CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 47/04

AHMED RAFFIK OMAR	Applicant
versus	
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
HALIMA JOOSAB	Third Respondent
THE COMMISSION FOR GENDER EQUALITY	Amicus Curiae

Heard on : 5 May 2005

Decided on : 7 November 2005

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction and factual background

[1] The Domestic Violence Act 116 of 1998 (the Act) provides for the issue of protection orders to help victims of domestic violence. Section 8[1] of the Act provides for a court to authorise a warrant of arrest when it issues a protection order, but for the

[1] The scheme of the Act and the role of section 8 are dealt with below from para 20 onwards. The wording of section 8 appears in para 27.

warrant to be suspended on condition that there is no breach of the terms of the protection order. This matter deals with the constitutionality of section 8, measured against the rights to freedom and security of the person, a fair trial and access to courts, as protected in the Constitution.

[2] Mr Ahmed Raffik Omar, the applicant, unsuccessfully applied to the High Court in Pietermaritzburg to have section 8 declared invalid.[2] He now applies for leave to appeal against the judgment and order of the High Court.

[3] According to the High Court judgment the application arose out of an abusive relationship between the applicant and Ms Halima Joosab, the third respondent. They were married to each other according to Islamic law, but became estranged from one another. Several protection orders were issued against the applicant in terms of the Act.

[4] This application was sparked by proceedings regarding one of these orders.[3] During the hearing in the Durban Magistrates' Court on the return day of an interim protection order, the parties – both represented by their attorneys – agreed to a draft order, which the court made the final order. In terms of the order the applicant was, amongst other things, prohibited from threatening, assaulting, harassing, intimidating,

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[2] See *Ahmed Raffik Omar v The Government of South Africa and Others* case number 3501/03, unreported.

[3] The order was issued under case number 113/2003. Another order under case number 143/2003, which the third respondent's father had obtained in the Durban Magistrates' Court against the applicant in terms of the Act, was set aside on the return date. An order under case number 880/2003, which the third respondent's father secured against the applicant in the Verulam Magistrates' Court, was discharged.

stalking or abusing the third respondent or their children. The applicant was furthermore ordered not to enter the third respondent's residence, nor to communicate with her except with regard to the children, to provide her with the use of a vehicle and to pay a monthly amount to her in respect of emergency monetary relief. The order also granted the applicant reasonable access to the children.

[5] A suspended warrant of arrest was annexed to the court order in terms of section 8(1) of the Act. When the terms of the order were allegedly breached, the warrant was executed, but subsequently suspended. The applicant then approached the High Court for relief.

[6] After the High Court application had been struck off the roll, and after an application for direct access to this Court had been dismissed for a number of reasons, including that the applicant should first approach the High Court,[4] the High Court heard the application. The applicant sought an order declaring section 8 of the Act invalid. Tshabalala JP dismissed the application.[5]

[7] The application for leave to appeal is opposed by the third respondent, as is the appeal. The third respondent applies for condonation for the late filing of papers in

[4] In *Ex Parte Omar* 2003 (10) BCLR 1087 (CC), this Court found that the constitutionality of section 8 of the Act was a matter of constitutional significance, but that the exceptional circumstances required for the grant of direct access did not exist, and that the applicant was entitled to and should re-enrol the application in the High Court. The applicant's refusal to comply with the rules of this Court was a contributing factor to this Court's order.

[5] The order as well as the last paragraph of the High Court's judgment erroneously refers to "section 12(8)" instead of section 8 of the Act.

response to the application. The third respondent has an obvious interest in the matter and could contribute to the deliberation of the important questions raised. She provides an acceptable explanation for the relatively short delay. The applicant would not be prejudiced by the granting of condonation. Therefore condonation is granted.

[8] The Government and the Department of Justice, the first and second respondents, do not oppose the application for leave to appeal. However, they oppose the appeal in the event of leave being granted. The Commission for Gender Equality applied to be admitted to the proceedings as amicus curiae, was admitted and made submissions on the appeal, but not on the application for leave to appeal.[6]

[9] The applicant also seeks condonation for his non-compliance with the rules relating to form, time and service. His explanation is that he was under the wrong impression that he needed a certificate from the High Court. Whether to grant or refuse condonation depends not only on the explanation offered, but also on the prospects of success of the applicant's case. The question of condonation is thus returned to later in this judgment.

