IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: 2022/049656

In the matter between:

THE EMBRACE PROJECT NPC	First Applicant
IH	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

THIRD APPLICANT'S WRITTEN SUBMISSIONS

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> "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"
>
> *Leonard Tsietsi Sebelemetja, First Respondent's Answering Affidavit*[1]

INTRODUCTION

1. Women and gender-diverse individuals in South Africa experience pervasive, relentless, and seemingly unending discrimination. This discrimination manifests in various forms of gender-based violence, including harassment, sexual violence and even death. The words of the deponent on behalf of the first respondent, the Minister of Justice and Correctional Services ("**the Minister**") quoted at above highlight the blatant and egregious manifestation of this discrimination through their reliance on gender stereotypes that are applied to the applicants (IH and Embrace NPO – a woman and a woman-led civil society organisation) and persons in a similar position.

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[1] First Respondent's Answering Affidavit, 03-90, at para 233. Emphasis is our own.

2. When one considers that this was the original position of the Minister, prior to their deposing to a supplementary affidavit in response to media scrutiny, it is not surprising to see that discrimination against women and gender-diverse people in the country is systemic in nature.[2] It may go without saying that this form of discrimination is commonplace in our society – in our homes, communities, schools, workplaces and even within the State.

3. The United Nations Women defines gender-based violence as "harmful acts directed at an individual or a group of individuals based on their gender. It is rooted in gender inequality, the abuse of power and harmful norms".[3] It further explains that gender-based violence manifests as physical, sexual, psychological or emotional violence against women and gender-diverse individuals.[4]

4. The third applicant ("**CALS**") submits that the case before this Honourable Court is centred around gender-based violence in the form of sexual offences and its intersection with discrimination faced by victims of this

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[2] Ferrieira E, 'Ronald Lamola to withdraw sexist court papers' Mail and Guardian. Available at https://mg.co.za/news/2023-04-06-ronald-lamola-to-withdraw-sexist-court-papers/.

[3] UN Women, Frequently asked questions: Types of violence against women and girls (not dated). Available at https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence.

[4] Id.

violence in attempting to attain justice through our own criminal justice system.[5]

5. The importance of this case is in part due to the high rates of gender-based violence in South Africa. Gender-based violence, manifesting as sexual violence, is endemic within South Africa. The rates of rape and other sexual offences in the country are amongst the highest in the world. The South African Police Service's reports ("**SAPS"**) detail this fact. By way of example, in the period of 2020/2021, 46 214 incidents of sexual offences were reported to the SAPS; and this increased to 52 694 in 2021/2022.[6]

6. The Minister opposes the relief sought by the first and the second applicants as well as CALS. He contends that everything is adequate in terms of the laws around sexual offences and the operations of the criminal justice system. Here are some examples from the Minister's answering affidavit:

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[5] CALS use the terms "victim" and "survivor" interchangeably as individual's can adopt one or both decriptors in relation to their experience of the violent sexual incident as well as in relation to their experience of the criminal justice system in dealing with the violent sexual incident.

[6] SAPS, Police recorded crime statistics Republic of South Africa - April 2021 to March 2022 (2022). Available at https://www.saps.gov.za/services/downloads/Annual-Crime-2021_2022-web.pdf ("SAPS").

6.1. They state that "the Act [referring to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007] … does not have any irregularities and it must be left as is".[7]

6.2. They state that "[t]he Act does not perpetuate rape culture as suggested… the victim must comply with the provisions of the Act if she wants the Act to aid her, no one is above the law".[8]

7. Finally, the Minister states that, "I submit that the Act is not perfect, it is not fullproof [sic], no legislation is. However, the arguments that the Act encourages women and children to avoid rape rather than admonishing men, not to rape spurious".[9]

STRUCTURE OF THE SUBMISSIONS

8. With the introduction in mind, our submissions will deal with:

8.1. The background to the application.

8.2. The point in limine.

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[7] First Respondent's Answering Affidavit, 03-90, at para 233.

[8] Id, 03-60 at para 131.

[9] Id, 03-63 at para 144.

8.3. The burden of proof around mistaken belief.

8.4. Coercive circumstances negate inherent power dynamics.

8.5. The definition of consent.

8.6. Consent is an unjustifiable limitation on individuals' right to equality under the Constitution.

8.7. International law concerning the reframing of sexual offences in terms of coercive control.

8.8. Comparative legislative developments.

8.9. The proposition of a new definition of rape and other sexual offences.

8.10. Retrospectivity.

8.11. Costs concerning the application.

8.12. Conclusion.

BACKGROUND TO THE APPLICATION

9. This application emerges from the experience of the second applicant ("**IH**") when she was raped in 2018 and endured an unsuccessful prosecution of the perpetrator in 2019.[10]

10. IH was the victim of the mistaken belief in consent defence in so far as the court held that

> "[although] the accused must have foreseen the possibility that the complainant's consent might be lacking and the accused must have reconciled himself with this possibility to commit the act in order for consent to be sufficiently proved. In our law and the reported case law that I am bound to follow the belief that a woman consent (sic) to sexual intercourse need not be a reasonable one as the test to establish intent is a purely subjective one".[11]

11. Furthermore, the court stated that:

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[10] First and Second applicants' Founding Affidavit, 01-29, at para 53.

[11] *State v Amos Pretoria Regional Court*, case no. 14/683/2018. See Caselines at 01 – 98 to 01 – 99.

> "[i]n our law and the reported case law that I am bound to follow the belief that a woman consent to sexual intercourse need not be a reasonable one as the test to establish intent is a purely subjective one. **The fact that the complainant did not signify her opposition to the acts in any way makes it impossible for the Court to be satisfied that the accused subjectively knew that he did not have consent to proceed with the acts**".[12] [our emphasis]

12. As stated by the first and second applicants, the other case on which the application emerged is the notorious appeal in case of *Coko v S*.[13] Where the appeal court acquitted the accused as the court held the state failed in its obligation to prove that the accused was aware of the lack of consent of the victim. The appeal court went on to state,

> "The correct sequence of the evidence, as given by the Complainant, is that she mentioned that she closed her legs and mentioned that she not want (sic) to have sex with the Appellant as he was undressing her. What happened next was that there was no indication expressly or otherwise of any lack of consent to being undressed. After she was being undressed, they continued kissing. Then the

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[12] Id at 01-99.

