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*

THE EMBRACE APPLICANTS' WRITTEN SUBMISSIONS ON THE STATE RESPONDENTS' ANSWERING AFFIDAVIT

INTRODUCTION

1. The First to Third Respondents ("**the State Respondents**") have filed, months late and at the eleventh hour, what they call an "explanatory/answering affidavit". The Court has directed that the applicants and *amici curiae* may file short written submissions in response to that affidavit

2. The First and Second Applicants in CCT 314/24 and the First and Second Respondents in CCT 315/24 ("**the Embrace Applicants**") hereby do so, and express their gratitude to the Court for this opportunity.

3. The approach adopted by the State Respondents in these proceedings is most unfortunate and prejudicial to the ability of the Applicants to properly prepare for and respond to the case they make before this Court. While the State indicates that it is abiding, the affidavit filed at the eleventh hour suggests the opposite. In most other circumstances, we would contend that condonation ought not to be granted. However, we recognise that the State has a duty to assist this court where the constitutionality of legislation is at issue. We therefore do not oppose condonation sought.

4. In relation to the State Respondents' position that they "*do not oppose the relief sought by the Applicants but will abide by the decision of this Honourable Court*":[1]

5. They do not indicate which "Applicants" they are referring to. The Embrace Applicants seek diametrically different relief in CCT 314/24 from that sought by the Applicant in CCT 315/24 ("**CALS**"). The Embrace Applicants seek confirmation of the High Court's order. CALS seeks the setting aside and substitution of that order. The approach of the State is therefore confusing and unhelpful.

6. The State Respondents also treat the Embrace Applicants' challenge and CALS' challenge as substantively indistinguishable and interchangeable which they are not:

    6.1. The Embrace Applicants' case, arising from the concrete facts of the injustice endured by Ms Holzträger, is that the Criminal Law (Sexual

[1] State Respondents' affidavit, para 5.

Offences and Related Matters) Amendment Act, 2007 ("**the Act**"), by failing to exclude the defence of a mistaken and unreasonable belief in the presence of consent ("**the *Amos* defence**"), violates the dignity, privacy and personal security rights of survivors, victims and potential targets of sexual violence (mainly women). The Embrace Applicants' case concerns only the element of fault (*mens rea*).

6.2. CALS' case, by contrast, is that the absence of consent should not be a definitional element of sexual offences. Instead, any sexual conduct in the presence of any "coercive circumstances" would be *prima facie* unlawful, and the presence of consent would be a defence against the element of unlawfulness, and (it seems) a subjective perception of the presence of consent would be a defence against the element of fault.

6.3. CALS' case entails a complete rewriting of the law concerning sexual offences where consent would be relevant. The Embrace Applicants' case is more modest, and only entails the insertion of a provision that qualifies the existing law by requiring that an accused's defence of his belief in the presence of consent can only succeed if that belief was reasonable in the circumstances (i.e. outlawing the *Amos* defence).

6.4. CALS' case does not appear to address the *Amos* defence at all.

7. Despite "abiding", the State Respondents then proceed to tell the Court why the relief sought by both the Embrace Applicants and CALS would "violate" the section 35 rights to be presumed innocent and to remain silent (or not to

incriminate oneself).[2] They do not disavow the grounds of opposition advanced by the First Respondent ("**the Minister of Justice**") in the High Court. On the contrary, they seek to defend and even supplement them. It is thus, in substance, incorrect that the State Respondents are "abiding".

8. Despite "abiding", the State Respondents also plead (without providing reasons) that the period of 12 months, afforded to Parliament to correct the constitutional defects, should be tripled to 36 months.

9. Below, we will explain the following:

   9.1. The State Respondents have impermissibly supplemented their grounds of opposition.

   9.2. In any event, the grounds of opposition have no merit – the fair trial rights of the accused would not be violated.

THE STATE RESPONDENTS HAVE IMPERMISSIBLY SUPPLEMENTED THEIR GROUNDS OF OPPOSITION

10. The Minister of Justice's grounds of opposition in the High Court were as follows:

> *"Firstly, the application seeks to place the burden of proof on the accused to prove the absence of essential elements of the crime rather than the State proving unlawfulness and culpability (mens rea). To do so, will essentially revoke the right to be presumed innocent until proven guilty.*

[2] Id, para 68.

