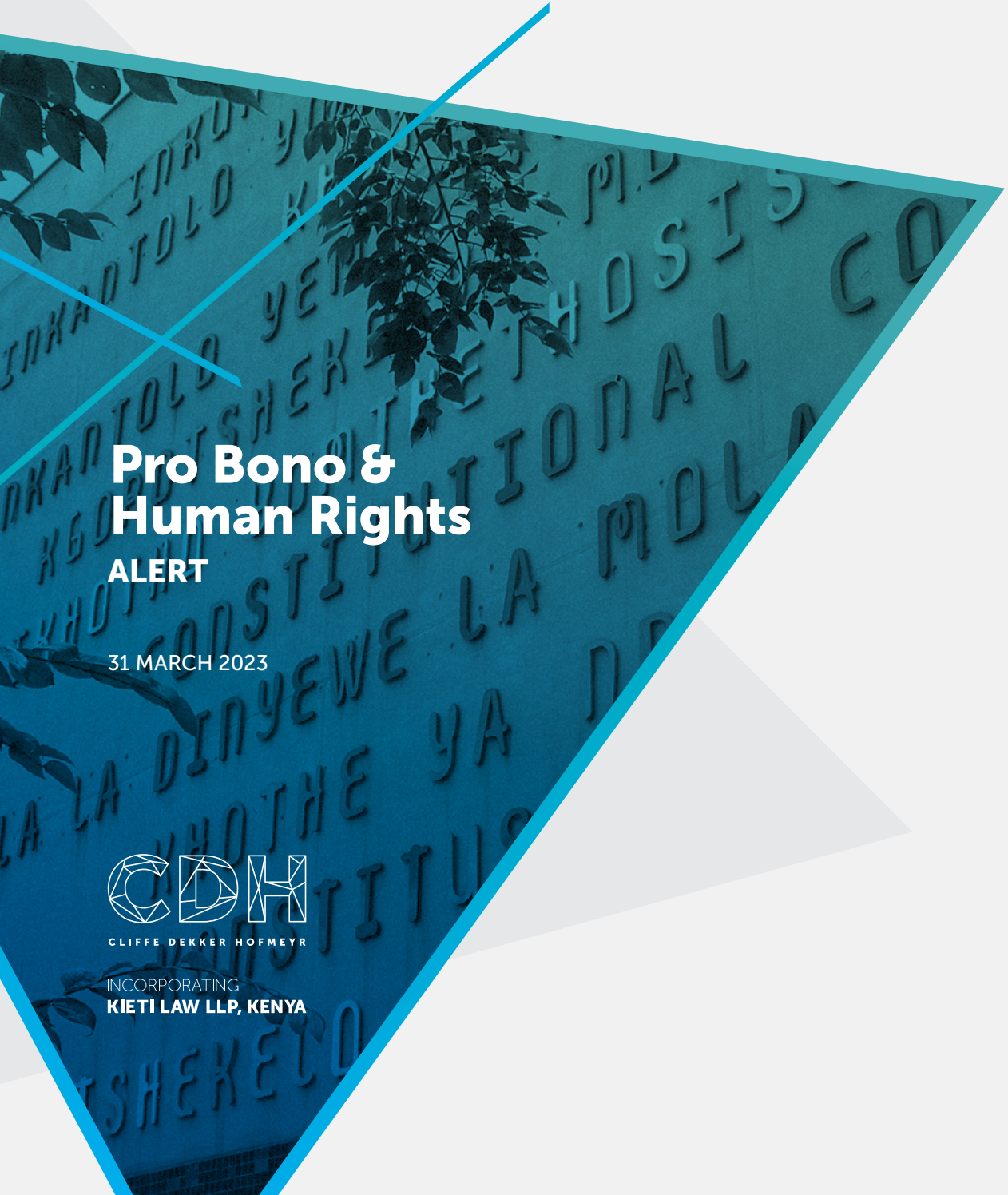

Pro Bono & Human Rights

ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

A challenge to rape laws met with Ministerial disdain

The Minister of Police's report on crime statistics over the period 1 October to 31 December 2022 indicates that an alarming total of 15,545 sexual assaults were reported. Of these assaults, 5,935 were rape incidents that took place at the residence of the perpetrator or victim. The raging scourge of sexual violence in our country demands that, at the very least, the laws intended to offer protection in the context of sexual violence are reflective of the lived realities of those affected, and are constitutionally sound. It is against this backdrop that in November 2022 the Embrace Project launched its application seeking that various sections of the Criminal Law (Sexual Offences and Related Matters) Act 23 of 2007 (Act) – including section 3, which defines rape – be declared unconstitutional.

