

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

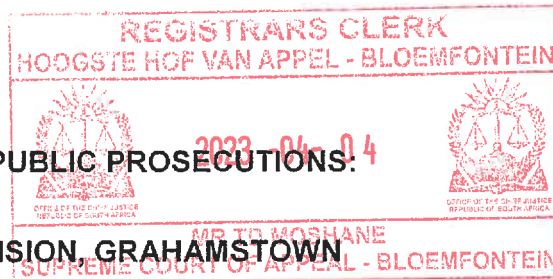
CASE NO. 248/2022

GHC CASE NO. CA&R 219/2019

THE DIRECTOR OF PUBLIC PROSECUTIONS:

Appellant

EASTERN CAPE DIVISION, GRAHAMSTOWN



And

LOYISO COKO

Respondent

And

WOMEN'S LEGAL RESOURCE CENTRE

First Amicus Curiae

INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA

Second Amicus Curiae

THE COMMISSION FOR GENDER EQUALITY

Third Amicus Curiae

FILING NOTICE

KINDLY TAKE NOTICE THAT the Second Amicus, the Initiative for Strategic Litigation in Africa, herewith files the following documents:

1. Second Amicus Curiae's Amended Heads of Argument

2. Second Amicus Curiae's List of Authorities for Argument
3. Second Amicus Curiae's Certificate in terms of Rule 10A(B)



CENTRE FOR APPLIED LEGAL STUDIES

Attorney for the Second Amicus Curiae

1st Floor, DJ Du Plessis Building

West Campus, Witwatersrand

1 Jan Smuts Avenue

Braamfontein

Johannesburg

Tel: 066 216 7276

Email: Basetsana.Koitsioe@wits.ac.za

Ref: B Koitsioe/Coko

C/O MCINTYRE VAN DER POST INC

Box 540, Bloemfontein

12 Barnes St. Westdene

Bloemfontein, 9301

Tel: 051 505 0200

Ref: B Hartel/Coko

TO: THE REGISTRAR: SUPREME COURT OF APPEAL

Cnr. Elizabeth and President Brand Street

Bloemfontein

By Hand

TO: THE STATE ATTORNEY: PORT ELIZABETH

APPELLANT'S ATTORNEYS

Tel: 041 585 7921

Email: LHart@justice.gov.za

Ref:0092/2022.D-L Hart

C/O THE STATE ATTORNEY: BLOEMFONTEIN

11th Floor, Fedsure Building

49 Charlotte Maxeke Street

Bloemfontein

9031

Private Bag X2063

Bloemfontein

9300

Email: CoCronje@justice.gov.za

Ref: 239/202200233/PIC- Ms C Cronje

Brandon Hartel

From: Laura Macfarlane <Laura.Macfarlane@nortonrosefulbright.com>
Sent: 30 March 2023 13:46
To: Jessie Ditshego
Cc: Basetsana Koitsioe; Sheena Swemmer; Thando Ndita; Jason Whyte; Luthando Dlamini
Subject: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No> 248/22 [NRFSA-CPT.FID690205]

Thank you Jessie. We confirm receipt.

Kind regards

Laura Macfarlane | Senior Associate
Norton Rose Fulbright South Africa Inc
9th floor, 117 on Strand, 117 Strand Street, Cape Town 8001, South Africa
Tel +27 21 405 1323 | Mob +27 81 700 3741 | Fax +27 21 418 6900
laura.macfarlane@nortonrosefulbright.com

We are a proudly BEE Level 1 Law Firm

ADVISORY:	If our bank account details change, we will notify you by phone or in person, but never by email. Please always verify any change in our banking details by oral communication. Be suspicious of emails from unknown or external senders and be alert to impersonation attempts to redirect funds inappropriately. Always check the sender's email address.
------------------	---

NORTON ROSE FULBRIGHT

Law around the world
nortonrosefulbright.com

From: Jessie Ditshego <jessie.ditshego@wits.ac.za>
Sent: 30 March 2023 13:19
To: Laura Macfarlane <Laura.Macfarlane@nortonrosefulbright.com>; Jason Whyte <Jason.Whyte@nortonrosefulbright.com>
Cc: basetsana.koitsioe <basetsana.koitsioe@wits.ac.za>; Sheena.Swemmer <Sheena.Swemmer@wits.ac.za>; Thando Ndita <Thando.Ndita@nortonrosefulbright.com>
Subject: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No> 248/22

[External Email – Use Caution]

Dear Colleagues

Kindly find attached the written submissions for the Second Amicus Curiae in the matter of *The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No: 248/2022*

Your ref: Laura Macfarlane/Jason Whyte PBO2684

Kind Regards,

Brandon Hartel

From: Microsoft Outlook
<MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@witscloud.onmicrosoft.com>
Sent: 30 March 2023 13:16
To: Jessie Ditshego
Subject: Relayed: RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No> 248/22
Attachments: details.txt; RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grah... (1.68 KB)

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

CoCronje@justice.gov.za (CoCronje@justice.gov.za)

LHart@justice.gov.za (LHart@justice.gov.za)

Subject: RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No> 248/22

Brandon Hartel

From: postmaster@wlce.co.za
Sent: 30 March 2023 13:18
To: Jessie Ditshego
Subject: Relayed: RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No 248/22
Attachments: details.txt; RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grah... (2.55 KB)

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

bronwyn@wlce.co.za

aretha@wlce.co.za

Subject: RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No 248/22

Brandon Hartel

From: postmaster@maduba-attorneys.co.za
Sent: 30 March 2023 13:18
To: Jessie Ditshego
Subject: Delivered: RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No 248/22
Attachments: details.txt; RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grah... (2.76 KB)

