CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 170/17

In the matter between:

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

and

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

Neutral citation: *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2018 ZACC 16

Coram: Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgments: Zondi AJ (unanimous)

Heard on: 14 November 2017

Decided on: 14 June 2018

Summary: Criminal Procedure Act 51 of 1977 — constitutionality of section 18 — section 18 is unconstitutional

Prescription of the right to institute prosecution for sexual offences other than rape or compelled rape — bar to prosecution after twenty years since commission of offence — section 18 distinguishes between rape or compelled rape and other sexual offences for purposes of prescription — section 18 is irrational and arbitrary

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ORDER

On application for confirmation of the order of the High Court of South Africa, Gauteng Local Division, Johannesburg (Hartford AJ):

1. The declaration of constitutional invalidity of section 18 of the Criminal Procedure Act 51 of 1977 made by the High Court of South Africa, Gauteng Local Division, Johannesburg is confirmed.
2. The order is suspended for 24 months from the date of this order to afford Parliament an opportunity to enact remedial legislation.

3. During the period of suspension section 18(f) of the Criminal Procedure Act is to be read as though the words "and all other sexual offences whether in terms of common law or statute" appear after the words "the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively".
4. Should Parliament fail to enact remedial legislation within the period of suspension, the interim reading-in remedy shall become final.
5. The declaration of invalidity is retrospective to 27 April 1994.
6. The first respondent's appeal against the costs order of the High Court is dismissed with no order as to costs.
7. The second respondent is to pay the costs of the confirmation proceedings.

JUDGMENT

ZONDI AJ (Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J and Theron J concurring):

Introduction

[1] The issue in this matter relates to the constitutionality of section 18 of the Criminal Procedure Act[1] (CPA), which provides that the right to institute a prosecution for all sexual offences other than rape or compelled rape is limited to a period of 20 years from the time when the offence was committed. The High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) declared section 18 constitutionally 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 section 18(f), (h) and (i), after the lapse of a period of 20 years from the time when the offence was

[1] 51 of 1977.

committed".[2] That order is before this Court for confirmation in terms of section 172(2) of the Constitution.[3] There are also two further matters that need to be resolved in these proceedings. First is the application by the fourth respondent, the Women's Legal Centre Trust (WLC) to adduce further evidence. The second is an appeal by the first respondent, the Estate of the Late Sidney Lewis Frankel (Estate) against the costs order of the High Court.

[2] I must emphasise that although this judgment accepts that all sexual offences are equally serious and that the harm they all cause is significantly serious, this matter is not about the magnitude of sentences that must be imposed on those convicted of such offences. Rather, it is about the constitutionality of the distinction that section 18 draws between rape or compelled rape, and other sexual offences for purposes of prescription.

[3] The application for confirmation arises from a refusal by the third respondent, the Director of Public Prosecutions, Gauteng (DPP) to prosecute the late Mr Sydney Lewis Frankel whom the applicants allege sexually assaulted them in and around Johannesburg more than 20 years ago when the applicants were between the ages of 6 and 15. The DPP declined to prosecute Mr Frankel on the ground that the crimes he was accused of having committed occurred more than 20 years earlier and that section 18 of the CPA bars the right to institute prosecution for such crimes.

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[2] *NL v Frankel* 2017 (2) SACR 257 (GJ) (High Court judgment) at 287.

[3] Section 172(2) of the Constitution reads:

> "(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
>
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
>
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
>
> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[4] The confirmation proceedings raise three interrelated questions. The first is whether section 18 of the CPA is inconsistent with the Constitution. The second, which arises only if section 18 is inconsistent with the Constitution, relates to the appropriate relief; whether the declaration of invalidity should be suspended with or without an interim reading-in and whether it should apply prospectively or retrospectively. The third relates to the question of costs in this Court.

Parties

[5] The eight applicants are adult males and females who all allege that they were sexually assaulted by Mr Frankel when they were children.

[6] The first respondent is the Estate which substituted Mr Frankel after his death in April 2017, before the hearing in the High Court. The second respondent is the Minister of Justice and Correctional Services (Minister).

[7] The fourth to sixth respondents are the WLC, Teddy Bear Clinic (TBC), and Lawyers for Human Rights (LHR). These respondents were amici in the High Court.

Background and litigation history

[8] During the period between 1970 and 1989, when the applicants were aged between 6 and 15 years old, Mr Frankel is alleged to have sexually assaulted them. As a result of the alleged sexual assaults, the applicants claim to have suffered physical, emotional, and psychological trauma. The effect of a 20-year prescription period imposed by section 18, for all sexual offences other than rape or compelled rape meant that the right to prosecute Mr Frankel for the sexual assaults he allegedly perpetrated against the applicants prescribed between 1998 and 2011. The applicants allege that they did not institute criminal proceedings against Mr Frankel within the period prescribed by section 18 because of lack of full appreciation of the nature and extent of the criminal acts allegedly perpetrated on them by him. They say they acquired full

appreciation of the nature of these criminal acts, allegedly committed, between June 2012 and June 2015 and that it was only then that they instituted civil and criminal action against him. The DPP, however, declined to prosecute Mr Frankel on the ground that the right to prosecute him for the alleged offences had prescribed in terms of section 18.

[9] The applicants thereafter approached the High Court and challenged the constitutionality of section 18 of the CPA. They sought, amongst other things, two main prayers. First, an order declaring that section 18 is inconsistent with the Constitution 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[4] (SORMA) other than rape or compelled rape, after the lapse of a period of 20 years from the time when the offence was committed. Second, they sought an order directing the DPP to consider prosecuting Mr Frankel for the offences he was alleged to have committed. The applicants submitted that there is no rational basis for distinguishing rape or compelled rape from other forms of sexual offences. They contended that section 18 is irrational and arbitrary and therefore unconstitutional and invalid, in that the distinction it seeks to make is based on the perceived seriousness of the offences and their impact on the survivors. They further contended that it unjustifiably violates their rights to human dignity, equality and non-discrimination, to be protected from abuse as children, to be free from all forms of violence from both public, and private sources and access to courts.

[10] Mr Frankel resisted the application contending, first, that the applicants had failed to establish the constitutional invalidity of section 18. Second, he contended that the applicants had not addressed the issue of retrospectivity in relation to the operation of the order of constitutional invalidity, as such order would necessarily operate retrospectively to allow the DPP to reconsider his or her decision not to prosecute him.

[4] 32 of 2007.

