Christian Education SA v Minister of Education of the Government of the RSA

High Court, South Eastern Cape Local Division

Judgment date : 04/08/1999 *Case No* : 2960/98

Before : HJ Liebenberg, Judge

Religion, freedom of *– section 15 of the final Constitution – right of cultural, religious and linguistic communities not to be denied the right to practise their religion with other members of that community – section 31(1) of the final Constitution – proper approach in determining whether a statutory provision infringes constitutional guarantees relating to religion – where a party claims that his or her right to practise their religion is infringed by legislation, a court will in the first place consider whether the belief relied upon in fact forms part of the religious doctrine of the religion concerned – once it is established that the belief does form part of that doctrine, the court will not embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of the belief but will then enquire into the sincerity of the party's claim that a conflict exists between the legislation and the belief which is burdensome to that party – as to the religious basis of the belief, the court should consider the grounds advanced for the belief in order to decide whether it has been shown that such a sincere belief in fact exists on religious grounds – a provision which impacts upon a practical application of a religious belief does not* per se *violate the constitutional guarantee of religious freedom and the right to practise a religion – the test is whether the impact of the provision substantially burdens religious freedom – the contended infringement has to be gauged against the background of the exercise of the religion by its adherents in general.*

Education *– independent educational institutions – right to establish independent educational institutions – section 29(3) of the final Constitution – challenge to constitutionality of section 10 of the South African Schools Act 84 of 1996 prohibiting the administration of corporal punishment in so far as such provisions applicable to independent schools – association representing affiliated independent schools challenging the constitutionality of section 10 on the basis of conflict with section 31(1) of the final Constitution guaranteeing the right of persons belonging to a cultural, religious or linguistic community not to be denied the right to practise their religion – such constitutional guarantee subject to the inbuilt limitation that the rights claimed may not be exercised in a manner inconsistent with any provision of the Bill of Rights – administration of corporal punishment at schools, including the constituent schools of Applicant, constituting a violation of sections 10 and 12(1)(c), (b) and (e) of the final Constitution – to permit corporal punishment to be administered at Applicant's schools, even if such done in the exercise of religious beliefs, would be to allow*

Applicant's members to practise their religion in a manner inconsistent with the Bill of Rights in contravention of section 31(2) of the final Constitution – application dismissed.

Editor's Summary

Applicant, a voluntary association representing independent schools (formerly known as private schools), brought an application in a local division of the High Court for an order declaring the provisions of section 10 of the South African Schools Act 84 of 1996 to be unconstitutional to the extent that those provisions apply to independent schools alternatively to the extent that those provisions apply to school pupils at those independent schools whose parents or guardians have given consent in writing for corporal punishment to be administered. Section 10 prohibits the administration of corporal punishment to pupils in a school context, and renders such act an offence that attracts the same sentence as would be imposed for assault.

It was contended on behalf of Applicant that section 10 offends against the religious and cultural guarantees provided for in the final Constitution. Reliance was placed on the guarantees contained in sections 15(1), 29(3), 30 and 31(1) of the final Constitution. Section 15(1) guarantees the right to freedom of conscience, religion, thought, belief and opinion. Section 29(3) guarantees the right to establish and maintain at own expense independent educational institutions provided that such comply with certain requirements. Section 30 guarantees the right of everyone to use the language and to participate in the cultural life of their choice, subject to such rights being exercised in a manner which is not inconsistent with the fundamental rights provisions. Section 31(1) guarantees that persons belonging to a cultural, religious or linguistic community may not be denied the right with other members of that community "(a) to enjoy their culture, practise their religion and use their language; (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society". It was contended that the corporal correction implemented by constituent schools of Applicant was sanctioned by the common law, formed part of the sincerely held Christian belief of its member parents, and formed an integral part of the religious beliefs and cultural values of such parents. Whilst Applicant and its member schools were completely opposed to child abuse in any form, they were unanimously in favour of correction if applied according to biblical guidelines. Whilst such correction contained a punitive element, the corrective element was paramount. It was a vital element of the Christian religion. Such belief was based on biblical authority. The provisions of section 10 of the Schools Act constituted an intolerable interference with the religious and cultural liberties of Applicant's constituent schools, of their governing bodies, their staff, and also of the parents of pupils attending them.