Your message has been delivered to the following recipients:

nadinem@maduba-attorneys.co.za

Subject: RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No 248/22

Brandon Hartel

From: postmaster@outlook.com
Sent: 30 March 2023 22:12
To: Jessie Ditshego
Subject: Delivered: RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No> 248/22
Attachments: details.txt; RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grah... (2.69 KB)

Your message has been delivered to the following recipients:

linogreysteenkamp@outlook.com

Subject: RE: RE: The Director of Public Prosecutions: Eastern Cape Division, Grahamstown v Loyiso Coko SCA Case No> 248/22

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

APPEAL COURT CASE NO: 248/2022

A QUO CASE NO: CA&R219/2020

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS: Appellant

EASTERN CAPE DIVISION, GRAHAMSTOWN (Respondent in the Court *a quo*)

and

LOYISO COKO Respondent

(Appellant in the Court *a quo*)

and

THE WOMEN'S LEGAL CENTRE *First Amicus Curiae*

INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) *Second Amicus Curiae*

THE COMMISSION FOR GENDER EQUALITY *Third Amicus Curiae*

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA'S
AMENDED WRITTEN SUBMISSIONS**

INTRODUCTION

1. On 08 October 2021, pursuant to an application for leave to appeal the judgement and order of the Regional Court (hereinafter the Court *a quo*), handed down on 08 September 2021 convicting the Respondent on one count of rape and sentencing him to 7 years' imprisonment, the High Court (per Ngcukaitobi AJ and Gqamana J) upheld the Respondent's appeal thereof, overturning the conviction and setting aside the accompanying aforementioned term of imprisonment.
2. The High Court primarily based its findings on the manner in which the Magistrate evaluated the evidence, finding that the Magistrate '*glossed over*' and '*overlooked crucial details*' which resulted in a misdirection.¹

¹ Judgment, Record Volume 3, para 97, pg. 313

3. The High Court further found fault in the Magistrate's conclusion that the rape had been planned by the Respondent beforehand, finding instead that there had been no evidence in support of such conclusions in the record.²
4. Ultimately, the High Court found that it could not satisfy itself that the State had succeeded in proving the guilt of the Respondent beyond reasonable doubt,³ acquitting him & setting aside the sentence.
5. The Director of Public Prosecution, Eastern Cape (hereinafter the Appellant) subsequently launched an application for leave to appeal against the judgment and order of the High Court. The Appellant seeks to have the order handed down by the High Court set aside and replaced with an order upholding the findings of the court *a quo*.
6. The Initiative for Strategic Litigation in Africa ("ISLA") was admitted as *amicus curiae* in the present appeal proceedings on 12 September 2022. The ISLA is an organisation primarily focused on women's rights and sexual rights both at national level and within the greater African human rights system. We align ourselves with the relief sought on appeal by the Appellant, and explain our reasoning in what follows below in these written submissions.

² Judgment, Record Volume 3, para 98, pg.314

³ Judgment, Record Volume 3, para 101

7. The principles governing the admission of a party as an *amicus curiae* are trite and well-settled in law.⁴ As such, ISLA's submissions will advance relevant, useful and new contentions going beyond those of the litigants and assist this Honourable Court in reaching a just outcome.
8. In these written submissions, the ISLA hopes to primarily to contribute to the evolution of normative concepts of what constitutes consent in rape matters, with specific emphasis in intimate partner relationships (and violence)⁵.
9. The present case highlights the importance of a contextual analysis in the adjudication of intimate sexual violence cases and raises questions about state obligations in the proper prosecution and punishment of acts of sexual violence against women and girls, including acts committed by non-state actors. Of particular significance is that the sexual violence in the present case took place in the context of an intimate partner relationship— an area in which there is limited jurisprudence.
10. This is compounded by the fact that the research demonstrates that cases such as the one presently on appeal before this Honourable Court have a lower chance of progressing successfully through the criminal justice chain due to a lack of

⁴ *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another* 2019 (1) BCLR 53 (CC)

⁵ Intimate partner violence has been defined by the World Health Organization as "*behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours*"

understanding of and attention to intimate partner violence by police, prosecutors and the courts.⁶

11. As was stated by this Court in *S v S*⁷:

*“Victims of rape, as a class of vulnerable people in our society, ought to have a reasonable expectation that their cases are taken seriously enough to be presented properly and tried at a standard that the guilty do not wriggle free because of un-insightful and superficial attention to the elements of the crime **by those who are responsible to protect them.**”* [Emphasis added]

12. ISLA supports the findings of the court *a quo*. It maintains that the court *a quo*’s conclusions and findings are correct and cannot be faulted. ISLA respectfully submits, that it can conceive of no justifiable legal basis for the High Court’s finding that the court *a quo*’s misdirection was material enough to warrant the overturning of the conviction and setting aside of the sentence. This Court has on occasion stated that courts ought to strive to balance various factors in order to arrive at a sentence that is just, and that in the careful consideration of the relevant factors present in each case, *‘the public interest must be an ever present concern’*.

⁶ M Machisa, R Jina, G Labuschagne, L Vetten, S Swemmer, B Meyersfeld & R Jewkes ‘Rape Justice in South Africa: A Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012’ (2017) Gender and Health Research Unit, South African Medical Research Council 39.

