IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 314/24

In the matter between:

EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
CENTRE FOR APPLIED LEGAL STUDIES	Third Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PEOPLE WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
WOMEN'S LEGAL CENTRE TRUST	*Amicus Curiae*

Case: CCT 315/24

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES	Applicant
and	
EMBRACE PROJECT NPC	First Respondent
INGE HOLZTRÄGER	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PEOPLE WITH DISABILITIES	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

HEADS OF ARGUMENT FOR THE WOMEN'S LEGAL CENTRE TRUST

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I. INTRODUCTION

1. One can hardly conceive of a realistic scenario in which an accused is found to have laboured under an unreasonable belief that consent had been given, that would not, on the same evidence, establish the existence of foresight that such consent had not been given.

2. That is because section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") defines consent, in the context of a sexual act, as "*voluntary or uncoerced agreement*".

3. The very notion of *voluntary* agreement requires an outward manifestation illustrating such agreement.

4. A belief (to the extent that there genuinely is one) will be unreasonable in the absence of any evidence pointing to such an outward manifestation of a complainant's voluntary agreement.

5. By the same token, in the absence of any outward manifestation of voluntary agreement to a sexual act, the only conclusion to be drawn is that the accused must have foreseen the possibility that consent had not been given?

6. This, in a nutshell, is the view of the Women's Legal Centre Trust ("the WLC Trust").

7. In the confirmation proceedings in Case CCT 314/24, the First and Second Applicants seek an order confirming that various provisions in SORMA that criminalise acts of sexual violence are:

   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 believe in consent.

8. The result of the declaration would be akin to introducing a competent verdict for rape in circumstances where intention is not established beyond a reasonable doubt.

9. In effect, introducing a 'competent verdict' for sexual violence crimes, by lowering the fault element from *intention* to *unreasonable belief*, will do nothing more than create a fiction to overcome the rules of evidence and onus in our criminal justice system (or, more accurately, how they are applied by courts).

10. In addition, the applicants seek an interim reading in to the effect that:

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.

11. In these submissions, we argue that:

    11.1. The declaration of constitutional invalidity is not necessary and will not achieve the intended purpose of protecting women against sexual violence; and

    11.2. The interim relief is not appropriate because its formulation lends itself to unintended consequences and abuse.

II. INTENTION AS AN ELEMENT OF CRIMES INVOLVING SEXUAL VIOLENCE

12. Section 3 SORMA defines the crime of rape as follows:

Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

13. The general formulation is a common thread that runs through definitions of other crimes involving sexual violence, as defined in sections 4, 5, 6, 7, 8, 9 and 11A of SORMA.

14. As confirmed in *Masiya*, the element of unlawfulness in rape is the absence of consent to sexual penetration.[1]

15. Staying with the example of rape, the reference to *intentionally* in s 3 of SORMA, carries a dual meaning:

    15.1. First, whether A *intentionally* sexually penetrated B; and

    15.2. Second, whether A intentionally sexually penetrated B *knowing* that B did not consent thereto.

16. *Intention,* in this context, is the form of *mens rea* (mental state of mind or *fault* element) that is required for the crime of rape and other acts of sexual violence. The alternative form of *mens rea* recognised in our law is *negligence* (*culpa*). The confirmation proceedings is aimed at incorporating the alternative form of *mens rea* – negligence – as a definitional element for all crimes of sexual violence.

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[1] *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC); 2007 (2) SACR 435 (CC) para 26

17. On the issue of intention, the Law Reform Commission's Discussion Paper 85 on Sexual Offences: The Substantive Law[2] correctly identified that intention extends to each element of the crime of rape; but that the question most often arises in connection with the element of lack of consent.

18. It is also trite that our law recognises two primary ways in which intention may be established:[3]

    18.1. If the accused knew that consent was lacking (*dolus directus*); or

    18.2. If the accused foresaw the possibility that consent had not been given, but proceeding with the act in question (*dolus eventualis*).

19. In dealing with the element of intention, Burchell explains "[*an*] *accused may escape liability on the ground of absence of knowledge of the unlawfulness of his conduct if he or she believed the complainant… was in fact consenting*"[4].

20. Thus, a defence that the accused mistakenly believed that consent was given is aimed at excluding intention (i.e. the *mens rea* element of the crime of rape).

21. As stated, our law recognises two primary ways in which to establish intention: *dolus directus* and *dolus eventualis*.[5]

22. In the context of rape, an accused acts with *dolus directus* if he intentionally sexually penetrated the complainant *knowing* that she did not consent thereto.

