

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

First Respondent

CORRECTIONAL SERVICES**MINISTER IN THE PRESIDENCY FOR WOMEN,**

Second Respondent

YOUTH AND PERSONS WITH DISABILITIES**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

Third Respondent

AND

CENTRE FOR HUMAN RIGHTS, UNIVERSITY

First Amicus Curiae

OF PRETORIA**PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA**

Second Amicus Curiae

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

**FIRST SECOND AND THIRD RESPONDENT'S
SUBMISSION ON CONDONATION**

INTRODUCTION

1. The first, second and third respondent (respondents) seeks condonation for the late service and filing of its explanatory affidavit. The respondent's application is unopposed.
2. The first and second applicants have responded to the respondents' explanatory affidavit and are seeking costs from the respondents. This submission will address the condonation application and the issue of costs.

BACKGROUND FACTS

3. 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.

4. The first and second applicant (the applicant) seek confirmation of the order of *Baqwa J* in terms of section 172(2)(d) of the Constitution of the Republic of South Africa, 1996 (“Constitution”)
5. The third applicant (“Intervening party”) has submitted an application to appeal the order issued by the High Court.
6. The respondents expressed no opposition to the relief sought by the applicants and will abide by the decision of court.

THE DUTY OF STATE IN CONSTITUTIONAL LITIGATION

7. The Constitution imposes a separate and distinct burden on the state in the conduct of constitutional litigation that is not placed on other constitutional litigants.
8. That duty was best explained by Justice Sachs, writing separately in *Matatiela Municipality and Others v President of the Republic and Others* 2006(5) SA 47 (CC) at paras 107, 119 and 110.
9. The ethical duty on the state flows directly from a number of fundamental provisions in our constitution. First, the rule of law requires that all laws and government actions are rational. To establish rationality, the government must provide quotes with all available and germane information so that the courts deliver decisions based on a full and proper understanding of the facts.

10. Secondly section 165(4) of the Constitution requires organ of state to assist and protect the courts. This obligation must impose a duty on the state to act in such manner when it is involved in litigation.
11. Thirdly, section 195(1) of the Constitution requires that public administration be accountable and transparent.
12. Lastly, the general ethical duty gives effect to the transformative ideals of the Constitution-these ideals at a minimum require a transition from a culture of authority to a culture of justification.
13. The main duty on the state is to provide courts with all the information they need to make their decision. This duty is not limited to the specific stages in constitutional litigation where the state often bears a specific evidentiary burden it extends to all aspects of constitutional litigation.
14. The state's duty is not, nor can it be limited only to the provision of information for the state to win its case. The duty covers all the information that would assist a court in rendering its decision. The duty to adduce information arises from the time the litigation begins: it is not necessary for a court to request information from the state.¹

¹ Mahlaule v Minister of Social Development and Others 2004(6) SA 505 (CC)

15. Because the ethical duty on the state does not flow from its position as a litigant but from obligations imposed by the constitution, the Constitutional Court has emphasised that the State must provide relevant information even if the State does not oppose the specific challenge at issue.²
16. In *Khosa*³, at paras 24-5, the Constitutional Court required further information to enable it to discharge its constitutional duty, and it was in the interest of justice that such information be placed before it. In the circumstances, the most appropriate way of dealing with the situation was to require the respondent to place the necessary information before constitutional court expeditiously. For these reasons the matter was postponed.

