IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO. 315/24
HIGH COURT CASE NO. 2022-048656

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES	**APPLICANT**
and	
THE EMBRACE PROJECT NPC	**FIRST RESPONDENT**
INGE HOLZTRÄGER	**SECOND RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**THIRD RESPONDENT**
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES	**FOURTH RESPONDENT**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIFTH RESPONDENT**

FIRST AND SECOND RESPONDENTS' NOTICE OF OPPOSITION IN TERMS OF RULE 19(4)

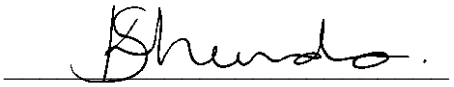
KINDLY TAKE NOTICE that the First and Second Respondents in the abovementioned application intend to oppose the application for leave to appeal of the Applicant.

TAKE NOTICE FURTHER THAT the First and Second Respondents have appointed the offices of its attorneys of record, set out below, as the address at which they will accept notice and service of all documents in these proceedings. The First and Second Respondents' attorneys will also accept electronic service at the following email

addresses: tina.power@powerlaw.africa, slindile.khumalo@powerlaw.africa, and legal@powerlaw.africa.

TAKE FURTHER NOTICE that the First and Second Respondents hereby file the Answering Affidavit of **S'LINDILE KHUMALO** detailing the grounds of opposition in terms of Rule 19(4)(a).

SIGNED at **JOHANNESBURG** on **4 NOVEMBER 2024.**



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TO: **THE REGISTRAR**
CONSTITUTIONAL COURT

AND TO: **THE REGISTRAR**
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

AND TO: **CENTRE FOR APPLIED LEGAL STUDIES**
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PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIFTH RESPONDENT**

FIRST AND SECOND RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

S'LINDILE KHUMALO

do hereby make oath and state that:

1. I am an attorney of the High Court of South Africa, practising as a senior associate at Power & Associates, 20 Baker Street, Rosebank, Johannesburg.

2. Power & Associates are the First and Second Respondents' attorneys of record in this application, and I have been involved in this matter since its inception.

3. I am duly authorised to depose to this affidavit on behalf of the First and Second Respondents.

4. The contents of this affidavit fall within my personal knowledge, unless indicated otherwise, and are, to the best of my belief, true and correct.

INTRODUCTION

5. The Applicant ("**CALS**") seeks leave to appeal against, and the setting aside of, an order obtained by the First and Second Respondents in the High Court of South Africa, Gauteng Division, Pretoria (per Baqwa J) ("**court a quo**").

6. The First and Second Respondents ("**the Embrace Respondents**") oppose the relief sought by CALS for the reasons set out in this affidavit.

7. CALS have indicated their desire for their appeal to be consolidated with the Embrace applicants' confirmation application (brought under case number CCT314/24). The Embrace Respondents support the proposal that their confirmation application and CALS' appeal be consolidated.

8. I will first provide a brief background to this matter, and then set out the First and Second Respondents' grounds for opposing CALS' application.

BACKGROUND

9. The First Respondent ("**Embrace**") is a non-profit company that aims to combat gender-based violence and femicide through a combination of art and advocacy.

10. The Second Respondent ("**Ms Holzträger**") is a graphic designer, and a rape survivor, whose rapist was acquitted on the grounds that the State had not proved beyond a reasonable doubt that he did not subjectively believe that Ms Holzträger had consented to the various sexual acts, even though the magistrate found that such alleged belief could not have been reasonable in the circumstances.

11. Ms Holzträger is referred to in CALS' present application as "IH", but she prefers to disclose her identity, in the belief that her ordeal should not cause her to have to hide any part of her life.

12. In her ruling, the magistrate in Ms Holzträger's case – *S v Amos* – lamented the fact that by requiring proof beyond a reasonable doubt that the accused subjectively knew or foresaw that the complainant was not consenting to a sexual act, the Criminal Law (Sexual Offences and Related Matters) Act, 32 of 2007 ("**the Act**") allowed the accused to allege a purely subjective belief in the presence of consent to escape conviction, even if such a belief would have been objectively unreasonable in the circumstances. The magistrate remarked that this defence was outdated and likely unconstitutional, but that her hands were tied by the Act, and the accused had to be acquitted.[1]

13. This defence – known as the *Morgan* defence in the United Kingdom,[2] and which we will call the *Amos* defence in this affidavit – is outdated and unconstitutional.

