IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO/YES	
(2)	OF INTEREST TO OTHER JUDGES: NO/YES	
(3)	REVISED.	
(4)	Signature	Date 20/12/16

CASE NO: **28532/14**

20/12/2016

GENERAL ALFRED MOYO	**1ST APPLICANT**
THE CENTRE FOR ALLIED LEGAL STUDIES	**2ND APPLICANT**
and	
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**1ST RESPONDENT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**2ND RESPONDENT**
THE DIRECTOR OF PUBLIC PORSECUTIONS SOUTH GAUTENG	**3RD RESPONDENT**
THE MINISTER OF POLICE	**4TH RESPONDENT**
AND	
	CASE NO: 41487/14
NOKULUNGA PRIMROSE SONTI	**1ST APPLICANT**
SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA	**2ND APPLICANT**
And	
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**1ST RESPONDENT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**2ND RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECUTIONS NORTH WEST PROVINCE	**3RD RESPONDENT**
MINISTER OF POLICE	**4TH RESPONDENT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The two matters came by way of special motion. The 1st Applicant in each of the Applications has a pending criminal trial in the Regional Court and seeking an order declaring unconstitutional and invalid s 1 (1) (b) and s 1 (2) of the Intimidation Act 72 of 1982 ("the Act") of which they have been indicted..

PARTIES

[2] In the first Application the 1st Applicant, General Alfred Moyo ("Mr Moyo") a resident in the Makause settlement and Chairperson of a community based organization known Makause Community Development Forum ("MCDF").is cited together with the Center for Allied Legal Studies, ("the CALS") as his co-Applicant (the 2nd Applicant") which is a center for human rights law, registered as a law clinic with the Law Society of the Northern Provinces, its object said to be, inter alia, to contribute towards developing a politically and economically just and sustainable society; challenging the systems of power through a combination of litigation, advocacy and research; and to act on behalf of the vulnerable.

[3] **Nokulunga Primrose** Sonti, **("Sonti"),** the 1st Applicant in the second Application is a member of parliament. She is supported by the Socio Economic Rights Institute ("SERI"), the 2nd Applicant, which is said to be a provider of professional services to individuals, communities and socio movements in South Africa who seek to enforce their socio economic rights that, inter alia, litigates in the public interest.

[4] In both matters the Minister of Justice, Constitutional Development and Correctional Services ("Minister of Justice"), the National Director of Public Prosecutions ("the NDPP") and the Minister of Police ("the Minister") are cited as Respondents. The Minister of Justice has indicated his wish not to be heard and to abide by the court's decision.

[5] Moyo's case is pending in the Germiston Regional Magistrate's Court where he has **been charged with contravention of s 1 (1) (b)** read with s 1 (2) **of the Act.** He **has as** such cited the Director of Public Prosecutions, Gauteng as the 3rd Respondent.

[6] Sonti's trial is pending before the Rustenburg Regional Magistrate Court, hence the Director of Public Prosecutions, North West Province is cited as the 3rd Respondent in her Application

. The charge against Sonti is **the contravention of s 1 (1) (a) (ii) read with s 1 (2) of the Act**.

[7] Mr Wilson and Mr De Jager appeared respectively for the Applicants and the Minister, the 4th Respondent.

[8] The Applicants have indicated that due to the impediment that arises from the matter proceeding in the Regional Court, were the constitutional validity of the legislation cannot be entertained, they have decided to bring their Applications to this court before the criminal trial can be finalized at the Regional Court.

ISSUES RAISED

[9] Moyo and the CALS are challenging the validity and constitutionality of **s 1 (1) (b) of the Act on the ground that the subsection violates the right to freedom of expression** as enshrined in the Constitution of the Republic of South Africa, 1996 ("the Constitution") **and the extent of the interference it creates cannot be justified in terms of the limitation in s 36 of the Constitution. Also contend that the effect of s 1 (2) of the Act is to violate the rights in s 35 (3) (h) of the Constitution.**

[10] Sonto and SERI allege that the unconstitutionality and invalidity of the provisions of s 1 (2) of the Act, is on the basis that:

> [9.1] when properly construed, the subsection constitute **a reverse onus** in that it inverts /reverses the burden of proof and relieves the prosecution from proving the contravention of s 1 (1) (a) of the Act.
>
> [9.2] it is inconsistent or in violation of the **Applicants' right to be presumed innocent, to remain silent and not to be compelled to give self- incriminating evidence as provided in s 35 (3) (h), including their right to freedom of expression as provided in s 16 of the Constitution.**

[11] Therefore the common ground upon which the Applicants are challenging both sections of the Act is their alleged infringement of the rights in s 16 and s 35 (3) (h) of the Constitution.

FACTUAL BACKGROUND

[12] The charge in terms s 1 (1) (b) brought against Moyo arose from a complaint that was laid against him on 18 October 2012 by a Station Commander of Primrose Police Station and one of her senior officers ("the complainants") following utterances or the speech he made and conduct he displayed in a meeting at the Primrose Police Station. The complaints are, that he made statements to the following effect, that:

> [12.1] he will make sure that they are removed;
>
> [12.2] they will not last long at Primrose; and or;
>
> [12.3] threatened to **repeat what happened at Marikana**; and or
>
> [12.4] **there will be bloodshed**; and or

[12.5] pointed fingers at the Station Commander; and or

[12.6] charged towards the Station Commander.

[13] Moyo's organization, the MCDF had sought to obtain permission to march to the Ekurhuleni Metropolitan Police Department ("EMPD") and requested a meeting with the EMPD in terms of the Regulation of Gatherings Act 205 of 1993. The meeting was arranged at the Primrose Police Station when Moyo had preferred it to be held at the EMPD offices and the permission to march denied, which infuriated Moyo. He was also not happy that members of a certain political party were invited to the meeting. All that resulted in the allegedly offending conduct and speech he made. He was arrested the next day whilst addressing a gathering at a football pitch in Makause.

