

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No.: 29573/2016

In the matter of:

<b>NICOLE LEVENSTEIN</b>	First Applicant
<b>PAUL DIAMOND</b>	Second Applicant
<b>GEORGE ROSENBERG</b>	Third Applicant
<b>KATHERINE ROSENBERG</b>	Fourth Applicant
<b>DANIELA McNALLY</b>	Fifth Applicant
<b>LISA WEGNER</b>	Sixth Applicant
<b>SHANE ROTHQUEL</b>	Seventh Applicant
<b>MARINDA SMITH</b>	Eighth Applicant

and

<b>SIDNEY LEWIS FRANKEL</b>	First Respondent
<b>MINISTER OF JUSTICE AND CORRECTIONAL SERVICES</b>	Second Respondent
<b>DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG</b>	Third Respondent

and

<b>WOMENS LEGAL CENTRE TRUST</b>	First <i>Amicus Curiae</i>
<b>TEDDY BEAR CLINIC</b>	Second <i>Amicus Curiae</i>
<b>LAWYERS FOR HUMAN RIGHTS</b>	Third <i>Amicus Curiae</i>

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**PRACTICE NOTE: SECOND AMICUS CURIAE**

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1. **Date on roll:** 23 and 24 May 2017
2. **Number on roll:** Unknown
3. **Counsel for the second** Gina Snyman  
**Amicus Curiae:** Cell no: 072 180 7524

4. **NATURE OF APPLICATION**

The Applicant challenges the Constitutionality of section 18 of the Criminal Procedure Act.

5. **ISSUES TO BE DETERMINED IN THE APPLICATION**

The main application seeks an order declaring that Section 18 of the Criminal Procedure Act 51 of 1997 (“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 offences as contemplated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, other than rape or compelled rape, after the lapse of a period of 20 years from the time when the offence was committed. The TBC supports this application.

6. **NECCESITY TO READ PAPERS**

It is necessary to read the founding affidavit and expert affidavit of Woollet in the TBC’s bundle.

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**SECOND *AMICUS CURIAE*'S WRITTEN SUBMISSIONS**

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1. These heads of argument are filed on behalf of the Teddy Bear Clinic (“TBC”), the second *amicus curiae*. On 1 February 2017, Lamont J made an order *inter alia* that:
  - 1.1. Subject to any ruling by this court as to the nature and extent of such intervention – the TBC is granted leave to intervene as an *amicus curiae*, to make written submissions, to make oral submissions, and is permitted to adduce the evidence contained in its founding affidavit and annexures.
2. The main application seeks an order declaring that Section 18 of the Criminal Procedure Act 51 of 1997 (“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 offences as contemplated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, other than rape or compelled rape, after the lapse of a period of 20 years from the time when the offence was committed. The TBC supports this application.
3. The TBC intervenes to advance legal submissions regarding the constitutionality of section 18 of the CPA in light of the evidence it places before the court that:
  - 3.1. the distinction between sexual assault and rape in respect of the nature of the harm is arbitrary;
  - 3.2. the State’s duty to protect is particularly vital in response to silent communities and failed systems of care; and
  - 3.3. the nature of disclosure amongst adults is not a single event.<sup>1</sup>

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<sup>1</sup> TBC Founding Affidavit para 6 p7

## DISTINGUISHING RAPE AND SEXUAL ASSAULT

4. The courts have recognised that the consequences of rape and sexual assault affect a multitude of the individual victim's rights.
5. In *S v Chapman*<sup>2</sup> the court discussed the seriousness of the offence of rape. Mahomend CJ stated that "[r]ape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim".<sup>3</sup>
6. In *Masiya v Director of Public Prosecutions Pretoria and Another*<sup>4</sup> Nkabinde J emphasized that "sexual violence and rape [...] offends the privacy and dignity [of victims]".<sup>5</sup> [Emphasis added]
7. In *Van Zijl v Hoogehout*<sup>6</sup> the court referred at length to the seriousness of childhood sexual abuse and the severe effect it has on the rights and psychological well-being of the individual.<sup>7</sup> On the serious effects of sexual abuse, the court included: distortion of a child's emotional and cognitive relationship with the world, stigmatization which leads to feelings of badness, shame and guilt which can colour the self image of the child. In adults the effects of sexual abuse can result in aversion to sex, flashback to the

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<sup>2</sup> *S v Chapman* 1997 (2) SACR 3 (SCA). Hereinafter referred to as '*Chapman*'.

<sup>3</sup> *Chapman* para 5.

<sup>4</sup> *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC). Hereinafter referred to as '*Masiya*'.

<sup>5</sup> *Masiya* at para 29.