[13] *Coko v S* [2021] ZAECGHC 91; [2021] 4 All SA 768 (ECG); 2022 (1) SACR 24 (ECG)("*Coko*").

> Appellant took off his clothes. **No force or threats were used to coerce the Complainant (who is the same age as the Appellant).** After he had taken his clothes off, he returned to place his head in between her thighs, **again with no force**. He then performed oral sex on her, which she testified she had no objection to. On the complainant's version, there was no manifestation of any refusal of consent between the kissing, the oral sex and the penetration. The evidence was that it was only after the penetration that the Complainant experienced pain and told the Appellant to stop as he was hurting her. **The Appellant accepted this but said he would stop and then continue".** [14] [our emphasis]

13. Consequently, the first and second applicants argue that the continued existence of unreasonable mistaken belief in consent is unconstitutional in so far as it fails to criminalise sexual violence where the "perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question".[15]

14. CALS asserts that the limitation of victims' and survivors' rights in sexual offences cases are not unjustifiably limited due to the unreasonable

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[14] Id at 94.

[15] First and Second Applicant's Founding Affidavit, 01-66, para at 138.

mistaken belief in consent defense, but rather due to the framing of numerous sexual offences as explicitly including a lack of consent as a requirement therein.[16]

Minister's opposition

15. The Minister opposes CALS' contentions on two bases. First, that by having consent as an element of sexual offences the victim does not have an increased burden to show she did not consent to the encounter. Thus, the element is not unjustifiably discriminatory. The second basis is that "coercive circumstances" are already contained within SORMA and thus the suggested amendment made by CALS is superfluous.[17]

POINT IN LIMINE

16. The Minister avers that the deponent for CALS does not possess the requisite authority to depose to CALS' founding affidavit.[18] The Minister does not expand on this allegation in any meaningful detail.

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[16] Third Applicants' Founding Affidavit, 05-129, para at 11.

[17] First Respondent's Answering Affidavit, at para 26 and 28.

[18] As above at para 34.

17. Respectfully, this allegation is without merit. In *Ganes and Another v Telekom Namibia Ltd*,[19] the Supreme Court of Appeal provided guidance around the issue of authority to depose to affidavits in motion proceedings. The Supreme Court of Appeal held that,

> "[t]he deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit… That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided". [20]

18. Consequently, this allegation should be dismissed.

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[19] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

[20] Id at para 19.

THE BURDEN OF PROOF AROUND MISTAKEN BELIEF

19. The Minister provides two primary arguments against CALS' contentions. First under the heading "[the] mens rea of the offender to commit the crime", and the second under the heading is the "the complainant's lack of consent".[21] CALS deals with these arguments in turn.

20. The Minister states that "the matter at hand concerning mistaken [belief in] consent does not pertain to the absence of consent, but rather pertains to the element of intention".[22]

21. CALS submits that the Minister is incorrect in framing the issue in this way. Intention and consent are intricately linked and can only but be artificially separated, as the Minister attempts to do in their papers.

22. In the Sexual Offences Commentary Act 32 of 2007 (loose-leaf), Phelps and Smythe describe how intention is linked to consent and to the lack of consent. They state,

> "…intention in the context of rape has two components: a form of intention and knowledge of unlawfulness. It is the

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[21] First Respondent's Answering Affidavit, 10-11, at para 18.

[22] Id, 10-11, at para 20.

> latter component that can cause difficulties for the prosecution in proving a charge of rape as it must be shown that the accused was aware that the complainant was not consenting". [23]

23. *S v Zuma*[24] further sketches the interrelatedness of intention, consent and the defense of mistaken belief, in so far as the court stated that,

> "[t]he element of intention is vital because rape can only be committed intentionally… [t]he act is not wrong unless the mind is guilty… [and it] means that the intentional sexual intercourse had to take place with the accused knowing there was no consent by the complainant". [25]

24. It is clear that intention (*mens rea*) includes intention to commit rape or another sexual offence and knowledge of unlawfulness, which includes awareness that the complainant was not consenting.

25. The Minister then proceeds to argue "[t]he burden of proof lies with the accused individual to present substantial evidence in support of their

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[23] Kelley Phelps and Dee Smythe, 'Section 3: Rape' 2011 Sexual Offences Commentary Act 32 of 2007 at 2 – 18 ("Phelps & Smythe")

[24] 995 (2) SA 642.

[25] Id at 828.

defense…" and "…it is submitted that the sole requirement for the state is to establish a prima facie demonstration of the absence of consent, thereby placing the burden of proof on the accused".[26]

26. It is trite that in criminal litigation, the burden of proof is that the state must prove the accused's guilt beyond a reasonable doubt.[27] In *In S v Van der Meyden*,[28] the test is set out as follows,

> "The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example R v Difford, 1937 AD 370 at 373 and 383)".[29]

27. In *R v Z*,[30] the Appellate Division held that:

> "[r]ape is a crime in which intention is an element; there must be an intention to have unlawful carnal connection with a woman without her consent. That intention must be

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[26] First Respondent's Answering Affidavit at para 25 and 26.

[27] 1935 A.C. 462. This case was followed in cases as early as 1945, also see *Rex v Ndhlovu* 1945 AD 369.

[28] 1999 (1) SACR 447 (W) at 448F-G.

[29] Id at 448F-G.

[30] 1960 (1) SA 739 (A).

> proved as an essential element in the Crown case. If the accused believed that the woman had consented, the guilty intent or mens rea is lacking. **The onus is on the Crown to prove that the accused had the necessary mens rea, and therefore the Crown must prove that the accused knew that the woman had not consented**… the necessary mens rea, like the other elements in the crime must be proved beyond all reasonable doubt".[31] [o*ur* emphasis]

28. In *Otto v State*,[32] the Supreme Court of Appeal provide a useful illustration, it held:

> "[t]he court below considered the twin issues of consent and intention in some detail. It considered the evidence of the complainant that, when the appellant first kissed her, 'she refused and said no'; that after the appellant left the room and then returned, she refused to turn around and look at him as he had instructed her to do; that when he physically forced her head towards him, he thrust his penis into her face; that he then told her to suck his penis and that she had, at first, refused but then did so in the hope that by 'playing along' for a while, he would then leave her alone;

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[31] Id at 756 D-E.

