CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: **CCT314/24**

In the matter between:

EMBRACE PROJECT NPC	First Applicant
IH	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 NO.: **CCT 315/24**

In the matter between:

CENTRE FOR APPLIED LEGAL STUDIES	Applicant

and

EMBRACE PROJECT NPC	First Respondent
IH	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*

CENTRE FOR APPLIED LEGAL STUDIES (CALS) WRITTEN SUBMISSIONS

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> "In no other crime does the response of the victim play such a large role in the very definition of the crime. Imagine that one's response to being robbed or hijacked during the very event could plausibly be considered a decisive factor in determining whether the crime actually transpired. Why does rape law do this?"[1]

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[1] L du Toit (2007) 'The Conditions of Consent' in R Hunter and S Cowan (eds), *Choice and Consent* at 61.

INTRODUCTION

1. This is a case that consists of both an application for confirmation and an appeal to this Honourable Court.

2. The First and the Second Applicant ("**the Embrace applicants**") seek confirmation of the order of invalidity granted by the court *a quo*.[2]

3. CALS seeks to appeal the judgment and order of the court *a quo* in relation to its own case.[3]

4. CALS' case is concerned with the direct challenge to the constitutionality of sections 3, 4, 5, 6, 7 and 11A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA)("**the impugned provisions"**).[4]

5. These provisions define the offences by reference to consent, requiring the presence or absence of consent as a core element.

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[2] Volume 1, page 1, para 1.
[3] Volume 1, page 65, para 2.
[4] Volume 1, page 66, para 2.2.

6. CALS contends that including consent as a definitional element in the offences listed above constitutes an unjustifiable limitation on individuals' rights to equality (and dignity), particularly those of women, children, and gender-diverse persons.[5]

7. Through this application and appeal, CALS seeks to address the root cause of these rights violations, namely, the incorporation and retention of consent as a definitional element of sexual offences.

JURISDICTION FOR LEAVE TO APPEAL

8. This matter comes before this Honourable Court as confirmation proceedings in terms of section 167(5), read with section 172(2), of the Constitution. This Court has exclusive jurisdiction to confirm the court *a quo's* declaration of constitutional invalidity of the impugned sections. Thus, this matter engages the supervisory jurisdiction of this Court in respect of the declaration of invalidity.

9. In addition, this Honourable Court has jurisdiction over this appeal in terms of section 172(2)(d) of the Constitution.

10. This matter raises critical questions concerning the constitutional rights to equality and dignity, among others, thereby squarely engaging this Court's

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[5] Volume 1, page 66, para 2.2.

jurisdiction. CALS submits that the interests of justice and the imperative of legal certainty demand that the constitutionality of the impugned provisions be definitively resolved.

GROUNDS OF APPEAL

Failure to consider CALS' pleaded case under section 172(1) of the Constitution

11. CALS argues that the court *a quo* failed to consider and conduct any form of constitutional analysis of its pleaded case, as required by section 172(1)(a) of the Constitution.

12. CALS submits that the court *a quo* ought to have taken the following approach –

12.1. In adjudicating a constitutional challenge of this nature, the court *a quo* was required to begin by determining whether CALS had established an infringement of a constitutionally protected right or rights and demonstrated a *prima facie* case of such impairment.

12.2. Once this threshold was met, the court's obligation was to consider whether the right or rights could be justifiably limited under section 36 of the Constitution. This enquiry necessarily places the onus on the State to demonstrate that the limitation is reasonable and

justifiable in an open and democratic society based on human dignity, equality and freedom.

12.3. If, after this analysis, the court *a quo* concluded that the rights asserted by CALS were unjustifiably infringed, it was constitutionally compelled to proceed to section 172(1). Section 172(1)(a) would then require that the court *a quo* "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

13. Section 172(1)(a) is peremptory: a court must declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency.

14. Having made such a declaration, the court *a quo* was then enjoined by section 172(1)(b) to determine an order that is just and equitable, taking into account considerations such as the doctrine of separation of powers.[6]

15. The court *a quo* effectively placed the cart before the horse by prioritising separation of powers considerations before undertaking the necessary enquiry into whether the impugned provisions were inconsistent with the Constitution.

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[6] Volume 1, page 81, para 31.

FIRST GROUND OF APPEAL: DOES CONSENT AS A DEFINITIONAL ELEMENT OF THE IMPUGNED PROVISIONS VIOLATE SECTION 9 OF THE CONSTITUTION?

16. Section 9 of the Constitution guarantees equality before the law, including the right to equal protection and benefit of the law (section 9(1)), prohibits unfair discrimination on listed grounds such as sex, gender and sexual orientation (section 9(3)), and presumes such discrimination to be unfair (section 9(5)). These provisions must be read with section 10, which affirms the inherent dignity of every person.[7]

17. This Court has consistently affirmed that equality under the Constitution is substantive, not merely formal.[8] Substantive equality requires an examination of the structures, context and impact of a law on disadvantaged groups. It recognises that laws which appear neutral on their face may perpetuate systemic inequality.

18. Gender-based violence is a form of discrimination. Sexual offences fall under the umbrella of acts which constitute gender-based violence. This Court's jurisprudence explicitly acknowledges that sexual offences constitute a form of gender-based violence (and thus unfair

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[7] *President of the Republic of South Africa v Hugo* (CCT11/96) [1997] ZACC 4 at para 41.
[8] *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC).

discrimination).[9] For example, in the case of *S v Tshabalala*, this Court explicitly acknowledges that sexual offences constitute gender-based violence.[10]

19. While the impugned provisions of SORMA may appear neutral, their impact is not. They operate in a context where women and gender-diverse persons are disproportionately affected by sexual offences and are entitled to heightened constitutional protection.

