

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: CCT314/24

In the matter between:

THE 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

and

CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA First *amicus curiae*

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA Second *amicus curiae*

Case No.: CCT315/24

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES Applicant

and

THE EMBRACE PROJECT NPC First Respondent

INGE HOLTZRÄGER	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
and	
CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA	First <i>Amicus Curiae</i>
PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Second <i>Amicus Curiae</i>

AMICI CURIAE'S WRITTEN SUBMISSIONS

Table of Contents

<i>INTRODUCTION</i>	4
<i>OVERVIEW OF SUBMISSIONS</i>	5
<i>THE PSYCHO-SOCIAL REALITY OF RAPE AND SEXUAL ASSAULT</i>	8
Peritraumatic responses as a barrier	8
Peritraumatic responses and the defence cascade	9
The defence cascade and consent	13
The broader psycho-social context as a barrier	14
Intersectionality and consent	14
Rape myths and consent	19
Sexual violence scripts and consent	22
Conclusion: the broader psycho-social context of consent	26
<i>THE RELIEF SOUGHT BY THE APPLICANTS</i>	27
The defence of mistaken belief and reasonability	27
Removing consent as a definitional element	33

“The complainant testified that she was *shell-shocked and that it felt as if she was in trance or had an out of body experience* The fact that the complainant *did not signify her opposition to the acts in any way* makes it impossible for the Court to be satisfied that the accused subjectively knew that he did not have consent to proceed with the acts.”¹ (Emphasis added.)

INTRODUCTION

1. On 31 March 2025, this Honourable Court granted an order admitting the Centre for Human Rights, University of Pretoria (“CHR”) and the Psychological Society of South Africa (“PsySSA”) as *amici curiae* (collectively “the *amici*”). The *amici* were directed to file written submissions relevant to the determination of only the issues arising from the consolidated application. These heads of argument have been prepared pursuant to this direction and constitute the *amici*’s written submissions.
2. The consolidated application fundamentally interrogates entrenched legal conceptions of consent in rape and sexual assault cases. Within the South African criminal law framework, consent is the central determinant for the prosecution of rape. The legal definition of rape relies on the absence of consent, so adjudication of rape cases rests on the survivor’s ability to prove that they did not consent.

¹ *S v Amos*, Regional Magistrates’ Court of Gauteng, Pretoria, Case No. 14/683/2018.

3. Psychological research into the complex dynamics that shape how survivors communicate, experience and understand consent has deepened our grasp of how non-consent may be expressed, and also why it cannot always be expressed. As illustrated in the excerpt above, the response of survivors during a sexual assault is particularly germane to the assessment of consent by our criminal courts. However, our current criminal law framework falls short of adequately accounting for the nuanced ways in which survivors may respond to sexual violence, as well as the factors that shape those responses.
4. It is within this context, that the *amici* submit that incorporating these psycho-social insights is crucial to developing a more nuanced and informed assessment of consent in the prosecution of rape.

OVERVIEW OF SUBMISSIONS

5. The *amici* seek to suggest a holistic, intersectional and survivor-centric approach to the prosecution of sexual violence, which is informed by the psycho-social context in sexual assault cases, as understood in the relevant academic literature. The current conception of consent in sexual assault cases rests upon a subjective understanding of consent, which assumes some outward expression of consent or non-consent. This is not aligned with the psycho-social reality of sexual assault cases, for at least the following reasons:

- 5.1. First, there are barriers to the expression of non-consent which are hardwired into the human psyche. Responses to sexual assault and rape are heterogenous among survivors of such abuse, but some of the most common peritraumatic responses to rape and sexual assault can incapacitate survivors, rendering them unable to articulate the fact that they do not consent.
- 5.2. Second, there are psycho-social factors which affect the manner in which consent is communicated by survivors of sexual assault, and even the manner in which consent is understood by those survivors. These factors are both interpersonal and intrapersonal, and include age, social status, racial identity and sexual orientation. The intersecting identities of survivors can create power imbalances that affect agency in sexual matters.
6. In this context, the current focus in our law on the subjective understanding of consent by an accused may present an insurmountable barrier to genuine survivors of sexual assault. The *amici* therefore seek to support the applicants in this matter. To be clear, the approach suggested by the *amici* supports all three applicants, albeit in different ways. Specifically:
 - 6.1. The *amici* support the relief sought by the Embrace Project NPC and Inge Holtzräger, that consent be considered objectively rather than subjectively in our law. An objective understanding of consent ought to include the reality of the barriers presented to survivors in the form of their own peritraumatic responses and their broader psycho-social

context, which impact upon – and may prevent – the expression of non-consent. Additionally, an objective understanding of consent ought to exclude the defence of mistaken belief, which operates to frustrate genuine charges of sexual assault by disregarding the truth of non-consent, and the various complexities affecting its expression. In this way then, the academic understanding of consent, which the *amici* present, supports the first and second applicants' arguments *for* an objective understanding of consent, and *against* the defence of mistaken belief.

- 6.2. The *amici* also support the relief sought by the Centre for Applied Legal Studies (“CALS”), that non-consent be removed from the definition of “rape” in our criminal law. The reality of survivor’s experiences – marked as they are by peritraumatic responses and intersectional impact – demonstrate the complexity, slipperiness and difficulty of the concept of consent. Therefore, the requirement that survivors prove lack of consent presents an unfair, unrealistic, and at times insurmountable barrier to securing justice for sexual offences.

7. It may appear strange that the *amici* seek to support all applicants in this matter, when the parties themselves appear at loggerheads with one another. To be clear, the academic literature surrounding consent provides support to both approaches suggested by the applicants, and so the *amici* are constrained to support both. Either is defensible from a psycho-social perspective. Either may be developed to align with the holistic, survivor-centred and intersectional approach to consent which the *amici* suggest. The only approach which cannot be countenanced – given the psycho-social background to consent – is the

current position in our law, which considers consent through the eyes of the accused and allows them the defence of mistaken belief, even though a survivor may not in fact have consented.

