

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Appeal Case No: A177/21**

**MC Case No: H1028/2019**

In the matter between:

████████████████████

Appellant

and

████████████████████

Respondent

and

**CENTRE FOR APPLIED LEGAL STUDIES**

*Amicus Curiae*

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**AMICUS CURIAE'S HEADS OF ARGUMENT**

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“...it would be preposterous to give the alleged abuser editorial rights over the victim’s narrative.”<sup>1</sup>

## INTRODUCTION

1 These submissions are made on behalf of the Centre for Applied Legal Studies (“CALS”) which seeks to be admitted as an *amicus curiae*.

2 The Constitutional Court has found that the role of an *amicus curiae*:

“The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.”<sup>2</sup>

3 At the outset, CALS note that this Court in *Booyesen v Dolly and Another* dealing with a case of a similar nature, held that “it is astounding proposition that the alleged rapist should have editorial rights over the alleged victim’s narrative”.<sup>3</sup>

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<sup>1</sup> *Booyesen v Dolly and Another* (case number: 5042/2021) at para 20 (delivered 30 August 2021)

<sup>2</sup> *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 13; 2002 (5) SA 713 (CC) at para 5.

<sup>3</sup> *Booyesen v Dolly and Another* (case number: 5042/2021) at para 20 (delivered 30 August 2021).

CALS submits that this is really the crux of this case. The Respondent is seeking to silence the Appellant by (mis)using the court process.

- 4 This matter raises significant questions of freedom of expression in the context sexual offences and gender-based violence. The *court a quo* mentions these rights but does not go further in analysing them and CALS submits that these rights are important and should be considered in this appeal.
- 5 The experience of Ms ██████████ is unfortunately not unique and CALS' participation in this case is to draw attention obligations under international law, tracing the development and purpose of the Protection from Harassment Act.
- 6 Comparative case law on issues dealing with sexual offences and freedom of expression and discouraging a culture of silence.
- 7 These submissions deal only with the following issues which are relevant and are of assistance to the Court in the determination of the issues before it:
  - 7.1 The development and purpose of the Protection from Harassment Act ("the Harassment Act").
  - 7.2 International law and national law on the right to freedom of expression.
  - 7.3 Comparative law on the use of lawsuits to silence victims of gender-based and sexual violence.
  - 7.4 The finding by the learned Magistrate encourages a culture of silence on cases dealing with gender-based and sexual violence.

## THE DEVELOPMENT AND PURPOSE OF THE PROTECTION FROM HARASSMENT ACT (“THE HARASSMENT ACT”).

- 8 The Harassment Act was enacted on 2 December 2011. Since its commencement the predominance of public violence and harassment in society has largely remained levelled at women. For example, the most common form of harassment in the workplace is sexual harassment and *gendered* harassment with the predominant victim remaining women.<sup>4</sup>
- 9 The Act emanated from an investigation by the South African Law Reform Commission (SALRC) into stalking behaviour. CALS submits that the current case is not one that deals with stalking. The High Court in *Mnyandu v Padayachi* held that the mischief the Act was targeted stalking:

Accordingly, in order to understand the purpose to which the Act was directed and the material considered by the drafters, and to “identify the mischief” targeted by the Act, I had recourse to the SALRC Discussion Paper on *Stalking*, which reflects the legislation in comparative jurisdictions and submissions which the SALRC considered when drafting the Act and the subsequent evaluation and recommendations by the SALRC, which forms the basis of the following exposition. I have, however, quoted only those parts of the legislation referred to in the Discussion Paper which are relevant to the facts of this appeal, where possible without detriment to comprehension.<sup>5</sup>

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<sup>4</sup> Nana, C. N. (2008). Sexual Harassment in the Workplace in South Africa: The Unlimited Vicarious Liability of Employers? *Journal of African Law*, 52(2), 245–267. <http://www.jstor.org/stable/27608009> and Leskinen, E. A., Cortina, L. M., & Kabat, D. B. (2011). Gender harassment: Broadening our understanding of sex-based harassment at work. *Law and human behavior*, 35(1), 25-39.