The Court observed that in a case of this nature it was necessary in the first place to consider whether the belief relied upon in fact formed part of the religious doctrine of the religion practised by the person concerned. Once it was found that the belief did form part of that doctrine, the Court would not embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of the belief. The Court would, however, enquire into the sincerity of the claim that a conflict existed between the legislation in question and the belief relied upon. Where a litigant alleged that he or she held a sincere belief and set out the grounds upon which such belief was based, the Court would not merely rely on the litigant's *ipse dixit* that such a belief was held on religious grounds. It was necessary for the Court to consider the grounds advanced for the belief in order to decide whether it was shown that such belief was held on what were religious grounds. If a provision were found to infringe upon the practical application of a belief, the Court would then examine whether the impact of the provision constituted a substantial burden

on the religious freedom of adherents of the religion in general. Only by considering the infringement against the background of the exercise of their religion in general could it be gauged whether an infringement impermissibly limited religious rights.

In the instant case there was no reason to doubt the sincerity with which Applicant attempted to maintain the right to administer corporal punishment at its constituent schools. However, it had not been shown that the sincere beliefs upon which this right was claimed were based on religious grounds. The biblical passages relied upon by Applicant made reference to the application of corporal punishment by parents, but did not support a right of persons other than parents to apply corporal punishment in order to correct a child. What Applicant had attempted to do was merely to clothe rules of the common law in religious attire. On Applicant's own showing the use of corporal punishment in disciplining children was a peripheral issue in the whole context of the exercise of Applicant's religion. Section 10 of the Schools Act did not constitute a substantial burden on the freedom of religion as practised in Applicant's constituent schools. In any event, the right contained in section 31(1) of the final Constitution was subject to the inbuilt limitation provided for in subsection (2) that the right to practise a religion could not be exercised in a manner inconsistent with any provision of the Bill of Rights. A growing aversion towards corporal punishment as a method of correction had developed over the last few decades. The use of corporal punishment as a sentencing option for juvenile offenders had been declared unconstitutional and had been found to be in conflict with sections 10 and 11(2) of the interim Constitution guaranteeing freedom and security of the person and the right to human dignity. There was a growing consensus in the international community that judicial whipping offended society's notions of decency and was a direct invasion of the right to human dignity. Judicial corporal punishment had been abolished in a number of foreign jurisdictions. Corporal punishment at schools had also been abolished in certain foreign jurisdictions. There was no reason in logic or principle to make a distinction between the judicial whipping of juvenile offenders and the administration of corporal punishment in schools. Section 10 of the Schools Act had done no more than give effect to the provisions of section 28(1)(d) of the final Constitution and to give substance to the fundamental rights which pupils in any event had in terms of sections 10, 12(1)(c), (d) and (e) of the final Constitution. It followed that to allow corporal punishment to be administered in Applicant's schools, even if such were done in the exercise of the religious beliefs or culture of those involved, would be to allow Applicant's members to practise their religion or culture in a manner inconsistent with the Bill of Rights in contravention of section 31(2) of the final Constitution.

Accordingly, the application fell to be dismissed.

Judgment

Liebenberg J: The applicant is a voluntary association which, in terms of its constitution, is a body corporate with power to sue and be sued. It represents 196 constituent independent schools with approximately 14 500 learners. The constituent schools all maintain an active Christian ethos by providing an environment where their learners can learn in keeping with their Christian faith.

In terms of section 10 of the South African Schools Act 84 of 1996 (the "Act") the legislature on pain of criminal sanction prohibited the administration of corporal punishment at all schools including independent schools within the Republic (see section 10 of the Act and the definition of "School" in section 1

thereof). It is common cause that in its present form section 10 is applicable to the constituent schools of the applicant.

The applicant now brings this application for the following relief as set out in the Notice of Motion:

> "1. THAT section 10 of the South African Schools Act, 1996 (Act No. 84 of 1996) is hereby declared to be unconstitutional and invalid to the extent that it is applicable to independent schools as defined in section 1 of the said Act.
>
> *Alternatively:*
>
> 2. THAT section 10 of the South African Schools Act, 1996 (Act No 84 of 1996) is hereby declared to be unconstitutional and invalid to the extent that it is applicable to learners at those independent schools as defined in section 1 of the said Act, whose parents or guardian have given consent to such corporal punishment being administered.
> 3. THAT the Respondent pay the costs of this application.
> 4. THAT such further or alternative relief be granted as the Court may deem meet."

At the hearing of the matter Mr *Richings*, who appeared for the applicant, however, only asked for the alternative relief set out in prayer 2. He also submitted that the effect of the order may be further limited by making it applicable to the applicant's constituent schools only.

