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The Constitutional Court Provides Succour for Victims of Domestic Violence - S v Baloyi

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rupture an already unstable organisation. This is especially so in light of the important role that the SANDF is likely to play in our fledgling democracy. Not only is the SANDF responsible for national security, but the order and discipline of the Defence Force may also be relied upon to promote the socio-economic needs of the population.[51] In addition to this the SANDF has important obligations internationally and regionally.[52]

Whether or not the granting of trade union and protest action rights to the SANDF will pose a threat to the security of the state will ultimately depend on the support such action and organisation gets from members of the SANDF.[53] The question we need to be asking ourselves, however, is whether this is a risk worth taking.

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THE CONSTITUTIONAL COURT PROVIDES SUCCOUR FOR VICTIMS OF DOMESTIC VIOLENCE
S v BALOYI

I INTRODUCTION

In *S v Baloyi*[1] the Constitutional Court had occasion to consider the constitutionality of s 3(5) of the Prevention of Family Violence Act 133 of 1993 (the Act). The subsection had been declared invalid by the Transvaal High Court which had referred its finding to the Constitutional

51 J Cock & P Mackenzie *From Defence to Development: Redirecting Military Resources in South Africa* (1998) 19. According to the authors, the SANDF has resources, equipment, skills and infrastructure that could be used for reconstruction and development. They indicate that the South African navy facilities could be used for training in diving, signals, catering and computers. The SANDF could also be involved in adult education and literacy, in providing health facilities through the South African Medical Services, and in loaning earth-moving and other construction equipment.

52 Gutteridge (note 49 above) 157. The SANDF is to play a key role in a number of ways, eg maintaining regional security, training missions, joint peacekeeping operations, and providing international and regional disaster relief. South Africa, with one of the more powerful armies in Africa, has a potentially important role to play in the Organisation of African Unity.

53 It is uncertain whether members of the SANDF support trade union and protest action rights being given to them. In letters to the editor of the Defence Force journal ((1999) October *Salut* 9), there were opposing views on whether members should be given these rights. One member rejected these rights, arguing that: '[s]ou unies in die SANW toegelaat word, al is dit net as 'n medium om sekere aangeleenthede te hanteer, sou dit katastrofiese gevolge vir die SANW inhou' [there would be catastrophic consequences for the SANDF if trade unions were allowed, even if just as a mechanism to deal with certain issues]. On the other hand, other members accepted these rights, arguing that 'if you allow soldiers to join a union you make the system more democratic and you reduce exploitation'.

1 2000 (1) BCLR 86 (CC) *(Baloyi)*.

Court for confirmation.[2] The High Court's declaration of invalidity was based on three findings: that the subsection under review 'places a reverse onus of proving absence of guilt on a person charged with breach of a family violence interdict',[3] conflicting with the constitutionally protected presumption of innocence, without compelling constitutional justification. The case presented the opportunity for the Constitutional Court to confront the vexed issue of domestic violence, and to balance the need to eradicate domestic violence with the constitutional rights of accused persons to a fair trial.

Section 3(5) of the Act reads as follows:

> The provisions of the Criminal Procedure Act . . . 51 of 1977, relating to the procedure which shall be followed in respect of an enquiry referred to in s 170 of that Act, shall apply mutatis mutandis in respect of an enquiry under subsection 4.

Section 170 of the Criminal Procedure Act reads:

> (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 to 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 a 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.[4]

Section 3(5) becomes operative after an interdict has been obtained against a person (almost always a male) in terms of the Act, the interdict has been violated and the violator arrested. Section 3(2) of the Act provides for the alleged violator to be brought before a judge or magistrate as soon as possible. Section 3(4) allows the judge or magistrate, after an enquiry into the alleged violation, either to order the release of the respondent from custody or to convict the respondent as outlined in s 6.[5]

2 Although the Prevention of Family Violence Act had been replaced by the Domestic Violence Act 116 of 1998, the Constitutional Court believed it appropriate to deal with the sections under review, since the appellant and others similarly situated would be affected by them.

3 *Baloyi* para 1.

4 Emphasis added. Whether a reverse onus was placed on the appellant was the essence of the enquiry in *Baloyi*.

5 Section 6 provides as follows:

> A person who –
>
> (a) contravenes an interdict or other order granted by a judge or magistrate under section 2(1) or (2); or
>
> (b) fails to comply with the provisions of section 4, 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.

