

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 Second Respondent

CORRECTIONAL SERVICES

DIRECTOR OF PUBLIC PROSECUTIONS, Third Respondent

GAUTENG

TRUSTEES FOR THE TIME BEING OF Fourth Respondent

THE WOMEN'S LEGAL CENTRE TRUST

TEDDY BEAR CLINIC Fifth Respondent

LAWYERS FOR HUMAN RIGHTS Sixth Respondent

FIFTH RESPONDENT’S WRITTEN SUBMISSIONS

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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

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.

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, stigmatisation 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

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:

²¹ Vol 6, p 488, para 82

²² *Van Zijl* 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.

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

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

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.

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*

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]

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 children⁴³ 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 grooming⁴⁶ 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,

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

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 were 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

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.

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

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.

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.”

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

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 be 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

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
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