

In the High Court of South Africa  
(Natal Provincial Division)

REPORTABLE

Case No 3501\03

In the matter between :

**AHMED RAFFIK OMAR**

Applicant

and

**THE GOVERNMENT OF SOUTH AFRICA  
THE MINISTER OF JUSTICE  
HALIMA JOOSAB**

First Respondent  
Second Respondent  
Third Respondent

---

## J U D G M E N T

---

**TSHABALALA JP**

Condonation

At the commencement of the hearing of this application the Third Respondent applied for condonation of its late filing of the opposing affidavit. The application was opposed by the Applicant. The notice to oppose the application was filed on 11 February 2004. The answering affidavit which should have been filed on or before 3 March 2004 was filed on the 6<sup>th</sup> April 2004.

The Third Respondent explained in her affidavit the reasons for the late filing of her affidavit. Initially she did not oppose the application because she did not have funds. When the Applicant went to the Constitutional Court and the matter received wide publicity she felt that the facts placed by the Applicant before the Court were incorrect. She was advised that she could approach the Legal Resources Centre who would not charge fees. Due to the nature of the information that was included in the affidavit the consultations took a

considerable amount of time because of the extent of the abuse at the hands of the Applicant.

The opposition by the applicant was based on the fact that the Third Respondent knew that the matter had been referred back to the High Court by the Constitutional Court and that Third Respondent flagrantly disregarded the rules. It was also argued that Third Respondent filed an affidavit which was not signed. The original affidavit was a confirmatory affidavit from her previous attorney which was apparently filed to comply with the time limits and a proper affidavit had been filed and served on the Applicant..

When Third Respondent filed the answering affidavit the matter had not been set down and the applicant had filed the replying affidavit subsequently and therefore there was no prejudice suffered by Applicant.

The Court has a very wide discretion in these matters. Condonation may be granted if the applicant has satisfied the Court that sufficient cause has been shown, the Court will consider all the relevant facts and circumstances of the particular case, such as the degree of non-compliance with the Rules, for example the length of the delay, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of the judgment and the avoidance of unnecessary delay in the administration of justice. See **Mbutuma v Xhosa Development Corporation Ltd** 1978(1) SA 681 at page 682 D.

I am of the view that this is a matter of great importance to women and I was satisfied on the reasons given by the Third Respondent for the delay. I accordingly granted condonation for the late filing of the Third Respondent's answering affidavit and ordered her to pay the wasted costs.

#### Background.

This matter is coming to this Court for the second time. It was first heard on the 29 July 2003 and was struck of the roll on the ground that the Government

and the Minister of Justice did not give reasons for not opposing the application for declaration of constitutional invalidity. The applicant decided to proceed seeking constitutional relief in the Constitutional Court directly on an ex parte application.

In its decision in *Ex Parte Omar*<sup>1</sup>, the Constitutional Court held that there were no exceptional circumstances for granting an application for direct access.<sup>2</sup> After stating that the matter raised an issue of constitutional significance, the Court decided that the applicant was entitled to and should re-enrol his application in the High Court,<sup>3</sup> hence this application.

### Facts.

This application raises the alleged unconstitutionality of one of the important statutes dealing with the scourge of domestic violence in South Africa. The act in question is the Domestic Violence Act<sup>4</sup> ('the Act') which was preceded by the Prevention of Violence Act.<sup>5</sup>

The application arose out of abusive relationship between the applicant and the third respondent. The sequence of events culminated in several protection orders that were issued against the applicant in term of the Domestic Violence Act. The applicant argues that the issuing of the warrant of arrest, which was issued in terms of the Act was irregular because Section 8 of the Act is unconstitutional. It was argued that the mandatory issue of the warrant of arrest at the time of the granting of the protection order in terms of s 8(1) (a) is unconstitutional.

One should mention at the outset that the Court was placed in a difficult position by the manner in which the case was presented. It is important that where provisions of the Act are challenged for unconstitutionality, the

---

<sup>1</sup> 2003 (10) BCLR 1087 (CC).