[14] In his founding affidavit Moyo alleges that the charges are simply a device to frustrate the members of MCDF's legitimate **right to protest** against and criticize what they see as biased policing policies sanctioned by the Complainants. He contends that the alleged conduct and speech is **an expression that is protected by s 16 of the Constitution**, **does not propagate war**, **incite to cause imminent violence**, or advocate hatred based on race, ethnicity, gender or religion which constitutes incitement to imminent harm (within the limitation criteria). He says his utterances or conduct are **not alleged to have caused any specific harm or** to have **had any specific focus**. He practically **denies that he intended to intimidate anybody** and alleges that the **fear alleged is extremely broad and non-specific,** as it extends to the complainants, all of their colleagues at the Primrose Police Station itself and all of its property. **It is not alleged that he intended to intimidate or induce fear in the complainants,** yet his alleged conduct and speech is deemed in terms of the Intimidation Act, actionable.

[15] Moyo further argues that the conduct/utterances **are harmless** therefore the limitation placed upon the right cannot be justified under the provisions of s 36 of the Constitution. **The Intimidation Act criminalizes a broad range of speech and conduct** which is protected under s 16 of the Constitution.

[16] On the other hand Sonti's indictment emanates from telephone calls and text messages that a "Complainant", Ms Nobuhle Zwane ("Zwane") alleges Sonti sent to her on 17 and 18 December 2012 at Marikana, threatening her, in order to compel her to withdraw a criminal complaint she had laid against one Anele Zonke ("Zonke"). The text messages and telephone calls are **alleged to contain threats to kill the complainant or burn her house down.** Sonti agrees that she knows and has interacted with Zwane, however denies that she threatened to kill or burn her house. According to Sonti upon a request made by Mr Zonke's relative she contacted Zwane to find out the reason for Zonke's arrest and if the dispute between her and Zonke could be resolved by the families. That is not the issue to be resolved in this matter.

[17] Germane is that Sonto alleges that s 1 (2) of the Act creates a plainly suspect reverse onus, depriving her of the right to remain silent and interferes significantly with **the right to freedom of expression** because as an accused person, she must provide evidence that she acted lawfully. This is so even if the prosecution leads no evidence that she acted unlawfully, and she wants to remain silent.

[18] Sonti further argues that s 1 (2) criminalizes a wide range of expressions which do **not amount to unprotected speech of this nature, idle threats to hit or frighten a person, trenchant/scathing and passionate criticism** of a person or group of people or even **threats made in jest** are potentially covered by s 1 (2) of the Act, they are presumed to be unlawful unless an explanation of their lawfulness is provided in advance.

[19] The essence of the Applicants' contestation **is the criminalization of the conduct or speech complained about on two grounds.**

> **[18.1] They deny that their conduct or speech offends, saying the provision is too wide covering utterances or conduct that does not offend or intended to offend. It therefore interferes or is inconsistent with their right to freedom of expression protected under s 16 of the Constitution and therefore invalid. Also the presumption of guilt as contained in s 1 (2) thereunder inconsistent with the right in s 35 (3) (h), to a fair trial.**

LEGAL FRAMEWORK

[20] Section 1 of the Act reads:

> "(1) **Any person who-**
>
> (a) **without lawful reason and with intent to compel** any person or persons of a particular nature, class or kind or kind or persons in general to do or abstain from doing any act or to assume or to abandon a particular standpoint-
>
> (i) ...
>
> (ii) In any manner **threatens to kill, assault, injure or cause damage to any person or persons of a particular nature class or kind, or**
>
> (b) **acts or conducts himself in such a manner or utters or publishes such words** that it has or they have the effect, **or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication-**

(i) **fears for his own safety or the safety of his property or the security of his livelihood,** or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any person; and

(ii) ...[s 1 (1) (b) (ii) deleted by s 6 of Act 126 of 1992)

Shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment."

[21] Section 1 **(2)** of the Act reads:

"(2) In any prosecution for an offence under subsection (1), **the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused,** unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution."

[22] Section 16 of the Constitution provides that:

"(1) Everyone has the right to freedom of expression, which includes- (a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research,

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred; that is based on race, ethnicity, gender or religion, and that

Whilst section 35 (3) (h) of the Constitution provides that:-

"(3) Every accused person has a right to a fair trial, which includes the right-

(a) ...

(b) ...

(c) (f) ...

(h) To be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) not to be compelled to give self-incriminating evidence;

CONSTITUTIONAL PERSPECTIVE

[23] Fundamental human rights are the cornerstone of our democracy, guaranteed by the Constitution, the supreme law of the Republic, to all persons who live in the Republic. Obligations imposed by the Constitution must be fulfilled and any law or conduct that is contrary to it is invalid; see s 2 in Chapter 1 and s 36 (2) of the Constitution. Our courts should rely primarily on the Republic's Constitution, as the supreme law of our country and not on that of other countries when considering the constitutionality of provisions in our statutes.

[24] The guidelines for the interpretation of a fundamental rights constitution prescribe that fundamental rights and freedoms are to be interpreted generously rather than legalistically. Provisions allowing for restrictions are therefore to be narrowly and strictly construed. A restriction of a fundamental right applies only in so far as is strictly necessary for protecting the values enumerated in the restrictions clause, s36 of the Constitution. Such restrictions and derogations may only be imposed by "law"; see *ANC (Border Branch) v Chairman, Council of State of the Republic of Ciskei* 1992 (4) at 447A-449D.

[25] Therefore in deciding on an impugned statutory provision alleged to be inconsistent with the Constitution, the following constitutional principles and phases of consideration apply:

[25.1] The meaning/content and application of the fundamental right (a right or freedom) in question should be identified. This is to be done by:-

[25.1.1] interpreting the constitution from a broad perspective, having regard to its spirit and objectives, avoiding a too legalist or positivist approach. Chaskalson P in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at Par 104 spoke about the **wider implications** which the right has for our society. In *Government of the Republic of South Africa v Sunday Times' Newspaper and Another* 1995 (2) SS 221(T) Joffe J advocated for a generous or liberal construction to be adopted, imploring the judiciary as guardian of the Constitution to be astute in determining the full ambit of the rights enshrined in the Constitution and be vigorous in its protection.

[25.1.2] an analysis of the purpose of such a guarantee (in the light of the interest it was meant to protect). Chaskalson spoke of **the purpose for which the right is limited**; the importance of that purpose to our society;

[25.2] **It can then be established whether the statutory provision in question limits the fundamental right; the extent of the limitation and its effectiveness.** The question asked would be whether there is a violation of a fundamental right caused by the legislation which is tested? Is the interference with the fundamental right prescribed by the law?

