

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 314/24

In the matter between:

EMBRACE PROJECT NPC

First Applicant

INGE HOLZTRÄGER

Second Applicant

CENTRE FOR APPLIED LEGAL STUDIES

Third Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Respondent

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

Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

and

CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA

First *Amicus Curiae*

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA

Second *Amicus Curiae*

WOMEN'S LEGAL CENTRE TRUST

Third *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 PERSONS WITH DISABILITIES

Fourth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

and

CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA

First *Amicus Curiae*

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA

Second *Amicus Curiae*

WOMEN'S LEGAL CENTRE TRUST

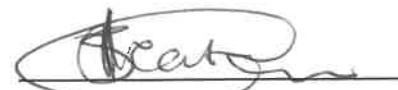
Third *Amicus Curiae*

FILING SHEET

KINDLY TAKE NOTICE that the Third to the Third Respondents in CCT 314/24 and the Third to the Fifth Respondents in CCT 315/24 hereby presents the following for service and filing:

1. Explanatory/Answering affidavit;

SIGNED at PRETORIA ON THIS THE 9TH OF SEPTEMBER 2025.



STATE ATTORNEY, PRETORIA

First to Third Respondents' Attorneys
under CCT: 314/24 and Third to Fifth Respondent's

Attorneys under CCT315/24

316 Thabo Sehume Street

Salu Building

Pretoria

Private Bag x 91

Pretoria

0001

Tel: 012 3091527

Email: SMatome@justice.gov.za

REF: 5209/22/Z92

**TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
CONSTITUTIONAL COURT**

AND TO: POWER AND ASSOCIATES

Attorneys for the First and
Second Applicants in CCT 314/24
and the First and Second Respondents in
CCT 315/24

Per: Claire Dehosse

20 Baker Street, Rosebank

JOHANNESBURG, 2196

Tel: +27 10 822 7860

Email: tina.power@powerlaw.africa, slindile.khumalo@powerlaw.africa,

claire.dehosse@powerlaw.africa

Ref: PSIEP-202122.

AND TO: LAWYERS FOR HUMAN RIGHTS

Attorneys for the First and Second *Amici Curiae*

4th Floor, South Point Corner Building

87 De Korte Street

Braamfontein

JOHANNESBURG

Tel: 011 339 1960

E-mail: kayan@lhr.org.za | charne@lhr.org.za.

Ref: 01/SLP/2024.

AND TO: WOMEN'S LEGAL CENTRE

Attorneys for the Third *Amicus Curiae*

Tel: 021 424 5660

Email: bronwyn@wlce.co.za | aretha@wlce.co.za | andrea@wlce.co.za.

C/o BOWMAN GILFILLAN INCORPORATED

11 Alice Lane

Sandton

JOHANNESBURG

Tel: 011 669 9000 / 9541

E-mail: bongusmusa.sibiya@bowmanslaw.com.

Ref: B Sibiya

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 314/24

In the matter between:

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

And

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
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MINISTER IN THE PRESIDENCY FOR WOMEN, YOUTH AND PERSONS WITH DISABILITIES	Second Respondent
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PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
--	------------------

AND

CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA	First Amicus Curiae
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PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Second Amicus Curiae
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Case CCT 315 /24

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES	Applicant
And	
THE EMBRACE PROJECT NPC	First Respondent
INGE HOLZTRAGER	Second Respondent
THE 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 Amicus Curiae
PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA	Second Amicus Curiae

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**FIRST, SECOND AND THIRD RESPONDENT'S
ANSWERING AFFIDAVIT**

I, the undersigned,

Leonard Tsietsi Sebelemetja

Do hereby make oath and say that:

1. I am an adult male of full capacity, in the employ of the Department of Justice and Constitutional Development. I am currently employed as the **Chief Director: Legislative Development and Implementation**.
2. In my capacity as the **Chief Director**, I am duly authorised to depose to this affidavit on behalf of the First, Second and Third Respondents ("the Respondents")
3. The facts herein contained, save where otherwise stated or indicated, are within my personal knowledge and are to the best of my belief, both true and correct.
4. Where I make submissions of a legal nature, I do so on the advice of my legal representatives which advice I accept is correct.

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5. I have read the application for leave to appeal, lodged by the Centre for Applied Legal Studies (CALS) as well as the confirmation application filed by the Embrace Project NPC together with Ms Inge Holztrager ("The Embrace"). For convenience, I shall refer to the parties as they appear in the confirmation application. The Respondents do not oppose the relief sought by the Applicants but will abide by the decision of this Honourable Court.