20. CALS submits that including consent as a definitional element entrenches a systemic disadvantage. It shifts the focus to the conduct of the complainant, imposes a disproportionate evidentiary burden, and reinforces patriarchal assumptions about sexuality. These consequences undermine both equality and dignity.

21. As Khampepe J observed in *Tshabalala*:

> *"Rape, at its core, is an abuse of power expressed in a sexual way. It is characterised with power on one side and disempowerment and degradation on the other. Without more being said, we know which gender falls on which side."*[11]

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[9] *Tshabalala v S; Ntuli v S* (CCT323/18;CCT69/19) [2019] ZACC 48.
[10] Ibid.
[11] Ibid para 73.

22. This reinforces that rape is not about sexual desire but about domination and systemic inequality.

23. The proper characterisation of rape, as this Court has held, “cannot be gainsaid” because it shapes the treatment of victims and society’s understanding of harm.[12] Rape is structural, with both direct and indirect victims, and its regulation by law must reflect that reality.

24. Accordingly, CALS submits that consent as a definitional element of the impugned provisions constitutes unfair discrimination contrary to section 9, read with section 10 of the Constitution. This is because it entrenches systemic patterns of disadvantage in three critical ways:

25. First, by differentiating between gendered and non-gendered crimes.

26. Second, by placing a disproportionate burden on victims to prove non-consent.

27. Third, by perpetuating force-based reasoning despite statutory reforms.

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[12] Ibid para 77.

Gendered versus non-gendered crime

28. The impugned provisions create a distinction between victims of gender-based crimes, such as sexual offences, and victims of non-gendered crimes, such as assault or robbery. This differentiation, which arises from the inclusion of consent as a definitional element in sexual offences but not in other violent crimes, requires constitutional scrutiny to determine whether it serves a legitimate purpose and bears a rational connection to that purpose.

29. According to the preamble of SORMA (the primary legislation containing sexual offence crimes), its purpose is to "comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute". Section 2 of SORMA sets out its objectives, which include providing maximum protection to complainants of sexual offences in the least traumatising manner possible.

30. The Act aims to establish a coordinated response among state organs to enforce its provisions, reduce the high incidence of sexual offences, and protect victims and their families from secondary victimisation. It further seeks to ensure that victims' needs are recognised through timely, effective, and non-discriminatory investigation and prosecution, while reducing disparities in service provision.

31. CALS submits that the retention of consent in the impugned provisions undermines, rather than advances, the objectives set out in section 2 of SORMA. Instead of providing maximum protection to complainants and minimising secondary victimisation, the consent requirement perpetuates trauma, places a disproportionate evidentiary burden on victims (that non-gendered crimes do not), and hinders the effective prosecution of sexual offences.

32. Historically, the law has approached sexual offences with unwarranted scepticism, largely because these crimes are typically committed against women. This is evident in the historic application of the cautionary rule to the testimony of rape complainants.

33. In her report, CALS' expert Professor Jameelah Omar submits that, unlike other types of assaults, such as common assault or other grievous types of assaults, sexual assault is effectively deemed to be lawful but for the lack of consent. This means that in sexual assault cases, the starting point is that the "conduct" (that is, the sexual activity) is lawful unless the allegation that it was "without consent" can be proven beyond a reasonable doubt. In other words, but for the lack of consent, the conduct would be lawful.[13]

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[13] Volume 6, page 565, para 19.

34. The retention of consent as a definitional element is because of the misconception that rape and sex are “two sides of the same coin”, divided only by consent:

> *It is, however, inappropriate to consider rape to be otherwise lawful sexual intercourse, rendered unlawful through lack of consent. Rape is forced or coerced sex, where coercion need not be direct, explicit or through physical force. The unlawful conduct is therefore not consent-less sex but a forced assault.*[14]

35. This reflects a policy choice shaped by historical and social dynamics, including entrenched patriarchal norms and misconceptions about gender, sexuality, and sexual autonomy, which remain deeply embedded in the law governing sexual offences.

36. Although any offence could theoretically include consent as a definitional element, in practice this feature appears almost exclusively in sexual offences. This highlights the exceptional and problematic manner in which these crimes have historically been treated in criminal law.

37. Professor Omar indicates that there have been global calls from numerous scholars for the removal of consent from the definition of rape.[15] Mackinnon, one of these scholars, contends that: “rape should be defined

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[14] Volume 6, page 565 at para 22.
[15] Volume 6, page 566, para 25.

as sex by compulsion of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime".[16]

38. CALS submits that retaining consent as a definitional element perpetuates the misconception that sexual offences are primarily about sexual activity rather than violence and coercion. This approach hinders meaningful law reform by reinforcing outdated, sexualised narratives instead of recognising these offences as acts of violence and domination.