[32] [2017] ZASCA 11.

> that, after he had choked her by thrusting his penis too deep into her mouth, he pushed her to the kitchen, took off her panties and pants and penetrated her".[33]

29. In *Le Roux v State (A & R 25/2018*),[34] the High Court held "[o]n a rape charge, it is trite that if the state cannot prove non-consent beyond reasonable doubt, the prosecution must fail, and the victim's consent is assumed so that the accused should be acquitted".[35]

30. Respectfully, this is not in line with what the Minister submits to this court. The Minister contends that "[t]he burden of proof lies with the accused individual to present substantial evidence in support of their defense".[36] CALS submits that the Minister misrepresents the law in this regard.

31. As Schwikkard explains "South African criminal law requires the prosecution to prove the absence of any defence beyond a reasonable doubt, [and] **the accused need do no more than place the defence in**

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[33] Id at para 17.

[34] [2021] ZAECGHC 57.

[35] Id at para 9.

[36] First Respondent's Answering Affidavit, 10-11, at para 25.

issue, this might be done by raising it in the pleadings or in cross-examination".[37] [our emphasis]

32. The basic principles of criminal law and the law of evidence that apply in this case are trite. In *S v T* [38], Plasket J said the following of the importance of this principle,

> "The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a care component of the financial right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial.
>
> It is not part of a charter for criminal and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that the accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed the perpetrator of the crime in question.
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> That is an evitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse –

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[37] Schwikkard P, 'Rape: An unreasonable belief in consent should not be a defence' 2021 (1) SACJ 76 at 80 ("Schwikkard")..

[38] 2005 (2) SACR 318 E.

> convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experiences of such a system and where it leads to".[39]

33. Section 174 of the Criminal Procedure Act substantiates the assertion that the state must prove its case beyond a reasonable doubt. Section 174 provides that "[i]f, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

34. In *S v Lubaxa*,[40] the Supreme Court of Appeal held that "an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself".[41]

35. Practically, CALS submits that the accused in a rape case need not testify because if they enter the witness box, they may incriminate themselves.

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[39] Id at para 37.

[40] 2001 (2) SACR 703 (SCA).

[41] Id at para 18.

So, the Minister's contention that "[t]he burden of proof lies with the accused individual to present substantial evidence in support of their defense" is not congruous with established jurisprudence.

36. CALS submits that the Minister is incorrect in asserting that the relief that CALS seeks is a duplication of the provisions already outlined in the SORMA. CALS has shown above that the law is not as the Minister presents it to be.

THE DEFINITION OF CONSENT

37. Section 3 of SORMA provides that "any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape". This element of consent is replicated in sections 4, 5, and 6 of SORMA.

38. SORMA provides that "consent" means voluntary or uncoerced agreement. This definition is unclear and paradoxical.

39. First, one must consider the relationship between consent and agreement. The concept of agreement is intended to provide part of the definition of consent. But one concept can only help define another if it is distinct from that other.

40. CALS submits that verb “to consent” is not synonymous with the verb “to agree”. Agreement is broader than consent. A person can agree with something as well as agree to something, but a person can only consent to, not consent with. So in this context, it is not clear how agreeing to be penetrated is to be distinguished from consenting to be penetrated such that the former provides part of a definition of the latter.

41. Furthermore, as contract lawyers will be aware, there are two ways in which agreement might be understood: either subjectively, as a meeting of minds, or objectively through the parties' communications. When we think of the subjective understanding of agreement, this means that the parties’ communications are evidence of something else whereas in the latter they are constitutive of an agreement. Hence, the important question concerning whether consent must be articulated by words or actions of the complainant to be effective is left open.

42. In the Scottish case of *Barbour v HMA*,[42] Lord Stewart indicated that the complainant had been asked during cross-examination whether she consented, and she answered “it depends on what you mean by consent”.[43] This response was given in the context of a testimony in which

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[42] 1982 SCCR 195.

[43] Id at 198.

she alleged she was so afraid of the accused that she did not resist intercourse with him. It is not difficult to see how the ambivalence in the concept of consent is capable of exploitation by defence counsel in rape cases.

43. Another problem with the definition is that it rests on concepts which are heavily contested in meaning and immensly vague. CALS has already demonstrated this is true about agreement.

44. The disadvantages of retaining consent goes beyond shifting the focus from the accused to the complainant's behaviour and detracting from the brutal and destructive nature of the crime of rape, it also assumes an equality between parties both as regards the ability to consent, and the weight accorded to the perpetrator and complainant's voices.[44]

45. Feminists have critiqued the inclusion of consent on the basis that it reinforces inequality between men and women in sex. MacKinnon, for example, argues that when the law of rape looks to establish consent in sex, it does not look to see if parties were social equals in any sense, nor does it require mutuality or positive choice in sex.[45] The doctrine of consent in the law of rape envisions instead unilateral initiation (the stereotyped

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[44] Schwikkard at 81.

[45] C MacKinnon (2005) *Women's Lives, Men's Laws* 243.

acted and acted-upon of people assigned male at birth dominant sex) followed by accession by persons tacitly presumed equal.

46. Consent then is proved if the person being acted upon does not say no. It can however, even include saying no. A lot of “not-yes saying” manages to pass for consent to sex, such as resigned, silence, passive dissociated acquiescence where a woman may fear for her life and safety.[46]

47. Ultimately, it needs to be acknowledge that sex under conditions of inequality can look consensual and this s the inherent danger on relying on consent as a definitional element

48. CALS expert Prof Omar states that consent remains deeply contested. And it is usually the primary point of contention in a rape case.[47]

COERCIVE CIRCUMSTANCES NEGATE INHERENT POWER DYNAMICS

49. The Minister argues that “[t]he inclusion of consent in the definition of rape and other sexual offences, along with a comprehensive enumeration of

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[46] Id.

[47] Expert Report, 09-9, para 15.

coercive circumstances, serves to acknowledge the inherent power dynamics between individuals involved".[48]

50. The Minister here acknowledges that there may be an **inherent inequality** of power in relation to women and gender-diverse people around exercising free, uncoerced consent to sexual encounters.