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[2] Relevant extract quoted at CC Record Vol 2, p 141, para 33: Founding Affidavit
[3] Ibid.; and also *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015) para 26
[4] Burchell *Principles of Criminal Law* 5th Edition 2016, pp 235-6, 414.
[5] *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015) para 26

23. On the other hand, the accused acts with *dolus eventualis* if he foresees the risk that the complainant does not consent, but nevertheless continues to act, while appreciating that he may be acting without her consent, "*therefore 'gambling' as it were with the [right to security of the person, bodily integrity and dignity] of the person against whom the act is directed.*"[6]

24. Both forms of intention are concerned with the subjective state of the accused's mind at the time of the alleged offence.

25. So how does the State establish the inner workings of an accused's mind?

26. Burchell, referring to the long-standing judgment of *R v Mosago*[7], highlights that:

"*…the question was left open whether in a case where, apart from the words or conduct of the complainant, the accused believes that the complainant consents, the accused could still plead absence of mens rea due to essential error.*"

27. While submitting that the defence would notionally be available to an accused in those circumstances, the author cautions "*the fact that the complainant gives no outward indication that she is consenting would be strong evidence that the accused's belief is not honestly entertained.*"[8]

28. Burchell continues by explaining that, in evaluating whether an accused's belief that consent had been given is honestly entertained, "*a court is always entitled to draw*

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[6] *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* (main and supplementary judgment) (248/2022) [2024] ZASCA 59; 2024 (2) SACR 113 (SCA); [2024] 3 All SA 674 (SCA) (24 April 2024) para 62; with reference to *Pistorius* para 26

[7] *R v Mosago* 1935 AD 32

[8] Burchell n 4, p 415 fn. 130.

legitimate inferences from the objective facts of the case in order to determine the mental state of the accused."[9]

29. This aspect of our law was affirmed in *Tshoba,*[10] reiterating that "*[a] court can reject an accused person's claim of belief in consent by drawing inferences from objective facts which indicate the contrary*".

30. Upon such a determination, i.e. where the conclusion is reached that the accused's belief was not honestly entertained, intention in the form of *dolus directus* will be established.

31. As regards *dolus eventualis* the correct approach (albeit in the context of murder) was confirmed by the SCA in *Director of Public Prosecutions, Gauteng v Pistorius*[11] as follows:

"[29] Furthermore, the finding that the accused had not subjectively foreseen that he would kill whoever was behind the door and that if he had intended to do so he would have aimed higher than he did, conflates the test of what is required to establish dolus directus with the assessment of dolus eventualis. The issue was not whether the accused had as his direct objective the death of the person behind the door. What was required in considering the presence or otherwise of dolus eventualis was whether he had foreseen the possible death of the person behind the door and reconciled himself with that event. The conclusion of the trial court that the accused had not foreseen the possibility of death occurring as he had not had the direct intent to kill, shows that an incorrect test was applied."

[9] Burchell n 4, p 626
[10] *S v Tshoba* (47/2022) [2022] ZAECMKHC 117 (12 December 2022) paras 3 and 40
[11] *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015)

32. Applying this reasoning in the context of rape, once the absence of consent is established, it is not sufficient to ask simply whether the accused *knew* that consent was lacking. The question which <u>must</u> follow, if the former cannot be answered in the affirmative, is whether the accused *foresaw* the possibility that consent was lacking.

33. It seems to be here where Courts (and the Law Reform Commission), despite correctly formulating the two forms of intention, conflate the two in the final analysis.

34. On this score, the Law Reform Commission's exposition[12] correctly states that "*the accused must foresee the possibility that the woman is not a consenting party, yet proceed with intercourse*".

35. However, despite recognising foresight as a form of intention, the leap is made to state "*if the accused genuinely believes that the woman consents, even though his belief is unreasonable, he lacks the necessary intention*".

36. The analysis conflates actual belief (which would establish *dolus directus*) with foresight (which would establish *dolus eventualis*). This conflation, which is not unique to the Law Reform Commission or sexual violence cases, was recognised in *Pistorius*.[13]

37. It is, therefore, not correct to say that a belief, no matter how unreasonable, is sufficient to exclude intention.

38. Where an accused's version that he believed consent had been given is accepted as reasonably possibly true, a trial court must then consider whether:

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[12] fn 2 above
[13] *Pistorius* para 29

38.1. The accused foresaw the possibility that the complainant had not consented to the sexual act, and

38.2. Despite such foresight, reconciled himself with that possibility (that the penetration would be unlawful because the complainant had not consented) and proceeded to sexually penetrate the complainant.

39. The SCA's guidance in *Pistorius* is equally instructive on how to approach this enquiry. The SCA accepted that subjective foresight can be proved by inference, and *held* that:

"*The pertinent issue then becomes whether, on the primary facts found proved, considering all of the evidence relevant to the issue, and applying the correct legal test, the inference has to be drawn that the accused acted with dolus eventualis ...*"[14]

40. A good analysis of the enquiry into foresight by inferential reasoning is provided in *Tshoba*.[15] The court in Tshoba relied on various *dicta* from the Appellate Division over the years.

41. *S v Mini*[16]

'In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time. He must of course also be on his guard against the insidious and subconscious influence of ex post facto knowledge.'

