

**CRITICALLY EVALUATING THE MACHINERY OF THE DOMESTIC
VIOLENCE ACT 116 of 1998 FOR COMBATING DOMESTIC
VIOLENCE IN SOUTH AFRICA**

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DECLARATION

I, Siyabonga Sibisi, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the requirements of any other degree or qualification at any other University.

I further declare that this dissertation reflects the law as at the date of signature.

Signed and dated at Pietermaritzburg on this day of 20 .

Siyabonga Sibisi

Research overview

There is an international law duty on South Africa in terms of the Convention on the Elimination of Violence Against Women (CEDAW) and the Convention on the Elimination of Violence Against Woman (CEVAW). Section 12 (1) (c) of the Constitution of the Republic of South Africa, 1996 guarantees a right to be free from violence either from a public source or a private source. South Africa ranks amongst the most dangerous countries in the world. It is submitted that intimate partner violence is at its peak. Domestic violence is a direct violation of various other rights including the right to life, equality, human dignity, privacy, labour and housing. The Domestic Violence Act 116 of 1998 (the DVA) was passed as a means to combat domestic violence primarily by issuing protection orders to victims of domestic violence. This dissertation affirms that the protection order is the core machinery in the DVA for combating domestic violence. However it is further submitted that there are other machineries within the DVA that may equally be effective. It is trite that domestic violence still rears its ugly head. There are various causes for this. On one hand, some argue that the machineries are ineffective, and on the other hand, some argue that they are not being properly implemented.

Therefore, the purpose of this dissertation is to set out the core machinery for combating domestic violence and then to critically examine the advances made in the implementation of the same machinery, focussing primarily on the criminal justice system and the challenges they face while implementing the DVA and providing possible solutions.

Chapter 1 is the introduction. It sets out the purpose of the study. It draws on the legal historical background, possible causes and consequences of domestic violence. It also tracks legal developments prior to the DVA. Chapter 2 sets out the DVA and the various machineries available to combat domestic violence within the confines of the Act. This chapter details the process of obtaining a protection order, being the core machinery in the DVA. It chapter makes it clear that there are other machineries within the Act and those machineries follow in chapter 3. It also discusses other topical issues such as the abuse of process by 'victims' and the remedies available to respondents in such circumstances. Chapter 3 is a critical evaluation of the machineries. This chapter builds on the foundation laid in chapter 2. It sets out each of the machineries that are available within the confines of the DVA other than a protection order. Each of these machineries is evaluated by taking into account the nature of the machinery and the problems associated with the implementation of such machinery. Up to this point an attempt has been made to refer to all available cases including those that are unreported. Chapter 4 contains summation of arguments, recommendations and the conclusion. Some of the recommendations call for statutory amendments.

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CHAPTER ONE

INTRODUCTION

1.1. THE PURPOSE OF THE STUDY

'Family violence is one of the most insidious forms of violence against women [and children]. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds...'¹

Studies have shown that South Africa is amongst the world's most violent countries,² with women and children being the most vulnerable to such violence.³ Violence in the private context can take many forms including physical assault, verbal assault, sexual assault, intimidation, psychological abuse, economic deprivation, harassment and any other controlling behaviour. The foregoing is true, especially with domestic violence which is a form of violence that usually occurs behind closed-doors when no one is looking. The knowledge that domestic violence intrudes on the comfort of a home, directly encroaching on the natural feeling of safety within one's home is on its own appalling. It is this characteristic of domestic violence that causes victims to suffer in silence and this only perpetuates the abuse rather than solving it.

While anyone can be a victim of domestic violence, women and children are at the forefront of victimology,⁴ to the extent that some writers regard the rife-ness of domestic violence instances as a clear indication that there still exist gender-based inequalities within the South African community.⁵ The unfortunate consequence of domestic

¹ Paragraph 23 of General Recommendation 19 in terms of the Convention on the Elimination of all Forms of Discrimination Against Women.

² C. Bendall 'The Domestic Violence Epidemic in South Africa: Legal and Practical Remedies' 39 (2010) *Women's Studies* 100, 101 available at www.volunteer-human-rights.org accessed on 9 February 2017.

³ Their rights tend to be pried on by reason of their gender and the natural inability to defend themselves. At the time of writing this chapter The New Age newspaper reported about an 8-year-old girl who had been killed by her stepfather over issues he had with her mother. The stepfather killed and buried the little girl on a shallow grave just behind his shack at Inanda Township just outside Durban.

⁴ *Omar v The Government of the Republic of South Africa and others* 2006 (2) SA 289 (CC) 294.

⁵ B. Clark 'Cold Comfort? A commentary on the Prevention of Family Violence Act' 1996 *South African Journal on Human Rights* 587.

violence is that children learn at a tender age that the use of violence is an acceptable way of dealing with problems or getting an advantage over others.⁶

There are international law obligations on South Africa to combat domestic violence. The Convention on the Elimination of Discrimination Against Women and the Declaration on the Elimination of Violence Against Women enjoin the state to take all necessary measures, statutory or otherwise, to ensure equality of men and women as well as eliminating the alarmingly high levels of violence against women.

Section 12 of the Constitution of the Republic of South Africa⁷ (hereinafter referred to as the Constitution) further provides generally that everyone has a right to freedom and security of the person. More specifically section 12 (1) (c) provides that everyone has a right to be free from violence either from a public or a private source.⁸ The far reaching consequences of domestic violence are a clear indication that it affects various other rights such as the right to equality⁹, the right to human dignity¹⁰, the right to life¹¹, the right to privacy¹², rights to freedom of belief, opinion and expression¹³, right to freedom of movement¹⁴ and the rights to property and housing.¹⁵ Section 7 (2) of the Constitution binds the state to respect, protect, promote and fulfil these rights, which, in essence culminates into a duty on the state (in all its facets) to shield its citizens against any violation of these rights. This dissertation is concerned mainly with the right to be free from domestic violence. However, the drastic effects that this social evil has on other rights will be thoroughly discussed.

The legislature has discharged its international law and constitutional duty by the passing of the Domestic Violence Act¹⁶ (herein after referred to as the DVA). The DVA

⁶ *S v Baloyi (Minister of Justice and another intervening)* 2000 (2) SA 325 (CC), 341D – F.

⁷ The Constitution of the Republic of South Africa, 1996.

⁸ J. Heaton *South African Family Law* 3rd Ed (2010) 267. See also Bendall (note 2 above; 102) wherein it is pointed out that this section places a positive duty on the state to safeguard against, and penalise acts of domestic violence

⁹ Section 9

¹⁰ Section 10.

¹¹ Section 11.

¹² Section 14.

¹³ Section 15.

¹⁴ Section 21.

¹⁵ Sections 25 and 26.

¹⁶ Domestic Violence Act 116 of 1998.

has been appraised as the best of its kind in the world.¹⁷ In *Seria v Minister of Safety and Security*¹⁸ Meer J described it as “a commendable and long-awaited addition to our jurisprudence promoting the rights of equality, freedom and security of the person.”¹⁹ A research paper by the African National Congress (A.N.C.) defined the DVA as “...a bid to reverse the long history of neglect of domestic violence by law enforcement officers...”²⁰

The preamble to the DVA states that its purpose is to afford victims of domestic violence maximum protection that the law can provide. What is left is to examine whether the machinery therein (stated below) fulfils this purpose and consequently translates the international and constitutional standard into a reality by combating domestic violence.²¹ Therefore, the purpose of this dissertation is to set out the core machinery for combating domestic violence and then to critically examine the advances made in the implementation of the same machinery, focussing primarily on the criminal justice system and the challenges they face while implementing the DVA and providing possible solutions.

1.2. METHODOLOGY AND LIMITATIONS

This dissertation is entirely desktop based. It is a consolidation of existing research in the field. Where there are gaps, an attempt is made to identify these gaps and provide a possible solution. Some of the solutions will be based on practical experience in the field. An attempt is made to refer to statistics and published findings of empirical studies in the form of reports. However the dissertation does not attempt to be empirical in any manner.

¹⁷ K. Gadinabokao ‘Shortcomings of the South African Domestic Violence Act 116 of 1998 in comparative perspective’ (Unpublished LLM dissertation, University of Pretoria, 2016) 2.

¹⁸ *Seria v Minister of Safety and Security* 2005 (5) SA 130 (C).

¹⁹ *Ibid* 148D.

²⁰ African National Congress *Discussion paper on gender based violence* (2012) 5.

²¹ The National Department of Social Development *South African Integrated Programme of Action: Addressing Violence Against Women and Children 2013 – 2018* (2014) 8.

1.3. TERMINOLOGY

Domestic violence is an umbrella concept used to define a collection of offences that occur in family settings.²² However it is worth noting that the concept of 'domestic violence' is relatively new. In South Africa it was presumably adopted because of its definitional capacity which extends even to conduct which would ordinarily not be regarded as 'violence' for example, stalking. Further, it is gender-neutral thus recognising that anyone can be a victim of domestic violence regardless of gender or sexual orientation. Furthermore the concept agrees with a wider definition of a family. As it will be seen below, the focus is on the closeness of the relationship and not the traditional family.

Nonetheless, concepts such as wife-battering, wife-beating, marital violence, family violence, gender-based violence, intimate partner abuse, violence against women, intimate terrorism²³ and women or child abuse had previously and continue to be used to denote domestic violence. These concepts cannot be divorced from a study on domestic violence and therefore any subsequent use in this dissertation is for contextual convenience and shall not be seen as bringing something new; or as a departure from the focus of this dissertation.

1.4. THE BACKGROUND OF THE STUDY

1.4.1. General remarks

Before carrying out any critical discussions of the machinery of the DVA, it is critical to set out the background against which the study emanates. What follows below is a discussion of the reality of domestic violence in South Africa; tracing its legal origins from different legal systems such as Roman law, Roman Dutch law, Germanic law, English law and indigenous practices where women were treated as possessions and

²² M.Carnelley 'Domestic Violence' in Hoctor *South African Criminal Law and Procedure: statutory offences* vol 3 2nd Ed (2012), 1.

²³ A.C. Madzivhandila 'The Policing Of Domestic Violence In The Tshwane Policing Presinct' (Unpublished MTech dissertation, University of South Africa, 2015) 25.

inferior to men. The aim is to show how these ancient practices were carried over to the modern world and that despite the formidable presence, the state had kept mum on the issue.

This background will discuss the key causes and the consequences of domestic violence. This is a critical thing to do because from this, one gets an idea of the type of machineries that are necessary to gauge it out. Further, a clear understanding of the causes and the consequences places one in a better and fair position to critically assess the suitability of the current machineries in the DVA. The detrimental effects on woman and children are also looked at.

Since this study is about critically evaluating the machinery in the DVA for combating domestic violence, it is contextually compelling to discuss the common law and statutory backdrop of the DVA. Below the common law remedies that were used to countenance violence against women, which are arguably still in usage, such as prosecution, interdicts and a claim for maintenance, which has now been codified, are discussed. These common law remedies were used at a time where there was no statutory measure. The Prevention of Family Violence Act, which precedes the DVA, was an attempt to close the statute vacuum by providing speedy remedies to victims of 'family violence'. This Act is extensively discussed below leading to the end of the chapter.

1.4.2. A brief diagnosis of domestic violence in South Africa

Throughout the years women and children have been victims of domestic violence. This is not the case just for South Africa, but across the globe. The society has at all times been aware of the incidence of domestic violence as they often resulted in casualties such as death.²⁴ Studies indicate that there is a high rate of murders between family members and this has been the case over many years.²⁵ Studies further show that some societal attitudes towards domestic violence have instead been

²⁴ See generally T. Deane 'Violence against women and children in South Africa' (2002) 43 (2) *Codicillus* 14.

²⁵ A.E. van der Hoven 'Social factors conducive to family violence' 1988 *Acta Criminologica* 34.

conducive to the continuation of the battering of women.²⁶ Despite the knowledge of this prevailing social evil, a majority of jurisdictions around the world have kept mum about it. However in recent years various countries are taking active steps to fight domestic violence; whether these steps are adequate is a subject of many studies and debates from which South Africa is also not exempt.

The South African jurisprudence draws from various legal systems including Roman law²⁷, Roman-Dutch law, Germanic law²⁸ and English law²⁹. In these legal systems it was accepted that a husband could enforce discipline on his wife just as he could do with his children through disciplinary chastisement. While it is acceptable to say that these legal systems brought with them the legal sanctioning of disciplinary chastisement with respect to a wife, it will be naïve to assert that the practice of wife beating did not exist within the indigenous South Africans prior to the reception of these western legal systems.³⁰ Therefore, instead of singling out a certain legal system, it is competent to say that the law had sanctioned domestic violence.³¹

Acts which would otherwise be regarded as domestic violence were not regarded as such, no prosecution could follow and the law developed as such. Prior to 1993 the

²⁶ Ibid.

²⁷ Under Roman law the wife was totally under her husband's authority or marital power. This was codified and proclaimed by the founder of Rome, Romulus, in 753 BC. Initially the husband had an absolute right over her life. This means that he could kill her for her transgressions. She had a duty of absolute obedience to her husband. See D. Singh 'Self-defence as a ground of justification in cases of battered women who kill their abusive partners' (unpublished LLD thesis, University of South Africa, 2007) 13. However these extreme rights of the husband were later significantly reduced to a husband's right to disciplinary chastise his wife. See Carnelley (note 22 above; 2).

²⁸ Under Germanic law the husband had absolute rights over his wife's body. He could do no wrong to it. He could kill her for her transgressions. However as the Germanic law evolved, wife killing was outlawed. The wife could divorce her husband if he maltreated her. See Carnelley (note 22 above; 2). See also Singh (note 27 above; 15).

²⁹ Under English law the husband was accountable for the conduct of his wife and as such he was entitled to chastise her in order to control her. The husband had a 'sexual-title' on his wife's body and he could not be charged for a sexual crime on his wife. In the 19th century English law abolished wife beating. Laws to that effect were passed, however they were rarely enforced. If a wife killed her husband, she was charged with 'petit-treason' which was a form of treason where a subordinate killed a superior. The sentence for petit treason was death by burning. See generally Singh (note 27 above; 16 – 19).

³⁰ M. Slabbert 'Explaining domestic violence in aboriginal communities: the relevance of the public/private dichotomy' 2003 (9) *Fundamina* 177, 197 submits that the remnants of the legal sanctioning of wife beating were arguably passed to different system through the European invasions.

³¹ Ibid 197 and 185. Slabbert focuses on rural communities in South Africa and other jurisdictions such as Australia. Whilst this research has a limited focus, the content speaks of the experiences of society at large.

South African law allowing a husband to disciplinary chastise his wife had long become obsolete.³² Prosecution could follow from a husband's criminal conduct towards his wife. However, this was not effective in dealing with domestic violence as the criminal justice system was designed to deal with criminal conduct as a public concern and could not interfere with the privacy of the family which the law had strongly protected.³³ The victims of domestic violence, nonetheless still turned to the police to report incidents of domestic violence and the police often did not know how to respond or what relief to provide.³⁴ They often turned to mediating the matter.³⁵ Some victims reported secondary victimisation at the hands of the police where police officers were reluctant to believe complainants in domestic violence matters or were insensitive to their plight.³⁶ For many years the police force was dominated by men; some who held the ill-conceived view that women were subordinate to men and those men could do as they pleased with their women.

Despite such compelling presence, there were no discernible statistics on the extent of domestic violence.³⁷ This is still the case today, after 19 years of the passing of the DVA. However it is estimated that at least 40% of the women have suffered from some act of domestic violence in their lifetime. This is alarming especially considering that women make up more than half of the population. Recent crime statistics (2014/2015) show that the crime of assault is the most prevalent.³⁸ This has always been the case

³² J. Church and S.K. Parmanand 'Towards the recognition of filial consortium' XX 1987 *Comparative and International Law Journal of Southern Africa* 230, 231.

³³ During the 18th century there was emphasis on the privacy of the family. See J.M. Quinn 'Wife Beating or Chastisement?: An Approach to Generating New Theoretical Concepts for Understanding the Changing Frames and Discourses of Domestic Violence' (unpublished Master of Arts thesis, University of North Carolina, 2007) 10. Life was divided into the public sphere as well as the private sphere. See R.B. Siegel 'The Rule of Love: Wife Beating as a Prerogative and Privacy' 105 (1996) *The Yale Law Journal* 2117, 2121. Consequently the family was regarded as a private institution with which the law had very little say. The husband as the head of the institution enjoyed the right to decide which aspects of family life is publicised. In this way the wife could not speak out.

³⁴ Madzivhandila (note 23 above; 2).

³⁵ A.E. van der Hoven 'The community's attitude towards wife battering' (1989) 2 (2) *Acta Criminologica* 54, 56.

³⁶ Ibid.

³⁷ It is submitted that available statistics show that at least 40% of women have suffered a form of domestic violence. see L. Moodley 'Battered women who kill abusive partners in non-confrontational circumstances...can South Africa legislation do more to protect them?' (unpublished LLM dissertation, University of KwaZulu-Natal, 2015) 1; A.B. Njezula 'Investigating Domestic Violence Against Women in South Africa' (unpublished MPhil dissertation, University of the Western Cape, 2006) at 1 notes that domestic violence is between 10 – 60%.

³⁸ Statistics South Africa *Crime Statistics Series Volume III: Exploration of selected contact crimes in South Africa in depth analysis of the victims of crime survey data 2011 – 2014/2015* (2016) 9.

over the years.³⁹ What is interesting to note about these general crime statistics is that the crime of assault is perpetrated mostly against women, children and the elderly; and the place where it usually occurs is at home.⁴⁰ Assaults against males usually takes place on the streets.⁴¹ Females also get assaulted on the streets, but the chances of this happening are much lower; and even then, the perpetrator is usually a male.⁴² Although these statistics do not deal specifically with domestic violence, however they do provide some insight into the extent of domestic violence in South Africa.

The reasons for the absence of statistics specific to domestic violence have not changed. Various writers submit that because domestic violence occurs within the 'family', many women elect not to disturb the fabric of the family. Bendall argues that married women keep quiet because they want to 'maintain the appearance of a happy family'.⁴³ Singh argues that some women have condoned domestic violence 'under the pretence of protecting and promoting integrity and privacy of family life'.⁴⁴ Madzivhandila notes that some victims do not report incidents of domestic violence because they are afraid of retaliation, that they are ashamed and they tend to blame themselves for the conduct of their abusers.⁴⁵ Van der Hoven points out that negative societal attitude towards women in abusive relationships could cause women to elect to suffer in silence.⁴⁶

In modern society, a marriage is no longer the basis for the formation of a family. Nuclear families have emerged. Whatever the formation of the family, the relations as far as domestic violence is concerned remains the same. Furthermore, it is common these days for men and women do elect to live together as though they are married. Society has accepted what in South African society is termed 'vat-en-sat' relationships.

³⁹ Ibid.

⁴⁰ Ibid 12 – 13. These statistics accept that assault can take on many forms such as common assault; assault GBH or sexual assault. The report indicates that the general statistics for the crime of assault were as follows: 2011 (50%); 2013/14 (65%) and 2014/2015 (55.1%). It also shows the instances where the assault was perpetrated against a female at home: 2011 (50%); 2013/14 (44%) and 2014/15 (57%).

⁴¹ The reports indicates the follows. During year 2011 38% of the assaults against men occurred on the streets; during 2013/14 instances grew to 67.5% and during 2014/15 at 45.1%.

⁴² Ibid 14.

⁴³ Bendall (note 2 above; 100).

⁴⁴ Singh (note 27 above; 9). Singh further says that society in general has condoned domestic violence by not mentioning it in public over centuries.

⁴⁵ Madzivhandila (note 23 above; 4).

⁴⁶ A. E. van der Hoven (note 35 above; 54).

Therefore when one speaks of a family, a marriage is not necessarily implied. In indigenous African societies it is possible to speak of a 'wife' or a 'husband' without there being a complete customary law celebration. This is largely because in indigenous African societies a marriage is more than the solemnisation. It passes through various stages and ends in solemnisation. As such it is more common in indigenous societies to find that a formal family has settled without there being any solemnisation of a marriage.

1.4.3. The common causes of domestic violence

Before one can craft a suitable tool to eradicate domestic violence, it is very useful to bear in mind the common causes of this social evil. Dealing with the cause means that one deals with the root from which the problem shoots out.⁴⁷ Identifying the likely causes of domestic violence is in itself machinery with which we can fight this scourge. Further, appreciating the causes of domestic violence enables the state to take preventive measures. By responding to the causes, the law is enabled to intervene at the earliest stage. This may have the effect of deterring and rehabilitating the 'would be' perpetrators of domestic violence.

The causes of domestic violence are many. It is difficult to attribute domestic violence to a specific cause due to various factors such as, for example, its discreet nature and victim reaction, to name a few. It cannot be said that it is caused by being destitute because it also occurs among the rich. Unemployment is not the sole cause as even those who are securely employed may be perpetrators or victims of domestic violence.⁴⁸ It is not a racial issue as it affects all people, whether white, black, Indian or coloured. As Carnelley points out, domestic violence is a societal problem.⁴⁹ Research conducted prior to this study, through practical experience shows that domestic violence is racially blind. It is neither a reserve for the drunkards or occasional drinkers as even those of sober habits do perpetrate domestic violence. Madzivhandila notes

⁴⁷ The National Department of Social Development (note 21 above).

⁴⁸ M.E. Baloyi 'Wife beating amongst Africans as a challenge to pastoral care' 2013, 2 available at www.indieskriflig.org.za accessed on 5 February 2017.