[10] The applicant raises several objections regarding section 8 and related provisions of the Act. It would be useful to gain an understanding of the social

[6] In terms of section 187 of the Constitution, the Commission, as one of the state institutions supporting constitutional democracy recognised in chapter 9, must promote respect for gender equality and the protection, development and attainment of gender equality. The Commission is referred to in the Constitution and therefore in this judgment as the "Commission for Gender Equality", even though its website and letterhead indicate its name as the "Commission on Gender Equality". The submissions of the first and second respondents and the amicus also apply to the issues to be resolved regarding the application for leave to appeal, and not only to the appeal.

context and purpose as well as the scheme and contents of the Act, before considering the applicant's objections.

The context of the Act

[11] The context and purpose of the Act are stated in its preamble:

> "RECOGNISING that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective;
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> AND HAVING REGARD to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child;
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> IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence . . ."

[12] The High Court referred to the prevalence of domestic violence in South Africa, the response of the legislature thereto, and the obligation of our country under international law to protect women and families from domestic violence. The amicus and respondents presented detailed arguments in this regard.

[13] The high incidence of domestic violence in our society is utterly unacceptable. It causes severe psychological and social damage. There is clearly a need for an adequate legal response to it. Whereas women, men and children can be victims of domestic violence, the gendered nature and effects of violence and abuse as it mostly occurs in the family, and the unequal power relations implicit therein, are obvious. As disempowered and vulnerable members of our society, women and children are most often the victims of domestic violence.

[14] The criminal justice system has not been effective in addressing family violence, for a range of reasons. The need for effective domestic violence legislation was recognised by the legislature. It thus enacted the Prevention of Family Violence Act 133 of 1993, which preceded the Domestic Violence Act. Aspects of the Prevention of Family Violence Act resulted in a constitutional challenge involving several issues related to the right of an accused person to a fair trial. In overturning the order of the Pretoria High Court declaring section 3(5) unconstitutional, this Court expressed itself on a number of points relevant to the present enquiry.[7]

[15] On domestic violence as criminal conduct Sachs J, writing for the Court, said:

> "All crime 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

[7] *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC).

> the more pernicious because it is so often concealed and so frequently goes unpunished."[8] (footnotes omitted)

Sachs J furthermore stated that:

> "[t]o the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form."[9]

[16] On the need of victims of family violence for effective legal protection, the following was said in the same paragraph of *Baloyi*:

> "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 society that the daily trauma of vast numbers of women counts for little. The terrorisation of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behaviour are normalised rather than combatted." (footnotes omitted)

[17] Domestic violence brutally offends the values and rights enshrined in the Constitution. According to section 1 non-sexism is a founding value of our state. In addition, human dignity, the achievement of equality and the advancement of human rights and freedoms are recognised as founding values.[10] Section 12(1)(c) provides

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[8] Id at para 11.

[9] Id at para 12.

[10] Section 1 states:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from public or private sources. This right must be understood in conjunction with the rights to dignity,[11] life,[12] equality (which includes the full and equal enjoyment of all rights and freedoms)[13] and privacy.[14] This Court has recognised the constitutional requirement to deal effectively with domestic violence.[15] In *Carmichele*[16] the Court furthermore pointed out that South Africa also 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.[17]

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[11] Section 10.

[12] Section 11.

[13] Section 9.

[14] Section 14.

[15] *Baloyi* above n 7 at paras 11-13. In para 12 Sachs J states that "it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied."

[16] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62.

[17] Id at n 67. The Court referred to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), adopted by the United Nations in General Assembly Resolution 34/180 on 18 December 1979, and signed on 29 January 1993 and ratified by South Africa on 15 December 1995, as well as to recommendations of the Committee on the Elimination of Discrimination Against Women. Articles 2, 3, 6, 11, 12 and 16 of CEDAW directly or indirectly relate to violence against women. The principles of CEDAW are also evident in the Preamble of the Universal Declaration of Human Rights adopted on 10 December 1948 and Article 4(d) of the Declaration on the Elimination of Violence Against Women of 1994.

[18] In giving effect to the rights and obligations above, the reality of people's lives within the prevailing socio-economic conditions of individuals and groups in our country cannot be ignored. The complex private as well as public character of domestic violence and the need to combine civil and criminal remedies to address it have been recognised by this Court in *Baloyi*.[18] Whereas the privacy of the home and the centrality attributed to intimate relations are valued, privacy and intimacy often provide the opportunity for violence and the justification for non-interference. Victims are ambivalent about their fate and reluctant to go through with criminal prosecution. It is understandable for the legislature to enact measures that differ from those generally applicable to criminal arrests and prosecutions. It is clear that the Act serves a very important social and legal purpose.

[19] This does not mean that in addressing domestic violence the legislature may disregard the fundamental rights and fair trial procedures guaranteed in the Constitution. The applicant submits that it has done so. The applicant's objections must be analysed in view of a proper understanding of the working of the provisions of section 8, within the purpose and scheme of the Act as a whole.

