CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 29/99

THE STATE

versus

GODFREY BALOYI Appellant

THE MINISTER OF JUSTICE First Intervening Party

THE COMMISSION ON GENDER EQUALITY Second Intervening Party

Heard on : 9 November 1999

Decided on : 3 December 1999

JUDGMENT

SACHS J:

Introduction

[1] The Transvaal High Court declared invalid section 3(5) of the Prevention of Family Violence Act 133 of 1993 ("the Act"), and referred its declaration to this Court for confirmation.[1] It based its

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[1] Section 167(5) of the Constitution reads:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

See also section 172(2) (a) which reads:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless

order of invalidity on three findings: first, that the section places a reverse onus of proving absence of guilt on a person charged with breach of a family violence interdict, secondly, that in so doing it conflicts with the presumption of innocence,[2] and thirdly, that such limitation of the right to be presumed innocent cannot be constitutionally justified.[3] In dealing with the matter, this Court faces the novel and complex task of establishing the appropriate balance between the state's constitutional duty to provide effective remedies against domestic violence, and its simultaneous obligation to respect the constitutional rights to a fair trial of those who might be affected by the measures taken.

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it is confirmed by the Constitutional Court."

[2] Section 35(3)(h) reads:

"Every accused person has a right to a fair trial, which includes the right—

. . . .

to be presumed innocent, to remain silent, and not to testify during the proceedings; . . ."

[3] Section 36(1) reads:

"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 an 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 relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

[2] Even though all the relevant provisions of the Act are about to be replaced by the Domestic Violence Act 116 of 1998, which comes into force on 15 December 1999,[4] a decision on the constitutional validity of the present Act is necessary, since it continues to affect the appellant and others in a similar position.

The factual background

[4] Government Gazette 20469 No. R 97, 13 September 1999.

[3] The dispute is between the appellant, an army officer, and his wife, the complainant. The complainant laid a charge of assault against the appellant with the police and was advised by them to obtain an interdict in terms of the Act.[5] The interdict was granted by a magistrate in Pretoria, who ordered the appellant not to assault the complainant and their child and not to prevent them from leaving or entering their joint home. A warrant for the arrest of the appellant was simultaneously granted but suspended in terms of the Act.[6] The appellant then allegedly assaulted the complainant again and threatened to kill her. The complainant reported this to the police and was requested to make an affidavit in terms of the Act setting out the alleged facts.[7] The police then arrested the appellant[8] and

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5 Section 2(1) reads:

> "A judge or magistrate in chambers may, on application in the prescribed manner by a party to a marriage (hereinafter called the applicant) or by any other person who has a material interest in the matter on behalf of the applicant, grant an interdict against the other party to the marriage (hereinafter called the respondent) enjoining the respondent—
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> (a) not to assault or threaten the applicant or a child living with the parties or with either of them;
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> (b) not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated;
>
> (c) not to prevent the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home; or
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> (d) not to commit any other act specified in the interdict."

6 Section 2(2) reads:

> "In granting an interdict contemplated in subsection (1) the judge or magistrate, as the case may be, shall make an order—
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> (a) authorizing the issue of a warrant for the arrest of the respondent;
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> (b) suspending the execution of such warrant subject to such conditions regarding compliance with the interdict as he may deem fit; and
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> (c) advising the respondent that he may, after 24 hours' notice to the applicant and the court concerned, apply for the amendment or setting aside of the interdict contemplated in subsection (1)."

7 Section 3(1).

8 Section 3(1) reads:

> "Subject to the provisions of section 2 (3) a warrant of arrest issued and suspended in terms of section 2 (2) may be executed by a peace officer as defined in section 1 of the

brought him before a magistrate for an enquiry into the alleged breach of the interdict.

[4] The Act provides that a person so arrested must be brought before a judge or magistrate as soon as possible[9] and:

> "3(4) The judge or magistrate before whom a respondent is brought in terms of subsection (2) shall enquire into the respondent's alleged breach of the conditions of the order made in terms of section 2 (2) and may at the conclusion of such enquiry—
>
> (a) order the release of the respondent from custody; or
>
> (b) convict the respondent of the offence contemplated in section 6."[10]

[5] It was at this stage that the provision under review in the present matter became operative. Section 3(5) of the Act reads:

> "The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), relating to the procedure which shall be followed in respect of an enquiry referred to in section 170 of that

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> Criminal Procedure Act, 1977 (Act No. 51 of 1977), upon receipt of an affidavit in which it is stated that the respondent has breached any of the conditions contained in the order contemplated in section 2 (2)."

9 Section 3(2).

10 Section 6 provides:

> "A person who—
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> (a) contravenes an interdict or other order granted by a judge or magistrate under section 2 (1) or (2); or
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> (b) fails to comply with the provisions of section 4,
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> shall be guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment and in the case of an offence referred to in paragraph (b) to a fine or imprisonment for a period not exceeding three months or to both such fine and such imprisonment."