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[1] A copy of the judgment in *S v Amos* was attached to the founding affidavit in the Court a quo and will thus form part of the record in this Court.

[2] After *DPP v Morgan* [1975] UKHL 3; [1975] 2 All ER 347, where the defence was successfully raised.

It has long been abolished in many democracies around the world, including the United Kingdom, United States, Canada, Australia and New Zealand.

14. Embrace and Ms Holzträger thus challenged the constitutionality of the Act in the court a quo, to the extent that it retains the *Amos* defence for the sexual offences defined by the lack of consent, namely:

14.1. rape (section 3);

14.2. compelled rape (section 4);

14.3. sexual assault (section 5);

14.4. compelled sexual assault (section 6);

14.5. compelled self-sexual assault (section 7);

14.6. compelled witnessing of sexual acts (section 8);

14.7. flashing (section 9); and

14.8. harmful disclosure of pornography (section 11A).

15. Embrace and Ms Holzträger pointed out that the "Defences" section of the Act (section 56) expressly excludes an *Amos*-type defence (unreasonable mistake) for statutory rape (section 15) and statutory sexual assault (section 16). Section 56(2)(a) of the Act provides (with emphasis added):

> *"Whenever an accused person is charged with an offence under section 15 or 16, it is, subject to subsection (3),*[3] *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."*

16. It also excludes an *Amos*-type defence in the crime of intentionally using children for or benefitting from child pornography (section 20(1)). With respect to section 20(1), section 56(6) of the Act provides as follows (with emphasis added):

> *"It is not a valid defence to a charge under section 20(1), 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."*

17. Embrace and Ms Holzträger argued in the court a quo that, by failing to exclude the *Amos* defence for rape and the other sexual offences defined by the absence of consent, the Act unjustifiably limits the constitutional rights of victims, survivors and potential targets of sexual violence (mainly women) to equality (section 9), human dignity (section 10), personal freedom and security, including bodily and psychological integrity (section 12), and privacy (section 14).

18. Embrace and Ms Holzträger accordingly sought an order:

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[3] 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."

18.1. declaring sections 3, 4, 5, 6, 7, 8, 9 and 11A unconstitutional to that extent;

18.2. affording Parliament 18 months to cure the unconstitutionality; and

18.3. in the interim, reading in the following proviso to section 56 of the Act (the "Defences" section):

> "*(1A) 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 objectively reasonable steps to ascertain that the complainant consented to the sexual conduct in question.*"

19. CALS was of the view that the relief sought by Embrace and Ms Holzträger was "short-sighted,[4] and applied for leave to intervene as the Third Applicant, seeking markedly different relief to that of Embrace and Ms Holzträger.

20. The relief sought by CALS in its intervention application was *inter alia* to:

20.1. declare that "the continued inclusion of consent as a definitional element in section 3, 4, 5, 6, 7 and 11A of the Act and in the common law, is unconstitutional and invalid; and

20.2. In the alternative, developing the common law sexual offences to include the requirement of reasonable mistaken belief.

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[4] Para 47, p23 of CALS' founding affidavit in the application to intervene.

21. CALS considered the problem with the Act to be, not the retention of the *Amos* defence, but the inclusion of consent as a definitional element of the offences in sections 3, 4, 5, 6, 7 and 11A of the Act (CALS did not target sections 8 and 9 and has not done so again in this Court). CALS believed that "*without the consent*" should be replaced with the phrase "coercive measures" wherever it appears and sought an interim reading-in to this effect.

22. CALS argued that, instead of the absence of consent being a definitional element of these crimes, the presence of consent should be a defence. It was not clear, however, what would become of the *Amos* defence in CALS' preferred model.

23. In the alternative, CALS sought to develop the common law sexual offences to include the requirement of a reasonable mistaken belief. CALS appears in this Court to no longer pursue this and now only seeks an interim reading in that the words "coercive measures" will be read in the relevant sections of the Act where the words "without consent" currently appear.

24. In the court a quo Embrace and Ms Holzträger did not oppose CALS' intervention, but did not agree with CALS' relief, and persisted with the relief they had originally sought.

25. The Court a quo agreed with Embrace and Ms Holzträger, and granted the order that CALS now attacks.

26. It is regrettable that Embrace and Ms Holzträger, after enduring sexist insults on affidavit[5] and dilatory conduct from the Third Respondent ("**the Minister of Justice**") in the long struggle to obtain an order from the court a quo, should now have to fight on two fronts. Nevertheless, I will now explain why Embrace and Ms Holzträger are opposing CALS' application to this Court.