39. CALS submits that crimes such as assault do not require the absence of consent to be proven; it is self-evident that the attack occurs without consent. The same principle should apply to sexual offences. Removing consent as a definitional element would reframe these offences as acts of violence rather than sexual acts, thereby desexualising the crime and focusing on the accused's coercive conduct. As Professor Omar notes, this shift would dispel the misconception that sexual violence is merely "sex gone wrong" rather than a serious act of criminality."[17]

40. Desexualising sexual offences would unburden the victim with having to prove that they were not a willing participant in the unlawful sexual act, that

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[16] C MacKinnon (1989) *Toward a Feminist Theory of the State,* Cambridge, MA: Harvard University Press at 245.
[17] Volume 6, page 567, para 28.

they were not overpowered by their own sexual desires and entertained the sexual advances of the perpetrator only to regret it later and cry “rape”.

41. Removing consent as a definitional element would therefore provide greater consistency and coherence in the criminal law as a whole.

42. Unlike other offences, which do not rely on consent as a definitional element, sexual offences are uniquely constructed in this way due to their gendered nature. This differentiation unjustifiably undermines the inherent dignity guaranteed by section 10 of the Constitution and constitutes unfair discrimination contrary to section 9, as it disproportionately impacts complainants in sexual offence cases, the majority of whom are women

<u>The disproportionate burden on victims to prove non-consent</u>

43. In criminal cases, each element of the crime must be proven beyond a reasonable doubt. Thus, by including consent in the definition of many sexual offences, the prosecution has the obligation to prove that consent was not present beyond a reasonable doubt.

44. As sexual offences almost always occur in private, the victim’s or survivor’s testimony is frequently the only direct evidence available. When consent is included as a definitional element, the case becomes a contest between the complainant’s account and the accused’s denial. In practical terms, the victim must give evidence so compelling that it excludes any reasonable

possibility that the accused believed consent was present. This burden is exceptionally difficult to discharge, particularly where the accused can rely on ambiguous circumstances to raise doubt.

45. During the adjudication of the offence, the victim is tasked with proving beyond a reasonable doubt that they communicated their unwillingness to engage in the sexual act and that such unwillingness could not have been misinterpreted by the offender.

46. Even harder to adjudicate are cases where the victim consents to parts of the sexual encounter but not to others. An apt example would be where a person consents to penile vaginal sexual intercourse but does not consent to anal intercourse and is thereafter forced to engage in anal sex. Since consent is central to the offence, it becomes insurmountable for the victim to prove that there was no consent for the act and that such a lack of consent was clearly communicated to the perpetrator.

47. CALS submits that retaining consent as a definitional element of sexual offences entrenches discrimination in violation of section 9 of the Constitution. It shifts the focus of adjudication from whether the accused acted unlawfully to the conduct of the victim, which is inconsistent with the treatment of most common law and statutory crimes, where the inquiry centres on the perpetrator's actions. This burden falls disproportionately on women, who make up the vast majority of sexual offence complainants, thereby perpetuating systemic gender inequality.

48. Du Toit contends that framing rape as a sexual offence defined by a woman's consent places the legal emphasis on female sexuality and shifts the burden of proof onto the victim. She states:

> *"[t]o approach the wrong of rape as embedded in the non-consensual nature of the act is inevitably to place the ethical burden on the victim" because the courts must try to determine "whether the victim sufficiently communicated her non-consent, or whether that non-consent was likely given the history of the victim*."[18]

49. The current structure of sexual offence crimes reflects archaic beliefs that rape and other sexual offences are simply sex or other sexual encounters without consent. Instead, these offences are about violence, control, and coercion. Not sexuality.

50. CALS submits that the removal of consent as a definitional element would force a great deal of focus on the conduct of the accused, rather than on how the victim responded and would be in line with the objects of SORMA. Focusing on the accused would also negate the impact of the overemphasis on whether the perpetrator could have genuinely believed there was consent if their behaviour in potentially coercing the victim were under greater scrutiny.

51. As Professor Omar submits, there is no other assault for which the absence of consent must be proven beyond a reasonable doubt. For

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[18] Id at 390.

common assault, for example, the unlawful and intentional application of force to the person of another or inspiring the belief in the other person that force is to be immediately applied.[19]

52. Professor Omar states that an emphasis on proving the absence of consent fundamentally affects the rhetoric of sexual violence and the possibility of proving a sexual offence in court.

53. She argues that consent remains a highly problematic concept. First, it is typically the central issue in rape trials. Second, it fails to address common situations involving acquaintances or intimate partners, where the accused proceeds without explicit agreement from the complainant, often raising the defence of a mistaken belief in consent.[20]

54. In other words, she argues that situations where the law would have previously likely found that there was no consent have been catered for, meanwhile, the more common “she said, he said” situations are no clearer than before and therefore are adjudicated using legal precedent under the common law.[21]

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[19] Volume 6, page 564, para 17.
[20] Volume 6 page 563, para 15.
[21] Volume 6 page 563, para 16.

Perpetuating force-based reasoning despite statutory reforms

55. Although the requirements of force and resistance in sexual offences have been formally repealed in SORMA, these are often still employed to interpret whether or not the sexual intercourse or sexual activity was consensual, as courts tend to revert to the standard of physical force or resistance to show a lack of consent. For example, in the Eastern High Court, Grahamstown decision of *Coko v S,* the court stated:

> *"No force or threats were used to coerce the Complainant (who is the same age as the Appellant). After he had taken his clothes off, he returned to place his head in between her thighs, again with no force. He then performed oral sex on her, which she testified she had no objection to. On the complainant's version, there was no manifestation of any refusal of consent between the kissing, the oral sex and the penetration".*[22]

56. In the case of *S v Amos* (IH's case), the presiding officer in the case states:

> *[t]he fact that the complainant did not signify her opposition to the acts in any way makes it impossible for the Court to be satisfied that the accused subjectively knew that he did not have consent to proceed with the acts.*[23]

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[22] *Coko v S* (CA&R 219/2020) [2021] ZAECGHC 91 para 94.
[23] Volume 2, page 216.

