

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 2022/048656

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES

Intervening Party

and

THE EMBRACE PROJECT, NPC

First Respondent

INGE HOLZTRÄGER

Second Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Third Respondent

**MINISTER IN THE PRESIDENCY FOR WOMEN,
YOUTH AND PERSONS WITH DISABILITIES**

Forth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

In re:

The matter between:

THE EMBRACE PROJECT, NPC

First Applicant

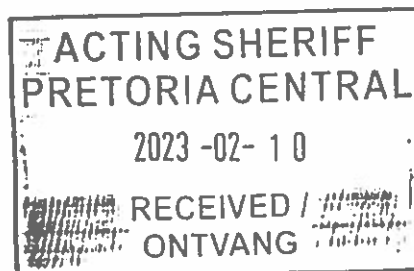
INGE HOLZTRÄGER

Second Applicant

and

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

First Respondent



**MINISTER IN THE PRESIDENCY FOR WOMEN,
YOUTH AND PERSONS WITH DISABILITIES**

Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE that the Intervening Party will make application to this Court on a date to be determined by the registrar for an order in the following terms:

1. That the Intervening Party be granted leave to intervene as the Third Applicant in the main matter.
2. That the Intervening Party be granted leave to file a Notice of Motion in the short form and Founding Affidavit setting out the relief it seeks and the facts it will rely on.
3. That the aforesaid Notice of Motion and affidavit will be filed within fifteen (15) days of an order being granted under this Notice of Motion.
4. Ordering the Respondents to pay the Applicant's costs jointly and severally, if and to the extent that they oppose the application.

TAKE NOTICE FURTHER that the affidavit of **SHEENA JUSTINE SWEMMER**, will be used in support of this application.

TAKE NOTICE FURTHER that the Applicants have appointed The Centre for Applied Legal Studies, 1ST Floor, DJ Du Plessis Building, West Campus, University of the Witwatersrand, Johannesburg, Private Bag 3, WITS, 2050 notice and service of all processes in these proceedings at the address set out below or alternatively service via electronic mail to the following recipients: sheena.swemmer@wits.ac.za and basetsana.koitsioe@wits.ac.za.

TAKE NOTICE FURTHER that any Respondents who wish to oppose the relief sought are required:

1. To notify the Applicant in writing within **five (5) days** of the service of the Notice of Motion of such intention to oppose;
2. Within **fifteen (15) days** of notifying the Applicant of their Intention to Oppose the application, to deliver their Answering Affidavit, if any, together with any relevant document in answer to the allegations made against the Applicant.
3. To appoint their notice of opposition to an address within eight (8) kilometers of the office of the Registrar at which they will accept notice and service of all documents in these proceedings.

DATED AT BRAMFONTEIN ON THE 07th FEBRUARY 2023.



SHEENA JUSTINE SWEMMER
CENTRE FOR APPLIED LEGAL STUDIES

University of Witwatersrand
1st floor PJ Du Plessis Building
West Campus
JOHANNESBURG
Private Bag 3
WITS
2050

Tel: 082 4916646

Fax: 011 717 1702

sheena.swemmer@wits.ac.za

basetsana.koitsioe@wits.ac.za

Ref: Embrace/Swemmer

C/O Mketsu Associates Inc.

333 Grosvenor Street

Block F, Unit no 2

Hatfield Gardens

Hatfield

PRETORIA 0002

Tel: +27 012 321 0149

Fax: +27 012 321 0039

admin@mketsu.africa

sydwell@mketsu.africa

TO: THE REGISTRAR

High Court of South Africa

Gauteng Division

PRETORIA

TO: THE FIRST AND SECOND APPLICANT

Attorneys for the Applicants

20 Baker Street, Rosebank

JOHANNESBURG, 2196

Tel: +27 10 822 7860

Email: tina@powersingh.africa /
slindile@powersingh.africa /
legal@powersingh.africa

Ref: PSIEP-202122

C/O Louis du Plessis
Gilfillan Du Plessis Inc.
1st Floor, LHR Building
357 Visagie Street
PRETORIA, 0002
Ref: COR/LOU/W48

P.C.

TO: MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Respondent

28th Floor, SALU Building

316 Thabo Sehume Street (c/o Thabo Sehume and Francis Beard Street)
PRETORIA, 0001

P.C.

