

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

In the application of:

**THE TRUSTEES FOR THE TIME BEING OF THE
WOMENS LEGAL CENTRE TRUST**

Applicant
(Fourth Respondent)

In re the matter between:

NICOLE LEVENSTEIN

First Applicant

PAUL DIAMOND

Second Applicant

GEORGE ROSENBERG

Third Applicant

KATHERINE ROSENBERG

Fourth Applicant

DANIELA MCNALLY

Fifth Applicant

LISA WEGNER

Sixth Applicant

SHANE ROTHQUEL

Seventh Applicant

MARINDA SMITH

Eighth Applicant

and

The Estate of the late SIDNEY LEWIS FRANKEL

First Respondent

**MINISTER OF JUSTICE
AND CORRECTIONAL SERVICES**

Second Respondent

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG

Third Respondent

**THE TRUSTEES FOR THE TIME BEING OF THE
WOMENS LEGAL CENTRE TRUST**

Fourth Respondent

THE TEDDY BEAR CLINIC

Fifth Respondent

LAWYERS FOR HUMAN RIGHTS

Sixth Respondent

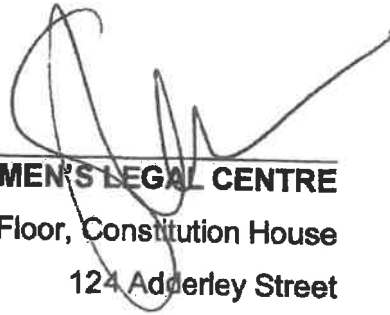
**THE FOURTH RESPONDENT'S NOTICE OF MOTION:
APPLICATION TO ADDUCE NEW EVIDENCE**

TAKE NOTICE THAT the Fourth Respondent hereby makes application to this Honourable Court for an order in the following terms:

1. The Fourth Respondent is granted leave to adduce the evidence contained in Annexures B to I of the Fourth Respondent's Supporting Affidavit;
2. The evidence contained in Annexures B to I of the Fourth Respondent's Supporting Affidavit is admitted;
3. Costs against any party that opposes this application;
4. Further and/or alternative relief.

TAKE NOTICE FURTHER that the affidavit of **SEEHAAM SAMAAI** (the Fourth Respondent's Supporting Affidavit) will be used in support of this application.

Dated at **CAPE TOWN** on this 28TH day of **JULY 2017**.



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**TO: THE REGISTRAR
CONSTITUTIONAL COURT
JOHANNESBURG**

AND TO:

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AND TO:

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AND TO:

THE STATE ATTORNEY

2nd & 3rd Respondent's Attorneys
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AND TO:

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AND TO:

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1 

THE FOURTH RESPONDENT'S SUPPORTING AFFIDAVIT

I, the undersigned,

SEEHAAM SAMAAI


do hereby make oath and say:

1. I am the director of the Women's Legal Centre Trust.
2. The contents of this affidavit are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief true. I am authorised to depose to this affidavit on the Women's Legal Centre Trust's behalf.

INTRODUCTION

3. The fourth respondent, the Women's Legal Centre Trust, files this affidavit in support of the application in terms of Section 172(2)(d) of the Constitution for the confirmation of the declaration of constitutional invalidity granted by the Honourable Acting Judge Hartford in the North Gauteng High Court, Pretoria on 25 May 2017.

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4. The WLC will also rely on this affidavit in support of its application to this Court for leave to adduce new evidence in the confirmation proceedings in accordance with Rule 31 of the Constitutional Court Rules.
5. The High Court declared that section 18 of the Criminal Procedure Act 51 of 1977, prior to and after the amendment effected by Act 32 of 2007, is inconsistent with the Constitution and invalid, to the extent that (with the exception of rape and compelled rape) it bars in all circumstances the institution of a prosecution for the offences referred to Chapters 2, 3, and 4 and section 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 and all statutory and common law offences of a sexual nature contained in any other law, after the lapse of a period of 20 years from the time when the offence was committed.
6. The WLC was admitted as the First Amicus Curiae in the High Court proceedings. The applicants have cited the WLC as the fourth respondent in the confirmation proceedings because of its direct and substantial interest in the order granted by Hartford AJ.
7. The WLC therefore finds itself in a unique position not expressly catered for in this Court's Rules or envisaged in section 172(2)(d) of the Constitution. It is a party supporting the confirmation of the order, but cited as a respondent. In the absence of directions from this Court in terms of Rule 16(4), the WLC has elected to follow the timelines for the filing of affidavits set out in the applicants' notice of motion.
8. The WLC respectfully submits that:

- 8.1. the declaration of constitutional invalidity on the terms granted by the High Court should be confirmed;
- 8.2. the ancillary order granted by the High Court suspending the declaration of constitutional invalidity was just, equitable and appropriate and should also be confirmed;
- 8.3. the WLC should be granted leave to adduce the new evidence in Annexures B to I.

