

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: 314/24 & 315/24

In the application to be admitted as an amicus curiae
in their capacity as trustees for the time being

ANIEKAH GAMIET
DEIDRE LOUISE SMYTHE
NOXOLO PATIENCE SILEVU
JAMEELAH OMAR
SIPHOKAZI MTHATHI
REBECCA CHRISTANTIA HLABATAU

*Applicant for admission as
amicus curiae*

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

And 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

**NOTICE OF APPLICATION FOR ADMISSION AS AMICUS CURIAE IN TERMS
OF RULE 10(4)**

PLEASE TAKE NOTICE THAT the applicant, the Women's Legal Centre Trust makes application to this Honourable Court for an order in the following terms:

1. Admitting the Women's Legal Centre Trust as an *amicus curiae*;
 2. Granting the Women's Legal Centre Trust leave to file written submissions;
 3. Granting the Women's Legal Centre Trust leave to present oral argument at the hearing;
- and
4. Further and/or alternative relief.

PLEASE TAKE NOTICE FURTHER that the affidavit of **BRONWYN PITHEY** and the annexures thereto will be used in support of this application.

PLEASE NOTICE FURTHER that the applicant has appointed the offices of the Women's Legal Centre care of Bowman Gilfillan 11 Alice Lane, Sandton, Johannesburg as the address at which the applicant will accept notice and service of all process and documents in these proceedings.

DATED at Cape Town on this 04 day of April 2025.



WOMEN'S LEGAL CENTRE

Attorneys for the application for admission

as *amicus curiae*

TEL 021 424 5660

Ref: B Pithey

Email: Bronwyn@wlce.co.za /

Aretha@wlce.co.za /

andrea@wlce.co.za

BOWMAN GILFILLAN

Correspondent attorneys for the Applicant

11 Alice Lane, Sandton, Johannesburg

Tel: +27 11 669 9000 / +27 11 669 9541

Email: bongumusa.sibiya@bowmanslaw.com

Ref: B Sibiya

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT

TO: POWER & ASSOCIATES

Attorneys for the First and Second Applicant

First Floor, 20 Baker Street, Rosebank Johannesburg, 2196

Tel: 0108227860

Email: tina@powersingh.africa

slindile@powersingh.africa

legal@powersingh.africa

Your Ref: PSIEP-202122

Service by email

AND TO: CENTRE FOR APPLIED LEGAL STUDIES

Attorneys for the Third Applicant

University of Witwatersrand

1st Floor PJ Du Plessis Building West campus Johannesburg

Tel: 0824916646

Sheena.Swemmer@wits.ac.za

Ref: Embrace/Swemmer

Service by email

AND TO: 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: +27123091693

Email: MRatshilima@justice.gov.za

MMatubatuba@justice.gov.za; ERamethape@justice.gov.za

Service by email

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

WITH DISABILITIES

Second Respondent

36 Hamilton Street Arcadia

PRETORIA,0007

Tel: +27123590011/+27820424151

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

Sipho.seakamela@women.gov.za

Service by email

AND TO: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

Union Building

Government Avenue

PRETORIA,0002

Tel: +27123005403/+27825786484

Email: presidentrsa@presidency.gov.za;

robert@presidency.gov.za

Geofrey@presidency.gov.za

malebo@presidency.gov.za

Service by email

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: 314/24 & 315/24

In the application to be admitted as an *amicus curiae*
in their capacity as trustees for the time being

ANIEKAH GAMIET
DEIDRE LOUISE SMYTHE
NOXOLO PATIENCE SILEVU
JAMEELAH OMAR
SIPHOKAZI MTHATHI
REBECCA CHRISTANTIA HLABATAU

*Applicant for admission as
amicus curiae*

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



And 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

FOUNDING AFFIDAVIT

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND CONTEXT	3
II. THE WLC TRUST'S INTEREST IN THIS MATTER.....	5
<i>Advocacy and law reform</i>	5
<i>Relevant judicial involvement</i>	7
III. POSITION TO BE ADOPTED BY THE WLC TRUST	10
IV. THE WLC TRUST'S INTENDED SUBMISSIONS	11
<i>S v Coko</i>	11
<i>Outline of submissions</i>	12
V. PROCEDURAL REQUIREMENTS AND CONDONATION	14
VI. CONCLUSION	16

For

I, the undersigned

BRONWYN PITHEY

do hereby make oath and state that:

1. I am a senior legal practitioner employed as such at the Women's Legal Centre Trust situated 5 St Georges Mall, Cape Town City Centre, Cape Town. I head the Applicant's programmatic area on the Right to be free from Violence.
2. The WLC Trust is a registered as both a non- profit and public benefit organisation
3. The WLC Trust has duly resolved to institute these proceedings and has authorised me to do so on its behalf. I depose to this affidavit on behalf of the WLC Trust. The resolution adopted by the WLC Trust Board of Trustees on 3 April 2025 is attached as "BP1".
4. The facts contained in this affidavit are both true and correct and, unless otherwise indicated by statement or context, fall within my personal knowledge.
5. Where the context indicates that I rely on the truth of information conveyed to me by others, I confirm that I have no reason to doubt the veracity of my sources and I verily believe such information to be true and correct, save as expressly stated.