⁴⁹ Carnelley (note 22 above; 1).

that 'the causes of domestic violence are far more rooted than simply being an effect of intoxication or alcohol and drug dependency'.⁵⁰

It is more acceptable to say that domestic violence is caused by a multiplicity of factors including some of these above. This antecedent statement is qualified because race can never be the cause of domestic violence. Baloyi shares his experiences while attending to his ministry as a pastor. He mentions a woman who was a primary school teacher but endured violence from her husband who was also a teacher at a high school.⁵¹ He further shares the plight of a woman who had chosen a life of escaping through the window whenever her husband was drunk.⁵² There is no specific trigger for domestic violence. A woman may be forced to endure violence by earning more than the man.⁵³ Refusal to have sex,⁵⁴ the inability to procreate,⁵⁵ dinner not cooked on time,⁵⁶ and children misbehaving are amongst many things that may lead a woman to being battered.

Among the above alcohol seems to be the greatest contributor to domestic violence. Abusers tend to react when they are under the influence of alcohol. As it will be seen below, discussions of cases on domestic violence will indicate that alcohol can be a stand-alone cause of domestic violence. This explains why women lay assault charges or execute warrants of arrest in terms of the DVA and subsequently withdraw the charges once reconciliation has taken place or once the abuser has returned to his sober senses. It must be indicated, however, that the above view that alcohol might be a cause of domestic violence is disputed. There are some who submit that alcohol is used as an excuse to justify premeditated conduct.⁵⁷

Unemployment on the part of the victims of domestic violence may not necessarily initiate domestic violence; however it places the woman in a less favourable position

⁵⁰ Madzivhandila (note 23 above; 48).

⁵¹ Carnelley (note 22 above; 2).

⁵² Ibid 1.

⁵³ Ibid 6.

⁵⁴ Ibid 7.

⁵⁵ Ibid.

⁵⁶ Ibid 6. See Njezula (note 37 above; 3) who shares similar views.

⁵⁷ Madzivhandila (note 23 above; 49).

thus making her vulnerable and dependant on her abuser. She is unable to speak out or take steps against the abuser because she depends on him. Therefore unemployment is a great contributor to the continued violence that a woman may endure, tolerate and keep up with due to her weak economic position. Women also endure domestic violence so that their children continue to receive maintenance from their abusive fathers.

Some cultural values and upbringing could be a catalyst for domestic violence. For example in African cultures young boys are taught that they are above young girls and that the latter should submit to them. It does not end here, they are even taught to take positive steps to subvert young girls.⁵⁸ Boys grow up to be men believing these ill views and they enforce them and then pass to the next generation. Girls grow up to be women who believe that they are subordinate to men and that men can do as they please with them simply because they are women. Women may pass these misconceptions in the form of 'advice' to their daughters.⁵⁹ 'African cultures' in this context is merely used as an example and should not be understood to say that only indigenous African people engage in such indoctrinating practices.

1.4.4. The consequences of domestic violence

Appreciating the consequences of domestic violence is just as important as appreciating the causes thereof. Each consequence will dictate the nature of the remedy that is required. For instance, economic abuse requires an economic remedy. It is impossible to prescribe a suitable remedy without knowing what different consequences may result from domestic violence. It is also impossible to critically evaluate the effectiveness of the DVA in the midst of ignorance about the situation which the DVA has to respond to.

⁵⁸ N. Morei 'Domestic Violence in South Africa: Women and children under siege?' (2014) 5 (20) *Mediterranean Journal of Social Sciences* 928, 929.

⁵⁹ Madzivhandila (note 23 above; 84) submits that children are more likely to emulate the behaviour of the parent they associate with in terms of gender.

To clearly understand the consequences of domestic violence, one has to first understand its private, silent and repetitive characters. In most instances domestic violence is not just a one-time event; it usually escalates in form and severity.⁶⁰ From verbal abuse a man graduates to making threats of physical assault, then a slap and from there a fist, sjambok or hard object resulting in broken bones or death. As a result of the foregoing, domestic violence affects all areas of life of the victims. Since women and children are usually at the receiving end, below is a discussion of how domestic violence affects women and children.

(a) *Children*

There are two ways in which children may be victims of domestic violence: Firstly, by witnessing their weaker parent being abused by the stronger of the two or any incidence of domestic violence. Secondly, by being direct victims. In *Baloyi* Sachs J noted the very 'devastating' effects that domestic violence can have against children as they run the risk of accepting violence as the correct way to deal with problems or to gain an advantage over others.⁶¹ Witnessing domestic violence can have far-reaching psychological and physical consequences. It is submitted that witnessing is more destructive than experiencing domestic violence.⁶²

A five-year plan by the National Department of Social Development noted that exposure to domestic violence may affect the 'maturing brain' either socially, mentally (memory loss), emotionally (depression), behaviourally (violence towards other children) or cognitively (identifying with violence as a correct way to do things).⁶³ The department further indicates that domestic violence has health risks as children often turn to drugs and early sexual activity for comfort thus exposing them to sexually related infection/diseases.⁶⁴

⁶⁰ Madzivhandila (note 23 above; 27)

⁶¹ *S v Baloyi* (note 6 above; 441).

⁶² Madzivhandila (note 23 above; 40).

⁶³ The National Department of Social Development (note 21 above; 17).

⁶⁴ *Ibid* 18.

Further, as a result of the absence of a conducive-to-study environment, children are likely to neglect their school work such as homework. This leads to poor performance at school which eventually results in lack of interest in school. It is also conceivable that these children cause disruptions in class by disrespecting their teachers and their fellow classmates.

Verbal abuse may harm the child's self-esteem and consequently the way in which the child reacts to other children. Things such as bullying at school or in the community are best dealt with through parental support. An abused woman is in a worse position than a single parent. Her ability to support her children in such instances is greatly diminished. Her self-esteem is eroded upon and as will be seen immediately below, she may pass this to her child.

Artz identifies with the following consequences on the children as a result of witnessing domestic violence: insomnia; restlessness; acute anxiety; diarrhoea and vomiting; abdominal pain; eating problems; notable problems at school when the violence intensifies; depression; sadness; bed-wetting; running away from home or staying with other family members; refusing to come home; poor general health like chronic flu symptoms.⁶⁵

(b) Women and the battered women syndrome

Women are usually the primary and direct victims of domestic violence. The effect of domestic violence depends largely on the type of violence inflicted upon them; due to poor reporting patterns, a bulk of the consequences form part of untold miseries of women in South Africa. The five-year plan by the National Department of Social Development noted that the consequences of domestic violence on women can be psychologically, physically, reproductively and economically;⁶⁶ a single act of domestic

⁶⁵ L. Artz 'Tough Choices: difficulties facing magistrates in applying Protection Orders' (2004) 8 SA *Crime Quarterly* 25, 29.

⁶⁶ The National Department of Social Development (note 21 above; 17). The study further states that domestic violence may result in broken bones, unplanned pregnancies, STI infections.

violence, like rape for instance, can be so drastic that it results in all these consequences.

Research highlights that physical abuse is a prevalent form of domestic violence. Madzivhandila describes physical abuse as 'any act or threat of physical violence intended to cause physical pain, injury, suffering or bodily harm'.⁶⁷ He adds that it includes, amongst others, hitting, punching, slapping, choking and pushing.⁶⁸ Physical abuse is the centre of domestic violence in that it has the ability to bring about all consequences of domestic violence. For instance, the uttering of insults which usually results in psychological harm cannot bring about physical harm. On the other hand physical harm can result in psychological harm. Sexual abuse is a form of physical abuse. Sexual abuse is defined as any conduct that humiliates, degrades or violates a person's sexual integrity. The problem with sexual abuse in a domestic situation is that it often goes unreported and unpunished due to the marriage or intimate relationship.⁶⁹

Conceivably, abused women are highly likely to neglect their children emotionally as a result of fear. It is accepted that children can pick up stress from their caregivers – usually the mothers.⁷⁰ The abused women may turn to alcohol and lose focus and the whole family drifts. Due to the absence of unity between parents children do not know who to turn to. It has been stated above that women are often financially dependent on the perpetrator and as such they stay in abusive relationships for their sake and that of their children. Economic deprivation results in poor nutrition. Meanwhile the abuse

⁶⁷ Madzivhandila (note 23 above; 28).

⁶⁸ Ibid. Madzivhandila also points out that physical abuse can include other conduct such as isolating the victim from her friends and family, stalking or following her around wherever she goes, assaulting children or any other third just to get the attention of the woman, making threats of physical assault and denial by the perpetrator of the abusive behaviour including charming in public but abusive in private.

⁶⁹ Ibid 29.

⁷⁰ Madzivhandila (note 23 above; 82) explains the **attachment theory** of domestic violence. She states that a child is emotionally attached to its caregiver. She notes that domestic violence disconnects the child leaving the child neglected emotionally. She adds that the child is likely to be a perpetrator of domestic violence. As much as I agree with this theory as far as children's emotional connection is concerned, however I disagree with that children learn to be violent this way. If this is accepted to be the case, then domestic violence may be treated as a biological issue. In law people with biological impairment are given special treatment or sometimes afforded complete immunity from criminal liability. This is not how domestic violence ought to be treated. What appears to be a more acceptable theory is stated at 84, the **social learning theory** which states that we are not born as aggressive creatures, instead we acquire these aggressive patterns through observation and personal experiences.

continues in pieces. Each day is different from the other. Some of them fruitlessly seek assistance.⁷¹ While some of them just endure the pattern of abuse.

Economic deprivation or economic abuse means depriving the victim of economic benefits which they are entitled to in law. It includes failing to provide the victim with food, failing to make rental or bond payment, or limiting the resources available to the victim thereby forcing the victim to a position where she is dependent on the perpetrator.⁷² For instance, taking the victim's name out of the medical aid scheme simply to render her redundant and vulnerable is some form of economic deprivation. In addition to deprivation, perpetrators can go as far as taking away whatever personal income the victim gets such as her earnings from piece jobs or the child support grant.

Most of all, violence against women takes away their autonomy leaving them as undecided beings. This has vast effects on them as they do not even get to decide on their own re-productivity since they are sometimes forced to have unprotected sex which may result in unplanned pregnancies thus taking away their human dignity and impairing them from enjoying many of their constitutional rights. The living in constant fear while pregnant could be a catalyst for a miscarriage⁷³ or premature births.⁷⁴ Further, forced sexual intercourse places women at a risk of contracting sexually transmitted diseases. Govender⁷⁵ notes the following consequences of domestic violence: minor bruises, organ damage, chronic disabilities, mental disorders, depression....⁷⁶ Goosen points out that various rights are effected, the right to life (as there is a high rate of intimate partner killings in South Africa), the right to dignity, the right to bodily integrity and the right to freedom and security of the person.⁷⁷

⁷¹ Ibid 2.

⁷² Ibid 31.

⁷³ M. Govender 'Domestic violence: Is South Africa meeting its obligations in terms of the women's convention?' 2003 *South African Journal on Human Rights* 663; 665) notes that domestic violence can have economic consequences on the state because it has to take care of health costs for instance.

⁷⁴ Madzivhandila (note 23 above; 37).

⁷⁵ Govender (note 73 above; 666).

⁷⁶ Ibid 665.

⁷⁷ S. Goosen 'Battered women and the requirement of imminence in self-defence' (2013) 16 (1) *Potchefstroom Electronic Law Journal* 71, 82 – 83; see also Govender (note 73 above; 666).

These abused or battered women eventually respond by killing their abusive partners. This behaviour has culminated to what is called the 'battered woman syndrome' (BWS). BWS is not a mental illness per se, but it is a way of explaining the circumstances under which the killing takes place. Reddi indicates that it is used to describe a 'pattern of psychological and behavioural symptoms' displayed by women who are being abused by their intimate partners.⁷⁸

The burning issues are whether the battered woman syndrome should afford a woman a complete defence in criminal prosecution for the murder of the intimate partner, especially when the murder occurs during the passive stage of the violence;⁷⁹ or it should be used as evidence to bolster the established grounds of justification such as private defence, putative private defence, diminished capacity or whether it should be used as evidence at the sentencing stage.⁸⁰ As the law stands in South Africa and various other jurisdictions such as Australia, Canada and the United States, BWS does not afford a complete defence.⁸¹ In the United States it has been suggested that the term 'evidence on battering and its effects' should be used to refer to the battered woman syndrome.⁸²

The implication is that women who find themselves trapped in abusive relationships cannot look to the criminal justice system for relief. At the same time they cannot resort to self-help by killing their abusers especially during the passive stage of the abuse because the law does not provide them with a unique justification ground in such a situation.

⁷⁸ M. Reddi 'Domestic violence and abused women who kill: Private defence or private vengeance?' 2007 *South African Law Journal* 22. See Moodley (note 37 above; 11 – 12) who points out that BWS was developed in American jurisprudence by Dr L Walker.

⁷⁹ Reddi (note 78 above; 23).

⁸⁰ Ibid 26.

⁸¹ Ibid 23 – 32.

⁸² Ibid 27. See generally M. Reddi 'Battered Woman Syndrome: Some Reflections on the Utility of this 'Syndrome' to South African Women Who Kill Their Abusers' 2005 *South African Journal of Criminal Justice* 259 in this regard.

1.4.5. Statutory and common law remedies for domestic violence in South Africa

South Africa's legal history is usually divided into two eras namely apartheid era and post 1994. However in the context of domestic violence, we usually look at the year 1998 as a defining year because the incumbent Domestic Violence Act was passed during this year. This section looks at the pre-1998 innovations for combat domestic violence. From the foregoing, it is clear that domestic violence is deeply rooted in our society and this has been the case over many years. This begs the question of whether the pre-1998 attempts to overhaul domestic violence worked.

It appears that the apartheid government had done virtually nothing about domestic violence. This is despite the calls by the United Nations through, amongst others, the Universal Declaration of Human Rights (UDHR) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). There are a few possible explanations for the apartheid government's failure to heed the rights of victims of domestic violence. Perhaps, the country was at the time locked in the struggle for basic human rights in general and not specific rights such as the right to be free from domestic violence.⁸³ Paying attention to specific rights was more difficult especially for a government whose policy was based on racial inequalities and favouritism. It goes without saying that any framework regarding domestic violence was first going to try and protect the rights of the minority while relegating those of the majority. This is an approach that was bound to fail because in its nature, domestic violence is a display of inequality and any interventions involve invoking the right to equality, which the apartheid regime was determine to keep away.

Another way to explain the apartheid government's silence on domestic violence is that parliament, the institution tasked with bringing legal reform, was dominated by men. While accepting that females may perpetrate domestic violence, however it is widely acceptable that a majority of the perpetrators are males. Therefore it was virtually impossible for an institution dominated by men to engineer interventions that

⁸³ Njezula (note 37 above; 2).

would limit their common law 'rights' to exercise 'authority' over their wives and thus restrain patriarchy or male dominance.

Because of the apartheid policy that was made into law in 1948, South Africa's relationship with the United Nations was turbulent from as early as the 1940s and had heightened in the 1960's following the 1961 Sharpeville Massacre⁸⁴ and as a result it could not benefit from the innovations that states were making towards the protection of the rights of the vulnerable such as victims of domestic violence. It is therefore arguable that this ejectment played a role in blinding the apartheid government against serious issues affecting vulnerable groups such as woman and children as well as the rest of the world.

During apartheid years, only a few remedies were available to victims of domestic violence.⁸⁵ These are common law and statutory. However, as will be seen below, some of the remedies were designed to deal with issues as a public concern and they failed to deal with the domestic or private character of domestic violence. These remedies are discussed below.

(a) *Divorce*

A victim of domestic violence could elect a divorce if he or she were married to the abuser. This remedy has its inherent shortcomings. First it is only available to a select class of persons, that is, spouses. Further, it was not a ready response to domestic violence as the victim did not necessarily want the marriage to come to an end.

⁸⁴ See [www.sahistory.org.za/article/south-africa-and-united-nations-1946 – 1990](http://www.sahistory.org.za/article/south-africa-and-united-nations-1946-1990) accessed on 26 August 2017.

⁸⁵ See Madzivhandila (note 23 above; 2) who prefers the view that the remedies available to abused women and children were unknown to the criminal justice system and whenever they approached the police for help, they were met with secondary victimisation.

(b) *Maintenance*

Domestic violence has many facets; in particular, it can take the form of economic deprivation. Economic deprivation is a severe form of domestic violence. Historically, it has been gender-biased in that women often find themselves making a home instead of finding employment. They rely on their partner to provide for them as well as for the children. However, just like divorce, this remedy was limited by the requirement of a duty to maintain on the part of the abuser. Women who cohabited could not invoke this remedy because no such duty existed as between them and their partners and as a result they were exposed to economic deprivation. At the same time the option of leaving an abusive relationship was not readily exercised because they had to care for the children, further, the children were a gateway to livelihood because they depended on the provision that their partner made for the children.

It is worth noting that prior to the Maintenance Act⁸⁶, the maintenance system was facing challenges; this made it unable to cater for the special characteristics of domestic violence. While some of the challenges have been allayed by the Maintenance Act, finality is still pending. These challenges are excessive when approached from the domestic violence perspective. Maintenance in the context of domestic violence is discussed in subsequent chapters.

(c) *Prosecution*

In theory it was open to women – married or unmarried - to file criminal charges against their abusers for acts such as assault, assault with intent to cause grievous bodily harm, *crimeninuria*, attempted murder, malicious injury to property or rape.⁸⁷ Women were not always comfortable with instituting prosecution due to the fear that their partner will be arrested leaving the family destitute. Sometimes, if they finally laid charges, they were vilified by the police who either did not take the issue seriously or regarded it as a private matter not worthy of public resources. It was worse for married

⁸⁶ Maintenance Act 99 of 1998.

⁸⁷ H.B. Kruger 'Addressing domestic violence: to what extent does the law provide effective measures?' (2004) 29 (1) *Journal for Juridical Sciences* 152, 155.

women who suffered sexual violence in the hands of their husbands because the latter could not be convicted for the rape of his wife.

Prosecution was insufficient because it was largely premised on the common law. The common law did not criminalise a wide range of conduct. For instance stalking is not an offence under the common law.

(d) *Common law interdicts and peace orders*

A victim of domestic violence could obtain a common law interdict or a peace order warning the respondent to desist from abusive conduct. While this remedy was available to everyone, it was dependent on the financial standing of a person. The result was that poor victims who did not have access to courts could not obtain relief.⁸⁸ Even if they tried to obtain one, there was always a chance that the partner, who often occupied a financially stronger position, would drag the proceedings and in turn drain the victim financially and the latter had no choice but to abandon proceedings.⁸⁹ Further, the law had placed a negligible value to domestic violence as something that warrants an interdict or peace order.⁹⁰

It should be recalled that during this time services such as legal-aid were not readily available. State funding was still an issue. Even now it is doubtful whether the overburdened services of the legal-aid board are able to meet the immediacy of an interdict application.

(e) *Evictions*

It was permissible in law for a victim of domestic violence to approach a high court and obtain an order evicting the respondent from the property provided that all the requirements for an eviction were met. One of the requirements for this remedy is

⁸⁸ Gadinabokao (note 17 above; 10).

⁸⁹ See *M v B* 2015 (1) SA 270 (KZP) at para 22 where the court highlights the inherent historical difficulties in obtaining a common law interdict in the context of domestic violence.

⁹⁰ Gadinabokao (note 17 above; 11).

ownership. In domestic violence cases the respondent is usually the owner of the property and as a result, this remedy was ineffective in the context of domestic violence. Further, just like an interdict, this remedy was available to a select few who had property and who could afford the cost of litigation.

1.4.6. The Prevention of Family Violence Act

The Prevention of Family Violence Act⁹¹ was passed towards the end of apartheid rule. The Act enabled the victims of ‘family violence’, as it was then called, to obtain ‘family violence interdicts’ against their abusers.⁹² This was the first of its kind in the area of domestic violence. While some saw it as the disgraced government’s attempt to save face in view of the first democratic elections⁹³, this Act had some good in it. For instance it upheld married women’s right to sexual autonomy by providing that a husband may be convicted for the rape of his wife.⁹⁴ It is also difficult to understand the view that the Act was an attempt by the nationalist government to rake votes because at the time the Act was passed, it was clear that they had lost power and there was no way that a majority of the recipients of the protection in the Act, which were black woman, were going to vote for a government under which they endured years of brutality. However, it is true that this Act had more shortcomings than good. The Act is substantially discussed below.

(a) Application for a family violence interdict

Any ‘party to a marriage’ could approach a judge or a magistrate in chambers and apply for an interdict against the ‘other party to the marriage’ (the respondent) in a ‘prescribed manner’ or by way of affidavit.⁹⁵ A third party with a ‘material interest’ could bring an application on behalf of the applicant. The Act extended the definition of a marriage to include heterosexual couples who were married under customary law and

⁹¹ Prevention of Family Violence Act 133 of 1993.

⁹² The Preamble of the Act.

⁹³ Gadinabokao (note 17 above; 11).

⁹⁴ Section 5.

⁹⁵ Section 2 (1).

to those who live together like husband and wife, although they are not married.⁹⁶ It is arguable that couples who were married under religious rights also received protection through the use of the words 'any law'.

The interdict could enjoin the respondent not to assault or threaten to assault the applicant or a child living with either of the parties,⁹⁷ not to enter the matrimonial home, the applicant's residence or a specified part thereof,⁹⁸ not to prevent the applicant or a child living with either of them from entering the matrimonial home⁹⁹ and not to commit any other act specified in the interdict.¹⁰⁰

The Act compelled a presiding officer issuing a family violence interdict to issue a warrant of arrest¹⁰¹ and suspend it pending the respondent's compliance with the interdict.¹⁰² The interdict and the warrant of arrest had no force and effect until it was served on the respondent.¹⁰³ The warrant of arrested was activated by non-compliance or a breach of the interdict. A breach of the interdict was an offence for which, on conviction, the abuser could be sentenced to a fine of R300 or imprisonment; or both such fine and imprisonment. The procedural aspects of obtaining a family violence interdict were a flaw, and these flaws are considered below.¹⁰⁴

(b) Shortcomings of the Prevention of Family Violence Act

The drafters of this Act failed to consider the sexual diversity of the South African communities and, as a result, some classes of people could not access family violence interdicts. The Act specifically provided protection to a couple consisting of 'a man and a woman'. Clearly same sex couples were specifically excluded and they could not

⁹⁶ Section 1 (2).

