IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 04856/22

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

30.09.24
Date

Signature

In the matter between:

THE EMBRACE PROJECT NPC	**FIRST APPLICANT**
INGE HOLZTRANGER	**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**
CENTRE FOR HUMAN RIGHTS	**FIRST AMICUS CURIA**
PSYCHOLOGICAL SOCIETY OF AFRICA	**SECOND AMICUS CURIA**

JUDGMENT

BAQWA J

Introduction:

[1] This application seeks to challenge the constitutional validity of sections 3,4,5,6,7,8,9 and 11A read with section 1(2) of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The absence of consent is constituent in this matter, to the extent that the Act does not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant consented to the conduct in question, therefore enabling the accused to successfully avoid conviction on the grounds of the subjective belief that consent was given.

[2] The third applicant 's relief deviates from the relief sought in the main application. The third applicant seeks to remove the definition of consent as an element of sexual offences in terms of common law and the Act. It submits that the inclusion of consent as a definitional element is an unreasonable limitation of rights to the individual (predominantly women, gender-diverse individuals and children) to equality before the law as well as limitations on their intersecting rights to dignity and to be free from all forms of violence.

[3] The Minister of Justice and Correctional Services, the respondent herein, opposes this application.

The parties

[4] The first applicant is the Embrace Project NPC (Embrace), a non-profit company that aims to "creatively combat" gender-based violence and femicide ("GBVF") through a marriage of art and advocacy. Embrace focuses on raising awareness around the root causes and prevalence of GBVF in South Africa through its social media presence. It is dedicated to effecting real social change, by using art as a medium of healing and expression while simultaneously working at changing the narrative of violence and disempowerment by, among other things, engaging in advocacy and law reform processes. The first applicant brings this application in three capacities[1]: firstly, in its interest as an organisation dedicated to combatting GBVF through advocacy, awareness-raising, and participation in the development and amendment of legislation, national policy, and strategies impacting GBVF, pursuant to

[1] Section 38(a), (c) and (d) of Constitution of the Republic of South Africa, 1996.

section 38(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution); secondly, in the interest of victims and survivors of all forms of sexual violence; and lastly in the public interest.

[5] The second applicant, Inge Holztrager (Ms. Holztrager), brings the application in her capacity and in the public interest as an adult female student. Ms. Holztrager is a victim of rape and was the complainant in *S v Amos*[2] which was heard at Pretoria Regional Court before Magistrate Yolandi Labuschagne. The accused was acquitted as a result of the current legal position of the subjective belief test regarding the requirement of consent in rape cases. The first and second applicant will be referred to as the "applicants" throughout this judgment.

[6] The third applicant is the Centre for Applied Legal Studies (CALS), admitted as an intervening party. The third applicant intervenes in the public interest and on behalf of its clients. CALS has assisted clients in navigating the criminal justice system in instances of various sexual offences. It has been involved in various research outputs relating to sexual violence, and it has also been an *amicus curiae* in many leading cases pertaining to sexual violence.

[7] The first respondent is the Minister of Justice and Correctional Services, cited as the Cabinet Member responsible for the administration of the Act. The second respondent is the Minister in the Presidency for Women, Youth, and Persons with Disabilities, a member of the Cabinet whose mandate includes helping combat gender-based violence. The third respondent is the President of the Republic of South Africa, cited for the interest he may have in the subject matter of this application.

[8] The Centre for Human Rights (CHR) and Psychological Society of South Africa (PsySSA) were admitted as the first and second *Amici Curiae (Amici)*. CHR has a substantial interest in this matter as an activist for human rights and the rights of women in Africa. CHR is a pioneer in human rights education in Africa and works towards a greater awareness of human rights, the wide dissemination of publications on human rights in Africa, and the improvement of the rights of women, people living

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[2] The Regional Magistrate Court of Gauteng, Pretoria, Case No 14/683/2018.

with HIV, Indigenous peoples, sexual minorities and other disadvantaged or marginalised persons or groups across the continent.

[9] The PsySSA is a national professional association that has been a vocal and authoritative advocate for the discipline of psychology on matters pertaining to the mental health and psychological well-being of South Africans. PsySSA is also home to a wide range of specialised divisions, including the Sexuality and Gender Division and the Trauma and Violence Division. The Sexuality and Gender Division of PsySSA aims to promote a psychological understanding of the fields of sexuality and gender diversity whilst the Trauma and Violence Division aims to promote the minimisation of violence in society and psychological harm due to exposure to potentially traumatic events.

[10] Accordingly, the terms "victim," "survivor" and/or complainant, will be used interchangeably to refer to persons or a person who have been raped or sexually assaulted in this context, and the words "accused" and/or "perpetrator" will be used to refer to persons or a person who committed the sexual offence.

Facts

[11] The salient facts of this case are based on the alleged shortcomings of the Act. Currently, the standard of fault in sexual offences defined by lack of consent in terms of sections 3,4,5,6,7,8,9 and 11A of the Act is that of "intention", with no qualification as to the reasonableness of a mistaken belief in the presence of consent. The Act ignores the possibility of an objective test for fault, in respect of sexual offences defined by lack of consent. Consequently, an unreasonable belief in the presence of consent is a defence. The State bears the extraordinarily high burden to prove that the accused's claim that he was under the impression that consent had been given is not reasonably possibly true. For example, in a case where the complainant knew their attacker (which is the vast majority of cases of rape and other sexual violence cases), did not physically resist or loudly protest or consented to some but not other intimate acts, this burden will, more often than not, be insuperable.[3]

[3] Founding Affidavit para 42.