THE PSYCHO-SOCIAL REALITY OF RAPE AND SEXUAL ASSAULT

Peritraumatic responses as a barrier

8. It is submitted that the way in which sexual assault and rape are prosecuted must correspond to the psycho-social reality faced by survivors. Therefore, it must account for the fact of peritraumatic responses to sexual assault and rape, which may function as barriers to the expression of non-consent.
9. Peritraumatic responses are the reactions that occur during or immediately after a traumatic event, meaning they are a survivor's immediate response to a traumatic stressor such as a sexual assault.² Survivors of sexual assault may exhibit varied peritraumatic responses at the time of the sexual assault.
10. During a sexual assault, survivors may experience subjective feelings of fear, paralysis, numbness and detachment alongside behaviours such as passivity and extreme immobilization.³ Whilst some survivors of sexual assault may resist

² Gorman, Kaitlyn & Engel-Rebitzer, Eden & Ledoux, Annie & Bovin, Michelle & Marx, Brian, (2015), *"Peritraumatic Experience and Traumatic Stress."*, 10.1007/978-3-319-08613-2_73-1.

³ Moller A., Sondergaard H.P., & Helstrom L. (2017), *"Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression."*, Acta Obstet Gynecol Scand, 96, 932–938. DOI: 10.1111/aogs.13174.

their attacker, a substantial number of survivors do not.⁴ In part, the explanation for these differing responses lies in the physiological constitution of the survivor in question.

11. Compared to victims of crimes such as robbery and assault, it has been found that a higher percentage of rape survivors employed non-physically active behaviour responses. These non-physically active behaviour responses include, *inter alia*, attempts to reason with the perpetrator or crying.⁵ For some survivors of sexual assault and rape, not resisting the perpetrator is a survival mechanism to mitigate against further physical injury or death. Other survivors are unable to react at all during the attack.
12. Peritraumatic responses take various forms. Those that are hardwired into the human psyche make up the so-called “defence cascade”, which will be unpacked in more detail below.

Peritraumatic responses and the defence cascade

13. In response to traumatic stressors, human beings are equipped with a spectrum of hard-wired, automatically activated peritraumatic responses known as the “defence cascade”.⁶ The defence cascade is an important survival response,

⁴ Ibid (Moller et al., 2017).

⁵ Kaysen, D., Morris, M.K., Rizvi, S.L. & Restock, P.A. (2005), “Peritraumatic responses and their relationship to perceptions of threat in female crime victims.”, *Violence Against Women*, 11(12) 1515- 1535.

⁶ Kozłowska K, Walker P, McLean L, Carrive P. (2015). “Fear and the Defense Cascade: Clinical Implications and Management”, *Harv Rev Psychiatry*, 23(4), 263-87. doi: 10.1097/HRP.0000000000000065.

composed of progressive defence or fear responses that are seen in human beings who are exposed to traumatic events, such as rape.⁷

14. The defence cascade is characterised by physiological changes that can be experienced as being overwhelming and out of the survivor’s conscious control.⁸

It is commonly associated with peritraumatic reactions to physical and sexual assaults. The sequence of the defence cascade includes—

14.1. Arousal, which potentiates the body to deal with the perceived danger through the activation of the sympathetic nervous system.

14.2. Flight or fight responses, an active defence response characterised by co-ordinated emotional behavioural and physiological responses. This response is commonly activated in response to perceived imminent danger.⁹

⁷ Ibid (Kozłowska et al., 2015) See also:

Richter Levin, G., & Sandi, C. 2021, *“Labels matter: Is it stress or is it trauma”*, Translational Psychiatry, 11: 385. <https://doi.org/10.1038/s41398-021-01514-4>.

Mobbs D, Marchant JL, Hassabis D, Seymour B, Tan G, Gray M, Petrovic P, Dolan RJ, Frith CD. (2009), *“From threat to fear: the neural organization of defensive fear systems in humans.”*, *J Neurosci*, 29(39):12236-43. doi: 10.1523/JNEUROSCI.2378-09.2009.

Niermann, H. C. M., Figner, B., & Roelofs, K. (2017), *“Individual differences in defensive stress-responses: The potential relevance for psychopathology.”*, *Current Opinion in Behavioral Sciences* , 14, 94–101. <https://doi.org/10.1016/j.cobeha.2017.01.002>

⁸ Ibid (Kozłowska et al, 2015)

⁹ Ibid (Kozłowska et al, 2015)

- 14.3. The freeze response, also known as “attentive immobility”, which is a common transient adaptive response.¹⁰ It is characterised by hypervigilance, heightened attention, vigilance to threat cues and a tense body. The freeze response is also described as a “stop, look, listen” response.¹¹
- 14.4. Tonic immobility, also referred to as rape-induced paralysis or fright, which may occur when threats to life escalate. It is an involuntary temporary state involving physical immobility and the perceived inability to escape.¹² Tonic immobility is characterised by a loss of the ability to move or vocalise. From an evolutionary perspective, tonic immobility may occur to reduce the possibility of further attack.¹³ When this response is experienced, victims describe subjective feelings of fear, immobility, coldness, numbness, paralysis, being unable to call out or scream, shaking, eye closure, depersonalisation (feeling detached from oneself), derealisation (feeling detached from the surroundings/ environment), a sense of futility, hopelessness and inescapability.¹⁴

¹⁰ Ibid (Kozłowska et al, 2015)

¹¹ Bracha, H.S., Ralston, T.C. & Matsukawa, M.A. (2004), “Does “fight or flight” need updating?”, *Psychosomatics*, 45(5), 448-449

¹² Magalhaes AA, Gama CMF, Gonçalves RM, Portugal LCL, David IA, Serpeloni F, Wernersbach Pinto L, Assis SG, Avanci JQ, Volchan E, Figueira I, Vilete LMP, Luz MP, Berger W, Erthal FS, Mendlowicz MV, Mocaiber I, Pereira MG, de Oliveira L. (2021). “Tonic Immobility is Associated with PTSD Symptoms in Traumatized Adolescents”, *Psychol Res Behav Manag*, 14:1359-1369. doi: 10.2147/PRBM.S317343.