THE STRUCTURE OF THIS AFFIDAVIT

6. In these submissions we deal with the following:
- 6.1. Introduction.
 - 6.2. The purpose of this affidavit.
 - 6.3. The constitutional mandate of the State in relation to the crime and gender-based violence and femicide ["GBVF"]
 - 6.4. The historical context within which the impugned legislation; and policies should be read and understood.
 - 6.5. The Foundational Principles.
 - 6.6. Legislative and policy framework.
 - 6.6.1. *Legislative response to violence against women*
 - 6.6.2. *The Onus and the approach to the facts*
 - 6.7. A brief background of the first respondent's basis of opposition in the high court.

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- 6.7.1. The proposed amendment creates an unjustifiable 'reverse onus'
- 6.7.2. Possible violation of the right to remain silent
- 6.8. Substantive challenge before this court.
- 6.9. Conclusion.

INTRODUCTION

- 7. Before going to the gist of this explanatory affidavit, it is apt to place great emphasis on the sensitivities that surround the topic in this application. The Respondents reiterate that rape is a heinous, violent crime with traumatic effects mainly on women and that the crime of rape infringes on the rights to dignity, equality, freedom and security of a person, and children's rights.
- 8. The Respondents acknowledge that, despite current legislative interventions, GBVF in South Africa remains unacceptably high. However, the South African Government continues to impress upon various government departments the importance of adequately prioritising and effectively implementing various policies and programmes aimed at reducing, and eventually preventing, such incidents from occurring.
- 9. The Respondents reiterate that they are cognisant of their obligations, both in terms of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and international treaties and agreements ratified, that in criminal proceedings, it is imperative to maintain a balance between the

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interests of society in the effective enforcement of criminal law and the interests of society in the protection of the rights and freedoms of individuals who are suspected of, arrested for, and charged with crimes.

10. Since society requires a criminal justice system that is both fair and dependable, it is necessary to distinguish between the guilty and the innocent. In doing so, due process necessitates that state power be constrained in practical ways, including the prosecution of crimes, in order to recognise that innocent individuals may be entangled in the system.
11. There is no doubt that criminals inflict significant harm on both individuals and society. However, the state and its officials will also be held accountable for the harm inflicted upon them by unbridled state power, which fails to safeguard substantive rights such as the right to remain silent, right to be presumed innocent and the rights to dignity and equality.
12. On 30 September 2024, the North Gauteng High Court, Pretoria, per Baqwa J, declared sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) ("the Act") unconstitutional, invalid and inconsistent with the Constitution to the extent that these provisions do not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question, alternatively, to the extent that the provisions permit a defence against a charge of sexual violence where there is no reasonable objective belief in consent.

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13. The Applicants sought the following relief:

1 *Declaring sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 ("the Act") unconstitutional, invalid, and inconsistent with the Constitution to the extent that these provisions do not criminalize sexual violence where the perpetrator wrongly and unreasonably believed that the complainant was consenting to the conduct in question, alternatively, to the extent that the provisions permit a defence against a charge of sexual violence where there is no reasonable belief in consent.*

2 *The declaration of invalidity in paragraph 1 is suspended for a period of 12 months to allow the constitutional defects to be remedied by Parliament.*

3 *During the 12-months period referred to in paragraph 2, the following words shall be read into the Act:*

56(1A) *Whenever an accused person is charged with an offence under section 3, 4, 5, 6, 7, 8, 9 or 11A, it is not a valid defence for that accused person to rely on a subjective belief that the complainant was consenting to the conduct in question, unless the accused took objectively reasonable steps to ascertain that the complainant consented to sexual intercourse with the accused.*

4 *The declaration of invalidity and reading in shall operate only with prospective effect from the date of this order and shall have no effect on conduct which took place before the date of this order.*

5 *Directing that the costs of this application, including the cost of two counsel, are to be paid jointly and severally by any Respondents opposing the relief sought.*

6 *Further and/or alternative relief.*

14. The Applicants now seek confirmation of that order in terms of section 172(2)(d) of the Constitution¹.

15. The First Respondent opposed the grant of the relief that the Applicants sought in the court *a quo*. However, after careful consideration, the First Respondent has decided not to oppose the relief that the Applicants seek and file this affidavit to assist the Honourable Court with relevant information.

PURPOSE OF THIS AFFIDAVIT

16. In her portfolio as the Minister of Justice, the member responsible for the administration and the implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) ("the Act"),

¹ The Constitution of the Republic of South Africa No. 108 of 1996.

