

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CC CASE NUMBER: CCT 320/17**

**In the matter between:**

**FREEDOM OF RELIGION SOUTH AFRICA**

**APPLICANT**

**And**

**MINISTER OF JUSTICE AND**

**CORRECTIONAL SERVICES**

**1<sup>st</sup> RESPONDENT**

**MINISTER OF SOCIAL DEVELOPMENT**

**2<sup>nd</sup> RESPONENT**

**NATIONAL DIRECTOR OF PUBLIC**

**PROSECUTIONS**

**3<sup>rd</sup> RESPONDENT**

**YG**

**4<sup>th</sup> RESPONDENT**

**THE CHILDREN'S INSTITUTE**

**5<sup>th</sup> RESPONDENT**

**THE QUAKER PEACE CENTRE**

**6<sup>th</sup> RESPONDENT**

**SONKE GENDER JUSTICE**

**7<sup>th</sup> RESPONDENT**

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**FIFTH TO SEVENTH RESPONDENTS SUBMISSIONS PURSUANT TO**

**DIRECTIONS DATED 4 SEPTEMBER 2018**

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## INTRODUCTION

1. These submissions are made on behalf of the Fifth, Sixth and Seventh Respondents (hereafter 'Fifth to Seventh respondents').
2. They are filed in accordance with the Directions of the Chief Justice dated 4 September 2018 in which the parties were directed to provide submissions on whether -
  - a) Parliament's call for submissions on the Draft Children's Third Amendment Bill has any impact on these proceedings, and
  - b) the respondents would suffer any prejudice should this matter be held in abeyance until the parliamentary process is complete.
3. We have read the submissions filed by the Applicant in this matter on 7 September 2018, and we are perplexed by the approach of the Applicant in this matter.
4. After having initially asked for leave to appeal the judgment of the High Court, and having received directions on 8 August 2018 indicating that the matter is to be heard on 29 November 2018, the

Applicant then saw fit to send a letter to the Chief Justice on 23 August which apparently indicated that they were of the view that the matter should not proceed.

5. We did not reply to that letter as we were of the view that, once directions had been issued by the Court, the matter would be heard unless withdrawn by the Applicants.
6. The Applicant's current position, set out in their submissions dated 7 September 2018, is that they wish the matter to proceed, and that their letter to the Chief Justice dated 23 August 2018, was merely a courtesy.

### **CLARITY REGARDING THE STAGE OF THE DRAFT CHILDREN'S THIRD AMENDMENT BILL**

8. We respectfully bring to the Court's attention that Parliament has not called for submissions on the draft Children's Third Amendment Bill (hereafter 'the draft Bill), as seems to be suggested by question a) in the directives.
9. The Court may have been misled by the statement in the Applicant's letter dated 23 August, which stated as follows:

'We advise that we have recently learnt from the Parliamentary Monitoring Group that the Department of Social Development has called for submissions on the "Draft Children's Third Amendment Bill" by 7 September 2018'.

10. A close reading of the abovementioned paragraph reveals that the draft Bill is still being dealt with by the Executive. The call for submissions advertised on the PMG website (referred to the Applicant's letter dated 23 August) was issued by the National Department of Social Development and submissions must be sent to the National Department, not Parliament.
11. It is thus important to note that the draft Bill has not be approved by Cabinet and not tabled in Parliament, relevant facts to which these submissions will return.

## **POSITION OF THE FIFTH TO SEVENTH RESPONDENTS**

12. The position of the Fifth to Seventh Respondents is that, with regard to the first question – whether 'Parliament's' call for submissions has

any impact on these proceedings – is that it does not, for the following reasons which will be set out in more detail below

12.1 The Court *a quo* knew that the Department of Social Development was in the processes of finalising a policy to end corporal punishment in the home at the time of writing the judgment, and also considered the fact that legislative reform that might flow from that would be a long time in the making.<sup>1</sup>

12.2 The Minister indicated in her submissions in the Court *a quo* that she had no objection to the court developing the common law, despite the fact that she also intended setting out a more detailed regime for doing away with the defence of reasonable chastisement, and

12.3 the existence of draft legislation is not a bar to this court hearing the matter, as case law relating to more advanced (ie tabled) legislation demonstrates.

