

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: **CCT 314/24 & 315/24**

In the application for admission
as *amici curiae*:

**CENTRE FOR HUMAN RIGHTS,
UNIVERSITY OF PRETORIA**

First Applicant for admission
as *amicus curiae*

**PSYCHOLOGICAL SOCIETY
OF SOUTH AFRICA**

Second Applicant for admission
as *amicus curiae*

In re matter CCT 314/24:

EMBRACE PROJECT NPC

First Applicant

INGE HOLTZRÄGER

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

In re matter CCT 315/24:

**CENTRE FOR APPLIED LEGAL
STUDIES**

Applicant

and

EMBRACE PROJECT NPC

First Respondent

INGE HOLTZRÄGER

Second Respondent

**MINISTER OF JUSTICE
ANDCORRECTIONAL
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

NOTICE OF MOTION

TAKE NOTICE that the first to second applicants for admission as amicus curiae (“the Amici applicants”) hereby make application to this Court in terms of Rule 10 subrule (1) and (2) of the Rules of the Constitutional Court in the following terms:

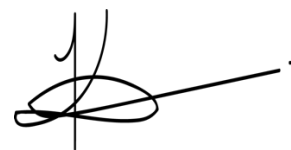
1 That the Amici applicants be admitted as amicus curie in this matter.

2 That the Amici applicants be granted leave to file written submissions and present oral submissions at the hearing of this matter.

TAKE FURTHER NOTICE that the consent letters for the first to fourth applicants are attached as annexures marked LK2 and LK3. Included is the correspondence to parties seeking the consent as annexure LK4.

TAKE NOTICE that the Amici applicants will accept notice and service of all documents in these proceedings at the address set out below.

DATED AT JOHANNESBURG ON THIS 17th DAY of FEBRUARY 2025.



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RIGHTS**

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AND TO: POWER & ASSOCIATES
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AND TO: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

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Second Respondent

LKN

**PRESIDENT OF THE REPUBLIC
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Third Respondent

In re matter CCT 315/24:

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Applicant

and

EMBRACE PROJECT NPC

First Respondent

INGE HOLTZRÄGER

Second Respondent

**MINISTER OF JUSTICE
ANDCORRECTIONAL
SERVICES**

Third Respondent

Fourth Respondent

**MINISTER IN THE PRESIDENCY FOR
WOMEN, YOUTH, AND PERSONS
WITH DISABILITIES**

Fifth Respondent

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

FOUNDING AFFIDAVIT

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I, the undersigned,

LLOYD KUYEYA

do hereby make oath and state that—

1. I am an adult male and the Assistant-Director of the Centre for Human Rights, University of Pretoria, whose registered address is at Lynnwood Road, Hatfield, Pretoria.
2. The facts contained herein are true and correct and are, unless otherwise stated or indicated by the context, within my personal knowledge.
3. Where I make submissions of a legal nature, I do so on the advice of my legal representatives.
4. Where I make use of headings in this affidavit I do so for the purposes of convenience only and do not thereby intend to limit any facts stated under a particular heading only to the topic covered by such heading.
5. I am duly authorised to institute this application and to depose to this affidavit on behalf of the *amici curiae* applicants. To demonstrate this point, I annex hereto a copy of the Resolutions passed by the Executive Committee of the Centre for Human Rights, University of Pretoria and the Psychological Society of South Africa which authorises me to depose to this affidavit as “LK1”.

LK1

PURPOSE OF THIS APPLICATION

6. The purpose of this application is to seek leave from this Honourable Court for the first and second applicants to be admitted as *amici curiae* in this matter, as contemplated by Rule 10(6) of the Constitutional Court Rules. The first and second *amici curiae* applicants are—
 - 6.1. The Centre for Human Rights, University of Pretoria (“CHR”); and
 - 6.2. Psychological Society of South Africa (“PsySSA”)(collectively “the *amici* applicants”).

7. In addressing the Court to seek leave to be admitted as *amici curiae*, this affidavit shall address—
 - 7.1. the background to these proceedings;
 - 7.2. the *amici* applicants’ interest in the matter;
 - 7.3. the consent of the parties;

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7.4. the submissions that the *amici* applicants intend to advance if admitted as *amici curiae*; and

7.5. the novelty of the *amici* applicants' submissions, and their relevance to these proceedings.