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which gives effect to the constitutional imperative to ensure the protection of the right of persons who are sexually assaulted and the protection of all who come into contact with the criminal justice system.

17. The objective of this affidavit is to assist this Honourable Court with the evidence relating to the state of the policy, programs and facilities available in giving effect to the constitutional imperative for the state to respect, protect, promote and fulfill the rights in the Bill of Rights.

THE MANDATE OF THE STATE IN RELATION TO CRIME AND GBVF.

18. For purposes of this matter, we shall focus on the constitutional mandate of the state parties in criminal matters and GBVF as appears from their official websites.

- 18.1. The First Respondent's mandate:

"...is derived from the Constitution, is two-fold. Firstly, it seeks to provide a framework for the effective and efficient administration of justice. Secondly, it seeks to promote constitutional development through the development and implementation of legislation and programmes that seek to advance and sustain constitutionalism and the rule of law."

- 18.2. The mandate of the Second Respondent is –

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“...to lead on socio-economic transformation and implementation of the empowerment and participation of women, youth and persons with disabilities through mainstreaming, advocacy, monitoring and evaluation. The vision of the Department is of a transformed, inclusive society free from all forms of discrimination and capable of self-actualisation. “

- 18.3. The constitutional mandate of the President of the Republic of South Africa, as elucidated in Chapter 5 of the Constitution, includes:

“The President—

- (a) is the Head of State and head of the national executive;*
- (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and*
- (c) promotes the unity of the nation and that which will advance the Republic.”*

- 18.4. The President also has specific powers and functions conferred by the Constitution and legislation, including assenting to and signing bills, referring bills for constitutional review, and making certain appointments.

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**HISTORICAL CONTEXT WITHIN WHICH THE PROVISIONS OF GENDER
AFFIRMING POLICIES OF THE SOUTH AFRICAN GOVERNMENT SHOULD BE
READ AND UNDERSTOOD**

19. Historically, the constitution has served as the cornerstone of our legal system, establishing fundamental principles and norms. The preamble of the Constitution acknowledges the injustices of the past; establishes the core foundational values which include democratic values, social justice, and fundamental human rights. Furthermore, the preamble lays out the vision for the nation, such as establishing a democratic and open society, improving the quality of life for all citizens, and building a united and democratic South Africa within the international community.²

20. The *Certification Case*³ sums up the fractious history of South African society-

"...a deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge".

21. Fundamentally, the new order is premised on values that are justifiable in an open and democratic society based on freedom and equality in which

² The preamble of the Constitution.

³ Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) at paragraph [5].

government is based on the will of the people and every citizen is equally protected by law.⁴ Thus, in interpreting the Bill of Rights it is important that the Courts give effect to those values.

22. Post-apartheid, the Constitution ushered in a new order, a constitutional state, which seeks to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
23. Chapter 1 of the Constitution, reinforces the constitutional values that underpin our democracy: human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism and the supremacy of the Constitution and the rule of law.

THE FOUNDATIONAL PRINCIPLES

24. The impugned legislation relates to the foundational principles of our criminal law; the presumption of innocence and the burden of proof on the one hand and safeguarding the rights that are enshrined in the Bill of Rights.
25. Thus, in criminal proceedings, there is a constant need to strike a balance between the interests of society in effective criminal law enforcement and the interest of society in the protection of the rights and freedoms of individuals suspected of, arrested for, and charged with crimes.

⁴ Act 108 of 1996.

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26. Section 35(3) of the Constitution⁵ guarantees accused persons 'the right to a fair trial which inter alia includes the right to be presumed innocent.
27. Section 7(2) of the Constitution enjoins the state "*to respect, protect, promote and fulfil the rights in the Bill of Rights*". This obligation extends to the rights of the accused person as well as the rights of society.
28. This dual obligation of the state was highlighted when the constitutionality of the death penalty was challenged, in *S v Makwanyane*.⁶ The Constitutional Court warned that even as the death penalty was abolished, in recognition of the new order, the obligation of the state to protect its citizens from the recidivist murderer or rapist remained. In other words, the state must protect society from further harm from the convicted unreformed recidivist killer or rapist.
29. In addition, the determination of the guilt of the accused is based on the full conspectus of the facts. As a result, reliable fact finding is essential if the criminal justice system is to ensure both that the guilty are punished and that the innocent remain free. The criminal justice system is striving towards maintaining a balance between truth seeking and individual liberties.

⁵ Constitution of the Republic of South Africa 108 of 1996.

⁶ 1995 (3) SA 391 at paragraph [170].