Before dealing with the merits of the application it is necessary to deal with one preliminary issue raised by the respondent on the papers. This concerns the question whether a *curator ad litem* should not have been appointed to represent the interests of the learners in these proceedings. It is contended that the interests of the learners may be at variance with the interests of the applicant as well as the parents and teachers represented by the applicant. Mr *Bertelsmann*, who appeared for the respondent, submitted that although he does not hold any strong views on the matter he nevertheless considered it appropriate to raise it. He further submitted that the case of the respondent and the argument to be presented on his behalf require that all the issues that may affect the rights of the learners must be fully dealt with from the perspective of the learners. In fact the reality of the matter is that the legislature, represented herein by the respondent, in enacting section 10 and by opposing this application acts as the champion of the learners. Mr *Richings*, in his address on the issue posed the question whether the views of the learners are legally relevant in the matter. The further question was raised as to who should be held responsible for the costs of the appointment of a *curator ad litem* and for his fees.

It seems to me that the answer to the abovementioned problems can be found in the provisions of section 28(1)(h) of the Constitution. In terms of that section every child has the right:

> "(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;"

Firstly, the section makes it clear that the state will be responsible to pay the expenses should it be necessary to appoint a *curator ad litem* for the learners. Secondly, I am of the view that no substantial injustice would result if a *curator ad litem* is not appointed for the learners. We are dealing here with an existing right which the schools have had for centuries to administer corporal punishment on learners. The respondent has now taken away that right by means of

legislation and the true enquiry is whether the respondent had the power in terms of the Constitution to do so. In my view the approach which the respondent must follow and in fact has followed in opposing this application is such that the interests of the learners are adequately protected. In my view there is also substance in Mr *Riching*'s contention that the views of the learners in respect of the issue at hand are not relevant. I am further satisfied that no injustice, let alone substantial injustice, will result if a *curator ad litem* is not appointed for the learners. I may also mention that after this point was raised I indicated that I will have to take time to consider my ruling, and so unconvinced were both counsel that I may hold that such an appointment should be made that both were prepared to continue to present full and time-consuming argument on the merits of the application at the risk of having to repeat it. I therefore hold that there is no need for the appointment and joinder of a *curator ad litem* to represent the learners in the present proceedings.

Religious and cultural basis of applicant's claim

The first ground relied upon by applicant for the relief claimed is that section 10 of the Act offends against its religious and cultural rights as protected in the Constitution.

The basis of the applicant's approach to the use of corporal punishment as a means of child discipline appears from the following statement in the founding affidavit:

> "Whilst Applicant and its member schools are completely opposed to child *abuse* in any form, they are unanimously in favour of *correction*, using Biblical guidelines. Whilst such correction does contain a punitive element, the corrective element is paramount. As such it is seen as a vital element of the Christian religion."

For this contention the applicant relies on the following Biblical passages found in the Book of Proverbs:

Proverbs 22:6

"Train up a child in the way he should go and when he is old he will not depart from it."

Proverbs 22:15

"Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him."

Proverbs 19:18

"Chasten thy son while there is hope and let not thy soul spare for his crying."

Proverbs 23: 13, 14

"Do not withhold discipline from a child; if you punish him with a rod he will not die. Punish him with a rod and save his soul from death."

It is further contended by Applicant that according to the Bible, God gave *parents* the fundamental responsibility for the training and upbringing of the child. In this regard it relies on what is stated in Deuteronomy 6:4 to 7:

> "4. Hear, O-Israel! The Lord is our God, the Lord is one! 5 And you shall love the Lord your God with all your heart and with all your soul and with all your might. 6 And these words which I am commanding you today, shall be on your heart; 7 and you shall teach them diligently to your sons and shall talk of them when

A you sit in your house and when you walk by the way and when you lie down and when you rise up."

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The extension of the responsibility of the parents for the training and upbringing of the child to the school is explained in the founding affidavit as follows:

"27

According to the Christian faith, schools are traditionally seen as an extension of the right and duty of the parents to train their children. The objective of a Christian school is to uphold parental authority by operating *in loco parentis*. In other words, the parents retain the basic authority in the training of their children, but for practical reasons this authority can be transferred to the church school for the period of time that the learner spends there. As is well known, during term time this may be for the greater part of each weekday, and even more so, where boarding-schools are concerned.

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An expansion of the Biblical and cultural basis for corporal correction will be found in the Applicant's Memorandum on the South African Schools Bill (annexure "D" to this affidavit), to which reference will be made again below."

The specific portions of the memorandum referred to in the passage quoted above is not stated but on a reading of the memorandum it appears that the following must be the relevant portions:

"11. God gave parents the fundamental and eternal responsibility for training a child (programming and directing the presuppositions and values of the child). He gave the parents this responsibility in Deuteronomy 6:4 and 9 and expanded the responsibility to include the Church in Matthew 28:19, 20.

12. Where as a norm is seen as protecting the child from child abuse, there is a danger of transferring the authority and the responsibility for training the child from the home to the State. (*Sic*)

13. The objective of a Christian school is to uphold the parental authority by retaining responsibility. The school also understands that it is operating "*in loco parentis*" which implies that the parents retain the basic authority in the training of children but that this authority for practical reasons can be transferred to the Church school for the period of time that the learner spends there."