<sup>5</sup> [2016] ZAKZPHC 78 (KZP); 2017 (1) SA 151 (KZP) at para 47.

- 10 The Harassment Act was based on the South African Law Reform Commission (SALRC) report Project, 130, Stalking, published in 2006.<sup>19</sup> The SALRC recommended that there was insufficient protection through common law for the needs of victims of stalking. The process they recommended, which has been adopted in the Act, mirrors the interdict process of the Domestic Violence Act.<sup>6</sup>
- 11 CALS submits that when applying the Harassment Act one must appreciate its purpose and history being founded upon the notion of protection of women and children from public abuse (where the Domestic Violence Act aims to protect them from private abuse). This is not to say that men and other individuals should not benefit from the protective measures of the Act. Rather we argue that individuals must not reappropriate, misuse and transform the Act into a weapon to be used against victims of public violence.
- 12 In short, CALS submits that this Court in reaching its decision must understand the context in which the legislation was created and the mischief it sought to address, to ensure that the purpose of the legislation is not perverted and misused.

## **INTERNATIONAL AND COMPARATIVE LAW EXPERIENCE OF GENDER BASED AND SEXUAL VIOLENCE AND FREEDOM OF EXPRESSION**

- 13 Section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is

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<sup>6</sup> Ibid at xiii and Protection from Harassment Bill [B1 – 2010]: Department responses to submissions, 22 November 2010. Available at <https://pmg.org.za/committee-meeting/12394/>.

consistent with international law over any alternative interpretation that is inconsistent with international law. In *Glenister v President of the Republic of South Africa*,<sup>7</sup> the Constitutional Court held that

“Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law.... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.”<sup>8</sup>

14 The Constitutional Court has emphasised the importance of South Africa’s international law obligations to prevent gender-based violence in *Carmichele v Minister of Safety and Security*.<sup>9</sup> The Court held:

“South Africa ... has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights”.<sup>10</sup>

15 CALS submits that it was important for the *court a quo* to consider international law as enjoined by the Constitution.

16 The international law position on gender based and sexual violence and freedom of expression is clear. International law guarantees the right to freedom of expression, which includes protecting the right of survivors of gender-based violence, including sexual violence and harassment, to talk publicly about their experiences of violence and discrimination. Freedom of expression is protected

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<sup>7</sup> 2011 (3) SA 347 (CC).

<sup>8</sup> Id at para 97.

<sup>9</sup> *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC)

<sup>10</sup> Id at para 62.

under article 19 of the International Covenant on Civil and Political Rights (ICCPR), and article 19 of the Universal Declaration of Human Rights (UDHR).

- 17 According to The Committee on the Elimination of Discrimination against Women (CEDAW Committee) freedom of expression for women is indivisible from and interdependent with their other human rights, especially their right to a life free from gender-based violence.<sup>11</sup> In this regard, the CEDAW Committee stated:

“Women’s right to a life free from gender-based violence is indivisible from and interdependent on other human rights, including the rights to life, health, liberty and security of the person, equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, and freedom of expression, movement, participation, assembly and association.”<sup>12</sup>

- 18 CALS submits that international law – which is binding upon government entities and private individuals in South Africa, including the judiciary – encompasses the obligation to protect the freedom of expression of women when they speak about gender-based violence that they suffered.

- 19 Additionally, the right of freedom of expression of survivors cannot be restricted except under very limited circumstances. Section 16 of the Constitution of the limits the right in this way. Section 16(2) provides that the right to freedom of expression does not extend to (a) propaganda for war; (b) incitement of imminent

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<sup>11</sup> CEDAW/C/GC/35.

<sup>12</sup> Id at para 15. Emphasis is my own.



violence or (c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.

20 CALS submits that the applicant in exercising her right to freedom of expression did not go beyond the confines of section 16(1), she was well within her rights.