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LEGISLATIVE RESPONSE TO VIOLENCE AGAINST WOMEN

30. As has been articulated above, the government recognises the brutality of rape and its consequences. As a result, various pieces of legislation were enacted in order to combat the scourge of GBVF”).
31. The respondent contend that a holistic approach needs to be adopted to end GBVF. Legislation alone cannot solve the problem, as the interpretation and application of the legislation comes into play after the fact. The old adage, prevention is better than cure is equally applicable to rape. All stakeholders should be engaged in the implementation and application of measures to combat GBVF.
32. The state has also introduced socio-economic interventions which will be discussed in more detail hereunder.
33. This Honourable Court can take judicial notice of the fact that, due to its apartheid past, South Africa is a violent society. GBVF is a by-product of that legacy. Other factors which contribute to the scourge of GBVF are socio-economic, cultural, patriarchy and religion. During her visit in December 2015, the UN special rapporteur on violence against women, Dubravka Šimonović, accepted this. She made the following observation-⁷

⁷ “South Africa’s Still Long Walk to Free Women from the Shackles of Violence” – UN Expert Calls for Change, 15 December 2015, <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=16885&LangID=E>

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“The violence inherited from the apartheid still resonate profoundly in today’s South African society dominated by deeply entrenched patriarchal attitudes towards the role of women in society which makes violence against women and children an almost accepted social phenomenon”

34. Šimonović made the following observation-⁸

“Despite an arsenal of progressive laws and policies to deal with gender-based violence put very ably in place, there has been little implementation, hence impact and gender-based violence continue to be pervasive and at the level of systematic human rights violations against women,” (My emphasis)

35. In line with its national and international obligations, South African legislation regarding violence against women is extensive. It is important to note here that legislation is supported by supplementary legislation and policies, guidelines and frameworks. The laws dealing with violence against women include: -

⁸“ South Africa’s Still Long Walk to Free Women from the Shackles of Violence” – UN Expert Calls for Change, 15 December 2015, <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=16885&LangID=E>

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- 35.1. **the Domestic Violence Act,**⁹ which places positive duties on the police regarding the protection of women in domestic partnerships and provides for women to apply for protection orders in order to force a separation between themselves and their abuser.
- 35.2. **The Criminal Law (Sexual Offences and Related Matters) Amendment Act** expanded the definition of rape and created a number of new crimes in order to cover the extent of violence against women in South Africa. Importantly, this Act removed the cautionary rule, where a rape survivor's testimony was to be regarded with suspicion and ensured that rape within marriage was classified as rape. In addition, the Act prescribes certain minimum sentences for certain acts of sexual violence.
- 35.3. **The Protection from Harassment Act**¹⁰ protects women from harassment and provides for them to apply for protection orders in this regard.
- 35.4. **The Prevention and Combating of Trafficking in Persons Act**¹¹ introduces trafficking as an offence and sets up mechanisms to offer support to victims of trafficking. Importantly, all these pieces of legislation give effect to the principles enshrined in the Constitution.

⁹ Act 116 of 1998.

¹⁰ Act 17 of 2011.

¹¹ Act 7 of 2013.

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36. Socio-economic factors, cultural practices, and patriarchy have been identified as the main contributors to violence against women. South Africa has made every endeavour to promote the equality of women as well.
37. To this end, South Africa has established the legal protection of the rights of women on an equal basis with men and ensured through competent tribunals and other public institutions the effective protection of women against any act of discrimination.
- 37.1. **The Commission for Gender Equality (“CGE”)** is mandated in terms of the Constitution *“to promote respect for gender equality and the protection, development and attainment of gender equality”*.¹²
- 37.2. **The Department of Women, Youth and Persons with Disabilities** which is now situated in the Presidency, has been mandated to champion the advancement of women’s socio-economic empowerment and the rights of women are mainstreamed as well as the promotion of gender equality.
- 37.3. *“The Sustainable Development Goals are a global call to action to end poverty, protect the earth’s environment and climate, and ensure that people everywhere can enjoy peace and prosperity.”*¹³ Gender equality is one of the goals the United Nations is working on in South

¹² Section 187 of the Constitution.

¹³ UN SDG in South Africa

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Africa. The South African government placed the SDGs in the Presidency and issued a publication on gender equality called: *The Presidency of the Republic of South Africa: National Planning Commission National Development Plan 2030: "Our future - make it work (2012)"* provides for the Sustainable Development Goals (SDGs) includes particularly SDG five¹⁴, which speaks to the achievement of gender equality –

"A target achieving SDG5 includes ending all forms of violence against all women and girls in the public and private spheres. South Africa's national development plan further and visions that, by 2030 people in South Africa should have no fear of crime, and especially women children and those who are vulnerable should feel protected".

