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IN THE HIGH COURT OF SOUTH AFRICA
Gauteng Local Division, Pretoria

CASE NO: **2022-048656**

In the matter between:

THE EMBRACE PROJECT NPC,INGE HOLZTRGER	Plaintiff / Applicant / Appellant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES,MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES,PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Defendant / Respondent

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Heads of Argument

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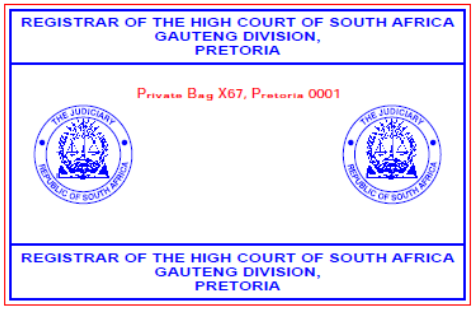

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Registrar of High Court of South Africa , Gauteng Local Division,Pretoria

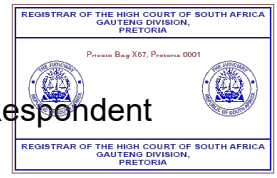
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.:48656/22

In the matter between:

THE EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
CENTRE FOR APPLIED LEGAL STUDIES	Third 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

FILING SHEET

PLEASE TAKE NOTICE that the First and Second Applicants hereby file their Heads of Argument.

SIGNED at **JOHANNESBURG** on **21st NOVEMBER 2023.**

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 48656/22

In the matter between:

THE EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
CENTRE FOR APPLIED LEGAL STUDIES	Third 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

FIRST AND SECOND APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

> *"Rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa. . . Section 165 of the Constitution vests judicial authority in the courts and nowhere else. They are the gate-keepers of justice."*[1]

1 This application concerns a constitutional challenge to the Criminal Law (Sexual Offences and Related Matters) Act, 2007 ("**the Act**"), specifically the provisions dealing with sexual offences for which the absence of consent is a constituent element,[2] most prominently rape.

2 As the law presently stands, an accused can avoid conviction where there is reasonable doubt that he[3] wrongly believed that the complainant consented to the sexual act, even if that belief was unreasonable. This issue is especially prevalent in, but not limited to, cases of intimate partner rape or in situations where consent is initially given but then later revoked (or given in respect of one sexual act but not others).

3 To this extent, we submit that the Act is unconstitutional, as it fails to ensure adequate respect and protection of the rights of survivors, victims and potential targets of sexual violence, to equality, dignity, privacy, bodily and psychological integrity, as well as freedom and security of the person.

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1 *Ndlovu v S* 2017 (2) SACR 305 (CC) para 53.

2 Sections 3, 4, 5, 6, 7, 8, 9 and 11A of the Act.

3 Although perpetrators of sexual violence may not always be men, in these submissions we adopt the pronouns of the male gender for the perpetrators and female gender for the targets of sexual violence, for the sake of brevity, and fidelity to the overwhelming majority of cases.

4 In the discharge of its section 7(2) duty to respect, protect, promote and fulfil all of these rights, the State is obliged to effectively prohibit and punish all violations of a person's sexual autonomy, including where the accused believed that the complainant consented, if that belief was unreasonable in the circumstances.

5 This is consistent with international law, which requires States to prevent and punish all forms of sexual violence, as well as relevant comparative law, which has developed to exclude the defence of unreasonable belief in consent.

6 We submit that in this regard, the Act is outdated, unconstitutional, and unjustifiable. The relief sought by the First and Second Applicants ("**the Embrace Applicants**") is directed at this unconstitutionality and is twofold:

6.1 First, the applicants seek an order declaring that sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of the Act are unconstitutional and invalid, as they are inconsistent with the rights of victims and survivors of sexual violence to equality (section 9), dignity (section 10), privacy (section 14), bodily and psychological integrity (section 12(2)), and freedom and security of the person (section 12(1)) to the extent that these provisions do not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question, alternatively to the extent that the provisions permit a defence of unreasonable belief in consent.

6.2 Second, an order suspending the declaration of invalidity for 12 months, coupled with a proposed interim reading in which provides that it is not a valid defence to a charge under section 3, 4, 5, 6, 7, 8, 9

or 11A, for an accused person to rely on a subjective belief that the complainant was consenting to the conduct in question, unless the accused took all reasonable steps to ascertain that the complainant consented to the sexual act in question with the accused.

7 The Minister opposes the relief sought by the Embrace Applicants. For the reasons we set out in these submissions, the Minister's opposition is surprising and without merit.

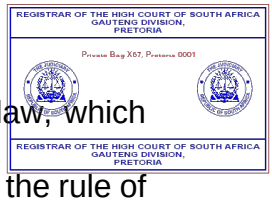
Relief sought by Embrace applicants differs to that of CALS

8 This relief sought by the Embrace Applicants is also distinct from that sought by the Third Applicant ("**CALS**"), which is significantly more far-reaching and in conflict with long established principles of law. CALS seeks retrospective application of the declaration of unconstitutionality, while the Embrace Applicants seek prospective application only. The Embrace Applicants' position in this regard is informed by the absolute rule, in constitutional and international law, of *nulla crimen, nulla poenae, sine lege*.[4] In addition, section 35(3)(l) of the Constitution provides for the right not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

9 The Constitutional Court in *Masiya* reinforced that section 35(3)(l) "*confirms a long-standing principle of the common law that provides that accused persons may not be convicted of offences where the conduct for which they are charged*

[4] See *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) at para 51.

did not constitute an offence at the time it was committed."[5] In that case, the Court found that an accused who had already been tried for certain offences could not, after the fact and following the development of the law, be found to have committed an offence that did not exist at the time. The Court found that this would violate section 35(3)(l). The Court extended the common-law definition of rape but ordered that the development of the common law shall be applicable only to conduct which takes place after the date of judgment in that matter.



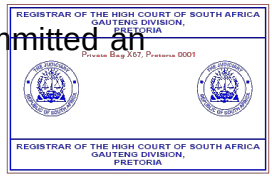
10 The principle of legality is a fundamental principle of South African law, which ensures that laws and state actions are based on the Constitution and the rule of law. On this premise individuals cannot be punished except for conduct or an omission that was clearly prohibited by law when it took place.

11 In *Levenstein*, relied on by CALS, the Court reiterated the principles set forth in *Masiya*, confirming that section 35(3)(l) of the Constitution recognises the principle of legality, namely that the accused may not be found guilty of a crime unless the type of conduct with which they are charged was recognised by the law as a crime at the time it was committed. *Levenstein* involved a constitutional challenge to a provision that imposed a time bar of 20 years for the right to institute a prosecution for certain sexual assault crimes. It was a question of prescription. In that matter, there was a retrospective component relating to prescription in relation to an existing crime rather than the creation of a new crime retrospectively. The order applied retrospectively to enable victims and survivors

[5] *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827.

to initiate proceedings. Retrospectivity was appropriate in that instance as the declaration of invalidity did not have the effect of creating a new crime – that is a different case to the present one.

12 The current constitutional challenge relates to various crimes and if applied retrospectively would be contrary to section 35(3)(l). Accordingly, we do not support the retrospective application of a finding of invalidity to the extent that it means an accused who had already been tried for certain offences, after the fact and following the development of the law, can be found to have committed an offence based on a different definition of the crime.



13 These heads of argument are structured as follows:

13.1 How the impugned sections infringe upon the rights of victims.

13.2 Why the infringement is not justifiable under the Constitution.

13.3 International and comparative law.

13.4 Why the Minister's arguments are misplaced.

13.5 Just and equitable relief.

HOW THE ACT VIOLATES RIGHTS

14 The Constitutional Court has recognised that the crime of rape has at its core, the breach of the right to bodily integrity and freedom and security of the person and the right to be protected from degradation and abuse. The crime of rape

further disproportionately affects women specifically, thereby falling foul of section 9 of the Constitution.