Volchan, E., Souza, G.G., Franklin, C.M., Norte, C.E., Rocha-Rego, V., Oliveira, J.M., Isabel A., David, I.A., Mendlowicz, M.V., Silva, E., Coutinho, F., Fiszman, A., Berger, W., Marques-Portella, C. & Figueira, I. (2011), “Is there tonic immobility in humans? Biological evidence from victims of traumatic stress”, *Biological Psychology*, 88(1), 13-19. <https://doi.org/10.1016/j.biopsycho.2011.06.002>.

Ibid (Moller et al., 2017).

¹³ Ibid (Mobbs et al., 2014).

¹⁴ Ibid (Moller et al., 2017).

Some survivors of sexual assault have been noted to exhibit extreme passivity during the assault¹⁵ and tonic immobility has also been described as a catatonic-like state.¹⁶ A Swedish study on tonic immobility during assault found that 70% of 298 rape survivors reported significant tonic immobility during the assault.¹⁷ It was noted by the authors of this study that within the criminal justice system, courts may interpret victim passivity as passive consent whereas the passivity merely represents a common biological survival reaction to a threatening situation. A number of studies have corroborated findings on tonic immobility during sexual assault.¹⁸

- 14.5. Collapsed immunity (threat induced fainting) which is characterised by a sudden drop in one's heart rate and blood pressure, leading to changes in consciousness. These changes in consciousness range from compromised consciousness to complete loss of consciousness.¹⁹

¹⁵ Ibid (Bracha, 2014).

¹⁶ Ibid (Moller et al., 2017)

¹⁷ Ibid (Moller et al., 2017).

¹⁸ Fusé, T John P. Forsyth, J.P., Brian Marx, B., Gordon G. Gallup, G.G. & Weaver, S. (2007), "Factor structure of the Tonic Immobility Scale in female sexual assault survivors: An exploratory and Confirmatory Factor Analysis", *Journal of Anxiety Disorders*, 21(3), 265-283.

¹⁹ Lempert T, Bauer M, Schmidt D. (1994), "Syncope: a videometric analysis of 56 episodes of transient cerebral hypoxia.", *Ann Neurol* 36:233–7.

The defence cascade and consent

15. Ordinarily, any ambiguity or ambivalence regarding whether consent was present during a sexual encounter is clarified through verbal or non-verbal communication.
16. However, as illustrated above, the hard-wired neurobiological responses associated with the defence cascade (fight/flight, freeze, tonic immobility, etc.) may render a survivor unable to express or articulate a verbal and/or behavioural response during the attack in question.
17. Specifically, the freeze response, tonic immobility, and collapsed immunity are characterised by non-active behaviours. Survivors who experience these responses within the defence cascade may, therefore, not be able to express their non-consent to a sexual act, either verbally or non-verbally.
18. The *amici*, therefore, submit that expressions of consent or non-consent are much more complex than simply saying “yes” or “no” and instead involve a diversity of behaviour,²⁰ including the responses associated with the defence cascade. The *amici* reiterate that hard-wired responses associated with the defence cascade are not within the conscious control of the survivor and may incapacitate them, rendering them unable to articulate their non-consent.

²⁰ Humphreys, T. (2007), “Perceptions of sexual consent: The impact of relationship history and gender.”, *Journal of Sex Research*, 44(4), 307-315.

The broader psycho-social context as a barrier

19. From the above, it ought to be clear that survivors of sexual assault must deal with barriers in the form of their own peritraumatic responses, when seeking to prosecute their abusers. Beyond these somewhat personal barriers, however, it must be remembered that survivors are located in a broader psycho-social context, which may also function as a barrier. There are a number of complex and intersecting variables that may affect survivors' agency in sexual matters. They may stop survivors from communicating their non-consent, and may even affect their understanding of consent. A subjective conception of consent – which has the law peering through the eyes of the accused – does not account for any of this complexity.

20. Below, some of the psycho-social variables impacting upon survivors will be explored. Intersectionality will be presented as a general framing concept, informing social and gender norms and lending form to phenomena such as rape myths and sexual scripts. All of these factors influence the way that survivors view consent in the context of sexual violence, and therefore also influence the way in which sexual violence can be prosecuted.

Intersectionality and consent

21. In 1989, Kimberlé Crenshaw coined the term intersectionality to describe the unique forms of discrimination faced by people living at the intersection of multiple marginalised identities, such as Black women who face both race-based

discrimination and sex-based discrimination.²¹ People may experience discrimination and disadvantage as a result of their gender, their race, their sexuality, their social status, and for many other reasons. However, discrimination and disadvantage appearing along multiple axes interact, so that the resulting experience is qualitatively different from discrimination and disadvantage along a single axis, and likely also quantitatively more extensive.²²

22. This Honourable Court has recognised the concept of intersectional discrimination in a number of cases forming part of our constitutional jurisprudence.²³ Perhaps most notably, in *Mahlangu and Another v Minister of Labour and Others*,²⁴ Victor J described the intersectional lens as follows:

“It means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination.”²⁵

²¹ Crenshaw, “Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Policies” (1989) *University of Chicago Legal Forum* 139. See more recently: Doyin Atewologun “Intersectionality theory and practice” (2018) *Oxford Research Encyclopaedia, Business and Management* (Oxford University Press: USA, 2020).

²² *Ibid* (Crenshaw, 1989).

²³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (12) BCLR 1517 (CC) at paras 78 and 113; *Hassam v Jacobs N.O.* [2009] ZACC 19; 2009 (5) SA 572 (CC); 2009 (11) BCLR 1148 (CC) at para 28; *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC) at para 27; *Brink v Kitshoff N.O.* [1996] ZACC (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 42; *S v Tshabalala* [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC) at paras 68-9 and fn 38; *Centre for Child Law v Media 24 Ltd* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at para 86.