THE EXPANDED RELIEF

9. The High Court granted an order on broader terms than sought in the applicants' amended notice of motion. The WLC submits that such an order best captures the constitutional inconsistency in section 18 of the Criminal Procedure Act and accords with the courts' obligations under section 172(1) of the Constitution to declare legislation invalid to the extent of its inconsistency.
10. The applicants' amended notice of motion sought a declaration that section 18 was unconstitutional to the extent that it imposed a 20-year prescription on offences of indecent assault committed against children. The WLC urged the High Court to broaden the scope of the order constitutional invalidity in three respects:
 - 10.1. Firstly, to declare the section unconstitutional to the extent that it bars the prosecution of all sexual offences (statutory and common law);
 - 10.2. Secondly, to declare the section unconstitutional to the extent that it bars the prosecution of these sexual offences against adults;

10.3. Thirdly, to declare section 18 unconstitutional in its form prior to the amendment effected by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (SORMA).

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

11.1. The provision in question, section 18(f) of the Criminal Procedure Act, makes no distinction between offences against children and those against adults; and

11.2. The common law offence of indecent assault was not an offence confined to children.

12. The Court rejected the *"artificial restriction that was never contemplated by the legislature in relation to these crimes"* and held that *"nothing turns on the fact that the applicants happen to be children when the alleged crimes of indecent assault were committed against them."*¹

13. The WLC supports these findings and conclusions. Indeed, there was nothing preventing the High Court from granting an order of constitutional invalidity of legislation broader than the specific facts arising in this case

13.1. The applicants brought a direct, facial challenge to legislation. The case therefore involved a determination of whether the legislative provisions are consistent with the Constitution.

¹ Para 39, High Court Judgment.

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- 13.2. No factual findings were necessary to determine whether the section 18 was unconstitutional to the extent that it bar prosecution against adult survivors of all sexual offences. The reasons necessitating the order of constitutional invalidity proposed by the applicants applies equally to all sexual offences and to sexual offences against adults. There was no reason to restrict the order to 'indecent assault against children'.
- 13.3. In *Masiya v Director of Public Prosecutions & others; Centre for Applied Legal Studies & another* [2007] JOL 19790 (CC) Nkabinde J expressly stated that such cases are distinct from cases requiring the development of the common law, which must take place on a fact-by-fact basis. Where there is a direct challenge to the constitutionality of legislation, this Court is at liberty to provide relief beyond the facts.
- 13.4. Moreover, the expanded relief was fully covered on the affidavits before the High Courts and extensively argued before the High Court in written and oral submissions.

**THE DECLARATION OF CONSTITUTIONAL INVALIDITY SHOULD BE
CONFIRMED**

14. The WLC supports the findings and conclusions of the High Court that, to the extent that (with the exception of rape and compelled rape) section 18 bars in all circumstances the institution of a prosecution for all sexual offences:

- 14.1. Section 18 is arbitrary and irrational. (para 63)
- 14.2. Section 18 infringes the right to dignity and equality. (para 79)

- 14.3. Section 18 stultifies the states' obligations under section 7 of the Constitution. (para 98)
15. In further support of the declaration of invalidity, the WLC will advance the following arguments:
- 15.1. Section 18 provides that all sexual offences prescribe except for the three categories of sexual offences excluded in the sub-sections. The only basis upon which this distinction between sexual offences is made is the 'seriousness' of the sexual offence. This exclusion of certain sexual offences in section 18 is therefore arbitrary and a breach of the rule of law entrenched in section 1 of the Constitution because:
- 15.1.1. The concept of 'seriousness' of offences is not an appropriate or rational basis upon which to differentiate between sexual offences for the purposes of prescription. Sexual offences are unique in their nature and impact. The considerations relevant to whether or not sexual offences should prescribe (or particular sexual offences should be exempt from prescription) are different to other offences.
- 15.1.2. The concept of seriousness based on 'harm' or moral gravity does not take into account the level of trauma endured by survivors of sexual offences which varies independently of the 'seriousness' of the offence. The characteristics of the offence, and its legal and social labelling, is but one indicator for trauma, harm or severity.

15.1.3. Any distinction in moral gravity between rape and other sexual offences is based on outdated, historical and patriarchal notions of seriousness which no longer have a place in our constitutional dispensation.

15.2. The operation of the section which prevents the Director of Public Prosecutions from instituting a prosecution for sexual offences against women and children on an arbitrary basis impedes the state's fulfilment of its constitutional obligations under section 7 of the Constitution.

15.2.1. All sexual offences infringe constitutional rights. This is so whether the offences are committed against children or adults. This is recognised in the Preamble of SORMA and by this Court on a number of occasions.