21 The Constitutional Court has held that “[f]reedom of expression is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm”.<sup>13</sup> This is because it “is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability”.<sup>14</sup>

22 For women, the right to live a life free from violence, specifically gender-based violence, is dependent on their right to freedom of expression being fully enjoyed.

23 The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, in her report on gender justice and freedom of expression stated that States have an obligation not only to respect freedom of opinion and expression, but also to proactively remove the structural and systemic barriers to equality, including sexual and gender-based violence, which impede women’s full enjoyment of freedom of opinion and expression.<sup>15</sup>

24 In short, CALS submits that international law makes plain that women in the appellant’s position have freedom of expression and that right includes the right

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<sup>13</sup> *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 at para 68.

<sup>14</sup> *Id.*

<sup>15</sup> Khan, Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression, a report on gender justice and freedom of expression at para 22 (<https://undocs.org/A/76/258>).

to be able to publicly name their alleged perpetrators and be able speak freely and openly about their experience of assault. The state and our courts should promote this right and not silence victims.

## **COMPARATIVE LAW ON THE USE OF LAWSUITS TO SILENCE VICTIMS OF GENDER BASED AND SEXUAL VIOLENCE**

25 Professor of Law David B. Oppenheimer has studied and examined cases of defamation from around the world that were launched by men in response to women speaking out about their sexual harassment.<sup>16</sup> He found that “defamation law has been weaponized to silence women who complain about sexual harassment, and others who report misconduct.” Rather than defamation law shielding women survivors, the law silences them. Oppenheimer also noted that “if the law fails to protect the right to speak out about abuses like sexual harassment and violence, those who benefit from unequal power will use that power to sustain inequality, including gender inequality.” Finally, Oppenheimer cautions that unless free speech protections are afforded to women survivors, then the cost will be grave and intolerable.<sup>17</sup>

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<sup>16</sup> Professor of Law David B. Oppenheimer is a Clinical Professor of Law Faculty and Co-Director, Pro Bono Program Director, at the Berkeley Center on Comparative Equality and Anti-Discrimination Law. In his research, he examined cases of defamation from China, United Kingdom, France, Egypt, United States, Israel and Australia.

<sup>17</sup> David. B. Oppenheimer, Defamation Law is Being Weaponized to Destroy the Global #MeToo Movement: Can Free Speech Protections Help Counter the Impact?, Chapter 40.

## India

26 in *Mobashar Jawed Akbar v. Priya Ramani*,<sup>18</sup> the Delhi High Court of India dismissed a defamation case. MJ Akbar filed a defamation case against Ms Ramani after she made statements in print media and online platforms calling Mr Akbar a sexual predator. Mr Akbar's claims were dismissed because the court recognised that Ms Ramani disclosed the truth regarding the incident of sexual harassment against her, based on the testimony of Ms Ramani and her friend, and that she made the publication in good faith and for the protection of other women's interest regarding sexual harassment at the workplace.<sup>19</sup>

27 The court reasoned that “the right of reputation cannot be protected at the cost of the right of life and dignity of women, and right of equality before the law and equal protection of the law guaranteed under the Indian Constitution. The woman has a right to put her grievance at any platform of her choice and even after decades.”<sup>20</sup> Furthermore, the Court held that “sexual abuse, if committed against [a] woman, takes away her dignity and her self-confidence” and when the woman speaks out about her sexual abuse experience and in turn makes an “attack on the character of [the] sex-abuser or offender” the woman's expression is “self-defence after the mental trauma suffered by the victim regarding the shame attached with the crime committed against her.”<sup>21</sup>

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<sup>18</sup> The Court of Shri Ravindra Kumar Pandey, New Delhi, *Mobashar Jawed Akbar v. Priya Ramani*, 17 February 2021 (India).

<sup>19</sup> *Id* at 72.

<sup>20</sup> *Id* at 90. Emphasis is my own.

<sup>21</sup> *Id* at 90.