TO: MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES

Second Respondent

36 Hamilton Street, Arcadia

PRETORIA, 0007

N E

TO: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

Union Buildings

Government Avenue

PRETORIA, 0002

N E

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 2022/048656

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES

Intervening Party

and

THE EMBRACE PROJECT, NPC

First Applicant

INGE HOLZTRÄGER

Second Applicant

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Third Respondent

**MINISTER IN THE PRESIDENCY FOR WOMEN,
YOUTH AND PERSONS WITH DISABILITIES**

Forth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

In re:

The matter between:

THE EMBRACE PROJECT, NPC

First Applicant

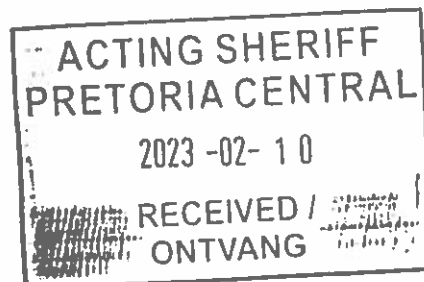
INGE HOLZTRÄGER

Second Applicant

and

MINISTER OF JUSTICE AND

First Respondent



CORRECTIONAL SERVICES**MINISTER IN THE PRESIDENCY FOR WOMEN,
YOUTH AND PERSONS WITH DISABILITIES**

Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

SHEENA JUSTINE SWEMMER

state under oath that:

1. I am an attorney and the head of the Gender Justice Programme at the Centre for Applied Legal Studies ("CALs"), situated at 1 Jan Smuts Avenue, Braamfontein. I am duly authorised to depose to this affidavit on behalf of CALs, the Applicant or Intervening Party, for the intervention application in the present matter.
2. CALs is a centre based at the University of the Witwatersrand. The University is a juristic person and tertiary education institution registered in terms of the Higher Education Act No 101 of 1997, as amended.

SJS

3. The facts contained herein are, to the best of my knowledge, both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.

4. I depose to this affidavit in support of CALS' application to intervene as the Third Applicant in the main matter before this Honourable Court, which full particulars are set out in the above case number 2022/048656 (the "main application").

5. The structure of this affidavit is as follows: –
 - 5.1. First, I briefly explain the purpose of this application;
 - 5.2. Second, I set out both CALS' interest in the case and then CALS' clients' interests in the main application;
 - 5.3. Third, I describe the nature of the issues central to the main application, as well as the relief sought therein;
 - 5.4. Fourth, I provide an overview of the evidence that CALS will provide in support of the relief sought;
 - 5.5. Fifth, I explain the basis for CALS's intervention and the additional relief it seeks; and



5.6. Sixth, I detail why CALS has satisfied the necessary grounds to be joined as an applicant in the main matter.

5.7. I finally conclude with the prayers that CALS seeks in terms of the Notice of Motion.

I. PURPOSE OF THIS APPLICATION

6. CALS brings this intervention application in the public interest and on behalf of certain of its clients who find themselves in the same precarious position as the Applicants in the main application. Over the four decades of CALS' existence, it has assisted its clients in navigating the criminal justice system in instances of various sexual offences. This work has included assisting clients in following up with the South African Police Service (SAPS) around investigations, liaising with the National Prosecuting Authority (NPA) over decisions around whether to prosecute perpetrators, attending court with complainants, supporting prosecutors and linking them to various experts on sexual violence and at multiple times conducting 'watching briefs' on behalf of clients.
7. CALS has also been involved in various research outputs relating to sexual violence, its manifestations and intersections in limiting various rights in the Constitution; these include:

SJS
70

- 7.1. Centre for Applied Legal Studies and Norton Rose, *Independent Inquiry into Allegations of Sexual Harassment at the University of the Witwatersrand, Johannesburg, 2013*¹;
- 7.2. Centre for Applied Legal Studies, *Managing Sexual Abuse in Schools: A Guide for Children, Families and Community Members, 2014*²;
- 7.3. Centre for Applied Legal Studies, *Sexual Violence by Educators in South African Schools: Gaps in Accountability, 2014*³;

¹ Available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Final%20Report%20Independent%20Inquiry%20into%20Sexual%20Harassment%20at%20Wits%20University%203%20September%202013.pdf>.