Instead, Mr Frankel argued, the applicants based their case on the constitutional invalidity of SORMA, which came into force on 16 December 2007 and therefore section 18 would be constitutionally invalid as of this date. As a result, Mr Frankel contended that the applicants would not be able to obtain relief in relation to the alleged criminal offences which took place approximately 30 years ago. Mr Frankel's defences prompted the applicants to amend their notice of motion by seeking an order declaring that section 18 was invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences suffered by children, other than rape or compelled rape, after the lapse of a period of 20 years from the time the offence was committed. Pursuant to this amendment, in January 2017 Mr Frankel withdrew his opposition to the relief sought in prayer 1 of the notice of motion but persisted in opposing the relief sought in prayer 2 based on the principle of legality, which is the position he maintained until his demise in April 2017 shortly before the hearing of the matter in the High Court.

In the High Court

[11] Notwithstanding the agreement between the applicants and Mr Frankel, that the relief sought should be confined to children, the High Court held that there were no reasons to do so. It concluded that the relief should apply to child and adult survivors of sexual assaults. The High Court based its conclusion on two grounds. First, it reasoned that section 18(f) itself does not make a distinction between children and adults and it would be nonsensical for the Court to artificially confine the relief to children only, when section 18(f) does not impose any such restriction. Second, the common law crime of indecent assault does not make such distinction either; indecent assault can be committed against both adults and children. The Court therefore accepted that the broader relief, as framed by the amici, was the most appropriate relief to grant, should section 18 be declared unconstitutional and invalid.[5]

[5] High Court judgment above n 2 at paras 37-41.

[12] The High Court, after analysing the historical development of section 18 and the extent to which it affects the discretionary powers of the National Prosecuting Authority (NPA), concluded that there was no rational basis for distinguishing rape or compelled rape from other sexual offences for purposes of prescription. That conclusion was based on the expert evidence presented, detailing the reasons why there is often delayed disclosure relating to *all* sexual offences and not just rape or compelled rape. The Court accepted expert evidence in this regard, and held that even though the reasons for delayed reporting only relate to children – delayed disclosure or reporting stems from all forms of abuse and therefore these traumatic symptoms and pressures apply equally to adult survivors of sexual abuse.[6]

[13] The High Court held that it was entirely irrational and arbitrary to create a random cut-off period of 20 years for prescription of sexual offences, when there is a sufficient body of evidence demonstrating that these offences inflict deep continuous trauma on survivors. Many survivors suffer quietly and either never disclose the offences at all, with the perpetrator escaping all consequences, or disclose over varying lengths of time after the offences were committed.[7]

[14] The High Court also held that the exclusion contemplated in section 18 breaches the survivors' rights to dignity and equality.[8]

[15] In addition, the High Court dealt with the question whether prosecuting Mr Frankel for offences which occurred more than 20 years earlier would have violated the principle of legality which is specifically confirmed in section 35(3)(l)[9] and section 35(3)(n)[10] of the Constitution. The principle of legality prevents arbitrary

[6] Id at paras 51-2.

[7] Id at para 67.

[8] Id at paras 76 and 78.

[9] Section 35(3)(l) prohibits a conviction for an act or omission that was not an offence under national or international law at the time it was committed or omitted.

[10] Section 35(3)(n) affords an accused the least severe punishment, where the prescribed punishment for the offence has changed between the commission of the offence and the time of sentencing.

punishment and ensures that criminal liability accords with clear and existing rules of law. The Court held that the principle of legality was not compromised as the acts allegedly committed by Mr Frankel constituted indecent assault, which was a common law offence at the relevant time. Therefore, the High Court reasoned, the declaration of invalidity operating retrospectively would not result in the criminalisation of conduct that was not already criminal when the alleged offences were committed.[11]

[16] The High Court accordingly made the declaration of invalidity, suspended it, and made an interim reading-in. The relevant terms of the order read:

> "1. It is declared that section 18 of the [CPA], is inconsistent with the Constitution . . . and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in sections 18(f), (h) and (i), after the lapse of a period of 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 [18 months] . . . , whichever is sooner, section 18(f) of the [CPA] 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."[12]

Proceedings in this Court

[17] In this Court, the applicants seek confirmation of the declaration of invalidity. They do not, however, support the confirmation of paragraphs 2 and 3 of the High Court

[11] High Court judgment above n 2 at paras 85-6.

[12] Id at 287.

order. The WLC supports the declaration of invalidity and its confirmation but with a reading-in to render section 18 constitutionally compliant. It does not support the suspension of the declaration of constitutional invalidity. The WLC also seeks to introduce new evidence which it contends will show that the reason for delayed disclosure in relation to all sexual offences and not just in relation to those of rape or compelled rape is the same in respect of all survivors of sexual assault whether they are children or adults. It further contends that the new evidence demonstrates that the differentiation which section 18 seeks to make between rape or compelled rape and other sexual offences for the purposes of prescription is irrational.

[18] The TBC and the LHR support confirmation of the order on the terms contended for by the applicants.

Application by the WLC

[19] Before addressing the merits of the appeal, it is necessary to dispose of an application by the WLC to adduce further evidence that it contends will assist this Court in determining the impact of section 18 of the CPA. The new evidence sought to be admitted consists of reports published by reputable inter-governmental and non-governmental organisations, as well as state agencies. It is directed at the impact of sexual offences on adult survivors and includes the personal, structural and social disincentives for reporting, as well as the psychological and physical reasons for delayed disclosure.[13]

[13] These reports consist of the following:

a. a South African Police Service publication entitled "An Analysis of the National Crime Statistics Addendum to the Annual Report 2011/2012" dated 31 August 2012;

b. a report by Gender Links and the Medical Research Council titled "The War @ Home: Findings of the Gender Based Violence Prevalence Study in Gauteng, Western Cape, KwaZulu-Natal and Limpopo Provinces of South Africa", published in 2011;

c. an extract from a Statistics South Africa report, Statistical Release No. P0341 titled "Victims of Crime Survey 2015/2016";

d. an extract from a Statistics South Africa report titled "Quantitative Research Findings on Rape in South Africa" released in 2000;

e. a report titled "Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Her Mission to South Africa" dated 14 June 2016;

[20] The WLC provides three additional grounds on which it contends the distinction between rape or compelled rape, and all other sexual offences, in section 18 is irrational. Firstly, it points out that the prime rationale for the differentiation between sexual offences in section 18 is that certain sexual offences are more serious than others and the perceived harm or moral gravity of sexual offences in this context is clearly linked to the penetrative or non-penetrative nature of the offence. It contends that there is no factual basis or policy reasons to support this view. Secondly, the WLC says the exclusion of certain offences, and not others, from prescription creates an artificial distinction between sexual offences, when in fact, the context and consequences of these offences are substantially the same. It argues that to the extent that the Legislature considered it necessary for certain offences to be excluded from prescription in order to achieve the objects of SORMA and to protect vulnerable groups, such a rationale must apply to all sexual offences.

