



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Nicole Levenstein and Others v The Estate of the Late Sidney Lewis Frankel and Others**

**CCT 170/17**

**Date of hearing: 14 November 2017**

**Date of judgment: 14 June 2018**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On 14 June 2018 at 10h00, the Constitutional Court handed down judgment in an application for the confirmation of an order of constitutional invalidity made by the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). The High Court declared section 18 of the Criminal Procedure Act 51 of 1977 (CPA) to be inconsistent with the Constitution and invalid to the extent that it bars, in all circumstances, the right to institute a criminal prosecution for all sexual offences, other than rape or compelled rape, trafficking persons for sexual purposes and using a child or person who is mentally disabled for pornographic purposes, after the lapse of a period of 20 years from the time when the offence was committed.

During the period between 1970 and 1989, when the applicants were aged between 6 and 15 years old, the late 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 the imposition of a 20-year prescription period, provided for in section 18 of the CPA, for all sexual offences other than those referred to above, meant that the alleged offences prescribed between 1999 and 2011. The applicants allege that it was only after they acquired full appreciation of the criminal acts committed by the late Mr Frankel, between June 2012 and June 2015, that they instituted civil and criminal action against him. The Director of Public Prosecutions, Gauteng, however, declined to prosecute, on the ground that the right to prosecute Mr Frankel for the offences concerned had prescribed in terms of section 18.

Consequently, the applicants applied to the High Court for an order declaring that section 18 of the CPA is inconsistent with the Constitution and invalid to the extent that it bars the right to institute a prosecution for all sexual offences, other than the offences listed above, after the lapse of a period of 20 years from the time when the offences were committed. The applicants contended that section 18 is irrational and arbitrary and therefore unconstitutional and invalid, because it makes an arbitrary distinction in respect of the gravest of crimes. They further contended that it unjustifiably violates their right 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.

The High Court declared section 18 unconstitutional and invalid as the distinction it provided for is irrational and arbitrary. Further, the Court held that section 18 unjustifiably limits survivors of sexual offences' rights to equality and human dignity, as contemplated in sections 9 and 10 of the Constitution, respectively. The Court suspended the declaration of constitutional invalidity for a period of 18 months to allow Parliament to remedy the constitutional defect. It further ordered that, pending the enactment of remedial legislation by Parliament, section 18(f) of the CPA is to be read as though the 20-year prescription period does not apply to all other sexual offences, whether in terms of common law or statute. To achieve this, the Court added (read-in) appropriate words to section 18(f).

In the Constitutional Court, the applicants supported the reasoning of the High Court but not the portion of the order suspending the declaration of invalidity. The applicants contended that there is no basis for suspending the declaration. They argued that the suspension coupled with an interim reading-in order is "technically flawed" on the ground that, should Parliament fail to enact remedial legislation within the specified period, the declaration of invalidity becomes operative without the words that have been "read-in". This, they said, would not be just and equitable. The applicants therefore called for a declaration of invalidity coupled with a "reading-in", without suspending the declaration of invalidity, to allow Parliament to cure the defect.

Mr Frankel has since died and his estate has been substituted as the first respondent. The Estate did not oppose the application for confirmation, it did however lodge an application for leave to appeal against the costs order of the High Court. The second respondent (Minister) supported the application for confirmation but rejected the applicants' contention that the order of invalidity should have immediate effect. The Minister also asked for a longer suspension period to allow Parliament to effect remedial legislative amendments. The Minister contended that, since he did not oppose the confirmation proceedings, he should not be ordered to pay the other parties' costs in the Constitutional Court. He also opposed the appeal by the Estate against the High Court costs order on the ground that Mr Frankel had "vigorously" opposed the applicants' constitutional challenge.

In a unanimous judgment, penned by Zondi AJ, in which Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, and Theron J concurring, the Constitutional Court held that the primary rationale for the distinction contemplated in section 18, is based on the perception that certain sexual

offences are more serious than others. The Court accepted that the survivors of sexual assault face similar personal, social and structural disincentives when reporting these offences and that the harm caused by sexual offences is similar, regardless of whether it is the consequence of rape or other forms of sexual assault. In essence, the Court reasoned that the effect of section 18 is two-fold: (i) it over-emphasises the significance of the nature of the offence, at the expense of the harm it causes to survivors thereof, and therefore fails to serve as a mechanism to protect and advance their interests; and (ii) it penalises a complainant by preventing him or her from pursuing a charge, where the delay is caused by his or her inability to act. Lastly, the Court held that section 18 undermines the state's efforts to comply with international obligations, which impose a duty on the state to prohibit all gender-based discrimination. The Court confirmed the High Court's order that section 18 is irrational and arbitrary, and therefore unconstitutional, insofar as it does not afford the survivors of sexual assault other than rape or compelled rape the right to pursue a charge, after the lapse of 20 years from the time the offence was committed.

The Court considered whether the order of constitutional invalidity would have any impact on the right to a fair trial, of an accused implicated in offences that occurred more than 20 years ago. The Court agreed with the High Court's conclusion that an accused's right to a fair trial would be no more prejudiced in the prosecution of sexual offences after 20 years, than his or her rights in a prosecution of rape or compelled rape, after 20 years.

The Court accordingly suspended the declaration of invalidity for a period of 24 months to allow Parliament to cure the constitutional defect. It further ordered that during the period of suspension section 18(f) 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". And should Parliament fail to enact remedial action within 24 months from 14 June 2018, the Court held that the interim reading-in will become final. As section 18 was substituted by section 27(1) of the Criminal Law Amendment Act 105 of 1997, the latter coming into operation on 27 April 1994, the Court held that the declaration of invalidity should therefore apply retrospectively from 27 April 1994.

The Court ordered the Minister to pay the costs of the confirmation proceedings, and dismissed the Estate's appeal against the costs order of the High Court. The Court held that the agreement whereby the applicants waived their rights to seek costs against the Estate goes beyond the confines of the parties to the agreement – instead its terms affect the Minister; a party to the proceedings whose consent had not been obtained for the conclusion of the agreement.