IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 314/24

In the matter between:

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

Case: CCT 315/24

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES	Applicant

and

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

EMBRACE PROJECT AND INGE HOLZTRÄGER'S 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 for confirmation concerns a constitutional challenge to the Criminal Law (Sexual Offences and Related Matters) Act, 32 of 2007 ("**the Act**"), specifically provisions dealing with sexual offences in which the absence of consent is a constituent element, most notably rape.[2]

2 We submit that the Act, as it is currently framed, undermines the rights of victims and survivors of sexual violence, including their rights to equality, dignity, privacy, bodily and psychological integrity, and freedom and security of the person.[3]

3 As the law presently stands, an accused can avoid conviction where they wrongly believed that the complainant consented to the sexual act, even if that belief was unreasonable. This issue is especially prevalent in, but not

[1] *Ndlovu v S* 2017 (2) SACR 305 (CC) at para 53.
[2] Sections 3, 4, 5, 6, 7, 8, 9 and 11A of the Act.
[3] We use the terms "victim" and "survivor" to refer to those who have been raped or have experienced other forms of sexual assault. The Embrace Applicants appreciate that different contexts, experiences, and trauma lead to different responses and forms of locating and identifying sexual violence. Accordingly, where the terms "victim" and "survivor" are used this is not intended to, by any means, impose a definition or response on persons who have been raped or sexually assaulted.

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).

4 To the extent that the Act permits an accused to raise an unreasonable belief in consent as a defence, we submit that it is outdated, unconstitutional and unjustifiable. In its judgment, the High Court found sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of the Act inconsistent with the Constitution and invalid. It is this order that forms the basis of this application.

5 The Embrace Project and Ms Holzträger ("**the Embrace Applicants**") seek the following relief:

5.1 First, a confirmation of the High Court's order which declared sections 3, 4, 5, 6, 7, 8, 9, and 11A read with section 1(2) of the Act 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)).

5.2 Second, a confirmation of the High Court's order which suspended the declaration of invalidity for 18 months and, in the interim, read in that it is not a valid defence to a charge under sections 3, 4, 5, 6, 7, 8, 9, or 11A, for an accused 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 had consented to the sexual act in question with the accused.

5.3 This Court is further asked to make an order that should the 18-month suspension period lapse without Parliament curing the unconstitutionality, that the interim reading will be final.

6 When this confirmation application was initially filed, there was an omission of section 11A in the order and judgment of the High Court. This omission has since been remedied by the High Court, as such we seek the relief set out in the amended Notice of Motion.[4]

7 The Minister opposed the relief sought in the High Court. However, in this Court, the Minister has not filed any papers. The Centre for Applied Legal Studies ("**CALS**") seeks to appeal the High Court's remedy in relation to the interim reading-in. We oppose the relief sought by CALS and submit that the order made by the High Court should not be set aside or varied, but should instead be confirmed.

[4] First and Second Applicants' Application for Leave to Amend the Notice of Motion (Constitutional Court) (CC Record Vol 1, p 20).

THE STRUCTURE OF THESE SUBMISSIONS

8 In these submissions we address the following issues in turn:

8.1 First, we provide an overview of the background to the impugned provisions;

8.2 Second, we deal with the proceedings in the High Court;

8.3 Third, we consider the Minister's case in the High Court and our response thereto;

8.4 Fourth, we consider the rights violations;

8.5 Fifth, we demonstrate that the violation is unjustifiable;

8.6 Sixth, we consider the relevant international and comparative law;

8.7 Seventh, we provide support for the relief sought by the Embrace Applicants; and

8.8 Finally, we describe CALS' position and highlight why its departure from the current statutory framework may overstep the separation of powers.

BACKGROUND

9 The South African Law Commission initiated a detailed reform process of the country's sexual offence laws, identified as Project 107.[5]

[5] First and Second Applicants' Founding Affidavit (High Court) at para 32 (CC Record Vol 2, p 140).

10 The South African Law Reform Commission's 1999 Discussion Paper 85 highlighted the problematic reliance on a subjective *mens rea* standard in sexual offences, questioning whether an unreasonable belief in consent should excuse liability. However, the final report failed to address this issue, leaving the Act silent on requiring accused persons to take reasonable steps to verify consent. Consequently, the legislation permits acquittals based solely on subjective beliefs, as illustrated by cases like Ms Holzträger's, where the accused escaped liability despite an objectively unreasonable belief in consent.

11 The burden therefore remains on the State to prove beyond a reasonable doubt that the accused did not believe there was consent – a burden that is often insurmountable in cases involving acquaintances or minimal outward resistance.[6]

12 Ms Holzträger's case exemplifies the difficulties posed by the subjective test. Having met Mr Amos through an online platform, she arrived at his home under the misapprehension that she was invited to a party at his home, only to discover she was the sole guest.[7] Despite it being clear that Ms Holzträger did not consent to any sexual act, and that Mr Amos was not a credible witness, he was ultimately acquitted because the court found it could not exclude the possibility that he genuinely lacked foresight of her non-consent.[8]

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[6] First and Second Applicants' Founding Affidavit (High Court) at para 42 (CC Record Vol 2, p 146).
[7] First and Second Applicants' Founding Affidavit (High Court) at para 52 (CC Record Vol 2, p 149).
[8] First and Second Applicants' Founding Affidavit (High Court) at paras 54-55 (CC Record Vol 2, pp 149-152).