Act, shall apply *mutatis mutandis* in respect of an enquiry under subsection (4)."

[6] Section 170 of the Criminal Procedure Act 51 of 1977 ("CPA") deals with failure of an accused in a criminal trial to appear after an adjournment or to remain in attendance. It reads as follows:

> "(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).
>
> (2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed ro remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months." [My emphasis.]

[7] At the enquiry the complainant and her brother testified first. Her story was that he had kicked her heavily on the buttocks and pushed her roughly. Thereafter the appellant, who was represented by an attorney, elected to testify. His story was that she had thrown something at him while her brother had tried to throttle him. Stating that the matter had to be judged "on the basis of the onus being on a balance of probabilities", the magistrate decided that the appellant's version was improbable and untrue. She convicted the appellant of violating the interdict, and sentenced him to twelve months imprisonment,

six suspended.

[8] The appellant appealed to the Transvaal High Court, contending that the section in terms of which he was convicted imposed an onus on him to prove that he had not wilfully violated the interdict. This, he submitted, was unconstitutional because it infringed his right under section 35(3)(h) of the Constitution to be presumed innocent and to have his guilt proved beyond reasonable doubt by the state. As already mentioned, the High Court upheld this contention. The High Court went on to state that the limitation of the right to be presumed innocent could not be justified under section 36 of the Constitution inasmuch as the injustice of sending an innocent person to jail outweighed the evil flowing from the difficulties encountered by the state in establishing proof beyond a reasonable doubt. The High Court further indicated, with little elaboration, that it was essentially a case of the appellant's word against that of the complainant and her brother. If the reverse onus applied, the conviction must be sustained. If, on the other hand, the state had to prove the appellant's guilt beyond a reasonable doubt, his appeal should be upheld. After declaring section 3(5) of the Act to be invalid, the High Court referred its decision to this Court for confirmation.

[9] Responding to notice given to various bodies by the President of the Court, the Minister of Justice and the Commission for Gender Equality made written and oral submissions on the constitutionality of section 3(5). The Court is indebted to the Commission for Gender Equality for its intervention and to Mr Marcus, Mr Chaskalson and Ms Kalla who appeared for the Commission pro bono.

[10] Counsel for the Minister and for the Commission, respectively, challenged the decision of the High Court on several grounds. There was considerable overlap between them, and for the sake of convenience I will consolidate their various contentions into three main arguments. The first is that alleged violators should not be considered as "accused persons" entitled to the protection of the presumption of innocence. The second is that even if they are to be regarded as accused persons the sections should not be interpreted to impose a reverse onus. The third is that if the proper interpretation of the sections involves the imposition of a reverse onus on accused persons, then the limitation of the presumption of innocence involved can be justified. Before considering these three questions I will establish the relevant constitutional and legislative context.

The constitutional requirement to deal effectively with domestic violence

[11] 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.[11] It cuts across class, race, culture and geography,[12] and is all the more pernicious because it is so often

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11 Speaking of the analogous situation in the United States, Donna Wills writes:

> "Besides being 'an unacknowledged epidemic in our society,' domestic violence is the leading cause of injury to women, a major factor in female homicide, a contributing factor to female suicide, a major risk for child abuse, and a major precursor for future batterers and violent youth offenders. The State cannot ignore the human tragedies that are caused by domestic violence." [Citations omitted]

"Mandatory Prosecution in Domestic Violence Cases: Domestic Violence: The Case for Aggressive Prosecution" (1997) 7 *UCLA Women's Law Journal 173* at 174-5.

12 Ed Schollenberg and Betsy Gibbons "Domestic Violence Protection Orders: A Comparative Review" (1992) 10 *Canadian Journal of Family Law* 191 at 193-4:

> "In virtually all of the jurisdictions reviewed, including Australia, New Zealand, most American states, and Britain, a novel remedy - more or less specific to domestic violence situations - has been provided for in statute. Civil protection orders or domestic violence

concealed and so frequently goes unpunished. The Law Commission, supporting the need for appropriate legislation to reduce and prevent family violence, invoked the following quotation from a document drafted by the US National Council of Juvenile and Family Court Judges:

> "Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence."[13]

The imperative for such legislation, as noted by the Law Commission derives from section 12(1) of the Constitution, which reads:

> "Everyone has the right to freedom and security of the person, which includes the right—
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> . . . .
>
> (c) to be free from all forms of violence from either public or private sources;
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> . . ."

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orders all start with the intention of providing relief, generally beyond the usual scope of existing criminal and family law, available to victims of abuse within the family. Generally the remedy is to be available with less effort on the part of the victim and with fewer procedural impediments. In addition, the order is to be officially sanctioned and to attract varying degrees of penalty for breach."