² Available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Managing%20sexual%20abuse%20in%20schools.pdf>.

³ Available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Sexual%20Violence%20by%20Educators%20Size%20180270%20NEW.pdf>.

SJS

7.4. Machisa, M *et al*, *Rape Justice in South Africa: Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012, 2017*.⁴

8. CALS has furthermore been party to or *amicus curiae* in many leading cases pertaining to sexual violence; these include but are not limited to:

8.1. *Carmichele v Minister of Safety and Security and Another*⁵;

8.2. *S v Engelbrecht*⁶;

8.3. *Masiya v Director of Public Prosecutions, Pretoria and Another*⁷;

⁴ Available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/RAPSSA%20REPORT%20FIN1%2018072017.pdf>.

⁵ 1999 (1) SA (CC).

⁶ 2002 (6) SA 642 (CC).

⁷ 2007 (5) SA 30 (CC).

535

8.4. *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*⁸;

8.5. *Tshabalala v S; Ntuli v S*⁹;

8.6. *AK v Minister of Police and Others*.¹⁰

9. According to the First and Second Applicant, the main application deals squarely with the definition and application of consent as set out under section 1(2) of the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007 ("SORMA") and the resultant defense of mistaken belief which arises therefrom.¹¹

10. Currently, rape and other sexual offences require consent as a definitional element of the crime. This is rather than having consent be merely grounds of

⁸ 2020 (2) SACR 38 (CC).

⁹ (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC).

¹⁰ (CCT 94/20) [2022] ZACC 14; 2022 (11) BCLR 1307 (CC).

¹¹ Applicants, Notice of Motion at 1.

SJS

justification.¹² The framing of sexual offences requiring consent as a definitional element was historically accompanied by the need for the victims/survivor to show she physically resisted the violation and was overcome by force.¹³

11. Fortunately, in South African law, physical resistance is no longer a requirement to show a lack of consent, yet this has led to a situation where there is an 'implicit' resistance requirement, and the defence of mistaken belief can be used to show a mistaken belief that consent was present.
12. In essence, the mistaken belief defence is grounded on the premise that the accused believed (although mistakenly) that the complainant consented because she failed to adequately resist to make him aware that she was not consenting. This implies that a complainant must perform a certain degree of resistance for a 'confused' accused to ascertain a lack of consent.
13. Due to the continued existence of consent as an element in sexual offences rather than existing as a justification, the accused can raise the defence of mistaken belief in consent (by simply placing the defence in issue), and the

¹² Crimes that have consent as a ground of justification include theft and malicious damage to property.

¹³ T. Illsey, 'The Defense of Mistaken Belief', *South African Journal of Criminal Justice*, 2008 (1), 63 – 80.

State has an obligation to prove beyond a reasonable doubt that there was an absence of such mistaken belief.

14. Not only does this retention of consent as a definitional element of rape (and other sexual offences) create a burden on the State to prove beyond a reasonable doubt that the accused did not mistakenly believe that he had the requisite consent from the complainant, the retention of consent implicitly creates an obligation on the complainant to show that she had not consented (due to the criminal case ultimately being around the complainant's experience of a violation). The complainant's actions then become the court's focus rather than the accused's actions. This is implicitly a process of putting victims on 'trial' to show how well they resisted the accused's advances so that he would be able to recognise a lack of consent.

15. Not only is retaining consent as an element of various sexual offences a problem of equality under the law for complainants, but the defence of mistaken belief which flows from this requirement creates an opportunity for the accused to rely on a multitude of rape myths and stereotypes to their benefit. The reliance on these myths and stereotypes does not need to be objective or even reasonable. It permits perpetrators to continue holding discriminatory and harmful views around women and sexual encounters, and having these discriminatory views and beliefs be a legitimate defense to sexual violations.