²⁴ [2020] ZACC 24 (“*Mahlangu*”).

²⁵ *Mahlangu id* at para 76

23. The single axis of gender-based discrimination is relatively well understood and accepted, and this Honourable Court has held on multiple occasions that there is a duty to eradicate such discrimination.²⁶ It ought to be uncontentious that harmful social and gender norms, bias, historically unequal power relations between men and women, and violence against women have positioned women in a socially subordinate position to men, thereby limiting their legal, social, and economic opportunities.²⁷ These factors also contribute to the social acceptance of gender-based violence against women and the minimisation, or justification, of sexual violence committed against women.
24. As a result of such factors, it may be said that a woman's "individual capacity" to give consent may be inhibited by her relative "social incapacity", to coin the term.²⁸ Such "social incapacity" or invalidation may be evidenced by women paradoxically not being able to either express desire or refuse sex; not being believed if they report unwanted sex; or being pressurised into not reporting unwanted sex because of the perceived status of the male perpetrator.
25. However, gender is but one aspect of an individual's identity. Intersectionality helps us to understand patterns of sexual violence in a manner that is nuanced and individual. For one thing, intersectionality demonstrates the reality that those who live at the intersections of multiple marginalised identities are more likely to

²⁶ See for example: *AK v Minister of Police* [2022] JOL 52755 (CC) at paras 2-3, 117, 167; *Carmichele v Minister of Safety and Security* [2001] ZACC 22 at para [62].

²⁷ United Nations General Assembly A/RES/48/104 Declaration on the Elimination of Violence Against Women 23 February 1994

²⁸ See for example: Emily Setty "Young people and sexual consent: contextualising 'miscommunication' amid 'grey areas' of ambiguity and ambivalence" (2023) 25 *Sex Education* 140 at 142-3; Rachel Jewkes & Robert Morrell "Gender and sexuality: emerging perspectives from the heterosexual epidemic in South Africa and implications for HIV risk and prevention" (2010) 13 *Journal of the International AIDS Society* 1.

experience sexual violence.²⁹ For example, women living with disabilities experience twice the amount of violence women living without disabilities do, and women living with disabilities who identify as lesbian, gay or bisexual experience twice the amount of violence women living with disabilities who identify as heterosexual do.

26. In this way then, a survivor's experience of sexual assault is a product of their full identity, understood holistically as embedded in the broader social context. Arguably, it is this multi-layered and intersectional context that produces sexual violence. more than it is the single axis of gender-based discrimination. This appears from academic literature in the area, where it has been argued that:

“Scholarship on sexual violence reveals it to be both a cause and a consequence of inequality, not only on the basis of gender, but also along lines of race/ethnicity, class, sexuality, age, ability status, citizenship status, and nationality. . . . [V]iolence ‘may serve as the conceptual glue that binds’ systems of domination together. Sexual violence – of different forms, against different bodies, and across locations and time – maintains and creates power asymmetries. Those deploying sexual violence need not be consciously aware of its power for it to achieve these effects.”³⁰

²⁹ Ibid (Crenshaw, 1989); Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43 Stanford Law Review 1241 at 1249-50. See also: *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24; 2021 (1) BCLR 1 (CC) (“Mahlangu”)

³⁰ Elizabeth A. Armstrong, Miriam Gleckman-Krut and Lanora Johnson “Silence, power and inequality: an intersectional approach to sexual violence” (2018) *Annual Review of Sociology* 99 at 100.

27. It follows that sexual violence is closely linked to inequality, which is a product of multiple intersecting identities. Such identities must be geographically and historically situated, and this point takes on particular importance in South Africa. Many academic commentators have pointed to the links between our history of trauma and oppression under Apartheid, and the prevalence of gender-based violence in South Africa.³¹
28. However, the relevance of intersecting systems of discrimination in this matter stretches beyond the fact of sexual violence, or their contribution to its statistical extent. Importantly, the intersecting identities of survivors have a direct impact on the manner in which they express consent and non-consent, and even the way in which they understand consent. This may affect whether survivors seek to prosecute their abuser, whether they report the abuse, and even whether they consider it to have been abuse. A 2010 study on African American women in the USA who had experienced sexual assault held that these women – located as they are at the intersection of race- and gender-based discrimination – are less likely to disclose their assault or seek help for it.³² This was associated with a variety of factors, including “intrapyschic factors, the damaging effect of an unsupportive response to initial disclosure, stigmatization of African American female sexuality, apprehension regarding racism, and racial loyalty”.³³

³¹ See for example: Wonke Buqa “Gender-based violence in South Africa: a narrative reflection” (2022) *HTS Theological Studies* 78; AO Enaifoghe “Gender-based violence and the global gendered viewpoint approaches to building a peaceful South Africa” (2019) 10 *Journal of Social and Development Studies* 15; Sophie Allen “The importance of an intersectional approach to gender-based violence in South Africa” [unpublished thesis, 2018, Portland State University]; Lyn Snodgrass “The sins of the father: gender-based violence in post-apartheid South Africa” (2016) 14 *Commonwealth Youth and Development*.

³² Shaquita Tillman, Thema Bryant-Davis, Kimberly Smith and Alison Marks “Shattering silence: exploring barriers to disclosure for African American sexual assault survivors” (2010) 11 *Trauma, Violence and Abuse* 59.

³³ Id at abstract.

29. No similar study appears to have been done in South Africa as yet, but it is submitted that it is unthinkable that intersectional discrimination here does not impact upon survivors' responses to sexual assault, and their ability to seek redress.
30. To be clear, the *amici* do not wish to suggest that there is a closed list of factors which may affect survivors of sexual assault, such as the list arrived at in the study mentioned above. Rather, intersectionality is a framing concept which allows survivors of sexual violence to be considered holistically and placed in the centre of a court's analysis. The current subjective understanding of consent in sexual assault cases does not allow for a consideration of the positionality of the survivor. It does not consider how this positionality will have affected the survivor's ability to express their non-consent to sexual contact – how it may, in fact, have prevented them from expressing this non-consent. It is submitted that the only way to ensure that a case of sexual assault is fully and holistically considered by a court is through intersectional and survivor-centric analysis.