[13] South African Law Commission Discussion Paper 70 Project 100 'Domestic Violence' (1997) at 2 - citing the *Model Code on Domestic and Family Violence* Nevada: 1994, drafted by the National Council of Juvenile and Family Court Judges.

The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with section 7(2),[14] section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person[15] and to bodily and psychological integrity,[16] and the right to have their dignity respected and protected,[17] as well as the defensive rights of everyone not to be subjected to torture in any way[18] and not to be treated or punished in a cruel, inhuman or degrading way.[19]

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14 Section 7(2) reads:
"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

15 Section 12(1).

16 Section 12(2).

17 Section 10.

18 Section 12(1)(d).

19 Section 12(1)(e).

[12] In my view, domestic violence compels constitutional concern in yet another important respect. To the extent that it is systemic, pervasive and overwhelmingly gender-specific,[20] domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form. As Joanne Fedler points out:[21]

> "Intrafamily offences include arson, assault, assault with intent to do grievous bodily harm, threats to do bodily injury, obstructing justice, cruelty to children, incest, kidnapping, murder, culpable homicide, rape, forced prostitution, unlawful entry on to property, malicious damage to property, stalking, theft, robbery, unlawful possession of a firearm, involuntary sodomy, extortion, blackmail and sexual assault."

The non-sexist society promised in the foundational clauses of the Constitution,[22] and the right to equality and non-discrimination guaranteed by section 9, are undermined when spouse-batterers enjoy impunity. In the words of White J in *United States v Dixon et al*:[23]

> "Realisation of the scope of domestic violence . . . 'the single largest cause of injury to women,' . . . has come with difficulty, and it has come late."

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20 Dorothy Thomas and Michele Beasley "Domestic Violence as a Human Rights Issue" (1993) 15 *Human Rights Quarterly* 36 at 60 underline the fact that both the abuse and the failure of law enforcement are gender specific.

21 "Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 - An Evaluation After a Year In Operation" (1995) 112 *SALJ* 231 at 243.

22 Section 1 provides:

> "The Republic of South Africa is . . . founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> . . ."

23 509 U.S. 688 (1993) at 730.

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.[24] 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. Yet it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied.

[13] In seeking to remedy the injustice, the legislature was acting in compliance with South Africa's international obligations. Freedom from fear is one of the fundamental rights identified in the preamble to the Universal Declaration of Human Rights (1948) which speaks of:

> ". . . the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."

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[24] "Developments - Domestic Violence" (1993) 106 Part 2 *Harvard Law Review* 1498 at 1552:

> "[S]tereotyped views of the family and of women have historically led state actors to blame the victim rather than her abuser. Often police and judges have refused to intervene, treated the situation lightly, or acted as if the batterer and the victim were equally responsible, thus sending signals of legitimization to the abuser or blame to the victim. . . . [T]he criminal justice system was designed when domestic violence was considered off limits to state intervention. Therefore, its structure is ill-adapted to confronting this problem. Together, outdated attitudes and inadequate institutional structures have prevented the state from effectively dealing with the crime of domestic abuse." [Citation omitted]

The Declaration on the Elimination of Violence Against Women[25] specifically enjoins member states to pursue policies to eliminate violence against women. In this regard the member states undertake to pass legislation to punish violence against women.[26] It is instructive to note that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms.[27] The Convention on the Elimination of Discrimination Against Women[28] imposes a positive obligation on states to pursue policies of eliminating discrimination against women by, amongst other things, adopting legislative and other measures which prohibit such discrimination.[29] Similarly the African Charter on Human and Peoples' Rights[30] obliges signatory states to ensure the elimination of discrimination against women.[31] These injunctions are directly relevant to the present matter: when interpreting the Act, the Court must prefer any reasonable

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25 General Assembly Resolution 48/104 of 1993.

26 Article 4(d).

27 To the extent that violence against women is recognised as a denial of human rights such as the right to life; the right to equality; the right to liberty and security of person; the right to equal protection under the law; the right to be free from all forms of discrimination; the right to the highest standard attainable to physical and mental health; and the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment (Article 3), South Africa has an obligation to take measures to protect those who are most vulnerable. For a discussion of the relationship between international law and South African municipal law, see John Dugard *Public International Law* in Chaskalson *et al* (eds) *Constitutional Law of South Africa* Revision Service 2 (Juta, Cape Town 1996) 13-1.

28 Commonly known as CEDAW, the Convention was signed by South Africa on 29 January 1993 and ratified on 15 December 1995.

