CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 320/17

In the matter between:

FREEDOM OF RELIGION SOUTH AFRICA	Applicant
and	
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
MINISTER OF SOCIAL DEVELOPMENT	Second Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
YG	Fourth Respondent
CHILDREN'S INSTITUTE	Fifth Respondent
QUAKER PEACE CENTRE	Sixth Respondent
SONKE GENDER JUSTICE	Seventh Respondent
and	
GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN	First Amicus Curiae
DULLAH OMAR INSTITUTE FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS	Second Amicus Curiae
PARENT CENTRE	Third Amicus Curiae

Neutral citation: *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Mogoeng CJ (unanimous)

Heard on: 29 November 2018

Decided on: 18 September 2019

Summary: minor — assault with intent to do grievous bodily harm — common law defence of reasonable and moderate chastisement — best interests of the child — defence inconsistent with sections 10 and 12(1)(c) of the Constitution — amicus curiae leave to intervene — application for leave to appeal

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ORDER

On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg (in an application for direct access):

1. The application for direct access is granted.
2. Freedom of Religion South Africa is granted leave to intervene.
3. The application for leave to appeal is dismissed.
4. It is declared that the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of sections 10 and 12(1)(c) of the Constitution.
5. There will be no order as to costs.

JUDGMENT

MOGOENG CJ (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] The adage "spare the rod, spoil the child" stares us in the face here.[1] It challenges our foresight and capacity to bring Solomonic wisdom to bear on a sensitive, complex and controversial matter of national importance – child discipline.

[2] Many parents contend that they bear the primary duty to lovingly raise their children in terms of their religious, cultural and other "non-harmful" beliefs, which entail the administration of moderate and reasonable chastisement, without being exposed to the risk of criminal charges or a criminal record.

[3] The entitlement of parents to administer that chastisement without attracting adverse legal consequences was declared unconstitutional by the High of South Africa, Gauteng Local Division, Johannesburg (High Court). This declaration was based on the infringement of several constitutional rights that a child enjoys.[2]

[4] This then is an application for leave to challenge the declaration of constitutional invalidity of a parent's right to administer reasonable and moderate chastisement to her child. It remains a valid defence against a charge of common assault throughout South Africa, except for Gauteng.

Background

[5] This matter began as a trial of assault with intent to do grievous bodily harm in the Johannesburg Magistrates' Court. The father abused his 13 year old son for watching pornographic material. The violence meted out to the son also took the form of vicious kicking and punching. The father could not, therefore, have justifiably raised the defence of reasonable and moderate chastisement or relied on any religious

[1] Proverbs 13:24 *Holy Bible New King James Version* (Thomas Nelson Publishers, 1982).

[2] *S v YG* 2018 (1) SACR 64 (GJ).

or cultural ground to justify that unmistakably immoderate and unreasonable application of force. Unsurprisingly, he was convicted of common assault. I deliberately refrain from saying any more about the assault on the wife, except that it also led to a similar conviction. I do so because it bears no relevance to the defence of reasonable and moderate chastisement of a child.

[6] Aggrieved by the outcome, the father lodged an appeal to the High Court. Although the State did not challenge the constitutional validity of the common law right of parents to chastise their children moderately and reasonably, the Court of its own accord decided the issue. It declared the defence to be constitutionally invalid and, therefore, prospectively unavailable to parents charged with the offence of assault (common or with the intent to do grievous bodily harm) upon their children.

[7] The history and nature of parents' legal authority to inflict reasonable and moderate corporal punishment upon their children deserves some attention. And I will borrow quite generously from Burchell and Milton,[3] who did a brilliant job in capturing the essence of this subject.

[8] The use of physical force upon a child as a means of corrective educational discipline is a long-established part of civilisation.[4] In line with the social importance attributed to the family unit in all societies, the law has traditionally conceded to parents a uniquely independent authority in raising their children. For this reason, the State did not interfere in the exercise of the rights, duties and responsibilities of parents in the upbringing of their children.[5]

[9] Some parents reportedly abused their children under the guise of religion. They viewed childish misbehaviour or misconduct as a sign of demonic possession that required the use of more force or physical pain to deliver their children from evil

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[3] Burchell and Milton *Principles of Criminal Law* (Juta & Co Ltd, Cape Town 1991).

[4] Id at 159.

[5] Id at 160-1.

spirits. This then resulted in many children being regularly subjected to savage and brutal chastisement without any legal protection whatsoever from that cruel or excessive punishment.[6] Societal outcry against this abuse dates as far back as the late nineteenth century, which led to the adoption of legal measures to curb child abuse and afford greater legal protection to children.[7]

[10] In this spirit, Cockburn CJ said:

> "A parent . . . may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment always however with this condition that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life and limb, in all such cases the punishment is excessive and the violence is unlawful."[8]

[11] Burchell and Milton correctly observe that disciplinary chastisement has been considered excusable provided it serves a corrective and admonitory purpose.[9] This legal entitlement of parents to discipline their own children exists only within the confines of moderation and reasonableness.[10] Ill-treatment or abuse of children exceeds those bounds and is in law punishable by reason of its unlawfulness.

