REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A263/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

19/10/2017
DATE

SIGNATURE

In the matter between:

YG — Appellant

and

THE STATE — Respondent

together with

THE CHILDREN'S INSTITUTE — First Amicus Curiae
THE QUAKER PEACE CENTRE — Second Amicus Curiae
SONKE GENDER JUSTICE — Third Amicus Curiae
FREEDOM OF RELIGION SOUTH AFRICA — Fourth Amicus Curiae

JUDGMENT

KEIGHTLEY, J:

INTRODUCTION

[1] The appellant in this matter was tried in the Regional Court, Johannesburg, on two charges of assault with intent to do grievous bodily harm. The first charge related to his alleged assault of his 13-year old son, M, and the second charge related to his alleged assault of his wife. The two assaults were alleged to have occurred at the family home on the same day, although they occurred at different times.

[2] The trial court found the appellant guilty on both charges on the competent verdict of common assault. The court invoked section 297(1)(a)(ii) of the Criminal Procedure Act 51 of 1977, and postponed the passing of sentence against the appellant for a period of five years. The magistrate granted the appellant leave to appeal against his convictions.

[3] As far as the facts relating to the first charge are concerned, it is common cause that on the day of the incident M was sitting on his parents' bed in their bedroom using one of the family's iPads. The appellant entered the room and accused M of watching pornographic material on the iPad. M denied this, but the appellant persisted with the accusation. There was a verbal exchange between them, with the appellant insisting that M should tell him the truth. When M repeated his denial the appellant hit him. He told M that he was lying, and he said that he was giving him another opportunity to tell the truth. When M refused to admit he was lying, the appellant hit him again. This pattern repeated itself a number of times.

[4] The appellant's defence at the trial was that he had done nothing more than to exercise his right as a parent to chastise M by meting out reasonable corporal punishment for M's indiscipline. He told the court that they are a Muslim family and that M knew that pornography is strictly forbidden.

[5] Certain important details of the incident are disputed. M testified that the appellant punched him with his fists on M's thighs. He also punched him on the chest. At this point M lost his balance and fell off the bed onto the floor and hit his back against the security gate, but his back was not really injured by the fall. While he was on the floor, the appellant kicked him three or four times with his bare foot. M was very sore. He was crying and he was emotional. He also testified that the appellant was very angry during the incident.

[6] The appellant's version was that he had only slapped M with an open hand on his buttocks. He did not dispute that this happened a number of times after M repeatedly denied that he was lying. He testified that on one occasion he might have hit M on the back of the thighs but this happened when M tried to twist away from the appellant's blows to his buttocks. As the appellant described his conduct, he had given M a spanking on the buttocks. He had done this because he was disappointed in M's conduct in watching pornographic material, which is forbidden in their religion, and for lying to the appellant about this. The appellant claimed that he did not intend to assault M. He said that:

> "I just intended(ed) to discipline him (M) out of concern to show him in the future what is right and what is wrong."

[7] M was examined by a medical doctor 4 days after the incident took place. Dr van der Poel's clinical findings were recorded on the J88 form, and confirmed by him at the trial. He found a tender, slight swelling on the left side of the chest, and a tender left scapular. There were two blue bruises on the upper lateral part of the right leg, and several blue bruises on the upper lateral part of the left leg. The J88 form indicates that the leg bruises were in the thigh region. Dr van der Poel testified that the injuries were consistent with an assault. However, he did not hesitate under cross-examination to confirm that the tenderness and swelling on the chest area could have been caused by something else, such as a soccer ball. He described the amount of force required to cause the injuries as medium, rather then severe or slight. He was asked under cross-examination whether the injuries could have been caused by a hiding with an open hand. To this Dr van der Poel responded as follows:

> "Your worship, no. I do not think ... not the legs, not the bruises. ... Because then we would have bigger areas of bruises and it would be bigger areas and it was not that big areas. It was more (round) areas."[1]

[8] According to Dr van der Poel, swellings usually take between 5-7 days to go down, but discolouration usually takes longer.

[9] The trial court found that the probabilities favoured the appellant's version on the question of whether or not his son, M, had been viewing pornographic material on the iPad. However, the court went on to find that M's untruthfulness on this aspect of his evidence should not be overemphasised,

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1 Record, pg 112, lines 10-14

and that it did not taint the remainder of M's evidence. The trial court went on to accept M's version of the assault on M, and to reject that of the appellant.

[10] As regards the assault on his wife, Ms G, the trial court also rejected the appellant's version. I will deal with the merits of the appeal against the appellant's convictions in respect of both counts in due course. First, however, it is necessary to deal with an issue raised by this court when it considered the appeal. That issue concerns the question of whether the defence of moderate chastisement to a charge of assault, which is based on the common-law right of a parent to inflict corporal punishment on his or her children, is compatible with the Constitution. As I have already indicated, this was the defence raised by the appellant against the charge of assault in respect of M.

[11] This court requested counsel for both the appellant and the State to make submissions on the issue. In addition, we issued directions inviting any interested parties to be joined as *amici* of the court and to make submissions. In particular, we invited submissions from the Minister of Justice and Correctional Services, and the Minister of Social Development. The former Minister did not respond to the invitation, but we received written submissions on behalf of the Minister of Social Development, for which we are grateful.

[12] Apart from the Minister of Social Development, we admitted four *amici curiae* to the proceedings. They made both written and oral submissions. The first three *amici* were represented by the Centre for Child Law, and made joint

submissions. They were the Children's Institute, the Quaker Peace Centre, and Sonke Gender Justice. For simplicity's sake, I refer to them collectively as "the CCL *amici*". The fourth *amicus* was Freedom of Religion South Africa ("FORSA").

THE *AMICI CURIAE*

[13] The Children's Institute was established at the University of Cape Town in 2001. It's mission is to contribute to the development of policies, laws and services that promote equality and realise the rights and improve the conditions of all children in South Africa, through research, advocacy, education and technical support. One of the focuses of its work is the high rate of violence and abuse of children in South Africa.

[14] The Quaker Peace Centre ("the QPC") was founded in 1987 by the Western Cape Religious Society of Friends (Quakers) in response to the repressive policies of apartheid and the need for developing non-violent methods of problem-solving, interaction and conflict resolution in South African society. Among other things, the QPC works with young parents providing support to, information on and skills for implementing positive and non-violent discipline of children.

[15] Sonke Gender Justice supports the development of just and democratic societies through equitable, healthy and happy relationships between men, women and children. It works to promote gender equality and to prevent domestic and sexual violence. One of Sonke's portfolios is entitled Child Rights and Positive Parenting, which is aimed at working to end violence against children and to promote child-rights and gender-equitable, non-

violent and positive parenting. Among other things, Sonke has worked with the Positive Discipline Working Group towards achieving an amendment to the Children's Act to establish a full ban on corporal punishment of children, including in the home.

[16] Not surprisingly, the CCL *amici* submitted that the common-law defence of reasonable chastisement is inconsistent with the Constitution. They submitted that this court should develop the common law by declaring that this defence is no longer applicable. In addition to their legal submissions, the CCL filed an expert opinion in the form of an affidavit by the Director of the Children's Institute, Prof Shanaaz Mathews, covering the linkages between corporal punishment and violence against children.