BACKGROUND

8. On 30 September 2024, the Gauteng Division of the High Court ("High Court") handed down an order which declared the provisions of sections 3, 4, 5, 6, 7, 8, 9 read with section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 ("SORMA") unconstitutional, invalid and inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The impugned provisions were declared unconstitutional, invalid and inconsistent with the Constitution to the extent that they do not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question, alternatively, to the extent that the provisions permit a defence against a charge of sexual violence where there is no reasonable belief in consent.
9. The declaration of invalidity was suspended for a period of 18 months to afford Parliament the opportunity to cure the constitutional defects in the impugned provisions of SORMA. Pending the enactment of the remedial legislation, the High Court ordered a reading in into SORMA.

10. On 21 October 2024, the Embrace Project NPC and Inge Holtzräger (“the first and second applicant”) filed an application in this Court under case number CCT314/24, in terms of Rule 16(4) of the Constitutional Court Rules.
11. Also on 21 October 2024, the Centre for Applied Legal Studies (“the third applicant”) filed an application in terms of Rule 19 of the Constitutional Court Rules alongside Section 172(2)(d) of the Constitution, which sought leave to appeal, and further sought to set aside or vary the High Court order under case number 2022/048656, as follows—
 - 11.1. Sections 3, 4, 5, 6, 7 and 11A of SORMA are declared to be inconsistent with the Constitution and invalid to the extent they unjustifiably limit the rights of women, children and gender-diverse people to equality;
 - 11.2. During the period of suspension, the words “coercive measures” are to be read into sections 3, 4, 5, 6, 7 and 11A of the Act, where the words “*without consent*” currently appear;
 - 11.3. The reading-in is to become permanent should Parliament fail to cure the defect within 24 months from the date of judgment or an extension period.

12. On 27 November 2024, the Chief Justice issued directives relating *inter alia*, to the consolidation of the two applications and the filing of written arguments by the parties.
13. In line with Rule 10 of the Constitutional Court Rules, the *amici* applicants now institute this application within the allocated timeframe to seek leave from the Court to be admitted as *amici curiae* in the consolidated application. If admitted as *amici curiae*, the *amici* applicants request the leave of this Court to file written submissions, and to advance oral argument at the hearing of the matter.
14. This application is made in respect of both the confirmation application and the leave to appeal application. The *amici* applicants' submissions are intended to ensure that this Court has a full and holistic understanding of consent from a psycho-legal perspective, which – it is submitted – will be of assistance in both applications.

THE *AMICI* APPLICANTS' INTEREST IN THE MATTER

15. The *amici* applicants have a substantial interest in these proceedings owing to the focus of our work, and our respective expertise. We seek to provide this Court with the psychological background pertinent to sexual assault cases, including an understanding of the psychological dynamics that inform how consent is expressed, and more particularly why lack of consent often cannot be expressed.

The nature of the *amici* applicants

The Centre for Human Rights, University of Pretoria ("CHR")

16. CHR – the first *amici* applicant – is an academic institution based at the University of Pretoria, and a non-governmental organisation. A pioneer in human rights education in Africa, the CHR works towards greater awareness of human rights; the wide dissemination of publications on human rights; and the improvement of the rights of women, people living with HIV, indigenous people, sexual minorities and other disadvantaged or marginalised persons or groups across the continent.
17. The CHR has a dedicated Women's Rights Unit which works towards the realisation of the rights of women and girls in Africa, especially against the backdrop of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.
18. Over the years, the CHR's focus has broadened to encompass diverse issues of human rights law in Africa and international development law in general. Most recently, the CHR has collaborated with the Clooney Foundation for Justice under its Waging Justice for Women project which seeks to advance the rights of women and girls through strategic litigation and legal advocacy.
19. The CHR has participated in numerous cases before United Nations human rights treaty bodies, African Union human rights bodies, and the Economic Community of West African States Court of Justice. The CHR has also

intervened as *amicus curiae* at the Inter-American Court of Human Rights, the East African Court of Justice and the High Court of South Africa. Notably, the CHR appeared as the ninth respondent in *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53.