The scheme of the Act

[20] The central theme of and main legal remedy contained in the Act is protection orders against domestic violence. The long title of the Act states:

[18] Above n 7 at paras 16-19.

> "To provide for the issuing of protection orders with regard to domestic violence; and for matters connected therewith."

[21] The historical ambivalence of the role of law enforcement is addressed emphatically in the Act. The essential importance of the South African Police Service (the police) in providing protection against domestic violence and in empowering the victims thereof is evident from the wording of section 2.[19] Under the heading "Duty to assist and inform complainant of rights" it states that any member of the police must, when domestic violence is committed or reported, assist the complainant and inform and explain to the complainant the available remedies, including the right to lodge a criminal complaint. In terms of section 3 a peace officer may without a warrant arrest any person at the scene of an incident of domestic violence, whom the peace officer reasonably suspects of having committed an offence containing an element of domestic violence against the complainant.

[22] Sections 4 to 7 deal with the circumstances in which protection orders may be obtained. In terms of section 4 (read with regulation 4(2) of the Domestic Violence

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[19] Section 2 states:

> "Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported—
>
> > (a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
> >
> > (b) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and
> >
> > (c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable."

Regulations of 1999)[20] any complainant may apply to the court for a protection order, by way of affidavit. The affidavit must explain the basis for the application and must include the name of the police station where the complainant is likely to report any breach of the protection order. The application may be accompanied by supporting affidavits and must be lodged with the clerk of the court. The application may be brought outside ordinary court hours or on a day that is not an ordinary court day, if the court is satisfied that the complainant may suffer undue hardship if the application is not dealt with immediately.

[23] In terms of section 5 the court must as soon as reasonably possible consider the application and may consider any additional evidence it deems fit, including oral evidence or evidence by affidavit. At this stage of the proceedings the respondent need not be informed of the proceedings. The Act regulates the circumstances in which the court has to grant an interim order without notice to the respondent. The court is only obliged to grant an interim order if the court is satisfied, firstly, that there is prima facie evidence that the respondent is committing or has committed an act of domestic violence and, secondly, that undue hardship may be suffered by the complainant as a result of the violence if an order is not issued immediately.

[20] Government Gazette 20601 GN R1311, 5 November 1999.

[24] The interim order must then be served on the respondent.[21] It must call on the respondent to show cause on the return date specified in the order why a final protection order should not be issued. The return date may not be less than ten days after service upon the respondent. It may however be anticipated by the respondent upon not less than 24 hours' written notice to the complainant and the court.[22] An interim protection order has no force and effect until it has been served on the respondent.[23] Provision is also made for situations in which the court does not issue an interim protection order, but directs that certified copies of the application and affidavits be served on the respondent, together with a notice calling on the respondent to show cause on the return day why a protection order should not be issued.

[25] Section 6 deals with the issue of a final protection order. If the respondent does not appear on the return date, the court must issue an order if it is satisfied that proper service on the respondent has taken place and that the application contains prima facie evidence that the respondent has committed or is committing an act of domestic violence. If the respondent appears on the return date to oppose the application, a hearing must take place. The court must consider any evidence previously received,

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[21] Section 5(3) states:

> "(a) 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.
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> (b) A copy of the application referred to in section 4(1) and the record of any evidence noted in terms of subsection (1) must be served on the respondent together with the interim protection order."

[22] Section 5(5).

[23] Section 5(6) expressly states: "An interim protection order shall have no force or effect until it has been served on the respondent."

as well as further affidavits or oral evidence. After the hearing the court must issue a protection order if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence. When a protection order is issued, the clerk of the court must forthwith arrange for the original of the order to be served on the respondent and certified copies of the order and the warrant to be served on the complainant. Copies must also be forwarded to the police station chosen by the complainant. A protection order remains in force until it is set aside.

[26] Section 7 describes the court's powers in respect of a protection order. The court may prohibit the respondent from engaging in a range of acts: from committing any act of domestic violence, to preventing the complainant from entering or remaining in a shared residence, or conducting any other act specified in the protection order. The court may furthermore order other conditions deemed reasonably necessary for the safety, health or well-being of a complainant and may impose on the respondent obligations regarding rent or mortgage payments. The court may order the respondent to pay emergency monetary relief, having regard to the financial needs and resources of both parties. It may also include in the order conditions concerning access to and contact with the children.