15 To this end, the Constitutional Court in ***Masiya*** held:

> *"With the advent of our constitutional dispensation based on democratic values of human dignity, equality and freedom, the social foundation of these rules has disappeared. Although the great majority of females, for the most part in rural South Africa, remain trapped in cultural patterns of sex-based hierarchy, there is and has been a gradual movement towards recognition of a female as the survivor of rape rather than other antiquated interests or societal morals being at the core of the definition.* ***The focus is on the breach of 'a more specific right such as the right to bodily integrity' and security of the person and the right to be protected from degradation and abuse. The crime of rape should therefore be seen in that context****."*[6] *(Our emphasis)*

16 Moreover, our courts have recognised that rape constitutes a brutal invasion of the privacy, dignity and person of the victim. By giving primacy to the subjective intention of an accused, the impugned provisions infringe the constitutional rights of a victim in an unjustifiable and impermissible manner.

17 As a starting point in the judgment in ***S v Tshabalala***,[7] the Constitutional Court cited the dictum in ***S v Chapman*** with approval, wherein the Supreme Court of Appeal held that:

> *"**Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim**. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate*

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6 *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC); 2007 (2) SACR 435 (CC) at para 25.

7 *S v Tshabalala and Another* 2020 (5) SA 1 (CC). See Introductory Quote.

claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."[8] *(Our emphasis)*

18 In this context, to the extent that the Act permits a person to rely on his own unreasonable and subjective view of consent when engaging in a sexual act with another person, that Act violates the rights identified by the Court in *Masiya* and must, we submit, be declared unconstitutional.

Rape myths and the Act

19 Rape culture, rape stereotypes, and rape myths are prevalent in South Africa, and are frequently perpetuated. For example, there is a misconceived notion that a person must be forced or threatened in order for a rape to be "legitimate". There is a further misguided expectation that unless there is a vocal or physical response of fighting, kicking, or screaming, consent is present. These stereotypes are echoed in certain court pronouncements. The unreported decision of *S v Sebaeng*, is an example. The Court made the following problematic observation:

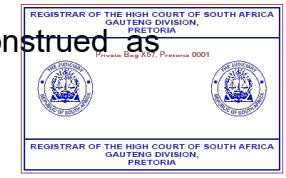
*"**There is no mention of limping or crying or anything of the kind, notwithstanding the Complainant's assertions that she was heartbroken and limping as a result of the sexual intercourse**. There is also a contradiction between her evidence and that of her mother with regard to whether it was in the evening of the event or at about 06h00 the next day when the Complainant*

[8] Id; *S v Chapman* 1997 (3) SA 341 (SCA) at paras 3-4.

disclosed the sexual act to the mother. ***This is not an exhaustive list of the unsatisfactory features in her evidence****."*[9] *(Our emphasis)*

20 The perpetuation of the myth of how a woman should behave if she has been raped, or if she is not consenting to sex, is deeply problematic.

21 Of further concern is the notion that if one consents to one type of sexual act, then they have automatically consented to everything, and that consent cannot be withdrawn once sexual contact has begun. More specifically, there is a perception, among some, that any form of "foreplay" can be construed as consent.[10]



22 This further adds to the myth that perpetrators of sexual violence are always violent monsters. We submit that this line of thinking ignores the hard lessons learned in ***Tshabalala*** where the Constitutional Court sagely observed:

> "***The notion that rape is committed by sexually deviant monsters with no self control is misplaced. Law databases are replete with cases that contradict this notion. Often, those who rape are fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues****. We commune with them. We share stories and coffee with them. We jog with them. We work with them. They are ordinary people, who lead normal lives.* ***Terming rapists as monsters and degenerates tends to normalise the incidents of rape committed by men we know because they are not "monsters" – they are rational and well-***

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9 *S v Sebaeng* [2007] ZANWHC 25 at para 13; See also, the unreported decision in *S v Moipolai* [2004] ZANWHC 19 at para 24 where the Court, in interpreting the *dictum* of the Appellate Division in *S v N* 1988 (3) SA 450 (A), held as follows:

> "*In the concluding portion of his judgment on sentence the magistrate said:*
>
> *'This is not the usual or ordinary type of case where the rapist grabs an unknown person and rapes her. In this case you knew the complainant well and you had often associated with her.'*
>
> *It is not clear whether he regarded this as a mitigating or an aggravating factor.* ***To my mind, it is a mitigating factor in that the shock and affront to dignity suffered by the rape victim would ordinarily be less in the case where the rapist is a person well-known to the victim and someone moving in the same social milieu as the victim***."

10 See for example, the Court's decision in *Coko v S* [2021] 4 All SA 768 (ECG); 2022 (1) SACR 24 (ECG) at para 52, read with paras 79-83.

respected men in the community. *Yes, the abominable behaviour of these men is abhorrent and grotesque and the recognition that they are human does not seek to evoke sympathy – it serves to signify a switch from characterising rapists as out-of-control monsters, and centres the notion that rapists are humans who choose to abuse their power.* ***The idea that rape is committed by monsters and animals may have adverse effects in that it may lead to the reinforcement of rape myths and stereotypes***. *For instance, labelling of this nature may lead to a cognitive dissonance when the actual rapist does not match the description of rapists. It has been said that this cognitive dissonance leads to the problematic questions like "person X is a good man, what happened to cause him to rape?"* ***These questions have the effect of then centring the actions of the victims and not those of the actual rapist. This in turn reinforces the prevalent rape culture in South Africa and safeguards the patriarchal norms which normalise incidents of rape***.

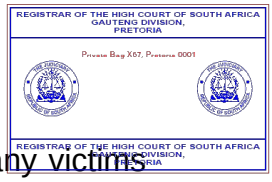
Again, I underscore that I do not imply that rapists do not behave in a way that is heinous and inhumane. The moral repugnancy of the act is self-evident. ***The point is merely that you cannot tell that someone is a rapist by their mere physical appearance or their standing in the community or their relationship to you. This may obscure the wider targets of our response to the scourge by narrowing our focus onto abhorrent individuals as opposed to dismantling an abhorrent system.***"[11] (Our emphasis)

23 While we accept that various amendments to the Act have served to combat several debunked rape myths and stereotypes and has made it relatively easier for the State to prove *unlawfulness* (i.e. objective lack of consent), we submit that the Act nullifies these developments by continuing to allow rape myths and stereotypes to frustrate proof of *intention*. This is particularly so for victims and survivors who know the perpetrator.

[11] *Tshabalala v S; Ntuli v S* 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) at paras 74-75.

24 The current legal framework validates false narratives and reinforces harmful and dangerous perceptions and behaviours that diminish a person's sexual autonomy, and dignity, among others.

25 The Act further perpetuates rape culture and victim blaming. This is clear from cases in which courts have found that a victim or survivor objectively consented to penetration because they had no physical injuries, did not call for help, wore revealing clothes, flirted with the accused, or perhaps even engaged in foreplay with the accused.[12]



26 It is trite, by now, and common cause in these proceedings, that many victims and survivors of sexual violations do not either "fight" or "flee", but "freeze". While the Court can no longer infer consent from their silence or passivity, the accused can – and the Act compels the Court to treat this as a valid defence.