[12] Eleven years before we became a constitutional democracy, South Africa already saw the need to pass legislation that limited parental authority and provided that parental ill-treatment of a child constituted a punishable offence.[11] Much

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[6] Id at 161.

[7] Id.

[8] *R v Hopley* (1860) 2 F&F 202, cited in *R v Janke* 1913 TPD 382 at 385.

[9] Burchell and Milton above n 3 at 163.

[10] Id.

[11] Section 50(1) and (2) of the Child Care Act 74 of 1983.

progress has since been made in that the Children's Act provides for a wide range of protective measures for children. [12]

Standing

[13] Returning to the declaration of constitutional invalidity, none of those who were parties before the High Court want, or are able to challenge that decision. Freedom of Religion South Africa,[13] which was amicus curiae (friend of the court) in the court of first instance, seeks to assume that responsibility. But there is uncertainty about its standing.

[14] The difficulty is whether a friend of the court has standing to bring an application for leave to appeal in circumstances where parties in the lower court are not willing or able to do so. And Freedom of Religion says that it does, under those circumstances, have standing since it is acting in the public interest.[14]

[15] In *Ferreira*, O'Regan J stated that the factors relevant to determining whether a person is genuinely acting in the public interest include considerations such as —

> "whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court."[15]

And in *Lawyers for Human Rights*, Yacoob J stated:

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[12] See sections 7, 9 and 10 of the Children's Act 38 of 2005.

[13] Whose objectives are described in broad terms as engaged in advancing freedom of religion in South Africa, through public awareness, lobbying and research.

[14] See section 38(d) of the Constitution.

[15] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 234.

> "The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."[16]

[16] As indicated, none of the parties before the High Court were willing or able to challenge the declaration of unconstitutionality. The only way put to the Court to challenge that declaration is to grant Freedom of Religion standing. Almost all parents and children in South Africa would be affected by this Court's decision on this matter. This group of people were not directly involved in the High Court and neither did they seek to be involved in the further prosecution of this matter. The parents' constitutional right to freedom of religion is also implicated. And it is a matter that involves the best interests of children, who are a vulnerable group. This, coupled with a child's right to be protected from all forms of violence, supports Freedom of Religion's contention that it has standing and should thus be allowed to intervene as a party.

[17] A jump or translation from being a friend of the court in a lower court to becoming a party at an appeal stage is at times permissible on considerations of justice.[17] And the case of Freedom of Religion finds itself in that exact same situation. Not only does it seek to become a party in the public interest, but the issues raised also bear out the need for intervention as a party on behalf of the general body of parents and children in our country.

[18] What also makes a noteworthy difference is that Freedom of Religion is not seeking to be involved in this matter for the first time. It took part in the proceedings in the High Court, albeit in a different capacity. It is familiar with the issues that it seeks to raise on behalf of the broader public for the attainment of a final and

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[16] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 18.

[17] *University of Witwatersrand Law Clinic v Minister of Home Affairs* [2007] ZACC 8; 2008 (1) SA 447 (CC); 2007 (7) BCLR 821 (CC) at para 6 and *Campus Law Clinic, University Of KwaZulu-Natal v Standard Bank of South Africa Ltd* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at para 21.

authoritative pronouncement by this Court. This does not necessarily extend to or address the position of a person who seeks to intervene at an appeal stage, but did not participate in the same proceedings in the court of first instance.

[19] Technicalities and senseless constraints that come with rigidity should never be allowed to stand in the way of a legitimate and demonstrably desirable pursuit and attainment of justice. True, only parties to litigation should ordinarily be allowed, by reason of their direct and active participation borne of their material interest in the case, to challenge the decision of the court which decided against them. Courts must, after all, protect scarce judicial resources by not easily allowing litigious busybodies to clog the roll in circumstances where those directly and materially affected by the outcome see no need to challenge an adverse outcome. But there are exceptions to that guiding principle and those exceptions are grounded on the interests of the public.

[20] Legal principles exist to facilitate rather than to frustrate the attainment of a just, equitable, and definitive outcome. The issue of discipline, its positive and negative aspects, and the need for certainty on the disciplinary options available to parents cry out for the attention of this Court. A pronouncement by the apex court on whether the common law defence of reasonable and moderate chastisement is constitutionally invalid would clearly serve the interests of the public. That is the extent of its general and prospective application. And that thus clothes Freedom of Religion with the standing to intervene and bring an application for leave to appeal.

Leave to appeal

[21] Standing or leave to intervene as a party is, however, not dispositive of the application for leave to appeal. The question in relation to leave is whether it is in the interests of justice to grant it[18] or whether the application raises an arguable point of law of general public importance that this Court ought to consider.[19]

[18] Section 167(6)(b) of the Constitution.

[19] Section 167(3)(b)(ii) of the Constitution.