29 Article 2.

30 The Charter was signed by South Africa in 1995 and ratified in 1996.

31 Article 18.

interpretation that is consistent with international law over any alternative interpretation that is inconsistent with it.[32]

The presumption of innocence

[14] The discussion so far has focussed primarily on one side of the constitutional equation, namely, the need to protect family members from violence within the family. The other side is the appropriate level of protection which the Constitution must afford to the persons against whom the domestic violence interdict has been granted. In the present case, a challenge has been mounted on the basis of an alleged infringement of the right to a fair trial, more particularly, of the right to be presumed innocent.

[32] Section 233.

[15] In open and democratic societies that have adversarial criminal justice systems similar to ours, the centrality of this right to a just criminal process has been strongly emphasised. The requirement that the state must prove guilt beyond a reasonable doubt has been called the golden thread running through the criminal law,[33] and a prime instrument for reducing the risk of convictions based on factual error.[34] The very first judgment of this Court affirmed the significance of the principle of not convicting a person if a reasonable doubt as to his or her guilt existed.[35] In *S v Zuma and others* Kentridge J pointed out that:

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33 See *Woolmington v Director of Public Prosecutions* (1935) AC 462 (HL) at 481.

34 *In re Winship* 397 US 358 (1970).

> "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offence without convincing a proper fact finder of his guilt with utmost certainty." Per Brennan J at 364.

35 *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

> "In . . . South Africa the presumption of innocence is derived from the centuries-old principle of English law, . . . that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt."[36]

He went on to adopt the following two principles:

> "I. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
>
> II. If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes section 11(d).[37] Such a provision would permit a conviction in spite of a reasonable doubt."[38]

The principle has been re-affirmed in a number of decisions since then,[39] almost invariably in matters where the imposition of a reverse onus has created the possibility of someone being convicted even though the judicial officer had a doubt as to his or her guilt.

The private/public and civil/criminal character of the Act

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36 Id at para 25.

37 This was the precursor in the interim Constitution to section 35(3).

38 Above n 36.

39 See for example, *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC); *Pharbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC); *S v Coetzee and Others* 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC); *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC).

[16] I turn now to the complex private/public character of domestic violence, which inevitably influences the combination of civil and criminal remedies provided and helps explain the manner in which they must be interpreted. As Jennifer Nedelsky points out, although women cherish personal autonomy, in practice the concept of autonomy has been used to protect the abusive husband from the actions of the state, but not the abused wife from the actions of the husband. Similarly, despite the high value set on the privacy of the home and the centrality attributed to intimate relations, all too often the privacy and intimacy end up providing both the opportunity for violence and the justification for non-interference.[40] This contributes to the ambivalence and a reluctance on the part of the victims to go through with criminal prosecutions.[41] Reporting on the first year of the Act's operation, Joanne Fedler observes that the:

> ". . . strange alchemy of violence within intimacy lends domestic abuse a unique quality as a legal problem, for there are no stark realities, no one-dimensional solutions.
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> . . . .

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40 Jennifer Nedelsky "Violence Against Women: Challenges to the Liberal State and Relational Feminism" in Ian Shapiro and Russell Hardin (eds) *Political Order* (New York University Press, New York, London 1998) 454 at 473 and 477.

41 Kathleen Ferraro and Lucille Pope "Irreconcilable Differences - Battered Women, Police and the Law" in N. Zoe Hilton (ed) *Legal Responses to Wife Assault* (Sage Publications, Newbury Park, London, New Delhi 1993) at 100-1:

> "For those immersed in a relational culture, the ability to connect, nurture, and maintain intimacy is highly valued. Threats to relationships and the possibility of alienation are feared and guarded against. [Yet] the male bias of US jurisprudence produces a legal structure contradictory to women's needs. Androcentric jurisprudence that values autonomy and fears annihilation collides with the values of women who seek relationship and fear separation.
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> . . . .
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> For judges . . . a woman's failure to separate from the relationship once an OP [Order of Protection] is granted is a demonstration of her failure to respect the court and instigation to renewed battering." [Citations omitted]

> [T]he lawyering of domestic abuse [therefore] requires skills and understanding not commonly required.
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> . . . .
>
> When domestic violence takes place, the criminal law intrudes into the domain of family relationships. This unhappy incursion lends crimes between intimates a unique and complex quality, importing concomitant difficulties around proof of the offence and appropriate sentencing."[42]

[17] 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.[43] 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.[44]

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42 Fedler above n 21 at 231 and 233.

43 *EM Rutenberg v The Magistrate, Wynberg and R Rutenberg* (Unreported) Case No 912/95 (CPD) per Thring J as quoted in the South African Law Commission Discussion Paper above n 13 at 3.