57. It is clear from the above that there is a certain threshold of resistance that a victim must reach (even implicitly so) for a court to be satisfied that the accused was aware of her lack of consent.

58. In *Masiya,* this Court traces the historical focus on "force" at the centre of the definition of rape. This Court said:

> *"In this period, patriarchal societies criminalised rape to protect property rights of men over women. The patriarchal structure of families subjected women entirely to the guardianship of their husbands and gave men a civil right not only over their spouses' property, but also over their persons. Roman-Dutch law placed force at the centre of the definition with the concomitant requirement of "hue and cry" to indicate a woman's lack of consent. Submission to intercourse through fear, duress, fraud or deceit as well as intercourse with an unconscious or mentally impaired woman did not constitute rape but a lesser offence of stuprum.*
>
> *In English law the focus originally was on the use of force to overcome a woman's resistance. By the mid-eighteenth century force was no longer required for the conduct to constitute rape and the scope of the definition was increased to include cases of fraud or deception. This latter definition was adopted in South Africa."*[24]

[24] Id at para 21 and 22.

59. Ross argues that the definition of rape, wrongly focuses on the male perspective and sees rape as just sex where the man has been "too aggressive" and has "gone too far".[25] Ross argues further that since there is no universal test for "non-consent", courts have relied on force or resistance by the victim as a (deceptively) simple formula to determine non-consent. Thus, force or resistance slips in through the back door and becomes a requirement of non-consent.[26]

60. This "force or resistance" requirement wrongfully assumes that "real victims" of sexual violations will respond in a particular way.

61. Although consent appears to be a neutral definitional element, in practice it is not. Victims of sexual offences are overwhelmingly women and gender-diverse persons, and as this Court has previously recognised, rape reflects unequal power dynamics between victim and perpetrator. Requiring "force" or "resistance" as an implicit marker of non-consent unfairly burdens these victims by imposing expectations on how they should respond for the offence to be recognised as rape.

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[25] Ross at 10.

[26] Ross at 11.

SECOND GROUND OF APPEAL: THE FAILURE TO MEANINGFULLY CONSIDER THE EXPERT EVIDENCE

62. CALS submits that the court *a quo* failed to meaningfully consider and engage with the expert evidence of Professor Omar. The judgment refers to her evidence only in paragraphs [22] and [23], summarising that she regards consent as "a deeply contested issue" and "a primary point of contention in rape cases," and that the inclusion of consent as a definitional element places undue emphasis on individual autonomy, often disregarding the structural realities that constrain the autonomy of women and children. Beyond this brief summary, the court did not interrogate or analyse the substance of Professor Omar's testimony or engage with the reasonableness of her conclusions.

63. Professor Omar's evidence was central to CALS' argument that retaining consent as a definitional element perpetuates discrimination and systemic inequality. Her testimony highlighted how this approach entrenches victim-blaming by shifting the focus of the trial onto the complainant's conduct rather than the accused's culpability. The court *a quo's* failure to address these critical insights or explain why it rejected them constitutes a material misdirection. It demonstrates an absence of meaningful judicial engagement with expert evidence that directly bears on the constitutionality of the impugned provisions.

THIRD GROUND OF APPEAL: FAILURE TO CONSIDER INTERNATIONAL AND COMPARATIVE LAW

International law

64. The infusion of our international obligations, into our law in relation to sexual offences is manifest if regard be had to the preamble of SORMA where it is stated:

> *"Whereas several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children."*[27]

65. South Africa is a party to several core international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which obliges States to take effective measures to eliminate gender-based violence. The decision in *Goekce v Austria* illustrates the scope of these obligations. Although the case concerned the killing of a woman by her abusive partner, its central holding

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[27] *Tshabalala* at para 97.

on a State's due diligence duty to prevent and respond to gender-based violence remains directly relevant.[28]

66. The CEDAW Committee found that the Austrian government had failed to meet numerous obligations through their failure to act in a timely manner and prosecute the abusive partner of the deceased, which included acquitting the abusive man on one occasion due to Goekce's injuries being minor.

67. In relation to the State's due diligence requirement the Committee stated "[w]ith regard to articles 1 together with 2 (e) of the Convention, the authors state that the Austrian criminal justice personnel failed to act with due diligence to investigate and **prosecute acts** of violence and protect Şahide Goekce's human rights to life and personal security". [29]

68. The Committee highlighted the due diligence requirement which includes successful prosecution of gender-based violence crimes, and states

> *…the remedies that came to mind for purposes of admissibility related to the obligation of a State party concerned to exercise due diligence to protect;*

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[28] CEDAW*, Communication No. 5/2005*, CEDAW/C/39/D/5/2005 (2007) para 7.3.