[17] FORSA is a non-profit company with the objective of engaging in advancing freedom of religion in South Africa through public awareness and research. They aver that they have an endorsement base of religious leaders representing more than 6 million people in South Africa, spanning various denominations, churches and faith groups. FORSA explains that its interest in the matter lies in that millions of believers believe that the scriptures command reasonable and appropriate correction of their children. Thus, for millions of believers, child correction, including physical chastisement at times, is a central to their faith. They submit that the court has a duty to respect and protect the religious convictions and beliefs of those believers who follow this tenet. FORSA advocates for the retention of the common-law defence of reasonable chastisement on the basis that it is compatible with the Constitution.

[18] The Minister of Social Development supports the view that the reasonable chastisement defence is incompatible with the Constitution, and submits that it should be declared unconstitutional.

[19] I will deal with the submissions made by the Minister of Social Development, the *amici*, the appellant and the State on this issue in more detail in due course.

SHOULD THIS COURT DECIDE THE CONSTITUTIONAL ISSUE?

[20] As indicated earlier, the constitutional issue of whether the common-law defence of reasonable chastisement is compatible with the Bill of Rights was raised by this court on appeal. The Constitutional Court has held that a court may, of its own accord, raise and decide a constitutional issue. This is so in circumstances where it is necessary for purposes of disposing of the case before it. It may also be so where it is otherwise necessary in the interests of justice.[2] The Court refrained from cataloguing the circumstances in which it would be in the interests of justice for a court to raise and decide a constitutional issue. However, it noted that there should be compelling reasons for doing so. Much would be dependent on the circumstances of each case. The Court expressly pointed out that even in cases where a matter has become moot, it may be in the interests of justice to decide a constitutional issue where this would be in the public interest and where the matter has been fully and fairly aired before the court.[3]

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2 *DPP, Transvaal v Minister of Justice* 2009 (2) SA 222 (CC) at [40]
3 Above, [41]

[21] The three CCL *amici* submitted that this was a matter where the court could properly raise and decide the constitutional issue posed. They added an important rider to this submission. The CCL *amici* submitted that the principle of legality required that even if this court were to decide that the common-law rule was unconstitutional, the effect of a declaration to this effect should be prospective and should not affect the appellant's rights in this matter. This is in accordance with the principle laid down in *Masiya v Director of Public Prosecutions (Pretoria) and Another (Centre for Applied Legal Studies and Another, Amici Curiae)*.[4] In that case the Constitutional Court held that:

> "... a development that is necessary to clarify the law should not be to the detriment of the accused person concerned unless he was aware of the nature of the criminality of his act."[5]

[22] None of the parties before this court suggested that there was any scope for the retrospective application of any declaration of constitutional invalidity in this case. Indeed, to make such an order retrospectively plainly would be contrary to the appellant's rights under section 35 of the Constitution. Strictly speaking, this means that the determination of the constitutional issue is not necessary to dispose of the appeal.

[23] The question that then arises is whether it is in the interests of justice for this court to do so in this case. FORSA submitted that unless it was found on appeal that the appellant had acted within the bounds of the common law defence, the constitutional issue was moot, and should not be considered

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4 2007 (5) SA 30 (CC) at [55]

5 Above at [56]

any further. FORSA pointed to the Supreme Court of Appeal decision in *Minister of Justice and Others v Estate Stransham-Ford*[6] on this point. In that case the SCA found that it was not open to courts of first instance to make orders on causes of action that have been extinguished merely because they think that their decision will have broader societal implications.[7] The court found that:

> "There must be many areas of the law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task. The courts have no plenary power to raise legal issues and make and shape the common law."[8]

[24] It must be borne in mind that these statements were made in the context of the facts of the *Stransham-Ford* case. The SCA noted that the relief sought by the applicant had been personal to him, and had been deliberately cast in those terms. Thus, when the applicant died before the court had made its ruling (although his death was unknown to the court), the entire cause of action died with him. In those circumstances, the SCA found that there was no longer a triable issue for determination by the court. The SCA noted, however, that there are cases in which a court may have a discretion to determine an issue even though it has become moot subsequent to a trial court's decision. The discretion exists where the interests of justice are

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6 2017 (3) SA 152 (SCA)
7 Above, [24]
8 Op cit

implicated, and where the order may have a practical impact on the future conduct of one or both of the parties.[9]

[25] I am mindful of the SCA's injunction against courts sallying forth to decide constitutional issues where it is not necessary or in the interests of justice to do so. However, in my view, the present case is one where the interests of justice require a consideration of the constitutionality of the common-law defence of reasonable chastisement.

[26] Critically, a determination of this issue will have important practical implications for how the State deals with charges of assault involving parents and their children in other cases. It is important for the State, and for parents who may be implicated in the future, to know whether the common-law defence is still available to an accused person. The situation is similar to that existing in the *Mayisa* case, where what was in issue was the common-law definition of rape. In that case, the Constitutional Court found that it was important to rule on the constitutionality of the definition, albeit that, because of the prospective nature of the declaration, it would have no impact on the conviction of the appellant.

[27] It is also important to bear in mind that courts are enjoined to apply the rights contained in the Constitution.[10] Courts have a constitutional obligation to develop the common law to bring it in line with the values that underlie our Constitution.[11] This is expressly recognised in section 39(2) of the Constitution. The Constitutional Court has held that the need to develop the

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9 At [22]
10 In terms of section 8(1), which states that the Bill of Rights binds the judiciary.
11 *Barkhuizen v Napier* [2007] ZACC 5 at [35]

common law arises where an existing common-law rule is inconsistent with a constitutional provision, or where the common law rule falls short of the spirit, purport or objects of the Bill of Rights.[12]

[28] In the present case, the constitutional rights implicated are the rights of children, who are afforded particular protection under the Bill of Rights.[13] Because of the application of the principle of legality, it will always be the case that any order declaring the common-law defence of reasonable chastisement to be unconstitutional will be prospective, rather than retrospective in effect. This means that, as a matter of course, the issue will always be moot when it arises for consideration in the sense that it will not determine the rights of the particular accused before the court. If this mootness were reason enough for a court like this one to refuse to consider the constitutional issue, it would mean that children's rights would continue to be placed in potential jeopardy unless and until the Legislature took action. This would be contrary to section 28(2) of the Constitution, which provides that a child's best interests are paramount in every matter concerning a child. It would also place the courts in the invidious position of having to ignore the potential unconstitutionality of the common-law rule, and thus bringing them into conflict with their duty under section 8(1) to apply the Bill of Rights, and their duty under section 39(2) to develop the common law in line with the Bill of Rights.

[29] It is also important to record that in this case this court took steps to invite submissions from all interested parties beyond the parties directly involved in

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12 *Thebus and Another v S* 2003 (6) SA 505 (CC)

13 Under section 28, and in addition to the rights they enjoy in common with everyone else.

the appeal. This court has had the benefit of extensive submissions by the parties and the *amici* on the issues involved. It has also had the benefit of submissions on behalf of the Minister for Social Development, who had no difficulty with the court determining the constitutionality of the common-law defence, and supported a declaration of unconstitutionality. Furthermore, in the affidavit supporting the Minister of Social Development's position, reference is made to a draft policy put out by the Department that promotes a ban on corporal and humiliating punishment in all spheres of children's lives, together with the promotion of parenting skills and positive disciplinary methods. There is no indication from the Department whether and when it will proceed to draft legislation to give effect to this policy. It seems, therefore, that any legislative intervention is still a long way off. In my view, the public interest would not be served by this court declining to take steps to determine this important constitutional issue in the interim.