[14] *Pistorius* para 47
[15] *Tshoba* paras 52 to 55
[16] *S v Mini* 1963 (3) SA 188 (A)

42. *S v Bradshaw*[17]

‘The court should guard against proceeding too readily from “ought to have foreseen” to “must have foreseen” and thence to “by necessary inference in fact foresaw” the possible consequences of the conduct being inquired into. The several thought processes attributed to an accused must be established beyond reasonable doubt, having due regard to the particular circumstances which attended the conduct being inquired into.”

43. *S v Sigwahla*[18]

‘Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.’

44. After referring to the relevant principles, the court in *Tshoba* considered whether, based on the objective facts, the accused foresaw the possibility that the complainant had a mental disability and, therefore, lacked capacity to consent to sexual penetration.

45. After a careful analysis of the evidence, including that the complainant’s mental disability was of a subtle kind and that the lay witnesses who testified on behalf of the State were equivocal about the nature of her condition, the Court ultimately concluded that there was *a reasonable possibility that subjectively [the accused] did not foresee* the possibility that the complainant lacked the capacity to consent.[19]

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[17] *S v Bradshaw* 1977 (1) PH H60 (A)
[18] *S v Sigwahla* 1967 (4) SA 566 (A) at 570
[19] *Tshoba* para 56 to 69

46. The Court did, however, mention in passing that, based on certain factors, a reasonable person would have realised the complainant was a person with a mental disability;[20]and that the accused ought reasonably to have foreseen that the complainant lacked the capacity to consent.[21]

47. However, viewed in the context of the evidence described by the Court, it cannot be said that the same conclusions would have been drawn if the Court applied the unreasonable belief test was an element of the crime of rape. The Court was not engaged in an enquiry into whether the accused unreasonably believed the complaint had the capacity to consent to sexual penetration; and therefore did not evaluate the reasonableness of the accused's belief against the onus and standard of proof applicable in criminal proceedings.

48. Based on the evidence evaluated by the Court, it cannot be said with any degree of confidence that the objective facts established, *beyond a reasonable doubt*, that a reasonable person in the position of the accused ought to have known that the complainant lacked capacity to consent to sexual penetration.

49. *Tshoba*, therefore, cannot serve as support for the proposition that a lower threshold of *mens rea*, in the form of an unreasonably held belief in consent, will justify a conviction in circumstances where the proper application of *dolus eventualis* will not.

50. Finally on the element of *dolus*, it must be borne in mind that:

    50.1. whereas the test for *dolus directus* is purely subjective – i.e. whether the accused mistakenly believed there was consent;

[20] *Tshoba* para 59
[21] *Tshoba* para 68

50.2. the test for *dolus eventualis* is a partly objective one – i.e. although it asks what the accused foresaw, if the objective facts indicate that the accused *must have foreseen* the possibility that consent was lacking, a court is entitled to conclude that he, in fact, *did foresee*, the possibility that consent was lacking.[22]

51. Ignoring the distinction, and applying a purely subjective test to both enquiries, undermines the principle of *dolus eventualis* in rape cases and would render it entirely meaningless.

III. S V AMOS

52. Before discussing the correct application of *dolus* in sexual offence cases, it is necessary to consider the evidence upon which the applicants in the confirmation proceedings rely. That is, the judgment of the Regional Court in Pretoria, in which the Second Applicant, Ms Holzträger was the complainant.

53. Ms Holzträger became acquainted with the accused, Mr Amos, on Tinder and accepted an invitation from him to a party at his home. It was to be their first meeting in person. As it turned out, there was no party. Ms Holzträger explains that Mr Amos had sexually penetrated her without her consent. She laid a criminal complaint against him for rape, which lead to a trial in the Regional Court in Pretoria.

54. The evidence discussed below emanates from the judgment of the Regional Magistrate, Ms Labuschagne.

55. First, Mr Amos' Plea explanation[23]:

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[22] See *Pistorius n22* paras 40, 51, 54

[23] CC Record vol 2 pp 197 - 198: Regional Court judgment

He indicated that the consent was accepted as the complainant actively participated in the preparation as well as in the sexual acts and at no stage indicated expressly or through actual or physical resistance that such consent was ceased.

56. A full transcript of the criminal trial has not been included in these proceedings. However, it is apparent from the judgment that the Regional Magistrate accepted Ms Holzträger's evidence that she did not consent to the sexual intercourse with Mr Amos and, further accepted her evidence that:

"she told the Court that she told the accused to stop but then admitted that she did not know if the accused heard her or not."[24] (sic)

57. The accused's version was that:

"She lifted her hip slightly and he with her help removed her pants and underwear.[25]

…

"He says he stood up back again from the couch, unbuttoned and removed his jeans and where after he kneeled in between her legs on the couch. They kissed for another one to two minutes and he then removed his underpants as well and they proceeded to have sexual intercourse.

