CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 32/03

AHMED RAFFIK OMAR Applicant

Decided on : 11 September 2003

JUDGMENT

THE COURT:

[1] This is an ex parte application for direct access to this Court in terms of rule 17 of the Rules of Court. The applicant seeks an order declaring section 8 of the Domestic Violence Act, 116 of 1998 invalid. That section provides:

> "(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
>
> (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 –
>
> (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 –

(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.

(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.

(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 –

(a) the risk to the safety, health or wellbeing of the complainant;

(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."

[2] The applicant originally approached the High Court in Pietermaritzburg for an order of constitutional invalidity, citing the government of South Africa, the Minister of Justice and Ms Halima Joosab (his wife according to Islamic law) as the respondents. He alleged that the third respondent has secured several protection orders against him in terms of the Domestic Violence Act. He also alleged that a warrant for his arrest had been irregularly issued. The applicant complained that the provisions of section 8, and, in particular, the mandatory issue of a warrant of arrest at the time of the grant of a protection order (s 8(1)(a)), were in breach of several of his constitutional rights including his right to freedom and security of the person. All three of the respondents filed notices indicating their intention to abide the decision of the High Court.

[3] In his affidavit filed in this Court, the applicant states that when the matter came before the High Court on the 29 July 2003, it was struck off the roll by the judge on the ground that the Government and the Minister of Justice were under an obligation to inform the Court of its reasons for not opposing an application for the declaration of constitutional invalidity. The applicant, aggrieved by this and still seeking constitutional relief, then approached this Court ex parte and directly.

[4] It is clear from the jurisprudence of this Court that an application for direct access, even where all interested parties are cited, will only be granted if exceptional

circumstances exist.[1] The Court will not grant an application for direct access to consider a challenge to the constitutionality of legislation where the Minister responsible for the legislation is not cited in the application. Even if that were cured in this application, however, no exceptional circumstances exist for the grant of an application for direct access.

[5] The constitutionality of section 8 of the Domestic Violence Act is a matter of constitutional significance but it is not one of such pressing urgency that this Court must consider it without the benefit of a considered judgment of the High Court. If it is correct, as alleged by the applicant that the High Court, without more, struck the matter from the roll on the ground that the first and second respondents had failed to put an affidavit before it on the constitutional point, then the High Court erred in doing so. It is true that this Court has on several occasions pointed to the importance in any constitutional challenge to legislation to have the attitude of the member of the executive responsible for the implementation of the legislation before the Court.[2] Constitutional challenges to legislation adopted by Parliament are not mere

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[1] *Bruce and another v Fleecytex Johannesburg CC and others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) para 9, *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) para 4, *Dormehl v Minister of Justice and others* 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) para 5, *National Gambling Board v Premier, KwaZulu-Natal, and others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) para 29, *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa intervening)* 2002 (5) SA 392 (CC); 2002 (10) BCLR 1092 (CC) para 7, *Satchwell v President of the Republic of South Africa and another* 2003 (4) SA 266 (CC) para 6.

[2] *Phillips and another v Director of Public Prosecutions, Witwatersrand Local Division, and others* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) para 11, *Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 15 – 17, *Beinash and another v Ernst & Young and others* 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) para 27, *Parbhoo and others v Getz NO and another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) para 5.

formalities. Parliament was obliged to consider the constitutionality of the Domestic Violence Act before it was passed, and the state law advisors would presumably have certified the Act as being consistent with the Constitution. If the government takes the view that it cannot support the legislation then it ought to have explained to the Court the reasons for its attitude, and what it considered to be an appropriate order in the circumstances. An order by the High Court adjourning the application and requesting the first and second respondents to file affidavits indicating their attitude to the application for an order of constitutional invalidity would have been an appropriate one.

[6] The failure of the executive to put its views before a court, however, cannot deprive an applicant of having an application for constitutional relief adjudicated. If the executive chooses to abide by the decision of a court where a constitutional challenge is raised, a judge cannot on that ground alone refuse to entertain the application for relief. The applicant is entitled to and should re-enrol his application in the High Court in Pietermaritzburg and seek relief there.

[7] One last matter needs to be considered. The applicant's attorneys approached the Registrar of this Court to enrol the application for direct access. The registrar requested that 25 copies of the application be furnished, but this was refused. Properly construed, this is an application for direct access in terms of rule 17 of the Rules. Rule 17(2) provides that such applications shall be "lodged" with the Registrar. Rule 1(3) makes it clear that when any rule refers to a document to be

"lodged", 25 copies of the document must be furnished to the Registrar. The applicant's refusal to comply with the rules in this respect without an accompanying application for condonation would be a further ground for rejecting his application.

[8] The application for direct access is therefore dismissed.

Chaskalson CJ, Langa DCJ, Ackerman J, Goldstone J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Yacoob J.

For the applicant: Zehir Omar Attorneys