[27] In view of the above-mentioned, the provision in section 8 for a warrant of arrest linked to the issuing of a protection order is clearly intended to provide a mechanism to ensure compliance with protection orders and to protect complainants

against further domestic violence. It also foreshadows a later criminal prosecution for breaching the protection order. Section 8 states:

> "(1) Whenever a court issues a protection order, the court must make an order—
>
> (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and
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> (b) suspending 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—
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> (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 a 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 the 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—
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> (i) specifies the name, the 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 a 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 notice to the respondent and that he or she explained the import thereof to the respondent.
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> (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.
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> (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—
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> (a) the risk to the safety, health or wellbeing of the complainant;
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> (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.
>
> (6) Whenever a warrant of arrest is handed to a member of the South African Police Service 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."

[28] In short, whenever a court issues a protection order, it must make an order authorising the issue of a warrant for the arrest of the respondent and suspending the execution of the warrant, subject to compliance with the contents of the order. The warrant remains in force until the protection order is set aside, or until the warrant is cancelled after its execution. A second warrant of arrest must be issued by the clerk of the court if the complainant states in an affidavit that the warrant is required for her or his protection and that the existing warrant has been executed and cancelled, lost or destroyed.

[29] A complainant, who is of the view that the respondent has contravened any of the contents of the protection order, may hand the warrant of arrest together with an

affidavit stating that the respondent has contravened the order to any member of the police. If it appears to that member that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, he or she must forthwith arrest the respondent for the alleged contravention, which is an offence in terms of section 17(a). In considering whether or not the complainant may suffer imminent harm, the police official must take into account the risk to the safety, health and well-being of the complainant, the seriousness of the conduct comprising an alleged breach of the protection order and the length of time since the alleged breach occurred. If the official is of the opinion that there are insufficient grounds for arresting the respondent, he or she must forthwith notify the respondent in writing to appear before a court at a specified time on a charge of contravening the protection order. In such a case the impact of the notice must also be explained to the respondent.

[30] Whenever a warrant of arrest is handed to a member of the police by a complainant, the police official must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent. The official must also explain to the complainant how to lay such a charge.

[31] In terms of section 10 a protection order may be varied or set aside by the court. A complainant or a respondent may give written notice to the other party and apply to the court for variation or rescission of the order. If the court is satisfied that good cause has been shown for variation or setting aside of the order, it may so order.

However – the legislature being mindful of the vulnerability of the victims of domestic violence and of power relations in family and domestic situations – a court may not grant such an application by the complainant, unless it is satisfied that the application is made freely and voluntarily.

The applicant's case

[32] The applicant's case has been neither precisely stated nor fixed. In the High Court he raised a number of constitutional objections to the provisions of section 8 of the Act, particularly subsections (1) to (4). He also complained about the implications of section 5(3) and (6) of the Act. On appeal he submitted that words must be read into section 20 of the Act, which would amount to an amendment of section 40(1) of the Criminal Procedure Act 51 of 1977 (as explained in paragraphs 54 and 55 below). His submissions in his affidavit supporting his notice of motion in the High Court, his application before this Court, the written heads of argument presented to this Court by his attorneys and in particular the oral submissions made to this Court by his legal representative present a less than completely coherent and logical picture of his concerns.

[33] If the raising of new issues on appeal is permitted, it would result in this Court as a court of appeal having to function as a court of first and last instance. It could also deprive this Court of the benefit of a judgment by another court. For these and

other reasons it is not ordinarily permitted.[24] In view of the analysis and conclusions that follow, it is not necessary to make a ruling on the applicant's conduct in this regard. The applicant's submissions are for the purpose of deciding this matter and clarifying the law around the Act approached with some flexibility. However, his prayer in his notice of motion to declare section 8 of the Act unconstitutional remains the only issue this Court is called on to decide.

[34] The heads of argument submitted on behalf of the applicant in this Court are regarded as the basis of his case. For the purposes of a legal and constitutional analysis, the applicant's submissions can be grouped under five headings:

(a) Section 8(1) of the Act violates the right of access to courts, guaranteed in section 34 of the Constitution, by making it mandatory for the court issuing a protection order to authorise a warrant of arrest, in the absence and without the knowledge of the respondent.

(b) Section 8(4) allows for arbitrary arrest in violation of section 12(1)(a) of the Constitution, by providing for the arrest of a respondent who does not have knowledge of the proceedings and by allowing the police no discretion as to the credibility of the allegations made by a complainant. The section bestows the functions of a court onto police officials.

[24] See *Phillips and Others v National Director of Public Prosecutions* CCT 55/04, 7 October 2005, as yet unreported, at paras 38-45; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at paras 25-26.

(c) Aspects of the right to a fair trial, guaranteed in section 35(3) of the Constitution, are violated because section 8, read with section 5(3), creates a "reverse onus of proof" and the possibility of a criminal conviction "on a balance of probabilities".

(d) Less restrictive means to achieve the purpose of the Act are available to the legislature, including section 40 of the Criminal Procedure Act.