13 The learned Magistrate expressed concern over the use of a purely subjective test, noting that it allowed the perpetrator to allege a purely subjective belief in consent to escape conviction, even if such belief was objectively unreasonable in the circumstances.[9] The Magistrate acknowledged that this defence was outdated and likely unconstitutional but, being a creature of statute, the Magistrate was bound by the Act and had no choice but to acquit the accused.[10]

14 In these submissions, we use the term "*Amos defence*" to describe a scenario in which an accused raises the defence that they subjectively thought the victim consented to the sexual act, in circumstances where he failed to take any reasonable steps to establish whether or not the complainant actually consented to the sexual act.

15 The law failed Ms Holzträger and many others like her. Ms Holzträger's case, together with a slew of court decisions which dealt with comparable factual circumstances, is what prompted the Embrace Project and Ms Holzträger to institute these proceedings – to change the law – so that other victims and survivors will not be let down the way Ms Holzträger was.

[9] First and Second Applicants' Founding Affidavit (High Court) at para 54 (CC Record Vol 2, pp 149-151).
[10] First and Second Applicants' Founding Affidavit (High Court) at paras 54-55 (CC Record Vol 2, pp 149-152).

IN THE HIGH COURT

16 The High Court, per Baqwa J, accepted that the Act failed to criminalise an accused's wrongful belief that the complainant consented to a sexual act, even in circumstances where that belief was unreasonable.[11]

17 As a result of this failure, the Act did not accord adequate protection to the rights of survivors, victims and potential targets of sexual violence. In particular, the rights to equality, dignity, privacy, bodily and psychological integrity, as well as freedom and security of the person were infringed.[12]

18 In the discharge of its constitutional duty to respect, protect, promote and fulfil these various rights, the High Court agreed that 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.[13]

19 The High Court declared the impugned provisions unconstitutional and ordered an interim reading-in precluding an accused from raising the Amos defence unless they can show that they took reasonable steps to establish the presence of consent.[14]

[11] High Court judgment at para 39 (CC Record Vol 1, p 46).
[12] High Court judgment at paras 33, 59 (CC Record Vol 1, pp 44, 54).
[13] High Court judgment at paras 56, 69 (CC Record Vol 1, pp 53, 58).
[14] High Court judgment at para 78 (CC Record Vol 1, p 62).

The Minister's opposition in the High Court

20 The Minister's unsuccessful opposition to the Embrace Applicant's case in the High Court can summarised as follows:

20.1 The Act is constitutional;

20.2 *Dolus eventualis* is sufficient for purposes of establishing intention in cases such as Ms Holzträger's;[15]

20.3 The Court is only empowered to consider international law where it has been ratified and promulgated through domestic legislation;[16]

20.4 The Applicants simply wish to import foreign jurisprudence into South African law;[17] and

20.5 Finally, that the use of an objective standard would unjustifiably limit an accused's right to be presumed innocent.[18]

21 The Embrace Applicants contended as follows in response to the Minister's case:

21.1 First, the Minister's submissions regarding international law were patently incorrect. Were the Minister's submissions to be accepted, international law as an interpretative tool would be rendered meaningless and would directly contradict this Court's

[15] Minister's Answering Affidavit (High Court) at paras 123-125 (CC Record Vol 3, pp 294).
[16] Minister's Answering Affidavit (High Court) at paras 11-13 (CC Record Vol 3, pp 254-255).
[17] Minister's Answering Affidavit (High Court) at para 226 (CC Record Vol 3, pp 324).
[18] Minister's Answering Affidavit (High Court) at paras 32-49 (CC Record Vol 3, pp 265-270).

pronouncements in *Makwanyane*,[19] which made it clear that binding and non-binding international law must be considered to assist in interpreting fundamental rights.

21.2 Second, to the extent that the Embrace Applicants refer to foreign law, they do so only to demonstrate that many like-minded human rights-based democracies have taken progressive strides towards incorporating an objective test for consent. This is in line with section 39(1) of the Constitution which permits Courts to consider foreign law when interpreting the Bill of Rights.

21.3 Third, in relation to *dolus eventualis*: where an accused subjectively believes the complainant has consented, *dolus eventualis* does not arise, since the requisite foresight of harm is absent. Decisions such as *Sigwahla*[20] and *Tshoba*[21] confirm that subjective foresight must be proved beyond a reasonable doubt, failing which *dolus eventualis* cannot be invoked. The accepted test for foreseeability when assessing intention under *dolus eventualis* remains subjective, not objective.[22]

21.4 Finally, the Minister's view that introducing an objective standard unconstitutionally reverses the burden of proof is misplaced.