I. INTRODUCTION AND BACKGROUND CONTEXT

6. On 30 September 2024, the North Gauteng Division of the High Court, Pretoria ("High Court"), declared 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') to be unconstitutional, invalid and inconsistent with the Constitution 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.

BP

7. The declaration of invalidity was suspended for a period of 18 months to allow the constitutional defects to be remedied by Parliament, with the following interim remedy:

7.1. During the period of suspension, the following words shall be read into the Act:

‘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 objectively reasonable steps to ascertain that the complainant consented to sexual conduct in question.’ (my underlining)

7.2. The declaration of invalidity and reading in shall operate only with prospective effect from the date of the High Court’s order and shall have no effect on conduct which took place before the date of the order.

8. On 21 October 2024, The Embrace Project and Ms Inge Holzträger (‘Ms Holzträger’) made application to this Court for, *inter alia*, confirmation of the High Court’s orders.
9. On the same day, the Centre for Applied Legal Studies (‘CALS’) applied for leave to appeal against the High Court’s refusal to (a) declare the continued inclusion of ‘*consent*’ as a definitional element in sections 3, 4, 5, 6, 7 and 11A of SORMA and in the common law to be inconsistent with the Constitution and invalid; and (b) as an interim remedy, to read in the words ‘*coercive measures*’ into sections 3, 4, 5, 6, 7 and 11A of the Act, where the words ‘*without consent*’ appear.
10. On 27 November 2024, the Chief Justice issued directives in terms of which the two applications were consolidated, and the parties were directed lodge their written arguments as follows:
- 10.1. The applicants, on or before Monday 27 January 2025; and
- 10.2. The respondents, on or before Monday 10 February 2025.
11. The WLC Trust applies, in terms of Rule 10(6) of the Constitutional Court Rules, to intervene as *amicus curiae* in the above consolidated matters.

II. THE WLC TRUST'S INTEREST IN THIS MATTER

12. One of the core objectives of the WLC Trust is to advance and protect the human rights of women and girls in South Africa.
13. The WLC Trust was founded in 1998 and, in 1999, opened the doors of the Women's Legal Centre ("the WLC"). The WLC is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, education and training. It remains the only dedicated women's rights legal centre of its kind in South Africa.
14. The WLC provides legal assistance to women litigants free of charge. The WLC litigates on behalf of its clients and in the name of the WLC Trust (both as applicant and as *amicus curiae*). Our work is underpinned by the feminist principle of intersectionality, and we work towards achieving feminist jurisprudence which recognizes the rights of women to substantive equality.
15. One of the WLC's strategic focus areas is the Women's Right to be Free from Violence programme. The programme's vision is to achieve the recognition and implementation of an accessible and responsive justice system that protects and supports women who are survivors of violence.
16. The Programme's core objectives include ensuring a legislative framework that addresses violence against women in a manner that complies with international and constitutional obligations. It does this through advocacy, law reform and judicial intervention.

Advocacy and law reform

17. Over the last 20 years the WLC has, as part of its advocacy work, participated in and contributed to the development of sexual offences legislation and policy.
18. The WLC was part of the National Working Group on Sexual Offences, which was originally formed in 2004, which advocated for amendments to existing law and the

For A

development of new legislation to redefine and codify the common law on sexual offences. This process ultimately resulted in the promulgation of SORMA.

19. In 2008, following the promulgation of SORMA, members of the National Working Group on Sexual Offences launched the Shukumisa Campaign and shifted their focus to monitoring the implementation of the new legislation and the amendments in the Criminal Procedure Act relating to sexual offences.
20. As both part of the Shukumisa Campaign and as an independent organisation, the WLC has made numerous written and oral submissions to government role players on various amendments to laws that impact on sexual offences. In the past four years alone, the WLC has made written and oral submissions in respect of the following:
 - 20.1. Judicial Matters Amendment Bill 14 of 2016: Section 37 of the Judicial Matters Amendment Bill 14 of 2016 sought to amend section 55A of SORMA. The WLC directly influenced the wording of this section to ensure that designated Sexual Offences Court remain exclusively for the hearing of sexual offences matters. The Bill was passed and operationalised in 2020.
 - 20.2. Draft Regulations relating to Sexual Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In partnership with the Department of Justice and Constitutional Development and other civil society organisations, the WLC was influential in drafting a number of the regulations in respect of the amended section 55A of SORMA. The Regulations were operationalised 2020.
 - 20.3. Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill [B22 – 2019]: One of the clauses which WLC had drafted and recommended is now included in the amended Act (amending section 18 of the Criminal Procedure Act) which revives the right to prosecute all sexual offences which had lapsed before the commencement of the Act. The Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020 was operationalised in 2021.

For a

20.4. Three Amendment Bills introduced in Parliament in 2020 dealing with amendments to the Domestic Violence Act, the Criminal Matters (Sexual Offences and Related Matters) Amendment Act, and the Criminal Procedure Act (colloquially referred to as “The 3 GBV (Gender Based Violence) Bills”). The WLC made extensive written and oral submissions to the Portfolio Committee on Justice and Constitutional Development and has remained involved in the process since these Bills were promulgated in January 2022. The Acts came into operation in July 2022.

