

Pro Bono & Human Rights

ALERT | 8 August 2024



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SOUTH AFRICA

Striving to honour and empower women this Women's Day, and year-round

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**PRO BONO & HUMAN RIGHTS
ALERT**

Striving to honour and empower women this Women's Day, and year-round

Each year we pay tribute to the thousands of women who marched to the Union Buildings on 9 August 1956, protesting against the extension of pass laws to women. We pause to reflect on what can be achieved through collective courage and determination and consider what more must still be achieved through collective action. One of CDH's Pro Bono & Human Rights Practice's (Practice) aims is to promote access to justice for all women, and to enforce and, where necessary, develop our legal framework to further recognise and honour the lived realities of our women. In this alert we shine a spotlight on some of the work being done by the Practice and public interest organisations to empower women not just this month, but year-round.

The Embrace Project's challenge to rape laws

The current definition of rape found in the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 (SORMA) permits an individual – in defending a charge of rape – to rely on his own unreasonable and subjective view of consent. Our courts have seen that some of the most significant evidentiary challenges in prosecuting rape cases is the primacy given by the law to the subjective intention of an accused, and the burden this in turn places on a survivor in proving the absence of her consent beyond a reasonable doubt.

This very issue was recently among those at the centre of our courts' considerations when hearing a constitutional challenge to several sections of SORMA, brought by the Embrace Project on behalf of a survivor of rape. The Embrace Project's application sought an order declaring sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of SORMA unconstitutional and invalid to the extent that these provisions do not criminalise sexual violence where the perpetrator wrongfully and unreasonably believed that the complainant had given consent, resulting in an infringement of the constitutional rights of survivors of sexual violence. Left unchallenged, the impugned provisions crucially fail to include a qualification that a belief in consent must be reasonable. Consequently, the current construction of these sections allows rape myths to be perpetuated and, sadly, serves to dissuade survivors from coming forward to lay charges given the extraordinary evidentiary burden upon them. An untenable situation in our current dispensation.

This challenge of constitutionality – which includes a challenge to the definition of rape – brings about a historical moment in the construction of our legal framework. If the Embrace Project's application is successful, laws regulating a range of sexual offences will be positively developed, increasing the legal protection available to survivors of several forms of sexual abuse.

The application was heard in July, and the Practice eagerly awaits judgment in this seminal matter.

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A balancing of rights for survivors of sexual abuse

The Women's Legal Centre represents a rape survivor in pursuing a challenge to the constitutionality of, among others, section 154(2)(b) read with section 153(3)(a) and (b), and section 154(5) of the Criminal Procedure Act 51 of 1977 (CPA) insofar as these provisions criminalise the publication of the identity of an accused before the accused has pleaded to the charges related to the sexual offence. Curiously, in no other criminal context is a survivor required by law to remain silent in this way – this is a protection that is only afforded to the accused in sexual violence and extortion cases. The Practice represents the Clooney Foundation for Justice (CFJ), Waging Justice for Women Initiative, which has in CFJ's name made application to intervene as an *amicus curiae* in these proceedings.

The main applicant avers that these sections of the CPA unjustifiably violate her (and others similarly placed) right to freedom of expression as enshrined in section 16 of the Constitution, and her section 9 constitutional right to equality by perpetuating indirect discrimination against women, who are primarily the victims of sexual violence.

Through its Waging Justice for Women Initiative which works to fight inequality, discrimination and violence against women and girls, CFJ seeks to intervene in the application in the public interest and in pursuit of its objectives to advance gender equality, promote the realisation of the rights of women and combat violence against women in South Africa. The submissions to be made by CFJ will assist the court by providing it with a broader understanding of the impact of the impugned provisions on the rights of women and activism against GBV in South Africa and provide crucial context on contemporary anti-sexual violence activism. Through a

constitutional and international law lens, the organisation intends to demonstrate to the court the broader implications of upholding laws that may be vulnerable to abuse or wielded as weapons against survivors of GBV.

On 2 August 2024, CFJ was successfully admitted as *amicus curiae* in these proceedings, and its leave to present oral and written submissions at the hearing of the application was granted.

The state's failure to protect: A call for constitutional damages

A woman was brutally murdered by her former boyfriend after the South African Police Service failed to arrest the perpetrator, notwithstanding having sufficient evidence and information to do so. The Practice is acting for the deceased's mother and son in their pursuit of damages for their profound and tragic loss.

In these action proceedings, the Practice has put forward, on the plaintiffs' behalf, a claim for delictual damages as a consequence of the state's failures to uphold its duties to protect the deceased from harm and all forms of violence, exacerbated in the context of GBV. But these damages fall woefully short of adequate and appropriate compensation given the state's failures to fulfil its constitutional obligations toward the deceased, and to her mother and son. For this reason, the Practice is also pursuing a claim for constitutional damages on the plaintiffs' behalf.



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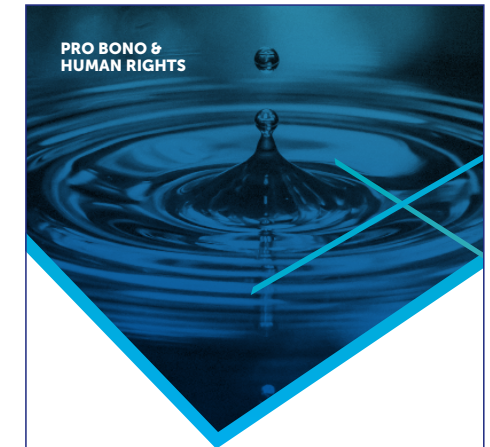
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Seen in the well-known cases of *Life Esidimeni*, which culminated in arbitration proceedings between the families of mental health care users affected by the Gauteng Mental Marathon Project, the National Minister of Health and others, and in *Komape and Others v Minister Of Basic Education and Others 2020 (2) SA 347 (SCA)*, an award of constitutional damages is an exceptionally high bar to meet. In constructing the claim on behalf of the plaintiffs, the Practice has drawn on local judicial comment in these cases and that of foreign jurisdictions, and has constructed a constitutional damages claim that seeks payment of a sum of money not only to the plaintiffs, but also in favour of a local women's shelter so that it can increase its capacity to protect and support women in the position that the deceased was in. The Practice's hope is that an award of constitutional damages will not only bring its clients some relief but will also serve to make a local community that little bit safer for women under threat of GBV.

Conclusion

Each of these matters and countless more aim to fight systemic injustices against women through strategic litigation aimed at increasing accountability for gender-based abuse. The Practice – alongside its partner public interest organisations – dedicates itself to promoting the positive development of our legal framework in a manner that benefits not only its own clients, but all women across South Africa. But just as thousands marched to the Union Buildings in 1956, so too must we all collectively march toward the progressive realisation of constitutionally enshrined rights. We do so not just as women, but as a collective, recognising the unique contribution we can all make in achieving justice and equality.

Brigitta Mangale and Caitlin Freddy



DEDICATED TO MAKING AN IMPACT

Whilst it's always rewarding to receive recognition, the greatest reward is knowing we are making a difference in the lives of many.

CDH Pro Bono & Human Rights Practice, ProBono.Org Awards 2021 winner of the highest number of pro bono hours in 2020, the Large Firm award for 2020 and a Special Mention for the many years of work on the Jose Brothers case.

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OUR TEAM

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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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