[25.3] if it does then the justification of the interference or limitation must be established proving that:

(a) the limitation or interference is prescribed by law, that it falls within the terms of an exception or limitation prescribed or allowed by the constitution itself;

(b) the legislation is necessary;

(c) it is reasonable; Whether the objectives of the limitation could reasonably be achieved by means less damaging to the right.

(d) the provisions thereof actually further the purpose for which it is legislated.

(e) it is demonstrably justifiable in the particular society.

[26] Section 36 provides for the limitation of rights and reads:

(1) The rights in the Bill of Rights maybe 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) Except as provided in subsection (1) or in any other provision of the Constitution, **no law may limit any right entrenched in the Bill of Rights.** (my emphasis).

[27] A party that challenges the constitutionality of a statutory provision is the one that bears **the onus of establishing *prima facie*, on a balance of probabilities that the provision effects a restriction on the fundamental right; See *Kauesa v Minister of Home Affairs and Others* 1994 (3) BCLR 1 (NmH).**

[28] The Applicants must persuade the court that, the said regulation is not reasonably justifiably in a democratic state. Also that the pending prosecution is an infringement of his fundamental freedom to have made the speech or because it is a threat to his fundamental right to a fair trial in that the statutory provision upon which the charge is based, is unconstitutional.

[29] Where it is shown that a fundamental right has been infringed, the onus shifts to the party seeking to justify such restriction or the offender. The latter party in order to succeed must establish that the restriction meets the limitations criteria allowed by the Constitution itself, that is, it is necessary, reasonable and furthers the objective of the legislation and demonstrably justifiable, showing that the infringement was authorized in all essential respects.

[30] Therefore the enquiry into the constitutionality of the impugned sections 1 (1) (b) and s 1 (2) essentially involves a two stage enquiry; Firstly, **whether the sections inconsistent with a fundamental right or freedom contained in Chapter 3 of the Constitution**; if it is, whether the inconsistency is saved in terms of s 36 of the Constitution.

Nature and Extent and Effect

[31] In his affidavit Moyo avers that s 1 (1) (b) is contrary to his right to freedom of expression as in s 16 of the Constitution in that:

> [29.1] it criminalizes conduct or speech that has the effect of inducing a subjective/personal state of fear, which fear need not be reasonable or intended to induce fear and would still be sufficient to convict under the section (which might be frivolous) opening the section to potential abuse. This has resulted in the grave concern raised about the constitutional validity of the section in a number of High Court decisions and its potential abuse. Referring to *Holbrook v S* [1998] 3 ALL SA 597) (E); *S v Motshari 2001* (1) SACR 550 (NC); *S v Cele* 2009 (1) SACR 59 (N). Significant in *Holbrook* was the empty threat to kill the complainant's cat issued in a state of irritation and insobriety.
>
> [29.2] the fear induced or reasonably expected need not be specific or imminent nor it be limited to fear for the safety of the persons hearing the speech or observing the conduct, but it is enough that any person **subjectively** fears for the safety or security of himself, his property, the livelihood or of any other person's safety, property or livelihood.
>
> [29.3] No actual harm or need that any person attempt to harm another as a result of any conduct or speech in order for a person to be convicted,

criminalizing a wide range of conduct and speech which clearly falls within the protection of s 16 (1) of the Constitution and does not constitute the unprotected forms of propaganda and advocacy of hatred or violence set out in s 16 (2).

[32] There being no contention about the conduct or utterances made, the main argument advanced was that the conduct or speech does not justify a prosecution on the basis that:

[32.1] it is not offending *per se* and supposedly harmless if viewed within the context it was made.

[32.2] it is protected by the constitutional right to freedom of expression. As a result the applicable provision of s 1 (1) (b) must be found to be unconstitutional as they are contradictory to a right conferred by the Constitution.

[32.3] Further that as far as it may be found that the conduct or utterances do not pass the Constitutional fortification as a result of the provisions of s16 (2), the question of the validity or fairness/constitutionality of the provisions of s16 (2) must be interrogated.

[33] In addition Mr Wilson on behalf of Applicants argued that Moyo's speech and conduct complained about is indeed harmless assessing it from the context in which it was made. Moyo himself has alleged that not only is his speech or conduct harmless, but has not been shown or alleged to have been directed to any specific person. It was argued to be such a harmless speech or conduct that needs to be protected.

[34] As it has been pointed out, according to s 16 (2) the right to freedom of expression propagated in s 16 (1) does not extend to certain acts, that is propaganda for war; or incitement of imminent violence and advocacy for hatred based on race, ethnicity, gender or religion that constitutes incitement to cause harm.

[35] The fundamental rights, including the right of freedom of expression are not absolute. To gain total protection afforded by the right the speech must first escape the exclusion criteria as expounded in s 16 (2). Since each of the prohibited circumstances instigate or lead to a commission of a crime, its prohibition is therefore justified. Therefore to arrive at a conclusion regarding its constitutional fortification the context in which the speech was made would indeed have to be established as proposed by Mr Wilson. However to test fully if it escapes the exclusion as provided in s 16 (2) the context as well as the content of the threat is relevant.

[36] Moyo's utterings or conducts were made at a meeting. At the time Moyo was unhappy about several happenings, inter alia, that the meeting took place at the

Primrose Police Station instead of at Ekurhuleni Metropolitan Police Department, also that contrary to his wishes members of a party that was not in good terms with his organization to whom he thought the police were showing some bias were invited to the meeting. To cap it all he was told that his organization's request for permission to hold a march was refused. He was as a result very aggrieved, incensed and had lodged a complaint, therefore not in a good state of mind. The threats were made in that acrimonious atmosphere.