The Psychological Society of South Africa ("PsySSA")

20. The second *amici* applicant is the PsySSA. This organisation was established in January 1994 as an amalgamation of various professional bodies that existed prior to that date. PsySSA was conceived as a transformative entity, intended to assist in navigating the rapidly evolving political and social landscape of the time. PsySSA has become a vocal and authoritative voice in the discipline of psychology, advocating for the recognition of matters pertaining to the mental health and psychosocial well-being of South Africans.
21. Since its inception, PsySSA has been unwavering in its commitment to the resolution of critical human development challenges within South Africa. PsySSA has been instrumental in the post-apartheid era, ensuring that psychological services and perspectives are available, in the knowledge that these are integral to the nation's growth and healing.
22. PsySSA engages in continuous dialogue with various government entities, legislative bodies, and stakeholders in the private and civil sectors, aiming to influence and inform policies that impact upon South Africa's dynamic socio-economic landscape from a psychological perspective. As the premier

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representative body for psychology professionals in South Africa, PsySSA lobbies actively on behalf of its members, emphasising the importance of psychology as both a rigorous scientific discipline and a practice of relevance to all facets of human life. Furthermore, PsySSA facilitates a robust networking platform for its members, fostering collaboration and community within the field of psychology.

23. PsySSA's commitment to academic excellence is exemplified by its publication of the South African Journal of Psychology, a quarterly journal that stands as the preeminent psychology periodical on the African continent.
24. Notably, PsySSA appeared as the second *amicus curiae* in this Honourable Court in the case of *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22.

The interest of the *amici* applicants

25. The work of the first *amicus* applicant, CHR, is aimed at advancing the rights of women, girls and sexual and gender minorities, amongst other things. Further, one of the tools used by the organisation for this purpose is strategic litigation. Given that rape is a gendered phenomenon, and the dynamics around the expression of consent are gendered, the present application is also gendered. In large part, it is an attempt by the applicants to protect and advance the rights of women, girls, sexual and gender minorities. It is therefore also a matter that falls squarely within the CHR's sphere of interest.

In supporting the two consolidated applications, CHR seeks to advance one of its own core goals.

26. Similarly, there is significant overlap between the focus of this consolidated application and the work of the second *amicus* applicant, PsySSA. The consolidated application concerns the requirement of lack of consent for a finding of rape, and this is intrinsically and fundamentally linked to the manner in which lack of consent is expressed, and therefore also to the psychological background of consent and its expression. It is PsySSA's view that the legal questions posed by the consolidated application cannot be answered fully without the use of a psychological lens to understand the dynamics surrounding trauma. PsySSA is therefore highly interested in this application and seeks to make use of its psychological expertise to assist with it.

CONSENT OF THE PARTIES TO BE ADMITTED AS AMICUS CURIAE

27. The *amici* applicants' attorneys filed a letter on 12 December 2024 requesting consent to be admitted as *amicus curiae*. The first and second applicants consented to the application on 17 December 2024, with the third applicant granting their consent on 14 January 2025. These letters granting consent are attached as "LK2" and "LK3". We confirm that we have not received any responses from the respondents.
28. A copy of the *amici* applicants' letter seeking consent to be admitted as *amicus curiae* is attached marked "LK4".

THE *AMICI* APPLICANTS' POSITION AND THEIR INTENDED SUBMISSIONS

29. In light of the *amici* applicants' expertise, we intend to provide this Honourable Court with a unique, medical and evidence-based perspective on consent and trauma. The points we seek to make are novel, have not been canvassed by the parties and would assist the court in making a determination in the two applications. Ultimately, our position is in support of all applicants. We seek a holistic, intersectional and survivor-centric approach to the prosecution of sexual violence, and our submissions are intended to bolster those of the applicants in both applications. However, we support the relief sought by the applicants in separate and distinct ways.
30. The *amici* applicants were admitted as *amici curiae* in the High Court, and maintain that the submissions made before that Court are highly relevant to these proceedings. Before this Honourable Court, we emphasise the following submissions that were made to the High Court—
- 30.1. Responses to sexual assault and rape are heterogenous among survivors of such abuse. In particular, victims and survivors may experience a range of peritraumatic responses to sexual assault, which are hardwired into the human psyche. Drawing from pertinent psychological academic literature, the *amici* set out these various peritraumatic responses before the High Court, by analysing the subjective feelings experienced by victims and survivors who have

such responses, and further by exploring the concept of the “defence cascade”.