[21] Thirdly, the WLC contends that the differentiation of sexual offences for prescription purposes fails to give recognition to the fact that the survivors of all sexual offences are faced with similar personal, social and structural disincentives to reporting the offence committed against them which leads to delayed and under-reporting of all sexual offences.

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f. Ullman et al "Psychosocial Correlates of PTSD Symptom Severity in Sexual Assault Survivors" (2007) 20 *Journal of Traumatic Stress* 821;

g. Ullman and Filipas "Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims" (2001) 14 *Journal of Traumatic Stress* 369;

h. Patterson et al "Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems" (2009) 34 *Health and Social Work* 127;

i. extracts from a February 2005 report titled "Differentiating Between Child Maltreatment Experiences";

j. an extract from an article Putnam and Trickett "Psychobiological Effects of Sexual Abuse: A Longitudinal Study" (1997) 821 *Annals of the New York Academy of Science* 150;

k. and an extract from a report titled "Tracking Justice: The Attrition of Rape Cases Through the Criminal Justice System in Gauteng", dated July 2008.

All of this material is annexed to the affidavit of Ms Kathleen Dey, dated 28 July 2017.

[22] Rule 31 of this Court's Rules permits any party to any proceedings before the Court including a properly admitted amicus curiae "to canvass factual material which is relevant to the determination of the issues before the Court and which does not specifically appear on the record" provided that "such facts are common cause or otherwise incontrovertible; or are of an official, scientific, technical or statistical nature capable of easy verification".

[23] This Court in *Prince* held that, where the new evidence sought to be canvassed is disputed, it undoubtedly demonstrates that the new evidence is not "capable of easy verification" and similarly is not incontrovertible.[14]

[24] The evidence which the WLC seeks to introduce should be admitted. None of the parties objected to its admission. The new evidence, which is entirely uncontested, sets out the effect of rape trauma on adult survivors reporting sexual assault and getting support thereafter. It is the only evidence we have that relates to adult trauma syndrome. The findings of this Court on the nature and extent of rape trauma syndrome would be a welcome addition to this Court's jurisprudence since its judgment in *Bothma*.[15] Moreover in order to consider the full extent of the impact of section 18, and whether it serves an important public interest, it is necessary to have information on the prevalence of sexual offences against women in South Africa and the percentage of female survivors of sexual offences who elect not to formally report the offences to the South African Police Service (SAPS) and why they do not do so. This is what the new evidence seeks to highlight. For instance the new evidence shows that in the "Victims of Crime Survey 2015/2016", a report by Statistics South Africa, only 35.5 percent of survivors reported sexual offences to SAPS, which is quite alarming.[16] Failure to report

[14] *Prince v President, Cape Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 10. See also *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2006 (2) SACR 525 (CC); 2007 (2) BCLR 140 (CC) at para 33 and *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 23.

[15] *Bothma v Els* [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) BCLR 1 (CC).

[16] "Victims of Crime Survey 2015/2016" above n 13 at 13.

crimes to the police in general and in particular those involving sexual violence undermines the efforts of the government to combat and ultimately eradicate the scourge of sexual offences.

Applicants' submissions

[25] The applicants support the reasoning of the High Court regarding the finding of constitutional invalidity of section 18, but not the portion of the order suspending the declaration of invalidity.

[26] The applicants contend that section 18 is an absolute bar to prosecuting sexual offences other than those listed in section 18 which were committed more than 20 years earlier, notwithstanding the seriousness of the offence, the extent of the infringement of rights, and the complex psychological factors that cause a delay in reporting. As a result of this bar, the NPA's power to institute criminal proceedings in terms of section 179(2) of the Constitution[17] read with the National Prosecuting Authority Act[18] is limited. And this limitation is arbitrary and unjustifiable, and thus unconstitutional.

[27] The lack of rationality, it is contended, is evinced by the following. Although rape is the "most reprehensible form of sexual assault", as noted by this Court in *Masiya*,[19] other forms of sexual abuse also constitute "a humiliating, degrading and brutal invasion of the dignity and the person of the survivor".[20] Sexual abuse in all forms, not only rape, infringes the survivor's right to bodily and psychological integrity.[21] The applicants submit that the state has a duty in terms of section 7(2) of the Constitution to respect, promote and fulfil this right, which they contend it failed to

[17] Section 179(2) of the Constitution provides that "[t]he prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings".

[18] 32 of 1998.

[19] *Masiya v Director of Public Prosecutions, Pretoria* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) at para 36.

[20] Id.

[21] Section 12(2) of the Constitution.

perform by placing a time-bar on the prosecution of sexual abuse, other than rape and compelled rape.

[28] As for the accused's right to a fair trial,[22] the applicants contend that striking down section 18 will not preclude an accused from raising the delay as a reason for a permanent stay of prosecution. Furthermore, they contend that if the impugned section was expanded to include all forms of sexual assault, the accused's right to a fair trial would still be protected, even before the trial phase, as the NPA would retain the discretion on whether to prosecute based on various factors, including the length of the delay and the availability of evidence.

[29] With regards to the suspension of the declaration of invalidity, the applicants contend that there is no basis for doing so. On invalidity coupled with a reading-in, the applicants argue that such remedy is "technically flawed". This is so, argue the applicants, because if Parliament fails to enact remedial legislation during the period of suspension, the declaration of invalidity becomes operative without the words that have been read in. This would not be just and equitable. The applicants call for a declaration of invalidity coupled with a "reading-in" without suspending the order.

[30] Further, although the applicants initially sought a declaration that was limited to sexual offences committed against children, they support the reasoning of the High Court for wider relief. As regards the date on which the declaration of invalidity should be effective, the applicants contend that it should apply retrospectively to 4 February 1997, the date on which the Constitution came into effect. Their alternative contention is that in any event, retrospectivity should apply in the present matter as the declaration of invalidity does not have the effect of creating a new crime. It only removes the limitation on the right to prosecute that is afforded to the NPA. But, in argument before us, counsel for the applicants in reply argued that the declaration of

[22] Section 35(3) of the Constitution.

invalidity should have an indefinite retrospective effect so as to apply to sexual offences that had already prescribed by 27 April 1994.

[31] Lastly, on the issue of costs, the applicants abide the decision of this Court on the costs appeal by the Estate. But they seek costs from the Minister for this confirmation application.

First respondent's submissions

[32] The first respondent does not oppose nor make any submissions concerning the application for confirmation of the order of constitutional invalidity. Nor does it oppose the application to adduce further evidence.

[33] However, the Estate appeals in terms of rule 16(2) of this Court's rules against the costs order of the High Court. This will be expanded on further, later in the judgment.

Second respondent's submissions

[34] The Minister supports the application for confirmation of the declaration of invalidity and generally supports the submissions of the applicants, but rejects the applicants' opposition to the suspension of the declaration of invalidity with an interim reading-in. Further, the Minister calls for a longer suspension period to allow Parliament to effect remedial legislative amendments.