The Minister of Justice and the Commission for Gender Equality intervened in the action challenging the High Court's decision on three grounds. The first was that the 'alleged violators should not be considered "accused persons" entitled to the presumption of innocence'.[6] Second, even if they are to be treated as such, the sections of the Criminal Procedure Act under review should not be interpreted as imposing a reverse onus. Their third contention was that if the proper interpretation of those sections involved the imposition of a reverse onus, 'then the limitation of the presumption of innocence involved could be justified'.[7]

II Facts

The complainant, the wife of an army officer, had been granted an interdict against her husband by a magistrate in Pretoria. The appellant was ordered not to assault the complainant and their child, and not to prevent them from entering or leaving the marital home. The appellant ignored the interdict and subsequently assaulted and threatened to kill the complainant. She complained to the police and, after she signed an affidavit, the police arrested the appellant and brought him before a magistrate to enquire into the alleged breach of the interdict.

III The Issue of Domestic Violence

The Court commenced its discussion by addressing the Constitution's requirement that the problem of domestic violence be effectively dealt with. Sachs J embarked on a thoughtful analysis of the need to deal comprehensively and effectively with the problem of domestic violence. Sachs J described the unique 'hidden and repetitive character'[8] of domestic violence, its ubiquity in cutting across class, race, cultural and geographical boundaries and the deleterious consequences for society of its persistence. Moreover, because domestic violence is so gender specific, it mirrors and mimics patriarchal domination in a particularly abhorrent manner.[9]

With intellectual precision Sachs J excavated the banality and perceived inevitability of domestic violence, and the imperatives on the government to stem it. He adroitly contextualised the problem as embedded in partriarchy and the continued subordination of women. In their research, women's organisations have uncovered the high levels of

6 *Baloyi* para 10.

7 Ibid.

8 Ibid para 11. It has been estimated that one in every four adult women is regularly assaulted by her partner. Jeni Irish 'Women and Political Violence' (1993) 16 *Agenda* 7.

9 Ibid para 12. Sachs J's identification of the intransigence of patriarchy in South Africa is not new. Before he was appointed to the Constitutional Court, he wrote a frequently quoted article on the pervasiveness of patriarchy, which he termed the only 'truly non-racial institution in South Africa'. See Albie Sachs 'Judges and Gender: The Constitutional Rights of Women in a Post-Apartheid South Africa' (1990) 7 *Agenda* 1.

domestic abuse across all sectors of South African society.[10] These disturbing numbers confirm the Court's assessment of the certain normalcy or banality of domestic violence.[11] This analysis is purposely victim-centered, that is, Sachs J detailed the effects of domestic violence on the victims. Moreover, he outlined how the collusion of the state in not rooting out domestic violence undermines its promise of gender equality and non-discrimination so clearly articulated in the Constitution.[12] Such inaction on the part of the government also contradicts South Africa's international and regional obligations; for example, those under the General Assembly Declaration on the Elimination of Violence Against Women,[13] the Convention on the Elimination of All Forms of Discrimination against Women[14] and the African Charter on Human and People's Rights.[15]

Dealing with the constitutional presumption of innocence,[16] Sachs J cited a list of Constitutional Court decisions that have reiterated this right.[17] He then elaborated on the hybrid (public/private) nature of the Act and analysed the complications that surface when the private (family) domain intersects with the public through the interdict provisions. The interdict proceedings in the Act are situated somewhere between family and criminal law remedies, their purpose being to supplement and enforce those remedies.

Citing feminist scholarship on this issue, Sachs J stressed the unique character of domestic violence as a legal problem, because of the 'strange alchemy of violence within intimacy'.[18] Innovative legal skills and methods are therefore essential in combating the problem; and to some

10 For example, a survey conducted by the Human Sciences Research Council found that 43 per cent of women in their survey sample in a Cape Town community had experienced marital rape and assault. '43% of Women Claimed Marital Rape, Assault' *The Citizen* 18 August 1994, cited in Human Rights Watch/Africa *Violence Against Women in South Africa* (1995) 45.

11 Human Rights Watch/Africa (note 10 above) 46–7 reported the following findings in their surveys: 'A man is seen as necessary, especially in the rural areas, to have any hope of economic security, and a degree of violence in a male-female relationship is frequently accepted as normal and inevitable'. See also Catherine Campbell 'Learning to Kill? Masculinity, the Family and Violence in Natal' (1992) 18 *J of Southern African Studies* 614. Campbell recounts (626) the findings of a survey to probe violence in the family: 'Violence was a common theme in the young respondents' accounts of their sexual relationships. Several respondents referred to the use of violence in what they called the "common practice of forced sex" amongst young people. Violence also played an important role in the territorial control of women'.

12 Of particular relevance to domestic violence is the right in s 12(1) of the 1996 Constitution: 'Everyone has the right to freedom and security of the person, which includes the right – . . . (c) to be free from all forms of violence from either public or *private* sources'. (Emphasis added)

13 GA Res 104 of 1993.

14 (1980) 19 ILM 33.

