IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/20

In the matter between:

ANDISIWE KAWA Applicant

and

MINISTER OF POLICE Respondent

and

CENTRE FOR APPLIED LEGAL STUDIES *First Amicus Curiae*

WISE4AFRIKA *Second Amicus Curiae*

FIRST AMICUS CURIAE WRITTEN SUBMISSIONS

INTRODUCTION

1 These submissions have been made on behalf of the Centre for Applied Legal Studies ("CALS") which has been admitted as *amicus curiae* as per the directions of this Court dated 3 February 2021.

2 At the outset, we note that despite the Respondents attempts to characterise this matter as a private law delictual claim – this matter raises

significant questions of constitutional obligations in the context of sexual offences and police investigations. The experience of Ms Kawa is unfortunately not unique and CALS' participation in this case is to draw attention to the constitutional obligations incumbent on the South African Police Services ("SAPS") in the investigation of sexual offences. A separate Rule 31 application is filed together with these submissions, in order to seek leave to adduce evidence of the experience of delayed investigations and secondary traumatisation.

3 In these submissions, we deal only with the following issues which, we submit, are relevant and are of assistance to the Court in the determination of the issues before it:

3.1 The international and comparative law experience of gender based and sexual offences investigations and the relevant standards expected of such investigations;

3.2 The need for a victim-centred approach to policing sexual violence and gender based violence ("GBV");

3.3 The impact of failed policing and insufficient investigation on victims (secondary traumatisation and victimisation);

3.4 The "legal convictions of the community" standard in light of the scourge of sexual violence and perceived impunity of perpetrators; and

3.5 The Development of the Common Law whether an omission is actionable.

THE INTERNATIONAL AND COMPARATIVE LAW EXPERIENCE OF GENDER BASED AND SEXUAL OFFENCES INVESTIGATIONS AND THE RELEVANT STANDARDS EXPECTED OF SUCH INVESTIGATIONS

4 This Court emphasised the importance of South Africa's international law obligations to prevent gender-based violence in ***Carmichele***[1].

> *"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".*[2] *(Emphasis added)*

5 The international law position on the prevention of sexual and gender-based violence and protection of women and children is clear. There are demands and obligations on member states to provide an effective criminal justice response, prioritising victim safety (particularly in cases of violence against women and child) and offenders accountability. This includes prompt access to redress for violence, the avoidance of re-victimization, and the enforcement of legal remedies, including appropriate punishment for the perpetrators. This is clear from the following:

5.1 The United Nations Convention on the Elimination of all Forms of Violence Against Women ("CEDAW")[3] obliges state parties to:

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[1] Carmichele v Minister of Safety and Security [2001] ZACC 22; 2001 (4) SA 938 (CC)
[2] *Carmichele* at para 62.
[3] South Africa signed the CEDAW on 29 January 1993 and ratified it on 15 December 1995.

5.1.1 act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life; [4]

5.1.2 according to the CEDAW Committee, States are "*required to have laws, institutions and a system in place to address such violence*[5]. Moreover, if a state fails to investigate, prosecute and punish gender-based violence, they provide tacit permission or encouragement to acts of gender-based violence against women.[6]

5.2 The CEDAW Committee [7] releases recommendations. General Recommendation 19 deals specifically with violence against women[8].

5.3 General Recommendation 35, observes that the prohibition on gender-based violence has become part of customary international law[9]:

> *"For over 25 years, the practice of States parties has endorsed the Committee's interpretation. The opinion Juris and State practice suggest that the prohibition of gender-based violence*

[4] Articles 2, 5, 11, 12 and 16. See also UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 12: Violence against women, 1989, available at: http://www.refworld.org/docid/52d927444.html.
[5] Supra at para 24(b).
[6] Ibid
[7] Established in terms of article 17 of CEDAW
[8] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, available at: https://www.refworld.org/docid/52d920c54.html
[9] UN CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (14 July 2017), CEDAW/C/GC/35.

against women has evolved into a principle of customary international law. General recommendation No. 19 has been a key catalyst for this process".[10]

6 Moreover, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the Maputo Protocol")[11] provides that:

6.1 Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights (Article 3(1));

6.2 States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women (Article 3(3));

6.3 States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence (Article 3(4));

6.4 Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited (Article 4(1)); States Parties shall take appropriate and effective measures to:

[10] Ibid.
[11] South Africa signed the Maputo Protocol on 16 March 2004 and ratified it on 17 December 2004. The Protocol is available online at [https://au.int/en/treaties/protocol-african-charter- human-and-peoples-rights-rights-women-africa]

6.4.1 enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public (Article 4(2)(a); and

6.4.2 adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women (Article 4(2)(b));

6.5 States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards (Article 5); and

6.6 Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure the reform of existing discriminatory laws and practices in order to promote and protect the rights of women (Article 8(f)).