13. With regard to the second question – whether the matter should be held in abeyance until the parliamentary process is concluded (noting however that it has not yet commenced in Parliament), the

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<sup>1</sup> *YG v S* (A263/2016) [2017] ZAGPHC 290; 2018 (1) SACR 64 (GJ) (19 October 2017) para [29].

position of the Fifth to Seventh Respondents is that they are opposed to the matter being held in abeyance for the following reasons, which will be addressed in further detail below:

13.1 The matter being held in abeyance leaves the High Court order suspended, with no effect, and thus creates uncertainty which would be prejudicial to the children whose interests the Fifth to Seventh Respondents (in accordance with section 38(b) and (d) of the Constitution) seek to protect;

13.2 The draft Children's Third Amendment Bill is still at an early stage, as it has not yet been approved by Cabinet or tabled in Parliament.

13.3 Parliamentary processes are lengthy, particularly Bills like the Children's Third Amendment Bill, which must be dealt with as two bills in terms of sections 75 and 76 of the Constitution. This matter is likely to be held in abeyance for a lengthy period, while children's constitutional rights are, according to the High Court judgment, being violated.

## WHETHER DRAFT LEGISLATION HAS ANY IMPACT ON THESE PROCEEDINGS

This draft Bill has not been approved by Cabinet or tabled in Parliament

14. The Chief Justice's directions posed the question whether 'Parliament's call for submissions has any impact on these proceedings'.
15. We reiterate that it is not Parliament that is calling for submissions, but, as the Applicants mentioned in their letter to the Chief Justice dated 23 August 2018, it is the Department of Social Development, which has put the draft Bill out for comment.
16. Furthermore, this draft Bill has neither been approved by Cabinet nor tabled in Parliament.
17. Only after it is approved by Cabinet can the draft Bill then be tabled in Parliament. These submissions will return to the question of how lengthy the process is likely to be, when we address the question of prejudice to the children whose interests we seek to protect.

The Court *a quo* was aware of Department Policy and considered the likely delay in the promulgation of legislation

18. At the time of hearing the matter, the Court *a quo* was aware that the Department of Social Development had reached a Departmental policy position that the defence of reasonable chastisement was not in line with the Constitution, and should be abolished.
19. The Court *a quo* also considered the fact that if legislative reform were to follow, it was still 'a long way off', and that 'the public interest would not be served by this court declining to take steps to determine this important constitutional issue in the interim'.<sup>2</sup>

The existence of draft legislation is not bar to this court hearing the matter

20. In the case of *Masiya v Director of Public Prosecutions*<sup>3</sup> the court was asked to expand the definition of rape to include anal rape, and to make the crime of rape gender neutral, an amendment which the court knew was included in a Bill before Parliament. The Bill was at an advanced stage of the legislative process within Parliament. It

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<sup>2</sup> *YG v S* para [29].

<sup>3</sup> *Masiya v Director of Public Prosecutions* (Pretoria) (Centre for Applied Legal Studies as *amicus curiae*) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2008 (8) BCLR 827.

was therefore already in Parliament's domain, unlike the draft Bill in this matter. Nevertheless, the Court decided that it should not delay, and that it was in the public interest to deal with the extension of the definition through a development of the common law in line with the Constitution.<sup>4</sup>

21. In a more recent matter heard by this Court, *My Vote Counts NPC v Minister of Justice and Correctional Services*<sup>5</sup> the court indicated that it had become aware that Parliament had already embarked on the process of legislation relating to disclosure of private funding of political parties (which was the subject matter of the case), and it posed the question as to 'whether the legislative process should be left to run its full course before this judgment could be produced and delivered'.<sup>6</sup>

22. After proper reflection, that court decided to that the delivery of the judgment was appropriate. The reason given by the Court was that the order of the court *a quo* was of no force unless confirmed by the Constitutional Court. The court therefore decided that 'the High Court order cannot be left hanging'.<sup>7</sup>

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<sup>4</sup> *Masiya* at para [44].