[37] The threat made was with reference to what happened at Marikana, coupled with threats of bloodshed, to make sure that the Complainants are removed and not last long in Primrose. The meaning of bloodshed is carnage, bloodbath, the killing or wounding of people, typically on a large scale during a conflict or act of spilling blood. The synonyms include, murder, slaughter, slaying of people, killing, massacre, bloodletting or bloodbath; see *Wikipedea and Shorter oxford English Dictionary 5th Edition*. Moyo is also a leader representing a disenchanted community. It is consequently to be established from what the threat entails and the context in which it was made, if the speech escapes the restriction as is set out in s 16 (2), and also does not infringe other rights. The choice of words used and context within which the threat was made gives credence to its exclusion from the protection of the right of freedom of expression. It defies the notion that it is to be regarded as harmless. The threat relays an incitement to imminent violence, the extent and kind of harm that resembles a large scale of violence that clearly false squarely within the s 16(2) exclusion from protection of the right of freedom of expression.

[38] It is of importance to deal with the purpose for which the impugned section was enacted, looking at which rights it seeks to protect. The Constitution in s 12 bestows on everyone the Freedom and Security of the person which includes *inter alia*, the right:

[38.1] to be free from all forms of violence from either public or private

Sources;

[38.2] not to be tortured in any way; and

[38.3] not to be **treated** or punished in a cruel, inhuman or degrading way.

[39] The state is required to respect, protect, promote and fulfill the rights in the Bill of Rights; see s 7 (2) of Chapter 2 of the Constitution. It is therefore obligated to enact legislation that will promote, respect and protect these rights and outlaw any action that would prohibit their advancement. In fulfillment of the obligation to safeguard these rights and freedoms and with a purpose to counter or combat any acts of violence and prohibit certain acts of intimidation the Legislature has as a result enacted several Acts and let some of the pre- democracy legislation remain in our statute books such that there are more than 23 Acts in our statute books, the

Intimidation Act is one of them. All of them legislated with the aim of fighting, mainly, violence in all forms.

[40] However due to the propensity of the statutes to encroach on other fundamental rights, several of them have been subjected to a constitutional scrutiny. Regarding section 1 (1) (b) of the Act there has been an outright decision as to its validity and constitutionality since there has not been a direct constitutional challenge of the section; see *Holbrook, Mtshali* and *Cele supra*.

[41] At the same time as the legislature strives to give protection and effect to these fundamental rights, it has to guard against the erosion or adversely affecting other fundamental rights, unless if it can be established that such erosion justifiable and in accordance with the Constitution. The Constitutional recognition of fundamental rights in criminal trials means that statutory erosion of any of these rights and principles cannot be accepted without question. Any legislation that adversely affect such rights as entrenched in Chapter 3 of the Constitution will have to meet the limitations criteria of s 36 of the Constitution; see *S v Bhulwana; S v Gwadiso* 1996 (1) SALR 388 (CC); 1995 (12) BLCR1579 (CC) at [16].

[42] Section 1 (1) (b) of the Act was recognized as an effective tool to combat not only certain forms of intimidation but also all forms of violence. The essence thereof being to prohibit the use or threatened use of violence for whatever end, or any use or threatened use of violence for the purpose of putting any person, the public or any section of the public in fear. Regrettably intimidation is rife in South Africa, however very few people get to be prosecuted for these crimes as many people who have been subjected to intimidation are afraid of laying criminal charges of intimidation or of testifying about the commission of the crime in a court, precisely because of intimidation. The assurance of successful prosecution of perpetrators may go a long way in encouraging people to act against intimidation.

[43] So Expressions or acts of threats or of instigation of violence are excluded from protection as a fundamental right of freedom of expression by a specific provision in the Constitution that excludes any acts or utterances that may instigate or might be perceived as promoting or begetting violence, hatred and degradation in s 16 (2).

[44] The Respondent has recognized the relevance of s 12 (1) of the Constitution and that of s 7 (2) in identifying the purpose of the restriction of freedom of expression to such categories of acts or utterances. It stated that it is precisely because they could seriously compromise the right to freedom from violence, as well as the right to life and at the same time disrupt the very foundation upon which the

democratic constitutional values are premised. Accordingly the Respondent asserted the necessity of the section and also that the limitation or interference with the freedom of expression is prescribed by the Constitution itself and falls within the terms of an exception or limitation prescribed or allowed by the Constitution. The Applicants ill-advisedly do not agree with this assertion and denounce the relevance of s 12 (3) and s 7 (2) of the Constitution.

[45] It is further appropriately recognized in the submission by Respondent's Counsel that on the question of hate speech, the jurisprudence of the Constitutional Court recognizes that the prohibition is directed towards the maintenance of public peace and of sound relations among the communities and the Constitutional Court has held that it is precisely for that reason that certain categories of expression, namely expression that are incompatible with the maintenance of a plural society do not enjoy constitutional protection. The protection from impairment of the fundamental right of security of life and property should be the basis upon which it is established if the restriction imposed on the right of freedom of expression is justified.

[46] The Applicants on the other hand have argued that the provisions of s 1 (1) (b) actually do not further the purpose for which the section was legislated as it has the propensity to punish frivolous threats for which the perpetrator did not intend to cause. Also that even the fear itself need not have manifested itself. Specifically those threats that are made during a time of passion or anger. Arguing that, it is so due to the fact that the question whether or not the conduct is intimidating is subjective, with the criminalization of conduct / or act that has the effect of inducing a subjective state of fear.

[47] The test applicable is that the conduct or speech should have the effect, that the person perceiving the act or conduct, fears for his own safety or that of another, or such conduct will only be brought within the confines of the section if **it might reasonably** be expected that the natural and probable consequences thereof would be that a person perceiving the conduct fears for his own safety or that of another.

[48] The statement that the section calls for a subjective test is very far from the truth in that the section specifically refers to intimidation where **it might reasonably be expected** that the natural and probable consequences thereof would be that a person perceiving the act, conduct, and utterance or publication fears for her or his life. The reference to "might reasonably be expected" signifies an objective assessment of the effect of the conduct or speech. The perceived fear of harm expected to be within reasonable bounds.

[49] It is therefore incorrect that the fear inducing a subjective state of fear need not be reasonable. From the reading of the subsection it follows as argued by the Respondent that in deciding if the conduct constitutes intimidation as defined in the Act, the court will not be confined to the determination whether the person perceiving

the act, or utterances as per publication fears for his safety or the safety of his property. The enquiry extends beyond the person's subjective mind. The test being whether objectively viewed the conduct or utterances have the effect or as envisaged in subparagraph (1) and or whether, objectively, it might reasonably be expected to have the effect contemplated in the subparagraph; see *Holbrook*.