27 And because the State bears the onus to prove guilt beyond a reasonable doubt, an accused is entitled to be acquitted if the State is unable to exclude beyond all

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[12] See, for example, the case of *S v Zuma* [2006] 3 All SA 8 (W) at 77 where the Court stated:

"*As far as the rape itself is concerned there are a few very strange and odd features. The complainant is not in any way threatened or physically injured. Her clothes are not damaged in any manner. At no stage did the accused resort to physical violence or any threat.*

. . .

A very odd feature is that the alleged rape took place within ten metres of a uniformed policeman with the accused's grown-up daughter not far away.

. . .

[I]t appears to be very odd that from the time the complainant assisted in rolling onto her back and having her clothes removed, she did not utter a single "no" throughout her vagina being touched and at least ten minutes of intercourse. At no stage was there any call for help which was immediately available.

. . .

During the 'rape' the accused uttered words of endearment to the complainant, not a single one whereof has the connotation of dominance or abuse."

See also the unreported judgment of *Makhubela v S* [2018] ZAFSHC 61 at para 20:

"When she initially tried to flee from the shack and the accused accosted her from the front she did not scream or call for help when he allegedly forced her back to the shack."

reasonable doubt the possibility that the accused subjectively believed that the complainant was consenting to the sexual act in question – even if the accused's belief was unreasonable (for example, rooted in rape myths or in patriarchal notions of male sexual entitlement). Most perversely, the less progressive the man's views about consent, the more likely he is to be acquitted.

28 The outdated beliefs which men often hold about consent mean that, in South Africa, the initiator of a sexual act has no legal duty, under current criminal law, to exercise any care regarding whether his target is consenting. The current law allows him, and in fact encourages him, not to take any reasonable steps to ascertain whether there is consent. The same discredited rape myths and stereotypes are legitimised and entrenched in our law through the retention of an unqualified subjective standard of fault.

29 The consequence is that victims and survivors have a legal duty to place their lack of consent beyond any reasonable doubt in the eyes of even the most unreasonable man. Victims and survivors are not legally allowed to freeze (or to submit because they believe fighting or fleeing will be futile or life-threatening). The obscene assumption underlying this (endorsed by the Act) is that women exist in a perpetual state of consent until they show otherwise even to the most perverse men.

30 We submit, the Act currently tells women and children "don't get raped" instead of telling perpetrators "don't rape". It saddles the burden of preventing sexual violence firmly on the shoulders of the very targets of that violence.

31 In failing to include a qualification that a belief in consent must be reasonable, the impugned provisions of the Act infringe the constitutional rights of the targets, victims and survivors of sexual violence.

The State's duty to prevent and punish <u>all</u> sexual violence

32 The Constitutional Court has upheld the State's duty to protect women from all types of gender-based violence.[13]

33 Early in our constitutional dispensation, the Supreme Court of Appeal and Constitutional Court recognised rape as a human rights violation.[14] Rape is criminal because it affects the dignity and personal integrity of women and limits an individual's bodily integrity and psychological integrity and is a degrading and brutal invasion of a person's most intimate and private space.[15]

34 The Supreme Court of Appeal has held that the very act itself, even absent any accompanying physical beating inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane, or degrading way.[16]

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13 *AK v Minister of Police* 2023 (2) SA 321 (CC) at para 3:

"*The state has a duty to protect women against all forms of gender-based violence that impair their enjoyment of fundamental rights and freedoms. . . The courts are also under a duty to send a clear message to perpetrators of gender-based violence that they are determined to protect the equality, dignity, and freedom of all women.*"

14 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 62; *S v Chapman* 1997 (3) SA 341 (SCA) at paras 3-4.

15 *S v Mudau* [2012] ZASCA 56 at para 17.

16 *S v SMM* 2013 (2) SACR 292 (SCA) at para 26:

"*It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane, or degrading way.*"

35 It is emphasised that, sexual violence violates the following constitutional rights of victims and survivors:

35.1 equality (section 9);

35.2 human dignity (section 10)

35.3 privacy (section 14);

35.4 bodily and psychological integrity (section 12(2)); and

35.5 freedom and security of the person (section 12(1)), which includes the right to be free from all forms of violence and the right not to be treated in a cruel, inhuman or degrading way.

36 All the same rights are violated, with the same excruciating effects, regardless of whether the perpetrator subjectively knew or foresaw that the complainant was not consenting. Yet, if he acted 'only' unreasonably, the victim or survivor is left without any criminal law recognition that they were violated. Consequently, there is nothing in criminal law to prevent or deter men from committing these heinous violations.

37 Under section 7(2) of the Constitution, the State has the duty to respect, protect, promote and fulfil the above-mentioned rights. This means that the State has a duty to take positive and effective measures to combat sexual violence, in all its forms – including where the target's right to withhold consent has been simply ignored rather than intentionally violated. In order to combat it, the State must (among other things) prohibit, punish and thus deter it. As explained below, this duty is buttressed by binding international law.

38 The Act, in essence, legalises sexual violence where there is no reasonable belief in consent. In doing so, the State is failing to take the necessary and effective measures to respect, protect, promote and fulfil fundamental rights of all South Africans, particularly women and children. The limitation of these rights caused by the Act cannot be justified, to this extent the Act is unconstitutional.

THE VIOLATION IS UNJUSTIFIABLE

Even negligence is blameworthy

39 The Constitution permits criminalising negligence, as long as the legal convictions of society regard it as morally blameworthy. Our laws are replete with examples of this.

40 A constitutional society founded on dignity, equality and freedom, which respects women's rights, not only may but must regard it as morally blameworthy for men to act with selfish, careless and callous disregard for the sexual autonomy of children and women.

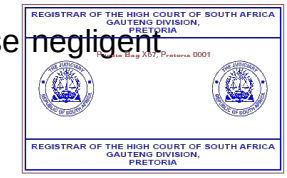
41 Sexual violence has the same excruciating and life-destroying effects on the victims and survivors irrespective of the accused's state of mind. As the Irish Law Reform Commission has explained:

> *"Sexual offences are very serious and can cause great physical and mental injury to victims, regardless of the accused's mental state. If one of the purposes of criminal law is to prevent harm and provide retribution where harm is caused, it*

arguably does not follow that inadvertent or careless actions should be ignored, particularly where the harm can be easily avoided by a simple inquiry."[17]

42 Because of the premium society places on the right to life, unlawful and negligent killing is criminalised as culpable homicide. Even lesser offences, such as reckless or negligent driving and a failure to report corruption, offences born of negligence can attract criminal liability.[18]

43 If the legislative purpose of the criminalisation of sexual violence is to protect and vindicate the rights of victims and survivors, it is irrational to legalise negligent acts that cause precisely the same harm.



44 The Constitution permits – and commands – the State to take firm steps to make men more responsible for respecting women's sexual autonomy. It follows that the Constitution cannot countenance a law that entrenches rape culture and patriarchy, which the Act currently does.

45 There is simply no conceivable reason why negligence should not be regarded as blameworthy when it results in a violation of a person's sexual integrity.

The Act itself criminalises negligence for other sexual offences

46 The Act already criminalises the negligent sexual violation of a "consenting" child between the ages of 12 and 16 years, under sections 15 ("statutory rape") and 16 ("statutory sexual assault"). Section 56(2)(a) of the Act provides as follows:

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17 Law Reform Commission of Ireland, *Issues Paper: Knowledge or Belief Concerning Consent in Rape Law*, 2018 at para 1.43.

