



CONSTITUTIONAL COURT OF SOUTH AFRICA

**Freedom of Religion South Africa v
Minister of Justice and Constitutional Development and Others**

CCT 320/2017

**Date of Hearing: 29 November 2018
Date of Judgment: 18 September 2019**

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday 18 September 2019 at 10h00, the Constitutional Court handed down judgment in an application for standing and leave to appeal against a High Court order declaring the common law defence of moderate and reasonable chastisement constitutionally invalid.

On 21 August 2017, the High Court of South Africa, Gauteng Local Division, Johannesburg heard an appeal from the Johannesburg Regional Court, against YG's conviction of the assault of his 13 year old son. Before the High Court, YG raised the defence that he was administering moderate and reasonable chastisement under the common law. The High Court called for submissions on the constitutionality of the reasonable chastisement defence, and joined the Minister of Justice and Correctional Services and the Minister of Social Development (Minister). Freedom of Religion South Africa (FOR SA), the Children's Institute, Sonke Gender Justice and the Quaker Peace Centre all filed submissions as friends of the court. The High Court dismissed the appeal and declared the common law defence of moderate and reasonable chastisement unconstitutional on the grounds that it violates the child's right not to be discriminated against on the basis of age; equal protection of the law; dignity; freedom from all forms of violence and degradation; and bodily and psychological integrity.

The application to challenge the High Court's order in the Constitutional Court is brought by FOR SA, one of the friends of the High Court. FOR SA avers that it acts on behalf of its members and the public at large who "believe that the scriptures and other holy writings permit, if not command, reasonable and appropriate correction of their children".

The respondents are the Minister of Justice and Constitutional Development, Minister of Social Development, National Director of Public Prosecutions, YG, the Children's Institute, the Quaker Peace Centre and Sonke Gender Justice.

The issue before the Constitutional Court was whether the High Court's declaration of unconstitutionality of the reasonable chastisement defence is correct.

FOR SA asserted that it is permitted to appeal against the order of the High Court because neither YG nor the State intended to appeal and it was in the public interest that the issue be considered by the Constitutional Court. FOR SA argued that the High Court should not have decided the constitutional issue as none of the parties had raised it and that there were no compelling reasons for constitutionality to be considered. It further contended that consideration of issues that have the potential to change the common law should be left to Parliament as the major engine of law reform in our constitutional democracy.

In respect of the constitutionality of the reasonable chastisement defence, the applicant submitted that the defence does not infringe on the dignity of the child or any of the child's rights. It stated that "loving parental chastisement applied for the benefit of the child and in his or her best interest, gives dignity to the child." FOR SA also argued that the High Court's conclusion that the defence is unconstitutional stemmed from an erroneous equation of reasonable and moderate correction with physical violence and abuse. The High Court should, in its view, have taken into account the constitutional right of parents to religious freedom and the constitutional right of children to parental care.

The Minister accepted that FOR SA had legal standing to bring an appeal but opposed the application on its merits, arguing that the High Court's decision was correct. She argued that the High Court decision did not prevent parents from disciplining their children as enjoined by their faith; it merely prevented them from employing corporal punishment. She also argued that if parents need to chastise their children, they can use appropriate and constitutionally acceptable ways to do so; not corporal punishment. This, in her view, balances parents' rights to religious freedom with children's rights. The Children's Institute, Sonke Gender Justice and the Quaker Peace Centre opposed the application on grounds similar to those of the Minister. They argue that the reasonable chastisement defence unjustifiably limited children's rights to dignity, equal protection of the law, freedom from violence, and bodily and psychological integrity, amongst others. They maintained that any form of violence amounts to assault, and that where an adult would have legal recourse, children do not. They also provided some evidence on the impact of corporal punishment on children and society.

The Global Initiative to End All Corporal Punishment of Children, the Dullah Omar Institute for Constitutional Law, Governance and Human Rights and the Parent Centre were admitted as friends of the Court. They also introduced new evidence on the effects of subjecting children to corporal punishment and the need for the implementation of positive parenting methods.

In a unanimous judgment, Mogoeng CJ (with Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring) reasoned that because children may still be effectively disciplined without resorting to moderate and reasonable chastisement, less restrictive means to achieve discipline are available. Therefore, the Constitutional Court granted FOR SA leave to intervene and dismissed the appeal, holding that the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of sections 10, 12(1)(c), and 28(2) of the Constitution.