16. Furthermore, mistaken belief does not require that the belief be feasible or even rational. To illustrate the point, I refer to foreign jurisprudence. In the United Kingdom case of *DPP v Morgan*, Morgan invited three of his junior colleagues home to have sexual intercourse (rape) with his wife.¹⁴ Morgan had apparently convinced his colleagues that his wife had consented to the sexual encounter and that she enjoyed 'kinky' sex. Although Morgan and his wife had been sleeping separately prior to the encounter, and even though she was sleeping with her 11-year-old child at the time of their arrival, all three colleagues ripped her from the bed, dragged her to an adjoining room and raped her.¹⁵ In evidence, Mrs Morgan said she did not consent and even called out for her son to phone the police. The Court found that the men had believed what Mr Morgan had told them, even despite Mrs Morgan's actions. The Court stated that belief did not have to be based on reasonable grounds. All three were subsequently acquitted.
17. This led the UK to enact the Sexual Offences Act 2003, which requires mistaken belief to be reasonable.

¹⁴ *DPP v Morgan* 1975 UKHL 3. Available at <https://www.casemine.com/judgement/uk/5a8ff8ca60d03e7f57ecd7a3>.

¹⁵ *Ibid* at para 6.



18. Currently, South African law allows for this type of complete defence despite the problems set out above, which have a disproportionate impact on victims' rights to equality under the law, rights to dignity and the right to be free from all forms of public and private violence, where accused persons successfully rely on this defence and are acquitted.

19. Thus, if granted leave to intervene, CALS will:
 - 19.1. Provide evidence that demonstrates how the retention of consent as a central element of common law and statutory sexual offences allows for the limitation of rights of victims and survivors of sexual offences to access to courts, equality, dignity, and freedom from all forms of violence.

 - 19.2. Demonstrate how the retention of the defence of mistaken belief limits the rights of victims and survivors of sexual offences to access to courts, equality, dignity, and freedom from all forms of violence. Furthermore, the defence permits and inadvertently upholds the continued existence and pervasiveness of discriminatory views around women and other victims of sexual offences by allowing accused persons to rely on rape myths and stereotypes.



- 19.3. Demonstrating through evidence how the various rape myths and stereotypes permeate society and the criminal justice system and how this affects victims and survivors.
- 19.4. Seeking an order declaring that consent as an element in sexual offences (both in common law and SORMA) is unjustifiably unconstitutional and instead should be redefined as grounds for justification.
- 19.5. In the alternative, seeking an order declaring that the defence of mistaken belief, which emerges from the common law, is unjustifiably unconstitutional and must be developed in terms of section 8(3)(a) of the Constitution to reflect a reasonable mistaken belief.
- 19.6. Furthermore, in the alternative, seeking an order that declares that the defence of mistaken belief deriving from section (1)(3) of SORMA in instances of sexual offences requiring consent in terms of SORMA and deriving from the common law in common law sexual offences requiring consent (prior to the enactment of SORMA) are unjustifiably unconstitutional and both must be developed in terms of section 8(3)(a) of the Constitution to reflect a reasonable mistaken belief.

A handwritten signature in black ink, appearing to be 'SJS' with a flourish underneath.

II. CALS' AND CALS' CLIENTS' INTEREST IN THE MAIN APPLICATION

CALS' interest in the main application

20. As set out briefly above, for decades, CALS has engaged in and around issues relating to gender and violence in South Africa. Currently, CALS' Gender Justice Programme ('GJ') focuses exclusively on advocacy, research and litigation concerning the intersection of gender and violence and especially sexual violence in South Africa.
21. CALS has an extensive and sustained record of being part of many of the notable cases dealing with the intersection of gender and violence in the country. As mentioned briefly above, this has included cases such as *Carmichele v Minister of Safety and Security and Another*¹⁶; *S v Engelbrecht*¹⁷ and *Tshabalala v S; Ntuli v S*¹⁸.

¹⁶ 1999 (1) SA (CC).

¹⁷ 2002 (6) SA 642 (CC).

¹⁸ (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC).

22. Furthermore, CALS has not only been involved in litigation around this intersection but has also contributed towards numerous submissions to Parliament around legislation dealing with the subject. For example, CALS has made submissions on regulations for sexual offences courts¹⁹; amendments to SORMA; amendments to prescription periods around sexual violence in civil and criminal cases²⁰; as well as various submissions around the domestic violence act and accompanying legislation²¹.
23. As such, CALS through its GJ programme, has a material interest in the main application as it has both historically and currently engaged in the development of laws and policies around gender and violence within the country.
24. This material interest extends to representing a public interest, too, as CALS conducts its mandate on behalf of the people of the country. Furthermore, the GJ programme conducts its mandate on behalf of vulnerable victims and survivors of sexual violence.