Relevant judicial involvement

21. Over the last 23 years, the WLC has actively influenced the development of feminist jurisprudence on sexual offences in our courts through litigation. Below are some examples of the WLC’s and the WLC Trust’s participation in cases involving violence against women or children:

21.1. In *S v Abrahams* 2002 1 SACR 116 (SCA), the WLC acted as the legal representative for the Rape Crisis Cape Town Trust, who was admitted as *amicus curiae* in the State’s appeal to the Supreme Court of Appeal. The appeal centred around the failure by the trial court to impose the minimum sentence applicable to a conviction of the rape of a girl under the age of 16.

21.2. In *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA), this Court admitted the WLC Trust as *amicus curiae*. In that matter, the WLC Trust supported the Appellant’s claim for damages after she had been raped by a person who had escaped from police custody. In 2009, the WLC represented another claimant, Ms Maritz, in a similar claim against the Minister of Safety and Security. That claim was settled before going to trial.

21.3. In *S v Ferreira and Others* 2004 (2) SACR 454 (SCA), the WLC represented Mrs. Ferreira, a victim of domestic violence, who was convicted of murdering her abusive husband. Mrs. Ferreira was ultimately successful in having the minimum sentence of life imprisonment reduced to 6 years.

Bv

- 21.4. In *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA), the WLC represented the appellant in successfully overturning the High Court's order upholding a special plea of prescription in respect of her claim based on sexual abuse which occurred between 1958 and 1967.
- 21.5. In *Van Der Merwe v The Road Accident Fund and Another* 2006 (4) SA 230 (CC), the WLC Trust was admitted as an *amicus curiae* in a constitutional challenge against legislation which prevented a spouse married in community of property from claiming patrimonial damages against the other spouse. This Court highlighted the WLC Trust's submissions relating to (a) the uneven power relations between men and women in marriages and (b) the need to consider the impugned provision in the context of the prevalence of domestic violence in South Africa and its gendered nature.
- 21.6. In *Director of Public Prosecution, Western Cape v Prins (Minister of Justice and Constitutional Development and two amici curiae intervening)* 2012 (2) SACR 183 (SCA), the WLC Trust was admitted as an *amicus curiae* in an urgent criminal appeal against a full court judgment of the Western Cape High Court in which that court held that, in the absence of an express penalty in SORMA, as it then read, the charge put to the accused failed to disclose an offence. Following this Court's judgment, the WLC Trust was also instrumental in facilitating appropriate amendments to SORMA.
- 21.7. In *Naidoo v Minister of Police* 2016 SACR 468 (SCA), the WLC Trust also assisted this court, as *amicus curiae*, by drawing the court's attention to various international instruments which require the State to take all measures necessary to provide effective protection to women against all forms of violence. Indeed, the SCA expressed its gratitude to the WLC Trust's counsel in that matter for the helpful submissions it made in relation to the State's obligations to combat, *inter alia*, violence against women that has the effect of impairing the quality of women's enjoyment of their fundamental rights and freedoms.

A
For

- 21.8. In *Democratic Alliance v Minister of International Relations and Cooperation* 2018 (6) SA 109 (GP) the WLC Trust made submissions on the state's constitutional and international law obligations to protect women from violence.
- 21.9. In *Levenstein and Others v Frankel and Others* 2018 (2) SACR 283 (CC), the WLC Trust presented evidence to illustrate, *inter alia*, the impact of sexual offences on adult survivors and how personal, structural and social factors disincentivise women from reporting sexual offences committed against them.
- 21.10. In *Segerman v Petersen and Others* (A177/21) [2022] ZAWCHC 1 (24 March 2022), the WLC represented the appellant in a successful appeal against a Magistrate's order, in terms of the Protection from Harassment Act 17 of 2011, prohibiting her from disclosing to anyone that the respondent, with whom she had previously been in a relationship, had raped her.
- 21.11. And, most recently, the WLC Trust was admitted and actively participated as *amicus curiae* in the matter of *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality intervening as Amici Curiae)* (248/2022) [2024] ZASCA 59 (24 April 2024), ('Coko'), discussed in more detail where I discuss the submissions the WLC Trust intends to make in these proceedings.
22. In addition to its participation in strategic litigation and its advocacy for legislative and policy reform, the WLC also assists women who approach it for assistance on an individual basis.
23. Given the WLC Trust's long-standing commitment against all forms of violence inflicted upon women, the WLC Trust has a manifest interest in this matter.