Rape myths and consent

31. In addition to the general impact of a survivor's broader psycho-social context on their agency in sexual matters, there are more specific psycho-social phenomena which may interfere with a survivor's understanding and communication of non-consent. The first of these is the phenomenon of "rape myths".
32. Rape myths – which are understood as cognitive schema that allow for harmful attributions to be made about the crime of rape, as well as victims and

perpetrators – may suggest that a perpetrator is not blameworthy because they have been allowed to reach a particular level of sexual arousal and therefore cannot control their actions.³⁴ Additionally, rape myths may perpetuate “real rape” stereotypes which involve the belief that a rape can only be seen as “legitimate” when it involves a sudden attack by an aggressive stranger with a weapon, and the survivor presents with active resistance and emotional trauma following the sexual assault.³⁵ This narrative, however, excludes most survivors’ experiences.

33. Globally, and in South Africa, research suggests that intimate partners are the most common perpetrators of sexual assault and rape. The greater the familiarity between victims and perpetrators, the greater the chance of victim blaming becomes. In comparison to survivors of “stranger rape”, survivors of acquaintance and marital rape are more commonly perceived to be culpable for the rape.³⁶
34. Rape myths consequently have a significant impact on the manner in which sexual assault is seen. More than that, however, rape myths influence the manner in which survivors view their own experience of sexual assault. Under the influence of the “real rape” myth, survivors are unlikely to view certain sexual encounters as lacking consent and constituting a rape.
35. Many sexual assault survivors evaluate their lived experience of sexual violence against an imaginary “violence” that they consider to be more “legitimate” or

³⁴ Hine, B., & Murphy, A. (2017). The impact of victim-perpetrator relationship, reputation and initial point of resistance on officers' responsibility and authenticity ratings towards hypothetical rape cases, *Journal of Criminal Justice*, 49,1-13. <https://doi.org/10.1016/j.jcrimjus.2017.01.001>

³⁵ Ibid (Hine et al., 2017)

³⁶ Gravelin C.R., Biernat, M. and Bucher, C.E. (2019). Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors. *Front. Psychol.* 9:2422. doi: 10.3389/fpsyg.2018.02422

“real”.³⁷ Survivors may also evaluate their lived experiences of sexual assault in terms of resistance characterised by “fighting back” and calling for help. Sexual assault survivors may, therefore, minimise their own lived experiences of sexual violence by defining “legitimate” or “benchmark” violence as consisting of extreme physical harm or external visible signs of injury.³⁸ Similarly, where survivors do not fight back or resist their attackers, they tend to reframe their experience as “unwanted sex”, rather than rape or sexual assault. For some survivors, these are psychological defences to minimise the sexual assault as a way of attempting to avoid psychic pain, stigma and trauma responses.

36. Accordingly, these erroneous “real rape” stereotypes may—

36.1. impede acquaintance rape survivors from acknowledging the rape as being a rape;

36.2. enable acquaintance rapists to engage in sexual violence while denying that the act constitutes rape.³⁹

37. The impact of rape myths on consent in sexual assault cases is not accommodated within the current legal framework. Given that rape myths play out specifically through the thinking of perpetrators of sexual assault, a subjective

³⁷ Bolton, R., Edwards, C., Leane, M. and Suilleabhain, F.O. (2023). ‘I’m not victim blaming, but...’: Young people’s discourses in understanding sexual violence against women. *Sociological Research Online*, 1-18. DOI: 10.1177/13607804231178673. See also: Anitha S, Jordan A, Jameson J, Davy Z. A. (2021), *Balancing Act: Agency and Constraints in University Students' Understanding of and Responses to Sexual Violence in the Night-Time Economy*. *Violence Against Women*, 27(11), 2043-2065. doi: 10.1177/1077801220908325.

³⁸ Ibid (Tarzia et al. 2024)

³⁹ Ibid (Ryan., 2011)

understanding of consent renders the impact of rape myths on consent invisible. Further, and in particular, the defence of mistaken belief is likely to present an automatic and insurmountable barrier to survivors of acquaintance rape and marital rape, even where the perpetrator's belief is entirely unreasonable.

Sexual violence scripts and consent

38. The second psycho-social phenomenon which the *amici* would like to bring to this Honourable Court's attention is that of "sexual scripting". It is submitted that this is a further factor that may affect a survivor's communication and understanding of consent, and which is not accommodated within the current legal framework surrounding sexual assault.
39. Sexual scripting theory posits that much like a movie script, sexual scripts provide direction for how individuals should and should not behave in particular sexual situations.⁴⁰ Sexual scripts are multifaceted and vary across the intrapsychic and interpersonal levels, as well as across cultural contexts. These sexual scripts are reinforced in the media, in magazines, and in depictions of pornography.⁴¹
40. Differences in gender socialisation lead to the adoption of certain sexual scripts. Sexual attitudes and behaviours exist within a broader social context, reflecting

⁴⁰ Siegel, J.A., Anderson, R.A., Silver, K.E. & Mitchell, T.L. (2021). Yes, (most) men know what rape is: A mixed methods investigation into college men's definitions of rape; Beres, M.A., 2014. Rethinking the concept of consent for anti-sexual violence activism and education. *Feminism & Psychology*, 24(3), 373-389. DOI: 10.1177/0959353514539652

⁴¹ Ibid (Siegel et al., 2021)

socio-culturally normative behaviours.⁴² Heteronormative sexual scripts have the effect of restricting women's sexual agency and expression and instead position women as "gatekeepers" or "limit setters" for sex. This discourages overt displays of sexuality by women, thereby positioning them as needing to be pursued, encouraged or coerced into having sex.⁴³