⁷ *S v S* [2012] ZASCA 85 at para 81

13. The (public interest) implications of the judgment and order of the High Court can therefore not be understated. In what follows, we expand upon this reasoning and deal with the following issues in turn:

13.1 First, we set out the relevant factual background;

13.2 Second, we outline the legal framework in support of our submissions;

13.3 Third, we set out the relevant portions of the judgment upon which these written submissions are based;

13.4 Fourth, we briefly deal with the misdirection by the court *a quo* and show that such misdirection was not material; and

13.5 Finally, we deal with the issue of consent and the lack of contextual analysis on the part of the High Court in relation thereto, which has resulted in a flawed judgment with dire public interest implications if left unchallenged.

RELEVANT FACTUAL BACKGROUND

14. On 1 July 2018, after a mere **two weeks**⁸ or so of being in a relationship with the Complainant, the Respondent, inserted his penis into the vagina of the Complainant after engaging in oral sex with her.

⁸ Judgment, Record Volume 3, para 19: "*Their relationship began in the middle of June 2018. She also confirmed that their relationship ended at the beginning of July 2018.*"

15. At the time of this incident, the evidence is indicative of the following facts which were common cause between the parties:

15.1 The two had never engaged in sexual intercourse (with each other) prior to that day;

15.2 The Respondent knew and had been told that the Complainant was a virgin and had never engaged in sexual intercourse with another person before;⁹

15.3 The Respondent knew and had been told that the Complainant did not wish to engage in sexual intercourse;¹⁰

15.4 He had given the Complainant his verbal assurance that he would not have sex with her, categorically stating *"don't worry, I am not trying to have sex with you"* *"No, I don't want to have sex with you"* when she closed her legs in resistance; and

15.5 The Complainant had cried when the Respondent penetrated her and told him that *"you are hurting me"*.

16. In the days, weeks and months that followed the incident of 1 July 2018 outlined above, the ***uncontested/undisputed*** evidence is indicative of the following facts:

⁹ Record Volume 1, pg. 82 lines 16 – 25; pg. 83 lines 1 – 5; See also Appellant's Heads of Argument pg 12 para22

¹⁰ Record Volume 1 pg. 22 lines 23 -24

- 16.1 The Complainant had sent the Respondent text messages in which she, *inter alia*, informed the Respondent that “...you assured me we weren’t having sex before you took off my pyjamas. But you said one thing and did the opposite. And I’ve been going insane ever since.”
- 16.2 In response to the above, the Respondent had texted back “As worthless as my apology is I’ll still apologise. I really am sorry”;
- 16.3 Additionally, the Respondent had sent the Complainant text messages in which he, *inter alia*, apologised for “going back on my word. And having unprotected sex with you”;
- 16.4 In response to the above, the Complainant responded “going back on your word(?) That’s what you call inserting your penis in my vagina without my permission. And continuing even when I told you you hurting me”;
- 16.5 The Complainant sought counselling from a psychologist on 1 August 2018;
- 16.6 The Complainant underwent a medico-legal examination on 2 September 2018 in which it was recorded that “hymen not present” and “clinical examination suggestive of previous per vaginal penetration as hymen is torn”.
- 16.7 The Complainant lodged a criminal charge with the police on 2 September 2018, with the charge sheet containing 1 charge of rape worded as follows:
- “On or about the 1st July 2018 and at or near 01 D Street, Fingo, Grahamstown in the Regional Division of the Eastern Cape the said accused did unlawfully and intentionally commit an act of sexual penetration with the Complainant to wit [TS], by inserting his penis into the vagina of the said Complainant without the consent of the said Complainant”.

17. During the trial before the Regional Court, the Respondent's defence was simple: he had understood there to have been consent on the part of the Complainant owing to her "*body language*" and had, as a result, "*gone with the motions*".
18. The Regional Court, held that the Respondent must have known that there had been no consent from the outset/onset and that there could be no argument that he had been 'deceived' by the body language of the Complainant in allowing him to perform oral sex on her. The Court found the Respondent guilty on one count of rape, and thereafter handed down a sentence of 7 years' imprisonment. The Respondent applied for leave to appeal both the conviction and sentence, which appeals were denied.
19. On appeal to the High Court, the Court considered what it termed to be the question before it, namely, whether the State had discharged its onus of proving beyond reasonable doubt that the Respondent had "unlawfully" and "intentionally" sexually penetrated the Complainant without her "consent".

STATUTORY AND LEGAL FRAMEWORK

20. The position to be adopted in these written submissions is informed by standards under international and regional human rights law, as well as domestic precedents. It is the ISLA's position that what had transpired in the present appeal

to date has been a failure on the part of the State and the court in that by failing to prosecute and punish the act of rape committed by the Respondent against the Complainant, the High Court has not met its due diligence obligations under international law.¹¹

21. The Bill of Rights is a cornerstone of democracy in South Africa, enshrining the rights of all people in our country and affirming the democratic values of human dignity, equality and freedom.¹²
22. The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all other organs of state.¹³ Section 173 of the Constitution confers upon the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa, the inherent power to protect and regulate their own processes, and to develop the common law taking into account the interests of justice. Section 8(3)(a) enjoins a court, when applying the Bill of Rights, to apply (or if necessary develop) the common law to the extent that legislation does not give effect to that right.

¹¹ Mainly: *The Declaration on the Elimination of Violence Against Women* (adopted 20 December 1993) UN Doc A/RES/48/104; *The Convention on the Elimination of All Forms of Discrimination Against Women* (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; *The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (African Union)(11 July 2003)

¹² Section 7(1) of the Constitution.

¹³ Section 8(1) of the Constitution.

