

## **LEVENSTEIN AND OTHERS V THE ESTATE OF THE LATE SYDNEY LEWIS FRANKEL**

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On 14 June 2018, the Constitutional Court ruled in an application for the confirmation order of a constitutional invalidity order made by the Johannesburg High Court. The High Court declared section 18 of the *Criminal Procedure Act* (CPA) inconsistent with the Constitution and invalid insofar as it bars, in all circumstances, the right to institute criminal prosecution for all sexual offences other than rape and compelled rape, after 20 years have lapsed since the commitment of the offence.

The applicants are adult men and women who were allegedly sexually assaulted by the now late Mr Frankel in 1970 and 1989 when they were between six and 15 years old. The applicants claim to have suffered physical, emotional and psychological trauma because of the alleged assault. The 20-year prescription period provided for by section 18 of the CPA meant that the alleged offences prescribed between 1999 and 2011. The applicants said that it was only after they fully appreciated the gravity of the criminal acts committed by Frankel (between June 2012 and 2015) that they instituted both civil and criminal action against him. However, the Director of Public Prosecutions (DPP) of Gauteng declined to prosecute, citing the CPA's prescription period as the reason.

The applicants approached the High Court seeking an order declaring section 18 of the CPA invalid to the extent that it bars the right to institute prosecution for all offences as contemplated by the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (SORMA) other than the abovementioned, after a 20-year period. Furthermore, they averred that section 18 was invalid because it arbitrarily distinguishes rape or compelled rape from other forms of sexual offence. In addition, they argued that section 18 seeks to distinguish between the types of offences based on their perceived seriousness impact on survivors. They also argued that the section unjustifiably violated their rights to human dignity, equality, non-discrimination, to be protected from abuse as children, to be free from all forms of violence from public and private sources, and access to courts.

The High Court agreed with the applicants and found section 18 unconstitutional because there was no rational basis for distinguishing rape or compelled rape from other sexual offences for prescription. Section 18 was found to unjustifiably limit the rights of survivors of sexual offences, of equality and human dignity. The High Court found that there is sufficient evidence showing that these offences exact deep and continuous trauma on survivors. Many suffer quietly and often, never disclose the offences. If they do disclose, it is often after significant time has passed. This results in the perpetrators never being held accountable. The High Court suspended the declaration of constitutional invalidity for 18 months to allow Parliament to remedy the offending provision. It further ordered that in the interim, section 18 be read as applying to all other sexual offences and not just rape.

The High Court also addressed the question of whether prosecuting Mr Frankel over 20 years after the alleged offences occurred would violate the principle of legality as



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contemplated in section 35 of the Constitution. This principle provides an accused person with the least severe punishment in a case where the prescribed punishment for the offence has changed between the commission of the offence and the time of sentencing. The High Court said that the principle of legality was not compromised, as the acts allegedly committed by Mr Frankel were indecent assault, which was a common law offence at the time.

In the Constitutional Court, the questions to be asked were whether section 18 is inconsistent with the Constitution, and if so, should the declaration be suspended with or without an interim reading in. Before the Constitutional Court, the applicants supported the High Court's reasoning but for the order suspending the declaration of invalidity. They said that there was no basis for the declaration's suspension because together with an interim reading-in order, the suspension was flawed. They argued this on the grounds that, should Parliament fail to remedy section 18 on time, the declaration would be operative without the words that have been read in and that this would be unjust. They asked for a declaration of invalidity and a reading in without suspending the declaration to allow Parliament to cure the defect.

The Constitutional Court said that the primary reason for the distinction in section 18 is based on the perception that some sexual offences are more serious than others. The Court also accepted that survivors of sexual crimes experience similar obstacles when reporting them and the harm caused is similar, regardless of whether caused by rape or other sexual offences. It also said that section 18 overemphasises the significance of the nature of the offence at the expense of the harm caused. The result is that the victim's interests are not protected. Section 18 penalises a victim by preventing them from pursuing a charge where the delay is caused by an inability to act. This is attributed to the fact that a significant number of children do not speak out of fear. A significant number of adults never disclose abuse either. The Court also said that the provision undermines the State's efforts to fulfil its international obligations to prohibit all gender-based discrimination.

The Court confirmed the High Court's order and found section 18 unconstitutional insofar as it does not allow survivors of other forms of sexual offences to pursue a charge after the 20-year period lapsed. The Court agreed with the High Court that an accused's right to a fair trial would be no more prejudiced in the prosecution of sexual offences after the 20-year period than his/her rights in a prosecution of a rape before the period has prescribed. The Court then suspended the declaration for 24 months to allow Parliament to cure the defect. During the period of suspension, the offending section would be read to include all other sexual offences. Should Parliament fail to remedy the section during the given period, the reading in would become final.

This judgment is important for the victims of sexual assault who, for whatever reason, could not and did not come forward at the time the assault occurred. It accepts that all sexual offences are equally serious and that the harm they all cause is significantly grave and therefore, all victims have a right to recourse whenever they are able to lay a charge. The



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judgment is a progressive step in the protection of the rights of children, in protecting their right to freedom and security of the person, human dignity and equality. The ruling serves to empower survivors of sexual assault to come forward. It gives many victims the choice to come forward and seek justice, where before, a timer was put on their access to justice.