<sup>2</sup> Id at Para [4].

<sup>3</sup> Id at Para [6].

<sup>4</sup> 116 of 1998.

<sup>5</sup> 113 of 1993.

applicant set out the impugned provisions and outline the basis on which it is claimed that the various subsections of the section in issue are inconsistent with the Constitution. In this case the applicant attacked the whole of s 8 without elaborating as to how each subsection or parts of the section contravene his rights.

Section 8 of the Domestic Violence Act provides:

- (1) Whenever a court issues a protection order, the court must make an order-
  - (a) authorizing the issue of a warrant of arrest of the respondent, in the prescribed form; and
  - (b) suspend the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.
- (2) The warrant referred to in subsection (1) (a) remains in force unless the protection order is set aside or it is cancelled after execution.
- (3) The clerk of the court must issue the complainant with a second or further warrant of arrest, if the complainant files an affidavit in the prescribed form in which it is stated that such warrant is required for her or his protection and that the existing warrant of arrest has been-
  - (a) executed and cancelled; or
  - (b) lost or destroyed.
- (4)
  - (a) A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition obligation or order contained in the protection order, to any member of the South African Police Service.
  - (b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of an alleged breach of the protection order by the respondent , the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17 (a).
  - (c ) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which-

- (i) specifies the name, residential address and the occupation or status of the respondent;
  - (ii) calls upon the respondent to appear before a court, and on the date and at the time, specified in the notice, on the charge of committing the offence referred to in section 17 (a); and
  - (iii) contains a certificate signed by the member concerned to the effect that he or she handed the original order notice to the responder and that he or she explained the import thereof to the respondent.
- (d) the member must forthwith forward a duplicate original of a notice referred to in paragraph (c) to the clerk of the court concerned , and the mere production in the court of such a duplicate original shall be prima facie proof that the original thereof was handed to the respondent specified therein.
- (5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4) (b), the member of the South African Police Service must take into account-
- (a) the risk to the safety, health or wellbeing of the complainant;
  - (b) the seriousness of the conduct comprising an alleged breach of the protection order;
  - (c) the length of time since the alleged breach occurred.
- (6) Whenever a warrant of arrest is handed to a member of the Police Services in terms of subsection (4) (a), the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

Mr *Omar* who appeared for the applicant argued that s 8 contravenes the following sections in the Constitution of the Republic of South Africa Act ('the Constitution') :<sup>6</sup> s 12 (1 (d), s 12 (2), s 21 (1), s 33 (1) s 34 and s 35 (3) (h). The threat is imprisonment and the most fundamental right limited by imprisonment is the right to freedom.

Section 12(1) (a) provides:

---

<sup>6</sup> Act 108 of 1996.

‘Everyone has a right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;...’

The primary attack was directed at s 8. Mr *Omar* submitted that the section allows a person to be imprisoned without having actual notice of either the original order or hearing. It was further argued that, in practice, the first notice of a case to the respondent is when the warrant of committal is executed and that the prescribed manner of service identified in s 5 (6) of the Act approves of substituted service which give rise to the above effect.

Section 5 (6) of the Act provides:

“An interim protection order shall have no force and effect until it has been served on the respondent.”

Mr Omar further argued that s 5 (3) and s 8 (2) imposed a ‘patent reverse onus’ and therefore infringes his Constitutional right to be presumed innocent.<sup>7</sup>

The effect of the above impugned provisions must be ascertained in the light of the State’s constitutional duty to protect the vulnerable members of the society in general and women and children in particular and to deal effectively with the scourge of domestic violence.

#### Constitutional requirement to protect women and deal with domestic violence.

The prevalence of domestic violence in South Africa has not gone unnoticed by the legislature, hence the promulgation of the Prevention of Family Violence Act, a precursor to the current Domestic Violence Act. As succinctly observed by the Constitutional Court in *S v Baloyi*<sup>8</sup>:

---

<sup>7</sup> Section 35 (3) (h) of the Constitution provides:

‘Every accused person has a right to a fair trial, which includes the right-

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;’

<sup>8</sup> 2000 (2) SA 424 (CC).