7 In short, South Africa bears international law obligations to take measures to protect women and children against violence, to prosecute acts of violence, and to prevent further acts of violence.

8 Foreign jurisprudence also makes clear that the standard of investigation is relevant:

8.1 In ***Secic v Croatia (2009) 49 EHRR 18*** (31 May 2007), the European Court of Human Rights held: "the obligation on the state to conduct an official investigation is one of means, not result,". Referring to ***Menson v United Kingdom (2003) 37 EHRR CD 220 and Yasa v Turkey (1999) 28 EHRR 408.***[12] It observed that the authorities had to take "all reasonable steps available to them to secure the evidence concerning the incident" and that the authorities must act with "**promptness and reasonable expedition**." Having considered the investigations conducted by the police, ECtHR concluded, at para 59, that "*the failure of the state authorities to further the case or obtain any tangible evidence with a view to identifying and arresting the attackers over a prolonged period of time indicates that the investigation did not meet the requirements of article 3 of the Convention".* It, therefore, found that article 3 had been breached and that the applicant was entitled to be compensated.

8.2 In a focal case emphasising the duty to conduct a sufficiently effective investigation, the European Court of Human Rights in

[12] - para 54

Fanziyeva v Russia (41675/08) (2018) 67 E.H.R.R.33 (2015) at para [47] stated the following.

> *"As a general rule, the mere fact that an individual dies in suspicious circumstances while in custody should raise an issue as to whether the State has complied with its obligation to protect that person's right to life[13]… The essential purpose of such an investigation is to ensure effective implementation of the domestic laws which protect the right to life. The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence."*

9 These cases reflect the manner in which the European Courts have regarded the appropriate standard of police investigations.[14]

THE IMPACT FAILED POLICING AND INSUFFICIENT INVESTIGATION HAS ON VICTIMS (SECONDARY TRAUMATIZATION AND VICTIMIZATION).

10 CALS has applied for leave in terms of Rule 31 of the Rules of this Court to adduce certain evidence relevant to the issue of secondary traumatization and victimisation. It did so because a reading of the papers in this matter made it clear that there is a lack of formal evidence of:

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[13] See Slimani v. France, no. 57671/00, § 27, ECHR 2004-IX (extracts))

[14] *Fanziyeva v Russia (41675/08) (2018) 67 E.H.R.R.33 (2015), Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents) [2018] UKSC 11, Vasilyev v Russia (Application No 32704/04)*, Mikheyev v Russia, no 77617/01, para 107, and *Assenov and Others v Bulgaria, judgment of 28 October 1998, Reports 1998-VIII, paras 102*

10.1 trauma resulting from a insufficient standard of work (which includes investigation as well as its duty to have a victim-centred approach in handling sexual offence cases) on behalf of the police; and

10.2 the link between this poor standard of work and attrition rates (the drop in the number of cases which are actively pursued from the time that the case is concluded with a conviction.)

11 Notably, according to Steyn secondary victimisation can be understood in relation to primary victimisation[15]. In her study on re-victimisation of victims of rape by police, she found that experiences of police unresponsiveness around the investigation resulted in secondary victimisation[16] and or further, re-victimisation occurring in relation to what she called police 'competence'.[17]

12 The lack of diligent policing combined with a human-rights based approach results in tremendous psychological trauma on victims, not only that, but this also impact on the decision of other victims to come forward and report sexual violence and case attrition.

