution read with section 20 of the National Prosecuting Authority Act 32 of 1988, the NPA Code of Conduct and NPA Prosecution Policy Directives. Any delay-related prejudice that might be suffered by Frankel or any other accused person consequent upon the removal of the 20 year time limit for prosecution retrospectively for sexual offences other than rape and compelled rape would be adequately mitigated by the fair trial guarantees provided in terms of section 35 of the Constitution.

[91] Weighing up the potential prejudice to offenders should the order of constitutional invalidity be made retrospective in this case with the fact that

the applicants' claims would be rendered moot by a prospective order only, along with the claims of thousands of other victims of sexual offences, the balancing act falls heavily in favour of making it retrospective.

J. THE STATE'S CONSTITUTIONAL OBLIGATIONS

[92] 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. Sexual violence, be it rape or other forms of sexual offences, 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.

[93] The duty of the State in terms of section 7(2) has been interpreted by our courts to include, as stated in *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) the obligation to "*take appropriate steps to*

[81] At paragraph [34].

reduce violence in public and private life" [82] and also, as appears in *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) "*directly to protect the right of everyone to be free from private or domestic violence*". [83]

[94] Not only does section 7(2) of the Constitution impose a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights, but the Stale has the responsibility to prosecute criminal offences. This arises directly from section 179(1) and section 179(2) of the Constitution. Indeed, in *S v Basson* 2005 (1) SA 171 (CC) the Constitutional Court stated that there is

a constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens and it is of essential importance in our constitutional framework. [84]

[95] The State is precluded, by section 18(f) of the CPA, in all circumstances, from prosecuting an accused for any sexual offence other than rape or compelled rape if it exceeds the 20 year prescription period. No assessment of the particular facts of the case, the evidentiary value of all evidence available and any other factors are able to be taken into account by the State. It has no discretion. The result is, as the applicants put it, a "*guillotine effect*" in preventing prosecution of other sexual offences after 20 years.

[96] The high and extreme levels of sexual violence against women in South Africa have been fully documented and recognised, in *Carmichele v Minister of Safety and Security supra*, as "*the single greatest threat to the self-determination of South African women*". [85] It has been found to reflect the unequal power relations between men and women in our society (in *Masiya supra*) [86] , and the threat of sexual violence has been described as being as pernicious as sexual violence itself and as entrenching patriarchy as it imperils the freedom and self-determination of women (*F v Minister of*

[82] At paragraph [47].

[83] At paragraph [11].

[84] At paragraph [32]

[85] At para [62].

[86] At paragraph [29]

Safety and Security and Another (Institute tor Security Studies as Amicus Curiae)) 2012 JOL 28228 (CC). [87]

[97] Furthermore, the preamble to SORMA recognises fully that the commission of sexual offences in the Republic is of grave concern.

[98] Consequently, the State's duty to protect all persons against sexual violence, in terms of section 7(2) of the Constitution, is a particularly onerous one having regard to the extreme levels of sexual violence in South Africa that continues unabated to this day, and section 18 of the CPA stultifies the State's constitutional obligations as sketched above.

K. SOUTH AFRICA'S INTERNATIONAL LAW OBLIGATIONS IN RELATION TO WOMEN AND THE APPROACH TO PRESCRIPTION IN FOREIGN JURISDICTIONS

[99] The Constitutional Court has determined that South Africa has a duty in international law 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. [88]

[100] South Africa is a signatory to much international human rights legislation, including the Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on the Rights of Women, and the SADC Protocol on Gender and Development. It is apparent from these that in terms of its international obligations, the State has a

constitutional duty to ensure that sexual offences are prosecuted and this duty is heightened in respect of sexual offences against women and children. In this regard, a prescription limit of 20 years on sexual offences other than rape or compelled rape appears to frustrate the aims and objectives of these international obligations.

