CONSTITUTIONAL COURT OF SOUTH AFRICA

Nicole Levenstein and Others v The Estate of the Late Sidney Lewis Frankel and Others
CCT 170/2017

Date of hearing: 14 November 2017

MEDIA SUMMARY

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 November 2017 at 10h00, the Constitutional Court will hear an application for the confirmation of an order of invalidity made by the 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 in 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 assault, 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, *inter alia*, an order declaring 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 offences as contemplated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, other than the sexual offences listed above, after the lapse of a period of 20 years from the time when the offence was 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 the applicants' 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.

The High Court dealt with two broad issues namely, whether section 18 of the CPA is inconsistent with the precepts of the Constitution and appropriate relief, in the light of the varied forms of relief proposed by the parties. 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 the rights of survivors of sexual offences (other than those referred to above) to human dignity and equality, as contemplated in section 10 and 9 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 also does not apply to all other sexual offences, whether in terms of common law or statute. To achieve this, it added (read-in) appropriate words to section 18(f).

In this Court, the applicants support the reasoning of the High Court but not the portion of the order suspending the declaration of invalidity. The applicants contend that there is no basis for suspending the declaration. They argue that the suspension coupled with an interim reading-in order is "technically flawed" on the grounds 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 say, would not be just and equitable. The applicants therefore call for a declaration of invalidity coupled with a "reading-in", without suspending the declaration to allow Parliament to cure the defect.

Mr Frankel has since died and his estate has been substituted as the first respondent The Estate does not oppose the application for confirmation of the order of constitutional invalidity, nor does it make any submissions in relation thereto. The Estate has however brought an application for leave to appeal against the costs order of the High Court.

The second respondent (the Minister) supports the application for confirmation of the declaration of invalidity but rejects the applicants' contention that the order of invalidity should have immediate effect. The Minister also asks for a longer suspension period to allow Parliament to effect remedial legislative amendments. The Minister contends 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 opposes the appeal by The Estate against its joint liability with the Minister for part of the High Court costs. He submits

that, since Mr Frankel had "vigorously" opposed the applicants' constitutional challenge, his estate cannot escape liability for costs incurred as a result of that opposition.

The fourth to sixth respondents are the Trustees (for the time being) of the Women's Legal Centre Trust, the Teddy Bear Clinic, and Lawyers for Human Rights, respectively. These respondents were *amici curiae* in the High Court. The fourth to sixth respondents support the reasoning and order of the High Court. They seek to make further submissions which they contend will assist this Court in determining whether section 18 is indeed irrational and arbitrary and therefore constitutionally invalid.