- 30.2. Hardwired peritraumatic responses to sexual assault and rape can incapacitate victims, rendering them unable to articulate their lack of consent, either verbally or through non-verbal behaviour. Before the High Court, the *amici* applicants demonstrated that the current understanding of consent in rape and sexual assault cases does not take this into account.
- 30.3. In addition, the defence of mistaken belief does not account for the reality of peritraumatic responses to sexual assault and rape. The defence of mistaken belief is more likely to be raised when survivors exhibit more “passive” peritraumatic responses to rape and sexual assault, as their inability to express lack of consent is not sufficiently recognised. Therefore, in the case of such “passive” peritraumatic responses, it is also less likely that a victim or survivor will be able to resist the defence of mistaken belief, despite the fact that they did not in fact consent. In this context, the *amici* applicants submitted to the High Court that there is a particular need to consider peritraumatic responses – and their effect on the ability to communicate consent or non-consent – when the defence of mistaken belief is raised.

31. Before this Honourable Court, the *amici* applicants seek to add to the above submissions as follows—

31.1. First, if admitted, the *amici* applicants will advance submissions on the interpersonal and intrapersonal factors that shape how consent is communicated and understood. This nuanced assessment of consent requires an intersectional approach that accounts for the diverse and overlapping identities of survivors of sexual assault. Accordingly, the *amici* applicants seek to submit that – within a criminal legal framework and in the context of sexual violence – consent must be evaluated through a survivor-centric lens that prioritises the survivor’s perspective and the ways in which their intersecting identities shape the manner in which they approach, express, refuse or withdraw their consent. In brief, a Court’s consideration of consent must be holistic, survivor-centric and intersectional.

31.2. In particular, there are nuanced differences between how consent might play out in heterosexual as compared to non-heterosexual dynamics. If admitted, the *amici* applicants seek to make submissions in this regard.

31.3. In this context, the *amici* applicants will demonstrate the manner in which a nuanced understanding of consent may assist the first and second applicants, by enriching the concept of objective consent. The *amici* applicants seek to provide guidance on factors that must be

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considered to ensure that the test for consent is holistic, survivor-centric and intersectional.

31.4. Further, the *amici* applicants will seek to establish the complexity, slipperiness and difficulty of the concept of consent. It follows that the requirement that victims and survivors prove lack of consent presents an unfair, unrealistic, and at times insurmountable barrier. This may assist the third applicants.

31.5. The *amici* applicants will situate this phenomenon in relevant South African judgments, to demonstrate the impact of the current understanding of consent in rape and sexual violence cases, and the need to expand this understanding to factor in peritraumatic responses and ensure that consent is considered in a manner that is holistic, survivor-centric and intersectional.

32. In summation, the *amici* applicants' submissions intend to assist the Court with a nuanced and technical understanding of consent from a psychological perspective in the context of sexual violence cases. The *amici* applicants seek to tether this psychological perspective firmly to South Africa's legal framework and the manner in which sexual violence is prosecuted, which is central to the case before the Court.

THE RELEVANCE AND NOVELTY OF THE SUBMISSIONS TO BE ADVANCED

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33. The submissions that the *amici* applicants seek to make are technical, medical and scientific. They will be based on non-legal academic literature that this Honourable Court, with respect, may otherwise not have access to. Further, the *amici* applicants' expertise in the fields of gender dynamics and psychology will allow them to assist this Court in interpreting the complex scientific concepts which, we submit, are central to this application. Therefore, the submissions that the *amici* applicants seek to make are distinct, relevant and novel. It is submitted that they will be of assistance and useful to this Honourable Court.

CONCLUSION

34. The *amici* applicants have set out a range of submissions relating to the concept of consent which, when read together, will assist the Court in adjudicating the constitutionality of the impugned provisions. Further, and importantly, these submissions may assist in the development of our criminal law to better protect survivors of sexual abuse.
35. In addition, for all the reasons given above, the *amici* applicants' submissions are relevant, novel and distinct from the submissions advanced by the parties.
36. In the circumstances, the *amici* applicants assert that they have established a case for this Honourable Court to grant leave for their admission as the first and second *amicus curiae*.

WHEREFORE, the amici applicants seek the relief as prayed for in the Notice of Motion to which this affidavit is attached.

[Handwritten signature]

LLOYD KUYEYA

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Brooklyn on this the 14 day of February 2025, 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.

