



CREATIVELY COMBATting GENDER BASED VIOLENCE

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Constitutionality of Rape and Consent Definitions In Sexual Offences Act Legally Challenged

A **ground breaking constitutional challenge** today has been launched out of the Pretoria High Court, by The Embrace Project, against the problematic **definitions** of **consent** and **rape** in the **Sexual Offences Act**, as recently amended. The Minister of Justice and Correctional Services, the President and the Minister of Women, Youths and Persons with Disabilities are cited as respondents. Click [here](#) for the full application.

The issues raised against the Act in this [application](#) were first brought to the attention of the President in October 2021, prior to him signing the recent amendments to the Act into law. The Embrace Project, which had participated in the legislative process of the "GBV Bills" in 2020, [wrote](#) to the President informing him that a rape survivor, the second applicant in this litigation, had approached it in August 2021 and highlighted the issue of the application of intent in the definition of rape. This was further amplified in the controversial *Coko v S* judgment on appeal.

As the law currently stands, it is **insufficient to prove that an accused person committed an act of sexual penetration without the complainant's consent**. It must further be proved that, in the accused's **subjective state of mind**, he/she/they **intended** to rape the complainant regardless of the complainant not having consented to the sexual penetration. A **subjective test** is applied in South African law when it comes to a charge of rape. This test is not only **regressive** but has proven to be an almost **insurmountable barrier** to the conviction of accused persons who have been found to have committed acts of sexual penetration without the consent of the complainants (objectively), where the prosecution have been unable to prove

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that the accused persons subjectively intended to rape the complainants.

The Embrace Project, in both its 2021 letter to the President and its current application, points out that this not only explains the shocking conviction rate of rape in a country with the highest levels of GBVF in the world, but is a **legislative endorsement and entrenchment of patriarchal beliefs and male sexual entitlement** when a defence to rape may be based on an accused person's subjective sexist beliefs. Most perversely, given the law as it stands, the **less progressive** an accused person's **views** are about consent, the **more likely** he/she/they is/are to be **acquitted** of rape.

The President not only **failed to respond** to The Embrace Project's 2021 letter, but signed the Amendment Bill into law in January 2022 with full knowledge of the problematic provisions. It is for that reason that The Embrace Project, with the assistance of its legal team, **Power Singh Inc**, Advocates **Azhar Bham SC, Nasreen Rajab-Budlender SC, Ben Winks and Lerato Phasha**, have launched this legal challenge.

It must be noted that had it not been for the **bravery of the second applicant**, a GBVF survivor, this application - and the effect of its expected outcome - may have never seen the light of day.

More about the Embrace Project

The Embrace Project is a non-profit organisation which aims to 'creatively combat' gender-based violence and femicide in South Africa. The organisation combines art and advocacy through law to raise awareness about gender-based violence and femicide and bring about real change. The Embrace Project also raises funds for grass-roots organisations already combatting gender-based violence in their own communities, through the sale of art.

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