23. Section 12(2) of the Bill of Rights guarantees everyone the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and the right to security in and control over their body.
24. Section 39(1) enjoins courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, to consider international law as well as foreign law in interpreting the Bill of Rights. In relation to the interpretation of legislation and the development of the common law, courts are enjoined by section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.
25. Over and above the Constitution's requirement of a consideration of international law and foreign law in the interpretation of the Bill of Rights and the development of the common law, Article 4(c) of the UN Declaration on the Elimination of Violence Against Women places a positive obligation on states to '**prevent, investigate, and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private actors.**' [Emphasis added]
26. The United Nations (UN) reports that worldwide, 27% of women 'have been subjected to physical and/or sexual violence from a current or former husband or

male intimate partner at least once in their lifetime.¹⁴ Similarly, a study of rape cases in Gauteng found that 25.3% of women had experienced intimate partner sexual violence in their lifetime.¹⁵

27. Domestically, South African legislation is informed by the Constitutional themes of equality and gender, and sets out broad protections for women, as well as clear mandates for the state to address all forms of violence against women including abuse taking place within the private sphere. The Domestic Violence Act 116 of 1998 ("DVA"), and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA"), in tandem with the Criminal Law Sentencing Amendment Act 38 of 2007, form the bedrock of South Africa's violence against women legislation.
28. Recently the state strengthened protections for victims through the passage of three gender-based violence Bills¹⁶ which stemmed from the momentum of the 2020 National Strategic Plan on Gender-Based Violence and Femicide (NSP-GBVF).

¹⁴ UN Inter-Agency Working Group on Violence Against Women Estimation and Data. *Violence Against Women Prevalence Estimates, 2018: Global, Regional and National Prevalence estimates for Intimate Partner Violence Against Women and Global and Regional Estimates for Non-Partner Sexual Violence Against Women* : Executive Summary 4. Geneva, World Health Organisation (2021)

¹⁵ M Machisa, R Jewkes, C Morna 'The War At Home: Gender-Based Violence Indicators Project' (2011) Gender Links and The South African Medical Research Council 10.

¹⁶ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021; the Criminal and Related Matters Amendment Act 12 of 2021; and the Domestic Violence Amendment Act 14 of 2021.

JUDGMENT OF THE HIGH COURT

29. The High Court held that that State had failed to discharge the onus, resulting in the conviction and sentence handed down by the Regional Court being overturned and replaced with an order finding the Respondent not guilty and acquitting the Respondent of the crime of rape. The sentence of seven years imprisonment was also set aside.

30. Key aspects of the High Court's judgment (for purposes of these submissions) include the following:

30.1 The judgment noted on more than one occasion that the communication between the Complainant and the respondent following the rape incident was "*cordial*";¹⁷

30.2 The judgment records that "*it was the Complainant who suggested 'that we should meet up and I would sleep over at his place that night', despite recording in the paragraphs immediately following that 'after 9;00 pm the Appellant and the Complainant met again at the Pick n Pay by chance. There, they made arrangements for the Appellant to fetch the Complainant from her residence'*";¹⁸

¹⁷ Judgment paras 14 & 16: "*between 14 and 15 July 2018 the Complainant and the Appellant were engaged in cordial conversations, with the Appellant repeatedly affirming his love for the Complainant*" and "*between 19 July 2018 to 27 July 2018 the Complainant and the Appellant continued to exchange cordial messages to each other. The same seems to have been the case for the period 2 August 2018 until 23 August 2018*"

¹⁸ Judgment paras 23.4 and 23.5

30.3 The judgment summarises the evidence of the Appellant as follows *“It was the evidence of the Appellant that throughout the encounter, the Complainant was an equally active participant, she was not merely passive. The only area where there was a dispute was after the penetration. It is in this area where the Complainant says she objected and said the penetration was hurting.”*,¹⁹

31. The paragraphs that form the basis for the High Court’s ultimate conclusions and findings however, and upon which the majority of the judgment’s analysis is based, are paragraphs 62 and 63, which warrant repetition herein:

*“The Magistrate enquired from the Appellant whether or not he admits that during the oral sex the Complainant did ask the Appellant for an assurance that there would be no penetrative sex. The Appellant in fact gave the assurance and then did the opposite. **The Court asked whether or not the evidence of the Complainant in that regard was true. The Appellant answered “yes your Worship”.** The Court asked whether in the light of that it was still disputed that there was no consent. The Appellant’s response was about the “body language” of the Complainant and the fact he went “with the motions”.*

(Emphasis and underlining added)

MISDIRECTION BY THE TRIAL COURT WAS NOT MATERIAL NOR DOES IT VITIATE THE CONVICTION/SENTENCE IMPOSED

¹⁹ Judgment para 91

32. Ordinarily, the ISLA as amicus would not be delving into this terrain of legal argument,²⁰ but as the issue of the consent of the Complainant is inextricably linked to the High Court's finding that the Magistrate misdirected himself materially, it warrants a discussion herein.
33. In *S v Vilakazi*, this Court held before convicting, a court must always be satisfied not merely that "*the exculpatory evidence of the accused is not true but also that every element of the offense has been established by evidence that is truthful and reliable beyond reasonable doubt and that applies as much to the crime of rape. In the case of rape those elements include both the absence of consent and knowledge by the accused of the absence of consent.*" [Emphasis added]
34. It is trite that it has long been our law that the trier of fact should not consider the evidence implicating the accused and evidence exculpating the accused in a compartmentalised manner. The Court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence.²¹