13 There is academic consensus that secondary traumatisation and victimisation occurs when police (around the world) fail to conduct

[15] E Steyn and J Steyn, Revictimisation of rape victims by the South African Police Service, Acta Criminlogica, (2008) 1.
16 Ibid.
17 Ibid.

themselves in a caring and compassionate ways towards victims of sexual offences, in particular where there is the perception by the victim that investigations are substandard and in some instances non-existent. There stands an intersection of violations of victim's rights in relation to negligent investigations and/or uncompassionate treatment of victims which extends beyond the violation of the specific victim of the sexual offence and affects the rights of *all* victims of sexual offences.

14 The perception of victims of sexual offences around the low conviction rate and uncompassionate treatment of victims by the criminal justice system, including the police is one of the reasons [18] for the lack of reporting of sexual violence cases, estimated to be 1 in 25 cases being reported in 2014 [19]. As evidence in the 2017 South African Medical Research Council's study, reflecting on rape cases only 57.8% of accused were arrested and charged and of the total reported cases only 34.5% were referred for prosecution.[20]

15 Effective policing is not a luxury but a must, because failure by the SAPS to conduct its duties with due care has a far-reaching consequence for victims of crime and society as a whole, particularly since the jurisdiction

[18] M, Machisa et al, Rape Justice in South Africa – Retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012, South African Medical Research Council, (2017).
19 L Vetten, Rape and Other forms of sexual violence in South Africa, Institute for Security Studies, (2014) 72.
20 Ibid.

over the investigation of criminal offences exclusively lies with SAPS. This was explicitly held in ***Botha v Minister of Safety and Security*** where the court held that: "SAPS must, 'exercise [its] powers in accordance with section 13 of the South African Police Service Act 68 of 1995, *which provides that official action is subject to the Constitution and must be performed with due regard to every person's fundamental rights"*[21]

Law and Policy call for a victim-centred approach to policing sexual violence (GBV generally).

16 The victim-centred approach to assisting victims of GBV specifically those who suffered sexual violence is defined as an emphasis or focus on the individual victim's needs, which ensures a compassionate and sensitive delivery of services.[22] Victim-centred policing specifically focuses on the need to restructure policing practices in order to position the victim as the focus and to reduce the negative effect of criminal victimisation.[23]

17 We submit that this demand for effective reasonable policing, build on a victim-centred and human rights approach is in fact recognized by the State. The Victim's Charter, the Minimum Standards for Services for Victims of Crime, the National Policy Guidelines for Victim Empowerment, the National Strategic Plan on Gender-Based Violence and Femicide, the

21 *Botha v Minister of Safety and Security and others; January v Minister of Safety and Security and Others* 2012 (1) SACR 305 (ECP).
22 L, Alvarez and J, Caňas-Moreira, 'A victim-centered approach to sex trafficking cases', *FBI Law Enforcement Bulletin,* (2015).
23 M, Clark, 'Victim-Centred Policing: The shepherd's solution to policing in the 21st century, *The Police Journal*, (2003).

SAPS National Instruction 3/2008 on Sexual Offences, and the SAPS National Policy Guidelines for Victims of Sexual Offences, and the Victim Support Services, Bill, all point to a demand for effective, reasonable policy, built on a victim-centred and human rights approach.[24]

18 A victim-centred approach is not about the availability of state resources. On the contrary, the state must always use the available resources reasonably, not negligently or with impunity. This is because on a proper interpretation of the law and policy, policing is an act of public administration. The SAPS is governed by the basic values and principles governing public administration.[25] There is thus a duty to use resources efficiently and effectively.

19 Moreover, the common law duty on SAPS to assist victims of crimes was established as far back as 1975 in the case of ***Minister of Police v Ewels.***[26] This duty was emphasised more recently and specifically with

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[24] *Victim's Charter, the Minimum Standards for Services for Victims of Crime https://www.justice.gov.za/vc/docs/vcms/vcms-eng.pdf*
National Policy Guidelines for Victim Empowerment,
https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf
National Strategic Plan on Gender Based Violence and Femicide,
https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf
the SAPS National Instruction 3/2008 on Sexual Offences,
https://www.saps.gov.za/resource_centre/acts/downloads/sexual_offences/ni/ni0308e.pdf
SAPS National Policy Guidelines for Victims of Sexual Offences,
https://www.justice.gov.za/policy/guide_sexoff/sex-guide01.html
and the Victim Support Services Bill.
https://pmg.org.za/call-for-comment/958/

[25] Section 195 of the Constitution.