[101] I also have taken note of the approach taken in many foreign jurisdictions to prescription relating to sexual offences. What is clear is that numerous jurisdictions have no prescription period whatsoever for all sexual offences. These include England, Wales and Canada. There are several jurisdictions that have no prescription for child sexual offences and other jurisdictions that provide for varying prescription periods according to severity.

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[87] At paragraph [57].

[88] *Baloyi* para [13]. *Carmichele supra* at para [62] and *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at para [15].

Accordingly, South Africa will not be alone if the 20 year prescription period for sexual offences other than rape or compelled rape is set aside.

L. THE RELIEF SOUGHT

[102] As described earlier, I invited all the parties to suggest what relief they believed it would be appropriate for this Court to grant in the case of a declaration of invalidity, and whether there should be some form of interim "*reading in"*, into section 18 of the CPA.

[103] The Minister and the applicants seek to confine any declaration of invalidity to sexual offences committed against children only. At the inception

of this judgment I concluded that such a limitation would not be warranted based on the facts of this case.

[104] The applicants and the LHR seek no suspension of the declaration of invalidity whilst requesting a "*reading in*" immediately. This, in effect, would close the door to Parliament reconsidering and amending section 18 of the CPA with regard to all the varied sexual offences set out in SORMA, particularly as, *prima facie*, some of the offences in SORMA may well warrant a prescription period, such as those pointed out to me by the Minister, namely the offences in Part 4 of Chapter 2 of SORMA There are further statutes that could also be affected by an immediate order with no suspension, such as the offences referred to in sections 50(A)(1) and 50(A)(2) of the Child Care Act 74 of 1983, sections 141 and 110(1) of the Children's Act 38 of 2005, sections 25, 26, 27(1)-(3), and 27(A)(1)-(2) and 28 of the Films and Publications Act 65 of 1996 and Chapter 2 of the Prevention and Combatting of Trafficking in Persons Act 2013.

[105] To thus grant an immediate order in the terms framed by the applicants, with no suspension thereof, would remove Parliament's right to assess which further sexual offences should prescribe or not prescribe, and unnecessarily blur the line between the courts and the legislature. There seems no reason why the order should not be suspended to enable the legislature to correct the defects identified herein, to properly consider the effects of the retrospectivity of the invalidity order, and to look at all the implications of an amendment to it. The Minister urged me also to consider

the fact that other stakeholders may also be affected by any invalidity declared, such as health services, social services and the NPA.

[106] This Court is empowered by section 172(1)(b) of the Constitution, when deciding a constitutional matter within its power, to make

> *"any order that is just and equitable, including-*
>
> *(i) an order limiting the retrospective effect of the declaration of invalidity; and*
>
> *(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."*

[107] The question that this Court has to grapple with, having found that section 18 of the CPA is inconsistent with the Constitution and that Parliament should be given an opportunity to remedy this defect, is whether, in the interim, this Court should grant further relief, in the form of a "*reading in*".

[108] The difficult issue is thus whether victims of sexual offences, other than rape or compelled rape, should continue to be precluded from pursuing prosecutions of their offenders for the further period of suspension of the invalidity of section 18 of the CPA, or whether they should be granted the ability to further prosecutions forthwith whilst Parliament considers the matter.

[109] In this regard, the offending legislation, namely section 18 of the CPA, has already been in operation for some 10 years and therefore, for some 10 long years already, victims of sexual abuse other than rape or compelled rape, who may have come forward to report same beyond the 20 year prescription period, have been barred from having any prosecution of their cases proceed.

[110] The effect of my not granting an interim remedy now would thus delay the ability of victims to prosecute their offenders by at least a further two years, if one has regard to the amount of time it will take between the granting of this order and a possible confirmation thereof by the Constitutional Court, coupled with the period of suspension of 18 months which I intend to make This would thus mean that 12 years will have elapsed since section 18 of the CPA was promulgated before victims may proceed with their prosecutions of sexual offenders.