[19] *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 (CC).at paras 34-35.
[20] *S v Sigwahla* 1967 (4) SA 566 (A) at 570.
[21] *S v Tshoba* [2022] ZAECMKHC 117 at para 68.
[22] 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.

> Requiring an accused to take reasonable steps to ascertain consent does not unjustifiably or unreasonably limit the presumption of innocence. The law is replete with examples where negligence is used as the yardstick for intent. The accused remains free to raise consent as a defence but simply cannot do so on wholly subjective grounds that are inconsistent with all surrounding circumstances. In fact, the Act itself already criminalises negligence in certain cases.[23]

THE AMOS DEFENCE VIOLATES RIGHTS OF VICTIMS AND SURVIVORS OF SEXUAL VIOLENCE

22 Our courts have recognised that rape constitutes a brutal invasion of the privacy, dignity and person of the victim. At the outset of the case of *Tshabalala v S; Ntuli v S* ("***Tshabalala***"),[24] this Court cited the dictum in *S v Chapman* with approval, in which 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 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*

[23] See sections 15 (statutory rape), section 16 (statutory sexual assault). This is dealt with in more detail below in these submissions.
[24] *Tshabalala v S; Ntuli v S* 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC).

fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."[25] (Our emphasis)

23 In *Masiya*, this Court again 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:

> "*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. <u>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.</u>*"[26] (Our emphasis)

24 Rape disproportionately affects women, thereby falling foul of section 9 of the Constitution.[27]

25 While it cannot be disputed that the act of rape constitutes a grave violation of fundamental rights, we submit that the infringement arises not only as a

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[25] Id; *S v Chapman* 1997 (3) SA 341 (SCA) at paras 3-4.
[26] *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.
[27] The Embrace Applicants submit that the impact of the current formulation of the impugned provisions have a disproportionate effect on women who have been raped or sexually assaulted. This does not discount sexual violence which is perpetrated against gender non-conforming persons, sexual and gender minorities, vulnerable members of society, persons with disabilities, and men. The Embrace Applicants fully accept that these provisions apply equally to all persons regardless of gender. Where specific reference is made to women and children, this should be read as a comment on a descriptive reality and not be read as a prescriptive or exclusionary statement of which members of society may be victims and survivors of sexual violence.

product of the action itself, but as a necessary consequence of the legislation which enables an accused to claim a purely subjective belief in consent as a complete defence. This, we submit, places excessive weight on the accused's mindset. By allowing a subjective unreasonable belief in consent to shield the accused from liability, it is the law itself that infringes upon the fundamental rights of survivors.

The Coko matter

26 The Embrace Applicants initially sought to rely upon the egregious outcome reached by the High Court in *Coko v S*[28] as one of the many cases demonstrating how the Act results in travesties of justice for so many victims of sexual violence. In the *Coko* case, a particularly concerning issue was the explanation regarding how a court should interpret consent in circumstances where it is initially given, but subsequently revoked.

27 In *Coko*, the Trial Court had convicted the accused of rape as the evidence had demonstrated that he had penetrated the complainant without her consent. The Magistrate emphasised that the accused, aware of the complainant's status as a virgin and her explicit intentions, could not justifiably assume consent based merely on prior non-explicit interactions.[29]

[28] *Coko v S* [2021] ZAECGHC 91; [2021] 4 All SA 768 (ECG); 2022 (1) SACR 24 (ECG) ("***Coko HC***").
[29] *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (main and supplementary judgment)* [2024] ZASCA 59; 2024 (2) SACR 113 (SCA); [2024] 3 All SA 674 (SCA).("***Coko SCA***") at paras 24-27.

28 On appeal the High Court reversed the Magistrate's finding. In the High Court's view, the State had not definitively disproved the accused's subjective belief in the complainant's consent – therefore it could not be said that the offence had been proven beyond a reasonable doubt.[30]

29 The SCA rightly, we submit, reversed the High Court's findings on the facts. It accepted that the accused's admissions and the circumstances surrounding the incident clearly indicated a lack of actual consent and that his conduct amounted to *dolus eventualis*.[31] While this outcome corrected the individual injustice in the *Coko* case, it did not resolve the constitutional shortcomings of the Act.

30 This purely subjective approach has led to conflicting interpretations in the lower courts, as evidenced by the divergent outcomes between the Trial Court, the High Court and the SCA in *Coko* itself.

31 The SCA's judgment in *Coko* also reinforced the reality that the test for *mens rea* itself remains subjective.[32] If an accused genuinely – but unreasonably – believes that the complainant consented, they may still avoid liability by claiming a lack of foresight as to the absence of consent.