…

He could hear an inaudible word and assumed that the word was wrong but was definitely not stop. [26]

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[24] CC Record vol 2: p 208: Regional Court judgment
[25] CC Record vol 2: p 203: Regional Court judgment
[26] CC Record vol 2: p 204: Regional Court judgment

…

"His version is based on the contention that the complainant consented to the touching of her breasts and the penetration of her vagina with his penis. He accepted that the complainant consented to his actions as there was mutual interaction and reaction by both parties."[27]

58. The Regional Magistrate found Ms Holzträger to be a credible witness and unreservedly accepted her evidence.

59. By contrast, the Regional Magistrate was not impressed by Mr Amos as a witness, noting that he "*changed the sequence of events several*" times and "*added to his own during cross-examination in a clear attempt to make his version more plausible*". Ultimately, having found that Mr Amos' evidence was not reliable, the Regional Magistrate rejected his version as "*false and farfetched*".[28]

60. Although it would not be appropriate to attempt to evaluate the evidence presented to the Regional Court in the absence of a full transcript, it is significant that the Regional Magistrate also rejected Mr Amos' version regarding the party that he claimed was going to be held at his house. Certainly, the rejection of this evidence would tend towards an inference that Mr Amos had lured Ms Holzträger to his home under false pretences. A finding along those lines would necessarily have an impact on the evaluation of the remainder of the evidence.

[27] CC Record vol 2: p 209: Regional Court judgment
[28] CC Record vol 2: p 210: Regional Court judgment

61. Having accepted Ms Holzträger's evidence as truthful, and rejecting Mr Amos' evidence as false and farfetched, the Regional Magistrate considered whether the State had proved the elements of the offence beyond reasonable doubt. Those elements being:

61.1. *actus reas*: whether sexual penetration occurred – this was common cause;

61.2. *dolus* / unlawfulness: whether Ms Holzträger consented to the sexual penetration – the Regional Magistrate accepted Ms Holzträger's evidence that there was no consent;

61.3. *mens rea* / intention: whether Mr Amos was aware that his conduct in sexually penetrating Ms Holzträger was without her consent – it is this element that the Regional Magistrate concluded the State had not established beyond a reasonable doubt. And it is in respect of this element that both the Regional Magistrate and the Applicants contend law reform is necessary. In what follows, we unpack the argument with reference to the Regional Magistrate's judgment and the proper interpretation and application of the law as it currently is.

62. The Regional Court stated that *dolus eventualis* is sufficient to establish intent, and correctly summarising the principles applicable to *dolus eventualis*.[29] However, there is no indication in the judgment that the Regional Magistrate applied those principles to the evidence accepted by her.

63. Instead, the Regional Magistrate dealt with the element of intention in a single paragraph as follows:

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[29] CC Record vol 2: p 215: Regional Court judgment

"In our law and the reported case law that I am bound to follow the belief that a woman consent to sexual intercourse need not be a reasonable one as the test to establish intent is a purely subjective one. 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."[30] (sic)

64. Confusingly, despite accepting unreservedly Ms Holzträger's evidence that she did not consent to the sexual penetration, the Regional Magistrate concluded her judgment with the following remark:

"Furthermore, the state must prove the lack of consent beyond reasonable doubt. And the Court cannot as the law stands today say the state had proved this. Mr Amos, you are accordingly acquitted on all four counts."[31]

65. The Regional Magistrate, therefore, erred in her interpretation and application of the existing law as it pertains to the crime of rape.

    65.1. First, by applying a purely subjective test in respect of *mens rea*; this, despite rejecting the accused's version as farfetched and unreliable; and

    65.2. Second, by concluding that the State had not proven the absence of consent beyond a reasonable doubt; this, despite accepting Ms Holzträger's evidence that she did not consent to the sexual penetration. Ms Holzträger's evidence that she did not consent, if accepted, is conclusive proof of her absence of consent. It is not at all explained why the Magistrate nevertheless concluded that the State had not proven the absence of consent beyond a reasonable doubt.

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[30] CC Record vol 2 p 216: Regional Court judgment
[31] Ibid. note 30 above.

66. In the circumstances, the case brought before the High Court was not one which showed a deficiency in the current law. Ms Holzträger's, as was case of the complainant in *Coko,* was a matter of the Court getting the law wrong.

67. Based on the Regional Magistrate's factual findings, a conviction of rape might have been justified by a proper evaluation of all the evidence and the correct application of the law as it relates to consent and intention.

68. Confirming the declarations of constitutional invalidity, in effect, tells Ms Holzträger that the Regional Magistrate was justified in acquitting the man who raped her. That is the wrong message. As happened in *Coko*, Ms Holzträger's vindication would have been an appeal court telling her that the Regional Magistrate had gotten it wrong.