[111] This Court is mindful of the delicate, sensitive, frightening and vulnerable situations that victims find themselves in when coming forward to pursue the prosecution of the crimes against them The legal process they have to go through in seeking justice is not for the fainthearted.

[112] Where victims have already begun the process of disclosure and reporting of the abuse against them, this Court is concerned that a further delay of 2 years may undermine the courage of the victims who are presently

coming forward to pursue their complaints when they are informed that they should wait a further 2 years, *in limbo*.

[113] As disclosure is in, of itself, a painful process, particularly as occurred with the applicants in this case, a further delay would in my view cause unnecessary insecurity in the minds of the victims and further traumatise them. My concern is reinforced by the facts of this case. The bravery of the applicants coming forward many years after the alleged commission of the offences by Frankel, coupled with the additional glare of the publicity to which they have been subjected and the concomitant intrusion into their personal suffering by having to publicly disclose the intimate details of the

offences allegedly endured by them in affidavits, has not gone unnoticed by this Court.

[114] But for the strength of the applicants in bringing this application, section 18 of the CPA may have continued indefinitely, unchanged, as it is clear that the legislature has been extremely lax in promulgating an amendment to section 18, despite the protestations of the Minister that the National Policy Framework on the management of sexual offences has been active in investigating these issues. It has been, in the case of the legislature, too little too late.

[115] There is accordingly no reason why this Court should not grant an immediate reading in pending the further investigations of the legislature, in the furtherance of an order that is just and equitable in terms of section 172(1)(b) of the Constitution.

M. COSTS

[116] In their Notice of Motion, the applicants sought a costs order against any respondent who elected to oppose this application. At the hearing of this matter, this Court was advised that the applicants had undertaken, in a letter dated 9 May 2017, as furnished to this Court after the hearing, not to seek costs against "*the estate and hereby abandon same"*.

[117] Applicants' counsel referred me to two cases, being *Malachie v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC) and *Malachie v Cape Dance Academy International (Pty) Ltd and Others* 2011 (3) BCLR 276 (CC). The Minister submitted in its final written submissions furnished after the hearing, that the costs should be shared jointly and severally with Frankel until 20 January 2017, being the date Frankel abandoned his opposition to prayer 1 of the applicants' Notice of Motion.

[118] In *Malachie v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 Mogoeng CJ found that the Minister should be liable for costs as he was enjoined to identify laws inconsistent with the Constitution for amendment, and that as the employers in this case had not been notified that an order for costs would be sought against them, it would not be just and equitable to mulct the employers in costs and made a provisional order.[89]

[119] In due course, and in *Malachie v Cape Dance Academy International* 2011 (3) BCLR 2076 (CC) the court considered whether the provisional order on costs should be made final. The court found:

[89] At para [50].

"We are satisfied that it will not be just and equitable for the employers to be required to pay any of Ms Malachie's costs. While it is true that they set the ball rolling by causing Ms Malachie's arrest, we must also have regard to what happened after that. The employers agreed to her release and after securing an agreement that Ms Malachie will not require them to pay their costs, took no further part in the proceedings. The position would have been different had the employers insisted on Ms Malachie's further detention and defended the constitutional validity of the proceedings.

The Minister has the duty to ensure that any provisional statute within his functional area which offends the provisions of the Constitution is suitably amended or repealed without unnecessary delay. This applies to the impugned provisions. As noted in the main judgment, he has not done so for the past 15 years into the constitutional dispensation. There is, therefore, merit in the employers' contention that the challenge to the constitutionality of the impugned provisions is a contest not between Ms Malachie and the employers but between her and the Minister. It is therefore just and equitable that the Minister should pay Ms Malachie's costs in this Court." [90]

[120] In the case before me, Frankel opposed the relief sought by the applicants in all the prayers in their Notice of Motion until the date that the applicants amended their relief, in the alternative, to narrow it down. Only on 20 January 2017, in his rejoinder, did Frankel withdrawn his opposition to prayer 1 of the Notice of Motion, but persisted in his opposition to the relief in prayer 2. He stated:

"However, I maintain my opposition to the relief sought in prayer 2 on the basis of the principle of legality as set out in my answering affidavit." [91]

[121] It was only when Frankel passed away on 13 April 2017, a few weeks before the hearing of this matter, that the relief sought in prayer 2 became moot as a result of his passing. Until such time Frankel was very much involved in the opposition of this application in relation to prayer 2, and in having opposed prayer 1 until January of this year.