18 PJ Schwikkard (supra) at 86.

"Whenever an accused person is charged with an offence under section 15 or 16, it is, subject to subsection (3)[19], a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older." (Our emphasis)

47 The Act also criminalises the negligent involvement in making child sexual abuse material. Section 56(6) provides as follows:

"It is not a valid defence to a charge under section 20(1) ["using children for or benefitting from child pornography], in respect of a visual representation that—

(a) the accused person believed that a person shown in the representation that is alleged to constitute child pornography, was or was depicted as being 18 years or older ***unless the accused took all reasonable steps to ascertain the age of that person****; and*

(b) ***took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years****."* (Our emphasis)

48 Parliament seemingly had no conceptual difficulty or constitutional reservations about criminalising these negligent acts. It is thus difficult to fathom why Parliament did not consider it appropriate and constitutionally imperative to protect women (and children) from negligent violation when they are old enough to consent but did not consent.

[19] Subsection (3) provides: "The provisions of subsection (2)(a) do not apply if the accused person is related to the child within the prohibited incest degrees of blood, affinity or an adoptive relationship."

INTERNATIONAL AND COMPARATIVE POSITIONS

International Law

49 Section 39(1) (b) of the Constitution provides when interpreting the Bill of Rights, a court must consider international law and may consider foreign law. We now turn to do so.

50 South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms. Recently, the Constitutional Court in ***AK v Minister of Police*** explained it as follows:

> *"It is trite that the duty to prohibit rape and other forms of gender-based violence is a customary norm of international law. South Africa is a party to several treaties which enshrine the rights of women. Chief amongst these are the Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Taken together, these instruments regard gender based violence as a pernicious form of discrimination against women that undermines their rights to equality and sexual autonomy."*[20]

51 The relevant international law instruments are each discussed in turn.

United Nations ("**UN**")

52 On 15 December 1995, South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women ("**CEDAW**"). Among other things, it obliges state parties to:

[20] *AK v Minister of Police* 2023 (2) SA 321 (CC) at para 88.

52.1 "*adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting **all** discrimination against women*";[21]

52.2 *"establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination";*[22]

52.3 *"take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise";*[23]

52.4 *"take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women";*[24]

52.5 *"repeal all national penal provisions which constitute discrimination against women".*[25]

53 State parties to CEDAW are obliged to take "*all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men*."[26]

54 Finally, state parties to CEDAW are obliged to "*take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to*

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21 Article 2(b) (emphasis added).

22 Article 2(c).

23 Article 2(e)

24 Article 2(f).

25 Article 2(g).

26 Article 3.

achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[27]

55 In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women. It declares that states should, among other things:

55.1 "*exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons*";[28]

55.2 "*develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered*";[29]

55.3 "*develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions*".[30]

56 Importantly, the Declaration defines violence against women by reference to its **effects** on the survivor (i.e. not the state of mind of the perpetrator):

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27 Article 5(a).

28 Article 4(c).

29 Article 4(d).

30 Article 4(f).

> *"For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that* ***results in, or is likely to result in****, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." (our emphasis)*[31]

57 In 2017, the Committee issued its General Recommendation No. 35 on gender-based violence against women. The Committee explained as follows:

> *"At the legislative level, according to article 2(b), (c), (e), (f) and (g) and article 5 (a) [of CEDAW], States are required to adopt legislation prohibiting* ***all forms*** *of gender-based violence against women and girls, harmonising domestic law with the Convention.* This legislation should consider women victims/survivors as right holders and include age and gender-sensitive provisions and effective legal protection, including sanctions and reparation in cases of such violence. *The Convention also requires the harmonization of any existing religious, customary, indigenous and community justice system norms with its standards, as well as* ***the repeal of all laws that constitute discrimination against women, including those which cause, promote or justify gender-based violence or perpetuate impunity for these acts.****" (Our emphasis)*[32]

58 The Committee made, among others, the following recommendations:

58.1 "*ensure that* ***all forms*** *of gender-based violence against women in all spheres, which amount to a* ***violation of their physical, sexual, or psychological integrity****, are* ***criminalized*** *and introduce, without delay, or strengthen legal sanctions commensurate with the gravity of the offence as well as civil remedies*" (our emphasis);[33]

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31 Article 1.

32 Paragraph 25(a).

33 Paragraph 29.

58.2 *"repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them";*[34]

58.3 *"in particular repeal … provisions that allow, tolerate or condone forms of gender-based violence against women… [and] all laws that prevent or deter women from reporting gender-based violence";*[35]

58.4 *"ensure that the definition of sexual crimes, including marital and acquaintance/date rape is based on lack of freely given consent, and takes account of coercive circumstances";*[36]

58.5 *"adopt and implement effective legislative and other appropriate preventive measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes".*[37]

59 We submit that this makes clear that South Africa has an international law obligation to criminalise all forms of sexual violence – including negligent sexual violence – as well as to repeal any laws that justify or tolerate patriarchal attitudes.

60 In 2010, the Committee decided the case of ***Vertido v Philippines***, where it found that the domestic court had erred in acquitting a rape accused on the basis of various "*gender-based myths and misconceptions*". The Committee held:

> *"[B]y articles 2 (f) and 5 (a) [of CEDAW], the State party is obligated to take appropriate measures to modify or abolish not only existing laws and*

[34] Paragraph 31.

[35] Paragraph 31(a) and (c).

[36] Paragraph 33.

[37] Paragraph 34.

regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. In the particular case, the compliance of the State party's due diligence obligation to banish gender stereotypes on the grounds of articles 2 (f) and 5 (a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case."[38]

61 The Committee recommended that the Philippines take the following corrective steps, among others:

"Ensure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women. Concrete measures include:

(i) Review of the definition of rape in the legislation so as to place the lack of consent at its centre;

(ii) Removal of any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimization of secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

*a. Requires the existence of "unequivocal and voluntary agreement" and **requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting**; or*

b. Requires that the act take place in 'coercive circumstances' and includes a broad range of coercive circumstances…"[39]

[38] *Vertido v Philippines*, Communication No. 18/2008, Views of the Committee on the Elimination of Discrimination against Women, 16 July 2010, UN Doc CEDAW/C/46/D/18/2008 at para 8.4.

[39] Id, at para 8.9(b).

62 The latter recommendation was also urged in the 2009 UN Model Framework for Legislation on Violence against Women.[40]

63 The 2021 UN Framework for Legislation on Rape (Model Rape Law) addresses the criminalisation of rape as follows:

> *"Article 1. Definition of rape*
>
> *A person (the perpetrator) commits rape when they:*
>
> *(a) engage in non-consensual vagina l, anal or oral penetration of a sexual nature, however slight, of the body of another person (the victim) by any bodily part or object; or*
>
> *(b) cause non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of another person (the victim) by a third person; or*
>
> *(c) cause the victim to engage in the non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of the perpetrator or another person.*
>
> *Article 2. On consent*
>
> *Consent must be given voluntarily and must be genuine and result from the person's free will, assessed in the context of the surrounding circumstances, and can be withdrawn at any moment. While consent need not be explicit in all cases, it cannot be inferred from:*
>
> *(a) silence by the victim;*
>
> *(b) non-resistance, verbal or physical, by the victim;*
>
> *(c) the victim's past sexual behaviour; or*
>
> *(d) the victim's status, occupation or relationship to the accused."*

[40] UN Department of Economic and Social Affairs: Division for the Advancement of Women, Handbook for Legislation on Violence against Women, 2010, UN Doc ST/ESA/329, at para 3.4.3.1.

64 The UN Model Rape Law regrettably does not address the required state of mind of the perpetrator. However, notably it does not require (as South African law presently does) that the perpetrator must have subjectively known or foreseen that the other party was not consenting.