44 Martha Minow "Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice" (1998) 32 *New England Law Review* 967 at 969-70 explains that:

> "Under restorative justice, repairing relationships between offenders and victims and within the community take precedence over law enforcement. Forgiveness and reconciliation are central aspirations. Also elevated are the goals of healing individuals, human relationships, and even entire societies. One reason to pursue these aspirations is pragmatic and psychological. Retributive approaches may reinforce anger and a sense of victimhood; reparative approaches instead can help victims move beyond anger and beyond a sense of powerlessness.
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> . . . .
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> Where victims do forgive, it is as much for their own healing and embrace of a future without rage as it is for the benefit of the offender." [Citations omitted]

[18] 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 suffer mutely because of unwillingness to invoke more drastic criminal proceedings. Although their reluctance to see the person they married and the parent of their children going to jail and losing employment is understandable, the community is affronted by the violence and neighbours, hospitals and police are directly implicated.[45] Further, it offers physical protection to the weaker party in the period when other legal mechanisms, such as divorce proceedings or criminal charges, are being pursued. The overall purpose, then, is to protect the victim of domestic violence, uphold the respect for the law, and indicate that organised society will not sit idly by in the face of spousal abuse.

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[45] According to Wills above n 11 at 174:

> "Domestic violence is a societal, not merely an individual, problem; it is not just about two people in a private relationship working out their 'family problems'. The harm caused by this violence refuses to be neatly confined between the abuser and the victim. Rather, domestic violence impacts everyone: children, neighbors, extended family, the workplace, hospital emergency rooms, good samaritans who are killed while trying to intervene, and the death row inmates who cite it as a reason not to be killed. The state has a legitimate interest in maintaining public safety, especially by ensuring that domestic violence offenders are not allowed to flourish unabated."

[19] The Act does not purport to oust existing family and criminal law remedies and penalties, but to supplement and reinforce them. It presupposes an interactive relationship between victim and law enforcement agencies, where she[46] initiates and retains some measure of control over the process, while the state ensures that at the end of the day the orders of the court are respected. The form of proceedings is neither that of a normal civil trial, nor that of an ordinary criminal trial, but of a special enquiry involving elements of both. Many of the interpretive problems in the present matter arise from the hybrid nature of the process and the role given to the judicial officer, to which I refer later. These are difficulties inherent in the situation. Yet, the problems are compounded by the obscurity of the language used in the section under scrutiny.[47] I now turn to analysing the unfortunately tortuous way in which the offence has been created, with a view to answering the three basic questions raised by counsel.

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46 The Act is expressed in language that is not gender specific. Clearly it applies to domestic violence of all kinds, whether by husband to wife, or wife to husband. Nevertheless in practice the complaints come overwhelmingly from women who are abused by men. I will follow international practice of referring to the complainant as 'she' and the alleged violator as 'he'. Not only does this correspond to the statistical norm, it also relates to the primary discriminatory social patterns addressed by the Act. It should be understood, however, that the Act protects all victims of domestic violence, whether male or female. Indeed the appellant in this case sought and obtained an interdict against the complainant shortly after she got an interdict against him. Fedler points out at 232 (see above n 21) that in the first year of operation of the Act, People Opposing Women Abuse (POWA), a non-governmental organisation specialising in the protection of women's rights, estimated that over 4800 women made use of its services. POWA is only one of a number of organisations in the Gauteng area that offer such services. Other organisations include Women Against Women Abuse (WAWA) in Eldorado Park, the Institute for Women's Development NISAA in Lenasia, Agisanang Domestic Abuse Prevention and Training (ADAPT) based at Alexandra Health Clinic in Alexandra, and Lungelo at Chiawelo Clinic, Soweto. All of these appear to be organisations set up to protect battered women. I am unaware of a need having been felt for the creation of similar organisations for male victims of domestic violence. See also SA Law Commission Research Paper on 'Domestic Violence' April 1999 at 10 n 20; Christopher Frank "Criminal Protection Order in Domestic Violence Cases: Getting Rid of Rats with Snakes" (1996) 150 *Miami Law Review* 919 at 921.

47 Counsel for the Commission for Gender Equality claimed that the legislation was rushed through Parliament prior to the first democratic elections in 1994. As far as I am aware, the Law Commission did not do an investigation before the Act was adopted, in contrast with the new Act which was preceded by a Law Commission report and public comment.

Is the subject of the enquiry "an accused person"?

[20] Counsel contended that the enquiry by the judicial officer into an alleged breach of an interdict should be seen not as constituting a criminal trial, but as part and parcel of proceedings that were essentially civil in character; accordingly, the arrested person was not an accused person entitled to the protection of section 35(3)(h). In this respect, they developed their case on the basis of certain observations by Ackermann J in the case of *Nel v Le Roux and Others*.

> "The section 25(3) rights to a fair trial accrue only to an accused person. The recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of sections 189(1) is not, in my view, an 'accused person' for purposes of the protection afforded by section 25(3) of the Constitution. Such examinee is unquestionably entitled to procedural fairness, a matter which will be dealt with below, but not directly to the section 25(3) rights, for the simple reason that such examinee is not an accused facing criminal prosecution."[48]

[21] Attention must be paid, however, to the words in the judgment which follow immediately afterwards.