⁹⁷ Section 2 (1) (a).

⁹⁸ Section 2 (1) (b).

⁹⁹ Section 2 (1) (c).

¹⁰⁰ Section 2 (1) (d).

¹⁰¹ Section 2 (2) (a).

¹⁰² Section 2 (2) (b).

¹⁰³ Section 2 (3).

¹⁰⁴ See South African Law Commission *Research Paper on Domestic Violence* (1999); P. Andrews 'The Constitutional Court provides succour for victims of domestic violence: *S v Baloyi* 2000 *South African Journal on Human Rights* 337, 341.

benefit from the protection in the Act. The Act provided protection to couples who were not married provided that they lived together as if they are married. This excluded heterosexual couples who did not live together.¹⁰⁵ It also excluded siblings and extended family members regardless of the fact that they lived together.¹⁰⁶

While the exclusion of same sex couples in the Act was regretted, one should guard against blindly attributing this omission solely to the Act. This is because the entire legal system and society at large had not accepted same sex couples as worthy of legal recognition and protection. This being the case it went without saying the Act would follow the legal trend. Nonetheless, this omission cannot be pardoned because anyone, regardless of sexual preference, could be a victim of family violence.

Critical concepts such as ‘family violence’ or ‘violence’ were not defined, leaving it to the judge or magistrate to decide. This was problematic because it was unclear under what circumstances a presiding officer could issue an interdict. This led to inconsistent approaches to the same issues by the judiciary.¹⁰⁷ In essence the fullness of the relief that the victim could obtain was largely defined by the presiding officer’s subjective interpretation of concepts in the Act. Further, since the application for a family violence interdict was done in chambers, the presiding officer was deprived of the benefit of arguments thereby narrowing the sources of his wisdom.

The Act simply provided that the application must be in the ‘prescribed manner’.¹⁰⁸ The usual manner for applications is by way of affidavit. In doing this the Act might have suppressed *viva voce* evidence in that the presiding officer could leave it out. This might not appear as a problem because it was the case with most applications. However there are two major differences to take into account. Normally; with application proceedings the respondent has a natural right to be heard, and secondly, in the absence of the respondent’s input, the interdict has an interim effect. This was not the case with family violence interdicts. The respondent did not have a natural right to be

¹⁰⁵ Morei (note 58 above; 932).

¹⁰⁶ Clark (note 5 above; 593).

¹⁰⁷ Clark (note 5 above; 593).

¹⁰⁸ Section 2 (1).

heard. If he wanted his say so to be considered, he had to make a separate application. Secondly the interdict, once granted, was final.

In view of the above, the Act was criticised for its disregard for the *audi alteram partem* principle since the applicant could obtain a final interdict without the respondent's knowledge. The South African Law Commission noted that this was 'radical and unjustified' departure from the rules of natural justice. A spiteful applicant could use it to get an upper-hand in matrimonial disputes.¹⁰⁹ In light of the rules of service, such as substituted service, it was possible for the respondent to learn about the existence of an interdict for the first time during his arrest. While the respondent had an option to apply to the court, on 24 hours' notice, for an amendment or setting aside of the interdict, this was ineffective as the evidential burden of proof was heavier on the respondent than it had been on the applicant. The difficulty was compounded by the fact that the respondent had to reverse facts which had already been accepted by the presiding officer to be true.¹¹⁰

Victims were expected to shoulder the costs of serving the interdict and the warrant of arrest to the respondent. If the victim was unable to pay, the court could order the state to do so.¹¹¹ However it is reported that the Department of Justice took long to process payment and, as such, sheriffs did not affect service pending the payment.¹¹² Police did not serve interdicts because it was thought that this would have a chilling effect on their work.¹¹³ This was self-defeating in two ways. First, the Act was meant to provide for a cheaper and faster option to obtain an interdict. Second, this easily resulted in the applicant carrying an ineffective interdict and warrant of arrest.

While the innovations brought by the Act (stated above) are noted, it is arguable that due to the shortness of the Act and the over reliance on existing law and procedure, the Act did not really deal with domestic violence. As it is indicated above, the Act relied

¹⁰⁹ South African Law Commission (note 104 above; 5).

¹¹⁰ South African Law Commission (note 104 above; 23).

¹¹¹ Ibid 73.

¹¹² Ibid 74.

¹¹³ Ibid.

on the family law definition of a family which is constituted by a marriage. By leaving many concepts undefined, the legislator left a gate opened for the common law to make its way in. It is also clear that the Act invoked the law of civil procedure without having due regard to the unique nature and character of domestic violence. Below it is also clear that the Act invoked the law of criminal procedure. The effect of the Criminal Procedure Act¹¹⁴ on the Act is discussed in detail below.

(c) Offences and prosecution

The Act created two offences. It criminalised the violation of a family violence interdict¹¹⁵ for which the respondent could be sentenced to fine or imprisonment not exceeding 12 months.¹¹⁶ It also criminalised failure to report child abuse and the sentence was the same.¹¹⁷

An applicant who alleged that any of the conditions of a family violence interdict had been breached could approach the police and depose to an affidavit stating the nature of the breach.¹¹⁸ Following this a respondent could be arrested on the discretion of a police officer.¹¹⁹ Once arrested he could not get bail until he appeared before a presiding officer for an enquiry into the breach. At the enquiry the respondent could either be acquitted or convicted.¹²⁰ Section 3 (5) of the Act provided that the procedure at the enquiry was that in terms of section 170 of the Criminal Procedure Act. This is a summary procedure which is used when an accused person fails to appear in court after an order to do so. It basically allows a presiding officer to convict the accused if he fails to provide an acceptable reason justifying his failure to appear in court. In other words section 170 presumes an accused person guilty unless he can provide an acceptable reason for his failure to appear in court. All that the state has to show is that the accused person failed to appear in court.

¹¹⁴ Criminal Procedure Act 51 of 1977.

¹¹⁵ Section 6 (a).

¹¹⁶ Section 6 (b).

¹¹⁷ Section 6 (b).

¹¹⁸ Section 3 (1).

¹¹⁹ Section 3 (2) (a).

¹²⁰ Section 3 (4) (a) and (b).

The practical effect of this section was that the respondent was presumed guilty of breaching a family violence interdict unless he could prove that he had not. All that the state had to show is that there was an interdict accompanied by warrant of arrest and the latter has been duly executed pursuant to a statement made by the applicant in terms of section 3 (1).

(d) Legal challenges to the Prevention of Family Violence Act

The most notable challenge of the Act was *S v Baloyi*¹²¹ held at the Constitutional Court. In this case, the respondent challenged the constitutionality of section 3 (5) of the Act as it invoked section 170 of the Criminal Procedure Act. The section was challenged on three grounds: first, it placed a reverse *onus* burden of proving absence of guilt of breaching the family violence interdict, secondly, it interfered with the presumption of innocence, and thirdly, it offended the constitutional right to be presumed innocent.¹²²

The court held that the first question was whether a violator of a family violence interdict was an accused person. The presumption of innocence is available to an accused person. This question was answered in the affirmative. Therefore the violator of a family violence interdict was entitled to all the rights of an accused person in terms of section 35 of the constitution.¹²³ Therefore, the respondent is presumed innocent until proven guilty. The reverse *onus* burden created by section 3 (5) ignored this. Nonetheless the court sought to provide possible interpretations of the section.

¹²¹ *S v Baloyi* (note 6 above).

¹²² Ibid 427G – 428A.

¹²³ In *S v Baloyi* (note 6 above; 438 – 440) the court noted that a violator of the interdict faces the possibility of a conviction coupled with a sentence of a fine or imprisonment; therefore he was clearly an accused. See also Andrews (note 104 above; 341).

(e) *Did the Act create a reverse onus?*

In answering this question the court provided three possible interpretations of section 3 (5). Interpretation A was that section 3 (5) merely inferred a summary trial procedure evinced by the use of the word 'procedure'.¹²⁴ Interpretation B was that section 3 (5) incorporates section 170 of the Criminal Procedure Act which in effect creates a reverse *onus*.¹²⁵ Interpretation C was that section 3 (5) provided a process in terms of which a judge or magistrate must be satisfied beyond a reasonable doubt that an interdict has been breached, and thereafter a reverse *onus* rest on the accused to prove his innocence.¹²⁶ The court held that interpretation A was the correct one and that section 3 (5) did not create a reverse *onus*. It was therefore unnecessary to answer questions two and three.

Although the Act survived constitutional scrutiny, it is doubtful whether it would have held the fort for any longer. The inherent short comings were enough to send it to its early grave if tested against the final constitution centred on fundamental rights such as equality regardless of, amongst many, marriage, race or sexual orientation.¹²⁷

1.4.7. Other post-1994 attempts to overhaul domestic violence.

The dawn of democracy gave South Africa the opportunity to focus on specific rights such the right to be free from domestic violence. As it has been shown above, this right formed part of the constitutionally guaranteed rights. The inherent failure of the Prevention of Family Violence Act to address domestic violence was an unequivocal invitation to the government to take immediate steps and thus uphold the constitution. Such steps resulted in a number of positive benefits even before the DVA was passed.

It is useful to mention the steps preceding the DVA as they form part of this study since they were machineries employed at that time to overhaul domestic violence. Given the

¹²⁴ *S v Baloyi* (note 6 above; 440D).

¹²⁵ *Ibid* 441C.

¹²⁶ *Ibid* 441D.

¹²⁷ South African Law Commission (note 104 above; 22).

high levels of crime in general and in particular, crimes against women, the National Crime Prevention Strategy (NCPS) was published in 1996 and came into operations in 1997. The NCPS prioritised violence against women and children. The NCPS was supplemented by the Victim Empowerment Programme which is an ongoing initiative by the Department of Justice to provide assistance to victims of crime.¹²⁸

Certain pieces of legislation were passed to deal with domestic violence and to improve the status of women. The Criminal Procedure Second Amendment Act¹²⁹ (1995) and the Criminal Procedure Second Amendment Act¹³⁰ (1997) brought about reforms to bail provisions to take into account the seriousness of the offence such as crime against women and children. The Promotion of Equality and Prevention of Unfair Discrimination Act,¹³¹ though it was passed after the DVA, played the role of was to enhancing the right to equality in terms of section 9 of the Constitution.¹³²

¹²⁸ T. Vogt 'The Impact Of An Interim Protection Order On The Victims Of Domestic Violence Act' (unpublished DPsych thesis, University of Stellenbosch, 2007) 23.

¹²⁹ Criminal Procedure Second Amendment Act 75 of 1995.

¹³⁰ Criminal Procedure Second Amendment Act 85 of 1997.

¹³¹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹³² See overall A.N.C. *Discussion Paper on Gender Based Violence* (note 20 above; 2).

CHAPTER TWO

THE MACHINERY OF THE DOMESTIC VIOLENCE ACT

2.1. INTRODUCTORY REMARKS

The purpose of this chapter is to place the legal framework of the DVA in the context of this dissertation by setting out how the Act sought to eradicate domestic violence. There are various machineries that flow from this Act. All of these machineries are aimed at achieving one goal, which is the eradication of domestic violence. It is common knowledge that some of these machineries have either not been fully implemented or implemented at all. Therefore this chapter will open by looking at the innovation brought by the DVA in response to the shortcomings of the Prevention of Family Violence Act which have been extensively discussed in the previous chapter.¹³³ This will be followed by a discussion on the procedural aspects of obtaining a protection order.

It will appear that the bulk of the machineries for combatting domestic violence are dependent on obtaining a protection order, being the main machinery of the DVA for combatting domestic violence. For this reason, it will seem as though the focus of this dissertation is mainly the protection order, but this dissertation will place more emphasis on the individual machineries other than the protection order. However these machineries flow from a protection order. There are also those machineries that are not dependant on a protection order, but can still flow from it, such as giving advice to a victim of domestic violence. The machineries that flow from a protection order include the following: (a) criminal sanctions for breach of a protection order; (b) giving advice to victims; (c) rendering assistance to victims; (d) ejectment of the respondents; and (e) rent, mortgages and emergency monetary relief (f) seizure of firearms and dangerous weapons and (g) access to children. A critical discussion of these appears in chapter 3 below.

¹³³ A. van der Hoven 'Domestic Violence in South Africa' (2001) 14 (3) *Acta Criminologica* 13, 21.

This chapter will also deal with aspects that are pertinent to the success of the DVA such as the institution of the Civilian Secretariat for Police and the recent ministerial six point plan against gender based violence. The purpose of the Civilian Secretariat for Police is to bolster compliance with the DVA. This is required by section 18 (4) of the DVA. These instruments should be seen as an extension of the DVA and as such this dissertation will treat them as one.

2.2. THE DOMESTIC VIOLENCE ACT 116 of 1998

2.2.1. The background of the Act

The DVA was prompted by the inadequacy of the Prevention of Family Violence Act and the wake of the Constitution premised on fundamental rights including the right to be free from violence from a private source.¹³⁴ The DVA was an attempt to overhaul previous neglect of domestic violence by the lawmakers, the police and society in general,¹³⁵ mainly by affording victims of domestic violence maximum protection that the law can provide through the issuing protection orders.¹³⁶

The DVA deals with 'domestic violence' instead of 'family violence'. In so doing the, legislature moved away from the inherently discriminatory approach that afforded more protection to married or heterosexual couples to the exclusion of certain groups in society, such as those couples who were unmarried and did not live together. The protection is no longer afforded only to a traditional family. Instead, the focus is on the domestic nature of the relationship between the perpetrator and the victim regardless of sex, marriage or whether the parties live together or not.¹³⁷

The concept 'domestic violence' is defined in broader terms to include:

'physical abuse; sexual abuse; emotional, verbal and psychological abuse;
economic abuse; intimidation; harassment; stalking; damage to property, entry

¹³⁴ Section 12 (1) (c) of the Constitution.

¹³⁵ Ibid.

¹³⁶ The Preamble of the Act.

¹³⁷ A. van der Hoven (note 25 above; 21).

into the complainant's residence without consent, where the parties do not share the same residence; or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause harm to, the safety, health or wellbeing of the complainant.'¹³⁸

Further, each of these sub-categories of domestic violence is defined individually. By doing this the legislature provided clear guidelines as to what constitutes domestic violence and who is entitled to protection in terms of the legislation. A single act is enough to constitute domestic violence.¹³⁹ This denotes a shift from the Prevention of Family Violence Act which had blurred the criteria for obtaining relief by not defining family violence and had narrowed the definition of a family, further limiting access to the Act.¹⁴⁰

Victims of domestic violence may now approach the family courts section in a Magistrates Court and apply for a protection order. The DVA provides that 'any complainant may in the prescribed manner apply to the court for a protection order'.¹⁴¹ The question of who is a complainant is easily answered by looking at the relationship between the applicant and the respondent. The relationship will qualify if it is a 'domestic relationship'. The concept of a 'domestic relationship' includes:

A relationship between a complainant and a respondent in any of the following ways:

- (a) They are or were married to each other, including marriage according to any law, custom or religion;
- (b) They (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) They are parents of a child or a persons who have or had parental responsibility for that child (whether or not at the same time);

¹³⁸ S 1 definition of 'domestic violence'.

¹³⁹ South African Law Commission (note 104 above; 107 – 118).

¹⁴⁰ Clark (note 5 above; 590).

¹⁴¹ Section 4 (1).

- (d) They are family members related by consanguinity, affinity or adoption;
- (e) They are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) They share or recently share the same residence;¹⁴²

This wide definition of a 'domestic relationship' now included same sex partners and people who have never stayed together. For instance, even cousins are now legible to protection from domestic violence.¹⁴³ In *Botha v Minister of Police and another*¹⁴⁴ a nephew was able to obtain a protection order against an uncle he did not live with. As a result of what has been said above, the DVA has been lauded for its forward looking approach.

2.2.2. Applying for a protection order

The protection order is the core machinery in the DVA. Section 4 (1) provides that any complainant may apply for a protection order in the 'prescribed manner'. The prescribed manner is by way of an affidavit and oral evidence. This is explicit in the Act and the Regulations under the DVA.¹⁴⁵ The practical implication is that a presiding officer has to consider oral evidence. Oral evidence assists a presiding officer in cases where the affidavit does not provide sufficient information. This is a significant improvement from the Prevention of Family Violence Act which only made provision for 'prescribed manner' possibly leading to suppression of oral evidence at the option of a presiding officer with a view to saving time.

The application for a protection is completed by deposing to an affidavit detailing the nature of the violence suffered and the relief sought. The clerk of the court will assist in completing the application.¹⁴⁶ The application, (that is, the affidavit and form 2

¹⁴² Section 1 definition of 'domestic relationship'.

¹⁴³ S 1 definition of 'domestic relationship'.

¹⁴⁴ *Botha v Minister of Police and another* 2014 (2) SACR 601 (GP).

¹⁴⁵ Regulation 4 of the Regulations under the DVA.

¹⁴⁶ Section 4 (2) of the Domestic Violence Act provides that 'If the complainant is not represented by a legal representative, the clerk of the court must inform the complainant, in the prescribed manner –

(application for a protection order)) are sent to a presiding officer who studies these and if he or she is satisfied, based on the affidavit, that (a) the respondent is committing or has committed an act of domestic violence and (b) undue hardship may be suffered by the applicant if a protection order is not issued immediately, the presiding officer must, notwithstanding that the respondent has not been given notice of the application, issue an interim protection order.¹⁴⁷ The presiding officer *may* summon oral evidence for assistance before granting the interim order.¹⁴⁸ The court may not refuse to issue an order on the ground that other remedies are available to the complainant.¹⁴⁹ The application may be heard outside court hours or court days if undue hardship may be suffered by the applicant as a result of the delay.¹⁵⁰ It is submitted that this is a commendable innovation taking into account that domestic violence usually takes place after hours and on weekends.¹⁵¹ This did not exist under the Prevention of Family Violence Act.

The interim order must be served on the respondent calling upon him to provide reasons why the order should not be made final on the return date.¹⁵² The return date may not be less than 10 days after service.¹⁵³ In practice the courts set the return day at least a month after the issue of an interim protection order to allow enough time for timeous service to take place. The respondent must be served with enough information on the allegations to enable him to make a defence. Pending service, the interim protection order is of no force and effect.¹⁵⁴ Once served, it has the effect of a final protection order. It appears possible to meet the requirement of service by informing the respondent via a phone call.¹⁵⁵ The respondent may be convicted and sentenced

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- (a) Of the relief available in terms of this Act; and
 - (b) Of the right to also lodge a criminal complaint against the respondent, if a criminal offence has been committed by the respondent.'

See also Regulation 5 that imposes a duty on the clerk of the court to assist unrepresented applicants in various respect including making the application and explaining the relief available in terms of the Act.

¹⁴⁷ Section 5 (2) (a) & (b) of the Domestic Violence Act. The interim protection order is the same as a rule *nisi*. See South African Law Commission (note 104 above; 21).

¹⁴⁸ Section 5 (1).

¹⁴⁹ Section 7 (7) (a).

¹⁵⁰ Section 4 (5).

¹⁵¹ A. van der Hoven (note 32 above; 23).

¹⁵² Section 5 (3) (a) and (b) of the Domestic Violence Act.

¹⁵³ Section 5 (5).

¹⁵⁴ Section 5 (6).

¹⁵⁵ See overall *Botha v Minister of Police and another* (note 144 above).

as though he had breached a final protection order. Just like the final protection order, the interim order may impose certain obligations on the respondent. As it will be seen below, this dissertation takes the view that imposing certain obligations on the respondent as part of the interim protection order is undesirable.

The court is not obliged to issue an interim protection order. It is clear above that the court should only issue an interim protection order if the complainant would suffer an undue hardship if one is not issued. If the court does not issue an interim order, it must direct the clerk of the court to cause certified copies of the application and any supporting documents to be served on the respondent calling upon him to provide reasons why the order should not be made final on return day.¹⁵⁶ The respondent may on 24-hours' notice anticipate the return date and have the application heard before the initial return date set by the court. He must be informed of his right in this regard.¹⁵⁷ The Act and regulations do not prescribe any process or form for anticipating the return day. Its only provides that the respondent has to notify the applicant in the prescribed manner.¹⁵⁸

For procedural reasons, the complainant is not usually armed with the interim protection order. It is only once the court is satisfied that the respondent has received proper service of the interim protection order that the clerk of the court must cause a certified copy of the interim protection order and an original suspended warrant of arrest to be served on the applicant.¹⁵⁹ The warrant of arrest is suspended on condition that the respondent complies with the prohibitions, conditions and obligations on interim protection order.¹⁶⁰ These prohibitions, conditions and obligations are discussed further below.

¹⁵⁶ Section 5 (4).

¹⁵⁷ Section 5 (5). The terms of an interim order in this regard will state this:

"The respondent is hereby informed of his/her right to appear in the Magistrates Court at Room [room number] on the [date] at [time] in order to give reasons why the interim protection order should not be confirmed and made final; and of his/her right to have the matter heard on an earlier date at least 24 hours written notice to the applicant and the aforementioned court."

¹⁵⁸ Ibid.

¹⁵⁹ Section 5 (7).

¹⁶⁰ Section 8 (1) (b).

The requirement of service has both positive and negative aspect. It is good because it addressed the imbalance created by the Prevention of Family Violence Act. For the sake of coherence, this imbalance is discussed shortly below. On the other hand it is bad because the delay in serving the interim protection order may have deadly results for the complainant. This negative aspect can be eliminated by ensuring that interim orders are served on the day of issue. This way the order becomes effective without delay. In a very limited number of cases, the police do attend to service on the same day. However it is not uncommon to hear a lay person saying that they went to court to apply for a protection order and did not receive one and as a result they were further victimised by the respondent.