[30] For all of these reasons, I am of the view that in this case it is in the interests of justice for this court to determine the issue of whether the common-law defence of reasonable chastisement is constitutional.

ASSAULT AND THE DEFENCE OF REASONABLE CHASTISEMENT

[31] The common law crime of assault is defined as the unlawful and intentional application of force to the person of another.[14] Our existing common law also recognises a specific defence to a charge of assault for parents who use the application of physical force to discipline their children, provided this falls within the bounds of what is called moderate or reasonable chastisement.

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[14] Milton South African Criminal Law and Procedure II Common Law Crimes (3e, 1996) at page 406

This is the so-called reasonable chastisement defence, which is also sometimes referred to as the moderate chastisement defence or the disciplinary chastisement defence.[15]

[32] Most authorities ascribe the origins of this defence to the common-law rights and duties of parents: on the one hand, parents have a right to demand that their children pay due reverence and obedience to their orders, and on the other, the parents have a duty to discipline their children in order to correct their behaviour.[16] Burchell and Hunt[17] describe the origins of the defence in the following terms:

> "Consistent with the social importance attributed to the family unit in western society, the law has traditionally conceded to parents a uniquely independent authority in rearing children. This meant that the State did not interfere in the exercise of the rights, duties and responsibilities of the parent in rearing children."

[33] Being a common-law rule, there are no hard and fast rules as to what constitutes reasonable or moderate chastisement. The physical force employed must have been meted out *bona fide* for disciplinary purposes, but the method and extent of the force falls to the discretion of the parent, provided, of course, that it is not excessive. In fact our courts have held, albeit more than one hundred years ago, that they will not lightly interfere

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15 See CR Snyman Criminal Law (5th ed) (LexisNexis) p141-2; *S v Lekgathe* 1982 (3) SA 104 (B) at 109A

16 Van Heerden *et al*, Boberg's Law of Persons and the Family (2nd ed) (Juta) p668-9; Snyman, *op cit*; *Germani v Herf and Another* 1975 (4) SA 887(A).

17 South African Criminal Law and Procedure (3rd ed) (Juta) at p117

with this parental discretion as there is a presumption that moderate chastisement has not been meted out *mala fides*.[18]

[34] In determining what is reasonable or moderate, much will depend on the facts of each case. Our courts have indicated that regard must be had to factors such as:

[34.1] the nature of the child's disciplinary infraction;

[34.2] the motive of the person administering the punishment;

[34.3] the degree of force applied;

[34.4] the object that was used to administer the punishment; and

[34.5] the age, sex and build of the child.[19]

[35] The effect of the common-law defence is simple: provided that the person who applies the moderate physical force in question is the parent, and the victim is his or her child who is being disciplined, conduct that would otherwise be an unlawful assault, if meted out by and to anyone else, is rendered lawful. Is this constitutional in our democratic era?

THE CONSTITUTIONAL RIGHTS IMPLICATED

[36] There was general agreement among the parties as to the range of constitutional rights implicated. As far as the child is concerned, they include:

[36.1] the right to human dignity (section 10);

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18 *Rex v Janke and Janke* 1913 TPD 382

19 *Lekgathe*, above, at 109B-C

[36.2] the right to equal protection under the law (section 9(3));

[36.3] the right to be free from all forms of violence from either public or private sources (section 12(1)(c));

[36.4] the right not be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e));

[36.5] the right of children to be protected from maltreatment, neglect, abuse or degradation (section 28(1)(d));

[36.6] the right to and the constitutional principle that a child's best interests are of paramount importance in every matter concerning the child (section 28(2)).

[37] FORSA submits that as far as parents are concerned a number of their constitutional rights are also implicated. These are the right to freedom of religion, belief and opinion (section 15); the right to human dignity (section 10); and the rights of cultural and religious communities (section 31). In addition, FORSA submits that the Constitutional Court has given implicit recognition to the importance of the protection of family life through South Africa's ratification of international human rights treaties that protect families as the natural unit of society.[20] The Court held in this regard that:

> "The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the natural and fundamental unit of our society.

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20 *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC) at [28] – [33]

However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."[21]

[38] The Court also pointed out that there was sufficient protection of marriage and family life through the recognition in our Constitution of the rights to dignity, equality and freedom of the person. For purposes of the present case, it seems to me that one should not lose focus on the actual constitutional rights implicated, albeit that the issue plays out in the context of the family. In other words, it must be recognised that there is no protection of a self-standing right to family life *per se* in our Constitution. However, in this case the family is a critical component of the constitutional inquiry involved in in weighing and balancing the rights that are directly implicated. It is also important to bear in mind, as the Court noted in *Dawood*, that families come in all shapes and sizes, and that the notion of what is family is dynamic and changeable, in line with societal developments.

JURISPRUDENTIAL AND LEGISLATIVE BACKGROUND

[39] To date our courts have considered and pronounced on the constitutionality of corporal punishment *vis-à-vis* children in two contexts, neither of which directly involves the family environment.

[40] In *S v Williams*[22] the Constitutional Court found that juvenile whipping as a sentence under section 294 of the Criminal Procedure Act 51 of 1977 was

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21 At [31]
22 1995 (3) SA 332 (CC)

unconstitutional on the grounds that it violated the right to dignity and constituted cruel, inhuman and degrading treatment. The Court noted international trend towards moving away from punishments placing undue emphasis on retribution and vengeance, rather than on correction, prevention and the recognition of human rights.[23] It also noted the unacceptable levels of violence in South Africa, and found that the legitimisation of the institutionalised use of violence by the state was incompatible with the Constitution.[24] FORSA correctly point out that the constitutional inquiry in *Williams* was on the institutionalised meting out of corporal punishment by impersonal state authorities as a form of judicially sanctioned punishment. It is so that physical chastisement in the home by a parent differs from corporal punishment in this institutionalised context. Whether or not this difference is sufficient to render the practice (and the defence of reasonable chastisement) constitutional is a question that will be considered in due course. What is important about the *Williams* judgment for purposes of the present inquiry is the recognition given by the Court to the vulnerability of children and the fundamental importance of the duty on the State to protect them. The Court held, in this regard, that:

> "One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the State, as role model par excellence, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished."[25] (my emphasis)

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23 At [50]
24 At [52]
25 At [47]

[41] In *Christian Education South Africa v Minister of Education* [26] the Constitutional Court dealt with the constitutionality of the prohibition on corporal punishment in schools under the Schools Act. In that case the constitutional challenge was based squarely on the rights to freedom of religion under sections 15 and 31 of the Constitution. The applicants argued that their rights were infringed in that the Act prevented them from consenting to teachers dispensing corporal punishment in schools in line with their parental religious beliefs. They sought an exemption from the application of the relevant provisions of the Act to accommodate their beliefs.