[12] This was borne out in *Coko v S*[4] and Ms. Holztrager's case. In *Coko*, the court overturned an accused's conviction of having raped his then-girlfriend. The couple were both 23 years old at that time. While at the accused's residence for an intimate evening, they had agreed that they would not engage in penile-vaginal sex because the complainant had never done it before and had said she was not ready to do so. They only agreed on oral sex, but the accused performed penile-vaginal sex on the complainant and claimed that the complainant's body language gave tacit consent to penetration. The complainant contended that she asked him to stop because he was hurting her, but the accused claimed that he took that to mean that he must stop momentarily for her to become comfortable.[5]

[13] The accused was convicted of rape by the Magistrate court, but on appeal, he was acquitted because his version was reasonable and possibly true, although his explanation was improbable. The court found that the complainant had not objectively consented to penile-vaginal penetration. However, the State had not proved beyond a reasonable doubt that the appellant's version that he genuinely believed that there was at least tacit consent, was false.[6]

[14] In the second case, Ms. Holztrager was raped in 2018 by a man she met through an online dating site. The man invited Ms. Holztrager to his home for a party, only to find out when she arrived that there was never a party, she was the only guest. Ms. Holztrager suffered an ordeal at the hands of the man that night and later at the hands of the criminal justice system which accepted the version of perpetrator rather than that of the victim.[7]

[15] The court acquitted the accused on the basis that Ms. Holztrager had not objectively consented to the accused's penile penetration of her vagina and anus, but she neither physically resisted nor loudly protested. The State did not exclude the possibility that the accused did not hear her say "no" and did not prove beyond reasonable doubt that the accused was aware that she was not consenting. Put

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[4] 2021 JDR 2524 (ECG).
[5] Founding Affidavit at para 45 -47.
[6] Founding Affidavit at para 49 -50.
[7] Founding affidavit at para 52 -53.

differently, the court accepted that he had subjectively believed that there was consent. Despite this outcome, the Magistrate lamented the fact that the Act sets an unqualified subjective test for fault in rape cases, and it seemed unconstitutional, the Magistrate further said that:[8]

> "It is arguable that in a situation as intimate and mutual as sexual intercourse where the whole legality of such act is premised on the consent there should be a moral obligation to take the minimal step of ensuring that such act is indeed consensual. In my view, criminalising conscious advertence to the possibility of non-consent but excusing the failure of the accused to give minimal thought to consent at all to the extent that such complainant could be said to be completely objectified is arguably contrary to the right of such complainant to have his or her dignity protected and respected as envisaged in the bill of rights that form part of the Constitution of this country ."

[16] In support of their submission, the applicants also presented reports and inquiries made by the United Nations Special Rapporteur on Violence against Women and the United Nations Committee on the Elimination of Discrimination against Women ("CEDAW"), which specifically focused on the levels of domestic violence in South Africa, that there are low levels of prosecutions and convictions in such cases.[9] On this basis, they submit that South Africa is in violations of its obligations as a signatory to CEDAW. For example, CEDAW[10] reported that:

> "The State party is in violation of the following articles of the Convention:
> (a)...
> (b)...
> (c)...
> (d) 1 and 2 (b), (c), (e) and (f), read in conjunction with 3, 5 (a), 12 and 15, for failing to systematically prosecute cases of rape and domestic violence ex officio and ensure that questioning and evidence collection in domestic violence cases are not influenced by discriminatory stereotypes and that women's and girls' testimonies as parties or witnesses are given due weight;

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[8] Founding Affidavit at para 54.-
[9] Founding affidavit at para 25 and 26.
[10] CEDAW/C/ZAF/IR / 1 at p16.

(e) 1 and 2 (c)–(e), read in conjunction with 5 (a), 12 and 15, for failing to comply with its due diligence obligation to effectively investigate, prosecute and punish cases of domestic violence, including sexual violence, and to provide effective reparation to victims; provide mandatory, systematic and effective capacity-building for the judiciary and law enforcement bodies on the strict application of legislation prohibiting such violence and on gender-sensitive methods of investigation, cross-examination, case management and evidence collection; and raise their awareness to eliminate gender bias and discriminatory stereotypes."

[17] The report also highlights that sexual violence has dire consequences for the victim, which includes, amongst other things, sexually transmitted infections (STI), unwanted pregnancy, post-traumatic disorder, short or long-term physical damage, miscarriages, stillborn children, and abortions.[11]The courts have also noted that the number of sexual violent crimes is increasing and placing a premium on the right to equality and the right to human dignity.[12] Sexual violence is a horrific reality that continues to plague this country.[13]. This is also confirmed by the statistics delivered by the Minister of Police on 3 June 2022, as evidence of the increase of sexual violence in South Africa. The Minister reported that between April and June 2022, 9 516 rape cases were opened with the South African Police Services.

The applicants' submissions on how the Act violate the rights.

[18] The applicants submit that the Act as it presently stands, violates the rights of victims/ complainants, mostly women, to equality, dignity, privacy and freedom and security of the person, by permitting a person to rely on a subjective belief of consent when engaging in a sexual act with another person. They rely on *Masiya v Director of Public Prosecutions Pretoria (The State) and Another,*[14] in which the crime of rape was recognised as another example of a breach of the right to bodily integrity and freedom and security of the person and the right to be protected from degradation and abuse. The crime of rape further disproportionately affects women specifically, thereby falling foul of section 9 of the Constitution which emphasises the rights to equal protection before the law.

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[11] Id para 27.
[12] *Tshabalala v S; Ntuli v S* [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC); at para 61
[13] *AK v Minister of Police* [2022] ZACC 14; 2022 (11) BCLR 1307 (CC) at para 2.
[14]*Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC)at para 25

[19] The applicants further submit that the entrenching of rape myths, rape culture, rape stereotypes, are prevalent in South Africa, and are frequently perpetuated not only in society but also in the courts. This is fueled by the misconception that a person must be subjected to violence or threats for rape to be seen to have taken place. Further, consent is assumed unless the victim physically resists, if there are no signs of resistance then it is assumed consent was given. This observation was made in an unreported case of S *v Sebaeng*[15] where the court said that there was no mention of the complainant limping or crying or anything of that kind from the complainant. More concerning is the myth that once a person consents to one sexual act, they automatically consent to everything, and this cannot be withdrawn, and that foreplay is another form of consent. Another perpetuated rape myth that fuels the misnomers around consent is that sexual offenders are always violent monsters, this line of thinking ignores the fact that usually sexual offenders are fathers, uncles, bosses, husbands, colleagues and lovers, they are often the people close to the victim.

[20] The applicants also submit that the Act further perpetuates victim blaming, in that, there are courts that find that a victim or survivor objectively consented to penetration because they had no physical injuries, did not call for help, wore revealing clothes, flirted with the accused, or perhaps even engaged in foreplay. If the accused had subjectively perceived that there was consent from one or more of these myths, then he may be acquitted. Most of the time, the victims of sexual violence do not fight or flee, they freeze, the courts ought not to infer consent from their silence or passivity but allow the accused to subjectively conclude that the victim's actions mean consent. This is an indication that the Act compels the courts to treat subjective belief as a valid defence.