[Handwritten signature]
[Handwritten initials]

COMMISSIONER OF OATHS

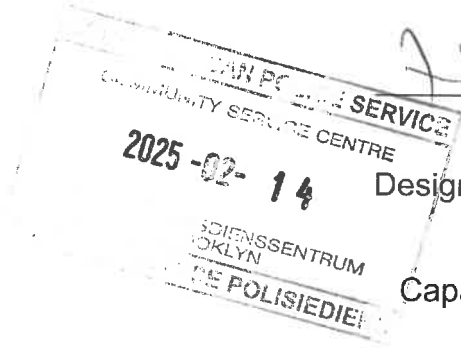
Full names: *[Handwritten name]*

Business address: *[Handwritten address]*

[Handwritten name]

Designation: *[Handwritten designation]*

Capacity: *[Handwritten capacity]*



Resolution of Executive Committee of the Centre for Human Rights

In respect of intervention in *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others (Case Number 314/24, Constitutional Court of South Africa)* and *Centre for Applied Legal Studies v Embrace Project NPC and Others (Case number 315/24, Constitutional Court of South Africa)*

1. The Centre for Human Rights has become aware of the application in *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others (Case Number 314/24, Constitutional Court of South Africa)* and *Centre for Applied Legal Studies v Embrace Project NPC and Others (Case number 315/24, Constitutional Court of South Africa)*. The Executive Committee of the Centre for Human Rights notes that:
 - a. The proceedings being brought before the Constitutional Court in Case Number 314/24 seek to obtain an order confirming the orders made by the Gauteng local division in *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others (Case Number. 04856/22)*, which found sections 3,4,5,6,7,8,9, and 11(A), read with section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Act, 32 of 2007 (SORMA) unconstitutional to the extent that these provisions do not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question, alternatively, to the extent that the provisions permit a defence against a charge of sexual violence where there is no reasonable objective belief in consent.
 - b. The proceedings being brought before the Constitutional Court in Case Number 315/24 seek to appeal against the judgment in which the order above was made, and to obtain an order setting aside or varying the orders made in that case. In particular, the Applicants seek an order finding that sections 3,4,5,6,7, and 11A of SORMA are unconstitutional. The two cases will be heard together before the Constitutional Court; and
 - c. The Centre for Human Rights and the Psychological Society of South Africa seek to collectively apply as amici curiae to these proceedings.
2. The Executive Committee authorises the Centre for Human Rights to apply for admission as an amicus curiae in proceedings concerning the confirmation of the order of the constitutional invalidity of sections 3,4,5,6,7,8,9, and 11(A), read with section 1(2) of the SORMA, and the

appeal proceedings appealing the judgment of the Gauteng local division, and seeking an order that finds sections 3,4,5,6,7, and 11A of SORMA unconstitutional.

3. The Executive Committee confirms that Lawyers for Human Rights has been instructed to act as the attorneys of record for Centre for Human Rights.
4. The Executive Committee authorises and mandates Nkatha Muringi and/or Lloyd Kuveya to depose to any necessary affidavits and take all steps which may be deemed necessary in the abovementioned proceedings, and to the extent necessary ratifies any actions taken by the aforementioned person on behalf of Centre for Human Rights in these proceedings.
5. On 10 February 2025 it was agreed by a majority of the Executive Committee members via email to authorise such intervention as a party in the above matter.

Date: 10 February 2025

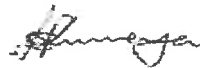
Nkatha Muringi

Executive Committee member:



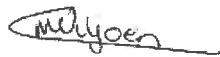
Lloyd Kuveya

Executive Committee member:



Carole Viljoen

Executive Committee member:



Samuel Chamboko

Executive Committee member:



POWER AND ASSOCIATES
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Date: 17 December 2024

Your ref: 01/SLP/2024

Our ref: PSIEP-202122

TO: LAWYERS FOR HUMAN RIGHTS

C/o Kayan Leung

87 De Korte Street, South Point CNR, Braamfontein, Johannesburg, 2017

Tel: +27(0)11 339 1960

E-mail: kayan@lhr.org.za

Dear Kayan Leung,

THE EMBRACE PROJECT NPC AND OTHERS // MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CCT 314/24) | REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE

1. Your correspondence dated 12 December 2024, in which you sought consent for the Centre for Human Rights and the Psychological Society of South Africa to intervene as *amicus curiae* in the above matter, refers.
2. We have been instructed to advise that our clients grant their consent for your clients to intervene as *amicus curiae*.
3. As you may already be aware, on 27 November 2024 the Constitutional Court issued the following directions in this matter:
 - 3.1. The applications in CCT 314/24 *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others* (the confirmation application) and CCT 315/24 *Centre for Applied Legal studies v Embrace Project NPC and Others* (the appeal application) are consolidated and will be heard together.