III. POSITION TO BE ADOPTED BY THE WLC TRUST

24. I have gone to some length to illustrate the WLC Trust's and the WLC's participation in all aspects of law reform surrounding sexual violence against women.
25. I did so, in part, to show that the position adopted in these proceedings was not taken lightly.
26. For the reasons discussed below, the WLC Trust does not support either of the applications before this Court. This position is informed by two main principles:
 - 26.1. While the WLC Trust and WLC are committed to fearlessly and relentlessly advocating for the rights of women, law reform must be consistent with the general principles of our criminal justice system; and
 - 26.2. Based on the WLC's work with victims of sexual violence, the amendments sought have the potential to be weaponised against women.
27. The WLC Trust did not participate in the proceedings in the High Court. At the time, although we were aware of the High Court proceedings, the WLC Trust directed its focus to support the DPP's appeal in the *Coko* proceedings. It did so primarily on the basis that, in the WLC Trust's view, the full bench judgment in *Coko v S* (and, indeed, the judgment in *S v Amos*) illustrate an incorrect application of our law, rather than constitutional deficiencies in the legislative framework.
28. The WLC Trust's view was vindicated by the SCA's judgment in *Coko*.
29. It therefore came as a surprise that the High Court's judgment was delivered some 5 months later, without any reference to the SCA's judgment in *Coko*.
30. In the absence of any opposition from the state respondents, the WLC Trust considers it important to present the arguments it presented to the SCA in *Coko* to this Court. Without the WLC Trust's contribution, this Court will not have the benefit of full and balanced

Br A

arguments on the issues underpinning both the confirmation application and CALS's application for leave to appeal.

IV. THE WLC TRUST'S INTENDED SUBMISSIONS

A. *S v Coko*

31. Primarily, the WLC Trust intends to argue that the SCA's judgment in *Coko* adequately addresses the mischief identified by the applicants in these proceedings.
32. As stated, the WLC Trust participated as *amicus curiae* in *Coko*.
33. The SCA's judgment in *Coko* concerned an appeal against the full bench of the Eastern Cape High Court in *Coko v S* [2021] 4 All SA 768 (ECG) (8 October 2021) ('*Coko v S*'). The full bench acquitted Mr Coko (who had been convicted of rape by the regional trial court) primarily on the basis that, contrary to the regional magistrate's finding, Mr Coko held a genuine (albeit mistaken) belief that the complainant consented to penetrative sex and, therefore, the State failed to prove that Mr Coko had the requisite *dolus* (intention) to be convicted of the crime of rape.
34. The Director of Public Prosecutions, Eastern Cape (Makhanda) appealed to the SCA. The SCA upheld the appeal and reinstated the conviction and sentence imposed by the regional magistrate.
35. At the hearing before the SCA, the WLC Trust argued that, in the context of rape, an accused acts with *dolus eventualis* if he foresees (based on the facts) the possibility that the complainant does not consent, but nevertheless continues (recklessly so), appreciating that he may be acting without the complainant's consent, therefore 'gambling' as it were [with the right to security of the person, bodily integrity and dignity] of the person against who the act is directed. Thus, although the test for intention is a subjective one, the specific test for intention in the form of *dolus eventualis* requires a court to consider the objective facts in order to determine the presence or absence of intention.

For A

36. It is apparent from the SCA's judgment in *Coko* that it relied on the WLC Trust's submissions in relation to the proper application of the test for *dolus eventualis* in rape cases.¹
37. Significantly, the present constitutional challenge was launched in the High Court little over a year after the full bench judgment in *Coko v S* and was argued before the SCA handed down judgment in *Coko*.
38. Although the SCA's judgment in *Coko* was handed down before the High Court's judgment in this matter, it is apparent from the latter that the SCA's judgment was not brought to the High Court's attention. To the contrary, the full bench judgment in *Coko v S* (and the implicit acceptance that that judgment represented the correct legal position in South Africa) featured prominently in the High Court's reasoning and decision to grant the declarations of invalidity that it did (see paragraphs 11, 12, 27, 41 and 68 of the High Court judgment).
39. In the WLC Trust's respectful view, the High Court might have found differently if the SCA's judgment in *Coko* was brought to its attention.
40. Indeed, the regional trial court in *S v Amos* (in which Ms Holzträger was the complainant) might have reached a different conclusion if the correct test for *dolus* had been applied. To the extent that the test was not properly applied, the error lies with the trial court and not with the current formulation of the impugned provisions.

B. Outline of submissions

41. In addition to discussing the general import and effect of *Coko*, the WLC Trust submissions will focus on:

41.1. the correct interpretation and construction of the defence of mistaken belief in consent in sexual offences matters;

¹ *Coko* paras 62 to 64.

Bo

- 41.2. the requirements of *dolus eventualis* and why they are sufficient to find a perpetrator guilty, when taking into account the objective facts of a case, where such individual alleges that they held the mistaken and/or unreasonable belief that the complainant had given consent to penetrative intercourse;
- 41.3. a comparative analysis of foreign jurisdictions, with an emphasis on how the defence of mistaken belief in consent in rape cases has been addressed and how they measure up to the impugned provisions, viewed in the light of *Coko*;
- 41.4. in the event that the declarations of invalidity are confirmed, why the legislature should be left to remedy the constitutional defects and, given the nature of the competing rights and interests at stake, the interim relief would be inappropriate.
42. In relation to the interim relief, specifically, the WLC Trust will submit that the High Court's introduction of a requirement to take '*objectively reasonable steps to ascertain the complainant's consent in question*', is impractical, unworkable and open to abuse by perpetrators to silence their victims.
43. Firstly, no clarity is provided as to what would constitute '*reasonable steps*'.
44. Secondly, and from a practical perspective, the proposed reading-in will place additional burdens on complainants in the following ways:
- 44.1. The prosecution, relying on the testimony of the complainant, will be required to prove what the reasonable steps would be in any particular case, and that the accused failed to take such steps;
- 44.2. Based on the WLC Trust's experience in domestic violence and harassment matters (which is so prevalent that the courts may take judicial notice thereof), the additional requirement to take '*reasonable steps*' will inevitably be weaponised (abused) by perpetrators of sexual offences to make retaliatory criminal complaints against their victims; an accused, charged with a sexual offence, might equally allege or query what steps the complainant took to ascertain *his* consent;

44.3. The additional requirement to take ‘*reasonable steps*’ might also lead would-be perpetrators to make repeated and incessant enquiries after their victim’s consent until the victim succumbs and submits to the pressure. This example is particularly likely in the context of intimate partner sexual violence.