¹⁹ [https://www.wits.ac.za/cals/our-programmes/gender/#:~:text=Submission%3A-Draft%20Regulations%20Related%20to%20Sexual%20Offences%20Courts.-\(January%202018\).](https://www.wits.ac.za/cals/our-programmes/gender/#:~:text=Submission%3A-Draft%20Regulations%20Related%20to%20Sexual%20Offences%20Courts.-(January%202018).)

²⁰ <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20%20Comments%20Prescription%20Bill%2015%20April%202019%20.pdf>.

²¹ <https://www.wits.ac.za/cals/our-programmes/gender/#:~:text=Domestic%20Violence%20Amendment%20Bill>.

CALS' clients' interest in the main application

25. As set out briefly above, CALS represents numerous victims and survivors of sexual violence. CALS' clients also have a material interest in this case in so far as the retention of problematic laws and discriminatory laws relating to sexual offences creates barriers to them attaining justice through the legal system.
26. The interests of CALS' clients in attaining justice through the legal system represents the interest of thousands of other victims and survivors of sexual violence.

III. NATURE OF THE ISSUES AND RELIEF SOUGHT IN THE MAIN APPLICATION

27. In order to place CALS' application in its proper context, it is important that I provide background to the main application, which sets out, to some extent, and highlights the issues faced by victims and survivors of sexual offences (which require consent as an element), at trial.

Factual background



28. The main application concerns the various limitations on victims' rights that the existence of the defence of mistaken belief in consent continues to perpetrate within the South African criminal justice system.
29. The applicants trace the emergence of the defence from the Law Reform Commission of South Africa ('Law Commission'), Discussion Paper 85 on Sexual Offences.²² This is where the Law Commission had originally requested submissions around whether the mistaken belief in consent should be a complete defence when viewed objectively.²³
30. In the Law Commission's final Sexual Offences Report in 2002 and its draft Bill (which was later introduced to Parliament), the issue was not canvassed.²⁴
31. SORMA was subsequently passed in 2007, where the mistaken belief in consent continues to enjoy the subjective application and thus allows for an unreasonable and irrational belief in consent.

²² Applicants, Founding affidavit, para 33.

²³ Applicants, Founding affidavit, para 35.

²⁴ Applicants, Founding affidavit, para 38.



32. The applicants cite the case of *Coko v S*²⁵ ('Coko') as one of the historical factors that precipitated their application.²⁶ This case was an appeal of a rape conviction. The appeal, with the Honourable court's acquittal of the accused, exemplified the problem of the continued existence of a mistaken belief in consent.
33. The *Coko* judgement by the appeal court saw vast public outcry around the acquittal of the accused. The acquittal was based on what many allege was the reliance of the accused on rape myths and stereotypes to justify his mistaken belief. The applicants noted that '*Coko v S*' has starkly spotlighted the unconstitutional shortcomings of the Act [SORMA], as identified and challenged in this [the applicants] application'.²⁷
34. Another historical factor cited by the applicants for their application was the case of the Second Applicant, Inge Holzträger ('Holzträger').
35. Holzträger was raped in 2018 by a man she had met online.²⁸ Holzträger reported the offence, and the matter went to trial. The accused was

²⁵ *Coko v S* [2021] ZAECGHC 91; [2021] 4 All SA 768 (ECG).

²⁶ Applicants, Founding affidavit, 44 – 51.

²⁷ Applicants, Founding affidavit, para 51.

²⁸ Applicants, Founding affidavit, para 52.

subsequently acquitted in 2019 by the Pretoria Regional Court. The applicants state that the Honourable court found,

Ms Holzträger had objectively not consented to the accused's penile penetration of her vagina and anus, but because she had neither physically resisted nor loudly protested, the State had not excluded the possibility that the accused did not hear her say "no", and had thus not proved beyond a reasonable doubt that the accused knew or foresaw that she was not consenting.²⁹

36. Based on the above, the applicants pursued their application, and their constitutional challenge to sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of SORMA.³⁰

IV. BACKGROUND TO CALS' INTERVENTION

37. The main application demonstrates the effect that the continued existence of consent as a central element of some sexual offences, coupled with the availability of the mistaken belief in consent defence, has in a criminal trial where victims and survivors must demonstrate how much they resisted the accused's actions and whether this was to a degree to which he could not (even irrationally) be mistaken about the consent existing.