Matthew 28:19, 20 relied upon in the above quoted passage reads as follows:

"19. Go therefore and make disciples of all the nations, baptizing them in the name of the Father and the Son and the Holy Spirit,

20. teaching them to observe all things I have commanded you, and lo, I am with you always, even to the end of the age."

As can be seen from the above quotations the applicant on more than one occasion claims that its views represent that of the Christian faith. In his address Mr *Richings*, however, conceded that the views expressed by the applicant represent the beliefs held by its members and that where reference is made to the "Christian faith" it must be implied that it is the Christian faith as held by the members of the applicant.

Having stated the aforegoing as setting out the Christian belief of the members of applicant it then proceeds to rely on a number of provisions in the Constitution for its contention that section 10 of the Act is unconstitutional because it violates rights of its members that are protected by the Bill of Rights as contained in chapter 2 of the Constitution. The provisions in the Bill of Rights relied upon are the following:

"*Freedom of religion, belief and opinion*

15 (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

. . .

"*Education*

29 . . .

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that:

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions

. . ."

"*Language and Culture*

30 Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions of the Bill of Rights."

"*Cultural, religious and linguistic communities*

31 (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

(*a*) to enjoy their culture, practice their religion and use their language, and

(*b*) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

It is further submitted by Applicant that the corporal correction implemented by the constituent schools of the applicant:

(a) is sanctioned by the common law;

(b) forms part of the sincerely held Christian belief of its member parents; and

(c) forms an integral part of the religious beliefs and cultural values of such parents.

Finally the applicant submits that the provisions of section 10 of the Act constitute an intolerable interference with the religious and cultural liberties of the applicant's constituent schools, of governing bodies, of staff and of the parents of learners attending them.

I have been referred to certain American authorities on the approach which should be followed by a court of law in order to decide the question whether a person's right to freedom of religion has been infringed.

In *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* 393 US 440 (1969) at 451 it was held by the United States Supreme Court that:

"Secular authorities may not resolve civil disputes that engage them in the forbidden process of interpreting and weighing church doctrine."

Why this is so has been stated in *Thomas v The Review Board* 450 US 707 (1981) thus:

"Religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection."

As to how the matter should be approached Tribe: *American Constitutional Law* (2 ed 1988) states at 1181 to 1182 after referring to various American decisions that:

"Externalities upon which courts cannot properly rely include the belief system's age, its apparent social value, its political elements, the number of its adherents, the sort of

demands it places on those adherents, the consistency of practice amongst different adherents, and the system of outward trappings . . . The proper place for that enquiry is an assessment of the believer's sincerity, not in any evaluation of the believer's externalities."

And at 1249 the same author states:

"When a claimant avers that a prohibition or requirement conflicts with his or her own faith, the appropriate enquiry may begin but cannot end by looking to the dogma of the religious tract or organisation, the ultimate enquiry must look to the claimant's sincerity in stating that the conflict is indeed burdensome for that individual."

Closer to our borders the Supreme Court of Zimbabwe in *In re Chikweche* 1995 (4) BCLR 533 (ZS) stated the approach to the question of religion as follows (at 538F):

"This Court is not concerned with the validity of attraction of the Rastafarian faith or beliefs; only with their sincerity."

Chaskalson et al: *Constitutional Law of South Africa* at 19–2 expresses the view that:

". . . the courts must not require religious beliefs to be reasonable or sophisticated in terms of an objective standard."

A consideration of the aforegoing has led me to the conclusion that in cases of this nature a court will in the first place consider whether the belief relied upon in fact forms part of the religious doctrine of the religion practised by the person concerned. Once it is found that the belief does form part of that doctrine, the court will not embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of the belief. But, the court will then inquire into the sincerity of the person's claim that a conflict exists between the legislation and the belief which is indeed burdensome to the person.

In keeping with the aforegoing the first step in the present enquiry must therefore be to decide whether it has been shown by Applicant that the administration of corporal punishment by the constituent schools does in fact form part of the *religious* beliefs of the applicant based on the Christian faith held by it. The respondent did not place the sincerity of the applicant's belief in corporal punishment in dispute. In my view, however, that does not protect the applicant in a matter such as the present one from having that belief scrutinised. Where, as in the present instance, the litigant who alleges that he has a sincere belief sets out the grounds upon which the belief is based, the court need not merely rely on his *ipse dixit* that he has such a belief. The court may, and in my view should, consider the grounds advanced for the belief in order to decide whether it has been shown that such a sincere belief in fact exists on *religious* grounds.