45. In light of these risks, the WLC Trust will argue that the legislature must carefully research and weigh up the benefits and pitfalls of any provisions aimed at remedying the defects in the impugned provisions.

V. PROCEDURAL REQUIREMENTS AND CONDONATION

46. As stated above, the WLC Trust did not participate in the High Court proceedings. Given the outcome of the *Coko*, it was not immediately clear that our participation in these proceedings would be warranted.

47. Considering the State’s success in *Coko*, it was expected that the Minister of Justice and Constitutional Development (the First Respondent in these proceedings)² would rely on the SCA’s to defend the impugned provisions.

48. However, I was informed on 12 February 2025 that the state respondents had not lodged any written arguments by the deadline referred to in paragraph 10.2 above.

49. After being so informed, it was necessary for all relevant stakeholders to discuss the WLC Trust’s obligation to assist this Court and to step into the shoes of the state respondents, as it were. The nature of the intended submissions also required careful consideration and vigorous debate to ensure that the position adopted aligned with the WLC Trust’s mandate. For the reasons already discussed, we concluded that it does.

50. Accordingly, on 28 February 2025, the WLC Trust addressed correspondence to the applicants’ and respondents’ attorneys requesting the parties’ consent for the WLC Trust to be admitted as an *amicus curiae*. Copies of the correspondence is attached as “BP2”.

² Cited as Minister of Justice and Correctional Services herein.

Rv. 9

51. On 28 February 2025, CALS responded and confirmed their consent to the WLC Trust's admission as *amicus curiae* in both matters. CALS's response is attached as "BP3".
52. On 4 March 2025, the attorneys for the Embrace Project and Ms Holzträger confirmed their consent to the WLC Trust's admission as *amicus curiae*. Their response is attached as "BP4".
53. We have not received a response from the state respondents.
54. Unfortunately, it took quite some time to then prepare this application. Briefly, the reasons for the delay are the following:
- 54.1. As I mentioned, the WLC Trust's only seriously considered the need to participate in these proceedings in February 2025, after it became aware that the state respondents have adopted an apparently supine approach to the matter.
- 54.2. I travelled abroad for the United Nations Commission on the Status of Women in the United States from 16 March 2025 to 22 March 2025. Because I am head the WLC Trust's Right to be free from Violence programme, the application could not be prepared in my absence.
- 54.3. Upon my return, I fell ill (with a virus I suspect I contracted in transit) and could only commence working on this application during the week of 24 March 2025.
- 54.4. I provided a draft of the application to counsel to settle by the end of that week.
- 54.5. This application is in the name of the WLC Trust; legal prescripts require the Chair of the Board of Trustees (on behalf of the Trustees) to sign a resolution resolving to bring the application in the name of the Trust in terms of relevant Rules of Court. The trustees of the WLC Trust were only able to meet on 2 April 2025 to discuss and authorise the application, with the resolution being signed on 3 April 2025. The application was launched as soon as reasonably possible thereafter.
55. In the circumstances, I humbly submit that it would be in the interests of justice to condone the WLC Trust's non-compliance with the time periods set out in Rule 10.



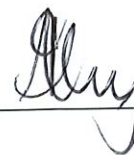
VI. CONCLUSION

56. For all the reasons discussed above, I submit that the WLC Trust has established grounds to be admitted as an *amicus curiae* in terms of Rule 10 of this Court's Rules.
57. In these circumstances, the WLC Trust submits that it has a clear, significant, direct and substantial interest in the issues raised in this matter and that it is able to assist the Court in submissions that are imperative to the Court's assessment of the relief sought.
58. The submissions to be advanced are relevant to the issues in dispute and are important to the proper understanding and application of *dolus eventualis* in the context of sexual offence cases; and why, therefore, the relief sought by the applicants is unwarranted.
59. The WLC Trust's submissions will not repeat the submissions made by other parties.
60. I therefore request that this Court grant the relief sought by the WLC Trust in its Notice of Motion.



BRONWYN PITHEY

I certify that the above affidavit was signed and sworn to at before me on this the 4th day of APRIL 2025 by the deponent after she declared that she knew and understood the contents of this affidavit, that she had no objection to taking the prescribed oath which she regarded as binding on her conscience and after she uttered the words: "I swear that the contents of this affidavit are true, so help me God".