65 In the context of war crimes, international law has evolved to impose liability for rape not only where the accused knew, but also where he had reason to know, that the other party was not consenting. In 2006, in ***Gacumbitsi v Prosecutor***, the Appeals Chamber of the UN International Criminal Tribunal for Rwanda held as follows:

> *"As to the accused's knowledge of the absence of consent of the victim, which as Kunarac[41] establishes is also an element of the offence of rape, similar reasoning applies. Knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware,* ***or had reason to be aware****, of the coercive circumstances that undermined the possibility of genuine consent." (Our emphasis)*[42]

66 This development was followed in 2009 by the Trial Chamber of the Special Court for Sierra Leone in ***Prosecutor v Sesay***:

> "*[T]he constitutive elements of rape are as follows:*
>
> *(i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;*
>
> *(ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by*

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41 *Prosecutor v Kunarac, Kovac and Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002.

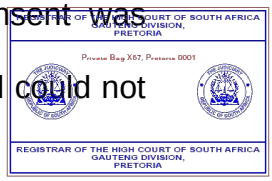
42 *Gacumbitsi v The Prosecutor (Appeal Judgement)*, ICTR-2001-64-A, International Criminal Tribunal for Rwanda, 7 July 2006, at para 157.

taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;

(iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and

*(iv) The Accused knew **or had reason to know** that the victim did not consent.*"[43]

67 We submit that this is the proper approach to the criminalisation of rape and other sexual offences defined by the lack of consent. It should not be required that the accused subjectively knew, beyond a reasonable doubt, that consent was lacking; it should be sufficient for the State to prove that the accused could not reasonably have believed that the complainant was consenting.



African Union ("**AU**")

68 The African Charter on Human and Peoples' Rights, 1981 ("**African Charter**"), enshrines the rights to equality,[44] dignity,[45] security of the person,[46] and physical and mental health.[47] South Africa ratified it on 9 July 1995.

69 The Maputo Protocol to the African Charter on the Rights of Women in Africa, 2003 (which South Africa ratified on 17 December 2004) obliges states parties, among other things, to:

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[43] *Prosecutor v Sesay, Kallon and Gbao (the RUF accused) (Trial judgment)*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009, at para 145.

[44] Article 2: "*Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as… sex…*" and Article 3: "*1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.*"

[45] Article 5: "*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited*."

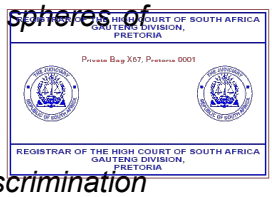
[46] Article 6: "*Every individual shall have the right to liberty and to the security of his person.*"

[47] Article 16(1): "*Every individual shall have the right to enjoy the best attainable state of physical and mental health.*"

69.1 *"combat all forms of discrimination against women through appropriate legislative, institutional and other measures";*[48]

69.2 *"enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women";*[49]

69.3 *"integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life";*[50] and



69.4 *"take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist";*[51]

69.5 *"modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional* practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men".[52]

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48 Article 2(1).

49 Article 2(1)(b).

50 Article 2(1)(c);

51 Article 2(1)(d);

52 Article 2(2).

70 More specifically, the Maputo Protocol obliges states parties to:

70.1 *"adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence";*[53]

70.2 *"enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public";*[54]

70.3 *"adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women";*[55]

70.4 *"identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence";*[56]

70.5 *"punish the perpetrators of violence against women";*[57]

70.6 *"provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated".*[58]

71 In 2007, the African Commission on Human and Peoples' Rights ("**African Commission**"), established under the African Charter, adopted the Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual

53 Article 3(4).

54 Article 4(2)(a)

55 Article 4(2)(b).

56 Article 4(2)(c).

57 Article 4(2)(e).

58 Article 25(a).

Violence.[59] In it, the African Commission "*urges states parties to the African Charter … to criminalise **all forms** of sexual violence, ensure that the perpetrators and accomplices of such crimes are held accountable by the relevant justice system, … identify the causes and consequences of sexual violence and take all necessary measures to prevent and eradicate it.*"

72 In 2017, the African Commission developed Guidelines on Combating Sexual Violence and its Consequences in Africa. They recommend that:

> *"States must take the necessary measures to prevent **all forms** of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, **patriarchal preconceptions and stereotypes** about women and girls, and/or preconceptions and stereotypes based on gender identity, real or perceived sexual orientation, and/or certain preconceptions of masculinity and virility, irrespective of their source."*[60]

73 The Guidelines also recommend that "*States must take measures to guarantee access to justice for **all** victims of sexual violence*".[61]

74 Importantly:

> *"States must ensure that their national legal framework guarantees that the definitions of **all forms** of sexual violence set out in criminal legislation are consistent with regional and international standards, including the definitions provided in these Guidelines. They must also guarantee that their national legal framework criminalizes forms of sexual violence that are not yet criminalized within their legislation, specifically by creating new offences in their criminal codes."*[62]

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59 Resolution 111 (XXXXII) 07.

60 Guideline 7.

61 Guideline 9.1.

62 Guideline 39.1.

Southern African Development Community ("**SADC**")

75 In 1997, the SADC Heads of State and Government (including South Africa) adopted the Declaration on Gender and Development, in which they committed themselves to, among other things:

75.1 *"repealing and reforming all laws, amending constitutions and changing social practices which still subject women to discrimination, and enacting empowering gender sensitive laws";*[63]

75.2 *"recognising, protecting and promoting the reproductive and sexual rights of women and the girl child";*[64]

75.3 *"taking urgent measures to prevent and deal with the increasing levels of violence against women and children".*[65]

76 In 1998, the SADC Heads of State and Government (including South Africa) adopted an addendum to the 1997 Declaration, in which they resolved to do the following, among others:

76.1 *"enacting laws such as sexual offences and domestic violence legislation making various forms of violence against women clearly defined crimes, and taking appropriate measures to impose penalties, punishment and other enforcement mechanisms for the prevention and eradication of violence against women and children";*[66]

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63 Paragraph H(iv).

64 Paragraph H(viii).

65 Paragraph H(ix).

66 Paragraph 8.

76.2 *"reviewing and reforming the criminal laws and procedures applicable to cases of sexual offences, to eliminate gender bias and ensure justice and fairness to both the victim and accused*".[67]

77 In 2008, the binding SADC Protocol on Gender and Development was adopted. South Africa ratified it in 2012 It provides that states parties shall, by 2015:

77.1 "*enact and enforce legislation prohibiting **all forms** of gender-based violence*" (our emphasis);[68]

77.2 "*review and reform their criminal laws and procedures applicable to cases of sexual offences and gender-based violence to: **(a) eliminate gender bias; and (b) ensure justice and fairness are accorded to survivors of gender-based violence in a manner that ensures dignity, protection and respect***".[69]

78 States parties to this Protocol are also obliged to "*provide appropriate remedies in their legislation to any person whose rights or freedoms have been violated on the basis of gender*".[70]

79 For the reasons set out above, by legalising sexual violence with no reasonable belief in consent, South Africa is in breach of these binding international obligations.

[67] Paragraph 10.

[68] Article 20(1)(a).

[69] Article 20(3).

[70] Article 32.

Comparative Law

80 Many open and democratic societies criminalise sexual violence with no reasonable belief in consent. In addition to the progressive countries that have already recognised this, more and more countries are moving towards a victim and survivor centred approach towards consent.

81 The Constitution invites this Court to consider the positions taken in foreign jurisdictions.[71] To this end, these submissions include an overview of the positions taken in one regional agreement and five overseas jurisdictions.