[42] The Court proceeded on the assumption that the Schools Act limited the applicants' rights as alleged. It was sensitive to the fact that it was not being called upon to consider the constitutionality of the meting out of reasonable chastisement in the family home.[27] The Court noted in this regard that there was a difference between the two situations in that parental discipline involved "*the intimate and spontaneous atmosphere of the home*" rather than "*the detached and institutional environment of the school*". However, the Court recognised the significance of existing social factors such as the extent of traumatic child abuse and the painful events of South Africa's past when "*the claims of protesting youth were met with force rather than reason*". In this regard, the Court recognised that these issues necessarily invoked legitimate concerns on the part of the state:

> "...such broad considerations taken from past and present are highly relevant to the degree of legitimate concern that the state may have in

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26 2000 (4) SA 757 (CC)
27 At [48]

an area loaded with social pain. They also indicate the real difficulties the State may have when asked to make exemptions even for the most honourable of persons." (my emphasis)

[43] The Court specifically stated that the State is under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally, and to protect all people and especially children from maltreatment, abuse or degradation. By ratifying the United Nations Convention on the Rights of the Child, the State undertook to take all appropriate measures to protect the child from violence, injury or abuse.[28] The Court also reiterated the importance of the constitutional recognition of the best interests of the child being of paramount importance, and the need for children to be protected from the potentially injurious consequences of their parents' religious practices.[29] The Court was persuaded by the arguments presented by the Minister of Education to the effect that the State had a duty to protect children from the degradation and indignity inherent in corporal punishment at schools. It accepted that any infringement of the applicants' rights was constitutionally justified.

[44] Neither of these two judgments speak directly to the question of parental chastisement in the home and the reasonable chastisement defence to a charge of assault against a parent. As Sachs J noted in *Christian Education*, the issue of religious freedom in a secular world is one fraught with complexity.[30] It is important to bear in mind that unlike the situation pertaining in *Christian Education*, the right to freedom of religion is not the

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28 At [40]
29 At [41]
30 At [43]

focal point of the present case. It is raised by FORSA as one of many reasons why it says that, insofar as children's constitutional rights may be held to be infringed by the reasonable chastisement defence, such infringement is constitutionally justifiable.

[45] There is well-established jurisprudence on the rights of the child under the Constitution facilitated by the inclusion of section 28, and South Africa's ratification of the United Nations Convention on the Rights of the Child ("the CRC"). In *S v M (Centre for Child Law as Amicus Curiae)* [31] the Constitutional Court noted the significance of the CRC in that it had "*become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's right*". This involved the need for "*a change in mindset, one that takes appropriately equivalent account of the new constitutional vision*".[32] Although the Court made these remarks in the context of juvenile justice, they are important principles of general application. The Court reiterated that section 28(1) and section 28(2) establish a set of children's rights that the courts are bound to enforce:

> "The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights."

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31 2008 (3) SA 232 (CC)

32 At [16]

[46] The Court in *S v M* laid down a fundamental principle pointing to a critical mind-shift in the relationship between parents, children and the protection of the law. In a passage that is often cited as identifying the essence of what children's rights mean under the Constitution, the Court held as follows:

> "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 the 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."[33] (my emphasis)

[47] For reasons I will expand on in more detail later, this dictum is critical to how the constitutional issue raised in the present case should be approached.

[48] The Constitutional protection of the rights of the child and South Africa's ratification of the CRC have spawned specific legislation establishing a detailed framework for the protection of children. The Children's Act 38 of 2005 is the primary legislation in this regard. It lists as some of its objectives the following:

[48.1] to give effect to the constitutional rights of children, including the right to be protected from maltreatment, neglect, abuse or degradation;

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33 At [18]-[19]

[48.2] to give effect to South Africa's obligations concerning the well-being of children in terms of international instruments binding on it;

[48.3] to provide care and protection to children who are in need of care and protection.[34]

[49] The Act places a duty of care on parents in respect of their children. This includes:

[49.1] the duty to protect the child from among other things, maltreatment, abuse, neglect, degradation, and any physical, emotional or moral harm or hazards;[35]

[49.2] the duty to protect, respect, promote and secure the fulfillment of, and guarding against any infringement of the child's rights set out in the Bill of Rights;[36]

[49.3] the duty to guide the behaviour of the child in "a human manner";[37]

[49.4] guiding, directing and securing the child's education and upbringing, including religious and cultural upbringing and education, in a manner appropriate to the child's age, maturity and stage of development.[38]

[50] The definition of abuse in the Children's Act is broad. It means any form of harm or ill-treatment deliberately inflicted on a child including, among others:

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34 Sections 2(b); (c) & (g)
35 Section 1(c), under the definition of "care"
36 Section 1(d), under the definition of "care"
37 Section 1(g), under the definition of "care"
38 Section 1(e), under the definition of "care"

"(a) assaulting a child or inflicting any other form of deliberate injury to a child; ... or

(e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally."[39]

[51] The Act further establishes a regime to deal with cases of abuse, as defined. Acts of abuse may be reported to a designated social worker or the police for investigation. The matter may be brought before a children's court and the court may determine if a child is in need of care and protection.[40] The powers of the court in terms of remedial action in this regard are broad. It may, among many other things, issue orders invoking intervention and family preservation programmes. These may relate to appropriate parenting skills and the promotion of positive, non-violent forms of discipline.[41] In terms of section 305(3), parents who abuse their children will be guilty of an offence.

[52] In addition to the Children's Act, as with other members of the household, children may claim the protections afforded under the Domestic Violence Act 116 of 1998. The definition of "complainant" in the Act includes any child in a domestic relationship with the respondent. Domestic violence is defined broadly and includes physical abuse, emotional and psychological abuse, intimidation, and any other form of abusive conduct causing harm or the

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39 Section 1

40 Section 150

41 Section 46(g), see also section 46(h), dealing with child protection orders, and what these may entail.

imminent threat of harm to the health, safety or wellbeing of the complainant.[42]

[53] By ratifying the CRC, South Africa bound itself to comply with the following protections afforded to children:

[53.1] to take all legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, or maltreatment while in the care of parents;[43]

[53.2] to take all appropriate measure to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the Convention;[44]

[53.3] to ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[45]

[54] While the CRC does not expressly deal with parental physical chastisement, the CRC Committee has over the years issued General Comments laying down guiding principles for contracting states. In General Comment 8, in 2006, the Committee stated that corporal punishment is incompatible with the CRC. It constitutes cruel and degrading treatment. All children have the right to be free from all forms of cruel and degrading treatment.[46] It stated further that state parties were expected to include in their periodical reports

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42 Section 1
43 Article 19(1)
44 Article 28(2)
45 Article 37
46 General Comment No 8: The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (article 19, 29(2) and 37 inter alia; 15 May – 2 June 2006, Paragraphs 7, 12 and 18

information on the measure and steps taken to eradicate corporal punishment.

[55] General Comment 13 was issued by the Committee in 2011 to address the extent and intensity of violence exerted on children.[47] Its recommendations included the following:

[55.1] No violence against children is justifiable, and is preventable.

[55.2] A child rights-based approach to child caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and physical and psychological integrity of children as rights-bearing individuals.