[29] CEDAW*, Communication No. 5/2005* (2007), para 3.5.

investigate the crime, punish the perpetrator, and provide compensation as set out in general recommendation 19 of the Committee".[30]

69. This principle is instructive when considering the definitional element of consent in sexual offences. As early as 1995, the Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, cautioned that the continued reliance on consent as a core element of sexual offences risks undermining these obligations. She observed that:

> "*In most countries, rape is defined by statute or by common law as sexual intercourse without the consent of or against the will of the victim. Research from all jurisdictions indicates that any woman who has to prove that she did not consent will face enormous difficulty unless she shows signs of fairly serious injury. She will face particular difficulty if she knows or has had a sexual relationship with the man in the past."*[31]

70. Given that South Africa secures convictions in only 8.6% of reported rape cases, CALS submits that the State's due diligence obligations demand the removal of legal provisions that hinder the effective prosecution of gender-based violence.[32] This duty is even more compelling where such provisions are discriminatory in nature and perpetuate systemic barriers to

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[30] CEDAW*, Communication No. 5/2005* (2007), para 7.3.
[31] UN Commission on Human Rights (1994) *Preliminary Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy*, E/CN.4/1995/42 at 42, para 182.
[32] M Machisa *et al* (2017) Rape Justice in South Africa: a Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012, South African Medical Research Council.

justice. The retention of consent as a definitional element of sexual offences constitutes such a barrier by shifting the focus from the accused's culpability to the complainant's conduct.

71. International law recognises that framing rape without consent as a definitional element is neither novel nor unprecedented. Several human rights instruments and comparative jurisdictions have adopted approaches that focus on coercive circumstances or the absence of voluntary participation, rather than centring the inquiry on consent. This shift was exemplified in the landmark 1998 case of *The Prosecutor v Jean-Paul Akayesu*, where, following the intervention of Trial Judge Navi Pillay, the prosecution included charges of sexual violence, establishing an interpretation of rape that prioritised coercion and violence over consent.[33]

72. The tribunal found that acts of sexual violence, beatings and killings occurred, at times with the facilitation of Akayesu, and subsequently found him guilty of crimes against humanity (murder), crimes against humanity (rape), and crimes against humanity (other inhumane acts).[34]

73. It was during this trial that a definition of rape was enumerated internationally for the first time and was defined as "a physical invasion of

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[33] *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, at 598 (Sept. 2, 1998).
[34] Id at 7.

a sexual nature, committed on a person under circumstances which are coercive". [35] Consent was not considered a feature at all.

74. In arriving at this definition, the Tribunal Bench reportedly canvassed domestic laws from states of all legal traditions and attempted to form a definition that represented the majority view. Judge Pillay later commented on this aspect, stating that "there was no place whatsoever for the consideration of consent. I hoped that this ruling would remove the age-old practice of focusing on the conduct of the woman to establish the guilt of the perpetrator".[36]

75. Non-consent is absent from the definition because it is redundant: coercion is present because consent is absent. Coercion can be circumstantial as well as physical: "[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances".[37]

76. Similarly, the Rome Statute of the International Criminal Court adopts an approach that does not require proof of consent as an element of the crime of rape. Articles 7(1)(g) and 8(2)(b)(xxii) classify rape as both a crime against humanity and a war crime, defining it in terms of acts of penetration

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[35] Id at 7.
[36] Id at para 7.
[37] *Akayesu* at 688. There, examples of coercive circumstances were given as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.

committed by force, threat of force, coercion, or in circumstances that deprive the victim of the ability to give genuine agreement. Notably, the Statute does not frame consent as part of the definitional elements of the offence. Instead, consent may arise only as a defence in exceptional circumstances, shifting the focus from the victim's conduct to the coercive environment created by the perpetrator. This reflects a deliberate move in international criminal law towards protecting sexual autonomy and bodily integrity without imposing an undue evidentiary burden on survivors.[38]

77. CALS submits that removing consent as a definitional element of rape is firmly supported by evolving international legal norms. Global human rights frameworks and international criminal law increasingly recognise that focusing on coercion, force, or circumstances that negate genuine choice provides better protection of sexual autonomy and aligns with States' due diligence obligations to eradicate gender-based violence. Adopting this approach would bring South Africa's legal framework in line with its constitutional and international commitments to equality, dignity, and freedom from violence.

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[38] K Mcloughlin and A Ringin at 9.

COMPARATIVE SUPPORT FOR CALS' POSITION

Namibia

78. Namibia has historically followed the approach of English law and South African law. However, it embarked on a process of re-evaluating and examining the effectiveness of its rape laws post-independence. As a result of this evaluation Namibia passed the Combatting of Rape Act 8 of 2000 ("the Act"). In terms of section 2(1), rape is defined as

> *any person (in this Act referred to as perpetrator) who intentionally under coercive circumstances – commits or continues to commit a sexual act; or causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.*

79. It is important to highlight that it is significant that Namibia has moved away from the notion of consent and defines rape using coercive circumstances, similar to International Criminal Tribunal for Rwanda. Namibia recognised that coercion was a new concept, within the context of rape, in this regard, the Act goes on to explicitly set out (in a non-exhaustive list) what constitutes coercive circumstances.

Eswatini

80. The Sexual Offences and Domestic Violence Act, No. 15 of 2018, ("SODV Act") became a law in Eswatini in June 2018. The SODV Act changes some of the definitions of sexual crimes and creates new crimes. Since the Kingdom of Eswatini is a signatory to CEDAW. The SODV Act plays an important role in domesticating the provisions in CEDAW relating to gender-based violence.