[21] The applicants further submit that the Act currently tells women and children "don't get raped" instead of telling men and boys "don't rape". It saddles the burden of preventing sexual violence firmly on the shoulders of the very targets of that violence. The practical result of this legal position is that the focus of the criminal trial is on the

[15] [2007] ZANWHC 25 at para 13.

conduct of the complainant (whether they should have done more to make it undoubtable that they were not consenting or no longer consenting) rather than the conduct of the accused (whether he should have done more to make sure that the victim was freely, comfortably, and continuously consenting). Therefore, in conclusion, the impugned provisions, by failing to include the objective test infringe the constitutional rights of the victims of sexual violence.

The third applicant's submissions

[22] As alluded to above, the third applicant in their alternative stance submits that the retention of consent as a definitional element in sexual offences allows for the perpetuation of discrimination against victims/survivors' rights under the Constitution. Amending or fixing the mistaken belief in consent defence will not alleviate the problem in a constitutionally sufficient way. The third applicant relies on the expertise of Professor Jameelah Omar (Prof Omar) who argued that consent is a deeply contested issue and a primary point of contention in rape cases. This has been a discourse by numerous scholars who condemn consent as having a discriminatory impact on the victim as it forces a trial to focus on the conduct of the victim.

[23] The definitional element of consent places too much emphasis on individual autonomy. Usually, the victims are the vulnerable members of the society (women and children), they do not enjoy the freedom to exercise their autonomy in a way that they can reject sexual advances. The law imposes a freedom to exercise autonomy and an expressive approach to consent where victims are deemed to have an autonomy that they do not have.

The first and second amici curiae submissions.

[24] The *amici* made their submissions highlighting the significance of incorporating psychological perspectives when assessing consent as an element of the crime of rape. The *amici* submit that victims experience various peritraumatic responses to sexual assault. These are the reactions that can occur during or immediately after a rape event. During sexual assault, survivors may experience subjective feelings of fear, paralysis, numbness and detachment, including passivity and extreme

immobilization. On the other hand, survivors of sexual assault may resist the attacker, but a substantial number of survivors do not. These differing responses to sexual assault can be explained by the physiological constitution of the individual as well as a number of complex and intersecting variables that can affect how individuals communicate their willingness or unwillingness to participate in a sexual act, or to withdraw their consent, either verbally or non-verbally.

[25] Peritraumatic responses that can be experienced by survivors of rape are varied and can affect an individual's ability to communicate their willingness or unwillingness to participate in a sexual conduct or to withdraw either verbally or non-verbally. One of them is the "defence cascade", this is a progressive defence or fear responses in human beings when exposed to traumatic events and it is characterised by physiological changes that can be experienced as being overwhelmed and out of the individual's conscious control. In these circumstances the victim can be aroused, to allow the body to deal with the perceived danger, to fight or flight which are an active defence response characterised by coordinated emotional and behavioral physiological responses; to "freeze", also known as "attentive immobility" which is also known as transient adaptive response; tonic immobility which can occur when threat to life escalates; and collapsed immunity described by a sudden drop in one's heart rate. Survivors of rape mostly employ a non-physical active behaviour, these responses include inter alia, attempts to reason with the perpetrator or crying. For some survivors, not resisting sexual assault is a form of survival mechanism to mitigate against physical injury or death.

[26] Secondly, the *amici* further analyse the legal concept of consent in South Africa and canvass how hardwired peritraumatic responses to rape can incapacitate victims, rendering them unable to articulate verbal or behavioral responses during an attack. The *amici* refer to relevant South African judgments to demonstrate the current position and need for developments in law which factor in peritraumatic responses when assessing consent. The *amici* have noted that the courts have recognised that passivity and submission by a survivor during a rape does not necessarily constitute

consent, this was mentioned in *S v Mugridge*[16] quoting *Rex v Swiggelaar* 1950 (1) PH H61 (A), the court recognised that the law requires consent to be active, and the mere submission is not sufficient. The present and accepted view is that passivity and submission to sexual act will only be regarded as "the abandonment of outward resistance" if one intimidates another with a view to induce them to abandon resistance and submit to intercourse to which they are unwilling to participate in. Currently responses of passivity and submission are not assessed in relation to other forms of sexual violence more especially in intimate partner relationships, and these varied psychological responses must be taken into account by courts when assessing consent in a range of rape and sexual assault circumstances.

[27] Thirdly, the *amici* discussed how the defence of mistaken of belief is more likely to be raised when survivors exhibit more "passive" peritraumatic responses to rape. With this backdrop, the *amici* submit that there is a need to consider peritraumatic responses to sexual assault and rape even where an accused raises the defence of mistaken belief. Looking at the *Coko* case as mentioned earlier, the high court ruled that an individual's mistaken belief in consent to penetrative sex could serve as a legitimate defence. Essentially where a survivor responds to a sexual assault in the form of passive peritraumatic response, an accused is more likely to succeed in raising the defence of mistaken belief and once this defence is raised, the focus ought to be placed on assessing what actions led to the accused believing there was consent instead of separately assessing whether valid consent was in fact present. Peritraumatic responses are not adequately considered by our courts and to continue with this stance will be to ignore the well-established psychological findings on peritraumatic responses. Raising a defence of mistaken belief cannot be allowed to continue to act as a get out of jail free card. These views by the *amici* seems to support the case presented by the applicants.

The respondent's submissions.

[28] The respondent shares the applicants 'sentiments that rape is a heinous, violent crime with traumatic effects mainly on women and that the crime of rape

[16] 2013 JDR 0658 (SCA) at para 40.

infringes on the rights to dignity, equality, freedom and security of a person, and children's rights. However, the respondent submits that the current legislative framework protects and safeguards the rights of the victims of sexual violence because it includes consent as an element of rape. This is illustrated by the transformation of the legislation relating to sexual offences being reformed even before the promulgation of the impugned provisions. The respondent relies inter alia on several paragraphs in *Masiya*[17] above to support the contention that the law has since evolved, where the court held that the current law of rape has been developed to an extent that, a husband can be charged for raping his wife, and a boy child is capable of committing rape. Amendments were made regarding the law of evidence in relation to sexual offences.

[29] The Act consolidates laws relating to sexual offences and repeals the common law definitions of rape and indecent assault by replacing them with expanded statutory offences and also creates new statutory offences which includes children and persons with disabilities and improves functions of the criminal justice system through synergies with stakeholders and protects victims of sexual assault. However, the respondent submits that the Law Commission did not give an unequivocal affirmation to excluding consent from the definition of rape but deferred to Parliament and that it is important that courts do the same. He further submits that the recommendations are aligned with the international standards, and that this is evident from the amendments that were effected to the law, and that the legislature has kept up with the evolution of law relating to sexual violence.