51. However, the Minister views the "list" of coercive circumstances contained under section 1 of SORMA to be "comprehensive" and effective in addressing coerced consent.[49]

52. Although the "list" may provide some coercive circumstances that potentially negate consent, it fails to deal with a very common form of rape, which emerges from non-consensual sexual encounters between individuals who know each other, or "acquaintance rape".

53. In terms of a study by the South African Medical Research Council ("**SAMRC**"), in 69% of cases, victims know the perpetrator, and of that, 30.4% of perpetrators are acquaintances of the victim. The prevalence of

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[48] First Respondent's Answering Affidavit, 10-13 at para 31.

[49] First Respondent's Answering Affidavit,10-13 at para 32.

acquaintance rape is extremely high and in 2021/2022 alone, equates to about 11 053 cases, which is approximately 21% of cases reported to police per annum.[50]

54. Professor Omar explains that when a court is confronted with acquaintance rape, the "list" is inadequate and fails to address these forms of encounters between individuals who know each other.[51]

55. Professor Omar argues that where acquaintance sexual encounters proceed without clear agreement or consent, these incidents give rise to the mistaken belief in consent defense.[52]

56. Without the applicability of the "list" in these instances the test for absence of consent remerges, and the complainant ultimately bears the burden of showing she adequately performed non-consent so that the accused would not be mistaken around consent being absent.

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[50] This is an estimate based on statistics provided by SAPS.

[51] Expert report, 09-11, para 15.

[52] Id.

57. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dr Tlaleng Mofokeng, writes that consent for sexual contact consists of more than a "yes" or "no". She says that consent must involve the details of condom use, what kind of sexual positions will be involved, what body parts will be used and when the sexual contact ends.[53] She further asserts that "[t]hings like relationship status do not constitute consent forever".[54]

CONSENT IS AN UNJUSTIFIABLE LIMITATION ON INDIVIDUALS' RIGHT TO EQUALITY UNDER THE CONSTITUTION

58. Phelps and Smythe in the Sexual Offences Commentary Act 32 of 2007 argue that:

> "[i]n practice, much of a rape trial will revolve around testimony as to the victim's unwillingness to engage in acts of sexual penetration with the accused. **This focus on non-consent has been identified as one of the most problematic aspects of rape law, focusing attention on**

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[53] Mofokeng, T. (2019). A guide to sexual health and pleasure. Johannesburg: Pan Macmillian South Africa at 173.

[54] Id at 173

> **the conduct of the victim rather than that of the accused"**. [55] [our emphasis]

59. CALS submits that due in part to the focus on non-consent as highligted by Phelps and Smythe, the current inclusion of consent as a definitional element in numerous sexual offences constitutes unfair discrimination against women and gender-diverse individuals and is unjustifiable.

60. Prof Omar states that the retention of consnet as a defintional element is because of a misconception that rape and sex are two sides of the same coin, divided only by consent:

> "It is, however, inappropriate to consider rape to be otherwise lawful sexual intercourse, rendered unlawful through lack of consent. Rape is forced or coerced sex, where coercion need not be direct, explicitor through physical force."[56]

61. In *Harksen v Lane*,[57] the Constitutional Court when referring to the Interim Constitution, stated that differentiation that does not constitute a violation

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[55] Phelps & Smythe.

[56] Expert report, 09-11, para 22.

[57] *Harksen v Lane NO* 1998 (1) SA 300.

of section 8(1) [section 9(1)] may nonetheless constitute unfair discrimination for the purposes of section 8(2) [section 9(3)].[58]

62. It is trite that section 9(3) of the Constitution that there are certain grounds on which an averment of discrimination, renders a presumption of unfairness. The relevant grounds for the purpose of this case include sex, gender, sexual orientation and race.[59] These grounds are reiterated in section 9 of the Constitution's enabling legislation, the Promotion of Equality and Prevention of Unfair Discrimination Act ("**PEPUDA**").[60]

63. According to section 1 of PEPUDA, discrimination is any act or omission including policy, law, rule, practice or situation which directly or indirectly (1) imposes burdens, obligations, or disadvantage on; or (2) withholds benefits, opportunities or advantages from; any person on one or more of the prohibited grounds.

64. Gender-based violence is described by the Convention for the Elimination of All Forms of Discrimination Against Women ("**CEDAW**"), under its

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[58] Id at para 43.

[59] Race becomes a relevant factor as the SAMRC study shows that black women were the predominant victims of rape in South Africa. Bundle at 10 – 57.

[60] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

recommendation 19, as a "form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality to men".

65. Gender-based violence should thus be seen as violence that emerges due to discrimination and hatred of a person because of their gender. It includes verbal, physical, sexual, emotional, psychological, and economic abuse.

66. Sexual offences are acknowledged as a form of gender-based violence in Constitutional Court jurisprudence. For example, the Constitutional Court in *Tshabalala v S* held:

> "[c]ourts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. **Hardly a day passes without any incident of gender-based violence being reported**. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, **underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity,** we are still grappling with what is a scourge in our nation".[61] [our emphasis]

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[61] *Tshabalala* at para 61.

67. Furthermore, the state also acknowledges the link between gender-based violence, sexual offences and the disproportionate number of women and gender-diverse individuals who become victims of gender-based violence. South Africa's National Strategic Plan on Gender-based Violence and Femicide ("**NSP**") describes the term gender-based violence as,

> "[t]he general term used to capture violence that occurs as a result of the normative role expectations associated with the gender associated with (sic) the sex assigned to a person at birth, as well as the unequal power relations between the genders, within the context of a specific society. GBV includes physical, sexual, verbal, emotional, and psychological abuse or threats of such acts or abuse, coercion, and economic or educational deprivation, whether occurring in public or private life, in peacetime and during armed or other forms of conflict, and may cause physical, sexual, psychological, emotional or economic harm".[62]

68. CALS thus submits that our courts and state have explicitly acknowledged the link between gender-based violence, sexual offences and the disproportionate number of victims of both being women and gender-

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[62] National Strategic Plan on Gender-Based Violence and Femicide. Available at https://www.justice.gov.za/vg/gbv/nsp-gbvf-final-doc-04-05.pdf at 10.

diverse individuals. CALS further submits that where sexual offences predominantly affect a certain group of individuals who enjoy explicit protection under the Constitution and PEPUDA (sex, gender, sexual orientation and race) then laws which deal with how their cases will proceed through the criminal justice system (including rules of evidence and burdens of proof) differentiates between these victims and victims of non-gendered crimes (but not necessarily unfairly).[63]

69. CALS submits that women and gender-diverse individuals who are the disproportionate victims in sexual offence cases experience the criminal law in an unfairly discriminatory way through the retention of consent as an element of sexual offences.