69. The failure by the State to take the Regional Magistrate's decision on appeal, with respect, cannot serve as a justification for law reform not necessitated by the facts of Ms Holzträger's case.

IV. PROPER APPLICATION OF *DOLUS* TO SEXUAL OFFENCES

70. The Regional Court in *S v Amos* did not conduct an enquiry into whether Mr Amos foresaw the possibility that Ms Holzträger consented to sexual penetration.

71. Without having sight of the full record of the evidence presented in the Regional Court, it is not possible to predict the likely outcome if the Regional Magistrate had approached the enquiry in the correct manner.

72. It is also not clear from the Regional Court's judgment, or Ms Holzträger's affidavit in the High Court, whether evidence was led to the effect that Mr Amos knew the complainant was a virgin. As highlighted by the SCA in *Coko,* while this fact does not

raise the bar as to the test for consent in rape cases, it would be relevant when considering whether an accused was alive to the possibility that the complainant did not consent to the sexual penetration.[32]

73. The upshot is that, without the benefit of all the evidence, it cannot be said that Mr Amos' acquittal is the result of a defect in the law. At least two alternatives are possible:

73.1. First, the *evidence* might not have justified a conviction of rape; or

73.2. Second, if the evidence did justify a conviction of rape, the Regional Magistrate failed to apply the test for *dolus eventualis*.

74. To illustrate the first possibility, the following evidence might have militated against drawing an inference that Mr Amos foresaw the possibility that Ms Holzträger had not consented to sexual penetration:

74.1. Ms Holzträger could not recall all the details of what she did or did not do.

74.2. Ms Holzträger's evidence that, although she said "no", she did not know whether Mr Amos had heard her.

74.3. That, although Ms Holzträger had tried to pull her pants back up, it slipped through her fingers. It is possible that Mr Amos might genuinely not have noticed her attempt to pull up her pants.

74.4. Dr Van der Caver's apparent concession that the injuries sustained by Ms Holzträger might have resulted from her positioning and not necessarily because the sexual penetration was not consensual.

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[32] *Coko* paras 63 and 62

74.5. Mr Amos' evidence that Ms Holzträger lifted her hip slightly and helped him to remove her pants and underwear.

74.6. Mr Amos' evidence that he penetrated Ms Holzträger's anus completely by accident and then 'corrected' himself quickly.

75. By the same token, such evidence, if accepted, might similarly militate against a finding that the State had discharged the onus of proving that Mr Amos' belief in consent was unreasonable.[33]

76. That is so because the amendment of the law contemplated in the confirmation application would not alter the onus on the State to prove the accused's guilt beyond reasonable doubt.

77. Therefore, if the Court found that Mr Amos' evidence that Ms Holzträger lifted her hip and helped him remove her pants was reasonably possibly true, the Court would be impelled to conclude that the State had failed to prove beyond a reasonable doubt that his belief in consent was unreasonable.

78. It is also one of the tragic features of Ms Holzträger's experience that she was not able to recall what she did or did not do on the night in question. The result is that, even if the fault element was lowered to include an unreasonable belief, the Court might not have been in a position to determine what would have been reasonable in the circumstances.

79. The result is that there is no tangible, factual or empirical basis for the proposed law reform.

[33] As per prayer 1 of the High Court's Order.

80. The same is true of the judgment in *Mashego*.[34] The facts of the case are summarised in the written submissions filed on behalf of the First and Second Applicants in the confirmation proceedings (p 13 para 32).

80.1. In summary, the complainant had stayed overnight at the accused's 2-bedroom house after her transport arrangements fell through. That night, she engaged in consensual intercourse with her partner, who then left the accused's house without her knowledge. Later that morning, she believed herself to be having intercourse with her partner again but realised mid-act that it was in fact the accused.

80.2. The first thing to highlight about the judgment is the glaring contradiction in (a) rejecting the accused's version that there had been a second round of intercourse after the incident in question; yet (b) accepting his version that he had requested sex with the complainant in the early hours of the morning, to which she allegedly responded that she was tired. The judgment contains no evaluation to justify why the one aspect of the accused's exculpatory evidence was rejected and the other not.

80.3. Leaving aside the apparent contradiction in the manner in which the court evaluated the evidence, the point is that the court accepted the accused's version regarding the exchange in the early hours of the morning.

80.4. Thus, having had the exchange, thereby making himself known to the complainant, he would have held an objectively reasonable belief that, later that morning, when the complainant responded positively to his touches, she knew it was him lying next to her.

[34] *Mashego v S* [2024] ZAGPPHC 1293 (27 November 2024)

80.5. Thus, the outcome of the judgment in *Mashego* is not a product of a deficiency in the law but of the manner in which the evidence was assessed.

81. To illustrate, let's assume the court had rejected the accused's version of the earlier exchange in the early hours of the morning. That being the case, there would have been no outward indication from the complainant that she knew who was lying next to her. As Burchell suggests, this would be strong evidence that the accused's belief, that the complaint knew it was him lying next to her, was not honestly entertained. The State would then have established *dolus directus*.