[50] The apprehension of injury or harm (fear) is therefore one which a reasonable man might entertain on being faced with certain facts. The state/ complainant is not required to establish that injury will follow; but to show that **it is reasonable to apprehend** that injury or harm will result. This means that, the court must decide, on the facts presented to it whether there is any basis for the entertainment of a reasonable apprehension by the person threatened; see *Setlogelo v Setlogelo* 1914 AD 221; and *Minister of Law and Order v Nordien* 1987 (2) SA 894 (AD) at 896F-H.

[51] The objective test has been found to be difficult to square with the subjective test applied by the courts to determine the existence of intention, since a conviction does not only follow from the fact that the Complainant had in fact feared for his or her life, but the court still has to be satisfied, objectively speaking, that the words complained of had the meaning, and therefore were likely to have the consequences, alleged by the State; see *S v Cele in [29] – [33], Holbroek*. A mechanism to avoid prosecution of frivolous conduct.

[52] The onus is on the state to establish beyond reasonable doubt that the Accused's words and actions had such effect. Whether the onus is discharged will be determined in the light of the circumstances which prevailed during the happening of the incident in question, as already illustrated *supra*. In so far as the Complainants are concerned, the fact that objectively viewed, a reasonable man would or would not have considered the Appellant's utterances or actions to be a threat to their personal safety is a factor that would be considered in establishing whether they in fact, on perceiving the Appellant's conduct and utterance feared for their safety.

[53] The restriction of the right to freedom of expression is therefore reasonable and necessary; notwithstanding that the statutory provision covers a wide range of behavior as per the Applicants' complain. Its necessity is unquestionable in a society

where incidents of violence have reached alarming proportions and still rising. The failure to effectively curb incidents of intimidation affect also the proper prosecution of crime. The fact that s 1 (1) (b) covers expressions that also falls outside the restriction in s 16 (2) does not mean that it violates or its contrary to the fundamental rights as argued by the Applicants as long as such expressions instill the fear of being harmed or personal safety being compromised. Its application is justifiable so that people should not be discouraged from performing their work without fear or favors or what they are legally entitled to do or coming forward to report a crime as in Sonti or in Moyo conducting proper policing.

[54] The Applicant has not made a case for the invalidation of the subsection or shown that his utterances are protected by his right to freedom of expression and could not prove that the statutory provision is inconsistent with the Constitution.

[55] Finally, a side comment I thought is necessary. It is within reason that an Applicant who applies for an order protecting, *inter alia,* or in effect the freedom of expression relating to a particular speech and that speech is alleged in a pending criminal matter to have violated the fundamental rights and freedoms of others, like the right of other persons to be free from all forms of violence, dignity or their right not to be defamed, would recognize that such parties have a direct and substantial interest in the issue and should be joined. Applicants have failed to join the Complainants in their pending criminal matters. As the point was not taken at the hearing nor raised by the court, though regarded as an important fact, it will not be pursued further.

[56] A question whether the objectives of the limitation could reasonably be achieved by means less damaging to the right has been addressed by the Applicants suggesting that the offence be brought under the category of either Crimen Inuiria, Common Assault or Public Violence. Common- law assault is mentioned since the offence's definition includes "inspiring a belief in another that force is immediately to be applied." The focus on the s 1 (1) (b) offence is the instilling of a belief that harm is imminent which could result from any form of action besides the application of force. Assault is restricted to force. Use of the word immediate in common –law assault, compared to the use of imminent on the latter is restrictive, since harm contemplated in the s 1 (1) (b) offence need not be immediate but imminent. Assault will

therefore not cover incidents of intimidation adequately. As much as intimidation can also be assault, there are other acts of intimidation that cannot be brought under the act of assault.

[57] Another alternative remedy is resorting to "Orders to keep the peace" in terms of s 384 of Act 56 of 1955, one of the only remaining sections of the old Criminal Procedure Act. In terms thereof a complaint is made under oath to a Magistrate regarding any person conducting himself in a violent manner or is threatening to cause harm to another person, or the property of another, damage or harm or has used a language and behaved generally in a manner that is likely to cause a breach of the peace or an assault. It carries no criminal sanction. Intimidation Act is a law of general application, which can be used to limit any constitutionality protected right in terms of s 36 (1) of the Constitution.

[58] The Applicant has not succeeded in proving that the statutory provision that is s 1 (1) (b) violates any of the Applicant's constitutionally entrenched fundamental rights or offends or contradicts the Constitution justifying its invalidation or eradication from the statute book.

SECTION 1 (2) OF THE ACT

[59] A further question is whether the requirement in s 1 (2) that the Applicants prove the existence of a lawful reason for the alleged threats made in terms s 1 (1) (a) in order to escape liability amount to a reverse onus imposed on an Accused, that is **inconsistent with the right to, remain silent, be presumed innocent and not to testify during proceedings, as provided** in s 35 (3) (h) of the Constitution, warranting its declaration as unconstitutional and invalid as sought by the Applicants?

[60] Section 35 (3) (h) entrenches as a fundamental constitutional value, the fact that it is the duty of the prosecution to prove the guilt of an accused person in a criminal case. In *S v Zuma and Others* 1995 (2) SA 642 (CC) Kentridge AJ at [25] pointed out that:

> "the presumption of innocence is derived from the centuries-old principle in English law, forcefully restated by Viscount Sankey in his celebrated speech in *Woolmington*

v Director of Public Prosecutions (1935) AC 462 (HL) at 481, that it is always for the prosecution to prove the guilt of the accused person, and that proof must be proof beyond reasonable doubt."

[61] The rights as encompassed in s 35 (3), requiring criminal trials to be conducted in accordance with those notions of basic fairness and justice and the courts hearing the criminal trials or appeals to give content to the notions. The *onus* is rooted in the rights to be presumed innocent, to remain silent during trial and not to be compelled to give self-incriminating evidence entrenched in the Constitution.