Sexual offence crimes impose burdens and obligations on women and gender-diverse individuals that non-gendered crimes do not

70. The law has historically approached crimes which have women as the predominant victims with caution and mistrust.

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[63] *Harksen* at para 42. For the purposes of clarity non-gendered crimes can include theft, fraud, damage to property or other crimes which are not based predominantly on discrimination due to gender and thus have a disproportionate number of women or gender-diverse people as victims.

71. An example of this is the (mis)use of the cautionary approach, which historically was applied to the testimony of women who alleged that men had raped them. The Supreme Court of Appeal in *S v Jackson* described the foundation for the cautionary approach, and said

> "[t]he cautionary rule in rape cases is based on the principle that women are naturally prone to lie and to fantasise, particularly in sexual matters and that they are naturally vengeful and spiteful and therefore likely to point a finger at an innocent man just out of spite. **There is absolutely no evidence that women are less truthful than men, or that they fantasise more or that they are naturally vengeful and spiteful**. Therefore **the cautionary rule is based on a principle which is discriminatory towards women, and inappropriate in countries committed to equal rights for men and women, and the rule should be prohibited on this ground alone. The cautionary rule has been called a lingering insult to women**" [64] [our emphasis]

72. CALS submits that a woman or gender diverse person is raped, they enter the criminal justice system in the dual role of "accused" and witness. This

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[64] *S v Jackson* [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA); [1998] 2 All SA 267 (A) at 585 C – H.

is a more accurate description of their legal status. They are “accused”, as they are treated with distrust and disbelief.

73. Another example of the misogyny of laws relating to sexual offences (and women victims) is the previous applicability of the common law defense of “conjugal rights” when a man raped his wife. The defense has since correctly been prohibited under section 56(1) of SORMA.

74. It is not hyperbolic to state that with the advent of the Constitution and later SORMA, many misogynist laws in relation to sexual offences continue to remain in our books. The retention of consent in sexual offences as opposed to non-gendered crimes, is one of the relics of this patriarchal framing. Another includes the retention of the adducing evidence of previous sexual history, although in narrower circumstances.

A focus on the victim’s conduct – a disproportionate burden on the complainant in sexual offences

75. In sexual offence cases, each element of the crime must be proven beyond a reasonable doubt. Thus, by including consent in the definition of many sexual offences, the prosecution has the obligation to prove that consent was not present beyond a reasonable doubt.

76. According to the SAMRC, only 23.5% of rape cases have other witnesses present during the rape.[65] Consequently, approximately 76.5% of cases involve only the perpetrator and the survivor as witnesses of the incident, often termed the “he said, they said” scenario. Thus, many rape cases will involve a focus solely on whether the victim performed non-consent sufficiently for the perpetrator not to be mistaken about the absence of consent.

77. The state must prove this element, yet they do so by having the complainant’s actions or inactions scrutinised by the court. Thus, much of the success in convicting a perpetrator rests directly on the victim's shoulders.

78. CALS submits that discrimination arises from the retention of consent as an element of sexual offences as it focuses attention on the conduct of the victim rather than that of the accused. Whereas most common law and statutory crimes are solely concerned with whether the accused acted unlawfully. Furthermore, this is also where many common law and statutory law offences do not have women as disproportionate victims of the crime.

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[65] Bundle at 08- 78.

79. Du Toit argues viewing rape as a sexual crime depending on the woman's consent also implies that the law's focus is on female sexuality and the burden of proof is placed on the victim. They state, "[t]o approach the wrong of rape as embedded in the non-consensual nature of the act is inevitably to place the ethical burden on the victim", because the courts must try to determine "whether the victim sufficiently communicated her non-consent, or whether that non-consent was likely given the history of the victim".[66]

80. The current structure of sexual offence crimes reflects archaic beliefs that rape and other sexual offences are simply *sex or other sexual encounters without consent.* Instead, these offences are about violence, control, and coercion. Not sexuality.

81. In *Tshabalala,* the Constitutional Court held that "[t]he requirement of sexual penetration is a legal requirement which relates to the biological element of sexual intercourse. For many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack" and "as a moment of immense powerlessness and degradation".[67]

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[66] L du Toit 'From consent to coercive circumstances' (2012) 28 SAJHR 380 at 390 ("Du Toit")

[67] *Tshabalala* at para 70.

82. Furthermore, in *Masiya v Director of Public Prosecution (Centre for Applied Legal Studies and Another as Amici Curiae),*[68] the Constitutional Court held that,

> "Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the 'essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion".[69]

Implicitly returning to the requirement of active physical resistance to sexual offences

83. The Minister has argued that,

> "CALS asserts that somehow physical resistance remains a requirement due to the fact that a mistaken belief in consent is a defense. CALS misconstrues the determination of consent in several

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[68] 2007 (5) SA 30 (CC).

[69] Id at para 78.

material respects… when determining consent the Court must consider the full conspectus of the evidence; and secondly, the defence of the accused must be reasonably possibly true. A court will disregard an unreasonable explanation".[70]

84. Before addressing the inadvertent requirement of physical resistance, CALS must correct the Minister's understanding of the law about the mistaken belief in consent defense.

85. The defense of mistaken belief need **not be reasonably possibly true**. If this were the case, then IH's case and the victim in *Coko v S* would have possibly seen their perpetrators convicted of rape. Furthermore, if the Minister acknowledges that the standard for mistaken belief in consent should be that the perpetrator had a belief that consent was present and this belief was reasonably possibly true (which is currently not the case), then the Minister surely would not have opposed Embrace and IH's application to have rape laws reflect this approach.

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[70] First Respondent's Answering Affidavit, 10-17 at para 47.

86. CALS asserts that physical resistance implicitly crept back into the requirements of rape law in South Africa when SORMA was enacted and retained consent as a requirement for sexual offences.

