



CREATIVELY COMBATting GENDER BASED VIOLENCE

PRESS RELEASE:

MINISTER OF JUSTICE OPPOSES GROUND-BREAKING GBVF CONSTITUTIONAL CHALLENGE, 22 MARCH 2023

On Thursday, 16 March 2023, the Minister of Justice and Correctional Services, the first respondent in the ground-breaking constitutional challenge brought against the problematic definitions of rape and consent in the Sexual Offences Act, delivered their overdue answering affidavit.

In his affidavit, the Chief Director of Legislative Development, Leonard Tsietsi Sebelmetja, on behalf of the Minister, argues that The Embrace Project's application, if the relief sought is granted, would result in:

- a revocation of the accused person's presumption of innocence;
- the burden of proof unjustly falling on the accused, instead of the state;
- a lowering of the standard of proof from beyond a reasonable doubt to negligence; and
- a conviction of rape, when the accused was merely negligent, being too harsh a punishment.

The Embrace Project's application seeks to declare the subjective test, which is currently applied in the Sexual Offences Act to determine whether or not an accused person subjectively believed that a complainant was consenting to a sexual act, unconstitutional. The Embrace Project requests that the standard for determining the existence of consent, in the form of an objective test, be applied instead. As highlighted in our application, societies around the world are adopting more nuanced approaches to sexual violence, and are recalibrating the legal position to incorporate more objective standards and more victim and survivor-centred approaches towards

Directors: Leanne Berger and Lee-Anne Germanos

consent. We are submitting that a progressive constitutional democracy such as ours should enable what we view as a constitutionally permissible objective test.

The Minister is opposing this. Through his Chief Director's affidavit, he goes as far as to say that The Embrace Project, by bringing such an application, is blaming the country's outrageously high rates of GBVF on the Sexual Offences Act as though legislation were the cause of such violence. The affidavit states that:

*"The Act does not perpetuate rape culture as suggested but protects the victim of crime as well, **the victim must comply with the provisions of the Act if she wants the Act to come to her aid, no one is above the law.**"*

The Embrace Project is disappointed with the stance taken by the Minister, its mischaracterisation of the application and at his attempts to reassure the South African public that our law does not endorse misogynistic views when his Chief Director's affidavit ends by making the following statement:

*"The Court is requested not to suspend anything as the Act does not have any irregularities and it must be left as is, **the Applicants are only driven by their ego towards men and they are using their emotions to persuade the Court to declare unconstitutional an Act which is in line with the Constitution.**"*

Our application, made along with the Second Applicant (a rape survivor), is made in the public interest and the interest of victims and survivors of all forms of sexual violence. We, along with our legal team, will accordingly be preparing a reply to the answering affidavit.

For The Embrace Project's application, click [here](#).

For the Minister of Justice's answering affidavit, click [here](#).

For a break down of The Embrace Project's case, click [here](#).

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