[62] A statutory presumption and any other legislation that adversely affect any of the fundamental rights or values in the Constitution have therefore to meet the criteria of s 36. In *S Bhulwana; S v Gwadiso* 1996 (1) SALR (CC) at [15] O'Regan J on behalf of the unanimous court, with reference to the general rule restated by the Appellate Division in *R v Ndlovu* 1945 AD 369 at 386 that:

> "[1] in all criminal cases it is for the Crown to establish the guilt of the accused, **not for the accused to establish his innocence. The onus is on the crown to prove all averments to establish his guilt,"**
>
> pointed out that the **presumption of innocence** was not new to our legal system but was in fact an established **principle of our law**." (my emphasis)

[63] Sonti alleges that section 1 (2) of the Act:

> [63.1] creates a reverse onus by stipulating that the **onus of proving the existence of a lawful reason** as contemplated in subsection 1 (1) shall be upon the accused, unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused by the close of the case for the prosecution. Restating the provision to highlight what needs to be proven, it reads:
>
> **(1) Any person who-**
>
> **(a) <u>without lawful reason and with intent to compel</u>** any person or persons of a particular nature, class or kind or kind or persons in general to do or abstain from doing any act or to assume or to abandon a particular standpoint-
>
> (ii) In any manner **threatens to kill, assault, injure or cause damage to any person or persons of a particular nature class or kind**
>
> [63.2] The provision of s 1 (2) has **the effect of relieving the prosecution of the burden of proving every element of the offence created by s** 1 (1) and

instead the accused has to prove the existence of a lawful reason, unless if by the end of the prosecution's case such lawful reason has been submitted either by him or on his behalf.

[63.3] violates the right to silence and the right against self-incrimination, in that it compels an accused person to make a self-incriminating statement before the close of the state's case if **she is to be relieved from the burden of proving that her utterances or conduct were lawful; s 35 (3)**.

[63.4] constitutes an unjustifiable limitation on the right to freedom of expression, entrenched in s 16 of the Constitution, in that it presumes expression which falls within section 1 (1) (a) (ii) to be unlawful, unless a statement setting out a lawful reason for it is made in advance.

Violation of the rights to remain silent, presumption of innocence and against self-incrimination and justification

[64] The approach to the application of the provision of s (1) (2) in the context of s 1 (1) (a) should be with the understanding that section 35 (3) (h) rights are consequently procedural rights which are central to our adversarial criminal process. The order in which evidence is called is linked to the onus of proof and has to assert the right to a fair trial, which it does by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond reasonable doubt and to the accused the duty of rebuttal. Emphasis is also in the significance of the **presumption of innocence** as a general procedural safeguard minimizing the risk that innocent persons may be convicted and imprisoned, thereby reducing on an acceptable level the risk of error in the court's overall assessment of evidence tendered in the course of the trial; see S v *Manamela (Director General of Justice Intervening)* 2000 (3) SA 1.

[65] The following observation was adopted from the statement by Brennan J in *Speiser v Randall* 357 US 513 (1958) at 525-6 that:

> "There is always a margin of error representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading a fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt."

[66] Applying these principles to the provisions of s 1 (1) (a) in *casu*, and being mindful of the presumption of innocence, the state has, first, to prove by the close of its case, beyond reasonable doubt the intimidation or a threat made with the intention to compel a complainant to do something he is not legally entitled to do or refrain from doing something that he is legally entitled to do, without a lawful reason whereupon the burden to justify the proven conduct would arise, intimidation being inherently unlawful.

[67] However s 1 (2) imposes the *onus* of proving the essential element of the existence of a lawful reason on the accused as a legal duty, which onus arises at the close of the state's case, significantly at a time when a *prima facie* case of intimidation (a threat) with an intention to compel, would have to have been proven by the state. So when in general the state's onus is to be discharged by proving all the elements of the crime, the absence of a lawful reason is discharged by a presumption, and the onus of proof thereof placed upon the accused, resulting in a reverse onus.

[68] For the accused to escape the onus, provision is made by the section for the making of a statement prior to the close of the state's case by either the accused or anyone on his behalf setting out the lawful reason, failing which the accused would carry the onus. The question that has arisen from the Applicant's contention is whether the proviso for making the statement compels the accused to make it before the state's case is closed as alleged by the Applicants and thereby amounts to the violation of the Applicant's right to remain silent, against self-incrimination and presumption of innocence at that stage? Failure to have made such a statement would it just ordinarily result in a conviction?

[69] The ordinary use of the words '***unless a statement would have been made'*** indicate that the accused is not compelled to make a statement but if he has done so he would be exonerated from the onus to prove a lawful reason at the close of the state's case. The accused is not prohibited from exercising his right to remain silent or against self-incrimination and not make the statement. Therefore the rights are protected until at the close of the state's case whereby a legal burden is then imposed to prove the lawful reason. The conviction would follow only on failure by the accused to discharge the onus, subject to a *prima face* case having been proven by the state.

[70] The statement referred to, that would have been made by the accused or on his behalf by the close of the prosecution's case is in all probability a statement in explanation of a plea. I do not expect a trial in these proceedings to be run differently to any other ordinary criminal trial on a common law charge. The accused is not compelled to make a statement before the close of the state's case. The presumption of innocence and right of the accused to remain silent prevailing. It would be the accused's decision whether or not, to make the statement. Where it would appear that a *prima facie* case of a threat to assault or kill with intent to compel a certain outcome has been proven, and the accused has not made a statement prior to the close of the state's case (accused having exercised his right to remain silent), the accused in any other ordinary criminal proceedings would have carried the evidentiary burden to rebut the prima facie case or of proof of justification. The general principle being that it is up to the state to discharge the legal burden of proof in a criminal trial.

[71] The state's onus constitutes discharging the legal burden by proving the presence of all the elements of the crime beyond reasonable doubt to persuade the court of the accused's guilt. Therefore it is inappropriate of the provision to impose a legal burden in substitute of the evidentiary burden that would have arisen under ordinary procedure and violates the accused rights against self-incrimination and the presumption of innocence.

[72] It is the use of the words 'onus to prove' that is problematic, as in every criminal trial the accused is not compelled to give evidence self- incriminatory or otherwise, been argued that the is no legal duty for the accused to justify his threats.. The antithetical situation suggested by the Respondent is to allow the reading of the word "prove" in the section differently to instead denote an evidential burden to adduce evidence in rebuttal of the presumption of guilt arising from proof of the threat and its intended purpose. Notwithstanding, the section imposes a legal burden creating a reverse onus on the accused.