²⁰ "The principles governing the admission of a party as an amicus curiae are now well-settled. An applicant for admission as an amicus curiae must: (a) advance relevant, useful and new contentions going beyond those of the litigants; (b) not adopt a partisan stance 'better suited to a litigant than a friend of the court'; and (c) advance submissions assisting the court to reach a just outcome" *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another* 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC)

²¹ *R v Difford* 1937 AD 373; See also *S v Van Der Meyden* 1999 (1) SACR 447 (W) and *S V Toubie* 2004 (1) SACR 530 (W)

35. In *S v Trainor*,²² this Court, per Navsa JA explained that *"In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the Magistrate is illogical and wrong."*
36. It is the ISLA's position as amicus curiae in these proceedings that the High Court considered the evidence that came before the trial court in the compartmentalised manner cautioned by the Appellate Division in the dictum paraphrased above.
37. The Appellant's heads of argument clearly explain the correct sequence of the line of questioning by the Magistrate in relation the Respondent giving the Complainant assurance that he would not have sex with her that night at paragraph 25.
38. The Magistrate's exchange with the Respondent is recorded in the judgment of the High Court as follows²³:

²² *S v Trainor* 2003 (1) SACR 35 (SCA)

²³ Judgment Volume 3 para 86

"Yes, whilst we are on that I just wanted to get clarity from you Sir, it was her evidence and I do not recall it being disputed that around about the point where there was this oral sex, she did make it plain to you that there would not be any penetration and then you assured her that you will not penetrate her and all of a sudden you did exactly that." The Magistrate then asked whether the evidence is true, which the Appellant accepted"

39. However, what the Magistrate explained in the judgment (also cited by the High Court at paragraph 85 of the judgment) was that *"as they became engulfed in smooching and the oral sex, she made it plain once more that you cannot penetrate her vagina with your penis"*. [Emphasis and underlining added]
40. The exact point of the Magistrate's misdirection then becomes patently clear: he misdirected himself in finding that the Complainant had made it plain a second time that she did not wish to engage in sexual intercourse with the Respondent.
41. That the assurance had been made by the Respondent to the Complainant when she closed her legs during the kissing was a fact that was common cause between the parties throughout the trial. This is a fact that is corroborated by the text communication between them, and what was alluded to when the Respondent apologised for going back on his word.

42. In fact, the High Court's judgment also recognises the existence of the evidence of the assurance given to the Complainant:²⁴

"This was not the evidence of the Complainant. The Complainant did not say that an assurance was given 'at about the point of oral sex'. Her testimony was that when the Appellant was undressing her he told her that he was not going to have sex with her. But just as he was saying that, they were kissing..."

And

"...the text messages show that the Appellant apologised for 'going back on his word. And having unprotected sex' with the Complainant.

43. On the strength of the above, it becomes clear that the Magistrate based his findings and ultimate conclusions on the fact that the Complainant's consent could not be said to have been given as the Respondent had given the Complainant his assurance that he would not have sex with her, and turned around and done exactly that. His finding was not based on the (misdirection and) fact that the Respondent gave his assurance "again" nor "at about the point of the oral sex".

²⁴ Judgment Record Volume 3, paras 94 & 100

44. To quote this Court in *Venter v S*²⁵, which dealt with whether or not the misdirection by the Magistrate had been material: “*Whilst the Magistrate can be criticised for not having given sufficient reasons in respect of each charge, the conclusions he arrived at, as borne out by the record, were correct.*”
45. It is trite that an appellate court may not interfere with a trial court’s exercise of its discretion by rejecting its factual findings or its sentencing discretion in the absence of demonstrable and material misdirection by the trial court.²⁶
46. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate.²⁷ It is also trite that the State has a right of appeal only against a trial court’s mistakes of law, not its mistakes of fact.
47. In explaining the above, the Supreme Court of Appeal explained the following:²⁸
- “... the question posed was whether on the facts found the court had correctly applied the law. There had been two separate incidents resulting in the death of a person. On a charge of murder, the accused’s version was that he had acted in

²⁵ *Venter v S* [2021] ZASCA 21 (18 March 2021)

²⁶ *Livanje v S* 2020 (2) SACR 451 (SCA) at paras 18 and 25

²⁷ *DPP, Kwazulu-Natal v P* [2006] 1 All SA 446 (SCA); 2006 (1) SACR 243 at para 10

²⁸ *Director of Public Prosecutions, Free State v Mokati* [2022] 2 All SA 646 (SCA); 2022 (2) SACR 1 (SCA) at para 16 citing *Director of Public Prosecutions, Western Cape v Schoeman* 2020 (1) SACR 449 (SCA) (which in turn cited *S v Coetzee* 2010 (1) SACR 176 (SCA); [2010] 2 All SA 1 (SCA))

self-defence. The trial court had acquitted him. The State appealed, contending that he was at least guilty of culpable homicide. It appeared from the record that the trial judge had treated the two incidents in isolation, as if the first incident had no bearing on the second. It was also apparent that he had not analysed the evidence properly by asking himself whether the accused had acted in self-defence or whether the facts showed that there had been a 'free-for-all' between him and the deceased. **This court concluded that it may well have been that the trial judge had misdirected himself with regard to his treatment of the facts, but there was no indication of any misdirection regarding the law** [Emphasis and underlining added]

48. Later in the same judgment, the SCA states that "if we were to entertain the appeal on the merits, we would face the task of having to ascertain the relevant facts. To this end, we would have to read the entire record and re-evaluate all of the evidence, **thereby second-guessing the trial judge who was best placed to do this**. We would thus have to approach the matter as if this were a full appeal on the merits. ... we would have to decide whether the facts established by us accord with those found by the trial court. It is only if we find that the factual findings of the trial court were wrong and the result of a legal error would we be obliged to interfere with the decision of the trial court"

49. The High Court erred in finding that the Magistrate's misdirection was material and it erred in finding the State had not proven its case against the Respondent beyond reasonable doubt.