It is self-defeating for a court to issue an interim protection order if the complainant will not receive it immediately. This is because the interim order is issued on the ground that the respondent will suffer hardship if it is not issued immediately. It is therefore pointless to issue an interim order if it will not be immediately served on the respondent and thus validating it. On this basis the interim protection order, if issued, must be served immediately and a copy thereof given to the complainant together with a stayed warrant of arrest on the same day.

The respondent may be lawfully arrested pursuant to a warrant of arrest issued in conjunction with an interim protection order. He cannot interdict the execution of a warrant of arrest primarily on the ground that he will oppose confirmation of the interim order. In *Bent v Ismail-Essop and another*¹⁶¹ the applicant sought to obtain an order interdicting and restraining the first respondent (complainant in the protection order) and the second respondent (all members of the South African Police Services) from executing any warrant of arrest issued in conjunction with the interim protection order pending final determination of the matter (that is, confirmation or setting aside of the interim protection order). The court held that it could not interdict the processes of the

¹⁶¹ *Bent v Ismail-Essop and another* (KZD) unreported case no 4597/2011 of 24 May 2011.

DVA. Doing so would be tantamount to depriving a victim of her rights in terms of the Act and interfering with statutory powers of the police.¹⁶²

The process of notifying the respondent is a significant improvement from the Prevention of Family Violence Act. While it is possible under the DVA for the applicant to obtain an order without notice to the respondent, the effect of this order is subject to service of same, and even if it is duly served, the effect will be interim until the return date. As it has been shown above, if the respondent really feels aggrieved by the interim protection order, he may anticipate the return date and oppose the matter as soon as possible. Under the Prevention of Family Violence Act, the applicant could simply obtain final relief without notice to the respondent. This process lent itself to abuse by unscrupulous applicants. This also shifted the focus from the evil of family violence to the injustice permitted by the former Act, thus giving the momentum to the false argument that the former Act achieved nothing. Such an argument is fallacious; the former Act will be remembered for stating for the first time that a husband may be convicted for the rape of his wife. It also made it mandatory to report child abuse and failure in this regard was criminal offence.

The improvements brought by the DVA further gives effect to the *audi alteram partem* principle. Now the radical departure from this rule of natural justice has been curtailed. The deprivation of the respondent's procedural right has been lifted. The only departure or deprivation that exists has an interim effect. The respondent now has an unqualified right to be heard before a drastic decision against him/her may be made.¹⁶³

¹⁶² Ibid para 14. It must be noted, however, that in this case the court noted that the respondent may obtain the interdict if the protection order was obtained based on *mala fides* and in an improper way. The interdict so issued in this regard serves to prevent any malicious arrest on a fraudulently obtained protection order and warrant of arrest [para 7].

¹⁶³ South African Law Commission (note 104 above; 21). The commission pointed out how, under the Prevention of Family Violence Act, a judge or a magistrate could grant a final family violence interdict with serious repercussions that could see the respondent evicted or separated from his children without an opportunity to be heard. This was, according to the commission, a radical departure from the rules of natural justice.

On the return day the procedure is that of a civil trial. However the proceedings are informal in order to accommodate the parties.¹⁶⁴ The standard of proof is on a balance of probabilities.¹⁶⁵ The parties may be legally represented. If the respondent is not legally represented, the court may direct that he may not cross-examine the complainant directly and that he must do so through the court.¹⁶⁶ The respondent is not an accused person and therefore he is not entitled to the rights of an accused person in terms of section 35 of the Constitution.¹⁶⁷ The DVA provides that if the respondent appears on the return date to oppose the application, the court 'must hear the matter'.¹⁶⁸ Evidence of witnesses may be heard.¹⁶⁹ If the applicant makes a *prima facie* case that the respondent is committing or has committed an act of domestic violence, the court must confirm the protection order.¹⁷⁰ On the other hand, if the respondent makes a *prima facie* case that no act of domestic violence has been committed, the court may set aside the interim order. Some have argued that the protection order ought to be confirmed even in the absence of the complainant.¹⁷¹

This argument is unsettling for various reasons. First, if the applicant had it to come to court and make the initial application, surely she can make it on the return day to vindicate her rights. The issue of fear of the respondent does not arise because the applicant already enjoys an upper hand in the sense that she has possession of the interim order and a suspended warrant of arrest which may be executed at her option. Second, if she does not have an interim protection order, it simply means that the court was not of the view that she will suffer harm if one is not issued immediately. Third, confirming a protection order in the absence of the applicant may result in the court making a habit of issuing ineffective orders. Finally, this will take us to a position similar

¹⁶⁴ S. Sibisi 'Understanding certain provisions of the Domestic Violence Act: A practitioner's perspective' May 2016 *De Rebus* 22, 23.

¹⁶⁵ Ibid 22.

¹⁶⁶ Ibid 23.

¹⁶⁷ Ibid 22.

¹⁶⁸ Section 6 (2).

¹⁶⁹ Ibid.

¹⁷⁰ Section 6 (1).

¹⁷¹ See generally C. Lopes, D. Massawe and M. Mangwiro *Criminal Justice Responses to Domestic Violence: Assessing the implementation of the Domestic Violence Act in Gauteng* 2013 Tshwaranang Legal Advocacy Centre.

to that under the Prevention of Family Violence Act where the complainant could obtain an interdict in disregard of the respondent.

The court cannot confirm a protection order simply because the respondent did not appear in court to oppose confirmation. It must be satisfied that the proper service as indicated above has taken place¹⁷² and the applicant has a *prima facie* case.¹⁷³ If the respondent had not received proper service of the notice of application, the court will not confirm the order; in practice the return date is postponed. If the court confirms the protection order notwithstanding that the respondent had not received notice of the application, the respondent has a variety of remedies. For instance he may have the protection order set aside solely on these grounds or claim damages against the state if he is subsequently arrested on the strength of the order so granted. This is another way in which the Act gives vent to natural justice. Both the parties receive the protection of the Act.

The warrant of arrest is subsidiary to the protection order. If the order is not confirmed, the warrant also falls away.¹⁷⁴ If the order is confirmed, the clerk of the court must cause a certified copy of the final protection order together with a warrant of arrest to be served on the applicant if initial warrant has been executed.¹⁷⁵ This subsequent warrant of arrest (if issued) must also be suspended on condition that the respondent complies with the protection order. Unlike the interim protection order, the validity of a final protection order is not dependent on service.¹⁷⁶ The court's powers, which are discussed below, with respect to protection orders are provided for in section 7. This section will be discussed at length in chapter three as a bulk of the machineries emanate from it.

¹⁷² Section 6 (1) (a).

¹⁷³ Section 6 (1) (b).

¹⁷⁴ Sections 6 (7) & 8 (2).

¹⁷⁵ Section 6 (5).

¹⁷⁶ *Seria* (note 18 above; 143G).

2.2.3. The suspended warrant of arrest

On issuing a protection order, the court must also issue a warrant of arrest; suspend it on condition that the respondent complies with the conditions, prohibitions and any orders in the protection order. With this machinery, the legislature sought to provide an incentive for complying with the protection order. In *Omar v Government of the Republic of South Africa*¹⁷⁷ the applicant challenged the issuing of a warrant of arrest. He argued that it arbitrarily infringed on his right to freedom without him knowing because the complainant could execute it at any time.¹⁷⁸ The court held that the issuing of a warrant of arrest was not unconstitutional because it was suspended. The complainant could not use it provided that the respondent complied. Further, the requirement of service reduced the chances of the respondent being arrested on the strength of a warrant of arrest that he was unaware of.¹⁷⁹ Furthermore, the respondent can only be arrested by a police officer if that police officer believes, on reasonable grounds, that the complainant will suffer imminent harm if an arrest is not made.¹⁸⁰ This was confirmed in *Bent*.¹⁸¹

In summary the interim protection order has two functions. The first is to ensure that the respondent maintains compliant behaviour. Second, it is security in the hands of the complainant that the respondent will comply with the order and that if he does not comply; the complainant may execute the order. As it has been pointed out above, the question of arbitrariness does not arise.

2.2.4. Remedies available to the respondent

This dissertation has discussed above that a number of remedies flowing from the DVA. In fact the whole dissertation is based on remedies. However some of these

¹⁷⁷ *Omar v Government of the Republic of South Africa* (note 4 above; 303D).

¹⁷⁸ *Ibid* 302C – D.

¹⁷⁹ *Ibid*

¹⁸⁰ *Ibid* 305.

¹⁸¹ *Bent v Ismail-Essop and another* (note 161 above; para 13).

remedies should be highlighted because of their uniqueness and the context at this stage.

(a) *Appeals and review*

Any party to the proceedings may appeal against a decision to grant or refuse a final protection order. He or she may also have the decision reviewed.¹⁸² The respondent may not appeal or review an interim protection order. There appears to be two reasons for this, first the respondent has other remedies. He may anticipate the return date and have the matter heard early. He has a right to appear on the return date and oppose confirmation of the order. Second, pending confirmation of the protection order, the matter is still pending. In our law an appeal is lodged only once a final decision has been made. The same is the case with reviews. On appeal or review of the matter, the high court may set aside a protection order.¹⁸³

(b) *Variation and setting aside of the protection order*

It is open to any of the parties to apply for variation or setting aside of the protection order.¹⁸⁴ Variation changes a provision of the order. Setting aside cancels the order entirely. The DVA does not say prescribe any process for varying or setting aside a protection order. There is a cautionary rule in respect of an application by the complainant setting aside or varying a protection order. Section 10 (2) provides that a court shall not grant such an application unless it is satisfied that it is made freely and voluntarily. A party cannot seek to vary or set aside an interim protection order pending the return date. If the respondent is unhappy with a particular term of the interim protection order, or with the entire order, he has a right to anticipate the return date instead of making an application for variation or setting aside.

¹⁸² Section 16 of the Domestic Violence Act.

¹⁸³ *Bent v Ismail-Essop* (note 161 above; para 20).

¹⁸⁴ Section 10 (1).

It must be noted however, that there is no distinction as such between setting aside an interim protection order and anticipating the return date. The process of achieving either of these is the same, that is, service notice of the application to the other party. It is arguable that these are one of the same things. The only reason that a person will anticipate the return date is to have the interim protection order set aside.

It would be absurd for the respondent to opt for varying an interim protection order unless it would be easier for him to vary than set aside the protection order altogether on the return or anticipation date. It will be equally absurd for the complainant to make an application to vary an interim protection order unless she seeks to include a pressing or onerous term in the order. In all these instances, the parties can wait for the return or anticipation date. In all likelihood the court will not entertain an application to vary an interim protection order because it is tantamount to wasting the court's time since the matter is already enrolled for another day.

(c) *Suing the complainant for malicious application*

The respondent may sue a complainant who maliciously obtains a protection order against him. He may sue for damages for *contumelia*, discomfort suffered in the process, and defamation of character arising from content of the affidavit applying for a protection order.¹⁸⁵ This is an indirect remedy arguably provided by the DVA. In *Bent* the court reasoned the position as follow:

'The very nature of a Domestic Violence Act application brings about the implication of unacceptable and anti-social behaviour by the respondent against the complainant. Rather like defamatory statements, the institution of such proceedings intrinsically impacts injuriously on a respondent's dignity in the broad sense. Any respondent made subject to a protection order in terms of the Act is also made subject to a warrant of arrest, for example. The applicant must have appreciated this as much, and yet, she proceeded recklessly as to the consequences, actuated, as I have pointed out, by improper motives. In my

¹⁸⁵ *Bent v Ismail-Essop* (note 161 above; para 2).

judgment the magistrate correctly found that the alleged *injuria* has been established.¹⁸⁶

(d) *Criminal sanctions and a counter-protection order*

The purpose of the DVA is to curb domestic violence by issuing effective protection orders to those in need. However, with every mechanism of this nature comes manipulation. It is widely known that some people use the DVA to gain an advantage in matrimonial disputes or gain control over their 'abusers'. The question that should naturally come to mind is how the DVA protects respondents from exploitation through the Act.

There are two notable grounds of protection in this regard. One is directly from the DVA and the other one is indirect. The respondent receives direct protections from the DVA through section 17 (d). This provision criminalises the wilful making of a false statement in a material respect. The DVA also indirectly protects the respondent by making it possible for him to obtain a protection order termed a 'counter-protection order'. This, again, is a commendable feature marking an improvement from the Prevention of Family Violence Act which was so one-sided that it failed to take into account the potential abuse of the system.¹⁸⁷

However these protective measures are controversial on their own. There is a standing question of how these measures should be implemented. For instance courts are not unanimous on how to deal with applications for counter protection orders. Some are of the view that these ought to be heard with the preceding application while, on the other hand, some regard it as a separate application that ought to be considered on its own merits.¹⁸⁸ The latter view is sound because it gives effect to the respondent's unfettered right to be heard in a court of law. Those magistrates who reject a counter-

¹⁸⁶ Ibid para 17.

¹⁸⁷ L. Artz and D. Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' 2005 *Acta Juridica* 200, 207.

¹⁸⁸ Ibid 8.

application solely on the ground that it is a counter-application commit an injustice by denying the respondent a right to be heard.

When one considers the subject of counter-protection orders, it is important to distinguish between three cases. There are those cases where the respondent does not appear in court to oppose confirmation of an order in favour of the complainant; cases where the respondent does appear in court and counter-applications made before the return date. The important question is how courts should respond to counter-applications in each of these instances? It is submitted that there should not be any marginalisation. The courts ought to hear all application and decide on the merits and not procedure.

The offence created by section 17 (d) is hardly enforced. Further, as it will be seen below, this provision does not criminalise making of a false statement during application for a protection order. It only criminalises the making of a false statement with a view to an arrest and subsequent prosecution. Nonetheless the respondent does receive some measure of protection from the DVA.

2.2.5. Procedure in case of breach of a protection order

If the respondent breaches the protection order, the applicant must approach any police station with the protection order and a suspended warrant of arrest¹⁸⁹ whereupon a member of the South African Police Services (SAPS) must render such assistance as may be required including finding a suitable shelter and obtaining medical assistance for the complainant (s),¹⁹⁰ if reasonably possible to do so, hand a notice in the language that the complainant can understand detailing the remedies at the complainant's disposal as well as the right to lodge a criminal complaint.¹⁹¹

¹⁸⁹ Section 8 (4) (a); *Khanyile v Minister of Safety and Security and Another* 2012 (2) SACR 238 (KZD) 244.

¹⁹⁰ Section 2 (a).

¹⁹¹ Section 2 (b) and (C).

The member of the SAPS dealing with the complainant must take a sworn statement from the complainant and if it appears to the member concerned that there are reasonable grounds to believe that the complainant may suffer imminent harm as result of the breach, he must arrest the respondent forthwith.¹⁹² If there are no such grounds, the member must hand a notice to the respondent to appear at a specific court on a determined date.¹⁹³ At this stage the respondent becomes an accused person and he is entitled to all the rights of an accused person such as the immediate right to bail and all the rights of an accused person in terms of section 35 of the Constitution.¹⁹⁴ The offence of breach of a protection order is dealt with below.

2.5.6. The Offences

Section 17 of the DVA provides for four offences that may be committed under the Act. This part of the dissertation will focus more on the offences created by section 17 (a) and 17 (d). It is also worth noting that these are arguably novel offences created by the DVA, while the other offences (section 17 (b) and (c) are criminalised elsewhere in law. Perhaps this could be better illustrated by quoting the section:

17 Offences

Notwithstanding the provisions of any other law, any person who –

- (a) Contravened any prohibition, condition, obligation or order imposed in terms of section 7;
- (b) Contravenes the provisions of section 11 (2) (a);
- (c) Fails to comply with any direction in terms of the provision of section 11 (b); or

¹⁹² Section 8 (4) (b). Subsection 5 provides that in deciding whether or not the complainant may suffer imminent harm a member must consider the following grounds:

- (a) The risk of 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.

¹⁹³ Section 8 (4) (c). The notice must:

- (a) Specify the name, residential address and the occupation or status of the respondent;
- (b) Call upon the respondent to appear in court on a specified date and at a specified time on a charge of breach of a protection order in terms of section 17 (a).
- (c) Contain a certificate signed by a member concerned to the effect that the member did hand the written notice to the accused and that he explained the implications thereof.

¹⁹⁴ Sibisi (note 164 above; 23); Andrews (note 104 above; 341).

- (d) In an affidavit referred to [in] section 8 (4) (a), wilfully makes a false statement in a material respect,

...

Section 11 (2) (a) and (b) prohibits the publishing of certain information that might reveal the identity of the parties pending proceedings. It is trite in law that publishing certain information regarding court proceedings may be an offence. Therefore no reference shall be made to these offences.

As mentioned above, the most important offences in the DVA are that in section 17 (a) and (b). The offence created by section 17 (a) is also referred to as 'breach/contravention/violation of a protection order'. The mere existence of a protection order against a person has no criminal consequences provided that a person complies with same. It is only once a protection order is breached that the criminal aspect will kick in. It is not difficult to see that the legislature had hoped to first deter perpetrators from engaging in conduct complained of rather than merely incriminating the conduct of the respondent. Below is a discussion of the selected offences and the possible defences. This discussion will be followed by the argument for the creation of a stand-alone crim of 'domestic violence'. This argument is gaining momentum lately.

(a) *Breach of a protection order*

(i) The elements of the offence

The elements of breach of a protection order are as follows:

1. A protection order
2. Breach
3. Unlawfulness
4. *Mens rea*

These elements are discussed briefly below.

A protection order

As its name suggests, this offence presupposes a protection order. If there is no protection order, no charge in terms of section 17 (a) of the DVA may follow. The protection order must be valid. Mere existence of a final protection pre-supposes service of the interim order. It is up to the respondent to prove otherwise.¹⁹⁵ To determine if the protection order is valid, one must study the process under which it was obtained and see if the process was the correct one. This necessitates knowledge of the procedure for obtaining a protection order.

In summary, the DVA provides that the respondent must be furnished with the particulars of the application to enable him to make his case. Further, he must be informed of the date of the application, and in case an interim order is issued, the return date. The rationale behind this is that the respondent must be given enough information and opportunity to answer to the applicant's case and to construct his own case. If any of these processes is not followed, then there is a procedural flaw which in turn affects the validity of a subsequent protection order. It cannot then be said that the respondent is guilty of contravening an invalid protection order.

A misrepresentation by the complainant may be a ground for challenging the validity of a protection order. In *Seria*¹⁹⁶ the parties were spouses with marital problems leading to an application in terms of the DVA. The respondent (the husband) became aware of the interim protection order and the return date; however in the interim the parties 'reconciled' and the parties agreed that the applicant will cancel the pending application. On return date, the parties drove together to court, and the applicant convinced the respondent to remain in the car outside court while the applicant went inside and obtained confirmation of the order on false information that the respondent did not make an appearance. The court held that the respondent was entitled to oppose the application.

¹⁹⁵ *Seria* (note 18 above; 144D-E).

¹⁹⁶ *Ibid* 137.

The validity of a protection order may be challenged either pre-trial, during trial or post-trial. Pre-trial measures could be by way of an application for setting aside a protection order in terms of section 10 of the DVA due to the procedural flaw in obtaining it or during pre-trial consultations with the prosecution where the defence can point out the procedural flaws hoping that the prosecution might consider withdrawing the charge for contravening a protection order. During trial it is possible to raise invalidity of the order as a defence and lead evidence to prove same. Section 10 may also be used to bring an application for setting aside the protection order post-trial.

This being the case, it is important for those responsible for issuing protection orders to ensure that the correct procedure is adhered to in order to ensure the validity of any subsequent order. Doing this is also beneficial to victims of domestic violence who could do with the assurance that the protection order in their possession is worth the paper it is written on and it will go a long way to ensure that perpetrators do not get away as a result of procedural flaws other than the merits of the case.

The original protection order must be produced in court during proceedings. However, this requirement may be dispensed with if the accused admits that a protection order exists and he is aware of it. In *S v Bangani*¹⁹⁷ the accused was convicted for breach of a protection order. Although the protection order was not produced during trial, the court was satisfied, based on the accused admission, that there was a protection order the terms of which he had breached.

Breach

The second requirement is that there must be a breach of a protection order. The wording of the order is very important as only conduct expressly mentioned in the protection order suffices. The respondent contravenes a protection order if he engages in conduct which is prohibited by the order, or fails to engage in conduct ordered by the order. It should, however, be borne in mind that certain conduct is obviously prohibited

¹⁹⁷ *S v Bangani* (E) unreported case no 255/07 of 17 October 2007.

that it need not be spelled out. For instance, littering on the complainant's property does amount to damage to property in terms of section 1 (v).

Unlawfulness

The breach must be unlawful. In other words the respondent's behaviour must be unjustified. Conduct which is unlawful is that which is expressly mentioned in the protection order. If the conduct is not express in the protection order, the offence would not be committed.

The respondent may raise any of the justification grounds that exclude unlawfulness. For instance, if he happens to be at the complainant's premises in contravention of the protection order, he can always raise consent as a defence if the complainant had consented to him being there.