‘All crimes has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography and is all the more pernicious because it is so often concealed and so frequently goes unpunished.’<sup>9</sup>

South Africa has an international obligation to protect women and families from domestic violence.<sup>10</sup> Realising the plight of women internationally the United Nations promulgated The Declaration on the Elimination of Violence Against Women<sup>11</sup> and the Convention on the Elimination of Discrimination Against Women<sup>12</sup> which enjoins member states to pursue policies to eliminate violence against women by amongst other things, affording the victims of domestic violence the maximum protection from domestic abuse that the law can provide and to introduce measures which seek to ensue that the relevant organs of the State give full effect to the provisions of the act of policies.<sup>13</sup>

In *Carmichelle v Minister of Safety and Security*<sup>14</sup> Constitutional Court held that:

‘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>9</sup> *S v Baloyi* Above fn 8 at para [11] per Sachs J.

<sup>10</sup> The Preamble of the Domestic Violence Act provides:

‘AND HAVING REGARD to the Constitution of the Republic of South Africa, and in particular, the right to equality and to freedom and security of the person; and international commitments and obligations of the State towards ending violence against women and children and including obligations under the United Nations Conventions on the Elimination of All Forms of Discrimination Against Women and the Rights of the Child;’

<sup>11</sup> General Assembly Resolution 48/104 of 1993.

<sup>12</sup> The Convention was signed by South Africa on 29 January 1993 and ratified on December 1995.

<sup>13</sup> See The Preamble to the Domestic Violence Act.

<sup>14</sup> 2001 (4) SA 938 (CC) at para [62].

Many rights are implicated in the scourge of domestic violence. Like all the citizens in democracies founded on human dignity, the achievement of equality and the advancement of human rights, freedom,<sup>15</sup> and women's right have to be protected. The Constitutional Court has said that dignity is both a foundational value of the Constitution and a 'justiciable and enforceable right that must be protected and respected'.<sup>16</sup>

The country's obligation to protect women under international law is obvious; the Constitution also provides that:

'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'<sup>17</sup>

In *S v Baloyi* Sachs J expressed concern about the ineffectiveness of the criminal justice system in addressing family violence. The learned Judge said:

'The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of the society that the daily trauma of the vast numbers of women counts for little. The terrorization of the individual victim is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behavior are normalized rather than combated. Yet it is precisely the function of the constitutional protection to convert misfortune to be endured into injustice to be remedied.'<sup>18</sup>

It is also apparent that the criminal justice system has had a limited impact on the protection of women and the process of eradicating domestic violence.<sup>19</sup>

---

<sup>15</sup> S 1 (a)

<sup>16</sup> *Dawood ad Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para [35].

<sup>17</sup> S 233. See also *S v Baloyi* Above n 4 at para [13].

<sup>18</sup> *S v Baloyi* Above fn 8 at para [12].

<sup>19</sup> Shanaaz Mathews & Naeema Abrahams 'An analysis of the Impact of the Domestic Violence Act (No.116 of 1998) on Women: Combining Stories and Numbers' *The Gender Advocacy Programme & The Medical Research Council (Gender Health Research Group)* November 2001 at p 41-42.

### The question of lack of notice

The applicant's argument is that the first notice in terms of s 5 (6)<sup>20</sup> of the Act is when the warrant of committal is executed and thereby violate various constitutional rights , as enumerated above, including, as I have alluded to, his right to freedom. The applicants' argument attacks the issue of service. He argued that s 5 (6) has the effect of imprisonment of the respondent without proper notice. The reason, so the argument went, is that the definition of service contained in the Magistrates' Court Act and the Supreme Court Act provides that service by registered post and service upon any person over the age of sixteen is sufficient. The applicant argued that this has the effect of the arresting of the respondent if, having not received the interim protection order but the order having been served and for argument sake received by a sixteen year old child who forgot to give it to him. Then the applicant might be imprisoned if, before seeing the interim protection order, the wife makes an affidavit in terms of s 8 (4) (b).

