

Pro Bono & Human Rights

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Beyond 16 Days of Activism

In this issue

SOUTH AFRICA

Standing in solidarity against
gender-based violence and femicide

16
days of
activism / AGAINST
GENDER
BASED
VIOLENCE

Standing in solidarity against gender-based violence and femicide

As we continue to stand in solidarity with the activists who began the Women's Global Leadership Institute in 1991, we take a moment to reflect on what can be achieved through collective commitment and resilience in building a safer South Africa for all. The annual 16 Days of Activism for No Violence Against Women and Children Campaign aims to raise awareness of the enduring and devastating impact that gender-based violence and femicide (GBVF) have on women and children, and on our society more broadly.

This year marks the 33rd anniversary since South Africa adopted the campaign, and it runs from 25 November, the International Day for the Elimination of Violence against Women, until 10 December, International Human Rights Day. In this alert, we highlight some of the work being done by CDH's Pro Bono Practice (Practice) in Cape Town and public interest organisations to combat violence against women and children, not just during these 16 days, but year-round.

Accountability for systematic failures

An overwhelming number of sexual abuse survivors have expressed frustration with the attrition of their cases, often due to failures within the criminal justice system, including perpetrators not being arrested despite being an imminent threat and there being sufficient evidence, and the absence of valid reasons for a decision not to prosecute. Two matters run by the Practice grapple with this frightening reality through strategic public interest litigation.

The first concerns the South African Police Service's (SAPS) failure to adhere to its own policy on the detention of transgender persons, and, in contravention thereof, placing a transgender teenage girl in a holding cell with three men. She was consequently raped and sexually abused while in SAPS custody. Not only did SAPS officials not adhere to its policy, which is intended to protect vulnerable people, but her civil proceedings against the former Minister of Police (Minister) for his vicarious liability went ignored by the former Minister's office for nearly three years. The Practice continues in its pursuit of justice on the survivor's behalf to hold the Minister and SAPS officials accountable for their unlawful actions and to deter future occurrences of such actions.

The second concerns partnering with Gender Rights in Tech (GRIT) (formerly Kwanele – Bringing Women Justice), and two other public interest organisations to collect, analyse and investigate data in preparation to lodge a systematic relief claim against the National Prosecuting Authority (NPA) and other related departments whereby the issues that crop up repeatedly in the NPA's poor handling of cases are addressed, specifically those involving the sexual abuse of women and children.

The Pro Bono Practice in Cape Town is also committed to holding other government departments accountable. In another matter the Practice aims to hold the Department of Health accountable for violently violating the rights of several women, by representing another public interest organisation committed to achieving gender equality, to obtain relief for numerous complainants who have been forcefully sterilised without their consent in government hospitals across the country.

Standing in solidarity against gender-based violence and femicide

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Legal reform

Rape and other forms of sexual abuse are endemic in South Africa. However, some of our laws unfairly and unconstitutionally offend the basic human rights of survivors of sexual abuse – widely accepted to be predominantly women and girls – when they decide to pursue legal justice. Two high-profile cases, *S v Amos* (in the Regional Magistrate Court of Gauteng, Pretoria, case no 14/683/2018) and *Coko v S* 2021 JDR 2524 (ECG), among countless others, have seen rape charges dismissed or overturned on the grounds of the accused having a subjective belief of consent. By enabling a defence of unreasonable belief in consent, the law fails in the protection it ought to create, by violating the rights of victims and survivors to equality, dignity, privacy, bodily and psychological integrity, and freedom and security of the person, which includes the right to be free from all forms of violence and the right not to be treated in a cruel, inhumane or degrading way.

A seminal judgment was delivered on 30 September 2024, spearheaded by the Embrace Project and the Centre for Applied Legal Studies (CALs) in their successful constitutional challenge to sections 3, 4, 5, 6, 7, 8, 9, and 11A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 31 of 2007. This matter shone a spotlight on the injustices that result from the Act's current treatment of raising an unreasonable belief of consent as

a defence. The High Court in Pretoria held that whenever an accused person is charged with an offence under these sections of the Act, it is not a valid defence for that accused person to rely on a subjective belief that the complainant was consenting to the conduct in question, unless the accused took objectively reasonable steps to ascertain that the complainant consented to the sexual conduct in question. The practical result of this legal position is that the focus of the criminal trial is no longer on the conduct of the complainant (whether they should have done more to make it undoubtable that they were not consenting or no longer consenting) but rather on the conduct of the accused (whether he should have done more to make sure that the victim was freely, comfortably and continuously consenting). This outcome demonstrates the effectiveness of legal reform and marks an extraordinarily meaningful and positive development in South African criminal law, and more appropriately protects and supports sexual abuse victims and survivors. We commend the Embrace Project and CALs for their hard work in achieving this important victory in the public interest.

While this judgment is a phenomenal victory, further urgent legal reform is still required in respect of other legislation intended to uphold and develop the rights of women and girls, so that the rights available to them appropriately respond to their lived realities. A case that has been pursued by the Practice for some time is the constitutional

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Building a community: A step-by-step guide to township establishment in Johannesburg

CONTINUED



challenge to the Prescription Act 68 of 1969 (Prescription Act) as it relates to civil claims for sexual abuse. In our view, section 12(4) of the Prescription Act unconstitutionally infringes several basic rights of victims of sexual abuse by its application requiring a survivor of sexual abuse to persuade the court that she has overcome mental health difficulties and related problems associated with sexual abuse which rendered her unable to institute legal proceedings within three years of overcoming these difficulties. Section 12(4) offends the lived reality of survivors of sexual abuse and is contra to well-known evidence about the healing process from such profound trauma, the result of which is the unjustifiable limitation of a survivor of sexual abuse's access to justice. An outcome confirming that section 12(4) of the Prescription Act is unconstitutional and inappropriate in the context of sexual abuse and violence will better support survivors in taking legal action and better protect their constitutionally enshrined right of access to justice and courts.

Conclusion

Although we spotlight these matters during 16 Days of Activism, throughout the year, our Practice contributes to enforcing the constitutionally enshrined rights of women and children through initiating legal reform, participating in public interest litigation and facilitating access to justice for the disadvantaged and vulnerable. While we, alongside our public interest partner organisations, are working towards yielding positive developments of our legal framework that benefits all women and children across South Africa, we still need to consider what must and can still be achieved through collective action. We do so not just as legal practitioners but as South African citizens standing in solidarity and recognising the joint impact we can and must make.

Brigitta Mangale and Caitlin Freddy

OUR TEAM

For more information about our Pro Bono & Human Rights practice and services in South Africa and Kenya, please contact:



Jacquie Cassette

Practice Head & Director:
Pro Bono & Human Rights
T +27 (0)11 562 1036
E jacquie.cassette@cdhlegal.com



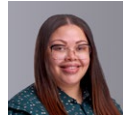
Clarice Wambua

Consultant | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E clarice.wambua@cdhlegal.com



Brigitta Mangale

Director:
Pro Bono & Human Rights
T +27 (0)21 481 6495
E brigitta.mangale@cdhlegal.com



Elgene Roos

Senior Associate:
Pro Bono & Human Rights
T +27 (0)11 562 1863
E elgene.roos@cdhlegal.com



Gift Xaba

Senior Associate:
Pro Bono & Human Rights
T +27 (0)11 562 1089
E gift.xaba@cdhlegal.com



Lauriene Maingi

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E lauriene.maingi@cdhlegal.com



BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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