Great Lakes

82 The binding Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, adopted in 2006 by the International Conference on the Great Lakes Region, is highly instructive and progressive.[72] Article 4(i) states as follows:

> *"The Crime of Sexual Violence*
>
> *Member States shall punish any person who, with intent, knowledge, recklessness,* ***or negligence****, violates the sexual autonomy and bodily integrity of any woman or child…" (our emphasis)*

[71] Section 39(1) of the Constitution states that: "*When interpreting the Bill of Rights, a court, tribunal or forum … (c) may consider foreign law.*"

[72] An intergovernmental organisation composed of Angola, Burundi, Central African Republic, Republic of the Congo, Democratic Republic of the Congo, Kenya, Rwanda, Sudan, South Sudan, Tanzania, Uganda, and Zambia.

New Zealand

83 Section 128(2) of the Crimes Act, 1961 (as amended in 2005) defines rape as follows:

> *"Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,*
>
> *(a) without person B's consent to the connection; and*
>
> *(b)* ***without believing on reasonable grounds that person B consents to the connection."*** *(our emphasis)*

United States of America

84 Many States within the United States have long held the position that, in order to exclude the *mens rea* for rape, a belief in the presence of consent must be "honest **and reasonable**".[73]

Canada

85 Canada amended its Criminal Code in 1992 to introduce a reasonableness test. Section 273.2 now reads as follows:

> "*Where belief in consent not a defence*
>
> *It is not a defence to a charge under section 271 [sexual assault], 272 [sexual assault with a weapon, threats to a third party or causing bodily harm] or 273 [aggravated sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where*
>
> *(a) the accused's belief arose from*
>
> *(i) the accused's self-induced intoxication,*

[73] See *People v Mayberry* 542 P.2d 1337 (Cal. 1975); *Reynolds v State* 664 P.2d 621 (Alaska Ct. App. 1983); *People v Lowe* 565 P.2d 1352 (Colo. Ct. App. 1977); *State v Smith* 554 A.2d 713 (Conn. 1989); *In Interest of JFF* 341 S.E.2d 465 (Ga. Ct. App. 1986); *State v Dizon* 390 P.2d 759 (Haw. 1964); *State v Williams* 696 S.W.2d 809 (Mo. Ct. App. 1985); *Owens v Nevada*, 620 P.2d 1236 (Nev. 1980); *People v Crispo*, No. 3105-85 (N.Y. Sup. Ct. October 16, 1988); *Green v State* 611 P.2d 262 (Okla. Crim. App. 1980).

(ii) the accused's recklessness or wilful blindness, or

(iii) any circumstance referred to in subsection 265(3)[74] or 273.1(2)[75] or (3)[76] in which no consent is obtained;

(b) ***the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting****; or*

(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct."

86 The Supreme Court in ***R v Barton*** recently explained the implications of this provision:

"While the jurisprudence has consistently referred to the relevant defence as being premised on an honest but mistaken belief in consent, it is clear that in order to make out this defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct. It is therefore appropriate to refine the judicial lexicon and refer to the defence more accurately as an 'honest but mistaken belief in communicated consent'

. . .

The availability of the defence of honest but mistaken belief in communicated consent is not unlimited. ***The reasonable steps requirement under s. 273.2(b) of the Criminal Code imposes a precondition to this defence. This requirement, which rejects the outmoded idea that women can be taken to be consenting unless they say 'no',*** *has both objective and subjective dimensions: the accused must take steps to ascertain consent that are*

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74 "For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of (a) the application of force to the complainant or to a person other than the complainant; (b) threats or fear of the application of force to the complainant or to a person other than the complainant; (c) fraud; or (d) the exercise of authority."

75 "For the purpose of subsection (1), no consent is obtained if (a) the agreement is expressed by the words or conduct of a person other than the complainant; (a.1) the complainant is unconscious; (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1); (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity."

76 "Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained."

objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time. The reasonable steps inquiry is highly fact specific. Trial judges and juries should take a purposive approach, keeping in mind that ***the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Trial judges and juries should also be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps****.*"

United Kingdom

87 Under the common law, as explained by the House of Lords in 1975 in ***Morgan***,[77] if the accused had a mistaken belief in consent, even if there was no reasonable basis for this belief, then the mental element of the offence was not satisfied and he was not guilty of rape. This position was heavily criticised, but nonetheless codified in the Sexual Offences (Amendment) Act, 1976.

88 In 2003, however, England and Wales passed the Sexual Offences Act, which defined rape as follows in section 1:

"*(1) A person (A) commits an offence if—*

(a) he intentionally penetrates the vagina, anus or mouth of another person (B)with his penis,

(b) B does not consent to the penetration, and

(c) A does not ***reasonably*** *believe that B consents.*

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including ***any steps A has taken to ascertain whether B consents****.*" (Our emphasis)

[77] *DPP v Morgan* [1975] UKHL 3; [1976] AC 182; [1975] 2 WLR 913; [1975] 2 All ER 347.

89 The same standard of fault applies to assault by penetration (section 2), sexual assault (section 3), and causing a person to engage in sexual activity without consent (section 4).

90 Section 75, importantly, provides as follows:

> "***Evidential presumptions about consent***
>
> *(1) If in proceedings for an offence to which this section applies it is proved—*
>
> *(a) that the defendant did the relevant act,*
>
> *(b) that any of the circumstances specified in subsection (2) existed, and*
>
> *(c) that the defendant knew that those circumstances existed, the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether she consented, and* ***the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it****.*
>
> *(2) The circumstances are that—*
>
> *(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;*
>
> *(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;*
>
> *(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;*
>
> *(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;*

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began."

91 Northern Ireland and Scotland subsequently enacted similar laws.[78]

Australian States

92 In **Victoria**, section 38 of the Crimes Act, 1958 (as amended), provides as follows:

"***Rape***

(1) A person (A) commits an offence if—

(a) A intentionally sexually penetrates another person (B); and

(b) B does not consent to the penetration; and

(c) ***A does not reasonably believe that B consents to the penetration.***" (Our emphasis)

93 The same standard of fault applies to the other sexual offences defined by lack of consent.[79]

[78] Sexual Offences (Northern Ireland) Order, 2008, and Sexual Offences (Scotland) Act, 2009.

[79] Sections 39-42.

94 In **Queensland**, section 348A of the Crimes Act, 1958 (as amended), applicable to rape and other sexual assaults, provides as follows:

> "*Mistake of fact in relation to consent*
>
> *(1) This section applies for deciding whether, for section 24 [mistake of fact], a person charged with an offence under this chapter did an act under an honest **and reasonable**, but mistaken, belief that another person gave consent to the act.*
>
> *(2) In deciding whether a belief of the person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.*
>
> *(3) In deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.*" (Our emphasis)

95 Like Canada, **Tasmania** requires the accused not only to have held a reasonable belief but also to have taken reasonable steps. The Criminal Code Act, 1924 (as amended in 2004) states as follows:

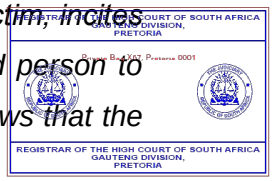
> "***14. Mistake of fact***
>
> *Whether criminal responsibility is entailed by an act or omission done or made under an honest **and reasonable**, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence.*
>
> ***14A. Mistake as to consent in certain sexual offences***
>
> *(1) In proceedings for an offence against section 124 [penetrative sexual abuse of child or young person], 125B [indecent act with child or young person], 127 [indecent assault] or 185 [rape], a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused –*
>
> *(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or*
>
> *(b) was reckless as to whether or not the complainant consented; or*

(c) ***did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.***" (Our emphasis)

96 In 2007 New South Wales amended its Crimes Act, 1900, by among other things replacing the purely subjective standard of fault with one qualified by "reasonable grounds". Section 61HE stated as follows:

"***Knowledge about consent***

(3) A person who without the consent of the other person (the "alleged victim") engages in a sexual activity with or towards the alleged victim, incites the alleged victim to engage in a sexual activity or incites a third person to engage in a sexual activity with or towards the alleged victim, knows that the alleged victim does not consent to the sexual activity if—



(a) the person knows that the alleged victim does not consent to the sexual activity, or

(b) the person is reckless as to whether the alleged victim consents to the sexual activity, or

(c) ***the person has no reasonable grounds for believing that the alleged victim consents to the sexual activity.***

(4) For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case—

(a) including ***any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity****, but*

(b) not including any self-induced intoxication of the person."