(e) The procedure provided for in section 8 of the Act is open to misuse, exploitation or manipulation and the Act does not contain sufficient safeguards.

(a) Access to courts

[35] According to the applicant, it is objectionable that in terms of section 8(1) it is mandatory for the court issuing a protection order also to authorise an arrest in the absence and without the knowledge of the respondent. As such the respondent is denied access to court and section 34[25] of the Constitution is violated.

[36] Not much appears to turn on the fact that it is mandatory for the court to authorise a warrant of arrest when issuing a protection order. Because the warrant is intended to ensure compliance with the protection order, it automatically accompanies

[25] Section 34 states:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

the order. The execution of the warrant is suspended for as long as the provisions of the order are complied with. The warrant cannot remain in force longer than the order is in place.

[37] As shown above,[26] an interim protection order may be issued without notice of the proceedings having been given to the respondent. The reason for this procedure is obvious, namely to protect a complainant against abuse by a respondent, who has committed or is committing an act of domestic violence, as soon as it becomes known to the respondent that the complainant has applied or is applying for a protection order. To require notice to the respondent – the very source of the threat of violence – would defeat the object of protection for the complainant, who could be placed in more serious danger. The interim order must be served on the respondent and has no force or effect before service has taken place. On a specified return day, which can be anticipated, the respondent may put forward reasons why a final order should not be granted. After a proper hearing the court decides whether to issue a final order.

[38] The procedure provided for to obtain a protection order is not uncommon for situations where a party who feels threatened by the immediate conduct of another approaches a court for urgent relief without giving notice to the respondent. Interim relief is granted by courts on a daily basis and respondents are called upon to appear before the court on a specified return date to show cause why the interim relief should not be made final. On the return date the court, after a proper hearing, decides

[26] See paras 23-25.

whether to discharge an interim order or to grant final relief. It is also quite common that the return date may be anticipated by the respondent and that an interim order can be varied or set aside. It is not surprising that the legislature has opted to utilise established and well-known procedures for dealing with emergency situations, to adapt these to meet the needs related to domestic violence and to codify them in a statute.[27] Section 8 does not deny a respondent access to the courts.

(b) Arbitrary arrest

[39] The applicant submits that section 8, read with other sections of the Act, provides for the arbitrary arrest of a respondent. It thus violates section 12(1)(a)[28] of the Constitution.[29]

[40] According to the applicant, the effect of section 8 is to provide for a respondent to be arrested without having actual knowledge of either the original order or the

[27] In *Baloyi* above n 7 Sachs J said the following in para 17 about the interdict process in the legislation which was considered in that case:

> "The ambivalence of the victim and the reluctance of law enforcement officers to 'take sides' in family matters, coupled with the intimate and potentially repetitive character of the violence, is highly relevant to the creation of a special process for the issuing of domestic violence interdicts. The interdict process is intended to be accessible, speedy, simple and effective. The principal objective of granting an interdict is not to solve domestic problems or impose punishments, but to provide a breathing-space to enable solutions to be found; not to punish past misdeeds, but to prevent future misconduct. At its most optimistic, it seeks preventive rather than retributive justice, undertaken with a view ultimately to promoting restorative justice." (footnotes omitted)

[28] The applicant's legal representative also referred to detention without trial. Section 12(1)(a) and (b) states:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial".

[29] His submissions in this regard also involve aspects of the right to a fair trial, dealt with below. It was argued on his behalf that even the right to freedom of movement, protected in section 21(1) of the Constitution, is violated, but no clear submissions were made in this regard.

hearing. The respondent might first get to know about the case against him or her when the warrant is actually executed, in other words when an arrest is made. The answer to this submission is that an interim order has no force or effect before service has taken place. The suspended warrant of arrest can only be executed once a police official has received an affidavit by the complainant stating that the protection order has been contravened. An order that has not come into force and has no effect cannot be contravened.

[41] The applicant however argues that the requirements regarding service are not sufficient. In terms of sections 5(3) and (6) and 13 of the Act, as well as regulation 15,[30] the warrant must be served by the clerk of the court, the sheriff, or a peace officer, according to the rules of the Magistrates' Court. Service by registered post is permissible. In view of the judgment of this Court in *Coetzee*,[31] he submits, any provision for the imprisonment of someone without actual knowledge of either the original judgment against him or her or the hearing is unconstitutional.

[42] The applicant's reliance on the judgment of this Court in *Coetzee* was correctly rejected by the High Court. In reviewing section 65 of the Magistrates' Court Act 32

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[30] The relevant part of regulation 15 states:

> "(1) Service of any document in terms of the Act or these regulations, except where the Act or regulations provide 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 . . ."