Issues for determination

[30] Issues for determination are:

30.1 Whether sections 3,4,5,6,7,8,9 and 11A read with section 1(2) of the Act are constitutionally invalid in permitting a defence of subjective though unreasonable belief that the victim consented to the sexual act.

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[17] See *Masiya* above at para 28.

30.2 Whether the limitation of these rights is reasonable and justifiable in an open democratic society based on human dignity, equality, and freedom, and in accordance with section 36 of the Constitution.

The Law

[31] The applicants submit that the Act is unconstitutional and invalid as it fails to accommodate the possibility of an objective test for fault in respect of sexual offences. The provisions of the Act read as follows:

"1 (2) For the purpose of sections 3,4,5(1),6,7,8(1),8(2),9, "consent" means voluntary or uncoerced agreement.

3. Rape. —

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.

4. Compelled rape. —

Any person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of compelled rape.

5. Sexual assault. —

(1) A person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault.

6. Compelled sexual assault.

A person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual violation with a complainant ("B"), without the consent of B, is guilty of the offence of compelled sexual assault.

7. Compelled self-sexual assault. —

A person ("A") who unlawfully and intentionally compels a complainant ("B"), without the consent of B, to—

(*a*) engage in—

(i) masturbation;

(ii) any form of arousal or stimulation of a sexual nature of the female breasts; or

(iii) sexually suggestive or lewd acts, with B himself or herself;

(*b*) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or

(*c*) cause B to penetrate in any manner whatsoever his or her own genital organs or anus, is guilty of the offence of compelled self-sexual assault.

8. Compelling or causing persons 18 years or older to witness a sexual offences, sexual acts or self-masturbation—

(1) A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, compels or causes a complainant 18 years or older ("B"), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual offence.

(2) A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, compels or causes a complainant 18 years or older ("B"), without the consent of B, to be in the presence of or watch—

(*a*) A while he or she engages in a sexual act with C or another person ("D"); or

(*b*) C while he or she engages in a sexual act with D,I s guilty of the offence of compelling or causing a person 18 years or older to witness a sexual act.

(3) A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, compels or causes a complainant 18 years or older ("B"), without the consent of B, to be in the presence of or watch A or C while he

or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a person 18 years or older to witness self-masturbation

9. Exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older ("flashing").—
A person ("A") who unlawfully and intentionally, whether for the sexual gratification of A or of a third person ("C") or not, exposes or displays or causes the exposure or display of the genital organs, anus or female breasts of A or C to a complainant 18 years or older ("B"), without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a person 18 years or older.

11A. Harmful disclosure of pornography

(1) A person ('A') who unlawfully and intentionally discloses or causes the disclosure of pornography in which a person ('B') appears or is described and such disclosure—

(*a*) takes place without the consent of B; and

(*b*) causes any harm, including mental, psychological, physical, social or economic harm, to B or any member of the family of B or any other person in a close relationship to B,is guilty of the offence of harmful disclosure of pornography.

2) A person ('A') who unlawfully and intentionally threatens to disclose or threatens to cause the disclosure of pornography referred to in subsection (1) and such threat causes, or such disclosure could reasonably be expected to cause, any harm referred to in subsection (1) (*b*), is guilty of the offence of threatening to disclose pornography that will cause harm.

(3) A person ('A') who unlawfully and intentionally threatens to disclose or threatens to cause the disclosure of pornography referred to in subsection (1), for the purposes of obtaining any advantage from B or any member of the family of B or any other person in a close relationship to B, is guilty of the offence of harmful disclosure of pornography related extortion."

[32] The applicants submit that the effect of the Act is that it allows the perpetrator to avoid conviction by raising the subjective test defence, If the perpetrator subjectively and unreasonably believes that the victim has consented, he may be entitled to acquittal, unless the State proves beyond reasonable doubt that the accused's subjective belief was false. In this way the Act validates false narratives and reinforces harmful and dangerous behaviours that diminish a person 's autonomy and dignity, it also perpetuates victim blaming.

[33] The applicants submit that this infringes the constitutional rights of the victim especially women—to equality, human dignity, privacy, bodily and psychological integrity, freedom and security of the person which includes the rights to be free from all forms of violence and the right not to be treated in a cruel, inhuman or degrading way. These rights underlie the applicant's case, and they continue to be violated under the Act.

[34] The third applicant submit that the retention of consent limits the right to equality as set out under section 9 of the Constitution. The relevant prohibited grounds under section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000(PEPUDA), include: gender, sex and sexual orientation. Sexual offences are a form of gender-based violence and this has been acknowledged in *S v Tshabalala*[18] and *AK v Minister of Police*[19] that gender-based violence is a form of discrimination as defined by the UN women as a harmful act directed at an individual or group of individuals based on their gender and it is rooted in inequality, abuse of power and harmful norms. CEDAW also defines gender-based violence as a discrimination against women which aims to inhibit women's ability to enjoy their rights and freedoms on a basis of equality with men.

[35] The third applicant further submit that In South Africa and globally, gender-based violence in the form of sexual offences disproportionally affects women. This is supported by the South African Medical Research Council's national study on rape, it was found that cases of reported rape to the South African Police Services in a particular year; 94,1% were female survivors along with 99% of perpetrators being

[18] 2020 (2) SACR 38 (CC)
[19] 2022 JDR 0612 (CC).

male. It submits that women are the majority victims of sexual offence in South Africa, thus the laws and policies around sexual offences must be deemed as automatically unfair and discriminatory.

[36] Whilst the submissions and the logic thereof by the third applicant are understandable, in the context of the present application, they are not sustainable due to the fact that "consent" in the definition of rape and the other offences is included as a policy decision by the South African Parliament. That decision accords with international practice (see footnote 39 below at para 65) The proposition, therefore, by the third applicant would fall foul of the doctrine of separation of powers. The Constitutional Court is not likely to confirm an order with that as a consequence.