GROUNDS OF OPPOSITION

27. CALS contends that the concept of consent has no place in the definition of rape and other sexual offences, and that its inclusion hampers prosecutions and thus unjustifiably limits the rights of victims, survivors and potential targets of sexual violence.

28. Embrace and Ms Holzträger are unable to agree, for three reasons:

    28.1. First, CALS' approach retains the Amos defence.

    28.2. Second, CALS has not shown a causal nexus between Parliament's choice of model and the hampering of prosecutions.

    28.3. Third, the consent model is accepted as a legitimate model in international and comparative law.

29. I will address each issue in turn.

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[5] Some of which were subsequently withdrawn by the Minister.

The *Amos* defence

30. CALS appears to accept that rape and the other targeted sexual offences would remain crimes of intention. Under their preferred model, the presence of consent would be a defence (which would exclude prima facie unlawfulness), and a belief in the presence of consent would also be a defence (which would exclude prima facie intention).

31. There is nothing in the relief sought by CALS which would do away with the *Amos* defence. CALS does not explain how the relief they seek will assist people in the position of Ms Holzträger to obtain justice. On the contrary, it would retain the *Amos* defence and thus the Act would still be unconstitutional.

The failure to show a causal nexus

32. The use of the consent model is inherently a policy decision which has been adopted by Parliament. In deference to the principle of the separation of powers, our courts are mindful to treat forays into the law-making realm with a degree of circumspection. This means that judicial interventions are limited strictly to that which is necessary to ensure that constitutional rights are properly protected when the validity of legislation is impugned.

33. It is therefore not sufficient for CALS to demonstrate that the current legislative framework is inadequate in protecting the constitutional rights of victims and survivors. Instead, it must meet the high watermark of proving that the constitutional deficiencies emerge from Parliament's decision to use the consent model. It has not done so.

34. CALS refers fleetingly to other jurisdictions that have replaced the consent model with the coercive circumstances model.

35. But CALS has not shown that these jurisdictions have improved the rate of conversion of complaints to prosecutions, and of prosecutions to convictions – as compared to those jurisdictions which have opted to make use of the consent model.

36. The expert evidence of Dr Omar does not take the matter further. While Embrace and Ms Holzträger have nothing but immense respect for Dr Omar and her expertise, it is not clear that Dr Omar's evidence: (a) is admissible, being expert evidence on *the law* (on which the Court is its own expert); and (b) shows the correlation between prosecution and conviction rates resulting from a change in model.

International and comparative law

37. The use of the consent model is commonly accepted in comparative and International law.

38. In *Vertido v Philippines*,[6] the United Nations Human Rights Committee made the recommendations, among others, that the Philippines:

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

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[6] *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, paragraph 8.4.

(ii) Removes 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...[7]

39. It is clear from this that the Human Rights Committee (at least in 2010) favoured the consent model, subject to requiring that the accused took reasonable steps to ascertain the presence of consent. This is consistent with the relief sought by Embrace and Ms Holzträger. For the Committee, coercive circumstances are a complement to the consent model, not a replacement for it.

40. The Committee does not appear to have changed its views in this regard.

41. The 2021 United Nations Model Rape Law addresses the criminalisation of rape as follows (with emphasis added):

> ***"Article 1. Definition of rape***
>
> *A person (the perpetrator) commits rape when they:*
> *(a) engage in non-consensual vaginal, 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.*

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[7] Id, para 8.9(b) (emphasis added).

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 behavior; or
(d) the victim's status, occupation or relationship to the accused."

42. It follows that the United Nations still considers it acceptable, indeed advisable, to place consent at the centre of the definition of rape.

43. As for comparative law, the consent model is used in many open and democratic societies, including Canada, the United Kingdom, New Zealand, as well as most of the Australian states.

44. It follows that the adoption of the consent model in the Act was an internationally accepted and legitimate legislative choice on the part of Parliament. That is why the court a quo found that it would contravene the separation of powers to strike down the impugned provisions of the Act on the basis that they use the consent model.

CONCLUSION

45. For the reasons set out above, Embrace and Ms Holzträger oppose the relief sought by CALS in this Court and submit that the order made by the court a quo should not be set aside or varied as requested by CALS, but should instead be confirmed.

DEPONENT

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and solemnly affirmed before me at Rosebank on this the 4th day of November 2024, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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