37.4. **National Human Rights Institution (NHRI)**, the SAHRC¹⁵ monitors the state's progress toward combating GBVF in all of its forms, including state compliance with international and regional instruments; domestic legislation and national programmes; and achieving the objectives articulated in the SDGs and NDP.

¹⁴ SDG 5 forms part of the goals Sustainable Development Goals the UN is working on in South

¹⁵ Established in terms of South African Human Rights Commission Act, 40 of 2013.

38. Aside from the regular courts, specialized courts have been established to expedite matters related to the discrimination against women as well as gender-based violence in relation especially to children.

38.1. **The Equality Courts**,¹⁶ designated to hear matters relating to unfair discrimination, hate speech and harassment.

38.2. **The Sexual Offences Courts**,¹⁷ are equipped with specially trained prosecutors, court supporters and magistrates as well as CCTV equipment to enable children to testify in a separate room, away from the perpetrator.

THE ONUS AND THE APPROACH TO THE FACTS

39. Our Courts have for decades acknowledged and held similar views expressed by the Constitutional Court in **S v Chapman**¹⁸ that:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate

¹⁶ Established in terms of section 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁷ Established in terms of section 55A (1) of SORMA

¹⁸ 1997 (3) SA 341(SCA) at paragraphs [3] to [4].

claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

40. Not only does South Africa have a comprehensive legal framework to address GBVF, the Constitution enjoins the country's courts to actively play an instrumental role in the fight against GBVF. Important judgments include *Carmichele v Minister of Safety and Security*,¹⁹ where the Constitutional Court held that the state is obliged in terms of the Constitution and international law to prevent violence against women and to protect the dignity, freedom and security of women.
41. In *Masiya v Director of Public Prosecutions*,²⁰ exercising its power to develop the common law under section 39(2) the court held that where there is deviation from the spirit, purport and objects of the Bill of Rights, courts are obliged to develop the common law by removing the deviation. Consequently, the Constitutional Court extended the definition of rape to include non-consensual anal penetration of females, which was previously not included in the definition.

¹⁹ 2001(4) SA 938 (CC).

²⁰ 2007(5) SA 30 (CC).

42. It is trite that the onus of proof rests on the state to prove the accused's guilt beyond a reasonable doubt. Where the accused's exculpatory version is reasonably probably true, he or she must be acquitted.

43. The proper approach to the facts in a criminal trial has remained the same. Malan AJA in *R v Mlambo*²¹ stated the following:

"In my opinion, there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration much more concludes that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."

44. Malan AJA in *R v Mlambo* at 738B-C further stated:

45. *"An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, approved facts of the case."*

²¹ 1957(4) SA 727 (A) 738A.

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46. From the above, it is evident that the facts are key. The courts are enjoined

*“When interpreting the Bill of Rights...to promote the values that underlie an open democratic society based on human dignity, equality and freedom.”*²²

47. Section 39(3) of the Constitution provides-

“When interpreting any legislation, and when developing the common law, every court, must promote the spirit, purport and objects of the Bill of Rights”.

48. The Respondents contend that despite all the endeavours set out above, GBVF in South Africa remains unacceptably high. However, South Africa continues to impress upon various government departments the urgency to adequately prioritise and effectively implement various policies and programmes that seek to minimise, and ultimately prevent, such incidences from occurring.

49. The Respondents are cognisant of their obligations, both in terms of the Constitution and international treaties and agreements ratified.

50. The primary questions to be considered relate to whether the current definition of rape is inconsistent with the Constitution.

²² Section 39(1) of the Bill of Rights.

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51. In criminal proceedings there is a constant need to strike a balance between the interests of society in effective criminal law enforcement and the interest of society in the protection of the rights and freedoms of individuals suspected of, arrested for, and charged with crimes.
52. Society requires a criminal justice system that is reliable and fair where the guilty are separated from the innocent. In doing so, due process demands that there must be practical limitations on state power. This means that state power should be restrained in the detection, investigation, prosecution and punishment of crimes, appreciating the fact that innocent people can get drawn into the system.
53. There can be no doubt that individuals and society suffer severely at the hands of criminals, but there can also be no doubt that unbridled state power which does not protect the substantive rights such as the right to dignity and equality of individuals and society will also suffer at the hands of the State and its officials.
54. A system which is essentially weighted in favor of due process does not ignore the rights of the victim of crime, however, seeks to ensure that vindication of the rights of the victim does not trigger or lead to further injustices. Reliable fact finding is essential if the criminal justice system is to ensure both that the guilty are punished and that the innocent remain free, which means the law striving towards maintaining a balance between truth seeking and individual liberties.