Analysis

[37] Our courts have considered the manner in which some of the rights embodied in the Bill of Rights are trampled upon by a variety of sexual offences. The present application seeks to add another dimension to the manner in which the Act exacerbates the situation and further tramples on those rights. I wish to refer to just two of those cases which I just referred to. The Constitutional Court in the *Masiya*[20] case mentioned above held:

> "With the advent of our constitutional dispensation based on democratic values of human dignity, equality and freedom, the social foundation of these rules has disappeared. Although the great majority of females, for the most part in rural South Africa, remain trapped in cultural patterns of sex-based hierarchy, there is and has been a gradual movement towards recognition of a female as the survivor of rape rather than other antiquated interests or societal morals being at the core of the definition. The focus is on the breach of 'a more specific right such as the right to bodily integrity' and security of the person and the right to be protected from degradation and abuse. The crime of rape should therefore be seen in that context."[21]

[20] See *Masiya* above.
[21] Id at para 25.

[38] The court in *Tshabalala*[22] above citing *SV Chapman* 1997 (3) SA 341 (SCA) at para 3-4 as a starting point held 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 tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives..."[23]

[39] In light of the above it can be accepted in terms of the Act that the conduct is unlawful if it was committed, without the consent of the complainant. But it must also be intentional. In South African criminal law concerning *mens rea*, the intention (*dolus*) must not only be to commit the conduct which is unlawful (*actus reus*) but to do so knowingly (or recklessly disregarding the risk) that it was unlawful.

[40] In the context of rape, this means that the accused must have not only intended to commit an act of sexual penetration, but he must also have intended to do so unlawfully and knowingly (or recklessly disregarding the risk) that the complainant was not consenting. In other words, if it is at all "reasonably possibly true" that the accused subjectively believed the complainant was consenting even if that belief was unreasonable, this approach favours the perpetrators than the victim. This places an almost insurmountable barrier to the conviction of the accused persons who have been found, by the courts, to have committed acts of sexual penetration without the consent of the complainant. By enabling a defence of unreasonable belief in consent, the Act violates the rights of victims and survivors, to equality, dignity, privacy, bodily and psychological integrity, and freedom and security of the person which includes the

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[22] See *Tshabalala* above.
[23] Id introductory note.

right to be free from all forms of violence and the right not to be treated in a cruel, inhumane or degrading way.

Whether the impugned provisions are justifiable

[41] It must be assessed whether the infringement of the rights as mentioned above is reasonable and justifiable in an open and democratic society. Section 36 of the Constitution governs the situations in which constitutional rights may be limited. The task of interpreting the fundamental rights rests with the courts, however, it is for the applicants to prove the facts upon which they rely for their claim of infringement of the rights in question. In my view the applicants have done so by including in the evidence presented in this application the facts in *Coko* and *Amos*. In those cases, the accused was acquitted based on the subjective belief defence that the victim had given consent which in terms of those decisions accepted that the victim had given consent without interrogating what reasonable steps the perpetrator had taken to satisfy himself that consent had indeed been given. Concerning the second stage, it is for the respondent to show that infringement is justified. In this regard the respondent dismally failed to establish such justification as explained later in this judgment. Save for making a reference to *Swiggerlar*,[24] the respondent does not explain how that case supports his case.

[42] The facts in *Swiggerlar* were briefly as follows: the accused was a uniformed police officer. What transpired was that the accused went to the complainant's home during the day to ask her about the whereabouts of a woman who was posted missing. He later returned at night and asked the complainant to go with him to the police station as there are people who want to see the complainant at the police station. On their way to the police station, the accused claimed that the complainant turned to him and asked him to have sexual intercourse with her and in return release her from the necessity of going to the police station. The accused claimed that he agreed to the complainant's request. However, the complainant said that is not what happened. In her words she said: " Hy het gese hy wil met my gemeenskap he. Ek het gese hy het my uit die kamer kom haal, hoe kan hy met my gemeenskap he?" The complainant

[24] 1950 (1) PH H61 (A).

said she was crying but beyond this remark she gave no indication of her attitude. The court found the accused guilty of rape.

[43] On appeal, the accused submitted that the evidence adduced by the Crown and in particular the complainant's evidence had failed to prove beyond a reasonable doubt the absence of the complainant's consent to sexual intimacy with the appellant and that, even on the assumption of the absence in fact of such consent, there was a reasonable possibility of a genuine (though mistaken) belief on appellant's part that such consent was present. The court's decision emphasized that submission due to fear or intimidation does not constitute consent. In cases where a person is coerced into sexual activity due to factors like physical superiority, official position, or possession of a weapon, submission cannot be misinterpreted as consent. This ruling highlighted the importance of considering all circumstances to distinguish between implied consent and abandoned resistance due to fear or hopelessness.

[44] In this case, there was no discussion about subjective belief as a defence and what steps have been taken by the perpetrator regarding the absence or presence of consent. It merely revolves around the absence of resistance and the conclusion by the court but that because the perpetrator was a person in authority the defence could not be upheld.

[45] The court in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)*[25] further opined on the burden of proof in cases of justification and said that:

> "If the government wishes to defend the particular enactment, it then has the opportunity indeed an obligation to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and

[25] 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC).

argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment."[26]

[46] The applicants submit that the violation of these rights cannot be justified under the prism of the limitation clause, because even negligence is blameworthy, criminalising negligence is not constitutionally wrong for as long as the society regards it as morally blameworthy. The constitutional society is founded on dignity, equality and freedom, which respects women's rights. It not only may but, must regard it as morally blameworthy for men to act with selfish, careless and callous disregard for the sexual autonomy of children and women. The premium the society places on the right to life, regards unlawful and negligent killing as culpable homicide. Even lesser offences, such as reckless or negligent driving and a failure to report corruption, offences born of negligence can attract criminal liability. The notion of negligence to criminal acts is not foreign to our law and introducing it in regard to the crime of rape does not offend against our understanding of criminal justice.

[47] In further substantiation of this notion, the applicants submit that under section 56(2) (a),[27] the Act criminalises the negligent sexual violation of a "consenting" child between the ages of 12 and 16 years, under sections 15 ("statutory rape") and 16. Moreover, under section 56(6)[28] the negligent involvement in making child pornography is also criminalised. The applicants submit that this shows that Parliament had no conceptual difficulty or constitutional reservations about criminalising these negligent acts (and the Law Commission had no issue with proposing them). It is thus difficult to fathom why Parliament did not consider it appropriate and constitutionally imperative to protect women (and children) from negligent violation when they are old enough to consent but did not consent.

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[26] Id at para 19.

[27] Whenever an accused person is charged with an offence under section 15 or 16, it is, subject to subsection (3), 17 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"

[28] "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.