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[48] *Nel v Le Roux and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 11. Section 189(1) of the CPA reads:

> "If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years." Section 25(3) of the interim Constitution corresponded to section 35(3) of the present one.

"The s 189(1) proceedings are not regarded as criminal proceedings, do not result in the examinee being convicted of any offence and the imprisonment of an examinee is not regarded as a criminal sentence or treated as such. If, after being imprisoned, an examinee becomes willing to testify this would entitle the examinee to immediate release; in American parlance such examinees 'carry the keys of their prison in their own pockets'. The imprisonment provisions in section 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee."[49]

[49] Id at para 11, see also *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC), Ackermann J at para 36 and 37, Didcott J at para 119 and 122, and Sachs J at para 176.

[22] The reasons advanced by Ackermann J for regarding the coercion as amounting merely to process in aid and not criminal punishment in that matter, point in precisely the opposite direction in the present case. The language of the Act is clear. Section 6 is headed *Offences and Penalties* and says that a person who contravenes an interdict *"shall be guilty of an offence and liable on conviction*"to a fine or imprisonment for a period not exceeding twelve months. Section 3(4) states that the judicial officer shall enquire into the alleged breach and may "(b) *convict* the respondent of the offence contemplated in section 6." The execution of the warrant of arrest is effected by a peace officer as defined in section 1 of the CPA, and the provisions of the CPA are further imported by section 3(5), the section under scrutiny. Once the enquiry stage has commenced, it is no longer the complainant who controls the proceedings on her own behalf, but the state which pursues the enquiry in its own interest. To sum up: the objective is not to coerce the will[50] to desist from on-going defiance, but to punish the body for completed violation; and the convicted person carries no keys in his pocket - indeed there is nothing in the Act to suggest that he can be released early if either the complainant so wishes, or the judicial officer so decides.[51]

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50 Commenting on the use in the United States of injunctive relief as a tool for enforcing health precautions, Eric Janus writes in "Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments" (1996) 72 *Indiana Law Journal* 157 at 169:

> "Injunctions are not 'directly' enforced on the body of the person. Rather, they are intended to operate on the person's will. That is, persons who violate the injunction are either imprisoned as a means of coercing compliance, or are imprisoned (or fined) as punishment for violation."

51 The rationale for holding that defiance of a court order granted in civil proceedings constituted criminal contempt has been articulated by Steyn CJ in *S v Beyers* 1968 (3) SA 70 (A) at 80E-F and 81E in the following terms:

> "Die opvatting dat dit inderdaad _ misdaad is, blyk ten duidelikste uit die feit dat _ gewone straf opgelê word as die aansoek slaag. . . Al is afdwinging van _ burgerlike verpligting die hoofdoel van die straf, dan word dit nogtans nie opgelê bloot omdat die verpligting nie nagekom is nie, maar uit hoofde van misdadige minagting van die Hof wat daarmee gepaard gegaan het.

[23] I accordingly conclude that an alleged violator of the interdict, who faces conviction and imprisonment for up to twelve months (and a fine), is an "accused person" as contemplated by section 35(3)(h) of the Constitution, and entitled to the benefit of the presumption of innocence.

Do the provisions impose a reverse onus?

[24] The words used in section 3(5) of the Act and section 170 of the CPA do not lend themselves to ready interpretation. They are not so much ambiguous as obscure. Three possible interpretations have been offered; all have their merits and all their disadvantages. I will refer to them as interpretations A, B and C.

[25] Interpretation A places the emphasis on the word 'procedure' in section 3(5) and infers that the section should be read as importing only the summary procedure contained in section 170 and not the reverse onus. Since the procedure is prescribed in a section of the CPA, it would carry with it all the protection guaranteed by the CPA, such as the right to counsel, and the right to call and challenge

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> . . . .
> Dat die gesag en aansien van ons Howe doeltreffend beskerm moet word, is onontbeerlik vir regsordelike verkeer en _ saak van hoë Staatsbelang."
>
> [The view that it is indeed a crime appears most clearly from the fact that ordinary punishment is imposed if the application succeeds. . . Even if enforcement of a civil obligation is the main purpose of the punishment, it is nevertheless not being imposed simply because the obligation is not being fulfilled, but in consequence of the criminal contempt of court that accompanied it.
> . . . .
> That the authority and prestige of our courts must be effectively protected, is indispensable for the proper functioning of the legal order and a matter of profound state interest.] [My translation.]

testimony. The reverse onus does not enter the picture, and the intrusion on the presumption of innocence is avoided. This, it is contended, is the interpretation most compatible with liberty.