41. Sexual scripts between genders have been shown to be contributing factors in acquaintance rape and sexual coercion.⁴⁴ Sexual scripts normalise sexual violence against women and are particularly harmful when they coincide with rape myths that blame survivors of sexual violence, and minimise the actions of perpetrators.⁴⁵ One sexual script that is pervasive in South Africa is the notion that sexual violence is a normal aspect of women's lives, i.e. that sexual violence is to be expected.⁴⁶
42. In the context of LGBTQIA+ relationships, social stigma plays a significant role in perpetuating gendered violence. In LGBTQIA+ relationships, abusers may

⁴² Ibid (Beres, M.A., 2014); Ibid (Siegel et al., 2021)

⁴³ Crawford, M., & Popp, D. (2003). Sexual double standards: A review and methodological critique of two decades of research. *Journal of Sex Research*, 40(1), 13–26. <https://doi.org/10.1080/00224490309552163>;

Littleton, H. L., & Axsom, D. (2003). Rape and Seduction Scripts of University Students: Implications for Rape Attributions and Unacknowledged Rape. *Sex Roles: A Journal of Research*, 49(9-10), 465–475. <https://doi.org/10.1023/A:1025824505185>;

U.S. Littleton, H. L., & Dodd, J. C. (2016). Violent Attacks and Damaged Victims: An Exploration of the Rape Scripts of European American and African American College Women. *Violence Against Women*, 22(14), 1725-1747. <https://doi.org/10.1177/1077801216631438>.

⁴⁴ Ryan, K. M. (2011). The relationship between rape myths and sexual scripts: The social construction of rape. *Sex Roles: A Journal of Research*, 65(11-12), 774–782. <https://doi.org/10.1007/s11199-011-0033-2>

⁴⁵ Ryan, K. M. (2011). The relationship between rape myths and sexual scripts: The social construction of rape. *Sex Roles: A Journal of Research*, 65(11-12), 774–782. <https://doi.org/10.1007/s11199-011-0033-2>

⁴⁶ Tarzia L., Henderson-Brooks K., Baloch S., Hegarty K. (2024). Women Higher Education Students' Experiences of Sexual Violence: A Scoping Review and Thematic Synthesis of Qualitative Studies. *Trauma Violence Abuse*, 25(1), 704-720. doi: 10.1177/15248380231162976.

capitalise on a partner's fear of being stigmatised by threatening to "out" them to family, friends and co-workers if they do not remain in abusive relationships.⁴⁷ Abusers may capitalise on survivors of abuse who are already socially isolated, further isolating their victims and contributing to their abuse. Additionally, myths and expectations around typical intimate partner violence scenarios – of a cisgender man abusing his cisgender woman partner – may lead abusers to gaslight their LGBTQIA+ victims into thinking they cannot be victims of abuse due to their relationship not conforming to these stereotypes.⁴⁸

43. Sexual scripts create power imbalances, with men positioned as more dominant, active and entitled to sexual gratification.⁴⁹ It then follows naturally that women are passive recipients. Consequently, the expression of sexual desire by a woman constitutes a risk because any conduct thereafter is perceived as having been "wanted".
44. In summation, sexual scripts influence the manner in which survivors can think about sex and consent. They suggest that men should pursue sex whilst women are taught to be passive recipients. This fundamentally impacts the way that consent is understood and communicated. For example, a woman might not believe she has the right to express sexual desire, for fear of being judged as "easy". She may also believe that she cannot refuse unwanted sex for fear of

⁴⁷ Human Rights Campaign (2022), "Understanding Intimate Partner Violence in the LGBTQ+ Community", available at <https://www.hrc.org/resources/understanding-intimate-partner-violence-in-the-lgbtq-community>

⁴⁸ Human Rights Campaign (2022), "Understanding Intimate Partner Violence in the LGBTQ+ Community", available at <https://www.hrc.org/resources/understanding-intimate-partner-violence-in-the-lgbtq-community>

⁴⁹ See for example: Aryn A Benoit & Scott T Ronis "A qualitative examination of withdrawing sexual consent, sexual compliance, and young women's role as sexual gatekeepers" (2022) 34 *International Journal of Sexual Health* 577; Kayla Beare & Floretta Boonzaier "South African women's constructions of sexual consent" (2019) 11 *Psychology and Sexuality* 329.

being judged as “difficult”. In both instances a woman may fail to acquire a confident “grammar” around sexual negotiations, rendering her more vulnerable in sexually ambiguous situations where there are gender and power imbalances. These gender and power imbalances can be exacerbated if the man is in a position of physical power, economic power or hierarchical power (for example if a pastor proposes sex in a religious context on the grounds that God has ordained such an encounter, or a male teacher proposes sex for marks to a female learner).

45. The cumulative effect of the above is that, rather than being approached as a mutual, clear and affirmative process, consent in sexual encounters is often guessed or assumed based on harmful stereotypes and misconceptions. This influences the way that individuals recognise when consent is missing, or do not recognise this, which can lead to situations where sexual violence is normalised or even excused.
46. Effectively, some survivors may not realise that what is happening to them is in fact sexual assault and, consequently, they may not communicate their non-consent. Likewise, perpetrators may not believe that what they are doing is harmful and will then persist despite the absence of consent.
47. It must be noted that harmful heteronormative sexual scripts have also been reported in same-sex relationships.⁵⁰ In some same-sex relationships, parties may internalise heteronormative and patriarchal ideas about “gender

⁵⁰ Pham JM (2016), “The Limits of Heteronormative Sexual Scripting: College Student Development of Individual Sexual Scripts and Descriptions of Lesbian Sexual Behavior”. *Front. Sociol.* 1:7. doi: 10.3389/fsoc.2016.00007

complementarity”, where the more feminine-identified or “femme” partner is expected to act in ways which are subservient to their more masculine-identified or “butch” partner.⁵¹ When they do not, violence may be the outcome. In a 2016 study, the authors noted that some lesbian women internalise a “grammar” for “respectable” relationships in their context, setting out a language and structure for how men and women should relate to each other.⁵² The authors further commented that “conforming to aspects of these dominant regulatory systems affords participants access to a measure of social credibility and belonging”.⁵³

48. There are therefore various ways in which sexual scripts may impact upon a survivor’s agency, limiting their understanding of and ability to communicate their non-consent. Once again, however, the current legal framework surrounding sexual assault – which considers the subjective understanding of the accused and not the positionality of the survivor – does not account for this.