50. But the error of law that has attracted the intervention of the ISLA appears at paragraph 94 of the High Court's judgment, which warrants repetition herein and lays the basis for the rest of the ISLA's written submissions:

On the Complainant's version, there was no manifestation of any refusal of consent between the kissing, the oral sex and the penetration. The evidence was that it was only after the penetration that the Complainant experienced pain and told the Appellant to stop hurting her. The Appellant accepted this but said he would stop and then continue."

CONSENT

51. The finding by the High Court that there was no indication ***expressly or otherwise of any lack of consent to being undressed is equally incorrect and problematic***. This, we submit, is an error of law that warrants this Court's attention and careful consideration as it runs counter to the constitutional freedoms guaranteed in the Bill of Rights.

52. In amplification of the above submission, reliance is placed on what was held by the Constitutional Court in *Masiya*:²⁹

“The current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights. It ensures that the constitutional right to be free from all forms of violence, whether public or private, as well as the right to dignity and equality are protected”.

53. The judgment of the High Court also stands in stark contrast to the groundbreaking stance adopted by this Court (per Mahomed CJ, Van Heerden and Olivier JJA) in *Chapman*,³⁰ wherein it held (in declining to interfere in the sentence, notwithstanding its view that such sentence was ‘undoubtedly severe’) that:

“The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. We communicate that message in this case...” [Emphasis added]

²⁹ *Masiya v Director of Public Prosecutions Pretoria (the State) & Another* 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 at para 27

³⁰ *Chapman v S* [1997] 3 All SA 277 (A) at pg. 280J

54. The judgment of the High Court (in particular the paragraph quoted immediately above) appears to suggest that the Complainant ought to have refused consent at every turn (i.e. before and after the kissing, before and after the oral sex, before and after the sexual penetration). This fails to take into account the circumstances under which the present case took, namely, in the setting of an intimate partner relationship.
55. Respectfully, an evaluation of the evidence in its totality would have made clear that consent from the Complainant had *never* been present as she had informed the Respondent of her desire not to have sexual intercourse:
- 55.1 When they first started seeing each other;
 - 55.2 During the course of the relationship, hence their previous intimate meetings had always ended with no sexual intercourse;³¹
 - 55.3 The night of the rape incident (in closing her legs signalling no consent, leading to the Respondent giving her the reassurance/"word" he reneged on); and
 - 55.4 In the exchanged communication between the Respondent and the Complainant in the days that followed the night of the rape incident.

³¹ Record Volume 1 pg. 22, lines 23 – 24; *"in terms of the words that we exchanged I believe that I was explicit that no sex would be happening."*

56. Despite the incremental strengthening of legislative and policy frameworks, criminal justice systems remain a site for discrimination against survivors due to the weight of rape myths and stereotypes.
57. Rape myths and stereotypes are *'attitudes and beliefs that are generally false but are widely and persistently held and that serve to deny and justify male and sexual aggression against women'*.³² Rape myths and stereotypes are also defined as being *'descriptive or prescriptive beliefs about rape (i.e. about its causes, context, consequences, perpetrators, victims and their interaction) that serve to deny, downplay, or justify sexual violence that men commit against women'*.³³
58. In a large scale study of rape conducted by the South African Medical Research Council (MRC) identified the following in its research sample:
- "Rape by intimate partners occurred mainly in the perpetrators' homes (54.5%) and this proportion was higher than for any of the other relationship categories. **About half of the victims raped by an intimate partner resisted (50.5%)**"*³⁴
- [Emphasis added]

³² K Lonsway & L Fitzgerald 'Rape myths in review' Psychology of Women Quarterly 133, 134 (1994) 18

³³ G Bohner, F Eyssel, A Pina, F Siebler & GT Viki 'Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator' in M Horvath & J Brown (eds) *Rape: Challenging Contemporary Thinking* (2013) 17, 19

³⁴ Ibid

59. In addition to the above, there is little societal awareness of the pervasiveness of intimate partner sexual violence as it is severely under-researched, under-recorded and under-reported.³⁵ This is the primary reason why public interest considerations require that this judgment on appeal be reconsidered by this Honourable Court as the consequences for victims of intimate partner violence are dire and include suicide, suicide attempts, murder, unwanted pregnancy, sexually transmitted diseases, physical injuries, poor general health, depression, anxiety and post-traumatic stress disorder.³⁶
60. Tellingly, the evidence indicated that the Complainant suffered from some of the aforementioned consequences. The psychologist recorded (and later testified) that the Complainant:
- 60.1 Struggled a lot with anxiety and panic attacks; and
 - 60.2 Struggled to sleep at night, struggling to wake up or to fall asleep;
 - 60.3 Withdrew socially from her friends;
 - 60.4 Displayed symptoms of post-traumatic stress disorder (PTSD) and had flashbacks;
 - 60.5 She also struggled academically with her work; and
 - 60.6 Was ashamed to report the incident initially.