Miss Pillay, who appeared for the third respondent argued that the flaw in the applicant's challenge is his point of departure that the Act provides for an arrestee's first notice of the case against him when the warrant of committal is executed.

The proper analysis and interpretation of the Act, especially the impugned provisions preclude any fears that a person may receive first notice of the case against him when the warrant of committal is executed. First, something should be mentioned about the applicant's reliance on the decision in *Coetzee v Government of the Republic of South Africa*.<sup>21</sup> Mr Omar argued that for the constitutional attack he relies on six of the seven reasons identified by Kriegler J in the Coetzee decision in finding s 65A-M of the Magistrates Court Act 32 of 1994 indefensible.<sup>22</sup> This matter dealt with the constitutionality of the provisions of the aforementioned act so far as they authorised the

---

<sup>20</sup> Above page 4.

<sup>21</sup> 1995 (4) SA 631 (CC).

<sup>22</sup> These grounds are outlined by the learned Judge at para [14]

imprisonment of defaulting judgment debtors. The question raised was whether the imprisonment of defaulting judgment debtors can be justifiable in an open and democratic society based on freedom and equality.

This case is distinguishable from the *Coetzee* decision. Clearly the wording of s 8 does not in any way allow for the imprisonment of the respondent without him knowing the nature of the case against him. The procedural features of the Act in issue in this case disqualify any reliance on the decision in *Coetzee* case. There is an important point made by Kriegler J when he deals with the issue of lack of notice in *Coetzee* case; after making a point that in terms of the procedure permitted by the Magistrate' Court Act and its Rules there need not be personal service of any process, the learned Judge said that s 65A (2) does no more than require that a notice be given by registered post.<sup>23</sup>

When it was indicated in argument to the applicant's representative whether he argues for the personal service of documents as in divorce proceedings, Mr Omar agreed. However, it is not clear how the speedy process and effectiveness of the Act can be guaranteed if the courts or the legislature can insist on personal service. In my view, to insist on personal service will not be appropriate in this Act.

The applicant further argued that it is unfair and contravene his right to be presumed innocent that the police can in terms of s 8 (4) (b) arrest him without a warrant. Section 8 4) (b) provides:

'If it appears to the member concerned that, subject to section 5, there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of an alleged breach of a protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17 (a).'

This provision clearly does not affect the respondent's right to remain silent. This is the stage of the proceedings where the criminal character of the Act

---

<sup>23</sup> *Coetzee* Above fn 21 para [14] at footnote 20.

comes in. The respondent is now the accused and is entitled to all his rights guaranteed in terms of the constitution and any other law. Contrary to Mr *Omar's* submission, the section does not entail an arbitrary arrest. The police official concerned must take into account various factors that are mentioned in section 5.<sup>24</sup> If the police does not have the power to arrest without a warrant in circumstances where the member reasonably believe the victim is at risk, the whole purpose of the Act will be defeated because, as succinctly stated by the Constitutional Court in *Carmichelle*:<sup>25</sup>

'The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by the perpetrators of crime.'

The Constitutional Court has held that in entrenching the right to freedom and security of the person, the constitution entrenches two different aspects of the right to freedom. In *Bernstein and Others v Bester N.O and Others*<sup>26</sup> O' Regan J said:

'In my view freedom has two inter-related constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in recognition that, in certain circumstances, even when fair procedures has been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.'

---

<sup>24</sup> Section 5 provides:

'In considering whether or not the complainant may suffer imminent harm, as contemplated in section (4) (b), the member of the South Africa Police Service must take into account:

(a) the risk to the safety, health or wellbeing of the complainant;  
(b) the seriousness of the conduct comprising an alleged breach of the protection order; and  
(c) the length of time since the alleged breach occurred.'