[48] The respondent submits that there has been a growing realisation that there may be other reasons why victims do not actively resist such as fear, duress or threats of violence which resulted in most legal systems moving away from the requirement of physical force. Therefore, the law as it stands currently, criminalises sexual offences. The Act when combined with the principles of South African Criminal Law provides a legal framework for dealing with sexual offences in general. Whilst this may be a correct statement of the law as it currently stands, it does not detract from the content of the present application.

The balancing act between the rights of the victims of sexual offences and those of the perpetrators.

[49] Turning to the balancing acts that a court must engage in, in relation to the tension between the rights of the victims and those of perpetrators, as set out in sections 35(1), 35(3)(1), (h) and (j) of the Constitution, which give every accused person a right to a fair trial. The balancing of competing interests must still take place. The courts[29] have demonstrated their efforts to balance the competing interests in sexual offence matters and ensuring that the rights of both the victim and the accused are protected while promoting justice. If there is any inadequacy that needs to be addressed, it is not due to an oversight on the part of the courts but due to the impact of the impugned provisions.

[50] The respondent contends that to ensure that the guilty are punished and the innocent are protected, the assessment of the defendant's culpability relies on a comprehensive examination of all relevant evidence to have accurate and reliable fact finding. In doing this, the criminal justice system aims to strike a balance between the pursuit of truth and the protection of individual liability. The respondent further contends that the proposed amendment to challenge the provision will reverse the onus and shift the burden of proof from the prosecution regarding the crucial element of the offence. The respondent puts fourth this submission as a justification for the infringement of a rape victim's constitutional rights mentioned earlier. Nothing could

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[29] *S vJordan and Others (Sex Workers Education and Advocacy Task Force and Others As Amici Curiae)* 2002 (6) SA 642 (CC), *S v M (Centre For Child Law As Amicus Curiae)* 2008 (3) SA 232 (CC).

be further from the truth. The correct position is that there is no reverse onus, and the onus remains where it belongs namely on the State to prove its case beyond reasonable doubt. All that the suggested amendment to the law seeks is to suggest is a test that will require a perpetrator to explain the objective steps he took to establish the presence or absence of consent prior to the alleged rape.

[51] Balancing the competing interests of victims of sexual abuse with the rights of an accused as set out in the Constitution, I am of the view that an accused's rights to a fair trial will not be prejudiced in a prosecution if the required standard changes to an objective test. This in summary, is the essence of the objection by the respondent to the current application and it fails to suggest sufficiently why the proposed amendment should not be granted and why it is not justifiable in an open and democratic society based on human dignity, equality and freedom and not in a closed authoritarian society based on the violations of human dignity equality and freedom. The fundamental principle of our justice system which is to the effect that every person is presumed innocent until found guilty is not challenged at all by the suggested amendment. The applicants are not blind to that notion.

The State's duty to prevent and punish all crimes.

[52] In terms of section 7(2) of the Constitution, the state has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights. This was emphasised by the court in *Glenister v President of the Republic of South Africa and Others*[30] which stated that:

> "This obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the State to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights…
>
> Under s 7(2), there are a number of ways in which the State can fulfil its obligations to protect the rights in the Bill of Rights. The Constitution leaves the choice of the means to the State. How this obligation is fulfilled, and the rate at which it must be fulfilled, must necessarily depend upon the nature of the right involved, the availability of

[30] 2011 (3) SA 347 (CC).

government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect. Thus, in relation to social and economic rights, in particular those in ss 26 and 27, the obligation of the State is to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights"[31]

[53] The duty of the State in terms of section 7(2) has been interpreted by our courts to include, as stated in *Christian Education SA v Minister of Education*[32] the obligation to "take appropriate steps to reduce violence in public and private life", and also, as appears in *S v Baloyi (Minister of Justice and Another Intervening)*[33] "directly to protect the rights of everyone to be free from private or domestic violence".

[54] In our constitutional dispensation, the Constitutional Court in *Carmichele v Minister of Safety and Security*[34] recognised rape as a human rights violation. Earlier in *AK v Minister of Police*[35] the Court held that it is the State's duty to protect women from all gender-based violence. Relying on these cases, the applicants submit that the State has to take positive and effective measures to combat sexual violence in all its forms including where the target's right to withhold consent has been simply ignored rather than intentionally violated. The State must prohibit, punish and deter it. The applicants submit that this duty is buttressed by international law. Currently sexual violence is legalised where there is subjective belief in consent. The applicants argue that the State has failed to take necessary and effective measures to respect, protect, promote and fulfil the fundamental rights of women and children.

[55] The respondent contends that a holistic approach needs to be adopted to end GBVF. Legislation alone cannot solve the problem. The respondent contends that prevention is better than cure and this method is equally applicable to rape and all stakeholders should be engaged in the implementation of these measures to combat GBVF. In fulfilling its obligations, the respondent contends that the legislation

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[31] Id at para 105-107.
[32] 2000 (4) SA 757 (CC) at paragraph [47].
[33] 2000 (2) SA 425 (CC) at paragraph [11].
[34] 2002 (1) SACR 79 (CC) 62.
[35] 2023 (2) SA 321 (CC) at para 3.

regarding violence against women is extensive. This legislation is supported by extensive policies, guidelines and frameworks of laws dealing with violence against women such as the Domestic Violence Act 116 of 1998, the Act which expanded the definition of rape and created new crimes for the purposes of covering the extent of violence against women, and the Protection from Harassment Act 17 of 2011. The State has also established national institutions such as the Commission for Gender Equality, to serve as a promotion for gender equality. In essence the State recognises the brutality of rape and its consequences, and these legislations were created to combat the scourge. What the respondent has said is merely expanding on the manner in which the State is fulfilling its duties in terms of section 7(2) of the Constitution referred to above. That is commendable. That does not however, mean that where the Act falls short, it must not be corrected.

[56] The preamble to the Act recognises fully that the commission of sexual offences in South Africa is of grave concern. Sexual violence, be it rape or other forms of sexual offences, results potentially in a breach of the rights in sections 9, 10, 12,14 of the Bill of Rights. Consequently, the State's duty to protect all persons against sexual violence, in terms of section 7(2) of the Constitution, is a particularly onerous one having regard to the extreme levels of sexual violence in South Africa that continues unabated to this day, and the impugned provisions are an attempt to implement the constitutional obligations as sketched above.

[57] Section 36 provides as follows:

"36. Limitation of rights.