(Our emphasis)

97 This formulation was, however, not entirely satisfactory, as it was not a complete reasonable person standard. In ***Lazarus***, the Criminal Court of Appeal found that the jury should **not** "*ask what a reasonable person might have concluded about consent, rather than what the accused himself might have believed in all the*

circumstances in which he found himself and then test that belief by asking whether there might have been reasonable grounds for it".[80] This judgment was heavily criticised and spurred calls for law reform.

98 On 1 June 2022, New South Wales enacted the Crimes Legislation Amendment (Sexual Consent Reforms) Act, which amended the Crimes Act, 1900, by among other things replacing section 61HE with several more progressive provisions on consent, including the following:

> "*Section 61HK – Knowledge about consent*
>
> *(1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if—*
>
> *(a) the accused person actually knows the other person does not consent to the sexual activity, or*
>
> *(b) the accused person is reckless as to whether the other person consents to the sexual activity, or*
>
> *(c)* ***any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.***
>
> *(2)* ***Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.***" (Our emphasis)

Conclusions on Comparative Law

99 The Minister, in his supplementary answering affidavit, contends that foreign jurisdictions which have adopted the objective test are not similar to South Africa

[80] *Lazarus v R* [2016] NSWCCA 52 para 156.

as they are not, in his view, "*homogenous societies*".[81] It is astonishing that the Minister's office could make such a submission under oath. It is patently wrong as a matter of fact and law:

99.1 None of the jurisdictions listed above are homogeneous in nature. This Court may take judicial notice of the fact that they are all diverse in race, religion and culture.

99.2 Second, and more importantly, the surreptitious claim that there are segments of South Africa's "heterogenous" population – presumably religious or cultural portions of society – who hold outdated and gendered beliefs about consent and that somehow such beliefs should be protected is deeply problematic and out of step with the Constitution.

100 It should be readily apparent from the submissions above that societies in various foreign jurisdictions are adopting more nuanced approaches to sexual violence, and are adjusting their legal frameworks to ensure that victims and survivors are capable of seeking and securing justice.

101 This trend aligns with South Africa's progressive constitutional democracy. While positive developments have been made which advance South Africa's legal framework relating to sexual violence – the Act in its current form is unconstitutional and must be corrected. This is especially so given the pressing need to address the unacceptably high prevalence of GBVF in the country.

[81] Minister Supplementary Answering Affidavit at para 12 (Caselines 03-7).

THE MINISTER'S MISAPPREHENSIONS

On the Embrace Applicants' motivations

102 The Minister had initially sought to suggest that this challenge was somehow driven by the Embrace Applicants' "ego towards men" and that "they are using their emotions to persuade the Court to declare unconstitutional an Act which is in line with the Constitution".[82]

103 The Minister has subsequently apologised and rightfully withdrawn his insulting and sexist statement.[83] Notwithstanding the apology, it does beggar belief that such an avowal could have been made in the first place. The Minister submitted his initial answering affidavit under oath. It is accepted that, in doing so, the Minister's deponent was *au fait* with the facts of the case and the content of his own affidavit. The remaining argument that consent in South Africa is somehow different to consent in other jurisdictions – is extraordinary in the context where the Minister attempts in the same breath to state how much government has done to eradicate GBV and sexual crimes.

On the role of international and comparative law

104 The Minister's submission on the function and application of international law in constitutional interpretation is patently incorrect.[84] Contrary to the Minister's submission, which we submit is a poorly contextualised misapprehension of the

82 The Minister's Answering Affidavit at para 233 (Caslines 03-90).

83 The Minister's Supplementary Answering Affidavit at para 7 (Caselines 03-6).

84 The Minister's Answering Affidavit at paras 11-13 (Caselines 03-18 – 03-19).

precedent established by ***S v Makwanyane***,[85] the Court clearly states that international law, both of a binding and non-binding nature should be considered to assist in interpreting fundamental rights. To this end, Chaskalson CJ stated the following:

> *"In the course of arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to section 35(1) of the [Interim] Constitution. . .*
>
> ***In the context of section 35(1), public international law would include non-binding as well as binding law. They may be used under the section as tools of interpretation****."*[86] *(Our emphasis)*

105 The Minister's suggestion that the Embrace Applicants wish to simply import foreign jurisprudence in our shores is misguided.[87] The foreign jurisprudence serves merely to demonstrate that many democratic and heterogeneous human rights-based democracies (contrary to the Minister's view)[88] have taken progressive strides to shift the focus from male-centricity in defining their sexual violence offences to one which is focused on the sexual autonomy of the victim or survivor. This demonstrates that the Court would not be performing a radical feat in granting the Applicants' relief.

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85 Id.

86 *S v Makwanyane* 1995 (3) SA 391 (CC) at paras 34-35.

87 The Minister's Answering Affidavit at para 226 (Caslines 03-88).

88 The Minister's Supplementary Answering Affidavit at para 12 (Caselines 03-7).

On dolus eventualis

106 Furthermore, the Minister's view that the State's failed to rely upon *dolus eventualis* in establishing intention in the *Coko* and *Amos* cases is grossly misplaced. It ignores the established approach to challenging a misinformed perception of consent.

107 From the accused's subjective standpoint, he genuinely could not have anticipated the prospect that the complainant might decline consent, owing to his mistaken belief that she had indeed granted it, constituting his defence. A mistaken belief in consent inherently negates the presence of intent. As *dolus eventualis* falls under the umbrella of intention, the state appropriately opted not to incorporate it into their argument.

108 This view is in accord with the established approach that was set out by the Appellate Division in *S v Sigwahla*, where Holmes JA stated:

> *"Subjective foresight, like any other factual issue, may be proved by inference.* To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. ***It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so****."*[89] *(Our emphasis)*

109 The Appellate Division's construction was more recently reinforced by the Court in the unreported decision of *S v Tshoba*:

> *"Considering the evidence as a whole, I am unconvinced that the state has proved beyond reasonable doubt that Mr Tshoba subjectively foresaw the*

[89] *S v Sigwahla* 1967 (4) SA 566 (A) at 570.

> *possibility that E lacked the capacity to consent or was not consenting during the time that sexual intercourse took place.* ***In the circumstances, he ought reasonably to have done so. Even if, on the probabilities, he probably did foresee that possibility, that is not the test to be applied and there is a reasonable possibility that subjectively he did not foresee that possibility at the relevant time.*** *Put differently, there is sufficient doubt in my mind, based on the evidence presented, that he did not foresee the possibility that E lacked capacity to consent.* ***The nature of his evidence, suspicious as it is, does not change that****."*[90]

110 Contrary to the Minister's view, the accepted test for foreseeability when assessing intention under *dolus eventualis* is **subjective**, not **objective**.[91]

On fair trial rights

111 There is no unjustifiable or unreasonable limitation of an accused's fair trial rights in granting the relief sought by the Applicants. If regard is had to the existing negligence-based offences, it is clear that this approach to determining fault is warranted in situations that call for it. The current state of the law in dealing with nonconsensual sexual offences is undoubtedly a clarion call.