[55.3] The concept of dignity requires that every child is recognised, respected and protected as a rights holder and as a unique and valuable human being with individual personality, distinct needs and privacy.[48]

[55.4] The Committee recognised the primary position of families in caregiving and protection and in the prevention of violence, but the Committee also recognised that the majority of violence takes place in the context of families and therefore intervention and support is required when children become victims.[49]

[55.5] Critically, the Committee noted that national laws should "*in no way erode the child's absolute right to human dignity and physical*

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47 General Comment No 13 (2011): The Right of the Child to Freedom from all forms of violence; 18 April 2011

48 Paragraph 3

49 Paragraph 14

and psychological integrity by describing some forms of violence as legally or socially acceptable".[50] (my emphasis)

[56] As recently as October 2016, the Committee had cause to comment on South Africa's second report on the implementation of its obligations under the CRC.[51] The Committee made the following pertinent remarks:

[56.1] It was "*concerned that corporal punishment in the home has not been prohibited and is widely practiced*".

[56.2] With reference to the Committee's General Comment No 8, it recommended that South Africa: "*Expedite the adoption of legislation to prohibit all forms of corporal punishment in the home, including 'reasonable chastisement'*". (my emphasis)

[57] Similarly, the African Committee of Experts on the Rights and Welfare of the Child in 2014 called on South Africa to ban corporal punishment in the home and to promote and provide information and training on positive disciplining. It also urged South Africa to harmonise its national laws which currently permit parents to reasonably chastise their children.[52]

[58] It is in light of comments like these that the Department of Social Development supports the view that the reasonable chastisement defence is

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50 Paragraph 17

51 27 October 2016, CRC/C/ZAF/CO/2, Concluding Observations on second report

52 The African Committee of Experts on the Rights and Welfare of the Child Concluding recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child at para 35

inconsistent with the Constitution. Rather strangely, the Department states in its Draft Policy quoted in its written submissions to this court that:

> "Hitting a child is assault, but previously, parents who hit their children had a special defence of 'reasonable chastisement'. That defence is not part of South African law anymore. This puts hitting of children on the same footing as hitting an adult." (my emphasis)

[59] It is not clear what the legal basis is for the Department's view that the defence is no longer part of our law. Unfortunately, as the Department did not appear before this court to make oral submissions, this court was unable to pursue the matter with them. However, whatever the basis for the view is, it is clearly incorrect. Until the Department has put in place legislation outlawing the defence, or unless the courts develop the common law to render it no longer applicable in our law, the defence remains a part of our law.

[60] I turn now to consider the constitutional issue.

IS THE REASONABLE CHASTISEMENT DEFENCE CONSTITUTIONALLY COMPATIBLE?

[61] The authorities discussed earlier provide the necessary roadmap to guide the process of considering whether the reasonable chastisement defence is compatible with our Constitution. It seems to me to be clear that the starting point is the recognition by the Constitutional Court in *S v M* that our Constitution imagines children as their own constitutional beings. They hold constitutional rights in their own respect, not through their parents. Children are entitled under the Constitution and legislation like the Children's Act to

require their parents to protect their rights. If their parents fail in this regard, the state bears the overarching obligation to ensure that children's rights are respected, protected and enforced.[53]

[62] As the Court stressed in *S v M*, what our Constitution requires is a mind-set change, towards a child-focused and child-sensitive model of child justice. The origins of the reasonable chastisement defence lie in our Roman and Roman-Dutch law. They are based on the notion of the parental power and the view that children owe a duty of obedience to their parents. This has been described as follows:

> "(the parental power) gives the parents the right of demanding from their children due reverence and obedience to their orders, and also, in cases of improper behaviour, to inflict such moderate chastisement as may tend to improvement."[54]

[63] Over the years our courts have reiterated the parent-centered nature of the defence. For example, in *Germani v Herf*,[55] the Appellant Division held that:

> "it is well-recognised that a parent of a child, ... is entitled to use reasonable and moderate force to procure the child's obedience to his legitimate directions and requests". (my emphasis)

The existing case law and authorities are littered with reference to the parental right to use reasonable and moderate chastisement on their

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53 Under section 7(2) of the Constitution

54 Van der Linden, 1.4.1, Juta's translation, cited in Van Heerden *et al*, Boberg's Law of Persons and the Family (2nd ed) at p668

55 1975 (4) SA 887 (AD) at 902B

children.[56] Following from this, if a parent raises the defence to a charge of assault, the onus lies on the State to prove that he or she exceeded the bounds of the defence and thus did not have the authority to carry out what would otherwise be an unlawful assault.[57]

[64] The parental power, or rights based origins of the defence are clearly at odds with the child-focused model of rights envisaged under our Constitution. However, it would be too simplistic to consider this on its own to be sufficient to condemn the defence to the constitutional litterbin. It is important to bear in mind that there are aspects of the defence that implicitly at least give some recognition to the protection and wellbeing of the child.

[65] FORSA point out in their submissions that parental discipline is an important part of the parent's duty to ensure that the child is brought up in a socially acceptable manner. This forms part and parcel of what the Constitution recognises to be the parental care which parents are obliged to provide.[58] It is also an important element of the duty on parents under the Children's Act to guide and direct the child's upbringing. Thus, parental discipline is something that is aimed at ultimately inuring to the benefit of the child and contributing to his or her best interests. FORSA submits that to place restrictions on the parental power of discipline by removing the reasonable chastisement defence would not be in the best interests of the child.

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56 See in this regard the very full and helpful discussion of the authorities in Van Heerden *at al*, Boberg's Law of Persons and the Family, above, p668-680

57 Milton South African Criminal Law and Procedure II Common Law Crimes at 414, cited in Boberg, above, p670

58 Section 28(1)(b)

[66] In addition, it is also important to bear in mind that the defence of reasonable chastisement does not permit untrammelled levels of physical punishment to be meted out to children. As FORSA points out, the defence limits a parent to reasonable or moderate levels of physical discipline. FORSA submits that this should not be equated with violence or physical abuse. Implicit in FORSA's submissions is the notion that the defence of reasonable chastisement permits, at worst for the child, only minimal levels of physical punishment. Developing this notion further, the submission is that, when balanced with the disciplinary benefits achieved, the defence cannot be regarded to constitute an unjustifiable breach of the child's rights.

[67] In my view, there are a number of difficulties with this submission. In the first place, as both counsel for the appellant and the State acknowledged in their submissions, the common law does not lay down strict guidelines as to what constitutes reasonable chastisement. Snyman, [59] suggests that it is constituted by an occasional slap on the thigh or the buttocks. However, in the old case of *R v Janke & Janke*,[60] the court noted that while a highly sensitive child may be seriously affected by a whipping, the same punishment may be harmless (and hence entirely justified) for a more robust child.