[35] The Minister concedes that the High Court was correct in declaring section 18 invalid, but on a slightly different basis. The Minister contends that section 18 creates two broad categories of sexual offences: the first category comprises rape or compelled rape, and using a child or mentally disabled person for pornographic purposes; and the second category is all other sexual offences. The first category is not subject to the 20-year time-bar, whereas the second is and there appears to be no rationale for this distinction, nor has any explanation been given. In the absence of a

rational explanation, the Minister contends that section 18 is irrational in so far as it imposes a time-bar on the second category of sexual offences.

[36] As for remedy, the Minister contends that the applicants' rights, and those of others in their position, will be fully vindicated by confirming the High Court's order. But he says no prejudice will be caused by the suspended declaration coupled with an interim reading-in which is consonant with this Court's approach in *Gaertner*.[23] Lastly, the Minister opposes the costs appeal by the Estate.

Fifth respondent's submissions

[37] The TBC focuses on the state's higher duty to protect children, particularly in "silent communities" and "failed systems of care".

[38] The TBC avers that the state's duty in section 7(2) of the Constitution encompasses a duty[24] "to take legislative and other measures to protect vulnerable groups, such as children, from the violation of their rights", taking into account that the child's best interests is of paramount importance in every matter concerning the child.[25] The TBC argues that despite the operation of the Children's Act[26] and SORMA, which seek to protect children from maltreatment, neglect, abuse, and degradation, the state has failed to ensure the constitutional validity of section 18 in recognition of the child's right to be protected from these horrors, or alternatively, has failed to develop section 18(f) adequately in line with the values of the Constitution.

[23] *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) at paras 82-5.

[24] In *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC) at para 40 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". See also *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 78 where this Court held that "[t]his obligation would normally be fulfilled by passing laws *and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children*".

[25] Section 28 of the Constitution.

[26] 38 of 2005.

[39] The TBC contends that there is a higher duty to protect children in failed systems of care facilities, places of safety, and insular communities, as they face the risk of being harmed in such places. It points out that in many instances survivors are coerced into silence by the perpetrator and the community or the facility may prevent them from speaking due to their dependency for care. The TBC argues that prescription on prosecution of sexual offences does a disservice to society as it promotes secondary violation and victimisation of the most vulnerable groups by not allowing justice to be seen to be done.

Sixth respondent's submissions

[40] LHR submits that the 20-year period is in itself arbitrary and irrational, as it has been adopted from Roman-Dutch law principles – codified in the 17th century – and the fact that the period has not changed over centuries is indicative of the arbitrary development of the contents of section 18. It further argues that there is no genuine rationale for this period within modern constitutional criminal law, as the usual justification for prescription in criminal cases is the availability of clear and best evidence which is often not relevant to the prosecution of sexual offences. It reasons that in the absence of physical evidence, the prosecution of sexual offences simply relies on the testimony of the complainant and alleged offender. In turn, where there is physical evidence, there is then no need for the 20-year prescription period in light of technological advances in forensics and evidence gathering. The LHR therefore contends that it would be "absurd" to have a serial sexual offender escape criminal liability, where there is clear evidence (such as DNA evidence) linking the perpetrator to the offence, because a period of 20 years has lapsed.

Is section 18 irrational and arbitrary?

[41] Before dealing with the irrationality and arbitrariness of section 18, it is necessary to say something about its historical development.

[42] The origin of the statutory 20-year prescription period in section 18 can be traced back to the common law.[27] In terms of the common law, all offences prescribed after a period of 20 years from the commission of the offence.[28] The common law position existed until it was altered by section 21 of the Cape Ordinance,[29] which provided that a prosecution for a crime of murder would not be barred as a result of a lapse of time. But the 20-year prescription period in relation to all other offences remained unchanged under the Criminal Procedure Act 31 of 1917 and the Criminal Procedure Act 56 of 1955 (the old CPA).

[43] The CPA altered the position. It extended the crimes which would not be barred by the lapse of time to those "in respect of which the sentence of death may be imposed". In its original form section 18(1) of the CPA provided:

> "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 the law, lapse after the expiration of twenty years from the time when the offence was committed."

[44] It is apparent from the historical development of section 18 that the Legislature under the old CPA specifically identified murder as the crime in respect of which the right to prosecute would not prescribe. In the 1977 CPA the Legislature employed a different marker to delineate the crime or crimes in respect of which prescription would not bar a prosecution. The marker used is the reference to all offences "other than the offences [in respect] of which the sentence [of death] may be imposed". The preceding statutory history shows us that when the Legislature enacted the CPA, it was aware of the fact that from time to time the list of offences in respect of which the death sentence was competent had changed and would in all probability change in the future. When

[27] Du Toit "Prosecuting Authority" in Du Toit et al (eds) *Commentary on Criminal Procedure Act* Service 57 (2016) at 87 and see generally *S v De Freitas* 1997 (1) SACR 180 (C).

[28] *De Freitas* id at 182I-J.

[29] 40 of 1828.

section 18 was enacted, offences that could attract the death penalty and which were excluded from prescription were, among others, rape, murder and treason.

[45] In 1997, as a result of the judgment of this Court in *Makwanyane* in which the death penalty was declared unconstitutional,[30] section 18 was amended by the Criminal Law Amendment Act,[31] to include a list of offences that were particularly serious.[32] These offences were excluded from the 20-year prescription period. SORMA, which came into effect on 16 December 2007, broadened the ambit of section 18 of the CPA by extending the definition of rape to include all forms of sexual penetration; and adding the offences of compelled rape and using a child or person who is mentally disabled for pornographic purposes. These are the offences to which the 20-year prescription period does not apply.

[46] Section 18 now reads:

> "The right to institute a prosecution for any offence, other than the offences of—
> (a) murder;
> (b) treason committed when the Republic is in a state of war;
> (c) robbery, if aggravating circumstances were present;
> (d) kidnapping;
> (e) child-stealing;
> (f) rape or compelled rape 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; or
> (h) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

[30] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[31] 105 of 1997.

[32] These offences were murder, treason committed when the Republic is in a state of war, robbery, if aggravating circumstances were present, kidnapping, child stealing, or rape.

> (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."

It is apparent that currently section 18 deals selectively with survivors of sexual violence. It precludes some survivors of sexual offences from access to criminal legal recourse, while protecting others.

[47] The question is whether section 18, by treating the survivors of sexual violence selectively, is irrational as contended for by the parties. This calls for the critical examination of the means chosen by Parliament to determine whether these means are rationally related to the objective it sought to achieve. This is so because, although Parliament has authority to make laws it is required to exercise that power within the law; it cannot act irrationally. This Court held in *Law Society of South Africa*:

> "A convenient starting point in evaluating these submissions is to restate, albeit tersely, the rationality standard that may be culled from the decisions of this court. The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution. The rule of law requires that all public power must be sourced in law. This means that [s]tate actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant 'to promote the need for governmental action to relate to a defensible vision of the public good' and 'to enhance the coherence and integrity' of legislative measures."[33] (Footnotes omitted.)