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55. The idea of a Constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrary action or decision making is incapable, in its nature, of providing a rational explanation, and without a rational justifying mechanism, unequal treatment will follow.

56. In Cloete 1999 (2) SACR 137 (C), Davis J observed that,

“It is wrong to conclude that an attempt to preserve the Constitution is necessarily a nod in the direction of criminals. The Constitution is not the cause of crime in this country; the court’s task is to uphold the Constitution in such a manner that gives it proper effect which is considered to achieve some balance between the models of crime control and due process. “

57. Jansen JA, in S v Ngubane²³ remarked as follows-

“If the objective test for culpa is applied, the question is whether the conduct of the agent measured up to the standard of the reasonable man in the circumstances; if the subjective test were to be applied, the question appears to be whether the conduct of the agent measured up to the standard of his own capabilities.”

²³ (30/83) [1985] ZASCA 41[1985] 2 All SA 340(A)

58. Our Courts have for decades acknowledged and held similar views expressed by the Constitutional Court in **Tshabalala v S; Ntuli v S**²⁴ that

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

59. In what follows, I set out the endeavors by the State to comply with the constitutional imperatives.

60. It is also important that any changes to the legislation should make a substantive difference. The presumption of innocence and the classification of liability in South African criminal law requires the prosecution to prove the absence of any defence beyond a reasonable doubt.

61. Internationally, excluding the concept of consent has proved impossible even where it is absent from the definition of rape or sexual assault it inevitably emerges as a defence. This is primarily due to the fact that in many instances

²⁴ 2020 (2) SACR 38 (CC).

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it is only the absence of consent that criminalises the behavior under scrutiny. It is the sexual nature of the offence that makes it so difficult to circumvent the element of consent. Whilst the victim's consent to physical assault may not constitute a defence, sexual relations are not *prima facie* unlawful, to deem them to be so would be to adopt a social norm that has yet to gain acceptance.

62. The disadvantages of retaining consent goes beyond shifting the focus from the accused to the complainant's behaviour and detracting from the brutal and destructive nature of the crime of rape, it also assumes an equality between parties both as regards the ability to consent and the weight accorded to the perpetrator and complainant voices.

63. The abuse of power and inequality between the parties was taken into consideration by the courts before the enactment of SORMA. **S v Egglestone**²⁵ and **S v SM**.²⁶ Section 1(3) of SORMA deals with unequal consent.

BRIEF BACKGROUND OF THE FIRST RESPONDENT'S BASIS OF OPPOSITION IN THE HIGH COURT

64. Although I have already indicated that in the present confirmation proceedings the First Respondent is not opposing this application, I deem it prudent to briefly set out the basis of the opposition in the High Court before the

²⁵ 2009(1) SACR 244(SCA).

²⁶ 2013(2) SACR 111 (SCA).

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Honourable Justice Baqwa. The purpose of this is to contextualise the First Respondent's submissions in its effort to assist this Honourable Court in its determination of these confirmation proceedings.

65. In the High Court, the First Respondent opposed the application to declare unconstitutional and invalid sections 3, 4, 5, 6, 7, 8, 9, and 11A read with section 1(2) of the Act. Collectively, the impugned sections create consent based sexual offences.
66. In that application, it was submitted that these sections are not inconsistent with the Constitution and that the proposed amendment will inevitably create an unjustifiable reverse onus.
67. It was contended that, considering the scope and ambit of the rights in question, as well as the meaning and effect of the impugned law, it does not infringe the fundamental rights to dignity, privacy, security and freedom. Alternatively, if it does, the infringement is a justifiable limitation.
68. As is clear, the First Respondent does not oppose confirmation by this Honourable Court of the High Court's order of invalidity. However, the First Respondent contends and cautions that the relief that the Applicants seek runs the risk of violating the rights that are enshrined in the Constitution. These are, *inter alia*, the right to remain silent at the trial; the right to be presumed innocent (section 35(3)(h) of the Constitution); and the privilege against self-incrimination at trial (section 35(3)(j) of the Constitution).