[68] The most the common law does is to identify factors that should be taken into consideration in each case in order to determine what is reasonable. This is deeply problematic as it introduces a level of arbitrariness to the infliction of physical punishment on children. In both *Williams* and *Christian Education*

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59 Above, at p142
60 Above, at 386

the Constitutional Court identified the arbitrary nature of the infliction of corporal punishment as being factors contributing to the constitutionality inquiry. In my view, the same applies to physical chastisement administered in the home environment. Under the common law, it is for the parent to decide in the first instance on the level of physical force his or her child deserves, and can withstand, as punishment. Many parents may behave, or believe they are behaving, "reasonably" in this regard. However, given the levels of child abuse and domestic violence in our country, as noted in numerous decisions, it is likely that many a child is subjected to levels of physical punishment that, regardless of their parent's belief, they are unable to withstand without harm to their physical and/or emotional states. This element of arbitrariness, which is inherent in the common law defence of reasonable chastisement is out of line with the child-centered model of rights demanded by our Constitution.

[69] There are further fundamental difficulties with the submissions made by FORSA in support of the retention of the common-law defence. The Constitution is very explicit in its exposition of rights. It gives protection from "all forms of violence", whether from public "or private sources" (my emphasis) in section 12(1)(c). It also protects the right to bodily and psychological integrity in section 12(2). This is a clear indication that the same level of protection is to be afforded to those who are victims of violence in the home as to those who are the victims of violence from public sources. In other words, if a child experiences any form of violence in the home from a parental source, that child is entitled to the same protection from the State as she would be entitled to if the violence came from a non-parental source.

Similarly, it should make no difference whether a child's bodily integrity or psychological integrity is interfered with through conduct on the part of a parent that, but for the defence, would be an assault.

[70] One of the obvious difficulties with the reasonable chastisement defence in this regard is that it permits a parent to inflict some level of violence on a child, and to breach their right to bodily and psychological integrity for disciplinary purposes. Even if the level of chastisement is adjudged to be "reasonable" under the defence, physical chastisement inevitably involves a measure of violence. It undoubtedly also breaches the physical integrity of the child. The offence of assault under the common law is aimed at protecting bodily integrity. Yet the reasonable chastisement defence decrees that it is lawful for a parent to breach that integrity. This is clearly a violation of the rights guaranteed under section 12.

[71] The same holds true for a child's right to dignity. Under the Constitution a child enjoys the general right to dignity under section 10. In addition, children enjoy special protection under section 28(1)(d) to be protected from, among other things, degradation. Human dignity lies at the heart of this latter protection.[61] In turn, the right to dignity is foundational to our constitutional dispensation. It is one of the factors expressly identified in the Constitution to be taken into account in the process of determining whether a limitation of a right is justified under section 36.

[72] The child's right to dignity is implicated in the present inquiry in two related respects. In the first place, it seems to me that where conduct breaches a

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61 *Williams*, above, at [35]

child's right to physical integrity, it must inevitably involve a measure of degradation or loss of dignity for the child. At the very least it has the potential to do so. So, where a child is subjected to conduct that would otherwise be an assault, but for the reasonable chastisement defence, there is an inherent breach of that child's dignity. This brings into play the second respect in which the child's right to dignity is impaired. If an adult is subjected to an assault, the law will take its course to protect his or her rights. However, in the case of a child, the defence of reasonable chastisement permits (and obliges) the State to treat him or her with a lesser level of concern and gives the State less power to protect her or his rights. This is inherently degrading for children who are effectively treated as second-class citizens by the law in this regard.

[73] The effect of the defence is fundamentally to undermine the critical concept of children having their own dignity, as noted in *S v M*. Contrary to this constitutional principle, it subsumes the child's right to dignity under that of their parents. It assumes that in meting out reasonable chastisement the parent is acting in the child's best interests, and that the parent knows what is best for the child. However, this assumption is made without any regard to the child's own, self-standing right to dignity, or to the child's right to require the State to protect it.

[74] My analysis of the reasonable chastisement defence in relation to the child's right to dignity points to a further constitutional deficiency in the defence. The defence treats child victims of assault by their parents differently to adult victims of assault. I earlier referred to the definition of assault under the

common law. In general, the offence[62] does not require unreasonable levels of violence to be perpetrated against the victim. All it requires is the unlawful and intentional application of force to the person of another. Pushing, or slaps on the buttocks would fall within the definition, as would striking someone with a slipper or other object, regardless of how benign the instrument might appear to be. However, where a parent carries out such conduct for disciplinary purposes, our law accepts that the parent may claim to have been acting lawfully. In that case, the State bears the onus of proving that the parent exceeded his or her lawful bounds of authority to discipline his or her child.

[75] Children are entitled under section 9(1) of the Constitution to equal protection of the law. They also have the right under section 9(3) not to be discriminated against because of their age. The reasonable chastisement defence does not give children equal protection under the law in that it does not protect children from assault in circumstances where adults who are subjected to the same level of force are protected.

[76] Moreover, this is not a rational differentiation that would fall within the bounds of different treatment permissible under section 9 of the Constitution. The defence legitimises the infliction of some level of violence, and breaches of bodily integrity, by parents against their children. This is antithetical to the constitutional right prioritising the best interests of the child. It is also undermines the special duty owned by the State to protect children from all forms of violence and degradation, and to protect their best interests. The

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[62] I do not refer here to the offence of assault with intent to do grievous bodily harm.

existence of the defence obstructs the state in its duty to prosecute parents who assault their children. Its effect is to render more vulnerable a group of rights-holders that has been singled out by the Constitution to be deserving of special protection, and whose best interests are expressed to be of paramount importance. For these reasons, I agree with the submissions made by the CCL *amici* to the effect that the reasonable chastisement defence breaches the rights of children under section 9(1) and 9(3) of the Constitution.

[77] Is there any basis upon which it can be found that these infringements of children's rights are justifiable under section 36 of the Constitution? That section provides that:

> "The rights in the Bill of Rights may be limited only in terms of a 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".

[78] As the Court held in *Williams*, limitations can only pass constitutional muster if a court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in its limitation, taking into account the availability of less restrictive means to achieve this purpose.

[79] I have already outlined why, in my view, the rights in question are very important. In short, they involve the rights of children to be protected, equally with adults, from assaults that constitute an affront to their dignity and bodily integrity. They are particularly important rights in the context of the high levels of child abuse and violence that pervade our society. It is important that the State is empowered, rather than shackled, by the arsenal at its disposal to investigate, prevent and protect children from harmful and potentially harmful situations. The defence creates an "off-limits" zone for State involvement, which is not conducive to facilitating a child-focused justice and protection system for children. The existence of the defence, which legitimises assault only in relation to children, is fundamentally at odds with the best interests of the child.

[80] The limitation has its origins in a pre-constitutional era, when children were not viewed as being the holders of their own set of rights. Discipline remains an important part of the responsibilities of parents. No-one is suggesting that parents should not be permitted to discipline their children. However, it is worth repeating a point I have made before: even reasonable chastisement may fall within the bounds of what our law defines to be an assault. Thus, the question is whether the severe limitations imposed by the defence on the rights of children can be justified by the need to continue to permit parents to assault their children for disciplinary purposes.