[73] Sonto would then instead be required to establish on a balance of probabilities that she has a lawful reason for having intimidated the complainant with the intention to compel her to withdraw the charges, failing which she would be convicted. A reasonable possibility that the ground exists, will not suffice to avoid conviction. Consequently a legal burden creates a possibility of a conviction being secured even on the basis of doubt of the presence of a lawful reason, which the Applicant argues opens a risk of innocent persons being convicted. It is of significance though that the onus of proving the presence of a lawful reason imposed on the accused according to the provisions of s 1(2) arises at the close of the state's case, at a stage when the general principle requires that the prosecution must have proven a prima facie case against the accused to secure a conviction. As a result the mere fact that if accused fails to prove the lawful reason at the close of its case, the court would insist on proof of a prima facie case, does, although not prevent, minimize the risk.

[74] As already alluded, the provision is an inroad to the accused's right to be presumed innocent, remain silent and against self- incrimination. In *R v Oakes* (1986) 26 DLR (4^{th}) 200 AT 214 it was held that the presumption of innocence contains three fundamental components: the **onus of proof lies with the prosecution**, the standard of proof is beyond reasonable doubt; and **the method of proof must accord with fairness**.

[75] As a result the legal burden imposed is contrarily to the principle of state proving all the elements of a crime and clearly encroaches on an accused's rights against self-incrimination and presumption of innocence which is contrary to the principle of the state proving all the elements of a crime. I however doubt that the number of innocent accused persons who might be open to the risk of conviction at the close of the prosecution's case are of such a proportion that might justify or call

for the revocation of the section when all the other elements of the crime would have been prima facie proven, which are:

[75.1] the threat to kill or assault or injure a person/s or to cause damage to his or her property;

[75.2] made with intention to compel the person /s to do or abstain from doing any act or to assume or to abandon a particular standpoint; and

[75.3] in a situation where the information to be proven is only accessible to the accused.

[76] That is the reason I place emphasis on the significance of the onus to justify the accused's conduct arising only at the close of the state case, when the prosecution is required to have proven a *prima facie* case for the accused to answer to or justify its proven conduct. In *casu* the Applicant is alleged to have threatened the complainant with death, in order to force her to withdraw charges against a suspect. The prosecution will have to prove those facts first thereafter it would be **reasonable** to expect the Applicant to be able to prove the presence of a lawful reason as that is information that would be known to her. Similarly if at the end of the prosecution's case it appears that a lawful reason exists justifying the proven acts of intimidation, the onus will have been discharged and would result in the accused's acquittal. Unless the burden, as submitted on behalf of Respondent, is read as an evidentiary burden (instead of a legal burden) requiring accused to adduce evidence that rebuts or justifies the proven offensive conduct.

[77] The imposition of a burden to prove facts which can only be within the accused's access does not amount to an unfair process or an unfair limitation of the presumption of innocence or an unjustifiable reverse onus, since it also arises at the close of the state's case and the prosecution would pretty much not have access to information relating to the lawful reason. However It would be unreasonable and detrimental to a fair process to expect the prosecution to know or to have access to information on accused's possible defenses.

[78] The Respondent has argued that the onus is in fact an evidential burden to rebut the *prima facie* case that would have been proven by the prosecution. If the accused's act is covered by a ground of justification such as private defence, necessity or official capacity she will obviously have a lawful reason for her conduct; see *Snyman's Criminal Law 5th Edition*, which information would normally not be accessible to the prosecution.

[79] I agree with the Applicant's counter argument that the incidence of burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party; see *R v Cohen* 1933 TPD 18. Failure of such an opponent to give evidence may weigh heavily against him, however a fact which should not alter the onus. **In some instances however, this does not amount to equitable results**

especially if there is no way that the state could be able to access the information but for the offender himself to volunteer.

[80] This was also noted as a peculiar situation that requires to be handled differently necessitating a balancing approach that will ensure a justifiable conviction. In *R v Chaulk* (199) 1 CRR (2d) 1 Lamer CJC noted that:

> "An accommodation of three important societal interests was involved: **avoiding a virtually impossible burden on the Crown**; convicting the guilty; and acquitting those who truly lacked the capacity for criminal intent." (my emphasis)

[81] In *S v Manamela (Director General of justice Intervening)* 2000 (3) SA 1(CC) it was emphasized that:

> "It is clear from the wording of s 36 (1) that no right enshrined in Chapter 2 of the Constitution is absolute. Although this court has so far not found an impugned reverse onus provision to pass constitutional muster, it has been at pains to articulate that there are circumstances in which such measures may be justifiable. The effective prosecution of crime is a societal objective of great significance which could, where appropriate, justify the infringement of fundamental rights."

[82] Acknowledging the possibility of the aforementioned being realized, Kentridge AJ in *Zuma supra* at para [41] emphasized that:

> "the effect of his judgment was not to invalidate every legal presumption reversing the onus of proof, since some presumptions, may be justifiable as being rational in themselves, **requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove** ....Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, **and the state is able to show that for good reason it cannot be expected to produce the evidence itself.** " (*my emphasis*)

[83] The circumstances of each case will determine whether the establishment of the elements of the offence should be reorganized. There being other ways of securing a conviction, like through circumstantial evidence. The provision could only be fatal if it lacks inherent mechanism to exclude the probability of a conviction of an innocent accused who may find themselves within the reach of the section whose rights the presumption of innocence was intended to safeguard. A sentiment eloquently explained by Sachs J in *State v Coetzee* [1997] 2 LRC 593 that Lord Bingham of Cornhill in *H M Advocate v McIntosh, P.C.* (5/2/2001) found worth setting out the significance of the presumption of innocence in full [para 220 at 677]:

> "There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring

> that a particular criminal is brought to book... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases".