15.2.2. Section 7 and 8 of the Constitution read with this Court's jurisprudence imposes a positive, direct and powerful obligation on the state to protect constitutional rights. This obligation is bolstered by various regional and international instruments including Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter of the Rights of Women and the SADC Protocol on Gender Development.

15.2.3. One aspect of the state's positive constitutional obligation is the protection of these rights through the prosecution of sexual offences and the promulgation of laws that ensure effective prosecution. This is apparent from the fact that

the state's power and responsibility to prosecute criminal offences arises directly from section 179 of the Constitution. This Court has expressly recognised the way in which the criminal justice system and particular the prosecution of criminal offences by the National Prosecuting Agency protects, and gives effect to, constitutional rights.

15.2.4. Section 18 places an absolute bar on the prosecution of certain offences after 20 years. While in certain cases such impediment imposed by statutory prescription may be constitutionally justifiable, the absolute bar to the prosecution of all sexual offenses after 20 years is constitutionally impermissible because of the unique nature of sexual offences and their unique impact on the adults and children against whom they are committed. In any limitation analysis, these factors outweigh the proposed policy reasons prescription against other types of offences in the normal course:

15.2.4.1. Sexual offences are disproportionately committed against women and children;

15.2.4.2. There are personal, social and structural disincentives and deterrents to the reporting of sexual offences committed against adults. This explains the common

delays between the commission of a sexual offence and a formal charge being laid.

15.2.4.3. The commission of sexual offences against both adults and children have a deeply harmful effect on the society envisaged by the Constitution.

15.3. The prescription of sexual offences committed against children and women after a period of 20 years infringes the rights to dignity and equality under sections 11 and 9 of the Constitution. The distinction in section 18 results in an unequal application of the law and discriminates against those victims who are sexually offended against but do not fall into the prescription exclusion categories of the perceived more serious offences. This allows perpetrators who committed sexual offences escape culpability simply as a result of the passage of time. These complainants who have endured sexual offences (other than those excluded) do not, for all intents and purposes, enjoy the equal protection and benefit of the law.

APPLICATION TO ADDUCE ADDITIONAL EVIDENCE

16. The High Court found that it is irrational to differentiate between rape and compelled rape, and other sexual offences for the purposes of prescription.² In doing so, the learned judge relied on evidence placed before the Court by the

² Para 48, High Court Judgment.

applicants and the amici curiae 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 compelled rape committed against children.³

17. It became apparent at the hearing of the matter, that there was a lack of formal evidence before the Court regarding the delay in disclosure of sexual offences committed against adults.
18. The WLC is mindful of its duty to assist this Court in the proper determination of this matter by drawing to this Court's attention relevant matters of both fact and law. The WLC has therefore secured additional evidence supporting the broader order as it applies to adult survivors of sexual offence.
19. The WLC applies to this Court in terms of Rule 31 and on the terms set out in the attached Notice of Motion for leave to adduce this further evidence which will not appear in the record before this Court.
20. The WLC seeks to adduce the evidence of Kathleen Dey, the director of Rape Crisis Centre Cape Town Trust contained in the affidavit attached as **Annexure B**.
21. The WLC also seeks leave to adduce the following reports and articles it relied upon in the High Court. Certain of these reports and articles were expressly relied upon by the High Court and the WLC submits that their admission as a formal part of the record of proceedings will assist this Court. The articles and reports, or relevant extracts were applicable, are attached as **Annexures C – I**

³ Para 49, High Court Judgment.



- 21.1. 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/32/42/Add.2 14 June 2016;
- 21.2. Ullman ES, Henrietta H. Filipas, Stephanie M. Townsend, and Laura L. Starzynski Psychosocial Correlates of PTSD Symptom Severity in Sexual Assault Survivors *Journal of Traumatic Stress Vol. 20 No. 5* October 2007;
- 21.3. Ullman ES, Filipas HH Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims *Journal of Traumatic Stress, Vol. 14, No. 2, 2001*;
- 21.4. Patterson, D., Greeson, M., & Campbell, R. (2009). Understanding rape survivors' decisions not to seek help from formal social systems. *Health & Social Work*;
- 21.5. Higgins, D. 2004. Differentiating between child maltreatment experiences. *Family Matters*, no 69, page 50-55
- 21.6. Putnam FW, Trickett PK. The Psychobiological Effects of Child Sexual Abuse. New York; W.T. Grant Foundation 1987
- 21.7. Vetten, L., Jewkes, R., Sigsworth, R., Christofides, N., Loots, L., & Dunseith, O. (2008). *Tracking justice: The attrition of rape cases through the criminal justice system in Gauteng*. Johannesburg: Tshwaranang Legal Advocacy Centre, The South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.