<sup>6</sup> *Van Zijl v Hoogehout* [2004] ZASCA 84. It is important to note this case dealt with civil damages and prescription.

<sup>7</sup> *Van Zijl* paras 10 to 14

molestation, and negative attitudes towards sexuality and their own bodies.<sup>8</sup>

8. The expert affidavit of the TBC goes further to explain that these psychological effects on the victim occur in the context of rape and sexual assault, and that the harm in respect of both is comparable. Woollet explains that:

*“[v]ictims’ response to sexual assault and rape is nuanced, and victims respond differently. Long term sexual assault and grooming can lead to sustained post traumatic distress and degrees of dissociation, which in some circumstances can be lessor, similar to, or worse, than the incidence of rape.”<sup>9</sup>*

9. It cannot be disputed that the severity of the effects of sexual assault and rape overlap.
10. As in *Chapman* where the ‘seriousness’ of the crime is based on the effect the offence has on the individual’s rights and psychological wellbeing, it is fitting that sexual assault be considered as serious – for victims to be afforded equal protection in law.
11. The distinction between the protection afforded to survivors of rape by section 18 of the CPA, vis-à-vis survivors of sexual assault, is arbitrary. It discriminates against victims of sexual assault, and, infringes the right to equality in section 9 of the Constitution.

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<sup>8</sup> *Van Zijl* para 10.

<sup>9</sup> TBC Founding Affidavit: para 43 p 23

## THE STATE'S DUTY TO PROTECT

12. Section 7(2) of the Constitution imposes a duty on the state to “respect, protect, promote and fulfill” the rights in the Bill of Rights, including equality, dignity and freedom from violence.

13. Section 12 of the Constitution deals with freedom and security of the person:

*“12. (1) Everyone has the right to freedom and security of the person, which includes the right—*

*[...]*

*(c) to be free from all forms of violence from either public or private sources;”*

14. Sections 7 and 12 encompass both negative and positive duties on the state. These duties are implicated in different ways. Through the enacting laws, policing, prosecution and the court process carries out its duty is the way in which the state exercises its duty to protect against the deprivation of security by others and the duty to provide security to those who are unable to provide for their own security.

15. The duty to protect is positive. It obliges the state to protect these rights from infringement by third parties. The duty to “promote and fulfil” is also positive. It requires the state to use its power to advance these rights and assist individual right holders to realise them.

16. In *S v Baloyi*,<sup>10</sup> the Constitutional Court dealt with the constitutional requirement to deal effectively with domestic violence, which it is submitted is applicable here.

With reference to section 12(1)(c) it held that:

*“The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with section 7(2), section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.”<sup>11</sup>*

17. In *Carmichele v Minister of Safety and Security*<sup>12</sup> the court held that the state is obliged in certain circumstances “to provide appropriate protection to everyone through laws and structures designed to afford such protection”.<sup>13</sup>

18. Prosecuting sexual assault is an aspect of the state’s duty to protect victims of sexual assault.

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<sup>10</sup> *S v Baloyi and Others* 2000 (2) SA 425 (CC)

<sup>11</sup> *Baloyi* at para 11

<sup>12</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)

<sup>13</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) paras 44 to 45



19. Removing the application of a prescription period to criminal prosecution for sexual assault is such a measure which will afford greater protection to victims of sexual assault.

20. In *Bothma v Els*<sup>14</sup> the Constitutional Court considered the state's duty to prosecute rape in relation to the legislature accepting that there should be no prescription period for prosecuting rape:

*“rape often entails a sexualised act of humiliation and punishment that is meted out by a perpetrator who possesses a mistaken sense of sexual entitlement. The criminal justice system should send out a clear message through effective prosecution that no entitlement exists to perpetrate rape.”*<sup>15</sup>

## **THE NATURE OF DISCLOSURE**

21. The nature of sexual assault disclosure is a complex and lengthy process.<sup>16</sup>

22. In *Van Zijl* the court dealt with the nature of trauma and its effects on the memory of the victim of sexual abuse. The court held that:

*“In short, the expert evidence demonstrates that:*

*(1) chronic child abuse is sui generis in the sequelae that flow from it;*

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<sup>14</sup> *Bothma v Els and 2010 (2) SA 622 (CC.)* Hereinafter referred to as 'Bothma'

<sup>15</sup> *Bothma* para 45

<sup>16</sup> TBC Foundig Affidavit para 82 p 38

*(2) distancing of the victim from reality and transference of responsibility by the victim on to himself or herself are known psychological consequences;*

*(3) in the absence of some cathartic experience, such consequences can and often do persist into middle age despite the cessation of the abuse during childhood.”<sup>17</sup>*