<sup>25</sup> *Carmichelle* Above fn 14 at para [62].

<sup>26</sup> 1996 (4) BCLR 449; 1996 (2) SA 751 (CC) para [145]. Quoted with approval in the majority judgment in *De Lange v Smuts NO and others* 1998 (7) BCLR 779 (CC) para [17] and confirmed in para [23] per Ackermann J.

The aspect of the right to freedom which is the subject matter in this case is the procedural aspect. The applicant is not arguing that to be imprisoned under the Act is unconstitutional *per se* but that to be imprisoned under the Act is unconstitutional because of the supposed lack of notice, or potential imprisonment without being notified of a case. That said, the trust of the matter is whether there are appropriate safeguards accompanying the deprivation of freedom. O' Regan J noted in her minority judgment in *De Lange v Smuts NO and others*<sup>27</sup> that 'there are no rigid rules as to what procedural safeguards are appropriate in the context of s 12 (1)'.

Procedural safeguards in the Act in issue will have to be considered on the circumstances of the impugned provisions, in the light of the 'nature of the deprivation and its purpose'.<sup>28</sup> The analysis requires us to understand and appreciate the role of the Domestic Violence Act which is affording the victims of domestic violence maximum protection that the law can provide.

Reverting back to the issue of notice, in addition to section 5 (3) (a) which make provision for the issuing of an interim protection order, there is s 5 (6)<sup>29</sup> which confirm that the interim protection order shall have no force and effect until it has been served on the respondent. This necessarily ensures that the respondent is apprised of the case against him from inception.

Section 6 (1) deals with the issuing of protection orders.<sup>30</sup> It provides that an interim protection order can only be finalized if the court is satisfied that proper service has been effected.

---

<sup>27</sup> *De Lange* Above fn 26 at para [143].

<sup>28</sup> *De Lange v Smuts NO and others*, Above fn 26 para [143].

<sup>29</sup> Above page 4.

<sup>30</sup> Section 6 (1) provides:

'If the respondent does not appear on return date contemplated in s 5 (3) or (4), and if the court is satisfied that-

- (a) proper service has been effected on the respondent; and
- (b) the application contains *prima facie* evidence that the respondent has committed or is committing an act of domestic violence,

the court must issue a protection order in the prescribed form.'

There are safeguards contained in the Act to ensure that as far as is reasonably possible, the respondent is apprised that the protection order has been sought and obtained against him before the warrant of committal can be executed against him. Others have been referred to above and furthermore there is s 13 and Regulation 15 which deal specifically with service of documents.

Section 13 (1)<sup>31</sup> provides that service of documents in terms of the Act must be effected by the clerk of the court, the sheriff, or peace officer in the prescribed manner or as the court may direct. Regulation 15(1) is an extension of the provisions of s 13. It confirms the manner of services that has to be ensured by all the officials involved; the clerk of the court, the sheriff, and the police official.

Regulation 15 provides:

‘Service of any document in terms of the Act or this Regulations, except where the Act or Regulations provides otherwise, must without delay be effected by:

- (a) the clerk of the court by handing or presenting for handing over a certified copy of the document to the person on whom the document is to be served or sending a certified copy of the document to that person by registered mail and endorsing the original document to this effect.
- (b) the sheriff in terms of the provisions of the Magistrates Court’s Act 1944 (Act No. 32 of 1944) and Rules published in terms of section 6 of the Rules Board for Courts of Law Act, 1985 ( Act No. 107 of 1985); or
- (c) a peace officer in terms of the provisions of he Criminal Procedure Act of 1977 (Act No. 51 of 1977), relating to the serving of subpoenas.

(2) The clerk of the court sending a copy of the document in terms of sub regulation (1) (a) to the person on whom the document is to be served, must

---

<sup>31</sup> Section 13 (1) provides:

‘Service of any document in terms of this Act must forthwith be effected in the prescribed manner by the clerk of the court, the sheriff or the peace officer, or as the court may direct.’

require that proof of receipt be returned to him or her by relevant postal authority.