Conclusion: the broader psycho-social context of consent

49. In summary, the *amici* submit that sexual consent does not occur in the abstract. Sexual consent reflects multiple levels of socialisation, socio-cultural norms, gender norms and past experiences. These intersecting factors result in a complex interplay between individual, socio-cultural, and neurobiological factors which make it impossible to predict how a survivor will act in the build up to, or respond, during a sexual assault or rape. For these reasons, the *amici* submit

⁵¹ Ingrid Lynch & Nadia Sanger “I’m your maker: power, heteronormativity and violence in women’s same-sex relationships” (2016) Cape Town: Triangle Project.

⁵² Id at 52.

⁵³ Id at 12.

that consent must be assessed in a holistic and survivor-centric manner that accounts for the ways in which a survivor's intersecting identities may influence their levels of agency, and how they understand and communicate consent. Looking through the eyes of the accused – as the law currently requires – a court cannot hope to get off the starting blocks.

THE RELIEF SOUGHT BY THE APPLICANTS

The defence of mistaken belief and reasonability

50. The Embrace Project NPC and Ms Holtzräger (“the confirmation applicants”) seek to confirm the order of constitutional invalidity made by the High Court, Gauteng Provincial Division, per Baqwa J on 30 September 2024 (“the confirmation application”).
51. In that order, the High Court declared sections 3, 4, 5, 6, 7, 8, 9 and 11A of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 (“SORMA”) unconstitutional and invalid to the extent that these impugned 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.
52. The High Court further ordered that the declaration of constitutional invalidity be suspended for a period of 18 months to allow the constitutional defects to be

remedied by Parliament. In the interim, the High Court ordered a reading in of the following words into SORMA—

“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”

53. The relief sought by the confirmation applicants calls for the consideration of the defence of mistaken belief, and specifically whether an accused’s mistaken belief that they had consent was reasonable in the circumstances.
54. The *amici* have canvassed the nexus extensively between responses associated with the defence cascade and the articulation of consent. Certain hardwired “passive” peritraumatic responses to rape may render survivors unable to articulate their non-consent to the sexual conduct in question.
55. The *amici* have also shown that survivor’s broader psycho-social context may lead to barriers to the expression of non-consent, and even to the understanding of consent.
56. With this understanding in mind, the *amici* submit that the current formulation of the defence of mistaken belief (which does not require such a belief to be reasonable) does not factor in barriers to the communication of non-consent that originate in both the human psyche and the broader psycho-social context of a

survivor. In particular, the defence of mistaken belief fails to recognise the passive responses associated with the defence cascade, or the impact of a survivor’s intersecting vulnerabilities on consent.

57. Our courts have repeatedly acknowledged that “passivity” and “submission” by a survivor during a rape does not necessarily indicate the presence of sexual consent. This suggests that the *amici’s* submissions on peritraumatic responses and intersecting vulnerabilities are aligned with the jurisprudence, although they take it slightly further. It also points to a recognition and understanding by the courts of barriers to the articulation of consent. Most recently, the Supreme Court of Appeal (“SCA”) in *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko*⁵⁴ stated—

“As this Court made plain in *Mugridge v S*, mere submission, or acquiescence, or lack of resistance does not convey a willingness to engage in a penetrative sexual act . . . the law requires further that consent be active, and therefore mere submission is not sufficient.”⁵⁵

58. The SCA further cited the case of *Rex v Swiggelaar*,⁵⁶ wherein Murray AJA commented—

⁵⁴ *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* 2024 (2) SACR 113 (SCA).

⁵⁵ *Id* at para 56, citing *Mugridge v S* [2013] ZASCA 43; 2013 (2) SACR 111 (SCA) at para 40.

⁵⁶ *Rex v Swiggelaar* 1950 (1) PH H61 (A).

“The authorities are clear upon the point that though consent of a woman may be gathered from her conduct, apart from her words, it is *fallacious to take the absence of resistance as per se proof of consent*. Submission by itself is no grant of consent, and *if a man so intimidated a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.*”
(Emphasis added.)

59. The *amici* submit, however, that when the defence of mistaken belief is raised, passive peritraumatic responses to rape are no longer considered as potential non-consenting indicators. Instead, our courts are likely to excuse the accused, considering the absence of outward resistance to justify their belief in consent. Similarly, where a survivor’s intersecting vulnerabilities prevent their recognition of abuse or else prevent their expression of non-consent, it is likely that the defence of mistaken belief will excuse an accused.
60. This is due to the fact that the defence of mistaken belief, in its current formulation, has evolved into a substitution for the “resistance” requirement – despite the fact that that requirement has been eliminated from South Africa’s criminal justice system. Illsey states that—

“Although the demise of the resistance requirement may, theoretically, have been a victory for the reform of sexual assault law it may have the practical result of introducing an implicit resistance requirement and, consequently, opening the door to the defence of mistaken belief. *In the absence of physical resistance by the victim, the accused has more scope to argue that he thought, albeit mistakenly, that the victim had consented because she did not offer any signs of resistance.*”⁵⁷
(Emphasis added.)