LEGAL PRINCIPLES

17. Rule 32 of the Rules of this Honourable Court deals with non-compliance with the Rules and empowers this Honourable Court to either of the Court's own accord or on application and sufficient cause shown condone non-compliance with the Rules. The Rule provides that the Court or the Chief Justice may –
- (1) of their own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules; and*
- ...2*

² Constitutional litigation page 3-25

³ *Khosa and Others v Minister of Social development* 2004 (6) BCLR 569(CC)

3. Sufficient cause or good cause has received considerable judicial consideration and the principles emanating from the authorities is to the effect that the Court has a discretion to be exercised upon consideration of all the facts, including:-

- 3.2. the explanation given for the delay;
 - 3.3. whether the explanation is full and frank;
 - 3.4. the degree of lateness; and whether there are prospects of success.
4. It is submitted, with respect, that the approach to the question of condonation should be similar to that adopted by His Lordship Mr. Justice Holmes in **Melane v Santam Insurance Co. Limited 1962 (4) SA 531 (A) at 532 C – D.**
5. The overriding consideration is whether it is in the interests of justice to grant condonation.
6. In the present matter, the applicants failed to comply with the time limits set out in the directives of this Court.
7. The respondents has tendered an explanation which, if viewed in isolation, might not seem sufficient. However, the duty of the state in constitutional litigation and the fact that the respondents does not oppose the application for condonation tilt the scales in the applicant's favour.
8. Furthermore, this issue holds significant relevance for the parties involved and the entire nation, and considering that, the respondents' condonation application

has not been opposed, and no prejudice was demonstrated in the delay, the application for condonation should be granted.

9. In the premises, the respondents respectfully request that the Honourable Court condone the respondents' late filing of its explanatory affidavit.

COSTS

10. Whilst the First and Second Applicants reasoning correctly that the respondents is not a litigant in these proceedings. Consequently, the First and Second Applicants do not oppose the application for condonation application. However, the First and Second Applicants have opportunistically argued that this Honourable should grant a cost order against the respondent due to the manner in which they conducted themselves in these proceedings.
11. The respondents does not deny that it failed to comply with the directives of this Honourable Court and has accordingly made the application for condonation. Nevertheless, the First and Second Applicants, requested to respond to the explanatory affidavit filed by the respondent. The court granted the other parties the opportunity to respond by the 19th September 2025. Pointedly, the First and Second Applicants were the only parties to respond.
12. The response by the First and Second Applicants, is contradictory. At first they make a broad attack that the contribution by the respondents is unhelpful and

then they go on to make two specific attacks on the content of the explanatory affidavit on two grounds.

13. The first attack is that the respondents has impermissibly introduced a new subject matter, the reverse onus, which was not raised in the High Court. This claim is patently incorrect. The respondents has referred to the effect the proposed amendment would have on the onus. At paragraph 50 of the judgment, the High Court makes reference to the submissions of the Minister of Justice on the subject matter. We submit that this argument is without foundation.
14. Secondly, the First and Second Applicants complain that in the explanatory affidavit, the respondent has fudged the applications for leave to appeal and the confirmation application proceedings, whereas in fact, the two proceedings are mutually exclusive. This claim too is without foundation. At the outset, in paragraph 5 of the explanatory affidavit, the respondent has specifically stated that they are not opposing either applications thus recognising that there are two distinct applications.
15. There is no justification for the First and Second Applicants' claims except a desperate attempt to unreasonably mulct the respondents in costs. The respondents has explicitly stated that they abide by the decision of this court. Additionally, the objective of the explanatory affidavit is to set out the obligations of the respondents in the criminal justice system and the importance of maintaining a balance between the rights of the survivors as well as the rights of the accused.

16. Fundamentally, the respondents participated in these proceedings in honour of the constitutional imperative to provide information to this Honourable Court in constitutional litigation. This obligation has been stated in *Matatiela Municipality & Others v President of the Republic of South Africa & Others & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) at paras 107, 109 and 110.

17. In *Khosa & Others v Minister of Social Development & Others; Mahlaule v Minister of Social Development & Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at *para 18* this court has held that the state is impelled to participate in constitutional litigation even in instances , such as this one where, it does not oppose the application.

18. In the circumstances, we ask that no costs order be made against the respondents.

Adv Sipokazi Poswa-Lerotholi SC

Sandton

Adv Mushaisano Makamu

Sandton

22 September 2025