## France

28 In *Cour d'Appel de Paris, Muller c/ Brion*,<sup>22</sup> a French woman posted tweets denouncing the sexist comments and inappropriate behaviour of a male counterpart as part of the #MeToo and #balancetonporc movements.<sup>23</sup> She was sued in the French courts for defamation against the plaintiff and damage to his reputation. The Court of Appeal found that she was acting within her rights to denounce these physical or verbal assaults likely to undermine the dignity of women and which have long been tolerated or passed over in silence and cannot be perpetuated. In such circumstances, the court stated, a conviction, even if only civil, would be a disproportionate interference with freedom of expression and would be likely to have a deterrent effect on the exercise of this freedom.<sup>24</sup> The court further stated that information disclosed was based on sufficient evidence for the public good and in the public interest for the protection for other women's interest in general regarding sexual harassment.<sup>25</sup>

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<sup>22</sup> Cour d'Appel de Paris, Muller c/ Brion, Arrêt du 31 mars 2021, N° RG 19/19081 (France).

<sup>23</sup> #MeToo is a social movement against sexual abuse and sexual harassment where survivors publicise their own experiences of sexual harassment and abuse to raise awareness, empower and bring solidarity among survivors, and help to combat sexual harassment against women. The phrase "Me Too" was initially used in this context on social media in 2006, on Myspace, by sexual harassment survivor and activist Tarana Burke and, following the 2017 allegations of sexual abuse and assault perpetrated by producer Harvey Weinstein, the #MeToo movement grew and sparked its own iterations in countries across the world; the French version is #BalanceTonPorc, widely translated as "squeal on your pig".

<sup>24</sup> Cour d'Appel de Paris, Muller c/ Brion, Arrêt du 31 mars 2021, N° RG 19/19081 (France)

Id. at page 11, §4.

<sup>25</sup> Id. at page 11, §4.

## Netherlands

29 In *Claimant v. TMG Landelijke Media B.V.*,<sup>26</sup> the claimant, who had been given an award by the Dutch government for helping families from Suriname in a vulnerable situation, sued a newspaper that published an article that claimed he had conducted paedophile actions and touched underaged girls inappropriately. After learning that the claimant had been nominated for the award, girls had come forward with allegations of paedophilia against him. While the interest of the claimant lay in the fact that he should not be exposed to frivolous accusations, the court considered the chance that the girls lied to be small and acknowledged the journalist ensured sufficient due diligence in reporting. Most importantly, the judge noted the importance that the newspaper be able to publicly express itself in a critical, informative, opinion-forming, and cautious manner on matters of general interest and that sexually transgressive behaviour is abusive conduct that affects the whole of society.<sup>27</sup>

## Russia

30 In *Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors*,<sup>28</sup> the Supreme Court in Russia dealt with a matter where the claimant claimed that the respondent's false allegation of rape, posted on Facebook and disseminated by the two other respondents, defamed his honour, dignity and business reputation. The Supreme Court pointed out that the case constituted a conflict

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<sup>26</sup> The Court of Amsterdam, *claimant v. TMG Landelijke Media B.V.*, 2018 (The Netherlands)

<sup>27</sup> *Id* at para 4.8

<sup>28</sup> The Supreme Court of the Russian Federation, *Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors*, Case No. 2-2979/2020, 28 January 2021 (Russia)

between the right to freedom of expression of a woman who had experienced sexual violence and the protection of reputation.<sup>29</sup> The court reasoned that citizens' right to the protection of their honour, dignity and business reputation is their constitutional right, but courts must ensure a balance between this right on the one hand, and other rights and freedoms guaranteed by the Constitution of the Russian Federation including freedom of thought, speech, mass information, and the right to freely speak, receive, transmit, produce and disseminate information by any lawful means. The Court held that cases involving the sexual abuse of a woman have peculiarities of consideration due to their high social significance and require the courts to be particularly careful in determining the subject matter of proof.<sup>30</sup>

#### United States of America

- 31 The Supreme Court of the State of New York, Appellate Division, First Judicial Department, in *Sagaille v. Carrega* reasoned that defamation suits like the instant one may constitute a form of retaliation against those with the courage to speak out since most survivors cannot afford years of litigation, nor do they want to be retraumatized through the discovery or endure continued unwanted interaction with the person alleged to have assaulted them through the litigation process.<sup>31</sup>
- 32 The Court of Appeal in the State of California found in *Wentworth v. Hemenway* that the plaintiff who filed a defamation lawsuit against a woman who accused

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<sup>29</sup> Id. at page 2, §6

<sup>30</sup> See also resolution in case Axel Springer AG v. Germany, Grand Chamber, Appeal no. 39954/08, 7 February 2012.