[81] I can find no justifiable reason to permit this. In saying so I take into account the fears expressed by FORSA, viz. that in doing away with the defence many well-meaning parents who genuinely believe they are doing their best for their children may become criminalised, as they will now be vulnerable to

criminal convictions for assault. FORSA also fear that these parents may end up losing their children. However, these are fears that are out of step with the underlying objectives of the Children's Act, which is to promote positive parenting and positive discipline, rather than to criminalise errant parental behaviour. I detailed earlier how the Act makes provision for the diversion of cases to the children's court, which has broad powers to make orders to facilitate positive parenting in families. In the draft policy discussed on behalf of the Minister in the Department of Social Development's submissions to this court, the same point is made: the Department does not envisage that doing away with the reasonable chastisement defence will lead to the over-criminalisation of parenting behaviours. Instead, the draft policy states that:

> "... as far as possible, parents should not be criminalised and, if reported for inappropriate punishment (including corporal punishment), should be referred to prevention and early intervention services."

As I have already indicated, these intervention and prevention services are already in place under the Act. In line with these legislative objectives, it seems clear that criminal sanctions are not intended to be imposed willy-nilly in respect of any parent who chastises their child.

[82] FORSA relies on the right to freedom of religion and belief under section 15, and on the rights of religious communities under section 31 to advocate for the retention of the defence of reasonable chastisement. FORSA submits that it would be unconscionable and unconstitutional to undermine these rights by doing away with the defence. They submit that this would place

many believers who believe that they are acting in the best interests of the children with the choice of obeying the law or obeying the reasonable tenets of their faith and facing criminal sanction.

[83] Unlike the applicants in *Christian Education*, FORSA does not submit that the common law defence ought to be retained specifically to provide for a religious exemption. Had they done so, this might have provided a stronger basis to argue against the wholesale doing away with the defence. As things stand, it is necessary to balance any limitations on the right to religious freedom involved in doing away with the defence against the limitations on the rights of the child in retaining it.

[84] I will assume, as the court did in *Christian Education*, that doing away with the defence may involve some limitation of rights under section 15, and perhaps section 31 (although I make no decision in either regard). Even if this were the case, it seems to me that these limitations are not such as to warrant retaining a defence that fundamentally undermines the rights of children. As I indicated earlier, it is accepted in our jurisprudence that children's rights are not subordinated to the religious views of their parents. The removal of the defence will not prevent religious believers from disciplining their children. It is so that they may have to consider changing their mode of discipline, but in view of the importance of the principle of the best interests of the child, this is a justifiable limitation on the rights of parents. In addition, to reiterate a point I made earlier, the removal of the defence will not open up religious parents to a greater threat of criminalisation and removal of their children. This is a case where I am satisfied that it is permissible to require religious parents who believe in corporal punishment

to be expected to obey the secular laws, rather than permitting them to place their religious beliefs above the best interests of their children.

[85] For all of these reasons, I find that the limitations imposed by the reasonable chastisement defence are not constitutionally justifiable under section 36. It is time for our country to march in step with its international obligations under the CRC by recognising that the reasonable chastisement defence is no longer legally acceptable under our constitutional dispensation. In doing so we will hardly be at the forefront of legal developments in the international community. Almost half of African states have either committed to abolishing corporal punishment in full (i.e. including in the home) or have expressed a clear commitment to doing so.[63] South Africa is one of those that has made the commitment although, as I indicated earlier, the process of doing so through legislation is not well advanced. The courts have a duty to take the necessary steps to develop the common law where it infringes constitutional rights. In my view, that duty will be served in this case by an order declaring, with prospective effect, that the common-law defence of reasonable chastisement is no longer applicable in our law.

[86] I accordingly propose an order in these terms at the end of this judgment.

THE MERITS OF THE APPEAL

[87] I dealt earlier with the pertinent details of the appellants appeal against his conviction on the charge of assault in relation to his son, M. The essential

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63 Kenya, South Sudan, Tunisia, Benin, Cabo Verde, the Republic of Congo and Togo have abolished it, while the following states have committed to doing so: Angola, Comoros, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Uganda, Zambia, Zimbabwe, Algeria, Burkina Faso, Guinea Bissau, Niger, Sao Tome and Principe, Sierre Leone.

question is whether the trial court was correct in finding that the State had proved that the appellant had exceeded the bounds of reasonable chastisement when he disciplined M for allegedly watching pornography on the iPad.

[88] Although M denied in court that he had been watching pornography, the trial court accepted the appellant's version in this regard and found that in all probability M had been doing so. The relevance of this finding is that it points to M not being truthful in his testimony in all respects. The appellant submits on appeal that the trial court was faced with the evidence of a single child witness on the events that took place during the alleged assault. The court ought to have approached M's evidence with due caution, and, so the appellant submits, the fact that M was untruthful about the pornography means that his evidence was not satisfactory in all material respects. Accordingly, the trial court ought properly to have rejected M's version of events. The appellant also pointed out various aspects of M's evidence that differed from that of the other witnesses.

[89] There is some commonalilty between the versions of M and the appellant. It is common cause that the appellant accused M of watching pornography and of circumventing the internet password to access the internet. The appellant warned M that if he did not tell the truth he would give him a hiding. There are some differences in their versions as to how many warnings the appellant gave M before he hit him, but those differences are not material. What is common cause is that the appellant applied physical force to M more than once. After the first warning he applied physical force, and then he gave M a chance once again to come clean and admit what he had done. When M did

not do so, he applied physical force to M again. It is common cause that this pattern repeated itself a number of times over a period of over an hour, with the appellant warning M to confess and when he refused to do so, applying force to M again.

[90] Where M and the appellant's version differ materially is on the nature of the physical force applied to M. M's version was that his father punched him with his fist and kicked him with his bare feet on the thighs and also on his chest. He denied the appellant's version, which is that he slapped M with his flat hand on his buttocks. The appellant testified that he lifted up M's legs and "gave him a shot" on the buttocks. His version was that he did hit M on the thighs but that this was unintentional and it occurred when M twisted away from him as he tried to hit him on the buttocks on one occasion. M testified that he had been given hidings before by his father, but that he had reported it to the police this time because his father had "*beaten him up*".

[91] The trial court was mindful of the cautionary rule to be applied to M as a single witness as to what had transpired between him and his father. It noted that M's untruthfulness as regards the pornography should not be overemphasised or regarded as an indication that he was an untruthful witness on the whole. I agree with the trial court's assessment in this regard. As was stated in the judgment of the trial court, if a 13-year old boy is caught watching pornography by his father it is likely that through embarrassment, the child will deny it. I accordingly agree with the trial court's finding that being untruthful in this regard did not affect the credibility of M as a witness.

[92] As the trial court stated, M's version of events, and particularly his version of the nature of the physical force applied by his father, was corroborated by Dr van der Poel, who examined M some days after the incident. At that stage, M still had bruises on his thighs which, according to Dr Poel's evidence, were not injuries inflicted with a flat hand. Although Dr Poel did not exclude the possibility that a soccer ball could have caused bruises of this nature, in my view, on the evidence it is highly unlikely that this was the case here. M was adamant under cross-examination that the ball that he had played with while on holiday before the incident was a soft soccer ball, not a hard one, and that he had not been injured from the soccer. He was not shaken under cross-examination on this score. Reading the record of his evidence as a whole confirms the trial court's assessment that M was a good witness, and there is no reason to fault the court's assessment that he made a good impression. On the appellant's own version, he admitted that at least one of his "*slaps*" connected with M's thigh. It is overwhelmingly likely that it was the physical force that the appellant applied rather than a soccer ball that caused the bruising to M's thighs.