[22] Not only does this application implicate several constitutional rights,[20] but it also most certainly raises an arguable point of law of general public importance which ought to be dealt with by this Court.

[23] Since the decision of one Division of the High Court of South Africa does not bind all other Divisions, the need for uniformity and finality demands the intervention of this Court. The constitutional sustainability of moderate and reasonable chastisement is an arguable point of law of general public importance because it concerns those parents who subscribe to different religious beliefs or cultural practices and even those who do not espouse any faith or culture. It is thus safe to conclude that this application affects the overwhelming majority of parents and children in our country.

[24] At the heart of this application lie issues relating to what is in the best interests of children. And children are a vulnerable group whose interests are of paramount importance.[21] An integral part of those interests is how to raise them well as responsible and disciplined citizens of our country. The issues or points of law raised are of great interest and importance to almost all parents and children, most of whom are not able to champion the cause of ventilating these rights themselves and would thus be well served by the intervention of Freedom of Religion as a litigating party. If moderate and reasonable chastisement is unconstitutional, it is best to settle the issue once and for all to avoid the possible violation of children's rights in other parts of the country. The issues have been extensively ventilated in the High Court and in this Court.

[25] Freedom of Religion does have reasonable prospects of success, particularly because some comparable democracies retain the common law defence of reasonable

[20] Sections 9, 10, 12 and 28 of the Constitution.

[21] Section 28(2) of the Constitution.

and moderate chastisement. The interests of justice thus point to the granting of leave to appeal. It follows that this Court has jurisdiction in this matter.

[26] This being an application for direct appeal in terms of section 167(6)(b) of the Constitution, it is necessary to explain why we do not insist on the Supreme Court of Appeal being approached before this Court. For, ordinarily litigants must not be allowed to bypass the Supreme Court of Appeal in matters involving the application or interpretation of the common law.[22] This being a matter concerning the validity of a common law defence, it is inescapable that an explanation for the deviation be furnished.

[27] In *Zondi*, we reflected as follows on the application for direct access, and by extension direct appeal, provisions:

> "Under these provisions, this Court has discretion whether to grant direct access but an application will only be granted if it is in the interests of justice to grant it. And the question whether it is in the interests of justice to grant direct access must be decided in the light of the facts of each case. In this regard this Court will consider a range of factors. These include the importance of the constitutional issue raised and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute of fact may arise in the case, the possibility of obtaining relief in another court, and the time and costs that may be saved by coming directly to this Court."[23]

By extension, similar considerations apply to direct appeals.

[28] The administration of reasonable and moderate punishment by parents on their children has been declared unconstitutional by the High Court. That declaration, though not relating to legislation, is just too close and similar in character to declarations of unconstitutionality relating to legislation, to render the bypassing of

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[22] In *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 3 SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 13, this Court emphasised that "courts are not [to be] bypassed in matters that fall within their jurisdiction unless there are compelling reasons to do so".

[23] Id at paras 12-3.

the Supreme Court of Appeal excusable. Although not all declarations of unconstitutionality of all common law principles would justify a departure from normal practice, the nature or importance of the constitutional issues raised, the seriousness and far-reaching implications of the unconstitutionality in this matter justify a departure from the normal appeal route, via the Supreme Court of Appeal. Certainty and finality is needed urgently. A delay that would be caused by that appeal process trajectory would not be in the public interest or in the interests of justice.[24] This is so because parents discipline their children daily. The sooner they know what is legally permissible, the better.

Issues

[29] The constitutional validity of a parent's defence to carry out reasonable and moderate chastisement has been attacked on several fronts.[25]

[30] But, I hasten to state that there is merit in the approach that recognises that prolixity must be avoided where that can be achieved without watering down the quality of reasoning or the soundness of a judgment. Where one or more key constitutional rights or principles could help to properly dispose of an issue, very little purpose is hardly ever served by the long-windedness that takes the form of trolling down all the rights, principles or issues implicated or raised in order to arrive at the same conclusion. That is not to make light of the educational value of, where appropriate or necessary, dealing with every right, principle or issue raised. But readability, due regard to the scarcity of judicial resources and time, and the need for precision or tight reasoning often call for a sharper focus and brevity.

[31] For these reasons, the constitutionality of moderate and reasonable chastisement will primarily be resolved on the provision of section 12(1)(c) of the Constitution. The right to dignity will also receive attention in the discussion.[26]

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[24] Id. This Court listed a range of factors that it would consider in determining whether it is in the interests of justice to grant direct access under section 167(6)(a) of the Constitution.

[25] On the bases of sections 9-10, 12 and 28 of the Constitution.

Is chastisement unconstitutional?

[32] Freedom of Religion rightly seeks to distinguish reasonable and moderate parental chastisement from the kind of assault and abuse of children that every campaign or challenge to end this common law defence is actually intended to curb. But, the difficulty they have is the attempt to locate this chastisement outside the boundaries of assault.