[26] *Minister of Police v Ewels* 1975 (3) SA 590 (A)

regard to sexual offences, in ***Levenstein and Others v Frankel and Others***, where this Court held:

> *"The evidence before us consistently shows that only one in three rape survivors seek assistance from formal social systems. Once a person decides to report, the police, the NPA and the courts have a duty to investigate, prosecute and adjudicate the complaint with due regard to the hurdles overcome before reporting".*[27]

20 The Victim's Charter is adopted in terms of section 234 of the Constitution and sets out victim's rights which include, the right to be treated with fairness and with respect for dignity and privacy, the right to offer and receive information, the right to protection, the right to assistance, the right to compensation and the right to restitution.[28] It sets out some of duties that the SAPS has towards victims, such as investigating the crime, responding to victims reports 'as quickly as they can', taking measures that minimise victim inconvenience.[29]

21 It is therefore submitted that government policy provides that police have a heightened duty towards victims of sexual violence in our country.

THE LEGAL CONVICTIONS OF THE COMMUNITY, IN LIGHT OF THE SCOURGE OF SEXUAL OFFENCE VIOLENCE AND THE COUNTRY'S

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[27] *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC). This was also dealt with in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) where it is stated that the state is 'under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation'.

[28] Minimum Standards on Services for Victims of Crime, p 3 and 4.

[29] Above at p 12.

HIGH LEVEL OF CASE ATTRITION AND PERCEIVED IMPUNITY AROUND SEXUAL OFFENCES.

22 The judicial enquiry into the "legal convictions of the community" requires an analysis of whether, how and to what extent the Constitution requires that the conduct at issue in a particular case be regarded as wrongful. The Court's enquiry into "legal convictions of the community" merges with its duty, in applying and developing the common-law to consider the "spirit, purport and objects" of the Bill of Rights.

23 In ***Minister van Polisie v Ewels*** *1975 (3) 590(A)* the (then) Appellate Division recognised that wrongfulness is also found in circumstances where the legal convictions of the community require a legal duty to shield others from injury, and not only when there was a negative duty to avoid causing injury.[30] It became generally accepted after ***Ewels*** that in all cases of delict an omission may constitute wrongful conduct in circumstances where the legal convictions of the community impose a legal duty to prevent harm[31]. The test has been described as objective, reasonableness[32].

[30] *Ewels,* (at 596H-597G).
[31] *See Minister of Law and Order v Kadir 1995 (1) SA 303 at 317C-318A; van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA).*
[32] *See Steenkamp NO v Provincial Tender Board of the Eastern Cape* (528/2004) [2005] ZASCA 120; [2006] 1 All SA 478 (SCA)

24 The test is not dependent on the court's personal views of what the community's legal convictions ought to be. The question to be determined is what the community's actual prevailing legal convictions are.[33] On this score, it is key for the court to understand victim behaviour and its social context, including the obstacles victims face in the criminal justice system. While it is generally reported that a significant portion of victims of gender-based violence suffer from trauma, such as post-traumatic stress disorder, depression and anxiety.

25 CALS submits that the community's legal convictions are against sexual violence and demands of the State that women be protected from such violence.

There is no need to develop the common law wherein omission is actionable.

26 Harm resulting from secondary victimisation such as psychological or psychiatric harm is actionable in our law, as articulated in *Komape v Minister of Basic Education*[34].

27 In the recent Victim Support Service Bill, 2019[35] ('the Bill') the legislature has suggested the inclusion of secondary victimisation under its preamble, section 1 and section 7. It is clear from this Bill that the State itself has

[33] See *Bakkerud* (*supra*) at 1057B-C.
[34] 2020 (2) SA 347 (SCA)
[35] Victims Support Service Bill, 2019

explicitly acknowledged the issue of secondary victimisation in relation to violent crime (of which sexual offences is included) and its duty to prevent or mitigate such in relation to these cases.

28 While we recognise that the Bill does not enjoy the status of law until passed, we refer to it for the sake of context. Section 1 of the Bill, defines secondary victimisation as '*victimisation that occurs, not only as a direct result of the criminal act but through the response of officials, service providers, the community and individuals'*. In terms of section 7 of the Bill "[e*]very relevant department, associated profession, and service provider must implement a code of conduct that directs employees to treat victims in accordance with the rights of victims set out in section 5 and thereby prevent secondary victimisation*."