Mens rea

Mens rea in the form of intention is required for a successful conviction. Intention will be proved if it can be shown that the respondent despite being aware of the protection order engaged in the prohibited conduct – knowledge of unlawfulness. This is because in law it cannot be said that someone acted intentionally unless he had the knowledge that his behaviour is unlawful. In *S v Mazomba*¹⁹⁸ the court illustrated this as follow:

‘...one of the elements that would need to be proved by the state to secure a conviction for such contravention is intent on the part of the accused person, it would be incumbent upon the State to prove that the accused person had intentionally violated the provisions of the protection order after it had been duly and properly served on him and he had been properly advised of, or had become aware of the provisions thereof. Indeed the certificate in the pro forma return of service of process in terms of Domestic Violence Act no.116

¹⁹⁸ *S v Mazomba* (ECB) unreported case number 08/09 of 31 March 2009.

of 1998... provides that the functionary serving the order must certify that he/she has handed the original of the notice to the respondent and that he/she had explained the contents thereof to the third respondent.¹⁹⁹

There is a fallacious argument in practice that if the respondent contravenes a valid protection order, there is no excuse. This is incorrect as it presupposes strict liability which is clearly not evident in the Act. The Act requires that the respondent must be informed of the intended application for a protection order and the allegations against him. It cannot then be that he will be found guilty even if he was unaware that his conduct is criminally reprehensible.

(ii) The defences

The respondent is entitled any defence that excludes unlawfulness. If the respondent, once accused, is able to meet the requirements of a certain defence, then he is entitled to an acquittal. In *S v Molapo*²⁰⁰ the court held that a protection order cannot deny a defence that is good in law. In this case the accused had sworn at the complainant (his wife) because she had called him an 'inkwenkwe' or 'boy' which suggested that he was not a complete man since he was uncircumcised. The complainant had also made reference to the accused's mother.²⁰¹

The court held that the complainant had impaired the accused's dignity and that he was justified in swearing back at her. The court found that that the 'complainant was not kind and considerate, she was insultative and demeaning... Physical wounds heal but those inflicted by words often last forever.'²⁰² Therefore the accused could rely on private defence to defend his dignity.

¹⁹⁹ *Mazomba* (note 198 above; para 9).

²⁰⁰ *S v Molapo* (O) unreported case no 213/2006 of 10 August 2006.

²⁰¹ *Ibid* para 11.

²⁰² *Ibid* para 13.

(b) Making a false statement

This offence is created by section 17 (d). It shall hereinafter be referred to as ‘making of a false statement’. It must be noted that the offence in section 17 (a) can only be committed by a respondent in a protection order; whereas this present offence can only be committed by a complainant or a holder of a protection order – a spiteful one. As it has been argued in chapter two above, this is yet another initiative to balance the scale in the DVA by protecting the interests of both the parties.

(i) The elements of the offence

Since little has been said elsewhere about this offence, and no known prosecution has been carried out under this offence, perhaps before trying to work out the elements of this offence, it might be useful to once again revisit the provision creating it. Section 17 (d) reads ‘...In an affidavit referred to [in] section 8 (4) (a), wilfully makes a false statement in a material respect...’

The elements on this offence are:

1. *False statement*
2. *Wilfulness*
3. *Materiality*

These elements are discussed in turn below.

False statement

The complainant must have made a false statement with respect to section 8 (4) (a). This provision deals with arrests and the subsequent prosecution for breach of a protection order. In other words, a complainant commits an offence if he or she makes a false statement leading to a potential arrest and/or subsequent prosecution of the respondent. Reference is made to a potential arrest and/or subsequent prosecution

because section 8 also makes it possible for prosecution to follow without an arrest; that is, following a notice to appear in court.

This offence clearly excludes a false statement made in an affidavit applying for a protection order. This is commendable because doing otherwise would have limited the number of people applying for protection orders for fear that any error in the statement could lead to prosecution. Further, protection orders are granted on merits. The respondent is afforded a chance to challenge any false statements before an order is granted, and if the application is based largely on false claims, it may be refused.

The fact that no prosecution may follow false accusations in a statement applying for a protection order does not necessarily mean a complainant may do as he or she pleases. In *Bent* the following was held.

‘The very nature of a Domestic Violence Act application brings about the implication of unacceptable and anti-social behaviour by the respondent against the complainant. Rather like defamatory statements, the institution of such proceedings intrinsically impacts injuriously on a respondent’s dignity in the broad sense. Any respondent made subject to a protection order is [sic] terms of the Act is also made subject to a warrant of arrest, for example. The applicant must have appreciated this as much, and yet, she proceeded recklessly as to the consequences, actuated, as I have pointed out, by improper motives. In my judgment the magistrate correctly found that the alleged *injuria* has been established.’²⁰³

Wilfulness/ mens rea

The false statement must be made wilfully. Wilfulness suggests intention on the part of the complainant. It is trite in law that intention and knowledge of unlawfulness go hand in hand. There can never be a finding that a person acted intentionally in the

²⁰³ *Bent* (note 161 above; para 17).

absence of knowledge of unlawfulness. An exception to this are a very few statutory offences and the statute must specifically state this exception. The DVA does not fall within these exceptions.

It therefore follows that the complainant must make the false statement with the intention to have the respondent either arrested and/or prosecuted. It is widely known that some spiteful 'complainants' will try by all means to get a respondent arrested just to make his life miserable by 'arranging' a weekend in custody. On the face of it, a false statement is intended to further an ulterior motive.

Materiality

The falsehood in the statement must be material. In other word it must have the potential to initiate an arrest or prosecution. It goes without saying that a minor misstatement of no consequence would not suffice for this offence. A false statement that the complainant was severely assaulted by the respondent, whereas the complainant fell and injured herself, would meet the requirement of materiality because it has the potential to bring about the respondent's arrest.

(ii) The Defences

Since there is no known prosecution under this offence, any exposition of available defences is merely speculative in light of the elements of the offence. Nonetheless the defences are worth exploring. An accused may argue that the statement was true. It must be noted that this will be resolved through an analysis of facts. The accused may argue that the false element was immaterial. In this regard the court will have to assess the foreseeable consequences of the accused's conduct. If an arrest and subsequent prosecution were bound to follow the accused's false statement, then she may not raise immateriality as a defence. If it ought to have been apparent to a reasonable police officer that the statement cannot be true, the false statement should be immaterial.

The above is only a brief summary of the DVA. It is not surprising that the Act has been lauded as a progressive step towards the realisation of the right to be free from domestic violence. Some have said that in passing this piece of legislation the South African government has to a large extent succeeded to fulfil its obligations in terms of CEDAW and the supporting instruments.²⁰⁴ It has been referred to as the long awaited addition to the South African Jurisprudence.²⁰⁵ It has also been referred to as 'the best and most progressive piece of legislature in the world'.²⁰⁶ In *Seria v Minister of Safety and Security*²⁰⁷ Meer J described the Act as 'a commendable and long-awaited addition to our jurisprudence promoting the rights of equality, freedom and security of the person'.²⁰⁸ Govender²⁰⁹ submits that the DVA must be commended because the drafters clearly asked the 'woman question'. She states further that 'the woman question is a way of looking at issues from a woman's perspective and recognising that many legal questions are gender oriented'.²¹⁰

On the other hand it has received sceptical comments. Parenzee, Artz and Moulton submit that the DVA is a positive step but little thought went towards its implementation.²¹¹ Furusa and Limberg describe it as a progressive legislation facing non-progressive attitudes.²¹² Galgut submits that '...further investigations reveal the emergence of a disturbing pattern and one that is unwittingly being facilitated by the matter in which the DVA is being implemented in our magistrate's courts'.²¹³ Artz and Smythe submit:

²⁰⁴ P. Parenzee, L. Artz and K. Moulton 'Monitoring the Implementation of the DVA: First Research Report' (2012) *Institute of Criminology: University of Cape Town* 2.

²⁰⁵ Gadinabokao (note 17 above; 1).

²⁰⁶ Ibid 2.

²⁰⁷ *Seria* (note 18 above).

²⁰⁸ Ibid 148D.

²⁰⁹ Govender (note 73 above; 672).

²¹⁰ A. van der Hoven (note 132 above; 19) submits that one of the main reasons that the Prevention of Family Violence Act failed was the fact that important stakeholders such as woman's organisations were not consulted. The author further submits that it was mainly the judiciary and government, majority of whom were white male that were consulted on the process.

²¹¹ Parenzee, Artz and Moulton (note 204 above: 22).

²¹² R. Furusa and C. Limberg 'Domestic Violence Act: Does it protect?': A review of literature surrounding the South African Domestic Violence Act focusing on the socio-economic and legal consequences of the legislation.' July 2015, 8 available at www.knowledgeco-op.uct.ac.za accessed on February 2016.

²¹³ H. Galgut *Reinforcing reigns of terror: Access to justice denied by the (non)implementation of the Domestic Violence Act* June 2005 Women's Legal Centre.

After extensive monitoring of the implementation of the DVA, over the first five years of its implementation, we still find ourselves reflecting on the real utility of the Act. The question of whether it is working is a complex one and naturally leads us to more abstract debates about what it means for the DVA to work. What we have come to realise is that the DVA brought with it an important symbolic message to the criminal justice personnel about how domestic violence cases should be treated.²¹⁴

The legislature has clearly discharged its duty in passing the DVA. It is a mixture of civil and criminal remedies. For instance the protection order in terms of the DVA is civil in nature, but non-compliance with such by the defendant is a criminal act on his part. The civil remedies have an interdictory function; while the criminal remedies have a punitive function. This being the case, much is expected of the DVA. A bulk of the work now rests with the executive and the law enforcement to oversee the proper execution of the machinery of the DVA to combat domestic violence.²¹⁵

Nonetheless there still remain concerns about the implementation of the DVA. These concerns stem from some provisions of the Act itself and the failure of law enforcement (police) and other stakeholders to implement these provisions. There are concerns about how to interpret and apply some of the provisions of the DVA namely, provisions ejecting the respondent from his residence²¹⁶, seizure of firearms and dangerous weapons²¹⁷, payment of emergency monetary relief (E.M.R.)²¹⁸, access/custody of children²¹⁹ and counter applications for a protection order. The courts differ in their interpretation and application of these provisions.²²⁰ This causes inconsistencies in the application of the law. Chapter three below is a critical discussion of these provisions. The offences created by the DVA have been discussed above; however, there is an

²¹⁴ Artz and Smythe (note 187 above; 202).

²¹⁵ Govender (note 73 above; 664) notes that '...while the state has introduced many tools for the elimination of discrimination against women, it has not been adequately and effectively used these tools to make a difference to the lives of women.'

²¹⁶ Section 7 (1) (c).

²¹⁷ Section 7 (2) (a).

²¹⁸ Section 7 (3) and (4).

²¹⁹ Section 7 (6).

²²⁰ Artz (note 65 above).

emerging argument for the creation of a stand-alone offence of domestic violence. This argument is assessed in chapter three.

2.3. THE INSTITUTION OF CIVILIAN SECRETARIAT FOR POLICE SERVICES

The success of the DVA is dependent on the compliance of those who are responsible for implementing it such as the police. The function of the Civilian Secretariat for Police (CSP) is to monitor police compliance with the DVA and deal with cases of non-compliance. For this reason this reason the CSP is discussed alongside the DVA. As it will be seen below, there are numerous instances of police non-compliance with their duties in terms of the DVA. In addition to this, police negative attitude toward domestic violence matters has been on the discussion table for many years prior to any legislative measure. With this in mind the legislature included section 18 of the DVA reflects to try and deal with this. This section provides, *inter alia*, that cases of police non-compliance must be referred to the CSP.²²¹ This is in line with a certain portion of the preamble of the DVA which reads ‘...to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act...’ Perhaps before one gets deeper into a discussion on the CSP, it is worthwhile to reveal the institutional history of the CSP below.

2.3.1. The institutional history of the CSP

The Civilian Secretariat for Police (CSP) was established by the Civilian Secretariat for Police Services Act²²². The CSP is headed by the national Secretary (the Secretary) and the various provincial secretaries. For present purposes, the primary functions of the CSP are to monitor and evaluate compliance with the DVA²²³ and to make recommendations to the SAPS on disciplinary processes and measures following non-compliance with the DVA.²²⁴ The secretary is tasked with submitting quarterly reports

²²¹ Section 18 (4) of the Domestic Violence Act.

²²² Civilian Secretariat for Police Service Act 2 of 2011.

²²³ Section 6 (1) (c).

²²⁴ Section 6 (1) (d).

to the Minister for Police and to Parliament on complaints that have been brought to the CSP.²²⁵

This noble function of the CSP was previously carried out by the Independent Complaints Directorate (the ICD). The ICD was established by the South African Police Service Act²²⁶. The ICD was empowered to receive complaints directly from the public, and like the CSP, the ICD had to report to parliament every six months. However research points out that the ICD only made one report to parliament, and this was during the 2006/2007 financial year.²²⁷ During 2011 the ICD was replaced by the Independent Police Investigative Directorate (IPID) which was created by the Independent Police Investigative Directorate Act²²⁸ and the function that relates to monitoring compliance with the DVA was transferred to the newly formed CSP.²²⁹

2.3.2. The Independent Complaints Directorate

It would be unfair to state that the ICD was non-functional. While it neglected to report to parliament, it did compile reports on its work. Fortunately this dissertation has benefited from at least two reports (2009 and 2010) compiled by the ICD.²³⁰ Both these reports agree that the year 2006/2007 was infested with police non-compliance with the DVA.

²²⁵ Section 13.

²²⁶ South African Police Service Act 68 of 1995.

²²⁷ See Bendall (note 2 above; 111); Vetten, L 'Gendering state accountability in South Africa: Police accountability and the Domestic Violence Act' (2014) 11 *APCOP Policy Brief* 5 available at http://apcof.org/wp-content/uploads/2016/05/No-11-Gendering-StateAccountability-in-South-Africa_-Police-Accountability-and-Domestic-Violence-Act-Lisa-Vetten-.pdf accessed on 11 May 2017.

²²⁸ Independent Police Investigative Directorate Act 1 of 2011.

²²⁹ L. Vetten '*Aluta continua*: Police accountability and the Domestic Violence Act 1998' 2017 (59) *SA Crime Quarterly* 7, 9.

²³⁰ These are: Independent Complaints Directorate: Proactive Research Unit *DVA non-compliance report: A study of the factors contributing to SAPS non-compliance with the DVA* (2009) (ICD 2009) and Independent Complaints Directorate *Non-Compliance to Domestic Violence Act* (2010) (ICD 2010).

The 2009 report identified the following heads of complaint against the police: failure to execute warrant of arrest,²³¹ failure to give proper advice to complainants,²³² failure to assist complainants to find a suitable shelter²³³ and failure to open criminal docket or to refer same for prosecution.²³⁴ These are the most common amongst many complaints. Further, the 2009 report also pointed out that during year 2006, the Western Cape, the Free State and Gauteng had the highest number complainants against the police at 31, 26 and 24 respectively.²³⁵ Furthermore this report showed that most complaints were against male police officers of all ranks.²³⁶

It is worth mentioning that this report took into consideration the views and the difficulties that the police face. The police indicated that the definition of domestic was very wide to such an extent that different interpretations could lead to a discrepancy in the implementation of the Act.²³⁷ Most police officers are concerned with the level of misuse of protection orders which in turn makes it difficult to identify a legitimate case of domestic violence.²³⁸ Further, the police are discouraged by complainants who open cases only to withdraw them.²³⁹ This is a clear waste of police resources and the work already put in the investigations. As a result of this, some police officers prefer to halt investigations until they are certain about the victim's intentions in laying a charge.

Reacting out of frustration, the then KwaZulu-Natal MEC for Safety and Security Bheki Cele, made the infamous statement that the police charge all complainant's who withdraw cases of domestic violence with defeating the ends of justice.²⁴⁰ It is clear that these words were uttered out of frustration and not knowing what to do. It is also

²³¹ Ibid (ICD 2009), 7 and 22. This report shows that during 2006, 69.7% of the complainants arose from failure to execute a protection order; Lopes, Massawe and Mangwiro (note 171 above; 46 – 51).

²³² Ibid. The report indicates that during 2006, only 15.2% of the complaints related to failing to give proper advice to complainants.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid 8.

²³⁶ Ibid 26.

²³⁷ Ibid 29.

²³⁸ Ibid 30.

²³⁹ Ibid 31 – 32. Some victims will approach the police uncertain of what they want. It is also reported that some of the victims do not want perpetrators to be arrested; they simply want the police to warn them. There is nothing sinister about this. In fact it should be recommended to victims and the police should be enticed to intervene in such cases as this limits the possibility of opening and withdrawing charges. It is more in line with the main function of the DVA, that is, to instil order in a domestic setting.

²⁴⁰ 'Abused women warned not to withdraw charges' *Independent Online* 10 December 2004 available at <https://iol.co.za>, accessed on 29 July 2017.

doubtful if defeating the ends of justice was a correct charge in the circumstance. It is correct that the unceremonious withdrawal of charges is demoralising. However charging the complainant only for withdrawing a charge will be catastrophic. It is a difference issue if the initial charge by the complainant has been without substance and malicious. Here the police are justified in charging the complainant in terms of section 17 (d) of the DVA.

2.3.3. The Civilian Secretariat for Police

The CSP has been at work for approximately five years and there are reports of a strained working relationship between the CSP, the SAPS and Parliament.²⁴¹ However research shows that fairly recent, there have been improvements in the working relationship.²⁴² The CSP is a good measure for checks and balances. The major challenge to the functionality of the CSP is that, unlike the ICD, they are unable to receive complaints directly from the public.²⁴³ Victims of secondary victimisation at the hands of the police have to lodge a complaint at the same police station where they were victimised and hope that the complaint will be forwarded to the CSP for consideration.²⁴⁴

It is submitted that it is less likely that a victim will go back to the same police station where they were abused.²⁴⁵ Further, a 2012 audit found that the SAPS had failed to forward some complaints to the CSP.²⁴⁶ The public should be able to forward their complaints to the CSP and they should be informed about this noble function of the CSP.

Allowing victims to complain directly to the CSP has various advantages. This will enhance proper compliance with the DVA. It will encourage police officers to take

²⁴¹ Vetten (note 229 above; 9).

²⁴² Ibid 10.

²⁴³ Ibid 9.

²⁴⁴ Ibid.

²⁴⁵ Ibid. The author also points out that the SAPS itself does not have a central reporting system where complaints may be lodged without fear that they may be concealed by the assailant police station commander.

²⁴⁶ Ibid.

complaints against them seriously and improve their conduct without a possible intervention of the CSP in this regard. Victims should be encouraged to make police aware of the complaints before proceeding to the CSP. However all of this will be futile if victims do not have direct access to a fully functioning CSP.

2.4. THE MINISTERIAL SIX POINT PLAN

During August 2017, women's month, the minister of police Honourable Fikile Mbalula announced the Ministerial Six Point Plan²⁴⁷. The purpose of this plan is to promote and protect the rights of women, children and vulnerable groups. The plan is a single page document with six points on how victims should be treated. This plan forms part of this chapter because it was introduced as an extension of existing measures. However it has instantly drawn some criticism.

The plan states:

“AYIHLOME AGAINST GENDER BASED VIOLENCE”

POINT 1: All victims should be treated with respect, dignity and interviewed by trained police officials in a victim sensitive manner.

POINT 2: Victims should be assisted at the Victim Friendly Rooms (VFR) or an alternative room where the statement will be taken in private at the police station or other location providing victim support services.

POINT 3: Victims will be referred/ taken for medical examination by a healthcare by a healthcare professional to obtain medical evidence and complete a medical report.

POINT 4: The investigation should be conducted by a Family Violence, Child Protection and Sexual Offence Investigation Unit (FCS) or a detective with relevant training.

POINT 5: The families and victims of sexual offences, femicide and infanticide, should be referred to the victim support services that are available within the precinct for legal, medical, social and psychological help.

POINT 6: Victims should be proactively provided with feedback on the progress of their cases on a continuous basis.'

This plan will form part of the discussions in chapter 3.

²⁴⁷ Available at www.saps.gov.za accessed on 8 September 2017.

CHAPTER 3

A CRITICAL EVALUATION OF THE MACHINERIES OF THE DVA

3.1. INTRODUCTORY REMARKS

Now that the DVA has been placed in the context of this study as stated in the preceding chapter, it is now competent to focus the discussion on the topic of this dissertation. What follows in this chapter is a critical evaluation/examination of the various machineries in the DVA for combating domestic violence. This will be achieved by putting forward arguments, consolidating existing arguments and possibly providing solutions moving forward. The machineries in the DVA can be categorised into two groups. There are those that are outside of the protection and those that flow from the protection order. A further critique of the DVA will be that it is not designed to function and protect the victims of domestic violence in rural areas.

3.2. MACHINERIES OUTSIDE THE PROTECTION ORDER

A careful study of the DVA reveals that a victim of domestic violence may enjoy protection from the machineries of the Act even if they do not have a protection order. Few as the machineries of this kind may be, they are nonetheless powerful and commendable because victims do not always have the resources to obtain a protection order in advance. Further, it is not a protection order but the nature of the conduct complained of that categorises a matter as domestic violence.²⁴⁸ There are three types of machineries that may be accessed outside the DVA. These are: (a) section 2 of the DVA which provides that a police officer must advise the victims of their rights under the DVA and render such assistance as the victim may require including finding a suitable shelter and obtaining medical assistance, (b) civil action against the police for breach of duty in terms of section 2 (c) The arrest of perpetrators and the possible opening of a docket. Below is a discussion of these machineries.

²⁴⁸ *Langa v Minister of Police and others* (GP) unreported case no 30355/2010 of 25 July 2014.

3.2.1. Section 2 of the DVA

The first machinery that may be exercised outside the DVA is section 2 of the DVA. This section imposes a duty on the police to give advice and render such assistance as victims of domestic violence may require. Victims of domestic violence often do not know about the various remedies available to them. Even if they are, they may not know how to go about obtaining such remedies. Victims will intuitively turn to the police in this regard. Thus, in such cases, two things must happen: the victim must be empowered with the necessary information, and secondly, there must be a speedy machinery to respond to the emergency facing the victim.