In my view a distinction should be drawn here between the power and duty of a parent to administer corporal punishment to his child and that of a teacher to administer corporal punishment to his learner. From a legal perspective parents have the right at common law to administer corporal punishment to their children in case of improper behaviour and for purposes of discipline provided it is justified and not excessive. Teachers have a similar right which stems from the relationship of teacher and pupil (see generally Boberg: *The Law of Persons and the Family* at 464–465; E Spiro: *Law of Parent and Child* 4 ed at 89–90; and in respect of the right of the teacher see *R v Scheepers* 1915 AD 337 at 338). The view is also expressed that the authority of the teacher arises from a

A delegation to him of the parent's power by the latter and that the teacher therefore acts *in loco parentis*. The correctness of this view was questioned by Horwitz J in *R v Muller* 1948 (4) SA 848 (O) at 861. In *R v Scheepers* (*supra*) the Appellate Division approached the matter on the basis that the right of the teacher arises B from the relationship of teacher and pupil without any reference to a delegation of authority by the parent.

It appears from the Biblical passages in Proverbs relied upon by the applicant that they contain guidelines to the parents with regard to the use of the rod. No Biblical guidelines have been relied upon which suggest that persons other than C the parents have a right or obligation to use the rod in order to correct a child. It is also significant that the applicant states with regard to this issue that its schools and parents are "in favour of" corporal punishment at schools. It was conceded by Mr *Richings*, and in my view correctly, that whereas the applicant is able to advance Biblical guidelines for its belief that parents should chastise their children when it is required for their correction and discipline the authority D of the school to chastise is based purely on legal principle. Although I do not question the sincerity with which the applicant attempts to maintain the right to administer corporal punishment at its constituent schools, I have not been persuaded that it has been shown to be a sincere belief on *religious* grounds that teachers and schools should be empowered to administer corporal punishment. E In my view the effect of the approach adopted by the applicant is merely to clothe rules of the common law in religious attire.

Although the aforegoing should be the end of the matter I shall also deal with two further issues because the parties have informed me that this matter is regarded as a test case and the probabilities are that the matter will be taken F further irrespective of the outcome. I shall, therefore, in what follows, deal with such issues on the basis that the applicant has shown the existence of a sincere religious belief in the administration of corporal punishment by teachers and at schools. The next question then to be decided is whether section 10 of the Act infringes upon such a belief. In Chaskalson et al (*op cit*) at 19–3, the learned G authors suggest the following as the test to be applied:

"The test for any law should be whether it substantially burdens religious freedom."

In my opinion this test commends itself and should be applied in the present matter. That the section does infringe upon the practical application of a belief by the applicant in corporal punishment is clear. In my view a proper applica- H tion of the above test, however, would require one to consider the effect of the infringement on the exercise by the applicant's members of their religious freedom in general and not merely the effect it has on the aspect of corporal punishment. In other words it is only by considering the infringement against the background of the exercise of their religion in general that the significance of the effect of section 10, namely whether it constitutes a *substantial* burden on I the religious freedom of the applicant's members, can be gauged.

As pointed out above the applicant states that it is in favour of corporal punishment and that it is administered in accordance with biblical guidelines. It appears, however, that the applicant's members themselves have accepted the fact that what might have been guidelines capable of practical implementation J during the times of the Old Testament can no longer be regarded as appropriate

punishment after a few thousand years of development of civilisation and, as far as Christians are concerned, the teachings of Christ. One such example in the Old Testament referred to by Mr *Bertelsmann* can be found in Deuteronomy 21:18–21:

> "If a man has a stubborn and rebellious son who will not obey the voice of his father or the voice of his mother, and who, when they have chastened him, will not heed them, then his father and his mother shall take hold of him and bring him out to the elders of his city and unto the gate of his place; and they shall say to the elders of his city, "this son of ours is stubborn and rebellious; he will not obey our voice; he is a glutton and a drunkard." Then all the men of his city shall stone him to death with stones; so you shall put away the evil from among you, and all Israel shall hear and fear."