[122] The *lis* between the applicants and Frankel was in any event terminated on 13 April 2017 arising from his death. No substitution of the Estate Late Frankel occurred until the hearing of this matter when a Notice of Substitution was handed in by counsel.

[123] In relation to the conduct of the Minister, he was singularly dilatory and unhelpful in assisting this Court, despite the precepts of the case of *Ex Parte*

Omar [92] in that he only filed his Answering Affidavit and Heads of Argument

[90] At para [7].

[91] Rejoinder pages 301-302. Para 9.

[92] 2003 (10) BCLR 1087 (CC).

after 23 April 2017, being less than a month before the hearing of this application.

[124] Frankel's counsel, for the *Estate Late Frankel*, argued vigorously against any costs order being made against Frankel. It was submitted that the opposition to prayer 1 of the Notice of Motion was limited to ascertaining the true ambit of the applicants' case, [93] and, *inter alia*, on whether a case had ever been made out in prayer 1.

[125] Despite the applicants having subsequently narrowed down their relief, 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. Thus the opposition initially raised by Frankel in relation to the broadness of the order sought would in any event have failed. Furthermore, Frankel continued to oppose the relief sought in prayer 2, and this would have remained an issue argued before this Court but for the passing away of Frankel a mere few weeks before the hearing of this application.

[126] In all these circumstances, this Court is not of the view that the Minister alone should be ordered to pay the full costs of this application, as suggested by the applicants, particularly having regard to the fact that all costs paid by the Minister ultimately flow from taxpayers' money.

[127] This case is different from *Malachie*. There, after the employers had agreed to her release after securing an agreement that Ms Malachie would not require them to pay her costs, the employers took no further part in the proceedings. The court specifically staled that "*the position would have been different had the employers insisted on Ms Malachie's further detention and defended the constitutional validity of the proceedings”*.

[128] Frankel chose to continue to actively oppose these proceedings right up until his death. A further point of departure from the facts in *Malachie* is that until the hearing of this matter, and until the undertaking given by the applicants that they would pursue costs only against the Minister, Frankel was fully aware that a costs order would be sought against him. 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.

[129] In relation to the Minister, the situation here too is similar to the *dictum* of Mogoeng CJ [94] referring to the fact that the Minister had failed to amend the

[93] First Respondent’s note on costs p 3, para 7.

[94] At paragraph [8].

defending provisions of the Constitution in that case for some 15 years. In this case, the Minister has failed to ensure that section 18 of the CPA, which offends the provisions of the Constitution, has been suitably amended for a period of at least 10 years since the last amendment to section 18 of the CPA was promulgated in 2007.

[130] For all these reasons, I am of the view that the costs of this application must be shared equally between Frankel and the Minister until 20 January 2017, whereafter they should be borne solely by the Minister.

N. THE ORDER

I accordingly make the following order:

1. 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.
2. The declaration of constitutional invalidity in paragraph 1 above is suspended for a period of 18 months in order to allow Parliament to remedy the constitutional defect.
3. Pending the enactment of remedial legislation by Parliament, or the expiry of the period referred to in paragraph 2 above, whichever is the sooner, section 18(f) of the Criminal Procedure Act 51 of 1977 is to be read as though the following words "*and all other sexual offences, whether in terms of common law or statute*;" appear after the words "*the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively".*

4. The costs of this 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.

C HARTFORD
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATES OF HEARING	22-23 MAY 2017
DATE OF JUDGMENT	