32 Recently, in *Mashego*,[33] the High Court quashed the accused's rape conviction in the Trial Court on the strength of the Amos defence, even

[30] *Coko HC*; *Coko SCA* at paras 28-32.
[31] *Coko SCA* at para 79.
[32] *Coko SCA* at para 62.
[33] *Mashego v S* [2024] ZAGPPHC 1293 (27 November 2024) ("***Mashego***").

though the victim's consent was vitiated by a mistaken belief regarding the accused's identity. In summary, the complainant had stayed overnight at the accused's 2-bedroom house after her transport arrangements fell through. That night, she engaged in consensual intercourse with her partner, who then left the accused's house without her knowledge. Later that morning, she believed herself to be having intercourse with her partner again but realised mid-act that it was in fact the accused.[34]

33 The High Court, in applying the subjective approach, found that the accused's own impression of the situation shielded him from criminal liability, despite the absence of any positive step on his part to confirm the complainant's consent.[35]

34 This underscores the principal issue. The Act, by placing a premium on an accused's subjective perception, invites inconsistent interpretation by our courts – all at the expense of a complainant.

35 The result is that victims and survivors of sexual violence are left vulnerable to the vagaries of an accused's self-serving interpretation of events. Survivors are left to face the reality that their explicit choices and boundaries are likely to be ignored in a courtroom by reason of an accused's subjective belief.

[34] *Mashego* at paras 7-8.
[35] *Mashego* at para 22.

36 The Act's approach serves to reinforce, rather than address, the scourge which plagues women and children. We submit that, in realistically confronting the reality of violence and sexual crime in the country, it is at the very least necessary for an accused to take reasonable steps to verify the complainant's consent before engaging in sexual intercourse.

37 An honest reflection requires that we reconcile practical realities with the Act. The practical reality was aptly observed by the SCA in *S v Vilakazi*, where Nugent JA acknowledged that a woman's right to consent is one of the most commonly violated human rights in South Africa, with a staggering number of rape reports made to the police while relatively few offenders are ever caught and convicted.[36]

Perpetuating rape myths and ignoring peritraumatic responses to sexual violence

38 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 but one such example, wherein the Court made the following problematic observation:

[36] *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2012 (6) SA 353 (SCA) at paras 2-3.

"*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 disclosed the sexual act to the mother. This is not an exhaustive list of the unsatisfactory features in her evidence.*"[37] (Our emphasis)

39 These observations serve only to perpetuate problematic myths regarding a woman's behaviour upon being raped.

40 Another problematic myth is that perpetrators of sexual violence are always violent monsters. This line of thinking ignores hard lessons learned in *Tshabalala* where this 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… 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-respected men in the community… The idea that rape is committed by monsters and animals may have adverse*

[37] *S v Sebaeng* [2007] ZANWHC 25 at para 13; See also, the unreported decision in *S v Moipolai* [2004] ZANWHC 19 2005 (1) SACR 580 (B)dd 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 bless 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." (Our emphasis).

> *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.*"[38] (Our emphasis)

41 While various amendments to the Act may have served to combat several debunked rape myths and stereotypes and have made it relatively easier for the State to prove *unlawfulness* (i.e. objective lack of consent), we submit that the Act negates 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.

42 Yet another issue is the Act's perpetuation of rape culture and victim blaming. This emerges from cases in which our courts have found that a victim or survivor objectively consented to penetration because they had no physical

[38] *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.

injuries, did not call for help, wore revealing clothes, flirted with the accused, or perhaps even engaged in foreplay with the accused.[39]

43 As evidenced in the *Amicus Curiae's* submissions in the High Court, which relied upon leading research into peritraumatic responses to sexual assault, it is clear that there is no "normative", "appropriate" or "expected" way for a victim to behave during or after an act of sexual violence. Whether a victim chooses to "fight", "flee", "freeze" or "participate" simply cannot be used as a yardstick for determining consent.[40]

44 And, because the State must prove guilt beyond a reasonable doubt, an accused must be acquitted if the possibility remains that they subjectively believed the complainant was consenting, even if that belief is rooted in rape myths or predicated upon patriarchal notions of male sexual entitlement. Perversely, this means that a man with less progressive views regarding

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[39] See, for example, the case of *S v Zuma* [2006] ZAGPHC 45; [2006] 3 All SA 8 (W); 2006 (7) BCLR 790 (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 even 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."*

[40] *Amici's Heads of Argument - High Court* at paras 8-9 (CC Record Vol 8: 788-789).

consent has a higher likelihood of acquittal as conviction is contingent upon his subjective views.

45 In the absence of the imposition of a legal duty to confirm whether the other person is consenting, the Act effectively entrenches patriarchal attitudes to excuse or justify a failure to seek genuine agreement where a man initiates sex.

46 Victims and survivors must prove their non-consent beyond any reasonable doubt, which denies them the right to freeze or submit (even if they believe fighting or fleeing would be futile or life-threatening), lest their silence be deemed acquiescence and their attacker's subjective belief be treated as reasonably possibly true.

47 In this way, rather than directing men and boys not to rape, the Act effectively tells women and children to avoid being raped, thus placing the onus of prevention on the very people most vulnerable to sexual violence.

48 The corollary of this is that sexual violence proceedings focus on whether the complainant did enough to signal non-consent in the mind of the perpetrator, instead of demanding that the perpetrator himself demonstrate that they took proper steps to ensure there was true, ongoing, and uncoerced consent.