Director: MJ Power B.A., LL.B., LL.M. (Wits) | **Associate Director:** T Power B.A., LL.B., LL.M. (Wits) | **Senior Associates:** S Khumalo LL.B. (Wits), T Lloyd LL.B. (Wits), LL.M. (Edin.) | **Candidate Legal Practitioners:** C Chitengu B.A., LL.B. (UJ), C Dehosse B.A., LL.B. (Stell.), LL.M. (UCT) | **Researcher:** W Trott B.A (UGA), M.A. (Sciences Po Paris) | **Technologist:** K Nwana | **Office Manager:** J Rashid | **Office Support:** S Mncube | Power & Associates Incorporated is a law firm registered with the Legal Practice Council of South Africa (F18433) and a personal liability company registered in the Republic of South Africa (2018/071686/21).

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- 3.2. The Applicants must file a paginated record in accordance with Rules 20(1) and (2) of the Constitutional Court Rules by Monday, 20 January 2025.
- 3.3. Written arguments, including on the merits of the appeal, must be lodged by the Applicants by Monday, 27 January 2025 and by the Respondents by Monday, 10 February 2025.
4. The directions are attached for your records.
5. We trust the above is in order.

With kind regards,



POWER & ASSOCIATES

Per: Tina Power | *Associate Director*

E-mail: tina.power@powerlaw.africa

COPIED TO: CENTRE FOR APPLIED LEGAL STUDIES

Third Applicant in CCT 314/24 and Applicant in CCT 315/24.

C/o Sheena Swemmer

University of Witwatersrand, 1st floor PJ Du Plessis Building, West Campus,
Johannesburg, 2025

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COPIED TO: MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES

Second Respondent in CCT 314/24 and Fourth Respondent in CCT 315/24

36 Hamilton Street Arcadia, Pretoria, 0007

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COPIED TO: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent in CCT 314/24 and Fifth Respondent in CCT 315/24

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E-mail: robert@presidency.gov.za | Geofrey@presidency.gov.za |

malebo@presidency.gov.za

ENDS.

Subject: Re: REQUEST FOR CONSENT TO BE ADMITTED AS AMICI CURIAE IN THE MATTER OF THE EMBRACE PROJECT, NPC AND OTHERS V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CCT 314/2024)
Date: Tuesday, 14 January 2025 at 07:56:46 South Africa Standard Time
From: Sheena Swemmer
To: Kayan Leung
CC: Tina Power, S'lindile Khumalo, MMatubatuba@justice.go.za, MRatshilima@justice.gov.za, Lesego Itumeleng, ministry@dwypd.gov.za, geofrey@presidency.gov.za, malebo@presidency.gov.za, Charne Tracey

Dear Kayan

Sorry for the delay.

CALS consents and welcomes your clients' intervention.

Best

Sheena

Sent from my iPhone

On 12 Dec 2024, at 14:02, Kayan Leung <kayan@lhr.org.za> wrote:

Good day,

The above matter refers.

Kindly acknowledge receipt of this correspondence for your attention.

Kind regards,

Kayan Leung (she/her)

Head: Strategic Litigation Programme

Grant Liaison

Kutlwanong Democracy Centre Tel: (012) 320 2943

357 Visagie Street

Fax: (012) 320 2949

Pretoria

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signature_1568602459



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12 December 2024

ATT: POWER & ASSOCIATES
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Tel: 082 491 6646
Sheena.Swemmer@wits.ac.za
Ref: Embrace/Swemmer

ATT: MINISTER OF JUSTICE AND CORRECTIONAL SERVICES
First Respondent
C/o State Attorney Pretoria
316 Thabo Sehume Street
Cnr Thabo Sehume and Francis Baard Streets
SALU Building
PRETORIA, 0001
Ref: 5209/2022/Z92
Tel: +27 12 309 1693
Email: MRatshilima@justice.gov.za ; MMatubatuba@justice.gov.za