81. Section 3 of the Sexual Offences and Domestic Violence Act, 2018 define rape as an unlawful sexual act with a person. Section 3(3) provides that an unlawful sexual act for purposes of this Part constitutes a sexual act committed under the following circumstances:

81.1. In any coercive circumstance;

81.2. Under false pretence or by fraudulent means;

81.3. In respect of a person who is incapable in law of appreciating the nature of the sexual act;

81.4. Duress;

81.5. Psychological oppression or

81.6. Fear of violence.

Lesotho

82. The Sexual Offences Act 2003 defines sexual offences under section 3 of the Sexual Offences Act and states that a sexual act is *prima facie* unlawful if it takes place in any coercive circumstances. The Act defines coercive circumstances to include:

82.1. there is an application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;

82.2. there is a threats, whether verbal or through conduct, of application of physical force to the complainant or a person other than the complainant;

82.3. the complainant is below the age of 12 years;

82.4. the complainant is unlawfully detained:

82.5. the complainant is affected by-

82.6. physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary; or

82.7. intoxicating liquor or any drug or other substance which mentally or physically incapacitates the complainant; or

82.8. sleep,

82.9. to such an extent that he/she is rendered incapable of understanding the nature of the sexual act or deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

82.10. the complainant submits to or commits the sexual act by reason of having been induced, whether verbally or through conduct, by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed is some other person;

82.11. as a result of the fraudulent misrepresentation of some fact by or any fraudulent conduct on the part of the perpetrator, or by or on the part of some other person to the knowledge of the perpetrator, the complainant is unaware that a sexual act is committed with the perpetrator; and

82.12. a perpetrator knowing or having reasonable grounds to believe that he/she is infected with a sexually transmissible disease, the human immuno-deficiency virus or other life-threatening disease does not, before committing the sexual act, disclose to the complainant that he/she is so infected.

83. In *Rex v Makebe High Court of Lesotho*,[39] the complainant alleged that the defendant raped her. The defendant vehemently denied the allegations and testified that the sex was consensual.

84. The High Court treated the defendant's claim of consent as an affirmative defence ruling that he had the burden of proving consent, on a balance of probabilities. The Court held that the defence was unable "through cross examination, to show that the sex was consensual".[40] Consequently, the court convicted the defendant of rape.

85. An examination of the legal frameworks in neighbouring countries demonstrates a clear regional trend toward defining rape without consent as a central element, instead prioritising coercive circumstances and the protection of sexual autonomy. This trajectory aligns with developments in international criminal law and reinforces the argument that South Africa should not remain an outlier. While some jurisdictions have retained

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[39] *Rex v Makebe High Court of Lesotho* (CRI/T/0018/2020) [2020] LSHC 90.

[40] Id at 4.

consent in their definitions, this does not preclude future reform; rather, it reflects an evolving consensus that reliance on consent is neither inevitable nor indispensable.

86. CALS submits that, in shaping its approach, South Africa should draw primarily on comparative experience from other African states and the broader Global South. These jurisdictions share similar socio-legal contexts, histories of colonial legal systems, and challenges in addressing gender-based violence. Such an approach ensures that reform is grounded in realities more analogous to South Africa's own, rather than replicating frameworks from the Global North that may not fully account for systemic inequalities and cultural contexts. In doing so, South Africa has both an opportunity and an obligation to align its laws with this progressive shift to protect constitutional rights better and eradicate gender-based violence.[41]

FOURTH GROUND: POLICY AND THE SEPARATION OF POWERS

87. Should this Court accept CALS' primary submission, the logical consequence would be to declare the inclusion of consent as a definitional element in the impugned provisions unconstitutional and invalid.

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[41] Id at para 38.

88. This Court, in *Mahlangu*, stated that declaring an Act of Parliament invalid is a serious intrusion into the domain of Parliament; however, intrusion is permitted by the Constitution.[42]

89. In line with this principle, the court *a quo* ought to have applied the separation of powers framework articulated in *Glenister v President of the Republic of South Africa*, which affirms that courts not only have the authority but the constitutional duty to ensure that the exercise of power by other branches of government occurs within constitutional bounds. By failing to engage with this obligation, the court *a quo* did not properly assess whether Parliament's retention of consent as a definitional element unjustifiably limits fundamental rights.[43]

90. The court *a quo* should have been guided by *Doctors for Life International v Speaker of the National Assembly,* where this Court states:

> *"Under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament must act in accordance with, and*

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[42] *Mahlangu* at para 142.

[43] *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC).

within the limits of, the Constitution, and the supremacy of the Constitution requires that the obligations imposed by it must be fulfilled." [44]

91. When considering a just and equitable remedy, a court must therefore be guided by the principle of separation of powers. When certifying the final Constitution, this Court had to consider the principle of separation of powers. This Court held:

> *"The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, '[t]he areas are partly interacting, not wholly disjointed'."*[45]

92. The court *a quo* ought to have exercised its remedial powers under section 172(1)(b) of the Constitution to grant a just and equitable order. These powers explicitly permit the court to tailor remedies that respect separation of powers while upholding constitutional supremacy, including suspending a declaration of invalidity to allow Parliament an opportunity to correct the defect. By failing to do so, the court *a quo* missed an opportunity to provide

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[44] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 200.

[45] *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 108-109.

an effective remedy that both preserves legislative competence and secures the constitutional rights at stake.

RESPONSES TO EMBRACE APPLICANTS' SUBMISSIONS

93. The Embrace applicants oppose CALS' relief and argue that doing away with consent would retain the defence of a mistaken belief in consent (the Embrace applicants call this "the Amos defence").