Secondly, the proposed amendment would be to lower the standard of proof in criminal cases from proof of guilt of the accused person beyond a reasonable doubt, to negligence as the applicants purport to do.

Thirdly, the application aims to amend the common law definition of intention (dolus) to include negligence (culpa) as a form of dolus eventualis when dealing with an offence in contravention of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA"). This application aims to include the objective reasonable person test used for culpa when ascertaining knowledge of unlawfulness."[3]

11. Now, for the first time in this Court, the State Respondents "contend and caution" that the relief sought by the Embrace Applicants will "violate" not only the right to be presumed innocent, but also the right to remain silent.[4] That was never part of the Minister of Justice's case in the High Court. The State Respondents now ask this Court to consider this contention without the benefit of any lower court's views on it, and, without affording the Embrace Applicants a proper opportunity to address it.

12. This conduct should not be countenanced. In ***DHB v CSB***, this Court held as follows (with our emphasis):[5]

"[45] A party should generally not be allowed to argue new issues on appeal that were not raised or considered by the lower court. There are exceptions and circumstances when a party may be allowed to rely on an issue which

[3] Minister of Justice's answering affidavit in the High Court, paras 19.1 to 19.3 (v3 p258).
[4] State Respondents' affidavit, para 68.
[5] *DHB v CSB* [2024] ZACC 9; 2024 (8) BCLR 1080 (CC); 2024 (5) SA 335 (CC).

was not covered in the pleadings. In ***Slabbert****, the Supreme Court of Appeal articulated these circumstances:*

'This occurs where the issue in question has been canvassed fully by both sides at the trial. In South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd, this court said: 'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.'

…

[49] An appeal court can deal with an issue that was not raised in the lower courts and not considered by the lower courts. <u>However, this can only be done in exceptional circumstances. A court will not entertain a new issue on appeal where it causes prejudice or unfairness to the other party.</u>"

13. In addition, this Court in *SATAWU* held that "*[h]olding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded*".[6]

14. It is plainly prejudicial to the litigants in these proceedings for the State Respondents to introduce a new ground of opposition on the eve of the hearing. This, in circumstances where the Minister has long since indicated that she abides. We accept that the State bears a special duty to assist the Court in

[6] *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 114.

confirmation proceedings.[7] However, it would be improper for the State to treat this duty as a *carte blanche* invitation to approbate and reprobate – to abide and then oppose.[8]

15. In any event, we submit that neither the grounds previously relied on by the Minister nor the new grounds of opposition have any merit.

THE ACCUSED'S FAIR TRIAL RIGHTS WOULD NOT BE VIOLATED

16. The State Respondents argue, in short, that the Embrace Applicants' relief would create a "reverse onus", and that this would be "unjustifiable".[9]

17. There are three reasons why this argument has no merit.

18. <u>First, the onus would not be reversed.</u>

    18.1. The burden would not shift to the accused to disprove an element of any offence, i.e. the intention to act wrongfully. All that would happen is that, if an accused is in a position that, on the State's evidence alone, there is no reasonable doubt that he knew the complainant was not consenting at the relevant time (i.e. the accused cannot obtain a discharge), only then is it up to the accused to put up evidence (most notably his own testimony) to show that he believed there was consent.

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[7] See, for example, *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC) at paras 126-127.
[8] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 101.
[9] State Respondents' affidavit paras 73-77.

18.2. This is no different from the position in any sexual offence case where an accused has a case to answer and invokes a defence excluding fault. *S v Coko* is one example. In that case, it was incumbent on the accused to put up a defence and evidence that he believed the complainant had consented to penile-vaginal penetration. The Supreme Court of Appeal found that that he did not truly believe she was consenting. His version was not reasonably possibly true.[10]

18.3. The Embrace Applicants' case deals with the problem that arises one step further, i.e. where the accused has established that he held such a belief, but his belief was unreasonable in the circumstances. The burden to prove that his belief was unreasonable still rests on the State.