COMMISSIONER OF OATHS

ISMET ALLY

COMMISSIONER OF OATHS R.S.A.
 PRACTISING ATTORNEY, CONVEYANCER, NOTARY, RSA
 S7BB | SMITH TABATA BUCHANAN BOYES ATTORNEYS
 9TH FLOOR, 5 ST GEORGE'S MALL
 CAPE TOWN

RESOLUTION OF THE WOMEN'S LEGAL CENTRE TRUST

The Trustees of the Women's Legal Centre ("Trust") resolve that:

1. The Trustees on behalf of the Trust will bring an application in terms of Rule 10 of the Constitutional Court Rules to intervene as *amicus curiae* in the matter of **EMBRACE PROJECT, NPC AND OTHERS // MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CCT314/2024); CENTRE FOR APPLIED LEGAL STUDIES // EMBRACE PROJECT NPC AND OTHERS (CCT315/24)**, in the **CONSTITUTIONAL COURT**, under the above case numbers in order to make submissions *inter alia* on:
 - 1.1 The precedent set in the Supreme Court of Appeal in *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality intervening as Amici Curiae)* (case no 248/2022) [2024] ZASCA 59 (24 April 2024).
 - 1.2 Unpacking the element of intention (*dolus*) as a subjective test and the application of *dolus eventualis* in the context of sexual offences.
 - 1.3 The appropriate/correct interpretation of the defence of mistaken belief in consent in sexual offences matters.
 - 1.4 The impact of the High Court's order, and declaration of invalidity in The Embrace Project, NPC And Others // Minister of Justice And Correctional Services And Others (CCT 314/2024); Centre for Applied Legal Studies // Embrace Project NPC And Others (CCT 315/24) on future prosecutions and the impact on the lived realities of women who seek justice through the criminal justice system.
 - 1.5 The order by the High Court judgment in Embrace in relation to the suspension and reading in, as at paragraphs 2, 3, and 4 of the order.
2. The Trustees hereby delegate authority to BRONWYN PITHEY AND CHARLENE CELESTE MAY who are Legal Practitioners at the Women's Legal Centre and an admitted advocate and attorney respectively:
 - 2.1 To take all necessary steps to sign all papers in order to bring the application on behalf of the Trust;
 - 2.2 Brief Counsel to argue the matter; and
 - 2.3 To take all necessary steps on behalf of the Trust to advance arguments in the application.

Dated at CAPE TOWN on this 3rd day of APRIL 2025.



ANIEKAH GAMIET

(Acting Chairperson of the Women's Legal Centre Trust)



Re:THE EMBRACE PROJECT, NPC AND OTHERS // MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CCT314/2024); CENTRE FOR APPLIED LEGAL STUDIES // EMBRACE PROJECT NPC AND OTHERS (CCT315/24)

From Andrea-Joy Jantjies <andrea@wlce.co.za>

Date Fri 2/28/2025 2:31 PM

To tina@powersingh.africa <tina@powersingh.africa>; slindile@powersingh.africa <slindile@powersingh.africa>; legal@powersingh.africa <legal@powersingh.africa>; Sheena.Swemmer@wits.ac.za <Sheena.Swemmer@wits.ac.za>; basetsana.koitsioe@wits.ac.za <basetsana.koitsioe@wits.ac.za>; MRatshilima@justice.gov.za <MRatshilima@justice.gov.za>; MMatubatuba@justice.go.za <MMatubatuba@justice.go.za>; ministry@dwypd.gov.za <ministry@dwypd.gov.za>; siphoseakamela@women.gov.za <siphoseakamela@women.gov.za>; lesego.itumeleng@dwypd.gov.za <lesego.itumeleng@dwypd.gov.za>; presidentrsa@presidencv.gov.za <presidentrsa@presidencv.gov.za>; Geofrev@presidencv.gov.za <Geofrev@presidencv.gov.za>; malebo@presidency.gov.za <malebo@presidency.gov.za>

Cc Bronwyn Pithey <bronwyn@wlce.co.za>; Aretha <aretha@wlce.co.za>

1 attachment (88 KB)

WLC_Consent letter for Embrace Project CCT 314.24 and CCT315.24 28.02.2025.pdf;

Good Day,
The above matter refers.

Kindly find attached correspondence of even date for your attention.

Kind Regards,



ANDREA-JOY JANTJIES
JUNIOR ASSOCIATE

2nd floor, 5 St Georges, St Georges Mall, Cape Town, 8001

+2721 424 5660 +2779 421 8197 www.wlce.co.za



Br A



**WOMEN'S
LEGAL
CENTRE**

2nd Floor, 5 St Georges
St Georges Mall
Cape Town
8001

+27 21 424 5660

info@wlce.co.za

www.wlce.co.za

28 February 2025

TO: POWER & ASSOCIATES

Attorneys for the First and Second Applicant

First Floor, 20 Baker Street, Rosebank

Johannesburg, 2196

Tel: 0108227860

E-mail: tina@powersingh.africa

slindile@powersingh.africa

legal@powersingh.africa

Your Ref: PSIEP-202122

AND TO: CENTRE FOR APPLIED LEGAL STUDIES

Attorneys for the Third Applicant

University of Witwatersrand

1st Floor PJ Du Plessis Building West campus Johannesburg

Tel: 0824916646

Sheena.Swemmer@wits.ac.za

Ref: Embrace/Swemmer

AND TO: 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

ACTING DIRECTOR: Charlene May

LEGAL PRACTITIONERS: B Pithey, C Blouws, A Stemele, K Motileni, K Managa

NPO NUMBER: 032-685 NPO PBO AND SECTION 18A: 930 00 242 VAT NUMBER: 419 025 3296



Handwritten signature

Tel: +27123091693

Email: MRatshilima@justice.gov.za;