49 By omitting a requirement of objective reasonableness in establishing consent, the Act infringes the constitutional rights of sexual violence victims and perpetuates a legal framework ill-equipped to protect them.

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

50 This Court has already pronounced itself in relation to the State's duty to protect women from all types of gender-based violence:

> "*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.*"[41]

51 Furthermore, the SCA and this Court have long recognised that rape constitutes a gross violation of human rights: affecting the dignity and integrity of women, limiting an individual's bodily and psychological integrity and constituting a degrading and brutal invasion of a person's most intimate and private space.[42] It is self-evident that even in the absence of physical violence, the act in and of itself 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 and degrading way.[43]

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[41] *AK v Minister of* [2022] ZACC 14; 2022 (11) BCLR 1307 (CC); 2023 (1) SACR 113 (CC); 2023 (2) SA 321 (CC) at para 3.
[42] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); 2002 (1) SACR 79 (CC) at para 62*; S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paras 3-4*; S v Mudau* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA)at para 17.
[43] *S v SMM* 2013 (2) SACR 292 (SCA) at para 26:

52 We have already established that at the very least, sexual violence violates the following rights of victims and survivors:

52.1 equality (section 9);

52.2 human dignity (section 10);

52.3 privacy (section 14);

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

52.5 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 and degrading way.

53 These rights are violated in the same manner regardless of whether a perpetrator's failure to recognise the absence of consent was deliberate or unreasonable. The only distinction is that where it is unreasonable, the Act does not sanction the perpetrator. The Amos defence ultimately leaves a survivor without redress.

54 Section 7(2) of the Constitution imposes a duty upon the State to respect, protect, promote and fulfil the rights listed above. In the circumstances, the State has a duty to take positive steps and implement effective measures to combat sexual violence in all its forms – including where a perpetrator

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"*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*."

intentionally or unreasonably ignores a person's right to withhold consent. The State is obliged to prohibit, punish and deter sexual violence in all its manifestations.

55 The Act effectively legalises sexual violence in circumstances where there is no reasonable belief in consent. By extension, this constitutes a failure by the State to take necessary and effective measures to protect, promote and fulfil the fundamental rights of women and children. As we will proceed to demonstrate, the Act's limitation of these rights cannot be justified and, to the extent that it does, the Act is unconstitutional.

THE VIOLATION IS UNJUSTIFIABLE

56 In the High Court, the Minister unsuccessfully sought to argue that an objective standard of fault would unconstitutionally reverse the onus onto an accused, undermining the presumption of innocence.[44] This contention was, we submit, misplaced. An objective standard does not force an accused to prove their own innocence. Rather, it aligns with established principles of criminal liability where conduct is measured against that of a reasonable person. There are various criminal offences, within the Act itself, where individuals may be found liable if they act in a manner that falls short of this objective standard, without shifting an onus onto the accused.

[44] High Court judgment at para 51 (CC Record Vol 1, p 51).

Even negligence is blameworthy

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

58 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.

59 The Act's failure to criminalise an unreasonable belief in consent is unjustifiable, particularly in light of the Constitution's foundational values of dignity, equality, and freedom. Negligence, where it results in harm, is recognised as morally blameworthy in South African law. For instance, the law of culpable homicide holds individuals accountable for negligent conduct that causes the death of another. Similarly, negligence is criminalised in the Act itself for other sexual offences, such as statutory rape under section 15 and the use of children for sexual exploitation under section 20(1). In these provisions, Parliament imposes a duty on the accused to take reasonable steps to verify circumstances such as a complainant's age or the absence of coercive circumstances.

60 It is therefore irrational and inconsistent to exclude negligence as a basis for liability in cases where an accused unreasonably believes there is consent in

sexual offences involving adults. Sexual violence inflicts the same harm on survivors, whether caused intentionally or negligently. Requiring reasonable steps to verify consent would align with both constitutional imperatives and the moral blameworthiness principle underpinning criminal liability.

61 This failure to criminalise negligent conduct perpetuates harmful patriarchal attitudes, tolerating sexual violence in circumstances where the accused's subjective belief is not supported by reasonable steps. The constitutional mandate under section 7(2) requires the State to protect and promote the rights of survivors, which include dignity, bodily integrity, and freedom from violence. The omission to criminalise unreasonable beliefs in consent undermines this mandate and cannot be justified in a democratic society founded on respect for human rights.

62 The Minister failed to make out a case to justify the limitation of the rights concerned. We submit that there is no justification for such limitation.

INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES

63 International law imposes a clear obligation on all states to adopt legislative measures that fully and effectively criminalise violence against women. Numerous international conventions and instruments demand that all forms of sexual violence be prohibited, regardless of the state of a perpetrator's mind when disregarding a survivor's autonomy.

64 In addition, there are a considerable number of diverse and open democratic societies which have taken steps to enact and reform legislation to ensure that the Amos defence can no longer excuse criminal liability.