[31] *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

of 1944, *Coetzee* dealt with civil imprisonment within the context of the protection of the right to freedom and security of the person in the interim Constitution. The Court held that to provide a mechanism for the enforcement of judgment debts was a legitimate governmental objective, but that the means to achieve it were unreasonable, because the provisions of section 65 were overbroad. The sanction of imprisonment ostensibly aimed at a debtor who will not pay, also struck at those who were unable to pay and failed to prove this at a hearing.

[43] Kriegler J advanced seven interrelated reasons why the provisions of section 65 were indefensible. According to the applicant's legal representative, six of the seven reasons support the applicant's attack on the constitutionality of section 8. However, the applicant's submissions appear to be based on the first reason, namely that the provisions of section 65 allowed persons to be imprisoned without actual notice of either the original judgment or the hearing. It was theoretically and practically possible that the debtor's first notice of the case against him or her was when the warrant of committal was executed.[32] In terms of the procedure permitted by the Magistrates' Court Act and the rules promulgated thereunder, there did not necessarily have to be a personal service prior to the execution of the warrant. In the case of a default judgment, section 65A(2) only required notice by registered post. The main point of comparison appears to be the fact that the Domestic Violence Act also permits service by registered mail.

[32] Id at para 14.

[44] The differences between the procedures are telling, though. The civil imprisonment procedure provided for indefinite imprisonment as a result of a failure to pay a debt. Section 8 is aimed at ensuring compliance with protection orders and the immediate protection of vulnerable people against domestic violence. It provides for the arrest of a person who has allegedly breached a protection order and envisages an eventual criminal trial. Once arrested, the respondent is entitled to the protection contained in section 35 of the Constitution. Most importantly the respondent will be entitled to legal representation, to be brought before a court within 48 hours and to be released on bail, if a court considers that appropriate. These protections were not available to a person imprisoned under section 65. The circumstances of a respondent contemplated in section 8 cannot therefore be equated with a person facing the form of civil imprisonment under consideration in *Coetzee*'s case. As stated earlier, this procedure has to be viewed against the sad history of the failure of the criminal justice system to provide for the protection of victims and for the arrest and conviction of perpetrators of family violence.

[45] The applicant also raises specific concerns about section 8(4), which in effect "clothes" the member of the police referred to in the section with the powers of the prosecutor and the court. As explained earlier, a complainant may hand the warrant of arrest to the police official, together with an affidavit stating that the respondent has contravened any of the provisions of the protection order. If it appears to the police official that there are reasonable grounds to suspect that the complainant may suffer

imminent harm as a result of the alleged breach, he or she must forthwith arrest the respondent.

[46] The applicant argues, firstly, that the police official is obliged to act on the word of a possibly malicious complainant. Section 8(4) thus provides for the imprisonment of the respondent without it having been established that the respondent is prima facie guilty of an offence. The police official has no discretion to consider the possible truthfulness or otherwise of the allegations in the affidavit that the protection order has been breached. Secondly, as to the suspicion that imminent harm may be suffered, the test is whether it appears to the police official that there are reasonable grounds for such a suspicion. According to the applicant, provision ought to be made for a complainant who believes that a protection order has been violated to approach a magistrate, who should then issue a warrant if he or she believes that good grounds in support of the complaint exist.

[47] As to the possibility of a false allegation that the protection order has been breached, it must be remembered that the complainant has to state in an affidavit that the respondent has committed an act of domestic violence in contravention of the protection order. The earlier application for a protection order must itself in terms of sections 5 and 6 be supported by an affidavit. This renders the complainant criminally liable for intentionally made false allegations. In comparison, section 40(1)(b) of the Criminal Procedure Act provides for the arrest by a peace officer without a warrant of someone whom he or she reasonably suspects of having committed a Schedule 1

offence.[33] Whereas a reasonable suspicion that the offence has been committed is required, the peace officer may have to act on a mere complaint made, without the measure of assurance implied by an affidavit.

[48] The context and purpose of the Act is again relevant in this regard. If a respondent, against whom a protection order has already been issued (based on previously committed acts of domestic violence), contravenes the order and commits or threatens acts of domestic violence that could cause a complainant imminent harm, the complainant needs immediate protection by the police. There is no time once again to approach a court. Therefore a warrant of arrest is authorised simultaneously with the issuing of a protection order. The police official does have a discretion. He or she is only obliged forthwith to arrest the respondent, if it appears that there are reasonable grounds to suspect that imminent harm to the complainant may result from the alleged breach. In considering whether imminent harm may follow, several factors have to be taken into account. The police official may also come to the conclusion that there are insufficient grounds for an arrest and must then notify the respondent to appear before court.[34] Historically law enforcement officials have been reluctant to believe complainants and to interfere in what was regarded as private and domestic conflicts. In terms of section 8(4) police officials are now obliged to accept the contents of the affidavit and to act when it appears that reasonable grounds exist for a suspicion of imminent harm to the complainant. The requirement of an

[33] Schedule 1 includes murder, robbery, rape and fraud.