[26] The appropriate approach to the interpretation is that commanded by the Constitution itself. Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

This involves a single interpretive enquiry. The Constitution embodies many enduring common law principles,[52] especially those associated with personal freedom. The Constitution also articulates, however, new values and contains different emphases. As pointed out above, the Constitution and South Africa's international obligations require effective measures to deal with the gross denial of human rights resulting from pervasive domestic violence. At the same time the Constitution insists that no-one should be

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[52] *S v Zuma* above n 35 at para 33 Kentridge AJ said:

> "The conclusion which I reach, as a result of this survey, is that the common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not te be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt . . . Reverse the burden of proof and all these rights are seriously compromised and undermined. I therefore consider that the common-law rule on the burden of proof is inherent in the rights specifically mentioned in s 25(2) and (3)(c) and (d), and forms part of the right to a fair trial. In so interpreting these provisions of the Constitution I have taken account of the historical background, and comparable foreign case law. I believe too that this interpretation promotes the values which underlie an open and democratic society and is entirely consistent with the language of s 25. It follows that s 217(1)(b)(ii) violates these provisions of the Constitution."

arbitrarily deprived of freedom[53] or convicted without a fair trial.[54] The problem, then, is to find the interpretation of the text which best fits the Constitution and balances the duty of the state to deal effectively with domestic violence with its duty to guarantee accused persons the protection involved in a fair trial.

[27] Interpretation B is to the effect that section 170 of the CPA provides for a procedure which incorporates a reverse onus as a central element. The High Court adopted this interpretation.

53 Section 12(1)(a).

54 Section 35(3).

[28] Interpretation C lies between the above two. It was adopted by the Cape of Good Hope High Court,[55] and emphasises disproof of wilfulness as constituting the heart of section 170 of the CPA. It presupposes that the judicial officer must first be satisfied beyond reasonable doubt that the interdict has in fact been breached and that only then is the onus placed on the alleged violator to prove on a balance of probabilities a lack of wilfulness on his part. There is a reverse onus, but its reach would be restricted because it would be triggered only after a breach of the interdict has been proved beyond a reasonable doubt. From a textual point of view it is the most strained. It breaks the offence artificially into two parts, assuming without direct textual support that conduct amounting to a breach has first to be proved beyond reasonable doubt, and then the interdicted person must establish that an innocent explanation exists. This interpretation also keeps alive the possibility of a person being convicted even though a reasonable doubt exists as to whether the breach was wilful or not.

[29] In my view, interpretation A is the correct one. Section 3(5) imports only the provisions of the CPA relating to "procedure" at a section 170 enquiry. The question is what those procedural provisions entail. It is well established in our law that the question of who bears the burden of proof is a question of substantive and not procedural law. In *Tregea and Another v Godart and Another* 1939 AD 16 at 30, Stratford CJ held that:

> "[S]ubstantive law lays down *what* has to be proved in any given issue and by whom, and

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55 In the case of *S v Chaplin* 1996 (1) SA 191 (C). Where a charge is brought under section 170 itself, the breach is established by the fact of non-appearance, something which will be known to the judicial officer without further proof. The alleged defaulter will then escape punishment only by offering an explanation which satisfies the court as being probably true.

the rules of evidence relate to the manner of its proof."[56]

[56] Italics in the original. See also *Groenendijk v Tractor & Excavator Spares (Pty) Ltd* 1978 (1) SA 815 (A) at 817G. See too the discussion in Hoffmann and Zeffert *The South African Law of Evidence* 4 ed (Butterworths, Durban 1988) at 495-6.

Section 170(2) of the CPA requires a court to convict an accused of a failure to remain in attendance at court proceedings "unless the accused satisfies the court that this failure was not due to fault on his part." This clearly places a burden of proof on the accused. As such it is a matter of substantive law, and falls outside of the procedures to be followed under section 170 of the CPA. These procedures differ from the procedures ordinarily adoptedin a criminal court. It is not necessary in this case to determine their precise nature nor the extent to which they differ from those in an ordinary criminal trial. It was not contended before this Court that the procedures so imported infringed the right to a fair trial in any way. In any event, the presiding officer in such an enquiry is obliged to ensure that the proceedings afford an accused a fair trial.[57]

[57] See *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 24; see also *S v Bkenlele* 1983 (1) SA 515 (O); *S v Du Plessis* 1970 (2) SA 562 (E). See the discussion in Du Toit et al *Commentary on the Criminal Procedure Act* Revision Service 21 (Juta, Cape Town 1987) at 22-30.

[30] One may accept that insistence on rigid and inflexible rules would be inappropriate in this developing area, with its complex nuances and new procedures.[58] Provided it remains within constitutionally appropriate limits, the legislature must enjoy a reasonable degree of latitude or margin of appreciation in choosing appropriate solutions to a grave social ill, particularly when the need for special law enforcement procedures has become manifest. In the present case this requires a construction of section 3(5) that is sensitive to its context and seeks to balance out the interests of all concerned in the fairest manner possible.