[33] *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 32.

[48] The question whether a legislative provision is rationally related to a given governmental object entails an objective enquiry. The test is objective because otherwise a decision that, viewed objectively, is in fact irrational—

> "might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."[34]

[49] The Minister, on whom the onus lies to justify the rationality of section 18, concedes that the exclusion of sexual offences (other than rape or compelled rape) from the definition of offences that do not prescribe in terms of section 18, was not informed by the government purposes underpinning SORMA. These are to: afford complainants of sexual offences the least traumatising protection the law can provide; introduce measures which seek to enable the relevant organs of state to give full effect to the Act; and combat and ultimately eradicate the high incidence of sexual offences committed in the Republic. The Minister points out that given the serious nature of all sexual offences and the vulnerability of survivors of such offences, any policy position that seeks to distinguish between penetrative and non-penetrative sexual offences in relation to section 18, cannot pass constitutional muster.

[50] When rape or compelled rape was excluded from the reach of the prescription period of 20 years, this was not done for the purposes of protecting and advancing the interests of the survivors of sexual offences.

[51] The primary rationale for differentiation between sexual offences in section 18 seems to be based on a consideration that certain sexual offences are more serious than others. This idea is seriously disputed by the WLC. It contends that there is no factual basis or policy reasons to endorse the view that penetrative sexual offences are more traumatic than non-penetrative sexual offences and the assumption that certain sexual

[34] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 86.

offences are more morally offensive than others is imbued with outdated, patriarchal ideas about the moral gravity and harmfulness of different sexual offences. The WLC says there is a significant body of evidence which shows that that assumption is incorrect. In its written submissions in this Court the WLC points out that all sexual offences occur within the same social and political context and the survivors of these offences are faced with similar personal, social and structural disincentives to reporting the offences committed against them.

[52] In these circumstances the use of prescriptive periods in section 18 as a basis to distinguish between rape or compelled rape and other forms of sexual assault when the harm they all cause to their survivors is similar, is irrational. Enacting legislation involves the exercise of public power and that being the case the Legislature is required to act in a rational manner when it exercises its legislative power. The section, by over-emphasising the significance of the nature of the criminal act at the expense of the harm that it produces to the survivors, fails to serve as a tool to protect and advance the interests of survivors of sexual assault. It works against their interests instead of promoting them. The criminal justice system should play a role that supports the survivors of crimes involving sexual violence and create mechanisms that would encourage them to come forward more so in view of the fact that such crimes have become prevalent these days.

[53] I agree with the TBC that the prescription period of 20 years imposed by section 18 is insufficiently cognisant of the nature and process of sexual assault disclosure. This sentiment is also shared by the WLC. According to the WLC there are numerous reasons why adult survivors choose to report the sexual offence against them after a long period of time. Personal circumstances of the survivor may change; with time comes maturity and an ability to process the trauma suffered as a result of the violence. She may seek out psychological help, such as counselling, which empowers her to enter the criminal justice system. The WLC points out that survivors develop resilience over time, and together with resolution of the trauma are able to report the matter to the police or the survivor may change communities with which she engages

which may be more accepting of women who are sexually abused. She may have a supportive partner later on in life who believes her and supports and encourages her to report to the police. Someone else may report a sexual offence committed by the same perpetrator which may give the survivor courage to report.

[54] It is apparent that section 18 is out of touch with the development regarding the application of prescription in relation to sexual offences, which has taken place since the judgment of the Supreme Court of Appeal in *Van Zijl*[35] and as developed by this Court in *Bothma*.[36] The Supreme Court of Appeal in *Van Zijl* held that the purpose of prescription is to penalise unreasonable inaction, and not inability to act.[37] This Court in *Bothma* appreciated the positive development that has taken place in the past two decades regarding the willingness of the survivors of sexual assault to come forward about their past.[38] In these days survivors of sexual assault feel empowered to come to grips with and denounce sexual abuse they had suffered as children.[39] They have become more informed about their condition and rights and have received support from public interest groups. There is healing power in groups. The survivors find solace in each other's words; they feel more empowered to bare their souls and relate their painful experiences. The Supreme Court of Appeal in *Van Zijl* accepted that rape had the inherent effect of rendering child survivors unable to report the crime, sometimes for several decades, and that the policy was not to penalise them for the consequences of their abuse by blaming them for the delay.[40] What was said by the Supreme Court of Appeal in *Van Zijl* and by this Court in *Bothma* applies with equal force to survivors of all forms of sexual violence though it was made in the context of rape. The effect of section 18 is that it penalises even a complainant whose delay was caused by or due to his or her inability to act by preventing him or her from pursuing a charge even if he or

[35] *Van Zijl v Hoogenhout* [2004] ZASCA 84; [2004] 4 All SA 427.

[36] *Bothma* above n 15.

[37] *Van Zijl* above n 35 at para 19.

[38] *Bothma* above n 15 at para 50.

[39] Id at para 48.

[40] *Van Zijl* above n 35 at paras 7 and 9.

she may have a reasonable explanation for the delay. Once a 20-year prescription period has expired that is the end of the matter for the complainant.

[55] The evidence before us reveals what countless women and children face. It illuminates the systemic failures that enable violence and exploitation of them to occur. Ms Dey, on behalf of the WLC explained that to think of sexual violence as merely unwanted sexual conduct is to miss the point. Rather, it is "by its very nature . . . intentionally designed to produce psychological trauma".

[56] Of pivotal importance to the case before us is this: that the systemic sexual exploitation of woman and children depends on secrecy, fear and shame.[41] Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator, as the applicants allege Mr Frankel to have been, is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones – let alone state officials. Combined with this is the frequent impact of deeply-located self-blame, which, as the Supreme Court of Appeal recognised in *Van Zijl*, disables the victim from appreciating that a crime has been committed against her for which the perpetrator, and not she, is responsible.[42]

[57] All these features of survival of sexual trauma make it rational to be reluctant to report and to avoid reporting. And this is before even considering the effect of rape trauma syndrome, the now recognised patterns of emotional, physical, cognitive and behavioural disturbances that approximately one in three survivors of sexual assault develop.[43] Even if a survivor is fully aware that she was abused, she naturally weighs

[41] See generally, an expert report by Muller and Hollely titled "The Disclosure Process in Cases of Child Sexual Abuse" dated 2004.

[42] *Van Zijl* above n 35 at paras 12 and 13.