65 In line with section 39(1)(b) of the Constitution, we submit that it is both necessary and instructive to consider these international and comparative law developments. They demonstrate that requiring an accused to show a reasonable basis for believing in consent aligns with globally endorsed best practices and reflects the values of dignity, equality and freedom that lie at the heart of our constitutional order.

International law

66 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. Very recently, this 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.*"[45]

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

67 We now turn to provide a brief overview of the relevant international law on the issues raised in this case.

United Nations ("UN")

68 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:

68.1 "*adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women*";[46]

68.2 "*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*";[47]

68.3 "*take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise*";[48]

68.4 "*take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women*";[49]

[46] Article 2(b) (Our emphasis).
[47] Article 2(c).
[48] Article 2(e)
[49] Article 2(f).

68.5 "*repeal all national penal provisions which constitute discrimination against women*".[50]

69 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*."[51]

70 Moreover, 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 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*".[52]

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

71.1 "*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*";[53]

[50] Article 2(g).
[51] Article 3.
[52] Article 5(a).
[53] Article 4(c).

71.2 "*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*";[54]

71.3 "*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*".[55]

72 Importantly, the Declaration defines violence against women by reference to its <u>effects</u> on the survivor (i.e. not the state of mind of the perpetrator):

> "*For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that <u>results in, or is likely to result in</u>, 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.*"[56] (Our emphasis)

[54] Article 4(d).
[55] Article 4(f).
[56] Article 1.

73 In 2017, the Committee on the Elimination of Discrimination against Women ("the Committee") issued its General Recommendation No. 35 on gender-based violence against women.[57]

74 The Committee made, among others, the following recommendations for States to:

74.1 "*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*"[58] (Our emphasis);

74.2 "*repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them*";[59]

74.3 "*in particular repeal … provisions that allow, tolerate or condone forms of gender-based violence against women… [and] all laws*

[57] Paragraph 25(a). 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)
[58] Paragraph 29.
[59] Paragraph 31.

that prevent or deter women from reporting gender-based violence";[60] (Our emphasis);

74.4 "*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*";[61]

74.5 "*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*".[62] (Our emphasis);

75 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.

76 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*".

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

[60] Paragraph 31(a) and (c).
[61] Paragraph 33.
[62] Paragraph 34.

"*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.... 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…"[63]

78 The latter recommendation was also urged in the 2009 UN Model Framework for Legislation on Violence against Women.[64]

79 The UN Model Rape Law regrettably does not address the required state of mind of the perpetrator. However, it does not require (as the Act presently does) that the perpetrator must have subjectively known that the other party was not consenting.

[63] Id, at para 8.9(b).
[64] 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.

80 In the context of war crimes, international law has evolved to impose liability for rape not only where the accused knew, but also where they 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*[65] *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.*"[66] (Our emphasis)

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

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[65] *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.
[66] *Gacumbitsi v The Prosecutor (Appeal Judgement)*, ICTR-2001-64-A, International Criminal Tribunal for Rwanda, 7 July 2006, at para 157.

(iii) The Accused intended to affect 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."[67]

82 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")

83 The African Charter on Human and Peoples' Rights, 1981 ("**African Charter**"), enshrines the rights to equality,[68] dignity,[69] security of the person,[70] and physical and mental health.[71] South Africa ratified it on 9 July 1995.

[67] *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.
[68] 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.*"
[69] 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*."
[70] Article 6: "*Every individual shall have the right to liberty and to the security of his person.*"
[71] Article 16(1): "*Every individual shall have the right to enjoy the best attainable state of physical and mental health.*"

84 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:

84.1 "*combat all forms of discrimination against women through appropriate legislative, institutional and other measures*";[72]

84.2 "*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*";[73]

84.3 "*integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life*";[74] and

84.4 "*take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist*";[75]

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

[72] Article 2(1).
[73] Article 2(1)(b).
[74] Article 2(1)(c).
[75] Article 2(1)(d).

85.1 "*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*";[76]

85.2 "*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*";[77]

85.3 "*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*";[78]

85.4 "*identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence*";[79]

85.5 "*punish the perpetrators of violence against women*";[80]

85.6 "*provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated*".[81]

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[76] Article 3(4).
[77] Article 4(2)(a).
[78] Article 4(2)(b).
[79] Article 4(2)(c).
[80] Article 4(2)(e).
[81] Article 25(a).

86 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 Violence.[82] In it, the African Commission "*urges state 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.*"

87 In 2017, the African Commission developed Guidelines on Combating Sexual Violence and its Consequences in Africa. It 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*."[83]

88 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,*

[82] Resolution 111 (XXXXII) 07.
[83] Guideline 7.

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."[84]

89 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:

89.1 "*enact and enforce legislation prohibiting <u>all forms</u> of gender-based violence*"[85] (Our emphasis);

89.2 "*review and reform their criminal laws and procedures applicable to cases of sexual offences and gender-based violence to: <u>(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</u>*"[86] (Our emphasis).