There are many procedural safeguards, as identified above, which form part of the Act. I am therefore not persuaded that those procedural safeguards employed in the Act are insufficient to protect the right to freedom and security of the person as entrenched in s 12 (1) (a) of the Constitution.<sup>32</sup> In the contrary, the nature of the deprivation is such that the procedure ensures that there are grounds for arrest if the respondent is arrested; and even before this it is ensured that the respondent is apprised of finalisation of the protection order. There is an overriding importance of eliminating domestic violence and in my decision, the legislature have adequately ensured that the rights of the respondents are not affected in the whole process.

On the facts before the court, the applicant was aware of the provisions of the order by consent which was finalized before the magistrate. There is no merit in the argument that the magistrate should not have issued a warrant on the order by agreement because that was the consent not the protection order. The applicant had legal representative at the time and should properly have understood the effects of the order. Parties came with the draft consent order, and the magistrate made the order final, as prayed. Contrary to the supposed ineffectiveness of the notice system in terms of the Act, the applicant at all times knew of the proceedings against him, this Court cannot therefore decide on what could happen in certain circumstances, suffice to say that proper safeguards exist to ensure that the speedy procedure of protecting the vulnerable and abused women does not compromise the equally important rights of the respondents.

#### Reverse onus and presumption of innocence

The applicant further challenged s 8 (2) and s 5 (3) (a) of the Act on the basis of the alleged reverse onus imposed by these section, which, so it was

---

<sup>32</sup> Above page 4.

argued, in turn infringes the constitutional right to fair trial and to be presumed innocent.<sup>33</sup> While, the Constitution protects the rights of women and their freedom, protection is also afforded to persons against whom protection orders are issued.

The first challenge is on s 8 (2). The section provides:

'The warrant referred to in subsection (1) (a) remains in force unless the protection order is made final.'

There is no merit in this submission, section 8 (2) is clear and unambiguous, it does not involve any incidence of onus.

Mr Omar also argued that there is a 'patent reverse onus' imposed on the applicant and other potential respondents under the Act by s 5 (3) (a).<sup>34</sup> The thrust of the submission is that in terms of the section, the respondent risks confirmation of the order or suspended warrant if he remains silent.

In this respect I agree with Ms Norman for the first and second respondents when she argued that the attack based on the reverse onus is misplaced. The nature of the proceedings before the confirmation of the interim protection order is civil. We actually find in this Act an interchange of civil and criminal proceedings. As put by Sachs J in the *Baloyi* case the Act:

'[S]eeks preventive rather than retributive justice, undertaken with a view ultimately to promoting restorative justice. The involvement of the courts in this realm represents an extension of the law into an area where lawlessness has long been sustained by interlaced notions of patriarchy and domestic privacy. It encourages recourse to law for spouses who might otherwise

---

<sup>33</sup> Above fn 7.

<sup>34</sup> Section 5 (3) (a) provides:

'An interim protection order must be served on the respondent in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued.'

suffer mutely because of the unwillingness to invoke more drastic criminal proceedings.<sup>35</sup>

In the words of the learned Judge the Domestic Violence Act does not oust criminal sanctions but 'supplement and reinforces them.'<sup>36</sup> The initial proceedings are in the nature of the interdict and therefore civil in nature. This is implicit even in the Act which provides that the standard of proof is on the preponderance of probabilities.<sup>37</sup> Those are two different aspects of the Act which in the first place ensure the speedy remedy and less confrontational approach before there can be any breaches of the protection order. If the protection order is breached and the party concerned is arrested, all the Constitutional rights will be given effect to.

This is in essence what happened in this case. There was a protection order which was issued by consent before the Magistrate, a suspended warrant of arrest was issued as per the provisions of s 8 (1), in all circumstances the applicant was aware of the protection order; the suspended warrant of arrest was then executed because the applicant breached the provisions of the order. Dealing with the matter as it came before me, with its facts, there is no reverse onus imposed by the s 5 (3) (a). Even if there is, in *S v Manamela and Another (Director General of Justice Intervening)*<sup>38</sup> the Constitutional Court has expressly confirmed the possibility of reverse onus being justifiable in certain circumstances. I will not deal with this matter since I have decided that no reverse onus is imposed by the Domestic Violence Act.