87. The above can be seen in the case of *S v Amos (*IH's case), where the presiding officer in the case states,

> [t]he fact that the complainant did not signify her opposition to the acts in any way makes it impossible for the Court to be satisfied that the accused subjectively knew that he did not have consent to proceed with the acts".[71]

88. Furthermore, in the case of *Coko v S* the court stated:

> "After she was being undressed, they continued kissing. Then the Appellant took off his clothes. No force or **threats were used to coerce the Complainant (who is the same age as the Appellant).** After he had taken his clothes off, he returned to place his head in between her thighs, **again with no force**.[72] [our emphasis]

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[71] *Amos* and Bundle at 01 – 99.

[72] *Coko* at para 94.

89. Although the Minister argues that resistance is not a requirement in sexual offences, it is clear from the above that there is a certain threshold of resistance that a victim must reach for a court to be satisfied that the accused was aware of her lack of consent.

90. In terms of the SAMRC study, only 52.3% of cases reported to police saw victims actively resisting rape. Of that 52.3%, only 23.2% physically resisted, 32.9% verbally resisted, and 27.4% non-verbally resisted.[73]

91. To exhibit the number of victims of rape who may simply freeze and not resist at all, we return to the SAPS stats for 2021/2022. Of the 52 694 incidents of sexual violence, approximately 25 135 victims would not have resisted a violation at all.[74]

92. Although this is already an alarming number of individuals who would potentially have difficulty arguing that they did not consent, the law also implicitly requires active resistance. This is where case law such as ***S v Amos*** and ***Coko v S*** suggest only force would alert a perpetrator to a lack of consent. With only 23.2% of cases having victims who physically resisted, the number of individuals who could potentially show that they

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[73] 08 - 78.

[74] SAPS.

reached the physical threshold of non-consent is only 12 225 victims. Thus 40 469 individuals will have a slim chance to see their violator convicted.[75]

93. Section 6 of PEPUDA explicitly acknowledges that the state cannot unfairly discriminate against individuals. This is where discrimination can include provisions in laws or policies. As long as consent is a requirement within sexual offences, women and gender-diverse people will be both victims of sexual violations but also victims of the state's unfair discrimination.

INTERNATIONAL LAW

94. 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 and to take reasonable and appropriate measures to prevent the violation of those rights.[76]

95. South Africa is a party to several core international human rights treaties, including the CEDAW and the Convention on the Rights of the Child

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[75] These numbers may differ slightly when taking account of children who are victims of sexual offences, where there is an irrebuttable presumption that children under 12 cannot consent.

[76] CEDAW was adopted in General Assembly Resolution 34/180 on 18 December 1979. See articles 1, 2, 3, 6, 11,12 and 16. The Convention was signed by South Africa on 29 January 1993 and ratified on 15 December 1995. In1992, the United Nations Committee on the Elimination of Discrimination Against Women, which was established under the Convention, recommended that " …States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

("CRC"). At the regional level, South Africa is, among others, a party to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("Maputo Protocol").

96. These instruments impose a duty on the state to prohibit all forms of gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of these rights.[77]

97. The Committee on CEDAW has noted that "gender-based violence is a form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".[78] The committee also stated that the general prohibition of gender discrimination includes gender-based violence. Gender-based violence is violence that is directed against a woman because she is a woman or which affects women disproportionately. Gender-based violence includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts,

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[77] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62. See also *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 (2) SACR 283 (CC) at para 60.

[78] Committee on the Elimination of All Forms of Violence Against Women, "Violence Against Women," General Recommendation no. 19 (eleventh session, 1992), U.N. Document CEDAW/C/1992/L.1/Add.15.

coercion, or other deprivations of liberty. Similarly, article 34 of the CRC requires state parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse.

98. The African Commission on Human and Peoples' Rights ("the African Commission") passed a resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.[79] The resolution states that states must take the necessary measures to ensure that the rights of victims of violence are guaranteed, irrespective of their race, colour, nationality, citizenship, ethnicity, profession, political opinions, sex, sexual orientation, gender identity, gender expression or any other factor that could lead to discrimination against them. The interpretation of article 2 of the African Charter is open ended and inclusive, and aims at offering the maximum protection to all Africans, hence the inclusion of sex, gender and sexual orientation as prohibited ground of unfair discrimination.

99. Further, states must take legislative and all other necessary measures to guarantee the well-being and security of victims and witnesses of violence. States must also ensure that they diminish the negative impact that actions to combat violence and its consequences can have on victims and witnesses. In particular, states must ensure that the potentially negative

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[79] ACHPR/Res.275(LV) 2014.

consequences for victims and witnesses, of procedures to investigate acts of violence and efforts to prosecute perpetrators, are reduced as much as possible.

100. Moreover, states must adopt legislative measures and any other measures required to guarantee effective, sufficient and timely remedies, including reparations, to the victims of violence. Remedies must be affordable and accessible without unjustified delays. There should be effective access to justice, a guarantee of fair and equitable treatment that is adapted to the legal proceedings undertaken, adequate, effective and timeous reparation for any damages sustained; and free access to information regarding remedies and the methods of obtaining reparation. Reparation must include individual and collective measures, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

101. Article 4(f) of the Declaration on the Elimination of Violence Against Women states that states should ensure that the re-victimisation of women does not occur because of laws that are insensitive to gender considerations, enforcement practices or other interventions.

102. In the *Akayesu judgment*,[80] the International Criminal Tribunal for Rwanda the Trial noted that there was 'no commonly accepted definition of [rape] in international law',[81] but described it as inherently a form of aggression, and argued that 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'.[82]

103. The judgment set out a broad conceptual definition of rape as "physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[83]

104. As Judge Pillay has publicly explained, the definition of rape in *Akayesu* intentionally excluded descriptive elements of penetration or issues of consent, but rather was intended to reconstitute "the law's perception of women's experience of sexual violence".[84]

105. Non-consent is absent from the definition because it is redundant: coercion is present because consent is absent. Coercion can be circumstantial as well as physical: "[t]hreats, intimidation, extortion and

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[80] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, at 598 (Sept. 2, 1998).

[81] Id at para 596.

[82] Id at paras 597 and 687.

[83] Id at pars 598 and 688.