89.3 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*".[87]

90 For all the reasons set out above, the impugned provisions result in a breach by South Africa of its international law obligations.

[84] Guideline 39.1.
[85] Article 20(1)(a).
[86] Article 20(3).
[87] Article 32.

Comparative law

91 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.

92 The Constitution invites this Court to consider foreign law in interpreting the Bill of Rights in section 39(1) thereof. To this end, we draw the Court's attention to the following jurisdictions:

Canada

93 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,*
> *(ii) the accused's recklessness or wilful blindness, or*

(iii) any circumstance referred to in subsection 265(3)[88] or 273.1(2)[89] or (3)[90] 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."

New Zealand

94 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)*

[88] "*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*."

[89] "*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*."

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

United States of America

95 Many States within the United States have long held the position that, in order to exclude *mens rea* for rape, a belief in the presence of consent must be "honest and reasonable".[91]

United Kingdom

96 Under the common law, as explained by the House of Lords in 1975 in *Morgan*,[92] 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 they were not guilty of rape. This position was heavily criticised, but nonetheless codified in the Sexual Offences (Amendment) Act, 1976.

97 In 2003, however, England and Wales passed the Sexual Offences Act, which shifts from the criticised position under the common law, as explained in *Morgan*, The Act now defines 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*

[91] 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).

[92] *DPP v Morgan* [1975] 2 All ER 347.

(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)

98 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).

99 Northern Ireland and Scotland subsequently enacted similar laws.[93]

Conclusions on comparative law

100 In the High Court, the Minister contended that foreign jurisdictions which have adopted the objective test are not similar to South Africa as they were not "*homogenous societies*".[94] This was a surprising contention by virtue of it being patently wrong as a matter of fact and law because:

100.1 First, none of the jurisdictions discussed above are homogeneous in nature. This Court may take judicial notice of the fact that they are all diverse in race, religion and culture.

100.2 Second, the surreptitious claim that there are segments of South Africa's "*heterogenous*" population – presumably religious or

[93] Sexual Offences (Northern Ireland) Order, 2008, and Sexual Offences (Scotland) Act, 2009.
[94] Minister's Supplementary Answering Affidavit (High Court) at para 12 (CC Record Vol 4, p 361).

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.

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

102 This trend is in step with our 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 Gender-based Violence and Femicide ("**GBVF**") in the country.

JUST AND EQUITABLE RELIEF

103 The High Court rightly held that the Act is unconstitutional to the extent that it fails to criminalise sexual violence in circumstances where the perpetrator's belief in consent is both wrong and unreasonable. This finding flows directly from section 172 of the Constitution which requires courts to declare any legislative provision which is inconsistent with the Bill of Rights invalid.

104 The High Court was entitled to craft a just and equitable remedy and, in the face of an ongoing epidemic of sexual violence, justifiably did so by suspending its declaration of invalidity and by granting an interim reading-in. By granting the order which it did, the High Court prevented a lacuna that would otherwise leave survivors unprotected, while affording Parliament the opportunity to remedy the identified constitutional defects. We submit that should this Court confirm the declaration of invalidity, a suspension of the order of invalidity coupled with an interim reading to allow Parliament to correct the unconstitutionality, is necessary and appropriate. Should Parliament fail to correct the unconstitutionality in the 18-month suspension period, we submit that this Court should order that the interim reading in will become final.

105 We say so for the following reasons:

106 The reading-in contended for by the Embrace Applicants, is limited to requiring that an accused take reasonable steps to ascertain consent. It is narrowly tailored to address the defect without overstepping into Parliament's policymaking role, as contemplated in *National Coalition for Gay and Lesbian Equality*.[95]

[95] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (CC) at paras 67-68, where this Court stated:

> "*[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.*"

107 The necessity of suspending the declaration of invalidity was underscored by the authoritative principles set out by Petse AJ in *Mlungwana*.[96] Suspension is warranted in circumstances where:

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

107.2 There are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and

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

108 We submit that in this case, immediate invalidation would create uncertainty in an area of law whose clarity is essential for both complainants and accused persons. Second, there are various ways to address and cure the unconstitutional omission, so legislative input is necessary. Third, delaying immediate invalidity will not undermine survivors' rights, given that the High Court's interim reading-in provides a protective framework pending intervention by the Legislature.

109 To this end, we submit that reading-in is necessary and that the High Court was correct to have granted the interim reading-in which it did.

[96] *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) at para 105.

110 The reading-in that the Embrace Applicants seek itself is modelled on section 56(6) of the Act (dealing with child sexual abuse material). This was done in order to maintain fidelity to the legislative scheme chosen by Parliament and proposes the following insertion into section 56(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 all reasonable steps to ascertain that the complainant was consenting.*"

111 The Embrace Applicants also ask this Court to order that should Parliament fail to cure the constitutional defect within the 18 months suspension period, the interim reading in will become final.

112 It is an unfortunate reality that Parliament has not always managed to address constitutionally defective provisions timeously within the periods stipulated by this Court when a suspended declaration of constitutional invalidity has been made.