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(*a*) the nature of the right;

(*b*) the importance of the purpose of the limitation;

(*c*) the nature and extent of the limitation;

(*d*) the relation between the limitation and its purpose; and

(*e*) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[58] Whilst the respondent suggests that the impact of the impugned provisions is justified in terms section 36 of the Constitution, he has failed to make out a case in terms of the aspects outlined in section 36 a – e above.

[59] The legal situation regarding the state of GBVF as outlined in the decisions of our courts referred to above and the legislation adopted by Parliament referred to by the respondent cannot and does not resolve the challenge that our nation is facing. The lacuna that has been pointed out in the present application does not, and has to be closed or attended to, in order to lessen or ameliorate the scourge of GBVF and prevent the current violations of the constitutional rights alluded to above. Whilst it is true that the State is not neglecting its constitutional obligations more work still needs to be done. The current legal position as sketched by the respondent in my view supports and endorses the case of the applicants and it is not inimical to it. The general statistics that are churned out by the Police, the media, and social media underlines the fact that the elimination of GBVF is not done yet.

South Africa's International Law obligations in relation to sexual violence against women and the approach to prescription in foreign jurisdictions

[60] The applicants made a submission on the State's international law obligation to combat sexual violence against women. They submit that to this end, international and comparative law has developed to define the *mens rea* of rape and other sexual offences, replacing the defence of a purely subjective belief in consent with a defence of reasonable belief in consent. They support their submission with referencing to foreign jurisprudence which serves to demonstrate that many democratic and heterogeneous human rights-based democracies have taken progressive strides to shift the focus from male-centricity in defining their sexual violence offences to one which is focused on the sexual autonomy of the victim or survivor.

[61] In *S v Makwanyane*,[36] the court clearly states that international law, both of a binding and non-binding nature should be considered to assist in interpreting fundamental rights. Chaskalson CJ stated the following:

> "In the course of arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention.
> They may also have to be considered because of their relevance to section 35(1) of the [Interim] Constitution. . . In the context of section 35(1), public international law would include non-binding as well as binding law. They may be used under the section as tools of interpretation."[37]

[62] South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms. This duty has been recognised by the Constitutional Court as a "customary norm of international law." The relevant international law instruments to consider are those that emanates from the United Nations.

[63] On 15 December 1995 South Africa ratified CEDAW, this international instrument obliges the States to, amongst other things to take all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women. It declares that States should, amongst others take all necessary steps amongst other things to prevent, investigate, and punish acts of violence against women, whether committed by the State or individuals. To establish laws and policies to hold perpetrators accountable and provide justice and remedies to survivors; ensure women have access to justice and effective remedies for the harm they have suffered; develop comprehensive strategies to prevent violence against women, including legal,

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[36] 1995 (3) SA 391 (CC).
[37] Id at para 34-35.

political, administrative, and cultural measures; prevent re-victimisation of women through insensitive laws and practices. Most importantly, the Declaration defines violence against women by reference to its effects on the survivor. The Committee also made recommendations to strengthen legal sanctions when it comes to all forms of gender-based violence.

[64] In the case of *Vertido v Philippines*[38] the Committee held that the State party is obligated to take appropriate measures to modify or abolish customs and regulations that discriminate against women in the case of rape where the court erred by acquitting the accused on the basis of gender-based myths and conceptions.

[65] In 2021 the framework for legislation on rape addressed the criminalisation of rape and defined rape in terms of Article 1 and consent in terms of Article 2 as follows[39]

> "Article 1 Rape :
>
> A person (the perpetrator) commits rape when they:
>
> (a) engage in non-consensual vagina, anal or oral penetration of a sexual nature, however slight, of the body of another person (the victim) by any bodily part or object; or
>
> (b) cause non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of another person (the victim) by a third person; or
>
> (c) cause the victim to engage in the non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of the perpetrator or another person.
>
> Article 2. On consent
>
> Consent must be given voluntarily and must be genuine and result from the person's free will, assessed in the context of the surrounding circumstances, and can be

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[38] No. 18/2008, Views of the Committee on the Elimination of Discrimination against Women (16 July 2010), UN Doc CEDAW/C/46/0/18/2008, paragraph 8.4.
[39] Report of the Special Rapporteur on violence against women, its causes and consequences, A framework for legislation on rape (model rape law) (15 June 2021) NHRC/47/26/Add.1 at V.

withdrawn at any moment. While consent need not be explicit in all cases, it cannot be inferred from:

(a) silence by the victim;

(b) non-resistance, verbal or physical, by the victim;

(c) the victim's past sexual behaviour; or

(d) the victim's status, occupation or relationship to the accused."

[66] International law also imposed liability for rape not only where the accused knew, but also where he had reason to know the other party was not consenting as it was held in *Gacumbitsi v Prosecutor*[40] in 2006 where the court held that the accused's knowledge of the absence of consent of the victim is an element of the offence of rape, the accused must be aware or have reason to be aware of the coercive circumstances that undermines the possibility of genuine consent. This development was followed in subsequent trials.

[67] Another international instrument is the African Charter on Human and People's Rights (the African Charter), it was ratified on 9 July 1995, and it enshrines similar rights as our Constitution. On 17 December 2004, the Maputo Protocol to the African Charter on the Rights of Women in Africa was ratified, it obliges State parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. Most specifically, State parties are obligated to adopt and implement appropriate measures to ensure the protection of every woman's right to her dignity, and protection from all forms of violence, particularly sexual and verbal violence. All the forms of international instruments were established to protect women from any form of violence and repeal, reform and amend laws that are discriminatory against women.

[68] The respondent contends that the judiciary itself, through constitutional imperatives, employs certain interpretive methodologies to protect the rights of the victims and that amending the impugned provisions will overlap with the need to

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[40] ICTR-2001-64-A, International Criminal Tribunal for Rwanda, 7 July 2006 at para 157 (emphasis added).

maintain separation of powers. The duty to amend should be left with the legislature. The role of the judiciary in the democratic State is given expression through section 39 of the Constitution to consider international law when interpreting the Bill of Rights. The courts may also consider foreign law. In his submission, the respondent relies on *Carmichele*[41] and *Independent Institution of Education (Pty) Limited v Kwa -Zulu Natal Law Society and Others,*[42] where the court has reaffirmed the application of the Bill of Rights to all courts and addressed the issue of the interpretation of statuses that it would be a woeful misrepresentation of the true character of the constitutional democracy to resolve any legal issue of consequence without giving effect to the role of the Constitution. Thus, where a court is confronted with a case of rape, it would consider that the Constitution lies at the centre of the law pertaining to interpretation and the purposive approach is the backbone of the interpretation of all legislation. The respondent argues further that once the courts apply the requirements of section 39(2) of the Constitution to a particular case there would be no room for entrenching rape myths, cultural stereotypes. This submission by the respondent may be considered as correct but it remains idealistic and it does not find application in most rape cases. As alluded in this judgement, this reality is borne out by the evidence tendered by the applicants supported by "live examples" in the matters of *Coko* and Ms. Hotzranger referred to above. In the circumstances a victim will not always be assured of protection in terms of s39(2) unless the proposed amendments sought in this application are granted which would decisively deal with the myths and cultural stereotypes surrounding the rape cases.