[33] They quite interestingly make the point that not every parent, who out of religious or cultural considerations chastises their children as a way of instilling or enforcing discipline or consequence management, intends to harm or does actually harm and abuse their children. Freedom of Religion displays an implicit appreciation of the reality that just as a verbal reprimand could have an even more traumatising or brutalising effect and an enduring negative impact on the well-being of a child, so can chastisement that is unreasonable and immoderate, often triggered by anger or an unbridled attitude or disposition of a tough disciplinarian. They only seek to protect and preserve a parental entitlement to lovingly discipline their children just or almost as positively as alternative methods reportedly do.

[34] The approach of Freedom of Religion is not purely biblical. There is, however, an allusion to the appropriateness of scriptural injunctions on the use of a rod and to parents' entitlement to administer reasonable and moderate chastisement on their children as an integral part of the exercise of the right to freedom of religion.[27] But, it fundamentally seeks to protect the pre-existing common law defence of chastisement available to all parents irrespective of their religious persuasions, cultural practices or non-belief in a deity. It bears repetition that one of Freedom of Religion's major

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[26] Section 10 of the Constitution.

[27] Undoubtedly, they draw additional reinforcement for their entitlement to chastise, based on their right to freedom of religion, from biblical injunctions like "[h]e who spares the rod hates his son, but he who loves him disciplines him promptly" Proverbs 13:24 *Holy Bible New King James Version* above n 1. And "[n]ow no chastising seems to be joyful for the present, but painful; nevertheless, afterward it yields the peaceable fruit of righteousness to those who have been trained by it." Hebrews 12:11 *Holy Bible New King James Version* above n 1.

concerns is the apparent conflation of reasonable and moderate chastisement with blatant child abuse and brutal assault by holding them out as being inherently or fundamentally the same.

[35] The application of force to the body of another may, subject to the *de minimis non curat lex* (the law does not concern itself with trifles) principle,[28] take the form of the slightest touch, holding a person's arm or bumping against them.[29] But the assault may be justified or rendered lawful on the basis of authority or the right of chastisement.[30] Had it not been for this defence, this application of force could have led to a parent being convicted of assault.

All forms of violence

[36] As indicated already, there are several constitutional rights that could be relied on to determine the validity of reasonable and moderate chastisement.[31] But the issue can be adequately resolved on the basis of, among others, section 12(1)(c) of the Constitution, which provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
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> . . .
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> (c) to be free from all forms of violence from either public or private sources."

[37] A proper determination of the constitutionality of chastisement requires that it be located within a criminal law setting, which is its natural habitat. Moderate and reasonable chastisement hitherto constituted an effective defence for parents who had administered it to their children and could be or were charged with assault. And

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[28] Burchell *Principles of Criminal Law* 5 ed (Juta & Co Ltd, Cape Town 2016) at 245.

[29] Where for example a man touches a woman on her breast or behind without permission or deliberately bumps against those parts of her body, our courts have held that it would amount to assault. *R v M* 1961 2 SA 60 (O).

[30] Id at 55.

[31] Sections 9, 10, 12 and 28 of the Constitution.

properly so because assault is correctly defined by Burchell and Milton as the unlawful and intentional application of force to the person of another or inspiring a belief in that person that force is immediately to be applied as threatened.[32] This accords with the definition our courts have given to assault, like the intentional application of unlawful force to the person of a human being.[33]

[38] The dictionary meaning of violence is "behaviour involving physical force intended to hurt, damage or kill someone or something".[34] And this is the ordinary grammatical meaning that ought to be ascribed to the word "violence" within the context of section 12(1)(c) of the Constitution. More importantly, even when contextually and purposively interpreted, as it should, the definition of assault by Snyman, Burchell and Milton converges on the same meaning. Violence is not so much about the manner and extent of the application of the force as it is about the mere exertion of some force or the threat thereof.

[39] Turning to the language of section 12, the operative words are "free from all forms of violence". The first question is whether we ascribe a highly technical meaning to the word "violence" or give it its ordinary grammatical meaning which

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[32] Burchell and Milton above n 3 at 423. See also Snyman *Criminal Law* 6 ed (LexisNexis, Durban 2014) at 455, in which he states—

> "[a]ssault consists in any unlawful and intentional act or omission—
> (a) which results in another person's bodily integrity being directly or indirectly impaired, or
> (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place."

[33] *S v Ntuli* 1975 2 All SA 1 A at 435-6 H. See also *Rex v Jolly* 1923 AD 176 at 179 where Innes CJ said that:

> "The definition of assault in South African practice as given by Gardiner and Lansdown (vol 2, p 1010) is as follows: 'The act of intentionally and unlawfully applying force to the person of another, directly or indirectly, or attempting or threatening by any act to apply that force, if the person making the threat causes the other to believe that he has the ability to effect his purpose.' The definition is substantially taken from the Transkeian Penal Code; it commended itself to the Trial Court, and would appear to be satisfactory for all practical purposes. It recognises that the application of force may be indirect as well as direct – a conclusion which is logically unassailable, for it is evident that a person may cause force to be applied to the body of another without himself touching that other. Such application of force would be properly described as indirect. A may cause B to fall from his bicycle, either by pushing him off or by overturning the bicycle; in one case he applies force to B's body directly; in the other indirectly; but in both cases the result, actual and legal, is the same. In each instance A has assaulted B."