113 In this case, and on the High Court's order, the consequence of such a scenario would be that the impugned provisions within the Act – all dealing with consent-based sexual offences – would fall away after the suspended period comes to term. This would effectively mean that consent-based sexual offences would no longer be criminalised in South Africa. The effect that this would have on survivors and society at large is simply inconceivable.

114 The additional relief we seek is not uncommon in proceedings of this nature. For example, in *Qwelane v South African Human Rights Commission and Another*, this Court catered for the possibility of Parliament not amending the legislation within the period of suspension and made the following order:[97]

> "*(d) During the period of suspension of the order of constitutional invalidity, section 10 of the Equality Act will read as follows:*
>
> *. . .*
>
> *(e) The interim reading-in will fall away when the correction of the specified constitutional defect by Parliament comes into operation.*
>
> *(f) Should Parliament fail to cure the defect within the period of suspension, the interim reading-in in paragraph (d) will become final.*" (Our emphasis).

115 We therefore submit that this Court should make an order as sought in the Embrace Applicants' notice of motion in this Court.

116 We now proceed to consider CALS' appeal and highlight our view that the relief which it seeks may overstep the delicate balance between constitutionally mandated intervention and usurping the law-making function of Parliament.

[97] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC).

CALS' appeal

117 It is common cause between CALS and the Embrace Applicants that the Act, in its current form, is constitutionally untenable and requires urgent intervention by this Court in the form of declaratory relief.[98] Our primary point of difference is how this Court should seek to craft a just and equitable interim remedy pending intervention by Parliament.

118 In our submission, the Act's shortcomings are not a product of Parliament's decision to implement a consent-based framework in sexual violence cases. Rather, it is a more nuanced failure by Parliament to preclude a perpetrator from relying solely on their own subjective state of mind, when establishing the commission of a consent-based sexual offence.

119 CALS, on the other hand, takes issue with the consent model as a whole, suggesting that the "coercive control" model used in some comparative jurisdictions would be more suitable.[99] As we contended in the High Court, and for the reasons we set out below, the relief sought by CALS would require this Court to intrude upon the domain of the legislature to impose a policy choice which Parliament actively chose not to adopt.

120 The use of the consent model is inherently a policy decision which has been adopted by Parliament. Respect for the separation of powers requires that

[98] CALS' Founding Affidavit (CC Appeal) at para 43 (CC Record Vol 1, p 86).
[99] CALS' Founding Affidavit (CC Appeal) at paras 53-86 (CC Record Vol 1, pp 89 – 98).

the Court be circumspect when foraying into the law-making sphere. What this means in practice is that once the nature of the constitutional infringement has been established, the relief should do no more than "*strike effectively*" at the source of the infringement.[100]

121 On the separation of powers, this Court in *National Coalition for Gay and Lesbian Equality* noted as follows:

> "*In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading-in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.*"[101] (Our emphasis)

122 Furthermore, in *ITAC*, this Court cautioned that judicial intervention must be restrained in its approach:

> "*Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of*

[100] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC).
at para 45.
[101] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (CC) at para 75.

government exercise their authority within the bounds of the Constitution."[102]

123 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.

124 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.

125 We submit that substituting "*consent*" with "*coercive control*" as a definitional element to consent-based sexual offences unduly shifts the legislative policy choice which underpins the Act. While we take no issue with CALS' desire to take proactive steps to cure the constitutional defects in the Act, the issue is that a wholesale departure from the consent-based system necessarily constitutes a departure from a legitimate legislative policy choice. As indicated in *National Coalition* above, courts must strive to be as faithful as possible to the legislative design, especially where the intention of the lawmaker is sufficiently discernible.

[102] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 95.

126 Moreover, as stated in *ITAC*, courts must be cautious not to usurp the policymaking powers of the legislature. We submit that the proposal advanced by CALS would place the Court in precisely this impermissible position.

127 We therefore submit that CALS' appeal be dismissed.

CONCLUSION AND COSTS

128 In conclusion, this case represents an opportunity for this Honourable Court to uphold the Constitution's promise of dignity, equality, and freedom for all persons, particularly victims and survivors of sexual violence. The perpetuation of the Amos defence within the Act, reflects an outdated and constitutionally untenable approach to consent. By confirming the High Court's declaration of invalidity and adopting the proposed interim reading-in, this Court will ensure that survivors of sexual violence are afforded the protection and justice to which they are constitutionally entitled. This approach not only aligns with South Africa's domestic constitutional obligations but also fulfils its international commitments to eradicate gender-based violence and promote substantive equality.

129 For all the reasons above, we respectfully submit that this Court should confirm the High Court's order and grant the additional relief sought by the Embrace Applicants.

130 The Embrace Applicants have brought this application in good faith, seeking to vindicate the constitutional rights of victims and survivors of sexual violence. They should be entitled to recover their costs from the State should this Court confirm the order and remain shielded from an adverse costs order if unsuccessful. [103]

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26 January 2025

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