[84] N Pillay, 'Equal Justice for Women' (2008) 50 Arizona Law Review 657 at 666-667.

other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances."[85]

106. The *Akayesu* definition is on the force side of rape definitions, consent not being mentioned, but the force it recognises is not limited to the physical

Regional

107. According to the Maputo Protocol, discrimination is required to be combated by enacting and effectively implementing 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.

108. In combating discrimination against women, article 2(1) requires states to take 'appropriate' measures. 'Appropriate measures' in the view of the CEDAW Committee, suggests that the intervention responds specifically to the resistance and obstacles to the elimination of discrimination against women.[86]

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[85] Id at 688. There, examples of coercive circumstances were given as "armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.

[86] UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 28 on the Core Obligations of States Parties under Article 2 of the

109. CALS submits that the current the exclusion of consent as a definitional element of rape is in line with international law.

COMPARATIVE LEGISLATIVE DEVELOPMENTS

Eswatini

110. Section 3 of the Sexual Offences and Domestic Violence Act, 2018 define rape as an unlawful sexual act with a person. Section 2(3) provides that an unlawful sexual act for purposes of this Part constitutes a sexual act committed under the following circumstances:

110.1. In any coercive circumstance;

110.2. Under false pretence or by fraudulent means;

110.3. In respect of a person who is incapable in law of appreciating the nature of the sexual act;

110.4. Duress;

Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28 (CEDAW Committee General Recommendation 28).

110.5. Psychological oppression or

110.6. Fear of violence.

Lesotho

111. The Sexual Offences Act, 2003 defines sexual offences under section 3 of the Sexual Offences Act and states that a sexual act is prima facie unlawful if it takes place in any coercive circumstances. The Act defines coercive circumstances to include:

111.1. there is an application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;

111.2. there is a threats, whether verbal or through conduct, of application of physical force to the complainant or a person other than the complainant;

111.3. the complainant is below the age of 12 years;

111.4. the complainant is unlawfully detained:

111.5. the complainant is affected by-

111.5.1. physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary; or

111.5.2. intoxicating liquor or any drug or other substance which mentally or physically incapacitates the complainant; or

111.5.3. sleep,

to such an extent that he/she is rendered incapable of understanding the nature of the sexual act or deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

111.6. the complainant submits to or commits the sexual act by reason of having been induced, whether verbally or through conduct, by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed is some other person;

111.7. as a result of the fraudulent misrepresentation of some fact by or any fraudulent conduct on the part of the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator,

the complainant is unaware that a sexual act is committed with the perpetrator; and

111.8. a perpetrator knowing or having reasonable grounds to believe that he/she is infected with a sexually transmissible disease, the human immuno-deficiency virus or other life-threatening disease does not, before committing the sexual act, disclose to the complainant that he/she is so infected.

112. In *Rex v. Makebe High Court of Lesotho*,[87] the complainant alleged that the defendant raped her. The defendant vehemently denied the allegations and testified that the sex was consensual.

113. The High Court treated the defendant's claim of consent as an affirmative defense ruling that he had the burden of proving consent. The Court held that the defense was unable "through cross examination, to show that the sex was consensual".[88] Consequently, the Court convicted the defendant of rape.

114. CALS submit that this was a landmark case because it shifted the burden of proof in rape cases. Instead of requiring the prosecution to prove a lack

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[87] (CRI/T/0018/2020) [2020] LSHC 90.

[88] Id at 4.

of consent, the court made the defendant prove that the victim consented to the sexual encounter and all this is as a result of the empowering legislation which does not have consent as a definitional element of rape.

Namibia

115. Section 2 of the Combating of Rape Act, No. 8 of 2000 defines rape as follows:

115.1. Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances - (a) commits or continues to commit a sexual act with another person; or (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.

115.2. The Act defines coercive circumstances as follows

115.2.1. the application of physical force to the complainant or to a person other than the complainant;

115.2.2. threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;

115.2.3. threats (whether verbally or through conduct) to cause harm (other than bodily harm)

115.2.4. to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;

115.2.5. circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant;

115.2.6. circumstances where the complainant is unlawfully detained;

115.2.7. circumstances where the complainant is affected by –

(a) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or

(b) intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or

(c) sleep,

> to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act.

116. CALS submits that Eswatini, Lesotho and Namibia are great examples of on the law of rape that is not focussed on consent as a definitional element.

THE PROPOSITION OF A NEW DEFINITION OF RAPE AND OTHER SEXUAL OFFENCES

117. In *Van Rooyen and Others v State and Others (General Council of the Bar of South Africa intervening)*,[89] the Constitutional Court set out the manner in which appropriate relief should be determined when dealing with possibly unconstitutional legislation -

> "[L]egislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if

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[89] 2002 (5) SA 246 (CC).

> this is not possible, must a declaration of complete invalidity of the section or subsection be made".[90]

118. Du Toit argues that the definition of rape should turn on whether the penetration was coerced or took place under coercive circumstances, with the implicit understanding that coercive penetration (the violation of a person's sexual integrity) is inherently and direly harmful to the whole, embodied person.[91]

119. This approach was by the Sexual Offences Amendment Bill of 2003. The Bill defined rape as follows:

> "(1) A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.

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[90] Id at para 88.

[91] Du Toit at 391.

(2) An act which causes penetration is prima facie unlawful if it is committed—

(a) in any coercive circumstance.

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration

(3) Coercive circumstances, referred to in subsection (2)(a), include any circumstances where there is—

(a) a use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) a threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) an abuse of power or authority to the extent that the person in respect of whom an act which causes penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act."[92]

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[92] B50 -2003 published in Government Gazette No. 25282 of 30 July 2003. See https://static.pmg.org.za/docs/2006/060621oldbill.pdf.

120. The South African Law Commission (Project 107, Discussion Paper 85 Sexual Offences: The Substantive Law, 12 August 1999) proposes, in the form of a section in a draft Sexual Offences Act, the following as the definition of the crime of rape:

> Rape
>
> "2. (1) Any person who intentionally and unlawfully commits an act of sexual intercourse with another person, or who intentionally and unlawfully causes another person to commit such an act is guilty of an offence.
>
> (2) For the purposes of this Act, an act of sexual intercourse is prima facie unlawful if it takes place in any coercive circumstances.
>
> (3) No marriage or other relationship shall be a defence against a charge of an offence under this section.
>
> (4) No person shall be charged with or convicted of the common law offence of rape in respect of an act of sexual intercourse committed after the commencement of this Act.
>
> (5) Subject to the provisions of this Act, any reference to "rape" in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to an act of sexual intercourse committed before the

commencement of this Act which shall be construed to be a reference to the common law offence of rape.'