The case of *Carmichele v Minister of Safety and Security and another*²⁴⁹ accurately captures this as follows:

'South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms, and to take reasonable and appropriate measures to prevent the violation of these rights. The police is one of the primary agencies of the state responsible for the protection of the public in general, and women and children in particular, against the invasion of their fundamental rights by perpetrators of violent crimes.'²⁵⁰

As it has been stated above, section 2 imposes a dual duty on the police, that is, to give advice and to render such assistance that the victim may require. This is further enhanced by the National Instructions²⁵¹ read in conjunction with section 18 of the DVA. Section 18 places a duty on the National Commissioner for Police to pass national instructions on the implementation of the DVA. It is submitted that the imposition of duties on the police is 'an attempt to undo the long-standing neglect of domestic violence.'²⁵² It is clear that the police bear certain duties, but the extent of

²⁴⁹ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

²⁵⁰ Ibid 965A.

²⁵¹ National Instructions 7 of 1999.

²⁵² L. Vetten (note 229 above; 7).

such duties require unpacking, which follows shortly below, more especially in cases where there is no protection order.

(a) The duty to give advice

The first leg of the duty is to give advice. The police must advise the victims of domestic violence of their rights in terms of the Act.²⁵³ These rights are, (a) to apply for a protection order and/or (b) to lay a criminal charge. The police must explain to the victim that he or she may elect to exercise one or both these rights. It must be emphasised, however, that a complainant may only lay a criminal charge if the conduct complained of will also constitute an offence in terms of the common law or other piece of statute. It is possible for the conduct complained of to only constitute an act of domestic violence but not an offence in terms of the common law. For instance, depending on the circumstances of each case stalking and harassment may not necessarily constitute offences in terms of the common law.²⁵⁴ It is submitted that these are usually a precursor to the commission of an offence. Viewed in isolation, stalking and harassment do not usually constitute a crime. Nonetheless such conduct is an act of domestic violence for which the complainant may obtain a protection order.

Conduct such as assault or assault with intent to cause grievous bodily harm is both an act of domestic violence and an offence in terms of the common law. Given this, a complainant may, pursuant to a domestic assault, obtain a protection order and lay a criminal charge in terms of the common law. The myth that complainants of domestic violence may only file a criminal charge provided that they first obtain a protection order is incorrect. The South African Law Commission noted that the police were refusing to accept a criminal charge until a family violence interdict was obtained.²⁵⁵ An attempt has been made to address this negative attitude over the years. However there are those cases that persist. In *Minister of Safety and Security v Venter and*

²⁵³ IDC 2009 (note 230 above; 8).

²⁵⁴ Department of Justice 'Stalking' at 18 – 19 available at http://www.justice.gov.za/salrc/ipapers/ip22_prj130_2003_quest.pdf accessed on 11 November 2017.

²⁵⁵ South African Law Commission (note 104 above; 89).

others²⁵⁶ the court specifically held that victims must be informed that 'it is not necessary to lay a charge before applying for a protection order'²⁵⁷.

The practice of simultaneously obtaining a protection order and laying a criminal charge does not amount to splitting of charges. In *Botha v Minister of Police and another*²⁵⁸ the court was not persuaded by the argument that an interim order ought not to have been issued because the respondent had already been convicted under the common law for the same conduct. However, the complainant cannot simultaneously lay a criminal charge in terms of the common law and then lay a charge for breach of a protection order for the same event unless there is an alternative charge. Otherwise such would be a clear case of splitting of charges.

The rationale behind allowing a complainant to both obtain a protection order and file a criminal charge is to ensure that the criminal conduct complained of does not go unpunished. Mere existence of a protection order does not have any punitive consequences; if a complainant only obtains a protection order for criminal conduct such as assault with intent to cause grievous bodily harm, the crime will inevitably go unpunished. Further, a protection order only applies from the date of service, which is obviously after the incident giving rise to the application, and it cannot be back-dated to punish conduct which occurred prior to its existence. In *Venter* this was illustrated as follows:

The difference between the remedies must be explained. A charge is aimed at securing a conviction of an accused, whereas the purpose of a protection order is to prevent future misconduct.²⁵⁹

The National Instructions are informative on how the advisory machinery of the DVA may be effectively implemented. Paragraph 10 (4) (a) provides that the police must

²⁵⁶ *Minister of Safety and Security v Venter* 2011 (2) SACR 67 (SCA).

²⁵⁷ *Ibid* 73 – 74. In the same case the respondent had been told that he had to get a case number before he could apply for an interdict.

²⁵⁸ *Botha v Minister of Police and another* (note 144 above; para 13 – 14).

²⁵⁹ *Ibid*.

explain the rights to the complainant in an official language that he or she understands. In addition to explaining, the police officer must hand a notice stating the explained rights. What is interesting to note is that the National Instructions do not require that the rights be explained in the complainant's vernacular, they simply require that they be explained in an official language that the complainant can understand. Further, they do not require the police officer to personally do the explaining. They are flexible to allow the police officer to use anyone who can explain the rights to the complainant in an official language that he or she can understand. This reflects that the legislature and the police ministry were aware of the budget constraints of requiring vernacular to be the medium of instructions. The instruction also allows the use of a foreign language by the police officer or a third party to explain to the victim.²⁶⁰ However, the written notice can only be in one of the official South African languages.²⁶¹

(i) *The standard of care when giving advice*

The standard of care when giving advice is that of a reasonable person in the same position as the member of the SAPS.²⁶² The Minister of Police may be held vicariously liable in delict for a negligent failure by the police to advise a complainant of his or her rights in terms of the DVA. The minister may also be held liable if the police give wrong advice.²⁶³ In the *Venter*²⁶⁴ case, the police officer had failed to explain the process of obtaining a protection order to the complainants. The police also went a step further by giving them wrong advice. They told the plaintiff that he required a case number before he could obtain an 'interdict' (protection order). As it has been stated above, this is incorrect. The court held that in so doing, the police had aborted their duty imposed by the DVA and the National Instructions and the minister was therefore held liable.²⁶⁵

²⁶⁰ Paragraph 10 (4) (b).

²⁶¹ The notice is form 1 of the Regulations in terms of the Domestic Violence Act.

²⁶² *Naidoo v Minister of Police and others* 2016 (1) SACR 468 (SCA).

²⁶³ See Kruger (note 87 above; 166) on the police giving wrong advice.

²⁶⁴ *Minister of Safety and Security v Venter and another* (note 256 above).

²⁶⁵ The same line of reasoning was used in *Naidoo* (note 262 above; para 33).

(ii) *Challenges to the duty to give advice*

Advice presupposes knowledge or experience on a particular subject. The execution of this machinery is hampered by lack of knowledge about the DVA on the part of the police. Research²⁶⁶ indicates that a large number of police officers have not received adequate training and are unsure of what is required of them. In 2012 the CSP reported that even those who receive some training do not show positive results.²⁶⁷ In *Naidoo*,²⁶⁸ a senior police officer did not hesitate to state that he did not understand some of the provisions of the National Instructions during trial. An earlier report by the Independent Complaints Directorate highlighted that during the 2006/2007 financial year there was a very large number of police officers who were not even aware of the existence of the National Instructions.²⁶⁹ The 2012 CSP report indicates that the same is still the issue.²⁷⁰

Lack of knowledge of the DVA and the national instructions on the part of the police cannot be sustained and it must be counter-nuanced. It is strongly suggested below that the police curriculum must be reviewed. Domestic violence is a serious issue that affects the fabric of society; those responsible for combating it should regard it with utmost decorum. Knowledge of the DVA must be administered at entry level. Having a police officer who is simply there to complement the SAPS staff has negative consequences as it results in civil claims against the state. It is equally absurd and risky to recruit a candidate on the hope that he or she will learn along the way. The chances are, once recruited, the candidate will be saddled with other work that any subsequent training of the DVA will be regarded as time off work.

²⁶⁶ Vetten (note 229 above; 5).

²⁶⁷ Civilian Secretariat for Police Service *Report on the implementation of the Domestic Violence Act* (2012) 16.

²⁶⁸ *Naidoo v Minister of Safety and Security* (note 262 above; para 13). In this case the police officer was an Inspector of many years' experience and he had dealt with so many cases of domestic violence in his career. Despite this, he was unaware of the National Instructions. This is alarming because the facts of this case date in 2010.

²⁶⁹ IDC 2009 (note 230 above).

²⁷⁰ Civilian Secretariat for Police (note 267 above; 15).

In *Seria v Minister of Safety and Security*²⁷¹ the arresting officer was of the negligent view that an arrest follows every instance of domestic violence.²⁷² This is a dangerous view. As it will be seen below, a decision to arrest is taken with caution and if it is taken negligently, the minister of police could face delictual liability for unlawful arrest. Case law and research paints a picture that those police officers who are unaware of what to do often resort to secondary victimisation.²⁷³ There are reports of police officers who simply refused to deal with domestic violence matters indicating that they cannot assist in the absence of a protection order. It is also reported that some police officer do not take domestic violence matters seriously simply because they believe they should not be preoccupied with these matters and they just mediate the matter.²⁷⁴ In *Naidoo* the police officer arrested the complainant for refusing to consent to mediation.²⁷⁵ In this case the police officer had fruitlessly tried to mediate a domestic violence matter between the plaintiff and her husband. When he realised that he was not succeeding, he advised the husband to depose to an affidavit laying a charge against the plaintiff. He then placed the two of them under arrest.

The *Naidoo* case is a clear case of how lack of knowledge easily results in secondary victimisation. It is submitted that secondary victimisation in the hands of the police is similar, if not worse, than domestic violence. Just like the latter, it occurs at a place where victims expect safety and relief. What should be borne in mind about the *Naidoo* case is that it is fairly recent. In the past, the police did not know what remedies to prescribe for victims of domestic violence since it was regarded as something falling outside the law. Giving victims a go about was a given or a patriarch response to the cause of women. Section 2 of the DVA was an acknowledgment that this had indeed been happening. It was further a plan of action. Had this section been carefully adhered to by the police, the issues in *Naidoo* and *Venter* could have been avoided.

²⁷¹ *Seria v Minister of Safety and Security and others* (note 18 above).

²⁷² *Ibid* 142C – D.

²⁷³ Lopes, Massawe and Mangwiro (note 171 above; 2). In this work the authors submit that secondary victimisation hampers the implementation of the Act and it is one of the set-backs towards achieving a domestic violence free society.

²⁷⁴ *Ibid*.

²⁷⁵ *Naidoo* (note 262 above).

Compliance with section 2, as far as the advisory duty is concerned, does not rest solely with the police. It is incumbent upon the state to take all the necessary steps towards placing police officers in a position where they will be able to properly comply with the section.²⁷⁶ This can only be done through the training of police officers, a process which has been either at a snail's pace or not yielding positive results over the years since the passing of the DVA. It is interesting to note that the DVA does not provide for the training of officials. The fairly recent ministerial six point plan does not regard the training of officers as part of the plan. However, it does provide that investigations in gender based violence matters should be conducted by a special unit or an investigating officer with the relevant experience. This is startling because experience in the police force is meaningless in the absence of knowledge of the DVA.

The imposition of positive duties on the police is nonetheless a commendable progress in light of the history of police neglect and attitudes towards victims of domestic violence. At least now the victims may turn to the police with much ease. If they do not obtain the assistance they require, or they are subjected to secondary victimisation, the matter may be referred to the Civilian Secretariat for Police and the police may be held jointly liable together with the minister of police. However, it has been argued that to merely legislate is not enough to enhance the role of the police in combating domestic violence. Education and training of those responsible for implementing the DVA is necessary.²⁷⁷ Nonetheless the strides made so far are a step in the right direction.

(b) The duty to render assistance to the victims

The second leg of the duty of the police in terms of section 2 is the duty to render assistance to the victim of domestic violence. Like the duty to advise victims, the duty to render assistance applies regardless of the absence of a protection order. Section 2 (a) provides that the police must, at the scene of the incident or soon after the incident

²⁷⁶ See *Venter* (note 256 above; para 19).

²⁷⁷ South African Law Commission (note 104 above; 97).

is reported, render such assistance as may be required by the complainant including finding a suitable shelter and obtaining medical treatment.

(i) *The terms of the duty*

Pursuant to reading this provision, it is possible to assume that the only assistance that the police are obliged to render is finding a suitable shelter and obtaining medical treatment. This is not the case. The section requires that the police render such assistance 'as may be required in the circumstances' including finding a suitable shelter and obtaining medical treatment. In other words, if the victim requires other assistance as a result of the domestic violence, the police are obliged to assist in terms of the Act. Paragraph 7 of the National Instruction describes this as 'general assistance'.

To enhance the provision of assistance to the victims, the DVA²⁷⁸ and the National Instruction²⁷⁹ require the station commander to liaise with stakeholders such as health and housing and forge a working relationship. In addition to this, the station commander is required to maintain a list of all the other service providers at the police station. The list must be immediately available to the police to enable them to enlist their help as it may be required.²⁸⁰ In the case of housing, there must be a list of all those who are willing to provide shelter to victims of domestic violence. A victim must be provided with such list to select from.

While maintaining such a list may be very efficient in certain geographical locations, in others, such as rural areas and townships, it could be difficult to compile such a list. The reason for this is because most of these services are rendered by NGO and there are not enough of them to cover all the areas. It is submitted that the department of housing should play a leading role in providing shelter to victims of domestic violence. A full discussion of the provisions of the DVA in this regard falls below.

²⁷⁸ Section 18 (3).

²⁷⁹ Paragraph 3.

²⁸⁰ Paragraph 3 of National Instruction; Civilian Secretariat for Police (note 267 above; 14 – 15).

(ii) *Limitations of the duty*

There are limitations to the assistance that the police may render to the complainant. These limitations are set out in the National Instructions. Paragraph 8 sets out the process to be followed when assisting the victim to find a suitable shelter. The paragraph provides that the transport expenses to the shelter shall be borne by the victim or a willing family member. It is only as a last resort, if a vehicle is available and when reasonably possible to do so, that a police officer should provide transport using a state vehicle.²⁸¹ Even then, the victim must be informed that the use of the police state vehicle is at his or her own risk. The police may not incur any liability in case of a peril.

The same is the case with obtaining medical treatment. Medical treatment is dealt with in paragraph 9 of the National Instruction. This paragraph only requires a police officer to ask the victim if he or she requires medical treatment²⁸² and if so, to assist or make the arrangements for the victim to obtain medical treatment.²⁸³ The only arrangement envisaged is calling in an ambulance. A police officer is not obliged to use state vehicle to transport the victim. He may only do so as a last resort if a vehicle is available and there is no other means of transport.²⁸⁴ The risks involved are borne by the victim and the police may not incur any liability.²⁸⁵

(iii) *Challenges to the duty to render assistance*

As it has been stated above, the first step towards compliance with the duty to render the assistance requires station commanders to liaise with all the relevant service providers. The list must be available to the victim to choose the most convenient shelter for herself. Ground research shows that there are police stations that are compliant in this respect.²⁸⁶ However, this machinery endures a lot of challenges. For

²⁸¹ Paragraph 8 (2) (c) of the National Instructions.

²⁸² Paragraph 9 (2) (a).

²⁸³ Paragraph 9 (2) (b).

²⁸⁴ Paragraph 9 (2) (c).

²⁸⁵ Ibid.

²⁸⁶ Civilian Secretariat for Police (note 267 above; 14).

instance, this machinery is scarce in townships and rural areas. This is ironic because most cases come from townships. It should be noted that townships are mostly riddled with issues that have been identified above as common causes of domestic violence such as alcohol, drug abuse and unemployment.

It is not easy to comment fully about rural areas because their situation is difficult to assess owing to the remoteness of such areas and absence of courts and police stations. Rural areas are a subject on their own that require much ground research and probably activism. It is submitted that the plight of women in rural areas is dependent on the success of the Traditional Courts Bill and that traditional leaders are able to deal with complex issues such as domestic violence because they are easily accessible. It is further submitted that such matters are within the ambits of their core function which is to maintain peace and order within their respective jurisdictions and they have been doing this way before the DVA.

Providing shelter to victims is much needed machinery because most incidents occur at times when there is nowhere to go for the victim except the police station. The work of non-governmental organisations in providing shelter to victims is commendable taking into account that international instruments such as the CEDAW specifically calls on, among others, non-governmental organisations to take positive steps towards eradicating domestic violence. However, the state should play a leading role in this respect. It is submitted that the state should provide these services especially in places where non-governmental organisations are yet to reach such as townships and rural areas. The state should also alert the community about the availability of these services. This will enable victims to approach the shelters without intervention of the police more especially in cases where the victim does not wish to lay a criminal charge.

The state should empower women by providing them with housing under the Reconstruction and Development Programme (RDP) as this will reduce the number of women who are depending on abusive partners for shelter. It is stated in chapter one above that part of the reasons that victims do not report domestic violence matters is the fear of losing the little support they get from the perpetrators. While it is conceded

that merely providing women with RDP housing is not guaranteed to deal with the violence, however it is submitted that having shelter in their name will, to a certain extent, empower woman to fearlessly take action against their abusers. This way the need to look for shelters will be greatly diminished. Further, owning property allows the victim to obtain a common law eviction order, thus widening the scope of remedies available. Furthermore, this is in line with the objective of the DVA which is to provide victims of domestic violence with maximum protection that the law can provide.

There are notable challenges associated with the allocation of RDP houses to victims of domestic violence. Married women who have already received a house in conjunction with their husbands are not legible as the same person cannot benefit more than once.²⁸⁷ It is argued that the allocation system should be reviewed to cater for those women who have been forced out of their homes by their husbands. However, one finds difficulty in arguing that married women who find themselves out of shelters should be allocated RDP housing in their own name in a separate estate while the marriage subsists. Such an argument offends established principles of family law of joint estate. Perhaps the marriage must have come to an end or broken down before a house may be allocated to woman is justified. This way the State can prevent false claims of domestic violence just to get access to a second house.

It has been stated above that the police may not, as a general rule, use work vehicles to transport victims to clinics or hospitals. This is justified. There are three grounds to justify this. First, police vehicles are not designed to carry patients. Second, the police are not trained to provide the necessary medical assistance and this could endanger the victims. Third, police cannot spend time attending to matters falling within the ambits of the health department. This will encroach upon the time dedicated to their core functions which is to maintain law and order.

Point 3 of the ministerial six point plan seems to be either oblivious to, or overrides, the National Instructions. Point 3 states as follows:

²⁸⁷ Vetten (note 229 above).

POINT 3: Victims **will** be referred/ taken for medical examination by a healthcare professional to obtain medical evidence and complete a medical report. [My emphasis]

The first question that arises is who should refer or take victims for medical examination. Given that this plan was divulged by the minister of police, it is safe to assume that it is the police. But can we rely on this?

Paragraph 9 (2) (c) of the National Instructions provides as follow.

(c) if a criminal charge has been laid, issue a J88 and SAPS 308 to the complainant for completion by a registered medical practitioner. (Where possible and provided transport is available, the member must arrange for the complainant to be taken to the registered medical practitioner.) A member **may**, only as a last resort, transport a complainant in a police vehicle to receive medical treatment if such a vehicle is available and there is no other means of transport. In such an event the complainant must be informed that he or she is being transported at his or her own risk.

It is clear that there is a clash between the point three (3) of the six point plan and the national instruction. It is submitted that the place of the latter is well established in domestic violence law and it was a call by the law makers through section 18 of the DVA. The six point plan on the other hand seems to be a vocal piece of work of no consequences. It is also clear that little thought went into the drafting of the six point plan. Strangely so, it purports to be a move to fight gender based violence, but it is isolated from the rest.

Medical assistance is necessary machinery. This way a medical report (J88) can be completed by a medical officer who examines the victim at the earliest moment. The J88 is very important because it operates as *prima facie* proof of injuries that the complainant may have suffered. This is important especially in light of our trial turnaround delays. A trial may sit when the victim has recovered from the physical effect of the injuries. Given that some people's bodies heal faster than others, in the

absence of the J88, it could be very difficult for the victim to prove that any injuries had been inflicted on him/her.

It must be added that in practice doctors are sure to examine victims and complete the necessary forms. But this is in cases where victims manage to get to hospitals.

3.2.2. Civil action for breach of duty in terms of section 2

The second machinery available to a victim who does not have a protection order is a civil action against the police who fail in their duty in terms of section 2. It is submitted that imposing civil liability in this regard is commendable; otherwise in the absence of repercussions this section would have been redundant. Before considering the question of liability, it is important to highlight the distinctions between the respective duties. It has been stated above that the duty of the police is two-fold, that is, *to advise the victims* and *to render assistance*. Each of these duties has been elaborated upon. The next issue to consider is that of delictual liability for failing to execute these duties. The threat of liability is on its own a machinery to bolster compliance with the DVA. It inspires diligence on the part of the police.

It is clear from the *Venter* case above that the police may be held liable for neglecting their advisory duties. On the other hand, it does not appear that police may be held liable for failing to render assistance to victims, which includes assisting victims to find a suitable shelter and obtaining medical assistance. The National Instruction specifically exonerates the police by stating that they are not obliged to personally render assistance by transporting victims using state vehicles and that even if they do so, they may not be held liable if any risk materialises.

Perhaps the rationale behind such a distinction in the imposition of liability is the ability of the police to comply. While giving advice to victims is done over the counter or at the scene of the incident personally by the police, the same cannot be said of assisting victims to find a suitable shelter and to obtain medical treatment. The police may do their part by assisting the victims; however the actual provision of these services rests

with third parties such as Social Welfare, NGOs and the Department of Health. Clearly the police cannot in law be held liable for things that are not within their abilities.