<sup>31</sup> *Sagaille v. Carrega*, 2021 N.Y. Slip Op. 1369 (N.Y. App. Div. 2021), Index No. 154010/18 Appeal No. 13314 Case No. 2020-02369, 9 March 2021 (US) at Page 2, column 2, §3.

him of sexual harassment brought the lawsuit to silence the defendant thus unduly interfering with her free speech rights on an important issue of public concern.<sup>32</sup>

33 CALS submits that although the current case is not about the law of defamation, the principles pronounced and articulated in the above-mentioned cases are relevant. The cases demonstrate that there is a predominant characteristic of gender-based and sexual violence which is the unequal power differential that exists between the offender and the survivor, and it is this very same power differential that is exploited both in the commission of violence and the subsequent use of the law to silence or discredit the survivor.

34 These judgments indicate that there is a misuse and abuse of laws such as the Harassment Act which reasserts patriarchal norms. CALS submits that the cases demonstrate that men co-opt these laws, and this has the effect of silence victims of gender-based and sexual violence. This process of co-opting is perverse and incredibly problematic.

35 Applications such as the present have shown to have a chilling and prohibitive effect on public participation, coming forth to report violence and conduct of freedom of speech. The use of the law to silence victims “demonstrates... how male perpetrators feel empowered to use the full force of the law to threaten and muzzle their accusers, rare as it is to have them speak out”<sup>33</sup>

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<sup>32</sup> Court of Appeal of State of California, *Wentworth v. Hemenway*, 5 June 2019 (US) at page 9, col.1 §1, and col 2, §2.

<sup>33</sup> Puja Kapai, *#MeToo as Catharsis for Hong Kong’s Child Sexual Abuse Victims: Confronting Cultures of Silence and Shame and Creating Conditions for Substantive Change*, chapter 26.

- 36 The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression stated “[i]n a perverse twist in the #MeToo age, women who publicly denounce alleged perpetrators of sexual violence online are increasingly subject to defamation suits or charged with criminal libel or the false reporting of crimes.”<sup>34</sup> Further, the Special Rapporteur stated that instituting legal proceeding is “[w]eaponising the justice system to silence women” and “feeds impunity while also undermining free speech.”<sup>35</sup>
- 37 In this regard, CALS submit that courts must be aware and prohibit the misuse of legislation, where there is an intent to use the law to continue to violate, control and silence vulnerable groups, especially women and children. If these laws become co-opted, government will have failed in its attempts (and legal duties) to create private and public spaces that are safe for vulnerable people such as women and children.
- 38 CALS submits that courts must be careful not to be used as an oppressive patriarchal vehicle utilised to preserve the violent status quo experienced by women and silencing women’s calls for assistance and justice.
- 39 Moreover, CALS submits that this Honourable Court would benefit greatly from taking guidance from the foreign jurisprudence cited as this Honourable Court will be coming to the aid of victims and survivors of gender-based and sexual

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<sup>34</sup> Khan, Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression, a report on gender justice and freedom of expression at para 22 (<https://undocs.org/A/76/258>).

<sup>35</sup> Id at para 22.



violence by affirming that they have a right to freedom of expression, which is linked to their right to live a life free from gender-based and sexual violence.

40 Additionally, following these cases accords with the judgment of this Honourable Court, where Baartman J held that “it would be preposterous to give the alleged abuser editorial rights over the victim’s narrative.”<sup>36</sup>

41 In essence, CALS submit that this is in correct approach to be followed in cases of this nature and that the court a quo should have followed this approach.