121. CALS submits that the approach to remove consent as a definitional element of sexual offences is neither radical or novel. This can be send from the South African Law Commission's Proposal and the Sexual Offences Amendment Bill of 2003. In both instances, the focus of the enquiry in respect of rape cases is not whether the victim consented to the sexual intercourse, but rather the circumstances of the sexual encounter. This shifts the focus from the conduct of the complainant to the conduct of the alleged perpetrator. If the victim was coerced into participating, then a conviction is a possibility.

122. CALS submits that this proposed new formulation does not change the onus upon the prosecution to prove that the sexual conduct was unlawful.[93] The aim is to give the prosecution a wider scope to prove unlawfulness without putting the complainant "on trial" in order to prove lack of consent.

123. What this means is that it will be up to the accused to prove that the complainant did in fact validly consent to the sexual intercourse.

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[93] J Milton, "Re-defining the crime of rape: The Law Commission's proposals" (1999) 12 SACJ 364.

124. This shifts the psychological nature of the enquiry away from what the victim did to what the accused did and puts him on terms to excuse or justify his conduct.[94]

125. CALS asserts that it is irrational, arbitrary, and discriminatory for those who have been victims of common law sexual offences to be excluded from benefiting from the prayers advanced by the applicants.

126. Common law cases of sexual violence are still permitted to be prosecuted and are actively prosecuted in South Africa.

RETROSPECTIVITY

127. CALS submits that the order should retrospectively from 4 February 1997, the date on which the Constitution came into effect. This argument does not have the effect of creating a new crime. It only removes the limitation by removing consent as a definitional element.

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[94] Id.

128. CALS submits that the declaration of invalidity with retrospective effect does not has a potential to cause unnecessary dislocation and uncertainty in the administration of justice.[95]

129. CALS furthermore, focuses on victims of common law sexual offences who would be excluded by the potential changes in rape law and would irrationally be burdened by the burden imposed by them in retaining consent in common law sexual offences.

COSTS CONCERNING THIS APPLICATION

130. in *Ex parte Minister of Home Affairs: In Re Lawyers for Human Rights v Minister of Home Affairs,*[96] *the* Constitutional Court restated the principles of punitive cost orders. Essentially, such an order will be justified to convey the court's displeasure at a party's reprehensible conduct which is extra-ordinary and deserving of the court's rebuke, especially where the litigants are public officials.[97]

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[95] S v Zuma [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 43

[96] [2023] ZACC 34.

[97] Id ta para 95

131. The court highlighted that,

> "A higher duty is imposed on public litigants, as the Constitution's principal agents to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights [Our emphasis]. That emanates from the Constitution itself, since the Constitution regulates all public power and public officials are required to act in accordance with the law and the Constitution."[98]

132. This case concerns not only the interests of the individual applicants but also extends to include public interest at large. Where in 2023, South Africa has been found to be among the top five countries with the highest rates of rape globally; the successful prosecution of sexual offences is in the interest of every individual in the country.

133. Victims and survivors of sexual violations have a particular interest in encountering a criminal justice system that not only provides them with justice through successful convictions but also laws that are non-discriminatory and are victim-centred.

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[98] Id at para 95.

134. However, CALS submits that the conduct of the Minister through his representatives in this litigation warrant a punitive cost order for two reasons.

134.1. First, the Minister's original position regarding the purpose of this litigation is reprehensible. The fact that it took media scrutiny for a supplementary affidavit to be filed purporting for the initial position to have been an error is tantamount to the very discrimination which is the basis of this litigation and to which public officials ought to be treated to a higher standard.

134.2. Furthermore, as the Minister admits, that the answering affidavit was disrespectful and offensive and that there is no reason proffered by the Minister why this court should accept that this position is no longer the position of the Minister. An assertion by the Minister that they do not prefer litigation cannot be the basis for disrespectful and offensive approaches against women litigants (or any litigants) and thus CALS submits that this warrants the court's rebuke.

134.3. Second, CALS submits that the Minister's *bona fides* is problematic. CALS submits that the Minister's remarks in their answering affidavit are unprofessional, and sexist.

134.4. Additionally, further questionable remarks are made about the other applicants. These comments include that the relief the applicant seeks is 'incompetent' despite purporting to retract the incompetency allegations in the paragraphs preceding.

135. If CALS is unsuccessful in its prayers, it submits that the *Biowatch* must apply In the *Biowatch* case.[99] the Constitutional Court, confirming an already established principle, referred to in the earlier *Affordable Medicines* case,[100] stated:

> "…that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."[101]

136. This case concerns not only the interests of the individual applicants but also extends to include public interest at large. Where in 2023, South Africa has been found to be among the top five countries with the highest rates

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[99] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[100] *Affordable Medicines Trust and Others v Minister of Health and another* [2005] ZACC 3; 2005 (6)BCLR 529 (CC); 2006 (3) SA 247 (CC)

[101] Id at para 139.

of rape globally; the successful prosecution of sexual offences is in the interest of every individual in the country.[102]

137. Victims and survivors of sexual violations have a particular interest in encountering a criminal justice system that not only provides them with justice through successful convictions but also laws that are non-discriminatory and are victim-centred.

138. We thus request that if CALS and the other applicants are unsuccessful in their prayers, the above honourable court upholds the *Biowatch* principle and makes no order as to costs.

139. However, due to entities such as CALS litigating on behalf of its client's interests and the public interest and doing so *pro bono*, if successful, CALS requests that the above honourable order costs in its favour, including the costs including the cost of one counsel.

CONCLUSION

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[102] World Population Review, Rape statistics by country 2023 (2023) https://worldpopulationreview.com/country-rankings/rape-statistics-by-country.

140. We request that the above honourable court grant CALS the recourse requested within its Notice of Motion.

LETLHOGONOLO MOKGOROANE

SHEENA SWEMMER

CHAMBERS & CALS

22 November 2023

LIST OF AUTHORITIES

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