<sup>5</sup> *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17.

<sup>6</sup> *Id* at para [13].

<sup>7</sup> *Id* at para [14].

23. In the current matter, the judgment of the Court *a quo* is no longer in operation, due to the automatic operation of section 18 of the Superior Courts Act no. 10 of 2013.
24. This leaves the legal status of the common law defence in limbo, and creates legal uncertainty.
25. Given that uncertainty, and the fact that the law reform process has not yet begun in Parliament, and is likely to be lengthy once it begins, we submit that this court should hear the matter.

**WHETHER ANY PREJUDICE WILL BE SUFFERED SHOULD THIS  
MATTER BE HELD IN ABEYANCE UNTIL PARLIAMENTARY  
PROCESS IS COMPLETE**

The draft Bill is not yet tabled in Parliament, is lengthy and will take some time to conclude

26. As recorded above, the draft Bill is still at an early stage, prior to Cabinet approval, and not yet tabled in Parliament. It is therefore still in the realm of the Executive arm of government.

27. It should be noted that the draft Children's Third Amendment Bill is a comprehensive draft Bill containing approximately 100 amendments.
28. The draft Bill will have to be split into two Bills, in terms of the different processes required by sections 75 (ordinary bill not affecting provinces) and 76 (ordinary bills affecting provinces) of the Constitution. Each of these two Bills will have to go through both houses of Parliament, and the section 76 Bill will also require provincial hearings.
29. Even if the draft Bill is approved by Cabinet by the end of 2018, and the two Bills are tabled in Parliament in 2019, Parliament is unlikely to commence work on it prior to the general elections in April 2019.
30. The Bills will therefore lapse when Parliament closes at the end of March 2019. The new Minister of Social Development will be required to re-table the Bills when the new Parliament is constituted.
31. Once the new Parliament is constituted, the first two months tend to be occupied with new member orientation and training, and committee appointments. The earliest that Parliament would begin deliberating on the Bills is August 2019, and taking an optimistic

view, it would take at least a year from that date for the Bills to be concluded in Parliament, most likely much longer.

32. Regulations would need to be finalised before the Amendment Act can come into operation, which is likely to take a further year.
33. Thus, if there are no delays and all time frames are strictly adhered to, the earliest that the Amendment Act could come into operation is the latter half of 2021. Most likely, it would be at a much later date.

Children subject to corporal punishment in the home will continue to suffer rights violations

34. The court *a quo* developed the common law by abolishing the defence of reasonable chastisement.
35. However, that order was suspended with immediate effect as from the date when the application for leave to appeal to this court was lodged. This occurred in accordance with Section 18(1) read with section 18(5) of the Superior Courts Act no 10 of 2013.

36. The uncertainty created by that suspension leaves children who are, or who may be, subjected to corporal punishment in the home, at risk of an ongoing rights violation.
37. As the period of time that it will take to initiate and then conclude the parliamentary process of law reform is unknown but likely to be lengthy, the risk to children may be drawn out over some years.

## **CONCLUSION**

38. In light of the foregoing answers to the questions posed by the Chief Justice, the Fifth to Seventh Respondents are of the view that holding the matter in abeyance until the initiation and conclusion of any parliamentary process at some unknown time in the future is the worst of all options to be faced by the children whose interests they seek to protect.
39. Had the Applicants withdrawn the appeal, the effect would have been to reinstate the judgment of the court *a quo*, thus restoring such level of certainty and protection that a High Court order can provide.

40. However, the option of holding the matter in abeyance would result in ongoing uncertainty for an unpredictable period of time, likely to be for several years.
  
41. We thus agree with the Applicants that matter should be heard on 29 November 2018, as originally directed by the Chief Justice.

**A. M. SKELTON**

**Counsel for the Fifth to Seventh Respondents**

PRETORIA

10 SEPTEMBER 2018