³⁵ M Bagwell-Gray, J Messing & A Baldwin-White 'Intimate partner sexual violence: A Review of Terms, Definitions, and Prevalence' (2015) 16 Trauma, Violence, & Abuse 1, 2; R Jewkes & N Abrahams 'The Epidemiology of Rape and Sexual Coercion in South Africa: an overview' (2002) 55 Social Science & Medicine 1231, 1232

³⁶ World Health Organisation, Violence Against Women Fact Sheet <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>>

61. The latter (i.e. the shame experienced by the Complainant) is one of the most common reasons that intimate partner violence is not reported widely. It is largely hidden as victims experience shaming, stigma and isolation by the perpetrator, family and community; and many are forced to remain within the circumstances of abuse due to economic, sociocultural and familial constraints.³⁷
62. This fact has been corroborated by this Court in *S v Jackson*³⁸ wherein Olivier JA observed that:

"Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad nauseam; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a 'soiled' wife."

³⁷ M Mphaphuli & L Smuts 'Give it to him': Sexual Violence in the intimate relationships of black married women in South Africa' (2021) 46 Signs: Journal of Women in Culture and Society 443; AN Rozani 'Intimate Partner Sexual Abuse: A Case Study of a Rural Community in South Africa' (2018) PhD dissertation, University of Johannesburg 137 – 141.

³⁸ *S v Jackson* 1998 (4) BCLR 424 (A); [1998] 2 All SA 267 (A)

63. The UN Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence Against Women and Girls recommends that *“criminal laws and procedures should not be interpreted and applied in the abstract... In such cases, for judges, the application of a context-driven analysis, can increase their understanding of the phenomenon of gender-based violence; the realities women and girls are facing when seeking justice through criminal proceedings; as well as how harmful gender stereotypes may still be reflected in discriminatory laws and procedures or continue to influence the application of criminal law”*.³⁹
64. This is corroborated by the findings outlined by the UN Special Rapporteur on Violence Against Women in her 2016 Report on South Africa in which she observed that one of the challenges that faced victims was the use of gender stereotyping by Magistrates (or judicial officers), *“leading to leniency towards perpetrators”*.⁴⁰
65. The General Recommendation No. 35 of the UN Convention on the Elimination of All Forms of Discrimination Against Women cautions against this and states that *“the application of preconceived and stereotyped notions of what constitutes gender-based violence against women, what women’s responses to such violence should be and the standard of proof required to substantiate its*

³⁹ UN Office on Drugs and Crime ‘Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence Against Women and Girls’ (2019) 8 (UNODOC Handbook)

⁴⁰ UN Special Rapporteur on Violence Against Women’s Report on Mission to South Africa A/HRC/32/42/Add.2 (2016) at para 75

occurrence can affect women's right to the enjoyment of equality before the law, fair trial rights and the right to an effective remedy established in Articles 2 and 15 of the Convention".⁴¹

66. The Preamble of the Declaration on the Elimination of Violence Against Women recognises that violence against women is a "*manifestation of historically unequal power relations between men and women*".⁴²

67. We submit that by minimizing the evidence of the Complainant (and failing to consider the totality of her evidence) and instead focusing on the rights of the Respondent and the immaterial misdirection by the trial court, the High Court neglects to adopt a victim-centered approach referenced by Victor AJ in *Tshabalala v S*⁴³ wherein the Learned Judge held that:

"the prosecution of gender-based violence has acknowledged a victim centered approach whilst at the same time not losing sight of an accused's rights to a fair trial."

⁴¹ CEDAW Committee 'General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No.19' (2017) UN Doc CEDAW/C/GC/35, para 24(b) (General Recommendation No. 35)

⁴² Declaration on the Elimination of Violence Against Women (adopted 20 December 1993) UN Doc A/RES/48/104, Article 4(c)

⁴³ *Tshabalala v S* 2019 (5) SA 1 (CC)

68. It is the ISLA's position further that the failure to carefully balance the rights of both the Complainant and the Respondent invariably causes and caused harm to the Complainant, resulting in what we contend is a secondary victimization which typically *'occurs because those responsible for ordering criminal justice processes and procedures do so without taking into account the perspective of the victim'*.⁴⁴

CONCLUSION

69. In the present matter, it is submitted that the High Court failed to exercise the due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women in that it to take into account the totality of the Complainant's evidence and her perspective, from her vehemence in not wishing to engage in sexual intercourse (communicated both verbally and in her body language) to the effects of the Respondent's violation of her. The High Court failed to appreciate the trial court's emphasis on her virginity in relation to the Respondent's disregard thereof and her wishes, finding instead that this risked *'engaging the courts in matters of sexual morality'*.
70. The High Court failed to recognise that far be it an engagement of the courts in matters of sexual morality, it was in fact a further violation of the Complainant's

⁴⁴ UNODOC *'Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'* (1999) 9.

right to security and control over her body and her dignity as the memory of the horror of her first sexual encounter will mar every other sexual encounter she has for the rest of life.

71. In light of these considerations, the ISLA submits that the findings of the trial court are correct and cannot be faulted, and that the judgment and order of the High Court must be overturned and set aside.