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69. The above rights would be illusory if accused persons were compelled to give evidence that they '*took reasonable steps to ascertain that the complainant consented to sexual intercourse with the accused*'.
70. In other words, a requirement that consent be explicitly communicated and that the accused take reasonable steps to ascertain consent as argued above may have the unintended effect of shifting the focus from the accused's behavior to that of the complainant and is consequently not endorsed.
71. The South African case law emanating from this Honourable Court show that the rationale for the presumption of innocence finds expression in the reasonable doubt standard. The reasonable doubt standard demands that the burden of proof rests on the prosecution to prove guilt beyond reasonable doubt.
72. Our case law also shows that the presumption of innocence contains two facets, namely, a rule regulating the standard of proof and a policy directive that the subject of a criminal investigation must be treated as innocent at all stages of the criminal process irrespective of the probable outcome of the trial.



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INSTANCES WHERE THE CONSTITUTIONAL COURT FOUND THAT A STATUTORY PROVISION UNJUSTIFIABLY CREATES A REVERSE ONUS

73. In *S v Manamela* 2000 (3) SA 1 (CC), this Honourable Court drew a distinction between an infringement of the right to remain silent and the presumption of innocence. The Honourable Court was required to consider whether the reverse onus in section 37 of the General Law Amendment Act, 1955 (Act No. 62 of 1955) infringed the constitutional right to a fair trial, in particular the right to be presumed innocent, to remain silent and not to testify during proceedings.

73.1. The majority held that section 37(1) required the prosecution to prove the following beyond a reasonable doubt: (1) that the accused was found in possession of goods, other than stock or produce; (2) that the goods were acquired otherwise than at a public sale; and (3) that the goods had been stolen.

73.2. Once the prosecution has discharged this burden the accused must establish on a balance of probabilities that: (1) he or she believed, at the time of acquiring the goods, that the person from whom he or she received them was the owner of the goods or was duly authorised by the owner to dispose of them; and (2) his or her belief was reasonable. Section 37(1) effectively creates statutory liability for the negligent acquisition or receipt of stolen goods.

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73.3. The majority held that section 37(1) (as it was at the time) was a justifiable infringement of the right to remain silent but an unjustifiable infringement of the presumption of innocence. The Honourable Court drew a distinction between the right to remain silent and the presumption of innocence. It held that the reverse onus (in that case) infringed the right to silence because the accused must establish that they had reasonable grounds for believing that the seller of the goods had been authorised to sell the goods or was the owner of the goods even where the prosecution had led no evidence regarding the reasonableness of their belief. Additionally, if the accused failed to produce evidence of the reasonableness of their belief it was an inevitable conclusion that such belief was not reasonable as it was not possible for any other inference to be drawn. Section 37 infringed the presumption of innocence because the section 'imposed a full legal burden of proof on the accused' (para 25 of the judgment).

74. In ***S v Singo 2002 (2) SACR 160 (CC)***, in adopting essentially the same approach as that taken in *Manamela* this Honourable Court indicated that the presumption of innocence as a constitutional right is restricted to the requirement that guilt be proved beyond a reasonable doubt, whilst the allocation of the burden is a product of the right to remain silent which appears to be a far more malleable right.

75. In ***S v Coetzee 1997 (3) SA 527 (CC)***, this Honourable Court dealt with the effect of the presumption of innocence on statutory provisions requiring the

accused to prove an exemption, exception or defence. This Court was required to determine the constitutionality of section 332(5) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides:

'When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the offence, unless it is proved that he did not take part in the commission of the offence and that he could have prevented it, and shall be liable to prosecution therefore, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefore.'

75.1. The Honourable Justice Langa held that the provisions of section 332(5) imposed an onus on the accused to prove an element relevant to the verdict, whether this element pertained to the offence or to an exemption was not relevant, the issue being the substance of the offence. *'If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in regard to that substantial part, the presumption of innocence is breached.'*

75.2. This Honourable Court in *Coetzee*, by implication rejected the 'greater includes the lesser test'. Consequently, a reverse onus provision

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cannot be saved by the argument that the Legislature, by creating a special defence in respect of which the accused bears the onus, has ameliorated the hardship the accused would otherwise have suffered if it had chosen to create an absolute liability offence.

76. In ***S v Mello* 1998 (7) BCLR 908 (CC)**, a case also involving the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), the statutory provisions of section 20 of that Act, which contained a presumption of guilt, was declared invalid and unconstitutional on the basis that it created a reverse onus.

76.1. The Honourable Justice Mokgoro cited ***S v Mbatha; S v Prinsloo* 1996 (7) BCLR 899 (CC)** and made the important observation that “similar to the presumption embodied in section 40(1) of the Arms and Ammunition Act, the effect of the presumption in section 20 of the Act is that it shifts the onus to the accused to prove his or her innocence”. Section 20 was therefore declared invalid.