82. The inherent implausibility of his belief being genuine would be amplified by the false version that they engaged in sexual penetration for a second time later that day.

83. In *S v Vilakazi*[35] Nugent JA explained:

"*Where an accused person advances a false defence, as the appellant did in this case, a court might ordinarily infer that the reason for doing so is that he or she has no other defence. But on the ordinary logic of inferential reasoning that inference could not properly be drawn if another reason presents itself. The most that could then be said is that he or she might have advanced a false defence for either of those reasons. Needless to say an accused person in that position takes a considerable risk. For if there is unchallenged evidence of all the elements of the offence a court would be perfectly justified in accepting the evidence. It is if there is no evidence on the issue that the onus that rests on the state will accrue to the benefit of the accused for the gap in the evidence*

[35] *S v Vilakazi* (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008) para 48

could not be filled by an inference drawn against the accused. That is not a matter of law but only a consequence of ordinary inferential reasoning."

84. Returning to *Mashego*, if the evidence was not strong enough to establish *dolus directus*, *dolus eventualis* might have been established for the following reasons:

84.1. Again, assuming the court rejected the accused's version of the earlier encounter, there would have been no objective fact from which the accused could have believed the complainant knew who was lying next to her;

84.2. There is no suggestion in the judgment that the accused did not know the complainant and his friend were in a relationship and that the friend had brought her to the accused's house that night;

84.3. His climbing into bed with her, without announcing himself;

84.4. In those circumstances, one could not but conclude, based on the objective facts, that the accused must have foreseen (and therefore did foresee) the possibility that the complainant did not know it was him lying next to her. There would have been no other conceivable inference.

85. It is, therefore, not that victims and survivors of sexual violence are left vulnerable to the vagaries of an accused's self-serving interpretation of events.[36] It is the tendency for courts in rape cases to elevate the enquiry into *reasonable* doubt to *no doubt at all*. The apparent tendency (as illustrated in *S v Amos* and *Mashego*) to selectively accept a discreet part of an accused's exculpatory evidence as 'reasonably possibly true', but without testing the reasonableness of the possibility against the totality of the evidence.

[36] First and Second Applicants' HoA: p 14 para 35

86. In truth, the courts essentially stretch the bounds of common sense and human nature in favour of accused rapists. The question is rarely about whether the accused's professed belief in consent was *genuinely* or *honestly* held. For a court to conclude that such belief was *genuinely* held, the accused's version (including any inferences to be drawn for his version) must be *reasonably possibly true*.

87. And a version can only ever be reasonably possibly true if it is consistent with the objective facts and other accepted evidence.

88. Taking the argument to its logical conclusion, if there are no objective factors to support the accused's version that he did not know or did not foresee that consent was absent, then his version must be rejected as not being reasonably possibly true.

89. And if his defence excluding *dolus* is not reasonably possible true, then the State would have established the element of intention as required by section 3 of SORMA.

90. But if there are <u>objective</u> factors which support the accused's version, and the court finds that his evidence is credible and <u>reasonably</u> possibly true, can that court nevertheless find that the accused's belief (mistaken as it appears to have been) was not reasonably held? We think probably not.

91. Before concluding on the issue of intention, it must be pointed out that the second part of the declaration of constitutional invalidity (framed in the alternative) is somewhat ambiguous. What does it mean to have '*no reasonable objective belief in consent*'? On its face, it seems to be a restatement of the existing legal position. If there is no belief in consent (reasonable, objective or otherwise), intention is established for purposes of section 3 of SORMA.

V. COMPARATIVE LAW

92. A number of foreign jurisdictions have introduced legislative amendments to deal with the defence of mistaken belief in consent in rape cases. In most instances those jurisdictions require either:

    92.1. That the belief must be reasonable in the circumstances of the case; or

    92.2. That the accused must take reasonable steps to establish consent.

93. The written submissions filed on behalf of the First and Second Applicants in the confirmation proceedings refers to a number of those foreign legislative amendments, including Canada (pp 38 - 41 paras 93 – 99).

