

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Omar v The Government of the Republic of South Africa and Others

CCT 47/04

Decided on 07 November 2005

MEDIA SUMMARY

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

Mr Ahmed Raffik Omar and Ms Halima Joosab were married according to Islamic law, but relations between them became bitter. The Durban Magistrates' Court issued a protection order under the Domestic Violence Act 116 of 1998 prohibiting Mr Omar from abusing Ms Joosab and their children. In terms of section 8(1) of the Act, the court annexed to its order a suspended warrant of arrest. When Mr Omar allegedly breached the terms of the order, the warrant was executed, but was subsequently suspended.

Mr Omar unsuccessfully sought leave to approach this Court directly. Thereafter he applied to the High Court for an order declaring section 8 of the Act unconstitutional. His application was dismissed. He applied to this Court for leave to appeal against the decision of the High Court and for condonation of his non-compliance with the rules of this Court.

Van der Westhuizen J, writing for a unanimous Court, dismissed the applications and ordered Mr Omar to pay Ms Joosab's costs. He noted that the Act serves an important social and legal purpose in addressing the scourge of domestic violence and South Africa's obligations under the Constitution and international law to combat domestic violence. The purpose of section 8 is to provide a mechanism to ensure compliance with protection orders and to protect complainants against further domestic violence.

Section 8(1), which mandates that the court issuing a protection order authorise a warrant of arrest in the absence and without the knowledge of the respondent, does not violate the right of access to courts as guaranteed by section 34 of the Constitution. An interim protection order has no force until the respondent has been served, and the respondent may contest the issue. It is not uncommon for the law to provide for interim relief to protect a party who feels threatened by the immediate conduct of another.

The arrests authorized by section 8(4) do not constitute arbitrary deprivation of freedom under section 12(1)(a) of the Constitution. Since the interim protection order and the accompanying arrest warrant have no force until the respondent has been served, the respondent will have knowledge of the order prior to an arrest. Arrests under section 8(4) must be seen in the context and purpose of the Act of ensuring immediate police protection to a complainant who faces imminent harm. The complainant must state in an affidavit that the respondent acted in violation of the protection order, and the complainant is criminally liable for intentionally made false allegations. Section 8(4) only requires police officials to accept the contents of the affidavit and to act when it appears that reasonable grounds exist to suspect that the complainant faces imminent harm from the alleged breach of the protection order. Once a person is charged, fair trial rights apply.

Finally, the Court held that the possibility that complainants will exploit, manipulate or misuse the procedure provided by section 8 does not render the Act unconstitutional. The possibility of manipulation is far outweighed by the potential of the Act to afford police protection to the victims of domestic violence, against the background of a history in which this protection was withheld. However, 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 proceedings or custody battles.