29 The Supreme Court on appeal in **Komape**[36] held as follow:

> *"...however, for many years now, such a claim has been recognised in this country where the claimant shows that the nervous shock is associated with a detectable psychiatric injury. Thus, in Bester v Commercial Union[37] this court, seemingly influenced to an extent by developments in England[38], 'held a psychological or psychiatric injury to constitute a 'bodily injury' for the purposes of delictual liability, and that there was no reason in our law why a claimant who suffered such an injury as the result of the negligent act of another should not be entitled to receive compensation."*

[36] *Komape v Minister of Basic 2020 (2) SA 347 (SCA)* , para24-25
[37] *Bester v Commercial Union Versekeringsmaatskappy van SA Beperk* 1973 (1) SA 769 (A).
[38] See 779D-G.

30 *In* ***Barnard v Santam***[39]*,* the supreme court subsequently confirmed the existence of a remedy where a plaintiff sustained 'nervous shock', although Van Heerden ACJ pointed out that the term was outmoded and misleading as the only question should be whether the plaintiff sustained a detectable psychiatric injury.

31 The same approach was followed by in ***Road Accident Fund v Sauls***[40]*.* In that matter, a plaintiff witnessed her fiancé being struck by a motor vehicle in his near vicinity. She thought he had been killed or seriously injured and was left in a condition of shock and confusion. She was subsequently diagnosed with a post-traumatic stress disorder which became chronic and unlikely to improve. The Court held that: '*her case is that as a consequence of her witnessing the injury to [her fiancé] she suffered severe emotional shock and trauma which gave rise to a recognised and detectable psychiatric injury* . . .'.

32 In holding the defendant liable, Olivier JA explained:

> *"It must be accepted that in order to be successful a plaintiff in the respondent's position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury. That this must be so is, in my view, a necessary and reasonable limitation to a plaintiff's claim . . . I can find no general, "public policy" limitation to the claim of a plaintiff, other than a correct and careful application of the well-known requirements of delictual liability and the onus of proof."*[41]

[39] *Barnard v Santam Beperk* 1999 (1) SA 202 (SCA).
[40] *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA).
[41] *Sauls* paras 13 and 17.

33 The State's duty under the Constitution is not abstract it can be called upon by an individual who demonstrates that the state's failure to fulfil its obligation, which has led harm and treatment prohibited in the Bill of Rights.

34 In the event that this Court finds that this form of delictual claim does not form part of our law, we submit that the common law should be developed in terms of section 8(3) of the Constitution to recognise such a claim.

COSTS CONCERNING THIS APPLICATION

35 The SCA granted costs against the Applicant. We submit that the issues raised by the Applicant are inherently constitutional and deal with the limitation of various intersecting rights. The limitation of these rights does not solely affect victims of sexual violence in our country, but victims of violent crimes in general. This is not simply a case of an individual holding SAPS to account in delict.

36 The Appellant's constitutional rights were limited, and she has rightfully approached this court for the vindication of these rights.

37 In the circumstances, the ***Biowatch Trust v Registrar Genetic Resources and Others***[42] principle is applicable and therefore the SCA erred in ordering Ms Kawa to pay the Respondent's costs. The same principle applies in this Court.

38 We submit if leave is granted to this Court, despite the outcome of the appeal the Ms Kawa should not be penalised with heavy cost orders. Neither should CALS be mulcted in costs in circumstances where it appears as *amicus curiae* in order to raise pertinent and relevant issues which the parties have not.

CONCLUSION

39 We reiterate the firm warning by Sachs J, albeit in the context of domestic violence that:

> *"The ineffectiveness of the criminal justice system… sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little."*[43]

40 Investigations must be correctly regulated and formulated to move away from a simple box-ticking exercise, to reflect a substantive duty of care placed on the police to "*respect, protect and promote*" the rights contained

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[42] *Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC)*

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

in the Bill of Rights and to "*prevent, protect and serve*" particularly those most vulnerable in society.

41 CALS submit the investigation carried out by the Respondents in this matter, falls miserably short of the appropriate standards of investigation articulated in the foreign cases referred to above in these submissions and is wrongful and actionable.

N Rajab-Budlender
L Phasha

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Chambers Sandton
5 February 2021