It can be stated without fear of contradiction that after a few thousand years of development of civilisation this guideline to parents is no longer appropriate nor does it form part of Christian religious doctrine. Even with regard to corporal punishment the applicant's papers show that the approach of its members has undergone change. It was conceded by Mr *Richings* that the Biblical guidelines relied upon by the applicant are equally applicable to sons and daughters. In terms of these guidelines the applicant should therefore have a similar approach in respect of girls as it has in respect of boys. However, in the applicant's founding affidavit it is stated that in the administration of corporal punishment its constituent schools do not discriminate between males and females at primary school level, but at secondary schools it is imposed only on male learners. When I confronted Mr *Richings* with this fact he attempted to explain the difference in approach to the sexes on the basis that boys are more often guilty of the worst transgressions. I cannot accept this explanation. If this is correct, must one also accept that girls in primary school are more often guilty of more serious transgressions than the girls in secondary school? At the end of the day we have the situation that the applicant's members discriminate between boys and girls at secondary school level and the applicant has not disclosed in its papers any grounds for this distinction nor did it show that it is based on any religious belief. What it does show is that the biblical guidelines relied upon by the applicant are not believed by its members to be of such importance that to do away with corporal punishment would result in its religious freedom being *substantially* burdened. It is further evident from the aforegoing that the applicant's schools must have found other means of correction in respect of girls at secondary school level that are adequately serving the purpose of correction. If that could be done in respect of the girls at secondary school level it can be done in respect of all boys and the girls at primary school level. No reasons have been advanced on the papers why it cannot practically be done. Mr *Richings* ventured to suggest that the writing of lines for example would not have the desired effect on boys as it apparently has on girls and nor would detention after school. No grounds exist in the present papers to support such a contention. There is however a positive message in the submissions of Mr *Richings* in that it shows that there are other methods of correction acceptable to the applicant that can be, and in fact are, successfully applied without compromising the Christian mission of the applicant's member schools. I have, therefore, come to the conclusion that on the applicant's own showing corporal punishment as a means of correction for boys is a peripheral issue in the whole context of the exercise of its religion. It can still carry on with the upbringing and teaching of

A the children at its schools in keeping with its religious beliefs and doctrine without any interference. This leads to the final conclusion that section 10 does not constitute a *substantial* burden on the freedom of religion as practised in the applicant's constituent schools.

Finally the question whether the administration of corporal punishment at
B schools is in itself unconstitutional must be considered. Section 31(1) of the Constitution insofar as it relates to religion provides *inter alia* that a person belonging to a religious community may not be denied the right, with other members of that community, to practise their religion. Subsection (2) of section 31, however provides that this right may not be exercised in a manner inconsis-
C tent with any provision of the Bill of Rights. This then requires a consideration of the question whether the administration of corporal punishment on learners at schools is inconsistent with any provision of the Bill. It seems that at present in our country there is a perception that the question of the desirability or not of corporal punishment at schools is a recent one which arose only with the
D dawn of our new democracy. This is a wrong perception. In 1948, the year when the previous Government came to power, the judgment in *R v Muller* (*supra*) was handed down. At 852 of the report the following remarks by De Beer JP appear:

> "Dit was aangevoer dat in die huidige oorgangsperiode die openbare mening, soos weergegee deur sommige sielkundiges, ouers en selfs opvoedkundiges, die toediening
E van enige lyfstraf bestempel as 'n verderflike oorblyfsel van die donkere eeue en die rotting te swaai as blote sadisme. Die vraag is gestel, waar staan die onderwyser wie gelas is met die handhawing van dissipline te doen waar na sy mening 'n vry ernstige oortreding plaasvind of waar miskien 'n noodtoestand geskep is? Tree hy nie drasties op nie lei dit tot warboel: tree hy drasties op lei dit tot 'n strafsaak.
>
F Moontlik sal 'n nuwe orde waar toediening van lyfstraf geheel en al gestaak word mettertyd verrys maar intussen is die gewone gemeneregtelike reëls van toepassing des te meer daar die wetgewende mag die huidige gedagtegang oor die hoof sien deur goedkeuring te heg aan toediening van lyfstraf – sien Art 62(5) van Onderwyswette Konsolidasie Ordonnansie, 15 van 1930. En in breë trekke is die beginsels wat die onderwyser as gids kan dien die volgende – waar na sy oorwoë mening of die belange
G van die leerling of die belange van die skool dit vereis, kan hy matige en redelike lyfstraf toedien. Nogtans moet uit die oog nie verloor word nie dat die toediening van lyfstraf *prima facie* aanranding is, 'n onwettige daad dog dit kan regverdig word op gronde dat dit verdien was en redelik was."