15 (1982) 21 ILM 58. The Charter was signed by South Africa in 1995 and ratified in 1996.

16 Section 35(3) of the 1996 Constitution provides: 'Every accused person has the right to a fair trial, which includes the right – . . . (h) to be presumed innocent, to remain silent, and not to testify during the proceedings.'

17 The Court cites *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC), *Parbhoo v Getz NO* 1997 (4) SA 1095 (CC), *S v Coetzee* 1997 (3) SA 527 (CC), *S v Mbatha* 1996 (2) SA 464 (CC) and *S v Bhulwana* 1996 (1) SA 388 (CC).

18 *Baloyi* para 16, citing Joanne Fedler 'Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 – An Evaluation After a Year in Operation' (1995) 12 *SAJHR* 231.

extent the interdict provisions of the Act create the legal space for such a possibility. These provisions require that police officers and other actors in the legal system temporarily jettison attitudes (often negative) about the appropriateness or otherwise of interfering in private family matters. In a country where victims of domestic violence have largely experienced the policy as indifferent to their predicament, these provisions are imperative if the attitudinal shift in policing domestic violence is to occur. The interdict provisions are intended as an 'accessible, speedy, simple and effective process'.[19] It is a proactive mechanism aimed at preventing further violence without being punitive. In the words of Sachs J, 'it seeks preventive rather than retributive justice'.[20]

IV Is the Alleged Violator an 'Accused Person'?

Sachs J then went on to deal with the three grounds on which the Act was challenged. The first was whether the alleged violator is 'an accused person' and therefore entitled to the presumption of innocence. Counsel had argued on the basis of *Nel v Le Roux*[21] that the proceedings under the Act were 'essentially civil in character'[22] and that the arrested person was not an 'accused person' entitled to the right in s 35(3)(h). *Nel* had dealt with the procedural consequences of the failure to testify when a legal duty to do so has been established. Ackermann J had held that 'the recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of s 189(1) [of the Criminal Procedure Act] is not, in my view, an "accused person" '.[23] Ackermann J described the imprisonment provisions of s 189 as 'nothing more than process in aid'.[24]

Sachs J however distinguished the *Baloyi* situation from that which pertained in *Nel v Le Roux* by pointing out the punitive nature of s 6 of the Prevention of Family Violence Act, which provides for the conviction to a fine or imprisonment for breach of the interdict provisions. Whereas the examinees in *Nel* carried 'the keys of their prison in their own pockets',[25] no such situation existed with violators of the interdict provisions of the Act. Once the enquiry into the alleged violation of the

19 *Baloyi* para 17.

20 Ibid.

21 1996 (3) SA 562 (CC).

22 *Baloyi* para 20.

23 *Nel* (note 21 above) para 11.

24 Ibid. Section 189 of the Criminal Procedure Act provides that: '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, 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 excuses 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.'

25 *Nel* (note 14 above) para 11.

Act commences, the complainant essentially had abdicated control of the proceedings to the state. In Sachs J's summary:

> the objective is not to coerce the will to desist from on-going defiance, but to punish the body for completed violation; and the convicted person carried 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.[26]

The Court concluded that the alleged violator of the interdict is an 'accused person' and therefore entitled to the presumption of innocence.

The Court then went on to discuss whether s 3(5) imposes a reverse onus. Commenting on the 'obscure'[27] nature of the words utilised in s 3 of the Family Violence Act and s 170 of the Criminal Procedure Act, Sachs J examined three possible interpretations of the sections under review. They are summarised in the judgment as interpretations A, B and C.

Interpretation A, emphasising the word 'procedure', allows only the importation of the summary procedure, and not a reverse onus. In other words, the protections guaranteed in the Criminal Procedure Act are not suspended; there is therefore no reverse onus interfering with the presumption of innocence. As the Court pointed out, this interpretation lends itself to the approach mandated in s 39(2) of the Constitution: '[w]hen interpreting any legislation . . . every court . . . must promote the spirit, purport and objects of the Bill of Rights.'

Interpretation B embodies the High Court position, namely that s 170 'provides for a procedure which incorporates a reverse onus as a central element'.[28]

Interpretation C provides for a reverse onus, but only once the 'accused person' has proved lack of wilfulness on his part. As the Court articulates this interpretation:

> 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 if 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.[29]

Finding that interpretation C was too 'strained',[30] and not persuaded by the High Court's position (interpretation B), the Court adopted interpretation A as stating the correct legal position. Distinguishing the substantive law question (what must be proved) and the procedural law question (how to prove it), Sachs J pointed out that s 170(2) of the Criminal Procedure Act provides for conviction for failure to attend court proceedings 'unless the accused satisfies the court that his failure was not due to fault on his part'.[31] This shifting of the burden to the

26 *Baloyi* para 22 (citations omitted).
27 Ibid para 24.
28 Ibid para 27.
29 Ibid para 28.
30 Ibid.
31 Ibid para 29.

accused renders the issue one of substantive law, and therefore the procedures of the Criminal Procedure Act are no longer apposite. In short, the presumption of innocence is left undisturbed.