[84] Although Lord Bingham found the logic of this reasoning inescapable. He nevertheless found it right to say that in a constitutional democracy limited inroads on presumption of innocence may be justified. The approach to be adopted was stated by the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379, 388 (para 28) as follows:

> "Presumptions of fact or of law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. **It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. This test depends upon the circumstances of the individual case".** (my emphasis)

[85] Lord Bingham conclusion was that 'It follows that a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed.' O Regan J in *Manamela* also was mindful that Rules regulating the burden of proof seem to determine the acceptable level of risk and who should bear it in each case, she concluded that 'the imposition of any reverse burden should be fair and proportionate, taking into account various factors including the **seriousness of the offence and the maximum sentence**, **the ease of proof by one party over the other** and the danger of convicting the innocent.

[86] It is understandable that the presumption of innocence and in particular the rules concerning the burden of proof exist because fact finding by a court can never be without the risk of error and because at times courts cannot determine the facts at all. The arising of a presumption of absence of a lawful reason after the close of the prosecution's case at the time when the state would have proven a prima facie case should be viewed as a mechanism that ensures the exclusion of the possible conviction of innocent accused. The legality of their actions is also within access of the accused.

[87] Whether such circumstances have arisen is a matter to be determined under s 36 (1) of the Constitution that provides that 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;

© the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

less restrictive means to achieve the purpose

[88] Accordingly, the provision would be eradicated as unconstitutional and invalid unless it defensible as a permissible limitation of the right. Like any other fundamental right, the presumption of innocence is not absolute. Once infringed the question arises as indicated in the mentioned authorities whether there are important reasons outweighing the importance of the presumption, for increasing the risk of error through varying the burden or incidence of proof. The Constitutional Court had already acknowledged that there are circumstances in which a burden of proof may be imposed upon an accused even though it had not yet found in favour of such sentiment; see *Makwanyane supra*. A view that has manifested in the English Justice for a long time on several occasions holding reverse onuses to be justified limitations of the presumption of innocence. *Woolmington v DPP* [1935] AC 462 is a landmark of the House of Lords case, where the presumption of innocence was first articulated in the Commonwealth identifying the common law exception and the statutory exceptions as examples where the burden of proof was reversed requiring the Defendant to discharge a legal burden to avoid a conviction.

[89] In *Regina v Lambert* UKHL 37 [2001] the Court emphasized that the prosecution always bear the primary obligation of proving the main elements of an offence. Where a legal burden is imposed it must be legitimate and proportionate. After that, the legality of the reverse burden would be assessed in light of all of the circumstances, including the **aim of the legislation**, the fact that **Parliament had intended** to pass such a statute, and **the ease with which the prosecution could discharge the burden should it be placed on them.** Every reverse burden will therefore involve a balancing exercise, involving several factors, to ensure that the burden is proportionate.

[90] The section is a law of general application and other factors have already been addressed in respect of accessibility of the information required to discharge the onus that it is not within reach of the prosecution. The minimized risk as a result of the actual onus arising at the close of the prosecution's case and the requirement that conviction be returned if a *prima facie* case is proven plus the accused has failed to discharge the onus.

[91] The purpose of this crime is to punish people who intimidate others to compel them to conduct themselves in a certain manner, such as not to give evidence in court, report crime, and support a certain cause or a political party, then committee illegal acts or not do their work properly. It is also well known in South Africa that intimidation is rife especially during strike actions, of witnesses in courts and victims of crime. Intimidation therefore hampers the successful prosecution of perpetrators of crime impact to such success. Consequently if crime in general is to be combated and the public deterred from committing crime through successful prosecution of, the protection of potential witnesses from intimidation is paramount. It is also to protect the public's right to freedom from violence or threat of violence. The combating of crime outweighing the inconvenience of standing trial at a slight risk of a wrong conviction.

[92] I have already dealt with the provisions infringement of the rights in s 35 (3) (h). On conviction the offence carries a sanction as stipulated in the Act not exceeding R40 000 or imprisonment sentence for a period not exceeding ten years, or to both such a fine and such imprisonment. Even though according to Snyman's Criminal Law at 463 s 1(2) of the Adjustment of Fines Act 101 of 1991, the maximum amount is adjusted to the maximum number of years in prison 10 x R20 000 which equals R200 000.00. Whatever it may be, the offence carries a hefty sentence to deter those who might be tempted to follow. This is a very serious offence and for all the mentioned reasons s 1(2) cannot be lightly invalidated.

[93] it is for the reasons that the evidence sought to be proven is within the exclusive knowledge of the accused and it would not be easy for the prosecution to prove the evidence required if the onus is left to the state, it is logical, just and necessary that the burden of proof of the existence of the lawful reason is imposed upon the accused. At the end of the day, and taking into account all the evidence, the court would still have to be convinced beyond reasonable doubt that the accused was indeed guilty, having intimidated the complainant with the intention to compel a certain situation without a lawful reason.

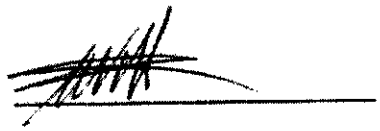
[94] The removal of the section from the statutes may have far-reaching consequences in that ordinary members of the community as it usually happen will continue to withhold information because they are too terrified and intimidated to come forward. Such conduct exacerbates incidents of crime, ineffective policing and criminals acting with impunity, taking advantage of the fears of the community. The Constitution requires that such pressing and social concerns that affect the everyday lives of ordinary citizens who are doing their duties to see to it that crime is prosecuted must be addressed by providing, if necessary, a reverse burden of proof that is held to be justified and as pursuing a legitimate aim. The provision is therefore of sufficient importance.

[95] The burden is therefore proportionate and less invasive than the infringement caused in other reverse onus. There is a balanced interference between the general

interest of the community and the fundamental protection of the rights of the individual, taking all the factors into consideration. The preservation of the section is justified by the nature of the penalty sanctioned, the ease with which the defendant can discharge the legal burden, the fact that the prosecution still has to prove the essential elements of the offence and the significance of the presumption of innocence as a general procedural safeguard that is maintained. Due to the proportionality of the section, the Respondent's proposal of reading down the provision as imposing an evidential burden is not necessary. There is also no sufficient cause for the invalidation of the provision or its declaration as unconstitutional.

[96] Under the circumstances I make the following order:

[96.1] The Application for a declaratory order of invalidity and unconstitutionality of s 1 (1) and s 1 (2) of the Intimidation Act 72 of 1982 is dismissed with no order as to costs.



N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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