MMatubatuba@justice.gov.za

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

Second Respondent

36 Hamilton Street Arcadia

PRETORIA,0007

Tel:+27123590011/+27820424151

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

AND TO: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

Union Building

Government Avenue

PRETORIA,0002

Tel:+27123005403/+27825786484

Email: presidentrsa@presidency.gov.za; Geofrev@presidency.gov.za

malebo@presidency.gov.za

**REQUEST FOR CONSENT TO BE ADMITTED AS *AMICUS CURIAE* IN THE MATTER: THE
EMBRACE PROJECT, NPC AND OTHERS // MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES AND OTHERS (CCT314/2024); CENTRE FOR APPLIED
LEGAL STUDIES // EMBRACE PROJECT NPC AND OTHERS (CCT315/24)**

1. We refer to the above application and appeal to the Constitutional Court under respective case numbers CCT314/2024 and CCT315/24, and to the Women's Legal Centre Trust intention to make application in terms of Rule 10 of the Constitutional Court Rules.

ACTING DIRECTOR: Charlene May
LEGAL PRACTITIONERS: B Pithey, C Blouws, A Stemele, K Motileni, K Managa

NPO NUMBER: 032-685 NPO PBO AND SECTION 18A: 930 00 242 VAT NUMBER: 419 025 3296



Bo

2. We act for and on behalf of the Women's Legal Centre Trust ("The Trust").
3. We write to you for the purpose of obtaining your respective clients' consent to the Trust's admission as *amicus curiae* in the above matter, as contemplated in Rule 10 of the Constitutional Court.
4. The Trust, if admitted as *amicus curiae*, intends to make both oral and written submissions.

The Women's Legal Centre's Interest in the matter:

5. The Women's Legal Centre Trust ("WLCT") was founded in 1998 and in 1999 opened the doors of the Women's Legal Centre ("the Centre" or "the WLC") which remains uniquely placed as the only dedicated women's rights legal Centre of its kind in South Africa. The Centre is an African feminist legal Centre that advances women's rights and equality through strategic litigation, advocacy, and education and training.

WLC submissions

The Women's Legal Centre intends to make submissions on the following issues:

6. The precedent set in the Supreme Court of Appeal in *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality intervening as Amici Curiae)* (case no 248/2022) [2024] ZASCA 59 (24 April 2024).
7. Unpacking the element of intention (*dolus*) as a subjective test and the application of *dolus eventualis* in the context of sexual offences.
8. The appropriate/correct interpretation of the defence of mistaken belief in consent in sexual offences matters.
9. The impact of the High Court's order, and declaration of invalidity in *Embrace Project NPC and Others v Minister of Justice and Correctional Services and Others* (04856/22)

ACTING DIRECTOR: Charlene May
LEGAL PRACTITIONERS: B Pithey, C Blouws, A Stemele, K Motieni, K Managa

NPO NUMBER: 032-685 NPO PBO AND SECTION 18A: 930 00 242 VAT NUMBER: 419 025 3296



Rv A

[2024] ZAGPPHC 967 (30 September 2024) on future prosecutions and the impact on the lived realities of women who seek justice through the criminal justice system.

10. The order by the High Court judgment in *Embrace* in relation to the suspension and reading in, as at paragraphs 2, 3, and 4 of the order.

Compliance with timelines and Condonation

11. Where the WLC has failed to meet the timelines for filing in terms of Rule 10 of the Constitutional Court, we intend to seek condonation for the delay. Our considered view is that condonation should be granted due to the important and public interest issues raised in this application.
12. Should the parties consent to our intervention, we undertake to adhere to all the timelines established and agreed to in the matter. We further confirm that our intervention will not cause the matter any undue delay. Instead, our intervention will greatly assist the Court in making its adjudication through the necessary gendered lens.

Women's Legal Centre's request

13. The WLC accordingly requests:
 - 13.1. That the WLC is given consent to enter as *amicus curiae* in these proceedings;
 - 13.2. That the WLC is given consent to lodge written submissions in this matter; and
 - 13.3. That the WLC is given consent to present oral submissions at the hearing of this matter.
14. We therefore kindly request that you advise in writing by 7 March 2025 whether your client consents to the WLC's intervention as an *amicus curiae*.

ACTING DIRECTOR: Charlene May
LEGAL PRACTITIONERS: B Pithey, C Blouws, A Stemele, K Motileni, K Managa

NPO NUMBER: 032-685 NPO PBO AND SECTION 18A: 930 00 242 VAT NUMBER: 419 025 3296



For A

15. We look forward to your positive response herein and should you have any queries, kindly contact Bronwyn Pithey, Andrea-Joy Jantjies or Aretha Louw at 021 424 5660 alternatively on Bronwyn@wlce.co.za Andrea@wlce.co.za and Aretha@wlce.co.za.