[31] Fairness to the complainant in the special circumstances of the case necessitates that the proceedings be summary, that is, that they be speedy and dispense with the normal process of charge and plea. It also requires that they be inquisitorial, that is, that they place the judicial officer in an active role to get at the truth, which usually will be done through questioning the accused.[59] Fairness to the accused, on the other hand, dictates that within this format the general protection granted by the CPA should apply in measure similar to that available to a person charged under section 170. Such a balancing of constitutional concerns leaves the presumption of innocence undisturbed. At most it may

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58 Dealing with the complex problem of securing convictions of pimps who terrify prostitutes into not testifying, Cory J in *R v Downey* (1992) 90 DLR (4th) 449 (SCC) at 466 made the following instructive observation:

> "Parliament is limited in the options which it has at hand to meet or address the problem. Rigid and inflexible standards should not be imposed on legislators attempting to resolve a difficult and intransigent problem."

59 The enquiry here has certain features in common with a bail hearing. It is inherently urgent, and although intended to be formal, could well be considerably less formal than a trial. Its function is to provide immediate relief to the complainant without deciding on whether or not the accused should be found guilty of the substantive offence. At the same time, unlike bail proceedings, it does lead to a determination of guilt or otherwise and can result in a conviction. Cf *S v Dlamini*; *S v Dladla and Others*; *S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) at para 11.

affect the right to silence.[60] The procedure involved in the Magistrate's Court in the present case did not raise this issue, nor was it an issue before us in the confirmation. That issue would have to be resolved when it arises.

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60 Section 35(3)(h) reads:

> "Every accused person has a right to a fair trial, which includes the right -
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> . . . .
>
> to be presumed innocent, to remain silent, and not to testify during the proceedings; . . ."

[32] The alleged violator might have some difficult choices to make at the enquiry. If the result involves an intrusion on the accused's right to silence, this limitation of the right to a fair trial would probably be less severe than a reverse onus affecting the presumption of innocence.[61] It does not appear to be disproportionately invasive given the special context and bearing in mind the fact that many of the matters in issue will be peculiarly within the knowledge of the alleged violator. In the particular circumstances of a domestic violence enquiry, therefore, where the danger of continuing violence is acute and the immediate issue at stake is upholding respect for the court's interdict, invasion of the right to silence may well be justified under section 36[62] of the Constitution. As I have said, the present case does not require us to determine this issue.

[33] Interpretation A, accordingly, stands as the interpretation of the text which best fits the Constitution. It most appropriately balances optimum protection for the complainant and the accused's right to a fair trial. I therefore hold that, properly construed, section 3(5) read with section 170 of the CPA does not impose a reverse onus on the accused. The Transvaal High Court was accordingly

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61 The possibility of this Court accepting the constitutionality of an intrusion on the right to silence in order to promote a compelling public purpose, was envisaged by this Court in *S v Mbatha; S v Prinsloo* 1996(2) 464 (CC); 1996 (3) BCLR 293 (CC). In that case the issue was the impact not of an inquisitorial procedure on the right to silence, but of a requirement on the accused to provide sufficient evidence to raise a reasonable doubt as to guilt. The principle, however, was the same. Langa J, at para 26, said:

> "That it might impact on the right of an accused person to remain silent is true; but on the assumption that the rampant criminal abuse of lethal weapons in many parts of our country would justify some measured re-thinking about time-honoured rules and procedures, some limitation on the right to silence might be more defensible than the present one on the presumption of innocence. The accused could of course be exposed to the risk of being convicted if he or she fails to offer an explanation which could reasonably possibly be true, regarding physical association with the weapons; there would however be no legal presumption overriding any doubts that the court might have. At the end of the day and taking into account all the evidence, the court would still have to be convinced beyond a reasonable doubt that the accused was indeed guilty."

62 See above n 3.

wrong in declaring section 3(5) of the Act to be unconstitutional to the extent that it imposed a reverse onus. It is not necessary to consider whether, if the section had imposed such an onus, the limitation on the presumption of innocence involved would have been justified.

The order

The following order is made:

1. This Court declines to confirm the order of the Transvaal High Court.

2. The matter is remitted to the Transvaal High Court to be dealt with in accordance with this judgment.

Chaskalson P, Langa DP, Ackermann J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Yacoob J and Cameron AJ concur in the judgment of Sachs J.

For the first intervening party: H Fabricius SC and S Lebala instructed by the State Attorney, Pretoria.

For the second intervening party: G Marcus SC, M Chaskalson and A Kalla instructed by Cheadle Thompson and Haysom.

For the Appellant: J Botha instructed by Marius Coertze Attorneys