[43] Ullman et al (2007) above n 13 at 821.

up the possibility of reprisals from the perpetrator together with the possible lack of support from the police and statistically small eventuality that reporting will actually, eventually, result in a conviction in a criminal court.[44]

[58] The evidence before us consistently shows that only one in three rape survivors seek assistance from formal social systems.[45] Once a person takes the decision to report, the police, the NPA and the courts have a duty to investigate, prosecute and adjudicate the complaint with due regard to the hurdles overcome before reporting. All this means that the decision not to disclose or report, for any length of time, cannot determine the question of guilt or innocence in the case against the perpetrator.

[59] In conclusion, it is clear from the preceding analysis that there is no rational basis for the right to prosecute to lapse after 20 years in respect of other forms of sexual offences, and not for rape or compelled rape. Sexual offences may differ in form but the psychological harm they all produce may be similar.

[60] Section 18 also undermines the state's effort to comply with its international obligations. South Africa is a party to a number of core international human rights treaties, including the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child. At the regional level, South Africa is, among others, party to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. These instruments impose a duty on the state 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 the violation of these rights.[46]

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[44] A 2008 study conducted by Vetten et al titled "Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng" above n 13 at 7, found that less than half of adult women's reported cases resulted in arrest and only one in seven went to trial. Of the total number of perpetrators of rape of adult women, only 4.7% were convicted.

[45] Ullman et al (2007) above n 13 at 826.

[46] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62.

[61] Section 39(1)(b) of the Constitution enjoins a court to consider these instruments when interpreting the Bill of Rights.[47]

Whether the declaration of constitutional invalidity will affect the right to a fair trial of an accused implicated in offences that occurred more than 20 years earlier

[62] Section 35(3)(l) of the Constitution recognises the principle of legality, namely that the accused may not be found guilty of a crime unless the type of conduct with which he or she is charged was recognised by the law as a crime at the time it was committed. This Court in *Masiya* applied this principle when it set aside the conviction for rape imposed by the Regional Court and replaced it with one of indecent assault. This Court stated the following:

> "Section 35(3)(l) of the Constitution confirms a long-standing principle of the common law that provides that accused persons may not be convicted of offences where the conduct for which they are charged did not constitute an offence at the time it was committed. Although at first blush this provision might not seem to be implicated by finding Mr Masiya guilty of rape in this case, because the act he committed did constitute an offence both under national law and international law at the time he committed it, in my view, the jurisprudence of this Court would suggest otherwise.
>
> . . .
>
> The strong view of legality adopted in *Veldman* suggests that it would be unfair to convict Mr Masiya of an offence in circumstances where the conduct in question did not constitute the offence at the time of the commission. I conclude so despite the fact that his conduct is a crime that evokes exceptionally strong emotions from many quarters of society. However, a development that is necessary to clarify the law should not be to the detriment of the accused person concerned unless he was aware of the nature of the criminality of his act. In this case, it can hardly be said that Mr Masiya was indeed aware, foresaw or ought reasonably to have foreseen that his act might constitute rape as the magistrate appears to suggest. The parameters of the trial were known to all parties before the Court and the trial was prosecuted, pleaded and defended on those bases. It follows therefore that he cannot and should not bear adverse

[47] *S v Baloyi* [1999] ZACC 19; 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 13.

> consequences of the ambiguity created by the law as at the time of conviction. The evidence adduced at the trial established that Mr Masiya was guilty of indecent assault. To convict him of rape would be in violation of his right as envisaged in section 35(3)(l) of the Constitution. I conclude therefore that the developed definition should not apply to Mr Masiya."[48] (Footnotes omitted.)

[63] In *Savoi* this Court held that the rule against retrospectivity was no longer a tool of interpretation but rather constituted a fundamental right not to be subjected to retrospective provisions.[49]

[64] The High Court, relying on *Bothma*,[50] held that an accused's right to a fair trial would be no more prejudiced in a prosecution after 20 years for sexual offences, than his rights in a prosecution after 20 years for rape or compelled rape. This conclusion was predicated on a finding that rights to a fair trial, coupled with the state's discretion on whether to prosecute based on the cogency and reliability of the evidence at its disposal, would serve to reduce any prejudice an accused person might have experienced as a result of a delay in prosecution beyond 20 years.[51]

[65] I agree with the High Court's conclusion. On the facts presented by the applicants, Mr Frankel could have been prosecuted for the common law offence of indecent assault as that was the crime at the time it was committed. The declaration of invalidity of section 18 does not therefore give rise to a new act which was not unlawful at the time it was committed.

Remedy

[66] It remains to consider an appropriate remedy. The constitutional invalidity of section 18 arises from that portion which bars, in all circumstances, the right to institute

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[48] *Masiya* above n 19 at paras 54 and 56-7.

[49] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC) at para 78.

[50] *Bothma* above n 15 at para 82.

[51] High Court judgment above n 2 at paras 81-3.

a prosecution for 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. In terms of section 172(1) of the Constitution,[52] a declaration to that effect must be made, including any order that is just and equitable. The offending portion of section 18 must be struck down. That leaves the question whether the portion of section 18 should be struck down with immediate effect or should be suspended to allow Parliament to enact remedial legislation. Related to this question is the question as to when the order of invalidity shall take effect.

[67] This Court has said on many occasions that in granting appropriate relief, and making an order that is just and equitable under section 172(1)(b), it is imperative that where possible and appropriate, successful litigants should obtain the relief they seek[53] and that that relief should be effective. As Ackermann J reasoned in *Fose*:

> "This brings me to the final and most debated question, namely whether in the present case any additional amount of punitive constitutional damages can be awarded to the plaintiff over and above the amounts he would be entitled to recover for patrimonial loss, pain and suffering, loss of amenities, *contumelia* and other general damages. Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, 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

[52] Section 172(1) of the Consitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[53] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

> 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."[54] (Footnote omitted.)

[68] These are not the only considerations that should be taken into account. Other considerations, too, are relevant to determining what is just and equitable. Where possible, relief should not only be granted to the applicants before a court, but to all those similarly situated to the applicants. Ordinarily, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity. But in situations where retrospectivity is to be applied, the court must consider the potential disruption and uncertainty that such an order could occasion.

[69] The High Court, after declaring section 18 constitutionally invalid, suspended the declaration of invalidity for a period of 18 months in order to allow Parliament to remedy the constitutional defect. It directed that pending the enactment of remedial legislation by Parliament, or the expiry of a period of 18 months whichever is the sooner, section 18(f) is to be read as though the following words "and all other sexual offences, whether in terms of the common law or statute" appear after the words "the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively".

[70] Although the applicants seek confirmation of the declaration of invalidity, they do not support the consequential orders made by the High Court. The first respondent does not oppose the application for confirmation as well as the consequential orders. The Minister supports the application for confirmation of the declaration of invalidity and the consequential orders of the High Court.