### **THE FINDING BY THE LEARNED MAGISTRATE ENCOURAGES A CULTURE OF SILENCE ON CASES DEALING WITH GENDER-BASED AND SEXUAL VIOLENCE**

42 The learned Magistrate held that:

“it was also “strange” that she was “raped” by three of her former “lovers” and yet failed to lay one charge of rape against anyone of them. This court by no means wants to silence the respondent or deprive her of her constitutional right but in my humble view she cannot continue to tell others that the applicant had “raped” her. This is a very serious allegation.”<sup>37</sup>

43 CALS submit that the finding in fact creates a culture of silence, and it means that women will be afraid to approach courts due to this judgment.

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<sup>36</sup> *Booyesen v Dolly and Another* (case number: 5042/2021) at para 20 (delivered 30 August 2021)

<sup>37</sup> Magistrate Court finding at para 25.

44 In *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*,<sup>38</sup> the Constitutional Court dealt with effect of silence in cases involving sexual violence. The Court held

“Of pivotal importance to the case before us is this: that the systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator, as the applicants allege Mr Frankel to have been, is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones – let alone state officials. Combined with this is the frequent impact of deeply-located self-blame, which, as the Supreme Court of Appeal recognised in Van Zijl, disables the victim from appreciating that a crime has been committed against her for which the perpetrator, and not she, is responsible.”<sup>39</sup>

45 Furthermore, the Constitutional Court dealt with reporting sexual violence to the police. The Court held that “survival of sexual trauma makes it rational to be reluctant to report and to avoid reporting”.<sup>40</sup> Additionally, the Constitutional Court held that “[e]ven if a survivor is fully aware that she was abused, she naturally weighs up the possibility of reprisals from the perpetrator together with the possible lack of support from the police and statistically small eventuality that reporting will actually, eventually, result in a conviction in a criminal court.”<sup>41</sup>

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<sup>38</sup> 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC).

<sup>39</sup> Id at para 56. Emphasis is my own.

<sup>40</sup> Id at para 57.

<sup>41</sup> Id at para 57.

- 46 Importantly, the Constitutional Court held "... that the decision not to disclose or report, for any length of time, cannot determine the question of guilt or innocence in the case against the perpetrator."<sup>42</sup>
- 47 CALS submits that the learned Magistrate did not take this judgment into account when making their finding. CALS submits that the learned Magistrate ought to have had regard to the judgment and the considerations that it is not easy to report sexual violence and that a lack of reporting does not attract a negative inference on part of the alleged victim. The negative inference drawn by the learned Magistrate determined "the question of guilt or innocence" and it is contrary to the jurisprudence of the Constitutional Court.
- 48 CALS, further, submits that the finding ignores that rape culture in South Africa is an undeniable epidemic, the rampant spread of which the criminal justice system is failing to curtail.
- 49 In essence, CALS urges this Court to make a different finding that upholds the reasoning of the Constitutional Court and does not draw a negative inference on the alleged victim or survivor. A finding that acknowledges that sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is single greatest threat to the self determination of South African women.

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<sup>42</sup> Id at para 58.

50 If the finding is not overturned, the culture of silence will be encouraged by the fear that a party have a negative inference drawn upon them because they have elected not to report. This precedent will be disastrous in a climate where gender-based and sexual violence is ubiquitous.

51 If this Court confirms the finding of the learned Magistrate, it will send “an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little.”<sup>43</sup>

52 The learned Magistrate said that this case involved the #MeToo Movement. The #MeToo Movement was started on social media with the primary purpose of empowering women, especially young and vulnerable with empathy against sexual harassment and sexual assault.

53 The use of social media is important and should be recognised. For example as a result of campaigning and speaking public about gender-based and sexual violence:

53.1 Several states in the United States of America are banning nondisclosure agreements that cover sexual harassment.<sup>44</sup>

53.2 In South Africa, the President has assented to three pieces of legislation that deal with gender-based and sexual violence because of advocacy such as protest marches and social media stories under hashtags such

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<sup>43</sup> *Baloyi (Minister of Justice Intervening)* [1999] ZACC 19; 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 12.