It would seem that the reference by De Beer JP to the new order that may arise where corporal punishment is abolished was prophetic indeed. The administra-
H tion of corporal punishment at schools has over the last decades undergone various changes which are indicative of a growing aversion towards this method of correction. It is apparent from the judgment in *R v Scheepers* (*supra*) that at the time of its delivery the corporal punishment of female learners was still allowed in terms of the common law. This practice to beat females was subse-
I quently abolished in public schools by the various provinces existing at that time. The administration of corporal punishment became regulated by provincial legislation which in the various provinces prescribed how corporal punishment should be administered. One such example can be found in *R v Scheepers* (*supra*) where Innes CJ at 338 refers to the provisions in Ordinance 9
J of 1913 (OFS) regulating the administration of corporal punishment at schools in the then Orange Free State. Where the common-law powers of the teacher

have been circumscribed by legislation it constituted an assault if corporal punishment was administered unless justified under the legislation (*S v Meeuwis* 1970 (4) SA 532 (T). Although the former legislation did not affect the administration of corporal punishment at private or independent schools it does show the growing opposition to corporal punishment at schools. In *S v Williams and Others* 1995 (2) SACR 251 (CC) the Constitutional Court held that the administration of corporal punishment upon juvenile offenders in terms of section 294 of the Criminal Procedure Act 51 of 1977 was unconstitutional as it offended against the provisions of sections 11(2) and 10 of the interim Constitution Act 200 of 1993. The provisions of section 11(2) of the interim Constitution have been re-enacted in section 12(1) of the present Constitution but in somewhat different format. In the present Act the relevant provisions read as follows:

"12 *Freedom and Security of the Person* –

(1) Everyone has the right to freedom and security of the person, which includes the right –

(a) . . .

(b) . . .

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way."

The provisions of section 10 of the interim Constitution was re-enacted in section 10 of the present Constitution but also in somewhat different terms. The essence however remains the same. In the present Constitution the section reads as follows:

"10. *Human Dignity* – Everyone has inherent dignity and the right to have their dignity respected and protected."

In my view the conclusions of the court are by no means affected by the difference in wording between sections 10 and 12(1) of the final Constitution and sections 10 and 11(2) respectively of the interim Constitution because the effect of the provisions material to the judgment is the same in both enactments. The following description by the European Court of Human Rights of the nature of judicial corporal punishment in *Tyrer v United Kingdom* (1978–80) 2 EHRR 1 was accepted by Langa J (who delivered the judgment of the Constitutional Court) as characterising juvenile whipping in terms of section 294 of the Criminal Procedure Act (at 261 paragraph [33]):

"The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which is the main purpose of art 3 to protect, namely a person's dignity and physical integrity . . . The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender."

Regarding the international approach to corporal punishment the learned Judge remarked as follows at 262 paragraph [39]:

A "There is unmistakably a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through the Courts and Legislatures of various countries and through international instruments. It is a clear trend which has been established."

B The learned Judge proceeds to point out that judicial corporal punishment has been abolished in a wide range of countries including the United Kingdom, Australia (except in Western Australia), the United States of America, Canada, Europe and Mozambique (see at 262 paragraph [40]). The question of the administration of corporal punishment at schools was referred to but the deci-
C sion as to its constitutionality was left open. The following remarks by Langa J appear at 265 of the report:

"[48] The issue of corporal punishment at schools is by no means free of controversy. The practice has inevitably come in for strong criticism. In *Costello-Roberts v United Kingdom*, the European Court applied the criteria set in *Tyrer v United Kingdom* that, in order for punishment to be 'degrading' and in breach of art 3
D of the Convention, the humiliation or debasement involved must attain a particular level of severity and must, in any event, be other than the usual element of humiliation inherent in any punishment. It drew a distinction between a judicially imposed whipping, as in *Tyrer v United Kingdom*, and punishment meted out on a juvenile boarder through disciplinary rules in force
E in a private school. This amounted to being slippered three times on his buttocks through his shorts with a rubber-soled gym shoe by the headmaster in private. The Court held that, in the circumstances of the particular case, the minimum level of severity had not been attained. It is noteworthy that the decision was carried by the narrowest of margins, with five judges voting for it and four against. What is of interest is how the European Court, in the exercise
F of a value judgment, went about evaluating the impugned conduct and distinguishing between the concepts 'inhuman' and 'degrading'.

[49] It is not necessary to comment on the suggestion that judicial corporal punishment is in reality no worse than cuts imposed at school; the subject of corporal punishment in schools is not before us. Suffice it to point out that the European Court in *Costello-Roberts v The United Kingdom* seemed to attach
G some importance to the difference between strokes inflicted by a policeman as a result of a court order, on the one hand, and corporal punishment administered by a headmaster in terms of disciplinary rules in force within the school in which the youth was a boarder. On the other hand, it was White J, in a dissenting opinion in *Ingraham v Wright*, who stated:

> 'Where corporal punishment becomes so severe as to be unacceptable in a
H civilised society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools.' "

It is noteworthy that since the judgment in *Costello-Roberts v United Kingdom* which was delivered on 25 March 1993 corporal punishment at all schools in the United Kingdom was abolished by section 131 of The School Standards and
I Framework Act of 1998. It was pointed out by counsel in argument that in the United States of America 21 of the member states have banned corporal punishment at all schools whilst 29 have retained some form of corporal punishment. In a note, *Is Lyfstraf in Skole Bestand teen 'n Akte van Menseregte?* (*Obiter* Vol 14 1993 at 190) Professor JMT Labuschagne points out that corporal punishment in schools was abolished in the whole of Europe. In another article,
J *Tugtiging van kinders: 'n Strafregtelik-prinsipiële evaluasie* (1991 *De Jure* 24)

the same author also points out that in Greece, Italy, Iceland and Luxembourg it was never allowed and that in Poland it was abolished as long ago as 1783.