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[54] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

[71] The question therefore is whether the declaration of invalidity should be suspended. The Constitution expressly permits courts to suspend an order of invalidity.[55] When a court does so, the effect of the order is to permit the unconstitutional provision to continue to operate pending the end of the suspension period. In other words, the impugned provision continues to operate for a limited period. The applicants' opposition to the suspension of the declaration of invalidity is anchored on three pillars. The first is based on a need to obtain effective relief which the applicants contend would not be achieved if the declaration of invalidity were to be suspended. The second pillar is that there is no evidence that the declaration of invalidity without suspension would disrupt the administration of justice.

[72] This Court in *Gaertner* held that in deciding whether to suspend a declaration of invalidity a court must consider the interests of a successful litigant in obtaining immediate constitutional relief and the potential disruption of the administration of justice that would be caused by the lacuna.[56] Absence of disruption to administration of justice is, however, not decisive. In *Dawood* this Court held that where a range of possibilities exist, and a court is able to offer appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured.[57] This Court emphasised that it should be slow to make choices which are primarily choices suitable for the Legislature.[58] This principle was affirmed in *Teddy Bear Clinic*.[59] This is particularly true for this case where there are numerous sexual offences which are subject to a 20-year prescription period.

[55] Section 172(1)(b)(ii) of the Constitution above n 52.

[56] *Gaertner* above n 23 at para 77.

[57] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 64.

[58] Id.

[59] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) (*Teddy Bear Clinic*) at para 106.

[73] It seems to me that a proper balance can be struck by suspending a declaration of invalidity and ordering an interim reading-in. Suspension coupled with an interim reading-in is a remedy that does not intrude unduly into the domain of Parliament. It is a remedy that gives recognition to the need to respect the separation of powers and in particular the role of Parliament as the institution constitutionally entrusted with the task of enacting legislation.[60] Such a remedy will prevent uncertainty by avoiding the piecemeal judicial amendment of legislation. It is a remedy that will allow Parliament to conduct the thorough process of consideration and constitutionally required consultation to properly cure the constitutional defect. This is the remedy which in my view is just and equitable.

[74] The third pillar of the applicants' objection to suspension of the declaration of invalidity is based on the Minister's failure to explain what he has done to have the constitutional defect remedied. The contention is that this Court should not suspend the order in circumstances where the Minister has not accounted for the failure to correct the defect in the section. While I accept that there has been a delay on the part of the Minister to remedy the constitutional defect of the impugned provision, I do not agree that the delay is unreasonable and that it provides a sufficient basis to not suspend the constitutional invalidity of the order. In the explanatory affidavit deposed to by Mr Bassett on behalf of the Minister, the latter points out that the South African Law Reform Commission has over the years been assisting his department with empirical research on how best to infuse the changing norms, values and interests of society with the pre-1994 statutory framework and its recommendations have led to the amendment of, among others, the CPA and the enactment of SORMA. He points out further that that a further amendment in relation to aligning section 18(h) of the CPA with the new offences relating to the trafficking of children, and the inclusion of offences relating to torture, are under consideration. This explanation is reasonable and it was therefore a prudent thing for the Minister to wait for this Court's confirmation before taking steps

[60] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 66 and *C v Department of Health and Social Development* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at para 89.

to rectify the impugned provision. In *Auction Alliance* this Court held that suspension is not an exceptional remedy.[61] It made it clear that suspension is an obvious use of its remedial power under the Constitution to ensure that just and equitable constitutional relief is afforded to litigants while ensuring that there is no disruption of the regulatory aspects of the statutory provision that is invalidated.[62]

[75] The Minister has requested that a declaration of invalidity be suspended for 24 months to enable Parliament to enact remedial legislation. I do not think that the period sought by the Minister can be said to be unreasonably long to enact a statute which will be constitutionally compliant having regard to the sensitivity of the impugned provisions and the need to obtain the views of various public interest groups on the extent of the amendment of section 18. This Court in *Teddy Bear Clinic* held that in a participatory democracy, Parliament is best-suited to ensure that the ultimate statutory regime is decided upon in an open, inclusive and transparent manner, with all relevant parties who so desire being given an opportunity to shape the debate and the eventual outcome.[63] Another consideration is that the suspension would not cause the applicants or similarly situated survivors of sexual assault any prejudice as the suspension order is coupled with an interim reading-in.

[76] And should Parliament fail to enact remedial legislation within 24 months from the date of this order without seeking and obtaining an extension, the interim reading-in remedy will become final.

[77] The next issue for consideration is the date from which the declaration of invalidity should run. Section 18 was substituted by section 27(1) of the Criminal Law Amendment Act.[64] Although the Act came into operation on 13 November 1998,

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[61] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* [2014] ZACC 3 (CC); 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) (*Auction Alliance*) at para 55.

[62] Id.

[63] *Teddy Bear Clinic* above n 59 at para 109.

[64] Above n 31.

section 27 was deemed to have come into operation on 27 April 1994. The declaration of invalidity should therefore apply retrospectively to 27 April 1994, which is the date on which the interim Constitution came into operation.[65] It is not contended that the declaration of invalidity with retrospective effect has a potential to cause unnecessary dislocation and uncertainty in the administration of justice.[66]

[78] I therefore conclude that the order of the High Court is just and equitable.

Costs in this Court

[79] These are proceedings which have been brought to this Court in terms of section 167(5) of the Constitution.[67] The applicants submitted that the Minister must pay the costs of confirmation proceedings. The Minister disagrees and cites recent decisions in which costs were only awarded where the confirmation was opposed.[68] The Minister contends that each party should pay its own costs in this matter as he does not oppose confirmation. The applicants successfully challenged the constitutionality of section 18 of the CPA in the High Court where they were awarded costs. It is the norm to award costs in favour of a successful applicant for a confirmation and there is no reason why this principle should not apply in this matter. The fact that the Minister has not opposed the confirmation proceedings does not in itself provide a sufficient basis for this Court to deviate from this principle. In the circumstances the Minister should pay the costs of the confirmation proceedings.

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[65] *Ferreira v Levin NO* and *Vryenhoek v Powell NO* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 27.

[66] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 43.

[67] Section 167(5) of the Constitution provides that—

> "[t]he Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force".

[68] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* [2016] ZACC 32; 2016 (6) SA 596 (CC); 2016 (12) BCLR 1535 (CC) at para 212(9); *McBride v Minister of Police* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) at para 57; and *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* [2016] ZACC 2; 2016 (3) SA 160 (CC); 2016 (4) BCLR 469 (CC) at para 60.