22. The WLC submits that the evidence falls within the ambit of Rule 31 of the Constitutional Court Rules and should be admitted:

- 22.1. The new evidence adduced by the WLC covers the same issues highlighted in the evidence before the High Court except that it is directed at the impact and effect of sexual offences against adults including the personal, structural and social disincentives for reporting, and the psychological and physical reasons for delayed disclosure.
- 22.2. It is highly relevant to the confirmation of the High Court's declaration of constitutional invalidity and will assist the Court in its adjudication of the case.
- 22.3. The evidence is incontrovertible and, in some cases, official and statistical in nature. It is easily verifiable, and generally accepted as reliable. It is unlikely to be disputed by any party. The WLC's proposition, based on the reports and academic articles, that there are high levels of underreporting and delayed reporting of sexual offences committed against adults was not an issue of factual dispute in the High Court. Nor was the proposition that many of the reasons why children delay in reporting sexual abuse apply to adults as victims as well.
- 22.4. In respect of the articles, reports and the Report of the Special Rapporteur, the WLC's reliance on these documents was not opposed by any party in the High Court proceedings nor were their contents disputed.
- 22.5. The evidence is also from a reliable and recognised sources.

- 22.5.1. Kathleen Dey, the director of Rape Crisis Cape Town Trust, has 21 years of experience dealing with adult survivors of sexual offences in South Africa. Her experience and expertise qualifies her as an expert on the matters on which she expresses an opinion in the affidavit.
- 22.5.2. The reports are published by reputable non-governmental organisations and recognised bodies. The Special Rapporteur is appointed by the United Nations Human Rights Committee.
- 22.6. Lastly, the WLC has sought to introduce this evidence at an early stage of the confirmation proceedings to ensure that there is no prejudice to any other party.
23. The WLC therefore requests this Court to grant the WLC leave to adduce, and to admit, the additional evidence contained in Annexures B to I.

APPROPRIATE RELIEF

24. The WLC does not resist or oppose an order of constitutional invalidity without the ancillary order moderating the retrospective effect of the order by suspension (as proposed by the applicants).
25. The WLC, however, submits that an order suspending the declaration of constitutional invalidity is the most appropriate relief in this case because it would:

- 25.1. Prevent uncertainty by avoiding the piecemeal judicial amendment of legislation;
- 25.2. Allow Parliament, as the designated legislating body, to conduct the thorough process of consideration and constitutionally required consultation in order to properly cure the constitutional defect;
- 25.3. Not cause any prejudice to the applicants. Mr Frankel has passed away and it is no longer possible for the applicants to institute a criminal prosecution against him. In the circumstances, a suspension of the order of constitutional invalidity does not delay the institution of the prosecution or further infringe their rights.

THE SCOPE OF THE ORDER

26. The High Court order declared section 18 unconstitutional to the extent that it bars prosecution of *"all statutory and common law offences of a sexual nature contained in any other law"*.
27. For the purposes of clarity, and in order to assist this Court, the WLC has prepared a list of the statutory and common law offences of a sexual nature that exist now and prior to the enactment of SORMA. This list is attached **Annexure A** to this affidavit.
28. The WLC respectfully submits that this list may assist this Court to the extent that there is any concern that an order in terms granted by the High Court leads to any ambiguity as to what offences should be excluded from prescription under the declaration of invalidity.

THE PROSECUTION OF UNCONSTITUTIONAL SEXUAL OFFENCES

29. The WLC is mindful that there are a variety of sexual offences that were offences more than 20 years ago and which have now been formally declared unconstitutional by this Court or are (in all likelihood) unconstitutional and invalid.
30. The WLC wishes to emphasise that its position on the unconstitutionality of prescription of all sexual offences does not equate in any way to the support of the prosecution of these unconstitutional offences. The WLC submits that, regardless of the lifting of prescription against all sexual offences, the prosecution of any offence that was a valid offence at the time, but has now been declared unconstitutional or is contrary to the Constitution, should not be permitted.

COSTS

31. The WLC makes no submissions in respect of the dispute on costs between the applicants and the First Respondent.
32. The WLC seeks costs only against any party who opposes the substantive merits of the confirmation application or who opposed the application to adduce new evidence.
33. The WLC also submits that, although it is cited as a respondent in the confirmation proceedings, it entered this litigation as amicus curia and remains a party litigating in the public interest and in order to assist this Court. For these reasons, it should not be burdened with a costs order.

[Handwritten signature]

DEPONENT

The Deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at on this the _____ day of _____ 2017, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

[Handwritten signature]
7162468

COMMISSIONER OF OATHS

Ntombeni

Full Names:

Capacity:

Designation: *CONSTABLE*

Address: *28 BUITENEN
STREET
CAPE TOWN*

SUID-AFRIKAANSE POLISIEDIENS
STASIE KOMMISSARIS
KAAPSTAD

28 JUL 2017

CAPE TOWN
STATION COMMANDER
SOUTH AFRICAN POLICE SERVICE

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