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A The nature of corporal punishment does not change because it is administered at a school and not judicially and it is the nature of the punishment that decides its undesirability. Although some differences may exist between the judicial administration of corporal punishment on a juvenile and the administration thereof at school, such differences do not, in my view affect the true nature of the punishment. The manner in which the punishment is administered at the schools of Applicant is that it is inflicted by the principal or a member of staff designated by him in the presence of a witness and the instrument used may be a cane, a strap, a ruler or a paddle. The following guidelines used by the constituent schools when administering the punishment appear in the aforementioned addendum to the founding affidavit:

"(a) Know the offence. Investigate and get the facts. The child must deserve the punishment. Know without a doubt that it was intentional not careless.

(b) Get a witness. Men give hidings to boys, ladies give hidings to girls and the witness should be of the same sex as the child.

(c) Discuss the offence. The child must know exactly what they did and why they [sic] are being punished. Give them the benefit of any doubt.

(d) Get an admission. The child should admit to doing wrong. If you know the offence and the child will not admit it, he is dishonest and this compounds the offence.

(e) Identify the biblical principle that has been violated. Identify a principle from scripture that has been violated by the child's behaviour.

(f) Position the child, have them lean forward with feet spread apart. Put their hands on the desk. You want them to be stationery. You don't want to hurt the child. Discipline is one thing, damage is another.

(g) Review the offence, discuss the seriousness of the offence and the objective in building character.

(h) Love the child, smile and tell them that you love them.

(i) Pray with the child and have the child pray first and ask for forgiveness then you pray for the child and for his/her growth.

(j) Men should hug boys and ladies should hug girls. Reaffirm your relationship with that child. When the child leaves they need to know that the slate is clean."

When comparing the administration of corporal punishment at schools with the administration of judicial corporal punishment on juveniles, I am of the view that in this instance as well the similarities far outweigh the differences. Save that the authority inflicting the punishment is different and that the person who administers it may not be a total stranger to the learner all the other characteristics of the punishment as appears from the above quoted description in *Tyrer v United Kingdom* are present. The immediate purpose remains to inflict acute physical pain (see *S v A Juvenile* 1990 (4) SA 151 (ZS)). The circumstances under which the punishment is administered as described by the guidelines do not make it less institutionalised than the judicial whipping of a juvenile and the whole aura of the procedure described in the guidelines equally compounds that institutionalised character. Its result must also be a cringing fear, a terror of expectation before the whipping and acute distress and it is no less an affront to the dignity of all concerned (cf *S v Williams* (*supra*) at 274(i)–275(a)). In my view a logical and realistic approach to the matter does not allow a conclusion that there is any material difference between judicial whipping of juveniles and the administration of corporal punishment at schools and it must therefore

follow that the finding of the Constitutional Court in *S v Williams and Others* (*supra*) that the former is unconstitutional must be equally applicable to the latter. It further follows that the administration of corporal punishment at schools, including the constituent schools of the applicant constitutes a violation of section 10 and 12(1)(c), (d) and (e) of the Constitution. Because this is so the legislature, in passing section 10 of the South African Schools Act did no more than to give effect to the provisions of section 28(1)(d) of the Constitution and to give substance to the human rights which learners have in terms of sections 10 and 12(1)(c), (d) and (e) of the Constitution. It further follows that to allow corporal punishment to be administered at Applicant's schools, even if it is done in the exercise of the religious beliefs or culture of those involved, would be to allow the applicant's members to practice their religion or culture in a manner inconsistent with the Bill of Rights in contravention of section 31(2) of the Constitution.

It follows that the relief prayed for by Applicant must be refused.

The parties have agreed that no cost order should be made irrespective of the outcome of these proceedings.

The order that I therefore make is that the application is dismissed.

For the applicant:
FG Richings SC and *DM Achtzehn* instructed by *Goldberg and De Villiers*, Port Elizabeth

For the respondent:
E Bertelsmann SC and *BJ Pienaar* instructed by the State Attorney, Port Elizabeth

The following cases were referred to in the above judgment:

Southern Africa

Europe

United States of America