94. Canada was one of the first jurisdictions to introduce the requirement of reasonable steps. It did so in 1992.

95. Twenty five years after the enactment, the academic author and professor, Dr Lucinda Vandervort reflected and cautioned that:

    "*…this is a cautionary tale about a law reform initiative that has demonstrably failed to achieve its intended objective. I believe we can learn from the experience. Activists, legislative drafters, judges, and jurists must scrutinize the probable effects of law reform proposals and restatements of the law closely and skeptically. A clear definition of the legislative objective and full appreciation of how specific legal tools function in practice are both necessary. Any other approach risks failure… When the conduct of an accused who is alleged to have made a mistake about whether a complainant communicated "consent" is assessed by a hybrid subjective-objective reasonableness standard, many decision-makers rely on extralegal criteria and assumptions grounded in their personal*

experience and opinion about what is reasonable. In the midst of debate over what was "reasonable," given the accused's knowledge of the circumstances, the legal definition of consent is easily overlooked. That is precisely what we see here; the result is often failure to enforce the law."[37]

96. Having analysed the relevant case law since the reasonable steps requirement was introduced, Vandervort concluded that the requirement:

(1) is redundant; even when used properly it adds nothing not already required by or contained in the law;

(2) is a source of "mischief" insofar as it makes proof of mens rea with respect to consent appear far more complex than it actually is; and

(3) as a result, often leads to legal errors and unsound verdicts. Judges who avoid error do so precisely because — to the extent that they use "reasonable steps" analysis, as such, at all — they use it only as a supplementary tool or merely allude to it in passing in the course of a comprehensive analysis of the availability of the defence of belief in consent...

97. Touching on the widely held belief that accused persons should not be permitted to rely on unreasonable beliefs to exclude *mens rea*, she opined that:

In truth, however, non-enforcement, both then and now, is largely due to the failure of decision-makers, from police to judges, to make effective use of the legal tools that are available to analyze mens rea in sexual assault cases.

[37] Vandervort, L., 2017. The Prejudicial Effects of Reasonable Steps in Analysis of Mens Rea and Sexual Consent: Two Solutions. Alta. L. Rev., 55, p.933.

98. In short, according to Vandervort, the introduction of "reasonable belief" and "reasonable steps" requirements resulted in the very pitfalls discussed over the course of these submissions.[38]

VI. THE RISK OF UNINTENDED CONSEQUENCES IN SOUTH AFRICA

99. The First and Second Applicants in the confirmation proceedings asks this Court to grant interim relief in the form of a reading in to SORMA as follows:

> "*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.*"

100. As indicated in its application for admission as an *amicus* in these proceedings, the WLC Trust has a number of concerns with the proposed interim relief.

101. Firstly, the lack of clarity or guidance on what would constitute '*objectively reasonable steps*'. This concern is fortified by Vandervort, who found that the reasonable steps requirement encouraged decision-makers to ignore the law and instead use private opinions about extra-legal social factors to determine what was legal in the circumstances.[39]

102. In the absence of any prior judicial precedent or statutory guidance, the adjudication of sexual offences will be left entirely to the subjective interpretation of judges. It also raises the question, if the accused believed he had taken reasonable steps to establish

[38] Vandervort: Consider, in particular, Part V. Reasonable Steps and Common Sense pp 942 - 944
[39] Vandervort: p 944

consent, whose view on what is reasonable will prevail? The accused? The complainant? The prosecutor? Or the Judge?

103. Secondly, the proposed reading-in will inevitably place an additional burden on complainants and the State. The prosecutor, in leading evidence, will be required to propose and prove (a) what steps could or should have been taken in the particular case, and (b) that the accused failed to take such steps.

104. Third, 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.

105. Artz and Smythe confirm the phenomenon in the context of domestic violence,[40] quoting one Magistrate as saying "*when the one has an interdict, the other also wants and interdict – it becomes a way of getting at the other*". The authors describe it as an attempt to reinforce power and '*level the playing fields*'.

106. There is no reason to be optimistic that rapists and sexual abusers will not utilise the requirement to take reasonable steps in an attempt to silence or suppress their victims.

107. Finally, the WLC Trust is concerned that the additional requirement to take '*reasonable steps*' might also lead would-be perpetrators to make repeated and incessant enquiries

[40] Lillian Artz & Dee Smythe, Bridges and Barriers: A Five Year Retrospective on the Domestic Violence Act, 2005 Acta Juridica 200 (2005) at 204 - 205

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.

108. In light of these risks, even if the declarations of constitutional invalidity are confirmed, the legislature is best placed to carefully research and weigh up the benefits and pitfalls of any provisions aimed at remedying the defects in the impugned provisions.

VII. CONCLUSION

109. For all of the reasons discussed above, the WLC Trust does not believe the propose declarations of constitutional invalidity are necessary or that it will operate to the benefit of victims of sexual violence.