23. With regard to when the plaintiff became ‘aware’ of the sexual abuse against her, in order to proceed with a civil damages claim, Heher JA stated

*“[t]he incidents in adulthood which counsel has cited are consistent with the plaintiff’s knowledge that the defendant had abused her, but they were visceral reactions falling short of rational appreciation that he rather than herself was the culpable party. It is more likely that the plaintiff developed insight, and with it the meaningful knowledge of the wrong that sets the prescriptive process in motion, only when the progressive course of self-discovery finally removed the blindfold she had worn since the malign influences which I have described took over her psyche.”<sup>18</sup>*

24. In *Bothma* the Constitutional Court considered memory and recollection in relation to the violating nature of rape:

*“[c]hild rape is an especially egregious form of personal violation. As law reports from other jurisdictions show, it is sadly found in all social classes in all parts of the world. It is widespread, if under-reported, in*

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<sup>17</sup> Van Zijl para 14

<sup>18</sup> Van Zijl para 44

*South Africa. By its nature it is frequently characterised by secrecy and denial. There is accordingly a special public interest in taking action to discourage and prevent the rape of children. Because it often takes place behind closed doors and is committed by a person in a position of authority over the child, the result is the silencing of the victim, coupled with difficulty in obtaining eye-witness corroboration. Complainants should be encouraged rather than deterred when, breaking through feelings of fear and shame, they seek to bring to light past abuses against them.<sup>19</sup> [Emphasis added]*

In light of the above it can be seen that the court recognises the effects that sexual violence perpetrated on an individual can have on that individual's memory and ability to disclose the abuse.

25. In *Bothma* the Constitutional Court further recognised the importance of encouraging the reporting of child rape and supporting survivors who report their abuse.<sup>20</sup> It held:

*“there ... exist strong public policy reasons for allowing the nature of the crime to weigh heavily in favour of allowing these charges to be aired in court. Adults who take advantage of their positions of authority over children to commit sexual depredations against them, should not be permitted to reinforce their sense of entitlement by overlaying it with a sense of impunity... the knowledge that one day the secret will out, acts*

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<sup>19</sup> Bothma para 46.

<sup>20</sup> Bothma paras 45-47

*as a major deterrent against sexual abuse of other similarly vulnerable children.”<sup>21</sup>*

26. The above highlights the general complexity and contingency of the disclosure process for victims of sexual assault. A number of nuanced factors and specific and intersectional circumstances contribute to disclosure rates and timings, with a general trend indicating that the disclosure of childhood sexual assault is widely delayed until adulthood.<sup>22</sup>

27. The prescription period of 20 years imposed by section 18 of the Criminal Procedure Act is insufficiently cognisant of the nature and process of sexual assault disclosure. It does not take cognizance of the fact that disclosure of sexual abuse is not a single event, and that it is a dynamic process that occurs in stages over a lengthy period of time and impacted by numerous factors, thereby denying complainants the right to access to justice through the court.<sup>23</sup>

## **THE CONSTITUTIONALITY OF SECTION 18**

28. Section 18 of the CPA deals selectively with victims of sexual assault. No prescription is applicable to criminal prosecution for rape survivors, while victims of sexual assault are left with limited redress, or without recourse of access to courts. Section 18 precludes some victims of sexual offences from access to criminal legal recourse, while protecting others. The distinction between rape and sexual assault is arbitrary, and results in an unequal application of the law. It unfairly discriminates against victims of sexual

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<sup>21</sup> Bothma at para 65

<sup>22</sup> TBC Founding Affidavit para 98 p 43

<sup>23</sup> TBC Founding Affidavit para 99 p 43

assault whose claims prescribe.

29. Section 9 of the Constitution provides that:

*“9 (1) Everyone is equal before the law and has the right to equal protection before the law.*

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. [...].”*

30. The distinction between the protection afforded to survivors of rape by section 18 of the CPA, vis-à-vis survivors of sexual assault, infringes the right to equality in section 9 of the Constitution.

31. Further section 18 of the CPA infringes section 34 of the Constitution which provides that:

*“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court [...].”*

32. The nature of the right of access to courts is infringed where section 18 does not account for the nature of disclosure of sexual offences, and incorrectly deems sexual offences a lesser crime to rape.

33. It is submitted that both the rights to equality and access to courts need to be positively interpreted under section 39(1)(a) and (2) of the Constitution to promote the values underlying the Bill of Rights.

## **CONCLUSION**

34. The prescription period for sexual assault contained in section 18 of the CPA denies victims of sexual assault their constitutional rights to justice, dignity and equality, and is accordingly unlawful and invalid.

**Gina Snyman**

**Johannesburg**

**10 March 2017**