[93] In my view, the trial court correctly rejected the appellant's version that he only smacked M with a flat hand on his buttocks, and correctly accepted M's version.

[94] I am also of the view that the trial court was correct in its finding that the appellant had exceeded the bounds of moderate or reasonable chastisement in acting as he did. He certainly did more than deliver a few slaps. Even if one were to accept that moderate chastisement can exceed an occasional slap on the buttocks, what the appellant did fell well outside of those bounds.

He repeatedly punched and kicked M over a period of time. At one point M even fell on the floor from the bed where he had been sitting. M's bruising was still visible some days later. This was, without any doubt at all, an assault on M.

[95] For these reasons, I find that there is no merit in the appeal against the charge of assault in respect of M.

[96] As regards the charge of assault against Mrs G, the appellant pleaded self-defence. It is common cause that the incident involving the second charge of assault occurred later on the same day as the first assault on M. The appellant admits that he pushed Mrs G during an altercation. He also admits that what triggered the incident was his suspicion that Mrs G was having an affair. He took possession of her cell phone at home and was checking her messages for evidence of an affair when she walked into the room. While Mrs G denies that she was having an affair, her version is consistent with the appellants to the extent that what transpired between them started when he was checking her cell phone. Mrs G was upset by this and asked him what he was doing. The appellant's version is that when he told her that he was checking for messages Mrs G was furious. She screamed at him and attacked him by grabbing his beard and punching him on his chest, and by pulling on and scratching his ears. According to the appellant, this was an extremely violent assault. He reacted by trying to keep Mrs G at bay. He pushed her on the chest away from him onto a bed. The children came into the room and he told them to leave. Thereafter, Mrs G punched him in the nose. The appellant testified that he suffered injuries as a result of Mrs G's attack on him. His nose and his ears were bleeding. He consulted a doctor

a couple of days later who completed a medical report detailing certain injuries.

[97] Mrs G's version was that when the appellant took her phone she asked him what he was doing and he said he was deleting things from it. She tried to take her phone from him, but he kicked her and pushed her on the bed. This was in the master bedroom. She was not visibly injured by the kick. She started screaming and the children ran into the room. M was one of the children who came into the room. M started crying. The appellant took the phone again and when Mrs G tried to take it from him he lifted her and pushed her against the cupboard. He was swearing at her during this incident. She grabbed onto the appellant's ear as she was falling down. She phoned her father to report what had happened. Her father later spoke to the appellant on the phone. That night she and the children slept in one of the children's bedrooms. According to Mrs G the appellant came into the room and apologised for his behaviour. Mrs G testified that she did not consult a doctor after the attack on her.

[98] It is common cause that Mrs G and the children left the matrimonial home a day or two after these incidents and that they are in the process of divorcing.

[99] The appellant laid an assault charge against Mrs G. He was advised by the police that he had to undergo a medical examination. Dr Futcher, who examined the appellant, gave evidence at the trial. He testified that he had noted an abrasion or scratching on the appellant's collarbone, and fine, speckled bruising below the collar bone, as well as abrasions to his ears. He

also had a contusion (tenderness but no visible bruising) to the nose. The injuries were relatively superficial.

[100] M testified that he saw his father punch his mother with a fist in the chest and that she had gone backwards into the cupboard. He also saw his mother pulling his father's ear. He denied that Mrs G had started the fight. According to him, his father had punched his mother first.

[101] On the appellant's own admission he pushed Mrs G onto the bed. However, on his version, Mrs G was the aggressor who committed a very aggressive and violent assault on him. By pushing her he was doing no more than acting with the necessary self-defence to ward off her attack.

[102] The trial court rejected the appellant's version. The appellant contends that it erred in doing so. He points to certain aspects of the evidence for the State that he says are contradictory. For example, he points out the Mrs G testified that the appellant lifted and pushed her against the cupboard, and pressed her there, whereas M testified that the appellant punched her in the chest so that she fell against the cupboard. He also points out that Mrs G only referred to her grabbing the appellant's ear in cross-examination, and not in his evidence in chief.

[103] In order to determine whether the trial court erred in rejecting the appellant's version, it is necessary to consider the evidence as a whole. At the very least, the appellant pushed Mrs G onto the bed. That in itself is conduct that may, depending on the lawfulness and intention involved, constitute an assault. The question then is whether the appellant was acting in self-defence or not. For his defence to succeed, his version that Mrs G was the

aggressor of a violent assault on him must be accepted. I cannot fault the trial court for its finding in this regard. The appellant suspected his wife of having an affair. In fact, in his evidence he remained adamant that she was having an affair. For this reason, he went into her private cell phone. It is reasonable to assume that he was not in a happy state of mind at this time. Furthermore, he had already had an altercation with his son earlier in the day when he felt that his position as father and head of the family was being thwarted by M's conduct. It is difficult to avoid the inference that he must have been in a state of some agitation when Mrs G walked into the room and found him with her phone. In these circumstances, it is highly unlikely, in my view, that it was Mrs G, rather than the appellant who was the aggressor. It is also highly unlikely that Mrs G perpetrated a very violent and vicious attack on the appellant, as he claims. As the magistrate noted, Mrs G is not a big woman, weighing only between 40 and 50kgs. The injuries noted by the doctor were superficial abrasions and contusions. They are not the kind of injuries one would expect to find on the victim of a violent or vicious attack.

[104] In addition, both Mrs G and M testified that the appellant had pushed Mrs G into the cupboard. M did not talk about him pushing her onto the bed. That makes sense as it seems to be common cause that the children entered the room after the incident started, and after he had pushed her onto the bed. If the incident had involved only a push onto the bed, as the appellant contends, then both Mrs G and M would have to have completely made up the story that he pushed her against the cupboard. There is further evidence to corroborate Mrs G's version. She phoned her father after the incident, who then spoke to the appellant. She and the children all slept in one room that

night, away from the appellant, and they left the home two days later. It is highly unlikely that Mrs G would have gone to these lengths to get away from the appellant if she was the aggressor in an assault and all he had done was to push her away from him in an act of self-defence.

[105] For all of these reasons I am of the view that the trial court did not err in rejecting the appellant's version as regards the second assault. While there was clearly an incident involving physical contact between the two of them, and which may have resulted in the appellant's superficial injuries, I find that the trial court was correct in rejecting, as not being reasonably possibly true, the appellant's version that he was the victim of an assault who acted in self-defence. I accordingly find that the trial court cannot be faulted for finding that the State had proved its case of assault against the appellant in respect of count 2.

[106] In my view, therefore, there is no merit in the appeal on the second charge either.

ORDERS

[107] I propose the following orders:

Order in respect of the constitutional issue

1. The common law defence of reasonable chastisement is unconstitutional and no longer applies in our law.
2. The development of the common law referred to in paragraph 1 above is only applicable to conduct that takes place after the date of judgment.

Order in respect of the merits of the appeal

1. The appellant's appeals in respect of both counts 1 and 2 are dismissed.

R M KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree, and it is so ordered

E FRANCIS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard:	21 August 2017
Date of Judgment:	19 October 2017
Counsel for the Appellant:	Adv. R Gissing
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