112 It is equally incorrect for the Minister to suggest that shifting the test for intention from those subjectively held by the accused to an objective existence of consent somehow reverses the burden of proof onto the accused. <u>The accused would remain entitled to raise the defence of consent but would simply be required to do so reasonably where all objective circumstances are taken into account</u>.

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90 *S v Tshoba* [2022] ZAECMKHC 117 at para 68.

91 Id at para 5, where the Court cited PJ Schwikkard '*Rape: An unreasonable belief in consent should not be a defence*' (2021) *SACJ* vol 34(1) 76 at 82 with approval.

113 We have demonstrated that non-consensual sexual violence violates a complainant's fundamental rights. The Minister has offered no compelling retort to justify why that violation is reasonable and justifiable as he bears the onus to do in terms of section 36 of the Constitution.

114 Finally, it is concerning that the Minister does not consider the two cases where an injustice arises to be sufficient to mount a competent challenge.[92] The few consolatory platitudes insensitively offered by the Minister perhaps demonstrate the precise plight faced by victims and survivors of rape in the justice system.[93]

115 Of the various cases cited in these heads of argument, particularly those that are not reported, it ought to be readily apparent that the Courts have, more often than not, taken a variety of unreasonably held subjective beliefs into account in acquitting an accused. As was observed by Nugent JA in *S v Vilakazi*:

> *"Yet women in this country are still far from having that peace of mind. According to a study on the epidemiology of rape*
>
> > *'the evidence points to the conclusion that women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa.'*
>
> *During 2007 as many as 36 190 reports of rape were made to the police. Perhaps in some cases the report was false but the figure is nonetheless staggering bearing in mind that rape is notoriously under-reported. It is also notorious that relatively few offenders are caught and convicted."*[94]

116 Some have lamented the state of the law in doing so. Others have been less mindful of it. The examples cited herein offer but a minute glimpse into the

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92 The Minister's Answering Affidavit at paras 35-36 (Caselines 03-30).

93 The Minister's Answering Affidavit at para 117 (Caselines 03-56).

94 *S v Vilakazi* 2012 (6) SA 353 (SCA) at para 2.

practical realities of how rape cases are dealt with on a daily basis by our justice system. The vast majority of them never see light beyond the unreported arena of the Magistrates' Courts. It is therefore most unfortunate that the Minister has sought to oppose this application, at all, let alone in the callous terms that he has.

JUST AND EQUITABLE RELIEF

117 The Act is unconstitutional to the extent that it does not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question.

118 Section 172 of the Constitution obliges this Court to declare any law that is inconsistent with the Constitution invalid to the extent of its inconsistency. In doing so, this Court is empowered to make any order that is just and equitable.[95]

119 In the Embrace Applicants' respectful submission, this Court must accordingly declare the relevant provisions of the Act (sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2)) invalid to that extent, and make a just and equitable order.

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[95] Section 172 of the Constitution states:

"*(1) When deciding a constitutional matter within its power, a court—*

(a) ***must*** *declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*

(b) ***may make any order that is just and equitable****, including—*

(i) an order limiting the retrospective effect of the declaration of invalidity;

and

(ii) an ***order suspending the declaration of invalidity for any period and on any conditions****, to allow the competent authority to correct the defect.*" (Our emphasis)

120 If this Court is minded to grant this relief, and declare that the impugned sections of the Act dealing with nonconsensual sexual offences are unconstitutional and invalid, then we submit with respect that it would be appropriate to suspend the declaration of invalidity for a period of 12 months to afford the relevant-decision makers an opportunity to remedy the defects.

121 The principles that inform when a declaration of constitutional invalidity should be suspended were authoritatively stated by Petse AJ, on half of the Constitutional Court, in ***Mlungwana***.[96] A declaration of invalidity should only be suspended if:

121.1 the declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship;

121.2 there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and

121.3 the right in question will not be undermined by the suspending of the declaration of invalidity.

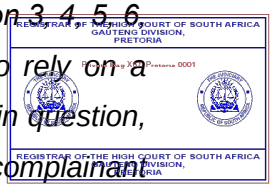
122 We submit that these grounds all apply in the present case, except the third. The rights of victims and survivors must be urgently protected and vindicated. An interim remedy is thus called for.

123 The Embrace Applicants submit that it would not be just and equitable – in view of the raging scourge of sexual violence our country faces daily – to leave the

[96] *Mlungwana and Others v S and Another* 2019 (1) SACR 429 (CC) at para 105.

unconstitutionality unaddressed in the interim. Accordingly, we propose an order granting interim relief to cure the constitutional defects during the period of suspension. We submit that this is necessary to render the relief granted appropriate, effective, just, and equitable, and will enable the rights of victims and survivors to be respected, protected, and promoted without further delay. An interim reading in of the following words into the Act, at section 56(1A) is thus sought:

> *"Whenever an accused person is charged with an offence under section 3, 4, 5, 6, 7, 8, 9 or 11A, it is not a valid defence for that accused person to rely on a subjective belief that the complainant was consenting to the conduct in question, unless the accused took all reasonable steps to ascertain that the complainant was consenting."*



124 This reading is modelled on section 56(6) of the Act, in order to be as faithful as possible to the legislative scheme Parliament has chosen to deal with the reasonableness of belief in the *mens rea* for other sexual offences (in this case, the creation of child pornography).

125 We submit that an interim reading-in amounts to a just and effective remedy that addresses the specific constitutional defects that have been established, and without going beyond that. This does not unduly trespass upon the powers of Parliament.

126 The order sought can have no retrospective effect. This is in keeping with the general approach in our law which prohibits retrospective criminalisation of conduct in accordance with the common law maxim *nulla crimen, nulla poena*

sine lege.[97] We further note that as pointed out above, section 35(3)(l) of the Constitution provides for the right not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

127 We submit that reading-in would be an appropriate response to cure a serious constitutional infringement of this nature. As the Constitutional Court held in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*:

> *"[t]here is in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, is being altered by the order of a court. In one case by excision and in the other by addition. This chance difference cannot by itself establish a difference in principle."*[98]

128 We therefore submit that the declaration of invalidity be suspended and the interim reading-in be granted.

CONCLUSIONS AND COSTS

129 The general principles relating to costs in constitutional litigation were laid down in *Biowatch*.[99]

130 The Embrace Applicants have brought this application seeking a *bona fide* vindication of constitutional rights, by seeking to outlaw an unreasonable perception of consent as a defence to exclude fault in nonconsensual sexual

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97 *DPP v Prins (Minister of Justice and Constitutional Development* 2012 (2) SACR 183 (SCA) at para 7.

98 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at paras 67-68.

99 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

offences. They should be entitled to recover costs from the State if successful, including the costs of two counsel. If they are unsuccessful, then they are entitled to *Biowatch* protection.

131 For all the reasons set out above, we submit that the Act is unconstitutional. The fact that an unqualified subjective belief in consent means that a victim or survivor cannot secure justice, for the most heinous affront to their dignity and bodily and psychological integrity, is outdated and perpetuates disrespect and disregard for women's sexual autonomy. It reinforces rape myths, amplifies sexist stereotypes, legitimises grossly unreasonable beliefs about women's sexuality, and further victimises rape victims and survivors by protecting perpetrators based on their unreasonable states of mind.

132 The law has already failed so many victims and survivors. Keeping the Act in its current form will result in the perpetuation of travesties of justice by prolonging constitutional violations that are certainly contrary to our constitutional dispensation. Accordingly, the Embrace Applicants respectfully pray for an order in terms of the Notice of Motion.

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Chambers, Sandton
21 November 2023

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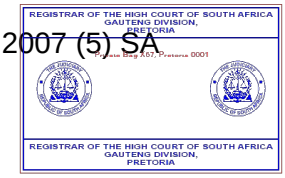

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