Appeal against costs order by the Estate

[80] The Estate is appealing against the costs order of the High Court in terms of which that Court ordered it to pay costs jointly and severally with the Minister until 20 January 2017, including the costs of two counsel, after which date the costs were ordered to be paid solely by the Minister. The Estate challenges this order. It contends that the High Court misdirected itself for three reasons.

[81] Firstly, the Estate contends that the application primarily concerned the constitutional validity of an Act of Parliament and thus the litigation was primarily between the applicants and the Minister. Secondly, the Estate contends that although Mr Frankel initially opposed the application, this was on a legal, principled basis as the initial relief was incompetent in so far as it did not include common law crimes. This was amended to include such offences and thus, the Estate contends, Mr Frankel was partially successful in his opposition. Lastly, the Estate contends that the High Court erred in disregarding an agreement in terms of which the applicants waived their right to seek costs against the Estate. In doing so, argues the Estate, the Court acted contrary to the *pacta sunt servanda* principle[69] (the principle that agreements are binding and must be enforced) which it contends it was only entitled to deviate from if enforcing the agreement would be unfair or unjust.[70]

[82] The alternative ground is that the High Court misdirected itself in the exercise of its discretion when applying the *Biowatch*[71] principles pertaining to costs in constitutional litigation.

[69] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd* [2016] ZACC 33; (2016) 37 ILJ 2723 (CC); 2016 (12) BCLR 1515 (CC) at para 22 and *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 10 where the Court defined the principle as "the common law rule that agreements are binding and must be enforced".

[70] *Barkhuizen* id at para 69.

[71] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[83] The Minister opposes the appeal by the Estate on the grounds that Mr Frankel actively opposed the application right until his death and his opposition was only withdrawn thereafter. Thus his Estate should bear the costs as ordered. As for the agreement between the applicants and the Estate, the Minister submits that the High Court was correct in disregarding it. The High Court's ruling in this regard is not without authority. This Court noted in *Malachi* that—

> "[t]his Court is, however, not bound by that agreement. Costs are a matter which lies entirely within the discretion of this Court, to be exercised with due regard to the particular circumstances of each case."[72]

[84] Relying on this dictum the Minister submits that this Court cannot be bound by the agreement between the applicants and the Estate regarding costs. In the alternative, the Minister submits that should this Court find that the applicants have indeed waived their right to claim costs as per the agreement, this Court should direct that the Minister is liable for only 50 percent of the costs incurred up until 20 January 2017.

[85] The award of costs is a matter within the discretion of the court. The discretion inherent in the decision to award costs is one that must be exercised judicially having regard to all the relevant considerations.[73] An appeal court will only interfere with the exercise of that discretion if it is demonstrated that it has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principle of law.

[86] The question is whether the High Court breached the principle of *pacta sunt servanda* when it refused to uphold the agreement and ordered the Estate to pay costs. It is correct that the general principle is that courts will enforce contracts between private parties which are entered into freely and voluntarily, and as long as

[72] *Malachi v Cape Dance Academy International (Pty) Ltd* [2010] ZACC 24; 2010 (6) SA 1 (CC); 2011 (3) BCLR 276 (CC) at para 52.

[73] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

their objective terms are consistent with public policy.[74] It must be accepted that the agreement on costs liability concluded between the applicants and the Estate cannot be said to be in any way against public policy. It may be enforceable at the instance of an aggrieved party. The difficulty for the Estate is that we are concerned here with a contract, the application of which goes beyond the confines of the primary parties. Its terms affect the rights of the litigants who are not parties to the agreement. The High Court was therefore correct in holding that it was not bound by the agreement entered into between the applicants and the Estate in relation to costs where the agreement affected third parties, such as the Minister. The Minister was a party to the proceedings and for that reason his consent had to be secured for the conclusion of the agreement that sought to settle the disputed issues between the parties. It is not in dispute that the Minister had not agreed to the conclusion of the agreement by which it was sought to settle liability for costs between the applicants and the Estate. Liability for costs was an issue in which the Minister had a substantial interest. This ground of appeal should therefore fail.

[87] The alternative argument advanced by the Estate is one based on the *Biowatch*[75] principle. The contention is that this application is not one of private litigation in which the ordinary rules pertaining to costs orders apply. The Estate argues it is a matter of constitutional litigation, which therefore means that the High Court's discretion on costs must be exercised in accordance with the special rules relating to costs in constitutional litigation and where necessary, to adapt substantially the common law rules relating to costs. In relation to the approach to the exercise of discretion in constitutional litigation in which the state is a primary role-player this Court in *Biowatch* had this to say:

> "[T]he general point of departure in a matter where the [s]tate is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the [s]tate should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any

[74] *Barkhuizen* above n 69 at paras 57 and 87.

[75] *Biowatch* above n 71.

> private litigants who have become involved. This approach locates the risk for costs at the correct door – at the end of the day, it was the [s]tate that had control over its conduct."[76]

[88] The Estate's reliance on the *Biowatch* principle is misplaced. Mr Frankel was not the party that initiated the proceedings in which the constitutionality of section 18 was challenged. Mr Frankel was a respondent and he opposed prayer 2 of the notice of motion until his death on 13 April 2017. In doing so he was not seeking to promote the advancement of constitutional justice which is the conduct that would provide a basis for not awarding costs against him in the event that he lost in his constitutional challenge. He was pursuing his own self-interest and therefore the *Biowatch* principle does not protect him against a costs order. In the circumstances the appeal based on this alternative ground must also fail.

Order

[89] In the result, the following order is made:

1. The declaration of constitutional invalidity of section 18 of the Criminal Procedure Act 51 of 1977 made by the High Court of South Africa, Gauteng Local Division, Johannesburg is confirmed.
2. The order is suspended for 24 months from the date of this order to afford Parliament an opportunity to enact remedial legislation.
3. During the period of suspension section 18(f) of the Criminal Procedure Act is to be read as though the words "and all other sexual offences whether in terms of common law or statute" appear after the words "the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively."
4. Should Parliament fail to enact remedial legislation within the period of suspension, the interim reading-in remedy shall become final.
5. The declaration of invalidity is retrospective to 27 April 1994.

[76] Id at para 56.

6. The first respondent's appeal against the costs order of the High Court is dismissed with no order as to costs.

7. The second respondent is to pay the costs of the confirmation proceedings.

For the Applicants:	A Katz SC instructed by Ian Levitt Attorneys
For the First Respondent:	S Kazee instructed by Billy Gundelfinger Attorneys
For the Second Respondent:	S Budlender and P Seseane instructed by the State Attorney
For the Fourth Respondent:	F Hobden, B Pithey and N Kakaza instructed by the Women's Legal Centre
For the Fifth Respondent:	G Snyman instructed by the Centre for Applied Legal Studies
For the Sixth Respondent:	A Du Toit instructed by Lawyers for Human Rights