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

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The Embrace Project, together with a rape survivor, brought the application against the Minister of Justice and Correctional Services (Minister), the Minister in the Presidency for Women, Youth and Persons with Disability, and the President in the High Court in Pretoria. The founding papers set out sound reasoning for the proposed amendments, referencing the co-applicant's experiences as set out in *S v Amos* (unreported), as well as the matter of *Coko v S (CA&R 219/2020)* [2021] ZAECGHC 91 as case studies, and extensively referencing international jurisprudence. The Minister has recently delivered his answering affidavit. It is no stretch to say that its contents are astounding.

Applicants' submissions

Section 3 of the Act provides that *"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."* The use of the words *"unlawfully and intentionally"* requires that the accused must have not only have intended to commit an act of sexual penetration, they must have intended to do so unlawfully, i.e. knowing (or recklessly disregarding the risk) that the complainant was not consenting. This means that, if it is at all *"reasonably possibly true"* that the accused subjectively believed the complainant was consenting – even if that belief was unreasonable – then the accused must be acquitted of a charge of rape, under section 3 of the Act. The same applies to the further provisions of the Act that form the subject of the application.

By enabling a defence of unreasonable belief in consent, the Act violates the rights of victims and survivors to equality, dignity, privacy, bodily and psychological integrity, and freedom and security of their person, which includes the right to be free from all forms of violence. Furthermore, enabling such a defence – with an emphasis on subjectivity rather than objectivity where the issue of consent is concerned – in turn further entrenches rape myths. When a victim does not fight or flee but instead freezes or does not kick, scream or fight back out of fear, or in the context of a romantic relationships,

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rape myths may support a subjective belief – however unreasonable in the circumstances – that there was consent. All of this is supported under the current construction of the Act.

The application references several international jurisdictions and unpacks their laws on rape and sexual assault. This comparative analysis shows that societies the world over are adopting more nuanced approaches to sexual violence, and are recalibrating their legal position to ensure that victims and survivors are capable of seeking and securing justice. It is entirely appropriate, given our present reality, for South Africa to align itself with this approach. Indeed, many foreign jurisdictions appropriately adjusted their laws decades ago. South Africa, despite our frightening realities, lags behind.

The applicants requested that the court declare sections 3, 4, 5, 6, 7, 8, 9 and 11A read with section 1(2) of the Act unconstitutional, invalid and inconsistent with the Constitution to the extent that they do not criminalise sexual violence where the perpetrator wrongly and unreasonably believed they had obtained consent, and for the following to be read into the Act during the requested 12 month suspension of the declaration of invalidity:

> *"Whenever an accused person is charged with an offence under section 3, 4, 5, 6, 7, 8, 9 or 11A, it is not a valid defence for that accused person to rely on a subjective belief that the complainant was consenting to the conduct in question, unless the accused took objectively reasonable steps to ascertain that the complainant consented to sexual intercourse with the accused."*

Minister's submissions

The Minister's answering affidavit was deposed on 16 March 2023.

In summary, if the applicants' relief is to be granted, it would, in the Minister's view, result in:

- a revocation of the accused person's presumption of innocence;
- the burden of proof unjustly falling on the accused, instead of the state;
- a lowering of the standard of proof from beyond a reasonable doubt to negligence; and
- a conviction of rape, when the accused was merely negligent, being too harsh a punishment.

The affidavit was deposed to by the Chief Director of Legislative Development in the Department of Justice, Leonard Sebelemetja, on behalf of the Minister. The Chief Director in essence avers that the

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state has done its part in responding to the prevalence of sexual offences and gender-based violence in South Africa. He goes to great lengths to unpack the ways of our new constitutional order and the foundational principles that must be observed. He lists legislation enacted in support of the position that there has been an appropriate and sufficient legislative response. He also makes the statement that "*members of the South African Police Service [SAPS] who are at the coalface are trained to create a supportive environment for victims to report incidences of domestic and sexual violence*".

His summation of the legislation not only fails to properly address the heart of the application and relief sought, but his comments on SAPS training and engagement with victims of sexual abuse is also sorely out of touch with the widely reported experiences of many who engage with SAPS.

In a further disappointing denial of the realities of our country, the Chief Director says in paragraph 131 of the affidavit: "*The Act does not perpetuate rape culture, as suggested, but protects the victim of a crime as well; the victim must comply with the provisions of the Act if she wants the Act to come to her aid. No one is above the law.*"

Perhaps the most disappointing, astounding an insulting portion of the affidavit reads:

> "*The court is requested not to suspend anything as the Act does not have any irregularities and it must be left as is, the applicants are only driven by their ego towards men and they are using their emotions to persuade the court to declare unconstitutional an Act which is in line with the Constitution.*"

Conclusion

That such fierce opposition was put forward in response to the relief sought by the applicants is disheartening. That the essence of the applicants' case has been reduced to an emotional, anti-men agenda, even more so. It is unfortunately a shining example of how many issues around sexual violence are misconstrued or diluted. The case is an important matter of public interest, and goes to the heart of the Cape Town Pro Bono Practice's core focus. We will keep a close eye on how this groundbreaking matter unfolds.

Brigitta Mangale and
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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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