61. This was aptly illustrated in the prosecution of Ms Holtzräger’s case where – despite a clear acknowledgement that Ms Holtzräger experienced responses associated with the defence cascade – the court could not be satisfied that the accused subjectively knew that he did not have consent. This was because Ms Holtzräger “*did not signify her opposition to the acts in any way*”.⁵⁸
62. The *amici*, therefore, submit that where a survivor responds to a sexual assault in the form of a “passive” peritraumatic response that prevents them from expressly articulating their non-consent, an accused is more likely to succeed with the defence of mistaken belief. This will also be true where a survivor’s intersecting vulnerabilities prevents the communication of non-consent. In this way, the defence of mistaken belief functions as an unreasonable and unconstitutional barrier to the prosecution of sexual assault. It is likely to be insurmountable for victims who experience “passive” peritraumatic responses, or

⁵⁷ D Berliner, “*Rethinking the reasonable belief defense to rape*”, (1991) 100 Yale Law Journal in T Illsey, “*The defence of mistaken belief in consent*”, (2008) 21 *South African Journal of Criminal Justice* 63 68.

⁵⁸ *S v Amos*, Regional Magistrates’ Court of Gauteng, Pretoria, Case No. 14/683/2018

whose intersecting vulnerabilities bar them from communicating non-consent, or even recognising abuse for what it is.

63. The *amici* submit that to continue with this current formulation of the defence of mistaken belief would have the effect of ignoring well-established psychological findings on sexual violence.
64. Furthermore, our courts tend to consider passivity and submission – which may be peritraumatic responses or follow from a survivor’s psycho-social positionality – as indicators of non-consent only where there are acts of intimidation by the perpetrator in question.⁵⁹ Essentially, passivity and submission to a sexual act will only be regarded as “*the abandonment of outward resistance*” if the perpetrator intimidates the survivor, with a view to abandon their resistance and submit to intercourse, in which they are unwilling to participate. This reinforces the “real rape” myth. It relies on harmful sexual scripts that suggest that rape is only “legitimate” when it involves a sudden attack by an aggressive stranger with a weapon.

⁵⁹ Section 1(3) of SORMA lists instances where a complainant would be taken not to have voluntarily or without coercion agreed to an act of sexual penetration. See 1(3) of SORMA provides—

“Circumstances in subsection (2) in respect of which a person (‘B’) (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5(1), 6 and 7 or any other act as contemplated in sections 8(1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following:

...

(b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;...”

65. This also ignores the reality that, in South Africa, intimate partners are the most common perpetrators of sexual violence, and that intimate partner violence is the most prevalent form of sexual violence.
66. In summation, the *amici* respectfully submit that the relief sought by the confirmation applicants could have the effect of aligning our law with the lived realities of survivors. As long as the impact of survivors' broader psycho-social context is recognised, as well as the impact of passive peritraumatic responses, the reading in suggested by the confirmation applicants will ensure that the defence of mistaken belief cannot be used to excuse conduct where no objectively reasonable steps were taken to determine whether there was consent from the survivor.
67. This is essential in preventing the reintroduction of a *de facto* resistance requirement and dispelling rape myths that continue to act as a barrier to justice for survivors, especially in the context of intimate partner sexual violence. The confirmation of the High Court order would thus be a meaningful step towards a more trauma-informed, survivor centric legal framework for the prosecution of sexual violence.

Removing consent as a definitional element

68. The Centre for Applied Legal Studies ("CALS" or "the appellant") seeks to appeal the whole of the judgment and order of constitutional invalidity made by the High Court, Gauteng Provincial Division, per Baqwa J on 30 September 2024.

69. In the court *a quo*, CALS requested that the court declare the continued inclusion of consent as a definitional element in sexual offences constitutionally invalid insofar as it limits the rights of women, children, and gender-diverse individuals to equality and other intersecting rights. CALS' appeal before this Honourable Court persists in the relief it sought before the High Court.
70. The *amici's* submissions above, on peritraumatic responses and the intersecting variables that shape how consent is communicated and understood, demonstrate the immense complexity and nuance involved in understanding consent in the context of sexual violence. Consent is an inherently multifaceted concept with a number of considerations influencing the way it is understood and expressed. As alluded to earlier, the complex nature of consent in the context of sexual violence makes it impossible to predict how a survivor may respond. Importantly, it is often not possible for survivors to express their non-consent outwardly.
71. Accordingly, the *amici* submit that the relief sought by CALS is also supported by the academic literature around peritraumatic responses and the broader psychosocial context. The current requirement that survivors prove a lack of consent fails to account for these realities. It imposes an unrealistic and, at times, insurmountable barrier to survivors of sexual violence. Interestingly, very similar arguments have been made by the academic commentator MacKinnon, who has also argued for the removal of consent from the discourse surrounding sexual violence.⁶⁰ In our context, the requirement that a survivor prove non-consent is

⁶⁰ Catherine A MacKinnon "Rape redefined" (2016) 10 *Harvard Law & Policy Review* 431.

particularly problematic, as the absence of resistance to rape acts as an indicator of consent when assessing the current defence of mistaken belief.

72. The *amici* submit that the inclusion of consent as a definitional element of rape and sexual assault requires survivors to demonstrate non-consent. This is not only at odds with the science of trauma but is also structurally unjust. The burden of proving non-consent perpetuates myths about “real victims”, reinforces harmful stereotypes and deters survivors from reporting sexual violence. Overall, to ensure justice for survivors of sexual violence, our criminal law ought to shift away from a rigid conceptualisation of consent which is inherently survivor-disproving. Instead, our legal framework should reflect the complex, nuanced and, at times, invisible dynamics of intersectionality, trauma and survival.

CONCLUSION

73. The *amici* have provided critical psychological and social insights that can help transform South Africa’s criminal law framework into one that properly reflects the realities of sexual violence in South Africa. The *amici’s* submissions illustrate that consent is not a simple or static concept, but a deeply complex and nuanced one shaped by neurobiological responses to trauma, embedded social scripts, structural inequalities and the intersecting identities of survivors.

74. These insights are pertinent and critical for a just assessment of consent in the context of sexual violence. They support the arguments of both the confirmation applicants and the appellant, albeit in different ways. Ultimately, the use of the

psycho-social lens provided by the *amici* compels the development of our jurisprudence so that consent is viewed in a holistic, survivor-centred and intersectional manner.

TAMIKA THUMBIRAN

RUTH KRÜGER

Chambers, Sandton

21 April 2025