[34] *Oxford English Dictionary* 6ed (Oxford University Press, Oxford 1936) at 3535.

connotes any application of force, however minimal. Chastisement does by its very nature entail the use of force or a measure of violence. To appreciate the connection, alluded to by the respondents and the amici, between reasonable and moderate chastisement and violence, we must ask why it is necessary to resort to chastisement in the first place. Is it not the actual or potential pain or hurt that flows from it that is believed to be more likely to have a greater effect than any other reasonably available method of discipline? Otherwise, why resort to it?

[40] It is the bite of the force applied or threatened that is hoped to be remembered to restrain a child from misbehaviour whenever the urge or temptation to do wrong comes. How then can reasonable and moderate chastisement not fall within the meaning or category of violence envisaged in section 12(1)(c)? After all, reasonable and moderate chastisement includes corporal punishment with the instrumentality of a rod or a whip. That accords with the biblical injunction referred to above namely, "He who spares his rod, hates his son, but he who loves him disciplines him promptly."[35] The reference to violence does, therefore, extend to all forms of chastisement, moderate or extreme – a smack or a rod.

[41] The objective is always to cause displeasure, discomfort, fear or hurt. The actionable difference all along lay in the extent to which that outcome is intended to be or is actually achieved. Since punishment by the application of force to the body of a child by a parent is always intended to hurt to some degree, moderate and reasonable chastisement indubitably amounts to legally excusable assault. And there cannot be assault, as defined, without meeting the requirements of "all forms of violence" envisaged in section 12(1)(c) of the Constitution.

[42] The mischief sought to be addressed through section 12(1)(c) is not only certain or some forms of violence, but "all forms". We have a painful and shameful history of widespread and institutionalised violence. And section 12 exists to help reduce and ultimately eradicate that widespread challenge. "All forms" is so all-

[35] *Holy Bible New King James Version* above n 1.

encompassing that its reach or purpose seems to leave no form of violence or application of force to the body of another person out of the equation. To drive the point home quite conclusively, the Constitution extends the prohibition to violence from "either public or private sources".

[43] It is necessary to emphasise that in terms of our law, the application of force, including a touch depending on its location and deductible meaning, or a threat thereof constitutes assault. And parental authority or entitlement to chastise children moderately and reasonably has been an escape route from prosecution or conviction. This means that the violence proscribed by section 12(1)(c) could still be committed with justification if that parental right is retained. But, if it is accepted that what would ordinarily be criminally punishable, but for the common law defence of moderate and reasonable chastisement, is indeed what section 12(1)(c) seeks to prevent, then children would be protected by that section like everyone else. One would be hard-pressed to suggest that assault, which chastisement however moderate or reasonable is, does not fall within the catchment area of section 12(1)(c). "All forms of violence" means moderate, reasonable and extreme forms of violence. Besides – "a culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands."[36]

[44] This proscription does put an end to any argument, however sound, that might be raised on any ground in support of the retention of the defence of reasonable and moderate parental chastisement. For there are indeed sound and wisdom-laden, faith-based and cultural considerations behind the application of the rod. That said, parental chastisement of a child, however moderate or reasonable does, in my view, meet the threshold requirement of violence proscribed by this constitutional provision and, therefore, limits the right in section 12(1)(c). The conclusion that it cannot escape the reach of section 12(1)(c) is inevitable.

The right to human dignity

[36] *S v Williams* [1995] ZACC 6; 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at para 52.

[45] There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J, correctly points out, the role and stressed importance of dignity in our Constitution aims "to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past."[37] Unsurprisingly because not only is dignity one of the foundational values of our democratic State, but it is also one of the entrenched fundamental rights.[38] And section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[46] Children are constitutionally recognised independent human beings, inherently entitled to the enjoyment of human rights, regardless of whether they are orphans or have parents. The word "everyone" in this section also applies to them. In *S v M* this Court gave appropriate recognition to the child's rights to dignity in these terms:

> "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. . . . Individually and collectively all children have a right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."[39]

The right to dignity and freedom from violence are some of those highlighted for special attention and most fitting recognition.

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[37] Cameron "Dignity and Disgrace: Moral Citizenship and Constitutional Protection" McCrudden *Understanding Human Dignity* (Oxford University Press, Oxford 2012) at 476.

[38] See sections 1(a) and 10 of the Constitution.

[39] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at paras 18-9.

[47] There is a sense of shame, a sense that something has been subtracted from one's human whole, and a feeling of being less dignified than before, that comes with the administration of chastisement to whatever degree. I say this alive to the reality that being held accountable for actual wrongdoing generally has the same effect. Being found guilty of misconduct or crime and the consequential sanction like imprisonment, however well-deserved, has a direct impact on one's dignity. It is all a matter of degree.