LOYISO MAKAPELA

Counsel for the Initiative for Strategic Litigation in Africa *Amicus Curiae*

Chambers, Sandton

30 March 2023

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

APPEAL COURT CASE NO: 248/2022

A QUO CASE NO: CA&R219/2020

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS: Appellant
EASTERN CAPE DIVISION, GRAHAMSTOWN (Respondent in the Court *a quo*)

and

LOYISO COKO Respondent
(Appellant in the Court *a quo*)

and

THE WOMEN'S LEGAL CENTRE *First Amicus Curiae*

INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) *Second Amicus Curiae*

THE COMMISSION FOR GENDER EQUALITY *Third Amicus Curiae*

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA'S
LIST OF AUTHORITIES**

Case Law

1. *S v Vilakazi* [2008] 4 All SA 396 (SCA)*
2. *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another* 2019 (1) BCLR 53 (CC)*
3. *Masiya v Director of Public Prosecutions Pretoria (The State) & Another* 2007 (5) SA 30 (CC); 2007 (8) BCLR 827

4. *S v S* [2012] ZASCA 85
5. *R v Difford* 1937 AD 373
6. *S v Van Der Meyden* 1999 (1) SACR 447 (W)
7. *S V Toubie* 2004 (1) SACR 530 (W)
8. *S v Trainor* 2003 (1) SACR 35 (SCA)
9. *Venter v S* [2021] ZASCA 21 (18 March 2021)
10. *Livanje v S* 2020 (2) SACR 451 (SCA)
11. *DPP, Kwazulu-Natal v P* [2006] 1 All SA 446 (SCA); 2006 (1) SACR 243
12. *Director of Public Prosecutions, Free State v Mokati* [2022] 2 All SA 646 (SCA); 2022 (2) SACR 1 (SCA)
13. *Director of Public Prosecutions, Western Cape v Schoeman* 2020 (1) SACR 449 (SCA)
14. *S v Coetzee* 2010 (1) SACR 176 (SCA); [2010] 2 All SA 1 (SCA)
15. *Chapman v S* [1997] 3 All SA 277 (A)
16. *Mugridge v S* 2013 (2) SACR 111 (SCA)*
17. *S v Jackson* 1998 (4) BCLR 424 (A); [1998] 2 All SA 267 (A)
18. *Tshabalala v S* 2019 (5) SA 1 (CC)*
19. *S v Monageng* [2009] 1 All SA 237 (SCA)

International Legal Instruments

20. The Declaration on the Elimination of Violence Against Women (adopted 20 December 1993) UN Doc A/RES/48/104.
21. The Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS.

22. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Union)(11 July 2003).
23. UN Office on Drugs and Crime 'Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence Against Women and Girls' (2019) 8 (UNODOC Handbook).
24. CEDAW Committee 'General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No.19' (2017) UN Doc CEDAW/C/GC/35, para 24(b) (General Recommendation No. 35)
25. UNODOC 'Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (1999) 9.

Other Authorities

26. Rachel Jewjes and Naeema Abrahams 'The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview' *Social Science and Medicine* 55 (2002) 1231 – 1244.
27. M Machisa, R Jina, G Labuschagne, L Vetten, S Swemmer, B Meyersfeld & R Jewkes 'Rape Justice in South Africa: A Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012' (2017) *Gender and Health Research Unit, South African Medical Research Council* 39.

- 28.M Machisa, R Jewkes, C Morna 'The War At Home: Gender-Based Violence Indicators Project' (2011) Gender Links and The South African Medical Research Council 10.
- 29.K Lonsway & L Fitzgerald 'Rape myths in review' Psychology of Women Quaterly 133, 134 (1994) 18.
- 30.G Bohner, F Eyssel, A Pina, F Siebler & GT Viki 'Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator' in M Horvath & J Brown (eds) Rape: Challenging Contemporary Thinking (2013) 17, 19.
- 31.L du Toit 'Shifting meanings of post conflict sexual violence in South Africa' (2014) 40 Signs: Journal of Women in Culture and Society 101, 105.
- 32.M Bagwell-Gray, J Messing & A Baldwin-White 'Intimate partner sexual violence: A Review of Terms, Definitions, and Prevalence' (2015) 16 Trauma, Violence, & Abuse 1, 2.
- 33.R Jewkes & N Abrahams 'The Epidemiology of Rape and Sexual Coercion in South Africa: an overview' (2002) 55 Social Science & Medicine 1231, 1232.
- 34.M Mphaphuli & L Smuts 'Give it to him': Sexual Violence in the intimate relationships of black married women in South Africa' (2021) 46 Signs: Journal of Women in Culture and Society 443.

35. AN Rozani '*Intimate Partner Sexual Abuse: A Case Study of a Rural Community in South Africa*' (2018) PhD dissertation, University of Johannesburg 137 – 141.

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

APPEAL COURT CASE NO: 248/2022
A QUO CASE NO: CA&R219/2020

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS: Appellant
EASTERN CAPE DIVISION, GRAHAMSTOWN (Respondent in the Court *a quo*)

and

LOYISO COKO Respondent
(Appellant in the Court *a quo*)

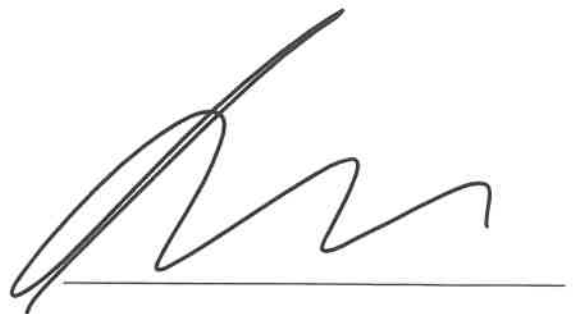
and

THE WOMEN'S LEGAL CENTRE *Amicus Curiae*
INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) *Amicus Curiae*

CERTIFICATE IN TERMS OF RULE 10A(b)

I am the legal practitioner responsible for the heads of argument. I certify that Rules 10 and 10A(a) have been complied with.

Signed at Pretoria on 30 March 2023



L MAKAPELA

Counsel for the *Amicus Curiae*