ASHLEIGH CHRISTIANS
Counsel for the Women's Legal Centre Trust
Chambers, Cape Town
27 June 2025

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 314/24

In the matter between:

EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
CENTRE FOR APPLIED LEGAL STUDIES	Third Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PEOPLE WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
WOMEN'S LEGAL CENTRE TRUST	*Amicus Curiae*

Case: CCT 315/24

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES	Applicant
and	
EMBRACE PROJECT NPC	First Respondent
INGE HOLZTRÄGER	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PEOPLE WITH DISABILITIES	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

WOMEN'S LEGAL CENTRE TRUST: LIST OF AUTHORITIES

AUTHORITY		REFERENCE IN WRITTEN SUBMISSIONS
1.	*Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC); 2007 (2) SACR 435 (CC)	p 5 para 14
2.	*Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015) para 26	p 8 para 31 p 9 para 36 p 10 para 39 p 6 paras 18 and 21
3.	*Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* (main and supplementary judgment) (248/2022) [2024] ZASCA 59; 2024 (2) SACR 113 (SCA); [2024] 3 All SA 674 (SCA) (24 April 2024)	P 7 para 23 p 18 para 72
4.	*R v Mosago* 1935 AD 32	p 7 para 26
5.	*S v Tshoba* (47/2022) [2022] ZAECMKHC 117 (12 December 2022)	p 8 para 29 p 11 paras 44 - 46
6.	*S v Mini* 1963 (3) SA 188 (A)	p 10 para 41
7.	*S v Bradshaw* 1977 (1) PH H60 (A)	p 11 para 42
8.	*S v Sigwahla* 1967 (4) SA 566 (A) at 570	p 11 para 43
9.	*Mashego v S* [2024] ZAGPPHC 1293 (27 November 2024)	p 21 para 80
10.	*S v Vilakazi* (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008)	p 22 para 83

11.	Burchell *Principles of Criminal Law* 5th Edition 2016, pp 235-6, 414.	p 6 para 19 p 7 para 26 and 28
12.	Vandervort, L., 2017. The Prejudicial Effects of Reasonable Steps in Analysis of Mens Rea and Sexual Consent: Two Solutions. Alta. L. Rev., 55, p.933.	pp 25 - 27 paras 95 – 98 p 28 para 101
13.	Lillian Artz & Dee Smythe, Bridges and Barriers: A Five Year Retrospective on the	p 28 para 105

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 314/24

In the matter between:

EMBRACE PROJECT NPC	First Applicant
INGE HOLZTRÄGER	Second Applicant
CENTRE FOR APPLIED LEGAL STUDIES	Third Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PEOPLE WITH DISABILITIES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
WOMEN'S LEGAL CENTRE TRUST	*Amicus Curiae*

Case: CCT 315/24

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES	Applicant

and

EMBRACE PROJECT NPC	First Respondent
INGE HOLZTRÄGER	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PEOPLE WITH DISABILITIES	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

PRACTICE NOTE

OF

WOMEN'S LEGAL CENTRE TRUST

NATURE OF THE MATTER

1 This matter concerns the constitutional validity of sections 3, 4, 5, 6, 7, 8, 9 or 11A 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 believe in consent.

2 The matter is before this Court as an unopposed application for confirmation of the order made by the North Gauteng High Court, Pretoria (*per* Baqwa J) in Case No 04856/22 on 30 September 2024.

3 The Women's Legal Centre Trust (WLC Trust) has been admitted as an *amicus curiae* in these proceedings. The WLC Trust does not support the confirmation of the High Court's declaration of constitutional invalidity.

ISSUES TO BE DETERMINED

4 Whether the *mens rea* element of sexual violence crimes should include the lower threshold of *culpa* by the inclusion of a requirement that any belief in consent, held by an accused, must be objectively reasonable.

5 Whether an accused charged with a sexual offence should be required to have taken reasonable steps to establish consent from the complainant.

SUMMARY OF THE WLC TRUST'S SUBMISSIONS

6 First, the test for *dolus eventualis,* if properly applied, is sufficient to find a perpetrator guilty in circumstances where the accused's professed belief in consent is inconsistent with the proven facts and, therefore, such professed belief is objectively unreasonable.

7 Second, a reflective analysis of the law reform in Canada (on which the relief sought in the confirmation proceedings is modelled) has shown that the introduction of an objective reasonableness standard did not advance the criminal justice system or jurisprudence in respect of sexual offences .

8 Third, the proposed introduction of a 'reasonable step' requirement will place additional evidentiary burdens on complainants and prosecutors.

9 Fourth, the additional requirement to take '*reasonable steps*' will be weaponised (abused) by perpetrators of sexual offences to make retaliatory criminal complaints against their victims.

ESTIMATED DURATION OF ARGUMENT

10 one hour.

PORTIONS OF THE RECORD THAT ARE NECESSARY FOR THE DETERMINATION OF THE MATTER

11 Regional Court judgment: CC Record pp 196 to 216.

AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED

12 Case Law

12.1 *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015)

12.2 *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko* (main and supplementary judgment) (248/2022) [2024] ZASCA 59; 2024 (2) SACR 113 (SCA); [2024] 3 All SA 674 (SCA) (24 April 2024)

12.3 *S v Tshoba* (47/2022) [2022] ZAECMKHC 117 (12 December 2022)

13 Literature:

13.1 Vandervort, L., 2017. The Prejudicial Effects of Reasonable Steps in Analysis of Mens Rea and Sexual Consent: Two Solutions. Alta. L. Rev., 55, p.933.

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