[48] That said, moderate and reasonable chastisement does impair the dignity of a child and thus limits her section 10 constitutional right. As with section 12(1)(c), the question that remains is whether the limitation is justifiable.

Justification analysis

[49] Sections 10 and 12 provide for the protection of human dignity and the freedom and security of the person respectively in the Bill of Rights. And section 36 of the Constitution provides for their possible limitation in these terms:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose."

[50] It must immediately be said that the common law defence of reasonable and moderate chastisement is a law of general application and may, therefore, potentially limit the rights in the Bill of Rights. This defence is available to all parents, regardless of their religious, cultural or other persuasions, when charged with assault of their

children. And it limits a child's constitutional rights to dignity and to be protected from all forms of violence. What remains to be determined is whether that limitation is reasonable and justifiable, regard being had to some of the factors listed in section 36.

The nature, purpose and importance of the limitation

[51] The reality is that parental chastisement is significantly different from the institutionalised administration of corporal punishment that has since been abolished.[40] The one is intimate and administered by a loving parent whereas the other is somewhat cold, detached and implemented by a stranger of sorts. Parents have the inherent obligation to raise their child to become a responsible member of society whose delinquency they stand to be blamed for, whereas strangers like teachers only had an official and possibly less-caring duty to punish. The primary responsibility to mould or discipline a child into a future responsible citizen is that of parents. For example Christian parents have a "general right and capacity to bring up their children according to Christian beliefs".[41] The abolition of the defence forces them —

> "to make an absolute and strenuous choice between obeying a law of the land or following their conscience . . . to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children."[42]

[52] The invalidation of the defence of moderate and reasonable chastisement in Gauteng thus means that the chastisement aspect of their religiously or culturally ordained way of raising, guiding and disciplining their children is no longer available to them. To discipline them in terms of the prescripts of their faith or culture would expose them to criminal prosecution, possible conviction and possible imprisonment. And the only safety valve available to them is the abovementioned *de minimis* rule.

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[40] *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 51.

[41] Id at para 38.

[42] Id at para 51.

Although this rule has acute shortcomings in terms of its inability to prevent the abolition of the defence from possibly imposing a strain on the family structure by allowing parents to be prosecuted for even the minutest of well-intentioned infractions, it is at least of some benefit in that it could save parents from being needlessly imprisoned. It does, barring diversion, not necessarily exclude the unlawfulness of the chastisement and a criminal conviction of assault, but only allows the assault to go unpunished on account of its triviality.

[53] Arguments for the retention of the defence of reasonable and moderate chastisement are understandable. Barring anger, frustration, abuse of intoxicating substances or sheer irresponsibility, parents who truly chastise their children on the love-driven religious or cultural bases do not always intend to abuse or traumatise their children. For they presumably love them and want only the best for them. It is also debatable whether the use of that method of discipline invariably produces negative consequences.

[54] It would thus be an over-generalisation to brand the very possibility of retaining reasonable and moderate chastisement on religious or cultural grounds as an inescapable recipe for widespread excessive application of violence or child abuse. Properly managed reasonable and moderate chastisement could arguably yield positive results and accommodate the love-inspired consequence management contended for by Freedom of Religion. And that would explain why so many other civilisations and comparable democracies have kept this defence alive and relatively few have abolished it.[43]

[43] In Africa, it is only Benin, Kenya, the Republic of Congo, Togo and Tunisia that have abolished corporal punishment in all settings, including in the home. Globally, only 54 states in seven territories have fully prohibited corporal punishment in the home, while 145 states in 32 territories have not fully prohibited it. Countries that have moved towards the full protection of children from physical punishment in the home are, for example, Albania, Andorra, Argentina, Aruba, Austria, Bolivia, Brazil, Bulgaria, Costa Rica, Croatia, Curacao, Cyprus, Denmark, Estonia, Faroe Islands, Finland, Germany, Greece, Greenland, Israel, Latvia, Norway and Sweden. See Global Initiative to End All Corporal Punishment of Children "Global progress towards prohibiting all corporal punishment" (June 2019), available at http://endcorporalpunishment.org/wp-content/uploads/legality-tables/Global-progress-table-with-terrs-alphabetical.pdf.

The nature of the affected interests and rights

[55] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child." Children are, after all, most vulnerable. Some of them are so young that they are incapable of lodging a complaint about abusive or potentially injurious treatment or punishment, however well-intentioned it might have been. Even those who are of school-going age might often be ignorant of what they could do to alert the law enforcement authorities to actual or potentially harmful parental conduct that they are made to endure. This alludes to an interesting speculation, not completely irrelevant though, whether the child in this matter would have reported the assault case had the mother not been a victim of the assault too.

[56] The State is obliged to respect, protect, promote and fulfil a child's section 28 protections[44] and the Judiciary is thus bound by the provisions of section 28.[45] That means that in our approach to a parent's entitlement to chastise a child reasonably and moderately, of paramount importance should be the best interests of the child in respect of protection from potential abuse and the need to limit the right because of the good a child and society stand to derive from its retention as a disciplinary tool.