²⁹ Applicants, Founding affidavit, para 53.

³⁰ Applicants, Notice of Motion.

38. CALS supports the essence of the prayers of the applicants. However, and as will be set out furthermore hereunder, CALS would deviate from these prayers and assert that consent as an element of these sexual offences is an unjustified limitation of an intersection of victims' and survivors' rights. This can be alleviated if consent is reassigned or redefined as a grounds for justification. Furthermore, CALS will argue that not only does the retention of consent as a definitional element creates the availability of the defence of mistaken belief, but this retention also will continue to keep a *status quo* where the prosecution (State) has to meet higher burden (beyond a reasonable doubt) around the existence of consent. This higher burden is a constitutional limitation and a form of indirect discrimination) when compared with other crimes such (where women are not the predominant victims), which have consent as a justification and thus, the burden is lower.
39. To support CALS' contention that the issue is primarily located around consent as an element of these crimes, CALS will provide evidence of how retaining consent as an element is discriminatory (indirect discrimination) and primarily affects women and other gender minorities in negative ways.
40. CALS will provide evidence of how the retention of this requirement of consent as a central element is patriarchal and sexist and is primarily applied to crimes that disproportionately affect women. Furthermore, CALS will provide



academic literature which shows that the emergence of definitions around sexual offences in South Africa stems from misogynist and misogynoir attitudes and replicates many of the stereotypes historically present in our law. These stereotypes include the cautionary approach, whereby courts were cautioned around the testimony of women as it was perceived that women often have nefarious motives of women for alleged sexual violations.³¹

41. In the alternative, in seeking an order declaring that the defence of mistaken belief, which emerges from the common law, is unjustifiably unconstitutional and must be developed in terms of section 8(3)(a) of the Constitution to reflect a reasonable mistaken belief, or
42. Further, in the alternative, in seeking an order that declares that the defence of mistaken belief deriving from section (1)(3) of SORMA in instances of sexual offences requiring consent in terms of SORMA and deriving from the common law in common law sexual offences requiring consent (prior to the enactment of SORMA) are unjustifiably unconstitutional and both must be developed in terms of section 8(3)(a) of the Constitution to reflect a reasonable mistaken belief;

³¹ This includes the historically problematic and unconstitutional cautionary approach which saw its application for the testimony of women. In the case of *RA v Rautenbach* 1949 (1) SA 135 (A) Schriener JA, said the following of women complainants 'hysteria that can cause a neurotic victim to imagine things that did not happen', they may claim to have been raped for 'financial considerations when the complainant is pregnant' or have 'the wish to protect a friend or to implicate someone who is richer than him' (at 143).



43. In support of both of the alternatives above, CALS will provide evidence on how the current defence of mistaken belief limits the rights of victims and survivors of sexual offences to access to courts, equality, dignity, and freedom from all forms of violence. Furthermore, we will provide evidence on how the defence permits and inadvertently upholds the continued existence and pervasiveness of discriminatory views around women and other victims of sexual offences by allowing accused persons to rely on rape myths and stereotypes.
44. CALS will show through evidence how the various rape myths and stereotypes permeate society and the criminal justice system and the effects this has on victims and survivors.

V. OVERVIEW OF CALS' EVIDENCE

45. If admitted as a party, CALS will adduce evidence which shows that:

45.1. The retention of consent as a definitional element of sexual offences disproportionately affects women and other gender minorities and is a form of indirect discrimination;



45.2. The retention of consent as a definitional element of sexual offences creates a burden of proof on the State to prove a lack of consent which is not present in many crimes that do not have women and other gender minorities as the principal victims;

45.3. The retention of consent as a definitional element of sexual offences creates an onus on the complainant to demonstrate how much or to what degree she protested the sexual violation. This places an unfair burden on victims to show 'how much' they actively resisted the accused and that he overpowered them. This onus is counter to the accepted psychological understanding that individuals respond differently to sexual violence. Active resistance is one of the three typical responses to a sexual attack. However, the other responses include flight and freezing.