[34] See the wording of section 8 and the explanation of its contents at paras 27-29 above.

appearance of reasonable grounds for a suspicion is no less objective a test than (for example) the required existence of a reasonable suspicion.

[49] In view of the above, the arrest provided for in section 8(4) cannot be regarded as the deprivation of freedom arbitrarily or without just cause.

(c) Fair trial concerns

[50] The applicant submits that a respondent in terms of section 8 should be regarded as an accused person in terms of section 35(3) of the Constitution. The process provided for in section 8 results in the violation of the rights of the respondent as an accused person to remain silent and to be presumed innocent, protected in section 35(3)(h).[35] The Act creates the risk of a criminal conviction based on proof "on a balance of probabilities", because of the absence of a specific provision in the Act directing that the court must be satisfied "beyond reasonable doubt" as to the guilt of the respondent. Furthermore, sections 5(3) and 8(2) of the Act are said to create a "reverse onus of proof", by requiring that an interim protection order must be served on the respondent and must call upon the respondent to show cause on the return date why a protection order should not be issued.

[51] The standard of proof required for satisfying the court that a final protection order must be issued is indeed the civil one of a balance of probabilities. A respondent in section 8 proceedings is clearly not an accused in a criminal trial and

[35] Section 35(3)(h) states that every accused person has the right to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.

therefore is not entitled to the rights enshrined in section 35(3) of the Constitution. If and when an accused is indeed charged with the contravention of the protection order as a criminal offence, he or she becomes an accused person in terms of section 35(3). The fair trial rights of an accused person would then apply to the process. A criminal trial is different, however, from the hearing to enable the court to decide whether a final protection order should be granted. It is also different from the execution of the warrant of arrest, which is not the imposition of a sentence, but rather a temporary measure to ensure compliance with a protection order and the protection of a complainant, in whose favour an order has already been granted.[36]

[52] Viewed from a proper perspective, section 5(3) and (6) has nothing to do with reversing the onus of proof in criminal proceedings. The procedure is not only common, as stated earlier, but does not result in a criminal conviction.[37]

[53] Section 8 of the Act cannot be found to violate the right to a fair trial.

(d) Less restrictive possibilities

[54] The applicant submits that section 8 of the Act unnecessarily infringes fundamental rights, because the creation of offences identified in section 17 of the Act in any event empowers a peace officer to invoke the provisions of section 40 of the Criminal Procedure Act. Section 40 states that a peace officer may without a warrant

[36] See also the distinction made in *Baloyi* above n 7 at paras 20-23.

[37] In *Baloyi* above n 7 at paras 23-33 this Court also dealt with the issue of a reverse onus in respect of the Prevention of Family Violence Act 133 of 1993.

arrest a person under a range of circumstances.[38] According to the applicant, this section could be used, rather than resorting to section 8.

[55] In his attempt to propose less restrictive means to achieve the purpose of the Act, the applicant also refers to section 20 of the Act. This section amends section 40(1) of the Criminal Procedure Act by adding subsection (q) to it and specifically mentions as one of the categories of persons who may be arrested without a warrant of arrest, a person who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act. The applicant proposes that a further subsection should be read into section 40(1) to incorporate the requirement of a reasonable suspicion into section 40(1), as well as into the application of the Domestic Violence Act. The applicant furthermore suggests that words should be read into section 56 of the Criminal Procedure Act.

[56] Even leaving aside the conclusion reached earlier that section 8 does not infringe constitutional rights, the applicant's submissions regarding less restrictive possibilities are not at all persuasive. Firstly, section 40 gives less protection to a person about to be arrested than section 8. It requires no previous process such as an interim order, no notice and no affidavit. In terms of section 40(1)(b) only a reasonable suspicion is required. Secondly, section 8 and section 40 are not comparable. Whereas section 8 provides for a warrant of arrest, which is suspended until the alleged violation of the protection order, section 40 authorises a peace officer

[38] These circumstances are stated in subsections (a)-(q) of section 40(1).

to arrest someone without a warrant in a range of specified circumstances. The only link between section 40 and the Domestic Violence Act is section 20 of the Act, which amends section 40 by adding subsection (q) to it. A peace officer may thus also arrest without a warrant a person who is reasonably suspected of having committed an act of domestic violence.