[57] More telling is that the drafters of section 28(2) chose not to say that the "interests" of a child are of "importance" in "some matters" concerning a child. The Constitution provides that "in *every* matter" concerning a child, her "*best* interests" are of "*paramount* importance". That, however, does not mean that the best interests of a child are superior to all other fundamental rights. This much was made clear by this Court in several matters. This Court in *S v M* held that—

[44] Section 7(2) of the Constitution.

[45] Section 8(1) of the Constitution.

> "the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited."[46]

[58] The paramountcy of the best interests of a child was further explained in these terms:

> "Does the fact that section 28(2) demands that the best interests of children be accorded paramount importance mean that children's rights trump all other rights? Certainly not. All that the Constitution requires is that, unlike pre-1994, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them. The Constitution demands that our criminal-justice system should be child-sensitive."[47]

[59] In *Christian Education South Africa*, we highlighted the paramount importance of the children's best interests in these terms:

> "Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This Court has recently reaffirmed the significance of this right which every child has. The principle is not excluded in cases where the religious rights of the parent are involved."[48]

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[46] *S v M* above n 39 at para 26. See also *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 72 and *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 49.

[47] *MR v Minister of Safety and Security* [2016] ZACC 24; 2016 (2) SACR 540 (CC); 2016 (10) BCLR 1326 (CC) at para 59. See also *AB v Minister of Social Development* [2016] ZACC 43; 2017 (3) SA 570 (CC); 2017 (3) BCLR 267 (CC) at paras 280-1.

[48] *Christian Education South Africa* above n 40 at para 41. See also *S v M* above n 39 at paras 15 and 22.

[60] It follows that these observations on the utmost necessity of child protection and the paramountcy of the importance of the best interests of a child find application regardless of the belief behind the practice that has potentially injurious consequences on the child. It could be religious, cultural practices or any other basis on the strength of which parents believe that their children ought to be treated in a particular way that happens to be harmful to their well-being.

[61] Section 28(2) wisely anticipates possibilities of conduct that are actually or potentially prejudicial to the best interests of a child. Unsurprisingly, it is crafted in terms so broad as to leave no doubt about the choice it makes between the best interests of the child and the parent's perceived entitlement to resort to unreasonable and immoderate chastisement meant to procure a child's obedience to a parent's legitimate directive and orders. However, what remains to be determined is whether chastisement that is moderate and reasonable, is constitutionally justifiable in our kind of democracy, regard being had to the paramountcy of the best interests of a child.

The extent of the limitation and its relation to purpose

[62] Parents have over the years enjoyed the right to discipline their children in a variety of ways. One of the instruments for instilling discipline in their children is the administration of moderate and reasonable chastisement. As indicated, its foundation is both religious and cultural in character. It is thus regarded partly as an incidence of the enjoyment of one's constitutional right of freedom of religion or culture.

[63] The disadvantage though is that, unlike the constitutional protections available to the child, the right to freedom of religion does not expressly provide for parental entitlement to administer moderate and reasonable chastisement to the child nor does any provision of the Constitution acknowledge the existence of a cultural right to the same effect. Freedom of Religion's reliance on "the right to parenting" grounded on South Africa's international obligations under several conventions that deal with the

right to family in particular[49] must suffer the same fate. Not only does international law not recognise the right to discipline, but our Constitution does not make express provision for it, unlike the rights sought to be vindicated here.

[64] And this is compounded by the paucity of clear or satisfactory empirical evidence that supports chastisement as a beneficial means of instilling discipline. Though not conclusive, there are, however, some pointers to the potentially harmful effect of chastisement.[50] Some of that research is open to criticism in that very little effort seems to have been made to distinguish between moderate and excessive or abusive application of force to the body of a child. In many of those studies, there has been a strong leaning on the effects of plain abuse and excessive application of force on the well-being of a child and very little on truly moderate and reasonable chastisement. That said, positive parenting reduces the need to enforce discipline by resorting to potentially violent methods. It could replace occasionally harsh and inconsistent parenting with non-violent and consistent strategies for discipline like positive commands, tangible rewards and problem-solving, obviously depending on age.

[65] What militates more against the retention of the defence of moderate and reasonable chastisement is the best interests of the child, which are of paramount importance in all matters involving a child. To retain this kind of chastisement, it would have to be demonstrated that apart from the fact that it ordinarily falls within the category of assault, there is something about it that advances the best interests of the child. In other words, there must be something about this excusable crime of assault that evidently redounds to the good of the child. It bears repetition that not much was said to help us appreciate that the benefits of that chastisement indeed outweigh its disadvantages, and thus justify the limitation.

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[49] Article 17 of the International Covenant on Civil and Political Rights and article 18 of the African Charter on Human and People's Rights (Banjul Charter).