18.4. The State Respondents refer to *S v Coetzee*,[11] where this Court held that "*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*."[12]

18.5. But that is not the scenario here. If the Embrace Applicants' challenge is upheld, the State will still need to exclude "*the existence of a reasonable doubt*" in relation to fault. But it will only need to exclude the possibility of

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[10] *Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (main and supplementary judgment)* 2024 (2) SACR 113 (SCA); [2024] 3 All SA 674 (SCA) at paras 79-80.
[11] *S v Coetzee and Others* [1997] ZACC 2; 1997 (4) BCLR 437 (CC); 1997 (3) SA 527 (CC).
[12] Id, para 38.

a reasonable perception of consent, and not an unreasonable perception of consent.

18.6. We submit that the question of whether an accused's right to remain silent in implicated by the relief sought by the Embrace Applicants is nothing more than a red-herring. Even under the reasonable-steps construction, the State still bears the onus to establish its case against the accused beyond a reasonable doubt – and an accused remains entitled to close his case without testifying. The only difference here, would be that the State would not be called upon to prove the subjective state of mind of the accused – and may rely on objective factors which establish that there was no consent. This position holds true in any criminal scenario: an accused will always have to make an election on whether or not to remain silent in the wake of the evidence.

19. Second, even if the onus was reversed, this would be justified.

19.1. The State Respondents rely on *S v Manamela*.[13] But that judgment does not say that a reverse onus as such is unjustifiable. It says that there were less restrictive means to achieve the purpose of the legislative provisions in that case.[14]

19.2. In the Embrace Applicants' case, the relief sought is carefully tailored to address the constitutional defect presented by the *Amos* defence and

[13] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC).
[14] Id, para 34.

goes no further. It simply excludes the *Amos* defence as a viable escape route for an accused who has a case to answer as far as fault is concerned, just as many other open and democratic societies have done.

20. Third, the State has failed (both in the High Court and in this Court) to address the issue, pertinently pleaded by the Embrace Applicants at each level, that the Act already outlaws an *Amos* type defence in respect of certain other offences:

20.1. Section 56(2)(a) of the Act (under "**Defences**") provides as follows:

> *Whenever an accused person is charged with an offence under section 15 or 16 ["statutory rape" and "statutory sexual assault"], it is, subject to subsection (3) , a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older.*

20.2. Section 56(6) of the Act provides as follows:

> *It is not a valid defence to a charge under section 20(1) ["using children for or benefitting from child pornography"], in respect of a visual representation that—*
>
> *(a) the accused person believed that a person shown in the representation that is alleged to constitute child pornography, was or was depicted as being 18 years or older unless the accused took all reasonable steps to ascertain the age of that person; and*

(b) took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years.

21. For these reasons, we submit that the State Respondents' grounds of opposition have no merit, and the High Court's order should be confirmed.

COSTS AND CONCLUSION

22. We submit that the State Respondents should bear the costs of the confirmation proceedings. The State is responsible for the constitutional defect, and thus should ordinarily bear the costs of a successful challenge to it. Moreover, the manner in which the State has conducted itself in these proceedings should, we respectfully submit, draw the sanction of this Court.[15]

23. For the reasons provided in these submissions, we submit that the order of the High Court should be confirmed and that the State should be ordered to pay the Embrace Applicants' costs, including the costs of two counsel.

NASREEN RAJAB-BUDLENDER SC

LERATO PHASHA

BEN WINKS

SANAN MIRZOYEV

[15] See this Court's dicta in *Booi v Amathole District Municipality and Others* [2021] ZACC 36; [2022] 1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC) ; 2022 (3) BCLR 265 (CC), paras 59-61.

Counsel for the Embrace Applicants

Chambers, Sandton

19 September 2025