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Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

The Constitutional Court faced 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.

The issue arose out of the conviction of an army officer (the appellant) in the Magistrate's court in Pretoria for breaching an interdict issued by a magistrate ordering him not to assault his wife or prevent her or their child from entering or leaving their home. The appellant was found guilty and sentenced to twelve months imprisonment, six suspended. He appealed to the Transvaal High Court which declared that section 3(5) of the Prevention of Family Violence Act of 1993, was unconstitutional to the extent that it placed an onus on him to disprove his guilt. The court interpreted section 3(5) to impose such onus because it invoked the procedure of section 170 of the Criminal Procedure Act, which required accused persons who failed to appear after an adjournment to prove that their absence had not been wilful. The High Court then sent its order of constitutional invalidity for confirmation by the Constitutional Court. Although the 1993 Act is about to be replaced by the Domestic Violence Act 116 of 1998, which comes into force on 15 December 1999, a decision on the constitutional validity of the present Act was necessary, since it continued to affect the appellant and others in a similar position.

The judgment of Justice Albie Sachs, in which all members of the Court concurred, noted that domestic violence was hidden and repetitive in character and had an immeasurable ripple effect in our society. It transgressed a constitutionally guaranteed right to be free from violence from either public or private sources. Because it was gender-specific it both reflected and re-enforced patriarchal domination, challenged the non-sexist foundations of the Constitution and violated the right to equality. South Africa was also obliged by international law to take steps to combat domestic violence.

On the other hand, a person charged at an enquiry with an offence carrying possible imprisonment for twelve months, had to be considered an accused person. Such person was accordingly entitled to be presumed innocent unless proved guilty beyond a reasonable doubt. The Court decided that when faced with different possible interpretations of section 3(5), it should prefer the one which best balanced these competing constitutional concerns. In the present case this meant opting for the construction which interpreted section 3(5) as only invoking the procedure involved in section 170 of the Criminal Procedure Act, and not the reverse onus. On such interpretation there was no unconstitutionality. The High Court's order was accordingly not confirmed.

In coming to this conclusion, the Court held that the overall purpose of an interdict was to protect the victim of domestic violence, uphold respect for the law and indicate that organised society would not sit idly by in the face of spousal abuse. In these circumstances, fairness to the complainant necessitated that the enquiry proceedings be summary, that is, that they be speedy and dispense with the normal process of charge and plea. Fairness to the accused, on the other hand, dictated that within the format of a summary enquiry, the presumption of innocence should

apply.