V. BASIS FOR CALS INTERVENTION AND ADDITIONAL RELIEF SOUGHT

46. As outlined above, CALS seeks to intervene in this matter primarily to advance evidence and argument that the retention of consent as a definitional element in sexual offences is a limitation of individuals' rights to equality and dignity, to be free from all forms of violence and access to courts.



47. Although CALS supports the Applicants' claim made in prayer 1 of the Notice of Motion, CALS submits that this approach is short-sighted and must include sexual offences (that require consent as an element of the crime) under the common law too.
48. This accords with both statute and case law which has explicitly held that individuals who have experienced any form of sexual offence at any time in their lives can approach lodge a criminal case with SAPS.³² The current framing of the relief by the Applicants does not include individuals who were sexually violated before the advent of SORMA in 2007, as their prayer rests solely on the provisions of SORMA and do not include common law sexual offences. Thus anyone who experienced a common law sexual offence (sexual offences prior to 2007) will be excluded from the benefit of the recourse.
49. In light of this CALS agrees that mistaken belief as a defence arises in the common law and in statutory sexual offences. To meet grounds of equality and non-discrimination of the law truly, it must be declared unconstitutional in both instances.

³² *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2020 (2) SACR 38 (CC).



50. In the alternative, CALS argues that the relief sought by the applicants must canvass all common law sexual offences and that an unreasonable mistaken belief be declared unconstitutional insofar as it applies to common law sexual offences.

VI. GROUNDS FOR CALS TO JOIN THE MAIN APPLICATION UNDER UNIFORM RULE 12 READ WITH RULE 6(14)

51. I understand that, for a party to intervene in an ongoing matter as an Applicant, it must comply with Uniform Rule 12, read with Uniform Rule 6(14).
52. As I detailed above, CALS has numerous current clients who are and have been in a similar position to the applicants in the main application, and the relief they require depends upon the determination of substantially the same question of law or fact as the main application. CALS furthermore also acts in the public interest of all victims of sexual offences who may encounter the barriers posed by the retention of consent as a definitional element during their quests for justice. Consequently, CALS, its individual clients, and similarly situated affected individuals have a direct and substantial interest in the relief sought by the applicant in the main application.

SJB

53. As noted, all of CALS's cases have common threads that align with the main application.
54. Thus, CALS' as an Institutional Applicant representing its clients and acting in the public interest, has a direct and substantial interest in the relief sought by the main application. This would also curtail further and ongoing prejudice and further and piecemeal litigation for CALS' various clients and similarly situated affected individuals.
55. In the premises, aside from the convenience of having these matters admitted as evidence and being heard together through the intervention of CALS as the Third Applicant the evidence put forth by the CALS is demonstrative of the prevalence and importance of the relief sought by the application the main application.

VII. CONCLUSION

56. CALS contends that it has met the requirements set out in Uniform Rule 12, read with Uniform Rule 6(14). The additional relief that CALS seeks will amplify the relief sought in the main application by focusing on the route of the issue, which is the retention of consent as a definitional element. Furthermore,



CALS will amplify the relief sought by the applicants by arguing for the inclusion of common law sexual offences in the relief sought.

57. CALS acts in the public interest and for its clients. The evidence it will produce before this Honourable Court raises substantially the same issues of fact and law as the applicant in the main application. CALS' clients and similarly situated affected individuals have a direct and substantial interest in the relief sought in the main application, given that sexual offences are rife in South Africa. That failure to successfully prosecute offenders of sexual violations affects not only individual victims but families, communities and the country.
58. In the premises, I contend that the CALS has made a case for obtaining leave to intervene as a Third Applicant.

WHEREFORE, I pray for relief as set out in the attached Notice of Motion.



SHEENA JUSTINE SWEMMER

The deponent acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at Fairview on this the February 2023, the regulations of Government Gazette Notice No. R1258 of



21/7/72 as amended and Government Gazette Notice No. R1648 of 19/8/77 as amended having been complied with.

*2023/3131P
RUC*
T. Hamman ER

COMMISSIONER OF OATHS

Full Names: *T. Hamman ER*

Business Address: *87 Sophia St*

Office: *RUC*



SS