94. It is worth noting that the defence of mistaken belief in consent emerges from the common law definition of rape in South Africa, which was then codified in section 3 of SORMA.

95. It is crucial to note that, under South African criminal law, rape is an intentional crime; there is no such offence as negligent rape. The offence requires proof that the accused intentionally committed an act of sexual penetration knowing that the complainant was not consenting. When a court introduces the concept of a "reasonable mistaken belief" in consent, it effectively shifts the inquiry to whether the accused acted reasonably, an inherently negligence-based standard. This approach creates a hybrid model that dilutes the intention requirement and allows accused persons to escape liability by demonstrating that they acted without negligence, rather than proving an absence of intent. Such reasoning undermines the

fundamental principle that rape is a crime of intent and risks creating a lesser threshold of accountability in sexual violence cases.[46]

96. Currently, sexual offences remain intent-based and thus the accused's intention must relate to all the elements of the crime, as the accused must have known or foreseen and discounted the possibility that the complainant had not consented to the sexual penetration. To this end, it is arguable that a subjectively mistaken belief that the person has consented to sex constitutes a valid defence since it excludes the element of intent.[47]

97. The genesis of the defence lies in the complex concept of *mens rea* which includes not only unlawfulness but also knowledge of unlawfulness. *Mens rea* is thus made up of two elements, the intellectual one and the volitional one.

98. The intellectual element requires the individual to have knowledge of the elements of the act, the circumstances mentioned in the definitional elements and of unlawfulness. The volitional element consists of directing one's will towards the act. The volitional element thus changes what is ultimately "day dreaming", "wishing" or a "thought crime" into intention.

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[46] *R v K* 1958 3 SA 420 (A) 421; *R v Z* 1960 1 SA 739 (A) 743A, 745D; (although these cases relate to the old common law crime of rape, they still apply to the new crime. It is nevertheless an indication that intent as an element of rape must be present for the crime of rape to be constituted); Van der Bijl 2010 SACJ 236; Hoctor Snyman's Criminal Law 307.

[47] S Stal (2023) 'Does Mistaken Belief in Consent Constitute a Defence in South African Rape Cases?' *PER* 28

99. In relation to the nature of the knowledge of unlawfulness, Justice Ackermann settled what this knowledge would entail in *S v Magidson*, where he explained that actual knowledge of unlawfulness is not necessary, but rather imputed knowledge would suffice.[48] As to what an "imputed" knowledge entails, Justice Ackermann clarified that it is sufficient if the accused realised what they are doing may possibly be unlawful and then reconciles themselves with this possibility. Snyman further explains that knowledge can thus include being aware of the possibility that an element of an offence exists and then reconciling themselves to this possibility (*dolus eventualis*).[49]

100. Since the accused must have knowledge of every element of the offence, a person accused of rape must similarly have knowledge that there was a lack of consent by the complainant. This emerges from the definition of rape, which according to section 3 of SORMA is defined as,

> *"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. [Emphasis is our own]"*

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[48] *S v Magidson* 1984 (3) SA 825 (T).

[49] C Snyman (2012) Criminal Law (LexisNexis) at 179 – 180.

101. The mistaken belief in consent defence only exists through the inclusion of consent as an element of the crime. By removing consent from the definition of certain sexual offences, the accused can no longer raise mistaken belief as a defence. Rather, the accused must raise consent as a justification.

102. Burchell states that for consent to succeed as a defence or justification, the following requirements must be met: (1) the complainant's consent in the circumstances must be recognised by law as a possible defence; (2) it must be real consent (not mistaken); (3) it must be given by a person capable of consenting in terms of the law.[50]

103. Burchell goes on to explain that "consent is a defence to rape because the harm that the crime seeks to prevent is sexual penetration of an unwilling person likewise consent is a defence to theft because the purpose of this crime is to prevent non-consensual dealing with the property of another".[51]

104. CALS thus submits that the "Amos defence" would not continue to exist in law if consent was removed as a definitional element of sexual offences.

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[50] J Burchell (2011) South African Criminal Law and Procedure 4th ed, Juta at 217.

[51] Id at 219.

105. The Supreme Court of Canada has considered the defence of mistaken belief in consent on a number of occasions.[52] The case law generated by the Court on this issue specifically recognises that the mistaken belief defence raises questions about the protection of fundamental human rights such as the right to equality, human dignity and bodily integrity.[53]

106. The doctrine underlying this defence has been criticised for defining sexual assault from the perspective of the accused as opposed to that of the complainant.[54]

CALS' REMEDY

107. The starting point on the issue of an appropriate remedy is found in section 172 of the Constitution. Section 172(1)(b) empowers this Court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

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[52] *Pappajohn v The Queen* [1980] 2 SCR 120; *Sansregret v The Queen* [1985] 1 SCR 570; *R v Osolin* [1993] 4 SCR 595; *R v Park* [1995] 2 SCR 836; *R v Esau* [1997]; *R v Ewanchuk* [1999] 1 SCR 330; *R v Davis* (1999) 29 CR (SCC).

[53] In Park para 38, L'Heureux-Dube J emphasised the importance of the link between the *mens rea* requirement in cases of sexual assault and the equality provision contained in section 15 of the Canadian Charter of Rights and Freedoms. See also J Temkin (2005) Rape and the Legal Process, Oxford at 131.

[54] C MacKinnon 'Reflections on sex equality under law' (1990-1991) 100 *Yale Law Journal* 1281 at 1304.