[50] See, for example, the sections on "corporal punishment as a risk factor for no optimal child development" and "physiologic changes associated with corporal punishment and verbal abuse" in Sege et al "Effective discipline to Raise Healthy Children" (2018) 142 *Pediatrics* at 4.

[66] To properly locate the best interests of the child, it is necessary to come to grips with the nature of those interests in relation to chastisement. Chastisement is meant to discipline and help a child appreciate consequence management. In other words, the purpose of moderate and reasonable chastisement is to mould a child into a responsible member of society. What then is in her contextual best interests? It is, in my view, to achieve the same laudable objective without causing harm or unduly undermining the fundamental rights of the child. In other words, if there exists a disciplinary mechanism or measure that is more consistent with love, care, the more balanced protection of the rights and advancement of the well-being of a child and another that is less so, the former must be preferred for it gives expression to what is in the best interests of the child. It recognises, in a practical way, the paramount importance of a child's best interests.

[67] The application of force or a resort to violence, which could be harmful or abused, cannot in circumstances where there is an effective non-violent option available be said to be consonant with the best interests of a child. For indeed the best interests of a child is about what is best for her in the circumstances – what benefits her most with no or minimum harm. But the absence of any form of discipline can never be in the best interests of a child. That said, moderate and reasonable chastisement as a tool for discipline, cannot be retained at the expense of a child's fundamental right to dignity. And the limitation of that right has not been properly explained.

Less restrictive means to achieve purpose

[68] What undermines the justification for retaining chastisement, more revealingly, is the availability of less restrictive means to achieve discipline. Chastisement is, after all, traditionally supposed to be the option of last resort, employed only when all else fails. Besides, the experience-borne traditional approach generally adopted by South African parents over the years has been to teach, guide and admonish their children, resorting to chastisement only as a measure of last resort. No research is required to

verify this reality. It is as obvious as the side of the road on which South Africans drive their vehicles. The unreasonable and immoderate chastisement which constitutes assault proper, maltreatment or child abuse has always been a criminal offence which all sound-minded parents agree must be punishable. It is an aberration that has inexplicably been left to permeate society with consequences that somehow militate against or undermine the retention of moderate and reasonable chastisement.

[69] The positive parenting approach relied on by the friends of the court is fundamentally about educating a child about good behaviour and the do's and don'ts of life. It also entails a more effective parent-child communication to help a child realise the adverse consequences of unacceptable conduct and to generally guide her on how best to behave in life. This is the most basic or commonsensical approach. And it is indeed a fairly well-known means of discipline that has coexisted with reasonable and moderate chastisement for many years. More importantly, it is a less restrictive means of discipline that could potentially be effective in the attainment of the same purpose that moderate and reasonable chastisement is intended for. Of concern to many others could be the apparent less regard for more effective consequence management in the approach to positive parenting that the friends of the court seem to be advocating for. Meaningful consequences must arguably follow repeat or serious wrongdoing. For it is that appropriate admonition that should never be played down.

[70] All of the above considered, I am satisfied that important though the purpose of the possible limitation of these rights is, the paucity of proof that the chastisement is beneficial and the availability of less restrictive means to instil discipline militate against the reasonableness and justification of the limitation. Children are indeed vulnerable and delicate. They are not always able to protect themselves and may not always know what to do in the event of the law being broken to the prejudice of their best interests. This conclusion is arrived at without branding parents, who prefer moderate and reasonable chastisement, as unloving, irresponsible and inclined to harm or abuse their children.

[71] The right to be free from all forms of violence or to be treated with dignity, coupled with what chastisement does in reality entail, as well as the availability of less restrictive means, speak quite forcefully against the preservation of the common law defence of reasonable and moderate parental chastisement. There is, on the material before us, therefore, no justification for its continued existence, for it does not only limit the rights in sections 10 and 12 of the Constitution, but it also violates them unjustifiably.

Conclusion

[72] It suffices to say that any form of violence, including reasonable and moderate chastisement, has always constituted a criminal act known as assault. The effect of relying on this common law defence was to exempt parents from prosecution or conviction. Identical conduct by a person other than a parent on the same child would otherwise constitute indefensible assault.

[73] The High Court was correct in its conclusion that the common law defence of reasonable and moderate chastisement is constitutionally invalid and that this declaration be prospective in its operation.

[74] A proliferation of assault cases against parents is a reasonably foreseeable possibility. Parliament would, hopefully, allow itself to be guided by extensive consultations, research and debates before it pronounces finally on an appropriate regulatory framework. That approach would enable it to benefit not just from lobby groups, but also from parents and possibly children themselves whose interests are at stake.

[75] How law enforcement agencies would deal with reported cases of child abuse flowing from this declaration of unconstitutionality is a matter best left to be dealt with on a case-by-case basis.

Order

[76] In the result, the following order is made:

1. The application for direct access is granted.
2. Freedom of Religion South Africa is granted leave to intervene.
3. The application for leave to appeal is dismissed.
4. It is declared that the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of sections 10 and 12(1)(c) of the Constitution.
5. There will be no order as to costs.

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