It is interesting to ask if it would be desirable to impose mandatory duties on the police to take victims to a shelter or to send them for medical treatment using state vehicles. At first glance, this seems to make sense because the victims of domestic violence intuitively turn to the police for assistance. However, when one carefully considers this point, it will be self-defeating to expect police to stretch themselves this way for a number of reasons. First, police vehicles are not designed to carry passengers. Second, if police vehicles are used as public transport, the police will fail in their duty to police crime and bring perpetrators to book using the same vehicles. Third, police vehicles are not designed to carry injured or medically needing people. Finally, the police are not trained to assist patients in-transit and this could worsen the health of the victim thus placing his or her life in greater danger than it would have been. The problem with transportation may be circumvented if the police forge a closer working relationship with respective stakeholders such as health or NGOs. These could assist with immediate transportation at the request of the police.

3.2.3. Arresting the perpetrator

(a) General

The third machinery available to a victim of domestic violence without a protection order is the arrest of the perpetrator. Domestic violence is characterised by the instilling of fear, controlling behaviour, threats and infliction of harm of various nature, including physical harm and psychological harm. Conduct of this nature harms every member of the household. The possible causes of such conduct are discussed in chapter one. A speedy solution is to arrest the perpetrator. This brings the question of under what circumstances to arrest the perpetrator in the absence of a protection order; and if the DVA provides for such machinery.

It is trite that a perpetrator may be arrested pursuant to a warrant of arrest issued together with a protection order in terms of the DVA. This being the case, may an arrest for domestic violence follow in the absence of a protection order? It would not make sense to discriminate against victims just because they have not obtained protection orders. The absence of a machinery to protect victims in this situation will be self-defeating and render the provision of speedy relief a tale rather than reality.

(b) *Grounds for an arrest without a protection order*

Section 3 of the DVA may provide a solution in this regard. It reads:

'3 Arrest by peace officer without warrant

A peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.'

This section appears to permit two kinds of arrests. An arrest without a warrant and an arrest without a protection order.²⁸⁸ This section is supported by section 40 (1) (q) of the Criminal Procedure Act which also permits a peace officer to arrest any person without a warrant of arrest whom he reasonably suspects 'of having committed an act of domestic violence...which constitutes an offence in respect of which violence is an element'. The requirements for an arrest are an act of domestic violence accompanied by an element of violence. Further, an arrest of this nature may only be carried out at the scene of the incident. The Criminal Procedure Act does not have this requirement.

The idea that an arrest in the absence of a protection order may be carried out in terms of the DVA should not be taken too far for two reasons. First, the underlying reason for an arrest in general is to bring the perpetrator to court to answer to allegations against him. While the perpetrator may be arrested in terms of DVA, he cannot be brought to court under the same Act in the absence of a protection order. Therefore logic dictates

²⁸⁸ That a lawful arrest may follow in the absence of a protection order was stated in *Langa v Minister of Police and others* (note 248 above; para 60) in the these terms: "...where the Supreme Court of Appeal dealt with a similar case and held that where a peace-officer without a warrant arrests a person on reasonable suspicion that he is committing acts of domestic violence the arrest will not be unlawful only because there is no domestic [sic] protection order against that person in place."

that he is arrested in terms of the Criminal Procedure Act to answer to any common law offence if any has been committed. Second, section 3 is vague and it is an unnecessary addition to the Act because the very same function is served by the Criminal Procedure Act. This is illustrated by the *dicta* of Lewis JA in *Minister of Safety and Security v Katise*²⁸⁹ where he says:

[14] I do not understand the section, on its plain meaning, to require an arrest at the scene of the domestic violence only after investigation and analysis. The stabbing of Mrs Katise, and threats to injure her with a spade, are self-evidently acts of domestic violence. It is true, however, that Katise was arrested only after he had been treated in hospital and then brought to the police station. But in any event, the conduct of Katise falls within the ambit of s 40(1)(q) of the Criminal Procedure Act.

The learned Judge adds:

[16] In my view the Domestic Violence Act adds to the protection offered to a victim of an offence like assault by the common law and the Criminal Procedure Act. It does not detract from it, which would be the effect of not permitting an arrest without warrant where the complainant has once sought [*but not obtained*] protection under that Act. The existence or otherwise of the interim protection order could not mean that in a clear case of violent abuse of a complainant the police could not arrest the perpetrator in order to protect her or him. [My emphasis]

(c) *Arguments for the creation of a stand-alone offence.*

That the perpetrator cannot be arrested and subsequently trialled under the DVA in the absence of a protection order is an anomaly. The DVA was passed to bring perpetrators of domestic violence into book. Yet, arguably, the legislature did not make provisions for situations where there is no protection order. As it will be seen shortly below, some authors have argued for the creation of a stand-alone offence of domestic

²⁸⁹ *Minister of Safety and Security v Katise* 2015 (1) SACR 181 (SCA).

violence. Section 3 provides for the arrest of 'any respondent'. Section 1 also defines a respondent as 'any person who is or has been in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant'²⁹⁰. Clearly he need not be a party to a protection order. This calls for substantive arguments in this respect.

There is an emerging school of thought that argues for the creation of a separate offence called 'domestic violence'. Various writers and activists on the subject of domestic violence argue that a stand-alone crime of domestic violence should be created.²⁹¹ Others are of the view that this will merit harsher penalties and deter would-be perpetrators.²⁹² As things currently stand, domestic violence is not criminalised, instead it is the breach of a protection order that is an offence.²⁹³ For statistical purposes domestic violence offences are recorded under a number of offences such as assault, assault GBH, murder, sexual assault, rape, and contempt of court and other.²⁹⁴ This in turn makes it difficult to point the extent of domestic violence cases.²⁹⁵

A stand-alone offence of domestic violence cannot be sustained for various reasons. The first is regarding protection orders; will they be dispensed with once a stand-alone offence has been created? It must be borne in mind that the current offence is termed 'breach/violation/contravention of a protection order' owing to the strength of a protection order. It goes without saying that once a stand-alone offence is recognised, the former offence will fall away. Further, the protection order seeks to instil peace and only non-compliance with the order attracts criminal liability; on the other hand it appears that the proposed offence will criminalise the act of domestic violence right from the start and thus bloat the work of the police.

²⁹⁰ Section 1 (XX).

²⁹¹ Parenzee, Artz and Moulk (note 204 above; 5 and 11);

²⁹² Furusa and Limberg (note 211 above; 5).

²⁹³ Njezula (note 37 above; 2); Vetten (note 229 above; 2 – 3).

²⁹⁴ Bendall (note 2 above; 101); Vetten (note 229 above; 2).

²⁹⁵ S. Rasool 'Is the Domestic Violence Act enough? Addressing women's needs' 1999 (18) *Institute for Security Studies* 29 argues that while statistics are an important aspects, however the absence thereof should not bar any strategizing on domestic violence. This author submits that 'We do not need to know exactly how many women are beaten or raped before we take solid action.'

Another issue is the definition of the proposed offence. Will the offence retain the meaning of 'domestic violence' or will it require a new definition. It must be borne in mind that the current definition seems appropriate because it covers all acts of domestic violence and it is well considered especially after the shortcomings of the Prevention of Family Violence Act. The current definition of 'domestic violence' is independent of protection orders; even if they are dispensed with, the definition should survive the day.²⁹⁶ However, since the current definition came with a protection order in mind, any reworking of the system might demand a different approach in defining the new offence.

Defining the new offence might be unworkable especially in circumstances involving established offences such as, among others, murder or rape when they occur within a domestic relationship. In this instance will we disregard the common law definitions or define the offences differently once they occur within a domestic relationship. It will be shown below that a differentiation between those convicted under the auspices of domestic violence and those convicted under the common law is potentially discriminatory.

Sentencing under the proposed crime of domestic violence might present some practical problems and therefore requires a careful consideration. The DVA currently provides for a maximum sentence of a fine or 5 years imprisonment. There is no fixed amount.²⁹⁷ This also marks some improvement from the Prevention of Family Violence Act. In terms of the latter Act, the sentence was a fine or a maximum of 12 months imprisonment.²⁹⁸

It is trite in law that offences such as rape and murder usually have a higher sentence associated with them. The sentence can go as far as life imprisonment depending on

²⁹⁶ Ibid. Rasool submits that the definition of domestic violence is very comprehensive and its covers all aspects of abuse mentioned by women in studies.

²⁹⁷ Section 17. The relevant portion of the section provides:

...liable on conviction...to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment...'

²⁹⁸ Section 6 (b) of the Prevention of Family Violence Act.

the circumstances of the commission of the respective offence. This means that, as the law currently stands, and if the proposed offence of domestic violence goes through, a person who is convicted of domestic violence rape and/or murder may only receive a maximum sentence of 5 years imprisonment. Whereas others convicted of the same offence but outside domestic violence may receive a sentence that exceeds 5 years imprisonment. Such discriminatory treatment will never survive constitutional scrutiny.

Sentencing between the different acts of domestic violence is one issue. Another issue is record keeping. If the proposed offence goes through, logic will dictate that the perpetrator ought to be convicted of domestic violence and the SAP 69 record should reflect this. The SAP 69 is a record of a person's previous convictions. The practical consequence is that two people who are guilty of the same act of rape, for instance, but in different contexts (domestic and public) will receive different treatment in as far as record keeping and the SAP 69s are concerned. The stigma against those convicted of rape is more negative than those convicted of domestic violence. This is another example of discrimination.

It is therefore submitted that, if the proposed offence goes through, and in order to alleviate discrimination, the offence should read, for example, 'domestic violence – rape' or 'domestic violence – murder' and the record of proceedings and the SAP 69 must reflect this. The sentence in each circumstance should reflect on the gravity of the act of domestic violence in question.

3.2.4. Opening a docket

The fourth machinery is the opening of a criminal docket. Whenever an act of domestic violence has been committed against a complainant, a docket must be opened irrespective of the fact that the complainant does not have a protection order. Hence for presence purposes, opening of a docket is treated as machinery outside a protection order. Opening a docket is also referred to as laying of a charge.

The opening of a docket is a very important aspect of criminal proceedings. A docket means the matter will be tracked. An investigating officer will be allocated and the matter will be investigated. The matter is allocated a unique case number and a CAS number. The case number is for record keeping in court, and the CAS number is for record keeping in the police station. The victim is able to do a follow up on the matter in court or at the police station using the relevant number or reference.

Once a docket has been opened, it is not easy to just close it. In practice certain processes must be followed. A senior public prosecutor must be made aware and approve of the withdrawal, the victim must be interviewed by the public prosecutor in charge of the matter and the investigating officer. The victim must depose to a withdrawal statement.²⁹⁹ The presiding officer must be informed in open court of the withdrawal. All these people act independent of each other. In *Langa* above, the court dealt briefly with these procedural steps.

Lazy police officers will often try to mediate matters so to avoid opening a docket. As it was seen in the *Naidoo* case above, the police officer attempted to mediate the matter just to avoid opening a docket. It is also stated above that the police officer even suggested that both the complainant and the respondent must open dockets against each other just to get them to mediate and avoid opening a docket all together.

It is submitted that there are three notable reasons that police officers will be slow to open a docket. These are laziness coupled with negative attitude towards domestic violence, the unreasonable withdrawal of charges and spiteful complainants. The last two are indeed frustrating especially after the investigating officer has put on a lot of effort in investigating a matter. However it is hereby submitted that these are not good enough reasons to falter in one's duty as the DVA is able to deal with all the above situations. Laziness is dealt with by imposing liability on the police. The withdrawal of charges can be dealt with through public awareness on the seriousness of opening a docket and allowing polices processes to be carried through. Victim empowerment is

²⁹⁹ See *Langa v Minister of Police and others* (note 248 above; para 39) where the issue of withdrawal of charges in such a way is briefly discussed.

very crucial in this regard so that the victim does not find herself in a position where she has to withdraw charges just to get the perpetrator out due to the support she receives from him.

Spiteful complainants can be dealt with through section 17 (d) of the DVA, which among others criminalises the wilful making of a false statement. In practice this is usually brought to the complainant's attention before she lays a charge. However, as it has been pointed out above, there is no known prosecution in this regard. It must also be brought to the complainant's attention that she may face civil liability from the complainant as a result of unfounded allegations.

3.3. MACHINERIES THAT FLOW FROM A PROTECTION ORDER

3.3.1. General remarks

While a victim of domestic violence does receive some protection in the absence of a protection order, a bulk of the protection is perfected by a protection order. This dissertation now turns to the much stronger machineries that flow from the protection order. A holder of a protection order is in a much stronger position because she is able to have access to all the relief that the DVA provides. For purposes of coherence, it is important to recap the machineries available to a non-holder of a protection order since a holder also benefits from these. The purpose of echoing these machineries is to show how the presence of a protection order changes the extent of the protection.

A holder of a protection order also has a right to receive advice from the police. It should be recalled that where there is no protection order a police has to advise the victims of her right to *apply for a protection order* and to *lay criminal charges* if the conduct complained of constitutes a crime in terms of the common law. However, in the context where there is a protection order, the police officer has to advise the victim on the right to simultaneously *lay a charge for breach of a protection order* and a

criminal charge under the common law or other statute.³⁰⁰ The police officer must explain to the complainant how to lay the charge.³⁰¹ The protection order prohibits a wider scope of conduct than the common law. It follows that a complainant who is a holder of a protection order may lay a charge for breach of a protection order in respect of conduct that would otherwise not be a crime under the common law provided that the conduct in question is prohibited by the protection order. Therefore the holder of a protection order is in a much stronger position.

The extent of the standard of care when advising a victim who is a holder of a protection order is the same as above. The victim has a right to receive the advice in any official language he understands from the police. The standard of care is that of a reasonable police officer in the circumstances and the minister of police may be held vicariously liable in the event of a breach in this regard.³⁰²

A holder of a protection order also has a right to receive such assistance as she may require including obtaining medical assistance and finding a suitable shelter. The nature and extent of this machinery is the same in both contexts. However, instead of looking for a shelter, a holder of a protection order may simply invoke a provision in the order that allows for the ejection of the respondent, if such a provision exists. The limitations remain the same. A police officer is not obliged to use a police vehicle to transport the victim to obtain medical assistance or to a suitable shelter.

3.3.2. Section 7 of the DVA

Section 7 of the DVA confers upon a court certain powers when issuing a protection order. This section carries an important machinery. It may be argued that this section also represents progress from the Prevention of Family Violence Act which conferred limited powers upon a presiding officer when issuing a family violence interdict. In

³⁰⁰ Section 8 (6).

³⁰¹ Ibid.

³⁰² Paragraph 10 of the National Instructions.

terms of section 2 of the Prevention of Family Violence Act a presiding officer could order the respondent:

(a) not to assault or threaten the applicant or a child living with the parties or with either of them;³⁰³

(b) not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated;³⁰⁴

(c) not to prevent the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home;³⁰⁵ or

(d) not to commit any other act specified in the interdict.³⁰⁶

It is *prima facie* clear that this section was destined to be less effective in dealing with domestic violence as it was limited. Section 7 of the DVA is a dawn of a new era. Now the court is empowered by means of a protection order to prohibit the respondent from:

- (i) Committing any act of domestic violence;
- (ii) Enlisting the help of another person to commit any such act;
- (iii) Entering a residence shared by the complainant and the respondent:
Provided that the court may impose this prohibition only if it appears to be in the best interest of the complainant;
- (iv) Entering a specified part of such a shared residence;
- (v) Entering the complainant's residence;
- (vi) Entering the complainant's place of employment;
- (vii) Preventing the complainant who ordinarily lives or lived in a shared residence...from entering or remaining in the shared residence or a specified in the protection order; or

³⁰³ Section 2 (1) (a) of the Prevention of Family Violence Act.

³⁰⁴ Section 2 (1) (b).

³⁰⁵ Section 2 (1) (c).

³⁰⁶ Section 2 (1) (d).

(viii) Committing any other act as specified in the protection order.³⁰⁷

It is submitted that the above provides a very wide scope. The court is empowered to prohibit the respondent by means of a protection order from committing any act of domestic violence.³⁰⁸ At the inception of this chapter it was made clear that the concept of an act of domestic violence is very wide. It includes any controlling or abusive behaviour by the respondent towards the complainant that harms or has the potential to cause imminent harm to the safety, health and wellbeing of the complainant.³⁰⁹ A good example of controlling or abusive behaviour is verbal abuse. The DVA has succeeded in providing a machinery to refute emotional, verbal and psychological abuse.

It was possible for a respondent to bypass a prohibition in the Prevention of Family Violence Act by enlisting the services of another person to commit an act prohibited by a family violence interdict. This Act did not expressly prohibit such collusive behaviour. This was the case unless the presiding officer decided to make use of the catch-all provision of section 2 (1) (d) to prohibit the respondent from enlisting the services of a third party, which, considering the narrow conceptualisation of domestic violence inherent in this Act was a far-fetched possibility. Section 7 (1) (b) of the DVA expressly empowers the court to admonish the respondent through the protection order from enlisting the help of another person to commit an act of domestic violence. The conduct of a third party may be imputed to the respondent.

Prohibiting the respondent from enlisting the services of another person is good machinery. Chapter one indicated that part of the reasons victims of domestic violence refrain from reporting domestic violence to the authorities is the fear of retaliation by the family or friends of the respondent. The DVA indirectly makes it mandatory for the respondent to tame those who are connected to him to avoid prosecution for breach of a protection order as a result of the conduct of a third party.

³⁰⁷ Section 7 (1) (a) – (h) of the Domestic Violence Act.

³⁰⁸ Section 7 (1) (a).

³⁰⁹ Section 1 (j) definition of 'domestic violence'.

Section 7 read with section 9 provides a very wide scope of protective machinery. Some of the provisions contained in these sections have stood out for various reasons. They are rarely sought and if sought, they are rarely granted.³¹⁰ The courts are not unanimous on how to approach them.³¹¹ These are provisions relating to ejectment of the respondent from his home,³¹² seizure of firearms and dangerous weapons,³¹³ rent, mortgages and emergency monetary relief³¹⁴ access to children,³¹⁵ arrests for breach of a protection order as well as sentencing for the latter. All of these measures are welcome as they provide for the much needed relief. However they also raise questions regarding their nature and extent. These are very important aspects to consider because they have an impact on the application and effectiveness of these provisions. Because of these reasons, these provisions are discussed in detail below.

3.3.3. Ejectment of the respondent from the common home

(a) General remarks

In South Africa, the court may order the respondent to refrain from entering a shared residence or a specified part thereof.³¹⁶ This provision is not unique to the DVA. Section 2 (1) (b) of the Prevention of Family Violence Act made it possible for the presiding officer to enjoin the respondent not to enter the matrimonial home or part thereof. This section went as far as barring the respondent from entering the area where the matrimonial home is situated. The DVA is also able to achieve this by prohibiting conduct such as intimidation³¹⁷, harassment³¹⁸ and stalking³¹⁹.

³¹⁰ E. Bonthuys 'Domestic violence and gendered socio-economic rights: an agenda for research and activism' 2014 (3) *South African Journal on Human Rights* 111, 126.

³¹¹ Ibid.

³¹² Section 7 (1) (c) – (f).

³¹³ Section 7 (2) (a) read with section 9.

³¹⁴ Section 7 (3) and (4).

³¹⁵ Section 7 (6).

³¹⁶ Section 7 (1) (c) and (d). Paragraphs (e) and (f) goes as far as prohibiting the respondent from entering the complainant's residence as well as the place of employment respectively.

³¹⁷ Section 1 (e) of the definition of 'domestic violence'.

³¹⁸ Section 1 (f) of the definition of 'domestic violence'.

³¹⁹ Section 1 (g) of the definition of 'domestic violence'.

This is a significant provision because it purports to deal with a phenomenon of domestic violence that it usually takes place behind closed doors within the confines of a home. The court is able to remove the abusive respondent thus providing relief to victims of domestic violence, particularly those who are unemployed and have no means to move out and find accommodation of their own. This is also useful to victims who are stuck in abusive relationships because of the children as well as those who are co-owners of the home by virtue of marriage to the respondent. This provision is also significant because it is a shift from the onerous common law requirements to obtain an eviction order or a judicial separation order which is only available to married people.³²⁰

It is worth noting that in terms of section 7 (1) (c), the court is able to make an order, not totally excluding the respondent from the shared residence, but from a specified part of the shared residence. Initially one would wonder why such a provision was included or what use purpose will it serve especially considering that it allows the respondent to remain on the property thus making it likely that the abuse will continue. It appears that an order of this nature can succeed in respect of households with more than one property. It is also submitted that this order will best suit a rural settlement with various properties.

Strictly speaking, if the parties are not married there is no legal duty on the respondent to move out of his home to accommodate the complainant. The victim cannot legally evict the respondent from his own property. Simply put, a girlfriend has no right to occupy the respondent's premises to his exclusion. However it is submitted that the DVA confers a special right of occupation on the complainant.³²¹ This right will only be conferred if the parties live together like husband and wife.³²² By analogy the courts will be more inclined to confer this right in situations where there are children involved.

³²⁰ See *Ex Parte Cooling* 1926 WLD 202 for a brief reference to how a judicial separation order operates. A judicial separation order is becoming less popular in recent years; spouses just decide to be estranged from each other and so the marriage goes. See *Nevhudzholi v Nevhudzholi* (V) unreported case no 180/94 of 22 September 1998 for a voluntary separation.

³²¹ 'Family Law' available at <http://www.divorcelaws.co.za/the-law-on-cohabitation.html> accessed on 7 September 2017.

³²² Ibid.

However, the courts should arrive at a different conclusion in cases where there are no children involved and where the relationship was of a shorter duration.

There are various reservations regarding the provisions ejecting the respondent from his residence, some of them albeit controversial. There are four notable reservations about this provision. The first is at what stage (interim or final) should an ejectment order be made; second, the relation between this provision and an eviction, third, the duration of time that the respondent may be kept away from his/her home and fourth, whether this provision may be justified when weighed against section 25 (1) of the Constitution which provides that no one may be arbitrarily deprived of their property. These reservations require an extensive consideration and therefore they are discussed next.

(b) At what stage should an ejectment order be made?