Yours sincerely,

WOMEN'S LEGAL CENTRE

BRONWYN PITHEY

LEGAL PRACTITIONER

ACTING DIRECTOR: Charlene May
LEGAL PRACTITIONERS: B Pithey, C Blouws, A Stemele, K Motileni, K Managa

NPO NUMBER: 032-685 NPO **PBO AND SECTION 18A:** 930 00 242 **VAT NUMBER:** 419 025 3296



RPV *AK*

"BP3"

 Outlook

Re: THE EMBRACE PROJECT, NPC AND OTHERS // MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CCT314/2024); CENTRE FOR APPLIED LEGAL STUDIES // EMBRACE PROJECT NPC AND OTHERS (CCT315/24)

From Sheena Swemmer <Sheena.Swemmer@wits.ac.za>

Date Fri 2/28/2025 2:45 PM

To Andrea-Joy Jantjies <andrea@wlce.co.za>

Cc tina@powersingh.africa <tina@powersingh.africa>; slindile@powersingh.africa <slindile@powersingh.africa>; legal@powersingh.africa <legal@powersingh.africa>; Petunia Koitsioe - Ex-Employee <basetsana.koitsioe@wits.ac.za>; MRatshilima@justice.gov.za <MRatshilima@justice.gov.za>; MMatubatuba@justice.gov.za <MMatubatuba@justice.gov.za>; ministry@dwypd.gov.za <ministry@dwypd.gov.za>; siphoseakamela@women.gov.za <siphoseakamela@women.gov.za>; lesego.itumeleng@dwypd.gov.za <lesego.itumeleng@dwypd.gov.za>; presidentrsa@presidency.gov.za <presidentrsa@presidency.gov.za>; Geofrev@presidency.gov.za <Geofrev@presidency.gov.za>; malebo@presidency.gov.za <malebo@presidency.gov.za>; Bronwyn Pithey <bronwyn@wlce.co.za>; Aretha <aretha@wlce.co.za>; Beatriz Nhlapo <beatriz.nhlapo@wits.ac.za>; Blossom Matzirofa <blossom.matzirofa@wits.ac.za>

Dear Andrea-Joy

Cals acknowledges receipt and consents to WLC's intervention in the modes set out in the letter.

Best

Sheena

Sent from my iPhone

On 28 Feb 2025, at 14:32, Andrea-Joy Jantjies <andrea@wlce.co.za> wrote:

CAUTION - This email originates from outside the University. Avoid clicking on any links or opening attachments unless you can verify the sender. REPORT SUSPICIOUS EMAILS TO: ithelp@wits.ac.za

Good Day,
The above matter refers.

Kindly find attached correspondence of even date for your attention.

Kind Regards,





"BP4"

e. legal@powerlaw.africa
t. +2710 822 7860
w. powerlaw.africa
a. 20 Baker Street, Rosebank,
Johannesburg, South Africa, 2196

This message/correspondence contains information which is confidential and/or legally privileged. It is intended for the addressee only. If you are not the addressee and you have received this message in error, you may not read, use, disseminate, distribute, or copy its information. Please notify us immediately and we shall arrange for the return of this message/correspondence at our own cost.

Date: 4 March 2025

Your ref:

Our ref: PSIEP-202122

TO: WOMEN'S LEGAL CENTRE

C/o Bronwyn Pithey

2nd Floor, 5 St Georges

St Georges Mall

Cape Town, 8001

Tel: +27(0)21 424 5660

E-mail: Bronwyn@wlce.co.za | Andrea@wlce.co.za | Aretha@wlce.co.za

Dear Bronwyn,

THE EMBRACE PROJECT NPC AND OTHERS // MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CCT 314/24), CENTRE FOR APPLIED LEGAL STUDIES // EMBRACE PROJECT NPC AND OTHERS (CCT315/24) | REQUEST FOR CONSENT TO BE ADMITTED AS *AMICUS CURIAE*

1. Your correspondence dated 28 February 2025, in which you sought consent for the Women's Legal Centre to intervene as *amicus curiae* in the above matter, refers.
2. We have been instructed to advise that our clients grant their consent for you to intervene as *amicus curiae*.
3. We trust the above is in order.

With kind regards,



POWER & ASSOCIATES

Per: Tina Power | Associate Director

E-mail: tina.power@powerlaw.africa

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.) | **Associate Designate:** C Dehosse B.A., LL.B. (Stell.), LL.M. (UCT) | **Candidate Legal Practitioners:** C Chitengu B.A., LL.B. (UJ), P Sekati B.Comm., LL.B., LL.M (UP), S Smit B.A., LL.B., LL.M. (Wits), W Trott B.A (UGA), M.A. (Sciences Po Paris), LL.B (UNISA) | **Technologist:** K Nwana | **Office Manager:** J Rashid B.Comm. (UNISA) | **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).

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

Tel: +27 11 717 8609

E-mail: Sheena.Swemmer@wits.ac.za | beatriz.nhlapo@wits.ac.za |
blossom.matizirofa@wits.ac.za

**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

Tel: +27 12 359 0011 / +27 82 042 4151

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

COPIED TO: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

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

Union Buildings, Government Avenue, Pretoria, 0002

Tel: +27 12 300 5403 / +27 82 578 6484

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

ENDS.

For A