

YG V S - CORPORAL PUNISHMENT AND THE BEST INTERESTS OF THE CHILD

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Recently, the South Gauteng High Court ruled in a landmark case concerning a contentious matter - that of children and corporal punishment. The judgment found its roots in the constitutionally-protected principle of the best interests of the child, as articulated in section 28(2). This section provides that “[a] child’s best interests are of paramount importance in every matter concerning the child”. The Court effectively proscribed corporal punishment of children by parents, and removed “reasonable chastisement” as a valid defence.

The appellant in this matter (YG) is the father of a 13-year-old boy (M). YG was tried and found guilty in the Johannesburg Regional Court, on two charges of assault with intent to do grievous bodily harm. The charges related to two separate assaults - the first against M and the second against his (YG) wife. M was examined by a medical doctor who testified regarding the gravity of the injuries sustained. The testimony disproved YG’s allegations that he used open palms to assault the child, versus fists that left the bruising in question. YG used “reasonable chastisement” as a defence and said that he was merely exercising his right as a parent to do so. Until this judgment, this was an accepted defence to the charge of common law assault.

The main issue was whether this defence, which is based on the common law right of a parent to exact corporal punishment on their child, is compatible with the Constitution. In coming to its decision, the Court relied on submissions from numerous *amici curiae* namely: the Minister of Justice and Correctional Services, the Minister of Social Development, the Centre for Child Law (CCL) the Children’s Institute, the Quaker Peace Centre, Sonke Gender Justice and Freedom of Religion South Africa (FORSA). Those who opposed corporal punishment argued that the defence of reasonable chastisement is inconsistent with the Constitution and asked the Court to develop the common law by declaring the defence no longer admissible. A nexus was drawn between corporal punishment and violence against children.

On the other hand, FORSA argued that millions of South Africans of different faiths believe that scriptures command appropriate chastisement for children, including corporal punishment. They argued that this belief is central to many faith groups and that the Court had a duty to respect the religious convictions of all people, as per the Constitution in section 15. Therefore, they argued that the defence should be retained as acceptable.

The Court went to great pains to explore both national legislation and international law by which South Africa is bound. An important highlight in this regard was the constitutional obligation placed on the courts to apply the Bill of Rights in section 8(1), and the section 39(2) duty to develop the common law to bring it in line with the Bill of Rights. Various international conventions emphasise the importance of religion in society, as well as the protection of the family unit. FORSA cautioned the Court not to assign one understanding and/or a single set of values to the concept of a family unit.

Human dignity, equal protection under the law, freedom from all forms of violence - regardless of the source - were all identified as the violated rights at issue. Furthermore, the right of children to be protected from maltreatment, neglect, abuse or degradation, and most importantly, the consideration of the best interests of the child in any matter concerning them, were also considered. In essence, the Court had to find the delicate balance between the freedom of religion and the best interests of the child.

The Court also emphasised the protection afforded to children under section 9(1) of the Constitution - that of equality. Section 9(3) further protects children from unfair discrimination based on age. The fact that the “reasonable chastisement” defence is predicated on age and disregards the equal, or even greater level of force used, is concerning.

The legal definition of assault is the unlawful and intentional application of force to the person of another. The main sticking point here is that the defence of reasonable chastisement is not applicable to an adult offender, but it is in the context of disciplining a child. The only qualification to this defence is that it must be moderate and reasonable. This is problematic because there are no hard and fast rules concerning what amounts to ‘moderate’ or ‘reasonable’. In addition, the chastisement must have been meted out in good faith for disciplinary purposes, but discretion as to how, lies with the parents. This broad and vague guide leaves a grey area in which abuse can occur.

The judge stressed the fact that when an adult is assaulted, the law takes its course to protect the rights of said adult. However, when a child is assaulted, the defence of reasonable chastisement permits and obliges the State to treat them with less concern. The State should have the same obligation to protect a child in that situation as it does an adult. The Court further qualified that parents who did use corporal punishment would not be criminally charged arbitrarily, but would be diverted to existing intervention services.

This judgment is important as it emphasises the inherent dignity to which children are entitled. It also reinforces their individual identities, outside of their parents. It emphasises the vertical operation of the Constitution for each individual, and not via a parent. It requires the State to relate to children as individuals with their own human dignity and elevated them from second-class citizen status. This judgment brings the Constitution into an area the courts have always been cautious to regulate - that of the home (private sphere) - and put its foot down and takes a step forward in the universal application of the supreme law.