[57] The applicant's proposals regarding reading into sections 40 and 56 of the Criminal Procedure Act are devoid of any persuasive value and in fact difficult to understand. These submissions furthermore fall outside the scope of the issues to be decided here, in view of the relief sought in the applicant's notice of motion.

Misuse, exploitation and manipulation

[58] The applicant submits that section 8 of the Act is open to "abuse" and that sufficient safeguards are lacking. In this regard his legal representative, especially in oral argument, referred to the wide definition of "domestic violence" in the Act, which includes "economic abuse" and the fact that a malicious and vindictive complainant could cause an innocent respondent to be arrested. He also mentioned the exploitation or manipulation of the Act by attorneys to gain an unfair advantage over their opponents.

[59] The definition of "domestic violence" in section 1 of the Act[39] does include "economic abuse". The last-mentioned term is defined in the same section as including−

> "(a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; or
>
> (b) the unreasonable disposal of household effects or other property in which the complainant has an interest."

Save to point out that in terms of the definition of domestic violence economic abuse could only be regarded as domestic violence where it harms or may cause imminent harm to the safety, health or well-being of the complainant, it is not necessary to decide conclusively on the constitutional acceptability of the definition, since it was not attacked as unconstitutional by the applicant.

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[39] "'[D]omestic violence' means—

(a) physical abuse;

(b) sexual abuse;

(c) emotional, verbal and psychological abuse;

(d) economic abuse;

(e) intimidation;

(f) harassment;

(g) stalking;

(h) damage to property;

(i) entry into the complainant's residence without consent, where the parties do not share the same residence; or

(j) any other controlling or abusive behaviour towards a complainant,

where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant."

[60] It is possible that the mechanism provided by section 8 of the Act may be exploited, manipulated or misused, although official statistics in this regard were not presented in this case and may not exist.[40] However, the potential to exploit a statute does not render the statute unconstitutional. Many laws are open to exploitation. Criminal law and procedure as such do not contain guarantees against unjustified arrests based on unfounded complaints regarding serious offences. The possibility of the Act being maliciously manipulated is by far outweighed by its potential to afford protection by the police to the victims of domestic violence, against the background of a history in which this protection was sadly withheld. The need for the law to encourage victims of domestic violence to approach and interact with the police was explained earlier and is to some extent met by the Act.

[61] It is crucially important for lawyers as officers of the court with a responsibility to uphold the Constitution and the law not to exploit or manipulate the Act to gain a tactical advantage in divorce litigation and custody battles, because this could well be at the cost of the effectiveness of the Act. As stated by this Court in *Baloyi*,[41] legislation of this kind does not purport to oust existing family and criminal law remedies and penalties, but to supplement and reinforce them.

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[40] Some research has been conducted on the implementation of the Act. A research report by the Consortium on Violence against Women found that the wide definition of domestic violence has opened the door to misuse. See Parenzee P, Artz L and Moult K *Monitoring the Implementation of the Domestic Violence Act: First Research Report 2000-2001* Institute of Criminology, University of Cape Town at 87-88. The report documents some of the frustrations of police officials at e.g. being faced with a conflict between two parents who have both breached protection orders, often in front of their children. It warns against the dangers of police and courts developing a cynical and flippant attitude regarding the Act, which could feed into negative and harmful stereotypical thinking about women.

[41] Above n 7 at para 19.

[62] The possibility of exploitation therefore does not render section 8 of the Domestic Violence Act unconstitutional.

Conclusion

[63] A case has not been made out that section 8 falls foul of any of the provisions of the Constitution on which the applicant relies. In view of the fact that the applicant's case is without merit and holds no reasonable prospect of success, viewed together with his explanation for his non-compliance with the rules, the condonation he applies for is refused. Leave to appeal can consequently not be granted.

Costs

[64] The applicant has not been successful. However, he has endeavoured to enforce fundamental constitutional rights, even though the application was to a considerable extent ill-conceived. Costs should not be awarded against him as far as the first two respondents are concerned. The third respondent submitted that the application for leave to appeal should be dismissed with costs. The costs of the third respondent must therefore be paid by the applicant.

Order

[65] 1. The application for condonation of the applicant's non-compliance with the rules of this Court is dismissed.

2. The application for leave to appeal against the decision of the High Court is dismissed.

3. The applicant must pay the costs of the third respondent.

Langa ACJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J and Yacoob J concur in the judgment of Van der Westhuizen J.

For the applicants:	Mr Zehir Omar instructed by Zehir Omar Attorneys.
For the first and second respondents:	Ms T V Norman instructed by the State Attorney.
For the third respondent:	Ms Kameshni Pillay instructed by the Legal Resources Centre, Durban.
For the amicus curiae:	Ms Karrisha Pillay instructed by the Women's Legal Centre.