<sup>44</sup>In September 2018, the State of California banned the agreements in cases involving sexual assault, harassment, or sex discrimination. New York and New Jersey enacted similar laws.

as #AmINext,<sup>45</sup> which was used by women to lament the state of violence against them.

54 Social media has also been used by rape and/or sexual assault victims and survivors and it has been a powerful tool through which women have gathered the strength to speak out and tell their narrative of sexual assault and rape. The use of social media and whisper networks constitutes a safe environment in which victims and survivors of sexual assault and rape empower themselves and own their stories free from judgement and shame.

55 The use of social media has also proven foundational to social movements that are aimed at providing support to women to tell their stories, raising awareness to issues of sexual assault and rape, and protecting other women from the same. Carter notes that social media facilitated movements such as the #Metoo movement have equally been instrumental in making women 'feel more empowered not only to share warnings but to acknowledge and agree that certain behaviours are wrong and inappropriate.'<sup>46</sup>

56 Victims and survivors of sexual offences are often made to feel shame and relegated to silence for fear of how they will be received in their communities and in society at large.

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<sup>45</sup> Domestic Violence Amendment Act, Criminal Law Amendment Act and the Criminal and Related Matters Amendment Act.

<sup>46</sup> R Carter 'It's The Only T's The Only Thing We H Y Thing We Have: Whisper Networks Among Works Among Women Theatre Actors' <https://doi.org/10.13023/etd.2021.034.122>.

57 As pointed out by the Constitutional Court in *Levenstein*, there is still a widespread stigma attached to issues of rape and sexual assault in the South African society. In this case, it was stipulated that:

“the systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones – let alone state officials.”<sup>47</sup>

58 CALS submit that social media can be used as a tool in combating and removing the stigma attached to matters of rape and sexual assault by shaping and informing society’s perceptions on issues of rape and sexual offences. Carter notes that by making the broader communities aware of the nuances of sexual offences, social media enables communities to better understand the adverse effects of sexual offences.<sup>48</sup>

59 CALS submits that the judgment of the *court a quo* and other judgments alike, have the inevitable effect of legitimising and perpetuating the silencing of sexual offence victims through their admonishment of the use of social media by victims and survivors. It is in this very silence that the rampant rape culture continues to thrive.

60 The High Court in *Booyesen* held:

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<sup>47</sup> *Levenstein* at para 56. Emphasis is my own.

<sup>48</sup> R Carter ‘It’s The Only T’s The Only Thing We H Y Thing We Have: Whisper Networks Among Works Among Women Theatre Actors’ <https://doi.org/10.13023/etd.2021.034.122>.

“Through her online speak out, the respondent has gone from victim to survivor and now uses the platform to educate and support others. The growth in her support base is an indication of the effect of the South African rape culture and the destruction it wreaks in the lives of women as well as the need for safe spaces to talk without being judged.”<sup>49</sup>

61 CALS submits that online discussions about rape challenges rape culture. These discussions mitigate the normalisation of rape. Online communities create space, at least, to escape the isolation in which many victims and survivors find themselves.

## **CONCLUSION**

62 CALS submits that the court must employ a gender-sensitive approach to understand the level of pain and suffering experienced by women. In doing so, the Court gives effect to the protections afforded to women under international law as well as national law.

63 Further, that granting the appeal would be in line with the words of the Constitutional Court that “the criminal justice system [which includes the courts] should play a role that supports the survivors of crimes involving sexual violence and create mechanisms that would encourage them to come forward more so in view of the fact that such crimes have become prevalent these days.”<sup>50</sup>

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<sup>49</sup> *Booyesen* at para 19

<sup>50</sup> *Levenstein* at para 52.

64 For these reasons, CALS submits that the application for leave to appeal should be granted and that the appeal be upheld.

**LETLHOGONOLO MOKGOROANE**

Amicus Curiae's Counsel

Chambers, Sandton

18 October 2021