77. The above cases provide a few instances in which the Constitutional Court found that a statutory provision containing a reverse onus provision that infringes upon the accused’s right to be presumed innocent is inconsistent with the Constitution and, for that reason, invalid.

POSSIBLE VIOLATION OF THE RIGHT TO REMAIN SILENT

78. This Honourable Court described the right to remain silent as the absence of a legal obligation to speak.
79. There is no doubt that the amendment that the Applicants propose creates a legal obligation to speak on the part of the accused person, thereby infringing the constitutional right to remain silent.
80. The rationale of this right is, *inter alia*, based on the belief that individuals have a right to privacy and dignity which, whilst not absolute, may not be lightly eroded and that the right to remain silent is necessary to give effect to the privilege against self-incrimination and the presumption of innocence.
81. In ***S v Bhulwana, S v Gwadiso*** (cct12/95, CCT11/95) [1995] ZACC 11, this Honourable Court held that the provisions of section 21(1)(a)(i) of the Drugs and Drug Trafficking Act, 1992, which placed the burden of proof on the accused under certain circumstances, is therefore an unconstitutional infringement of the right entrenched in section 35(1)(a) of the Constitution.
82. The Constitutional Court placed emphasis on the fact that the effect of the provision was that, once the State has proved that the accused was found in possession of an amount of dagga in excess of 115g, the accused will, on a balance of probabilities, have to show that such possession did not constitute dealing as defined in the Act. Even if the accused raises a reasonable doubt

as to whether he or she was dealing in the drug but fails to show it on a balance of probabilities, he or she must nevertheless be convicted. The effect of imposing the legal burden on the accused may therefore result in a conviction for dealing despite the existence of a reasonable doubt as to his or her guilt (para 8).

83. The Constitutional Court in *Bhulwana* held that the provisions of section 21(1)(a)(i) of the Act cannot be justified under the Constitution in that it gives rise to an infringement of the right to remain silent, a right which is a pillar of our system of criminal justice.

SUBSTANTIVE CHALLENGE BEFORE THIS COURT

84. I am advised that this Honourable Court must reach its own conclusion on all orders of constitutional invalidity and make the final decision on whether a law is indeed unconstitutional in terms of section 167(5) of the Constitution.
85. This Court's powers are buttressed by section 172(2)(a) of the Constitution, which reinforces that this Honourable Court must confirm an order of invalidity before the order can have any force. These provisions provide a limitation on the High Court's competence to make final decisions regarding the constitutional validity or invalidity.
86. Only this Honourable Court may make an order of constitutional invalidity that is final and binding.

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87. Bearing the above in mind, the Respondents' respectful submission is that the substantive challenge facing this Honourable Court is that the proposed amendment of the statutory provisions in question implicate rights in the Bill of Rights.

CONCLUSION

88. In the event that, this Honourable Court is inclined to grant an order of confirmation of constitutional invalidity, the following alternative suggestion may be beneficial for both the Applicants and the accused persons in rape cases.
89. The proposed legislation should establish guidelines for what constitutes a reasonable belief in consent. The Act defines consent in a clear manner and offers a comprehensive list of situations in which consent will not be required.
90. It is advisable to include situations in which consent is granted by an individual other than the complainant in the list. Moreover, the present circumstances regarding the abuse of power or authority necessitate clarification regarding the distinction between "unwillingness" and "resistance," as well as the distinction between "unwillingness/resistance to the sexual act" and "unwillingness to participate in such a sexual act."

91. It is evident that the requirement that consent be explicitly communicated and that the accused take reasonable steps to ascertain consent, as argued above, may have the unintended effect of redirecting the focus from the accused's behaviour to that of the complainant. Consequently, this requirement is not endorsed.
92. To prevent the reemergence of rape myths as a defence based on ignorance of the law, the Act should explicitly stipulate that ignorance of the law will only serve as a defence if it is reasonable, and that it will not be reasonable in the circumstances outlined in section 1(3) of the Act.
93. In the premises, the First Respondent respectfully request that the Honourable Court grants a 36 months period to rectify the impugned section and adhere to the court's ruling and further, that the respondent will abide by the decision of the Court.



DEPONENT

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I certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit which was signed and sworn to before me at Silverton SAPS on 08 September 2025, the regulations contained in Government Gazette Notice No. R1258 of 21 July 1972, as amended, and Government Gazette Notice No. R1648 of 19 August 1977, as amended, having been complied with.



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van Huissoelen
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COMMISSIONER OF OATHS

[Handwritten initials] R.E.