108. This Court is further empowered to make any order that is just and equitable, which may include an order limiting the retrospective effect of the declaration of invalidity or its suspension with the aim of allowing Parliament to correct the defect.[55]

109. CALS seeks an appeal against the judgment and order of the court *a quo*. It seeks that the impugned provisions be declared unconstitutional immediately.

110. In *Mvumvu v Minister for Transport* [56] this Court held

> *"Unless the interests of justice and good government dictate otherwise, the applicants are entitled to the remedy they seek because they were successful. Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, they are entitled to a remedy that will effectively vindicate those rights. The court may decline to grant it only if there are compelling reasons for withholding the requested remedy. Indeed, the discretion conferred on the courts by section 172(1) must be exercised judiciously."*[57]

111. In *Economic Freedom Fighters v Minister of Justice and Correctional Services*,[58] this Court held:

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[55] *Mahlangu* at para 121.
[56] *Mvumvu v Minister for Transport* 2011 (2) SA 473 (CC).
[57] Id at para 46.
[58] Id at para 67.

> *"In crafting a remedy, we must therefore remind ourselves that ours is an interim relief – a short term solution – whose lifespan is at the mercy of Parliament's prompt and more enduring intervention. The long term solution is best left to Parliament whose primary responsibility it is to grapple with and settle conceivable definitional challenges. While waiting for it to exercise its legislative authority in relation to the content of the provision, we have to ensure that the lacuna created by our invalidation of section 18(2)(b) is filled. And that would be achieved by reading-in a word into this provision. Like every reading-in exercise, this too must be done in a manner that is sensitive to separation of powers."*[59]

112. We submit that it is necessary to afford Parliament the opportunity to remedy this constitutional defect. We submit that this Court gives Parliament 24 months within which to do what it is needed.

113. CALS asks this Court to provide a short-term solution by reading in "coercive measures" where "without the consent" appears. This remedy will ensure that there is no lacuna created by the invalidation of consent as a definitional element.

114. This interim remedy shifts the focus from the conduct of the complainant to the conduct of the alleged perpetrator. If the victim was coerced into participating, then a conviction is a possibility.

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[59] Id at para 67.

115. CALS submits that this proposed new formulation does not change the onus on the prosecution to prove that the sexual conduct was unlawful.[60]

116. What this means is that it will be up to the accused to prove that the complainant did in fact validly consent to the sexual intercourse.

117. This shifts the psychological nature of the enquiry away from what the victim did to what the accused did and puts him on terms to excuse or justify his conduct.[61]

COSTS CONCERNING THIS APPLICATION

118. This case concerns not only the interests of the individual applicants but also extends to include public interest at large. Where in 2023, South Africa has been found to be among the top five countries with the highest rates of rape globally; the successful prosecution of sexual offences is in the interest of every individual in the country.[62]

119. The *Biowatch Trust v Registrar Genetic Resources and Others* principle generally holds that where litigation between the state and private parties seeks to assert or vindicate a particular right in the Bill of Rights, if the

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[60] J Milton (1999) 'Re-defining the crime of rape: The Law Commission's Proposals' 12 *SACJ* 364.
[61] Id.
[62] World Population Review (2023) Rape statistics by country 2023 https://worldpopulationreview.com/country-rankings/rape-statistics-by-country.

private party is unsuccessful, then the private party should not be liable for the state's costs.[63]

120. We thus request that if CALS and the other applicants are unsuccessful in their prayers, the above honourable court upholds the *Biowatch* principle and makes no order as to costs.

121. However, due to entities such as CALS litigating on behalf of its client's interests and the public interest and doing so pro bono, if successful, CALS requests that the above Honourable Court order costs in its favour, including the costs of one counsel.

CONCLUSION

122. Experience has shown that when the law is reconstructed from the lived realities of women and survivors of sexual violence, it can become a powerful tool for justice. As MacKinnon reminds us: "[L]aw is not everything, but [it] is not nothing either. Perhaps the most important lesson is that the mountain can be moved. . . [and] women's experiences can be written into the law, even though clearly tensions [will] remain".[64]

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[63] *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).
[64] C Mackinnon (1987) *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press at 116.

123. Leaving consent as a definitional element is not a neutral choice, it entrenches harmful stereotypes, shifts the burden onto survivors, and perpetuates myths that allow perpetrators to escape accountability. This framing ensures that trials focus on scrutinising the complainant's behaviour rather than the accused's unlawful conduct, resulting in systemic under-prosecution and impunity. With South Africa's conviction rate for rape standing at a devastating 8.6%, this legal construct is not only ineffective but discriminatory. It undermines the constitutional promise of equality, dignity, and the right to be free from violence.

124. The Constitution, read together with South Africa's binding international obligations, requires this Court to dismantle these barriers and ensure that the law reflects substantive equality and survivor-centred justice. In doing so, South Africa can align with progressive African jurisdictions and lead the Global South in rejecting outdated, patriarchal legal constructs.

125. For these reasons, CALS respectfully requests this Court to grant leave to appeal, set aside the judgment and order of the court *a quo*, and substitute it with an order declaring the impugned provisions unconstitutional and invalid. This Court has a constitutional duty to act decisively to ensure that the law protects rather than punishes those most vulnerable to sexual violence.

LETLHOGONOLO MOKGOROANE (THEY/THEM)

SHEENA SWEMMER (SHE/HER)

CHAMBERS (SANDTON) & CALS (UNIVERSITY WITWATERSRAND)