**ATT: MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS
WITH DISABILITIES**
Second Respondent
36 Hamilton Street Arcadia
PRETORIA, 0007
Tel: +27 12 359 0011 / +27 82 042 4151

LK A

E-mail: ministry@dwypd.gov.za / lesego.itumeleng@dwypd.gov.za

ATT: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
Third Respondent
Union Building
Government Avenue
PRETORIA, 0002
Tel: +27 12 300 5403 / +27 82 578 6484
E-mail: presidentrsa@presidency.gov.za; Geoffrey@presidency.gov.za;
malebo@presidency.gov.za;

Dear Sir/Madam/Mx,

RE: REQUEST FOR CONSENT TO BE ADMITTED AS *AMICI CURIAE* IN THE MATTER OF THE EMBRACE PROJECT, NPC AND OTHERS V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CCT 314/2024)

1. We refer to the above application and act on behalf of:
 - 1.1 The Centre for Human Rights, University of Pretoria ("CHR"); and
 - 1.2 The Psychological Society of South Africa ("PSYSSA").
2. Our clients seek your respective clients' written consent to be admitted as *amici curiae* in the above matter and to make written and oral submissions, as contemplated in Rule 10 of the Constitutional Court.

Our clients' interest in the matter

3. Our clients hold a substantial interest in these proceedings owing to their respective expertise:-
 - 3.1 The CHR is distinctively positioned as an academic department and a non- governmental organisation that combines academic excellence and effective activism to advance human rights, including the rights of women in Africa. The CHR is a pioneer in human rights education in Africa and works towards a greater awareness of human rights, the wide dissemination of publications on human rights in Africa, and the improvement of the rights of women, people living with HIV, indigenous peoples, sexual minorities and other disadvantaged or marginalised persons or groups across the continent.
 - 3.2 PSSYSA is a national professional association that has been a vocal and authoritative advocate for the discipline of psychology on matters pertaining to the mental health and psychological well – being of South Africans. PSSYSA is also home to a wide range of specialised divisions,

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including the Sexuality and Gender Division and the Trauma and Violence Division. The Sexuality and Gender Division of PSYSSA aims to promote a psychological understanding of the fields of sexuality and gender diversity whilst the Trauma and Violence Division aims to promote the minimisation of violence in society and psychological harm due to exposure to potentially traumatic events.

- 4 Our clients intend to assist the Court with submissions that are novel in the proceedings, and which directly relate to the issue of gender-based violence and the prosecution of sexual assault cases.

Our clients' proposed submissions if admitted as *amici curiae*

5. If admitted as *amici curiae*, our clients will advance, *inter alia*, submissions relating to:-
 - 5.1. The various ways that a survivor may respond in situations of sexual assault, as informed by an in - depth consideration of studies in the field of psychology;
 - 5.2. The manner in which these various responses affect a survivor's ability to refuse and/or withdraw consent;
 - 5.3. How these responses, and their subsequent effect on the expression, withdrawal or the lack of consent, affects the prosecution of sexual assault cases where the test is the subjective belief of the perpetrator; and
 - 5.4. The nuanced effect of the above in the context of intimate partner relationships, encompassing both heterosexual and non-heterosexual dynamics.

Prejudice to the parties

6. We are advised that the record has not yet been filed and parties have not filed their Heads of Arguments for the appeal by the third applicant. We are further advised that the matter has not yet been set down for hearing. Our clients' intervention as *amici curiae* will therefore not cause a delay in the proceedings or the adjudication of the main application. Accordingly, there shall be no prejudice suffered by any of the parties.

Conclusion

7. We kindly request that you revert to us with your written consent to our client's admission as *amici curiae* by **Monday, 20 January 2025**. We further kindly request that you indicate your willingness to accept service of all further documents and/ or processes from our clients electronically via e-mail.

8. We trust that the above is in order and look forward to receiving a positive response to our request. For any queries, please contact kayan@lhr.org.za.

Yours faithfully,



LAWYERS FOR HUMAN RIGHTS

Per: Kayan Leung | *Attorney*

Email: kayan@lhr.org.za

Address: 87 De Korte Street, South Point CNR, Braamfontein
Johannesburg

Tel: 011 339 1960

Ref: 01/SLP/2024

LK.n