If I am wrong in my conclusions above, I go on to deal with the limitations clause.

### The limitation analysis

---

<sup>35</sup> *Baloyi* Above fn 8 at para [17] - [18].

<sup>36</sup> *Id.*

<sup>37</sup> Section 6 (4) provides:

'The court must, after hearing as contemplated in subsection (2), issue a protection order in the prescribed form if it finds, on the balance of probabilities, that the respondent has committed or is committing an act of domestic violence' [ My Emphasis].

<sup>38</sup> 2000 (5) BCLR 491 (CC). para [28]; *Coetzee* Above fn 21 at para [13].

The effective protection of women is a societal objective of great significance for our democracy and Constitutional values of freedom and human dignity. Wherever possible; the rights of women to be free from violence, especially from their close allies, the husbands, need to be jealously guarded.

There are two rights which are centrally infringed in the applicant's challenge in this case. The right to freedom and the right to be presumed innocent which is allegedly affected by the reverse onus. The rights in the Bill of Rights are not absolute. Section 36 (1) of the Constitution provides that:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in a open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

It is now trite that the s 36 (1) enquiry is a proportionality enquiry where consideration of factors include, but is not limited to those listed in sub paragraphs (a) – (b).<sup>39</sup>

In *Manamela*<sup>40</sup> the majority of the Constitutional Court Judges decided that;

'This Court has expressly kept open the possibility of reverse onus provisions being justifiable in certain circumstances. Ordinarily, a reverse onus will be justifiable only if the risk and consequences of erroneous conviction produced by statutory presumption against the accused are outweighed by the risk and

---

<sup>39</sup> *S v Manamela* Above fn 38 at para [32] – [33], and *De Reuck v National Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) at para [56].

<sup>40</sup> *S v Manamela* Above fn 38 at para [28].

consequences of the guilty person escaping conviction simply because of categorical adherence to impervious presumption of innocence.’

The right to be presumed innocent is vital to an open and democratic society committed to fairness and social justice.<sup>41</sup> If there is contravention of this right through reverse onus, and if the reverse onus exists, it is justifiable. The primary ground will be the effect that the legislature intended the Act to have. The effectiveness of the Act itself has been questioned in so far as it protects women. There is therefore no doubt that the ongoing legislative endeavor to effectively protect women from domestic abuse is of such importance that it overrides the importance of the right to be presumed innocent.

The right to silence is another right which has been said to be affected. The Constitutional Court has said that “[t]he right to silence like the presumption of innocence, is firmly rooted in both our common law and statute”<sup>42</sup> and is “inextricably linked to the right against self-incrimination and the principle of no-compellability of an accused person as a witness at his or her trial”.<sup>43</sup>

If this right is contravened by the Act, it can be justifiable because the information that is required is exclusively known to the respondent. The successful operation of the whole process might require him to divulge certain information.

For the above reasons none of the applicant’s constitutional rights are infringed by Section 8 of the Act.

The order I make therefore is that the application to declare Section 12 of the Domestic Violence Act No 116 of 1998 invalid is dismissed with costs.

---

<sup>41</sup> *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) at para [19].

<sup>42</sup> *S v Osman and Another v attorney General, Transvaal* 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC) at para [17]

<sup>43</sup> *S v Osman* Above fn 42 at para [17].

Date of hearing : 30<sup>th</sup> April 2004

Date of judgment : 31<sup>st</sup> August 2004

For the Applicant : Z Omar (instructed by Zehir Omar Attorneys)

For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents : T V Norman (instructed by the State Attorney KwaZulu Natal)

For the 3<sup>rd</sup> Respondent : K Pillay (instructed by the Legal Resources Centre – Durban)