[69] Taking note of the approach in many foreign jurisdictions to consent relating to sexual offences, what is clear is that numerous jurisdictions require the accused to ensure and ascertain that consent was attained, not a subjective reasonable belief that consent was confirmed. These include England, Wales and Canada. These are several jurisdictions that do not take a subjective defence for sexual offences. Accordingly, South Africa will not be alone in adopting the objective test and require the accused to take reasonable steps to ensure and prove that consent was attained.

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[41] See *Carmichele* above.
[42] 2020(2) SA 325 (CC) at para 1-2.

Relief sought

[70] Section 172 of the Constitution obliges the court to declare any law that is inconsistent with the Constitution invalid to the extent of its inconsistency, and it states that:

> "(1) When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[71] The applicants' submission is that this court must accordingly declare the relevant provisions of the Act (sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2)) invalid to that extent, and make a just and equitable order.

[72] If relief is granted, and the impugned sections of the Act dealing with non-consensual sexual offences are unconstitutional and invalid, then the applicants submit that it would be appropriate to suspend the declaration of invalidity for a period of 18 months to afford the relevant-decision makers an opportunity to remedy the defects. The applicants rely on *Mlungwana and Others v S and Another* [43]for the principles that inform a declaration of invalidity:

> "121.1 the declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship;
> 121.2 there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and
> 121.3. the right in question will not be undermined by the suspending of the declaration of invalidity."[44]

[73] During the 18-month period referred to in paragraph 2 of the Notice of Motion the following words shall be read into the Act:

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[43] 2019 (1) SACR 429 (CC).
[44] Id at para 105.

73.1 56(1A) Whenever an accused person is charged with an offence under sections 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.

73.2 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.

[74] The order sought can have no retrospective effect. This is in keeping with the general approach in our law which prohibits retrospective criminalisation of conduct in accordance with the common law *maxim nulla crimen, nulla poena sine lege.*[45]

[75] The reading-in would be an appropriate response to cure a serious constitutional infringement of this nature. As the Constitutional Court held in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*:[46]

> "[T]here is in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, is being altered by the order of a court. In one case by excision and in the other by addition. This chance difference cannot by itself establish a difference in principle"[47]

[76] The relief sought by the third applicant is as follows:

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[45] *DPP v Prins (Minister of Justice and Constitutional Development 2012* (2) SACR 183 (SCA) at para 7.
[46] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).
[47] Id at para 67-68.

76.1 Declaring that the continued inclusion of consent as a definitional element in sections 3, 4, 5, 6, 7 and 11A of the Act and in the common law is unconstitutional, invalid and inconsistent with the Constitution.

76.2 The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.

76.3 During the period of suspension referred to in the above paragraph, the following words "coercive measures" will be read into sections 3, 4, 5, 6, 7 and 11A where the words" without consent appears"

76.4 The reading-in will fall away when the correction of the specified constitutional defect by Parliament comes into operation.

76.5 Should Parliament fail to cure the defect within 24 months from the date of the judgment or within an extended period of suspension, the reading-in will become final

74.6 In the alternative, developing the common law sexual offences to include the requirement of a reasonable mistaken belief.

Costs

[77] The applicants are asking for costs in this application to be paid by the respondent and I am of the view that the usual rule, that costs should follow the results should apply. The third applicant has asked for costs order against the respondent for the late filing of heads of argument on a punitive scale, I have considered the matter and especially the fact that the heads of argument were filed out of time by a matter of a few days. There was no prejudice to the third applicant especially because the heads of argument were uploaded on caselines and the third applicant would have had access thereto earlier than they actually did. Absence any prejudice, therefore, I am not of the view that the third applicant is entitled to any costs in that regard.

Conclusion

[78] In the light of the above, I have come to the conclusion that sections 3,4,5,6,7,8,9 and 11A read with section 1(2) of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 are unconstitutional to the extent that they are inconsistent with the Constitution and that the relief sought by the third applicant should not be granted because of its inconsistence with the doctrine of the separation of powers. In the result I make the following order:

Order

1. Sections 3,4,5,6,7,8,9 read with section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 are declared 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.

2. The declaration of invalidity in paragraph 1 is suspended for a period of 18 months to allow the constitutional defects to be remedied by Parliament.

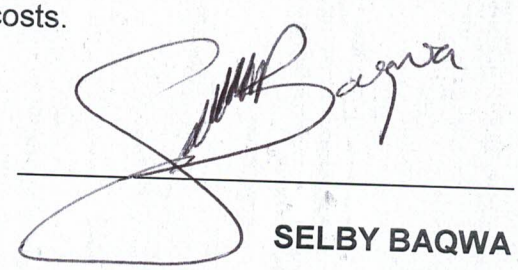
3. During the 18 months period referred to in paragraph 2, the following words shall be read into the Act:

   "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 conduct in question."

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. The respondents shall, jointly and severally, pay the first and second applicants' costs in this application including the cost of two counsel on scale.

6. In the light of what has been discussed above the application by the third applicant is dismissed with no order as to costs.



SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the First and Second Applicants:	Adv Nasreen Rajab-Budlernder SC Adv Lerato Phasha Adv Ben Winks Adv Sanan Mirzoyev Instructed by Power and Associates
For the Third Applicant:	Adv Letlhogonolo Mokgoroane Sheena Swemmer
For the Respondent:	Siphokazi Phoswa- Lerotholi SC Instucted by Mushaisano Makamu
For the *Amici Curiae*:	Adv Tamika Thumbiran Ruth Kruger
Date of Hearing:	23 and 24 July 2024
Date of Judgment:	30 September 2024