Sachs J referred to the need to provide the legislature with latitude in dealing with intransigent social problems that find their way to the courts. He does of course recognise that such latitude exists within constitutionally appropriate limits; however, fairness to the complainant is pre-eminent. This requires that the proceedings are 'speedy and dispense with the normal process of charge and plea',[32] something akin to a bail hearing.

Although the case was not mentioned in the Constitutional Court's discussion, the question of the nature of the interdict proceedings under the Act was dealt with by the Cape Provincial Division in 1997. In *Rutenberg v Magistrate, Wynberg*[33] the applicant applied for review and setting aside of the magistrate's decision on two bases. First, that the magistrate had declined the applicant's request to conduct the hearing (to have the interdict and order for his arrest set aside) in chambers and not in open court. The applicant had argued that the hearings were administrative or quasi-administrative in nature. The second basis was that the magistrate had erred in allowing oral evidence to resolve the disputes of fact on the papers. The Court held that the review had to fail, specifying that the nature of the hearing was judicial. Secondly, the decision of the magistrate 'to receive evidence viva voce and to try the issue in dispute in a summary manner could not be faulted'.[34] The Court suggested that a certain degree of latitude was to be accorded to judicial officers in dealing with the interdict provision in s 2(1) of the Act. Similar sentiments were expressed by Sachs J in *Baloyi*.

V Conclusion

This judgment is another in a line of cases emanating from the Constitutional Court which is carving out an impressive jurisprudence with respect to women's rights and equality.[35] There is widespread recognition that private violence against women is a cause for great concern. Some would argue that it constitutes a continual violation of women's human rights. The Court places its imprimatur on the need to eradicate such violence, without constraining the constitutional rights of the perpetrators.

32 Ibid para 31.

33 1997 (4) SA 735 (C).

34 Ibid 755F.

35 See, for example, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), where the court articulated a comprehensive definition of equality to incorporate not just formal equality, but also substantive equality. Similarly, other courts have contributed to this new dispensation of furthering women's rights. See, for example, *Christian Lawyers Association of SA v Minister of Health* 1998 (11) BCLR 1434 (T) where the High Court confirmed a woman's right to make decisions about her reproductive capacity and the right to exercise control of her body, as articulated in the Constitution.

The Court's decision is incontrovertible: there is general societal consensus that private violence, indeed any violence, against women is odious and the state ought to deal with this problem aggressively.[36] However, there is still a large gap between ubiquitous cultural attitudes about women, fuelled by a particular brand of South African masculinity[37] which gives rise to such violence, and the laudable statements of the Court. Closing this gap will require a recognition that the structural and attitudinal impediments to the 'right to be free from private violence' as articulated in the 1996 Constitution, can only be eradicated by a combination of governmental assaults which include education, access to resources and continued vigilance about the extent and persistence of violence. The Constitutional Court at least is doing its part, but it needs to be bolstered by other institutional arrangements, which will include both legal and extra-legal measures.

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MAKING THE BILL OF RIGHTS A REALITY FOR GAY AND LESBIAN COUPLES
NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY v MINISTER OF HOME AFFAIRS

I INTRODUCTION

According to Ackermann J, who delivered the judgment on behalf of a unanimous Constitutional Court in this case,[1] there were two questions for decision:

1. Whether it is unconstitutional for immigration law to facilitate the immigration into South Africa of the spouses of permanent South

36 The Domestic Violence Act 116 of 1998, which replaced the Family Violence Act reflects the government's commitment to eradicating domestic violence. For example, the new Act's expansive definition of 'domestic violence' to incorporate physical as well as emotional and economic abuse (and other forms of abuse) recognises the range of suffering perpetrated by abusive spouses. Similarly, the Act's definition of 'domestic relationship' provides protection for spouses who may not be formally married, for example those married according to customary law, or same-sex couples, as well as for a host of family members beyond the spouse, for example, children. Section 2 of the Act imposes a duty on police officers to assist and inform complainants of their rights under the Act. Section 4 of the Act also provides fairly comprehensive provisions to ensure that victims of domestic abuse are able to obtain protection orders against abusive spouses, with the assistance of parties who may have an interest in the complainant's welfare. Section 5–8 allow for streamlined set of procedures to interdict the abuser.

37 Sachs (note 9 above).

1 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (*National Coalition*).