It has been stated above that a protection order has two stages, the interim and the final stage. The interim protection order is issued without notice to the respondent. The question then becomes: can a court make an ejectment order without notice to the respondent?³²³ There is nothing in the DVA against this. When one looks at the immediate nature of domestic violence, it would make sense for the court to be able to eject an abusive person instantly without delay. On the other hand it is arguable that this would be unjust and prejudicial to the respondent because the only time he may learn of the order is when he has to move out. There is a counter argument in this regard that until service of the interim order is duly effected, it will be legally impossible to eject the respondent. On receipt of the service, the respondent can simply anticipate the return date and have the matter heard much earlier otherwise the ejectment order still stands.

³²³ Artz (note 65 above).

The case in point in this regard is *Lebaka v Minister of Safety and Security and another*³²⁴. In this case, the court had granted an ejectment order at interim stage against the respondent (Appellant) in favour of the complainant (his wife). The interim protection order had not been served on the respondent and he was subsequently arrested for being in his house unbeknown to him that he was in breach of the order. The court in this case appeared to accept that an order of this nature could be made at interim stage. The court found, however, that the arrest was unlawful on the ground that the respondent had not received service of the interim order.³²⁵ In the court's words "...the respondent could not have contravened an order of which he had not been aware as it had not been served on him."³²⁶

There is an argument that an ejectment order should only be made at the final stage, thus providing the respondent enough opportunity to plan ahead for a worst case scenario if he has to move out of the house. On the other hand, it can also be argued that the delay until the return date could allow further harm to the victim and this is not in line with the DVA, the purpose of which is to provide victims with speedy remedies.³²⁷

Magistrates differ on when an ejectment order should be made. Some are reluctant to make the order at the interim stage because of the drastic effect it has on the respondent.³²⁸ They are of the view that the respondent should be given an opportunity to respond before such a drastic decision is taken.³²⁹ There are also those magistrates who are determined to give effect to the purpose of the DVA. It is submitted that the courts should not shy away from making an ejectment order at any stage, especially in cases where the evidence is *prima facie* overwhelming that failure on the court to act will place the victim in greater danger. The inconvenience which the respondent

³²⁴ *Lebaka v Minister of Safety and Security and another* (O) unreported case no A114/2007 of 13 March 2008.

³²⁵ *Ibid* para 14.

³²⁶ *Ibid*.

³²⁷ Artz (note 65 above).

³²⁸ *Ibid*.

³²⁹ *Ibid*.

may suffer should not play much role because he/she is the author of his/her demise. However each case should be dealt with on its merits.

There is a vacuum of guidance in the DVA when it comes to implementing this provision. While the DVA is commended for being unequivocal on the type of conduct that qualifies as domestic violence and the person who should obtain a protection order, it provides no guidance on how to approach the ejectment provision. Simply providing for an ejectment without any further guidance creates more problems. This is problematic because since domestic violence matters are within the domain of the magistrates' courts, they do not have the benefit of judicial precedent. This leaves magistrates wondering in isolation, which in turn leads to inconsistencies. The DVA should be amended to provide the necessary guideline. For instance courts should be cautious and only issue ejectment order if there is evidence to suggest that the complainant does not have an alternative address and he or she will suffer serious harm if an ejectment order is not issued. Courts should never issue such orders on unsubstantiated say so of the complainant.

(c) The relation between the ejectment provision and evictions³³⁰

There are distinctions and similarities between an ejectment order and an eviction. The first distinction is that only an owner or a lessee may lawfully evict. On the other hand, it is arguable that the DVA creates a special right of occupation for people other than an owner or a lessee. Second, usually the high court has the jurisdiction to grant an eviction order; however the magistrate's court may now hear such matters. An ejectment order is granted by a magistrates' court. Third, each has its own requirement. In summary, the substantive³³¹ requirements for an eviction are that the applicant must be the owner of the property and the respondent must be in illegal occupation of the applicant's property,³³² whereas it is submitted that the requirements

³³⁰ Ibid.

³³¹ Eviction proceedings are largely procedural. The procedure is set out in sections 4 and 5 of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998.

³³² Illegal Occupations comes about in various ways. A person may be an illegal occupier where, after the lease expires, he continues to hold over the premises. A person may also be an illegal occupier if he simply takes it upon himself to move into another person's property without legal cause.

for an ejectment order are (i) the parties must be living together like husband and wife, and (ii) the respondent must have committed an act of domestic violence that merits an ejectment order. If parties are living together and have children, it may easily be inferred that they are living together like husband and wife.

There are procedural steps that must be followed in order to obtain an eviction. These are found in sections 4 and 5 of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act³³³. The owner of the property must first demand that the respondent evacuate the property. If the respondent does not evacuate the property, the owner must obtain a court order, either by way of application or action proceedings. The court order must be served or executed by a sheriff. This process may be protracted. Even if the eviction order is granted, it does not follow that the respondents will be evicted immediately. Eviction is last in line.³³⁴ On the other hand, an ejectment order is, justifiably so, a speedy process. As it has been shown above, unlike an eviction, the applicant in a protection order may simply obtain an ejectment order without notice to the respondent in controversial cases where an ejectment order is made at interim stage.

The similarity is that the respondent, like an evictee under the common law and PIE, is excluded from his/her house. The difference is that the evictee does not have title to the property. Some have submitted that there is no distinction between an ejectment order in terms of the DVA and the common law eviction, especially in cases where an ejectment is made indefinite, and that if there is any distinction, it lies only in terminology.³³⁵ This argument cannot be entirely true. The respondent may lawfully regain possession of his property by having the protection order varied or set aside; whereas an evictee has no remedy.

Of course one has to be careful in comparing an ejectment order to an eviction. These remedies are designed to respond to totally different situations. The former is designed

³³³ Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998.

³³⁴ For a brief summary of the process in this regard see T. Klos 'Step-by-step guide to residential housing eviction proceedings in the magistrate's court' July 2016 *De Rebus* 26.

³³⁵ Artz (note 65 above).

to deal with an immediate situation that may be life threatening or subject the applicant to an unbearable situation if it is not granted. At least with the latter the respondent usually has the opportunity to organise himself and he chooses to ignore that opportunity to his detriment.

(d) The duration of the ejectment

The DVA is silent on the duration of most the orders that may be made in a protection order. This can only imply that the question of the duration was left to the court to decide. There is nothing in the DVA that prevent the court from making an indefinite order in this regard. There is also nothing sinister about an indefinite order in cases where the victim is the owner of the property. The crucial question is whether the court may be justified in making such an order either in cases of joint ownership (either by virtue of marriage or property law principles), or in cases where the respondent is the sole owner of the property?

Nonetheless section 7 (7) (b) worth considering in this regard:

‘If the court is of the opinion that any provision of a protection order deals with a matter that should, in the interest of justice, be dealt with further in terms of any other relevant law...the court must order that such a provision shall be in force for such a limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law’

There are a few things that must be noted about this provision. It permits the court to refer issue of ejectment to another court. It is dependent on a magistrates’ subjective opinion; in other words if the magistrate is of the view that there is nothing sinister about granting an ejectment order at an interim stage, he/she may proceed to do so without any consideration. This is another problem because almost complete reliance is placed on unguided discretion.

The position is different in, for instance, Namibia. The Namibian Domestic Violence Act³³⁶ provides that a provision granting the complainant exclusive occupation of the respondent's residence is valid for a maximum of 6 months.³³⁷ If the provision relates to property jointly owned by the respondent and the complainant, the exclusion shall be valid for a maximum of 1 year.³³⁸ The courts may only depart from these stipulations to order a lesser period. One understands that it is impossible, and not advisable, to set time periods for everything. However, one has to equally caution against over reliance on judicial discretion as it can lead to inconsistencies. It is submitted that the setting of statutory maximum durations encourages the complainant to earn an independent living, starting by finding her own accommodation. This way the question of arbitrary deprivation of property on the part of the respondent does not necessarily arise.

It is interesting to note that the Namibian DVA is a spitting image of the South African DVA. It goes without saying that Namibia, in drafting its Act in this respect, used South Africa as a case study. However, Namibia went miles further by providing as much detail as possible. There is no doubt that Namibia intended to adequately deal with domestic violence by providing sufficient guidelines in the Act. These submissions do not in any way mean that South Africa adopted mediocrity. It is hoped that, like some of the provisions of the South African DVA, the Namibian DVA does not only good look on paper but also yields good practice. With this in mind, one can safely say that the South African DVA was an improvement from the Prevention of Family Violence Act, and that the Namibian DVA was, arguably, an improvement from the South African DVA.

South African magistrates are also not unanimous in applying the provisions relating to ejectment. As it has been pointed out above, there are magistrates who do not make an order of this nature because they feel that it is far reaching and open to abuse. There are also those who would make an ejectment order valid for a reasonable

³³⁶ Namibian Domestic Violence Act 4 of 2003.

³³⁷ Section 15 (a) (ii).

³³⁸ Section 15 (a) (iii).

duration to allow the complainant to find her own shelter.³³⁹ It is arguable that the court may make the order indefinite and, however, allow the respondent to apply for a variation of the ejectment order after reasonable time has passed allowing the victim to find suitable accommodation.

An order of this kind, temporary or indefinite amounts to a deprivation of property, something which the constitution frowns upon. Below we shall consider if this deprivation may be constitutionally justified.

(e) The constitutionality of the ejectment provisions³⁴⁰

In South Africa, because of our political history where a person could summarily or permanently be deprived of property due to the colour of his skin, the right to property is a sacred one. Section 25 (1) of the Constitution provides that 'no one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property'. A reading of this subsection makes it clear that this provision has a limitation, that is, a person may be deprived of his property according to the law of general application. There is no need to refer to section 36 of the Constitution in this regard.

An ejectment order in terms of the DVA is a limitation of the respondent's right to his property. But is this limitation justifiable in terms of the law of general application in an open and just society? This question should be answered taking into account the circumstances of each case, particularly the circumstances under which an ejectment order is granted. An ejectment order will probably be unjust, and consequently unconstitutional, if it granted at interim stage and in circumstances where there is no immediate or real danger to the complainant if it is not granted. A drastic order of this nature should be granted only if the harm is real.

³³⁹ Artz (note 65 above).

³⁴⁰ Ibid.

It is argued that the provision of houses or shelters is the duty of the state. Cases that require the respondent to vacate his/her home for the benefit of the complainant are a pointer to the failure of the state to provide adequate housing to those in need.³⁴¹ This is a fair price to pay if the state hopes to succeed in the fight against domestic violence. It is further arguable that by failing to provide housing to complainants, the state shifts its duty to the respondent who in turn takes unfair advantage on the complainant. Therefore the state should empower victims by affording equal opportunities in terms of acquiring skills and employment. This way they are self-sufficient and less dependent. In the alternative the state must prioritise vulnerable women in providing housing.

3.3.4. Seizure of firearms and dangerous weapons

(a) Seizure of firearms

The court may order a seizure of a firearm or a dangerous weapon in the possession or under the control of the respondent regardless of the question of ownership.³⁴² This provision is unique to the DVA. A similar provision did not exist in the Prevention of Family Violence Act. In terms of this provision, the court may order seizure of a firearm or a dangerous weapon if it is satisfied on the evidence placed before it supporting the application that:

- (a) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon; or
- (b) possession of such arm or dangerous weapon is not in the best interest of the respondent or any other person in a domestic relationship, as a result of the respondent's –
 - (i) state of mind or mental condition
 - (ii) inclination to violence; or

³⁴¹ Bonthuys (note 310 above; 127)

³⁴² Section 9 (1) of the Domestic Violence Act.

- (iii) use of or dependence on intoxicating liquor or drugs.³⁴³

This provision appears to mirror section 102 (1) (a) and (c) of the Firearms Control Act.³⁴⁴ This section allows the registrar to declare a person *unfit to possess a firearm* on precisely the same grounds as section 9 of the DVA. However the scope of section 102 is wider than the DVA in that the former applies to a variety of circumstances including domestic violence. For instance, section 102 also applies in instances when a person has failed to take steps for safekeeping of a firearm. Such person may be declared unfit to possess a firearm.

It is unclear when the registrar, acting in terms of section 102 of the Firearms Control Act, may make a declaration that a person is unfit to possess a firearm, whether on application by a third party or a victim of the respondent or a person on his own accord. However, the section provides that the registrar may declare a person *unfit to possess a firearm* ‘on the grounds of information contained in a statement under oath or affirmation including a statement made by any person called as a witness...’³⁴⁵ This section makes it possible for a victim of domestic violence to instigate proceedings to declare the respondent unfit to possess a firearm by making information available to the registrar. In *Minister of Safety and Security v van Duivenboden*³⁴⁶ the court held that the police have a duty to take active steps in terms of section 102 of the Firearms Control Act³⁴⁷ in cases where there is sufficient information to do so.

The distinction between the DVA and section 102 of the Firearms Control Act is that the former only allows the court to *seize a firearm* from the respondent, while the latter allows the registrar to declare a person unfit to possess a firearm on the evidence supplied to him or her. The DVA has narrow application in this regard because it does not affect the respondent’s ability to obtain another firearm after confiscation. Interestingly, section 102 (1) (a) of the Firearms Control Act makes it possible for a

³⁴³ Section 9 (1) (a) and (b).

³⁴⁴ Firearms Control Act 60 of 2000.

³⁴⁵ Section 102 (1) of the Firearms Control Act.

³⁴⁶ *Minister of Safety and Security v van Duivenboden* 2002 (6) SA 431 (SCA).

³⁴⁷ The *van Duivenboden* case was decided during the operation of section 11 of the now repealed Arms and Ammunition Act 75 of 1969. Section 11 of this Act was incorporated into the incumbent Firearms Control Act as section 102.

person to be declared unfit to possess a firearm on the ground that a protection order has been issued against him.³⁴⁸ This provision is consistent with section 9 (2) of the DVA which empowers the court to direct the clerk of the court to forward a copy of the evidence to the National Commissioner of South African Police Service (the National Commissioner) for his consideration in terms of section 102 of the Firearms Control Act. The DVA therefore has no powers beyond the mere seizure of the firearm.

It is submitted that there is no logic behind the absence of a provision that enables a court issuing a protection order to simultaneously declare the respondent unfit to possess a firearm. Section 9 (2) of the DVA simply passes the buck to the national commissioner who may in turn take his own time thus causing an unnecessary delay. Firearms, if used, are deadly. There is equally no logic behind issuing a protection order amid allegations of violence involving a firearm, thus confirming that an incident of domestic violence has taken place, and yet leave the question of the respondent's fitness to possess a firearm hanging. The DVA should be amended to allow for the impairment of a person's fitness to possess a firearm especially in cases where there is overwhelming evidence of misuse of a firearm as early as possible.

In terms of Section 103 (1) of the Firearms Control Act a person who is convicted of contravening a protection order is automatically declared unfit to possess a firearm unless he leads evidence as to why such a declaration should not be upheld.³⁴⁹ This is subject to the proviso that the accused is sentenced to imprisonment without the option of a fine.³⁵⁰ Clearly section 103 (1) creates a presumption of unfitness to possess a firearm in the absence of evidence to the contrary after a person has been convicted of contravening a protection order.³⁵¹ While this section is a good mechanism, it is not the best option in cases of domestic violence because in the absence of a conviction, it cannot be invoked thereby failing to play a preventative role.

³⁴⁸ This will be probably in cases envisaged in section 9 (1) (a) of the Domestic Violence Act where the respondent has threatened to injure himself or another person.

³⁴⁹ *S v Rasena* 2017 (1) SACR 565 (ECG). In this case the accused was convicted of one count of breach of a protection order and one count of assault. The court held that in applying section 103 of the Firearms Control Act the trial court must consider are the nature and seriousness of the offence, the connection that the offence has with the use of a firearm and the interest of the community.

³⁵⁰ Section 103 (1) (l).

³⁵¹ D. Smythe 'Missed opportunities: confiscation of weapons in domestic violence cases' (2004) 10 December *SA Crime Quarterly* 19, 21.

There is no justification for waiting until the damage is done before taking steps. It is submitted that when a court makes an order for seizure of a firearm and ammunition, the declaration of unfitness to possess a firearm should follow immediately if the evidence justifies such a declaration.³⁵² This can only be achieved through an enabling provision in the DVA.

The inability of the DVA's to simultaneously provide for the issue of a protection order and directly impair a person's fitness to possess a firearm other than through the auspices of sections 102 and 103 of the Firearms Control Act is regretted. This makes it possible that, until the national commissioner has made a negative determination, a respondent may voluntarily surrender his firearm pursuant to a protection order only to turn and legally obtain another firearm thus making section 9 (2) redundant and impotent.

Research shows that, in domestic violence cases, a firearm is usually used to threaten victims.³⁵³ If it is used, however, grave results normally ensue. As a result of this, Smythe argues that an order for confiscation of a firearm should be made at interim stage.³⁵⁴ This will not be arbitrary because the respondent will get a chance to argue why an order confiscating his firearm should be set aside.³⁵⁵ Research also points out that it is difficult to enforce an order for the confiscation of the respondent's firearm. Unless the respondent has a licence to possess a firearm, he can simply deny having a firearm thus implying that the complainant is making it up. The cause for these is the applicants' inability to give a description of the firearm and further particulars.³⁵⁶

It has also been suggested that applicants hardly request the court to make an order for confiscation of a firearm. They simply mention the use of a firearm in passing in the

³⁵² Ibid 22.

³⁵³ Parenzee, Artz and Moulton (note 204 above; 61). These authors point out that those applications for a protection order that mention a firearm usually allege that the respondent threatened to use the firearm. It must be pointed out that a threat is enough to commence an enquiry in terms of section 102 of the Firearms Control Act read with section 9 (1) (a) of the Domestic Violence Act. However there is no literature to suggest that the courts and the commissioner of police ever follow up in terms of these provisions; Smythe (note 351 above; 24).

³⁵⁴ Smythe (note 351 above; 21).

³⁵⁵ Ibid 21.

³⁵⁶ Parenzee, Artz and Moulton (note 204 above; 64).

affidavit.³⁵⁷ Even if the order is requested and granted, it does not describe the firearm with enough details.³⁵⁸ The order can also be difficult to enforce in cases where the respondent has more than one firearm or an arsenal of weapons.³⁵⁹ As one police officer has pointed out, the respondent can simply ask: “which one?” And the order will speak of ‘a firearm’.³⁶⁰ Researchers have suggested the inclusion of a lethality checklist to overcome this problem.³⁶¹ This suggestion is welcomed as it provide the courts with the necessary information to pronounce on the respondent’s fitness to possess a firearm should the DVA be enabled to impair a person’s ability to possess a firearm.

It is equally arguable that the illegal acquisition of firearms through the black market makes it difficult to ensure that a person does not obtain a firearm in circumstances where their ability to do same is impaired. This argument, whilst sound, should not deter the courts from confiscating firearms. It is submitted that actively confiscating all prohibited firearms and impairing person’s ability to obtain one might eventually wear out the black market. This way the only way to obtain a firearm is by following the proper channels. Further, disseminating the knowledge that to possess an unlicensed firearm or to possess a firearm whilst one’s ability to do same is impaired is an offence might be a step in the right direction.

(b) Seizure of dangerous weapons

Section 9 (2) also provides for the confiscation of dangerous weapons other than firearms. The Dangerous Weapons Act³⁶² simply defines a dangerous weapon as ‘any object, other than a firearm, capable of causing death or inflicting a serious bodily harm,

³⁵⁷ Ibid 19. The author suggests that section 7 (2) (a) imposes a duty on the court to make an order in this regard even if the applicant does not specifically request it. This is a sound submission considering that victims are usually lay persons who do not have the expertise to depose an affidavit, even if they are assisted by a clerk of the court, the clerk does not necessarily have to relevant expertise to draft an affidavit succinctly.

³⁵⁸ Smythe (note 351 above; 25).

³⁵⁹ Ibid 26.

³⁶⁰ Parenzee, Artz and Moulton (note 204 above; 65).

³⁶¹ Parenzee, Artz and Moulton (note 204 above; 35).

³⁶² Dangerous Weapons Act 15 of 2013.

if it were used for an unlawful purpose'.³⁶³ The problem with domestic violence is that virtually anything can be a dangerous weapon capable of inflicting a serious bodily harm when used.³⁶⁴ However a holistic reading of the Dangerous Weapons Act clearly shows that it was meant to deal with the public possession of dangerous weapons in circumstances that raise a suspicion that such person intends using the said weapon for an unlawful purpose.³⁶⁵ What is necessary for making a living, like a knife or a fork, can be a deadly weapon in domestic violence. At the same time the court can scarcely confiscate these. If it does, strangely so, it cannot confiscate everything or prevent the respondent from obtaining a similar object.

Unlike a firearm, one does not require a licence to possess a dangerous weapon and every household has a dangerous weapon. This triggers the question whether it is possible in practice to enforce an order for the confiscation of firearms? Clearly it does not make any sense to confiscate something which the respondent can repossess with utmost ease. It is submitted that a provision of this nature is designed to confiscate objects that are rare and not easy to obtain such as handcuffs, metal cane or other hard objects. While some of the objects are available in the market, it is possible for the law to regulate the sale of these objects by prohibiting the sale to certain categories of people.

3.3.5. Rent, mortgages and emergency monetary relief (E.M.R.) by the respondent

(a) General remarks

Chapter one asserted that the victims of domestic violence are often economically dependent on their abusers and, as a result, they are less inclined to speak up or take action against the abuse for fear of losing the economic support that the respondent

³⁶³ Section 1.

³⁶⁴ Parenzee, Artz and Moul (note 204 above; 64) point out the possibility that some complainants do not regard other objects as dangerous weapons as the law does.

³⁶⁵ Section 3 (1) of the Dangerous Weapons Act.

provides.³⁶⁶ The possibility of losing support is more devastating for those victims who have no legal basis to claim financial support from the respondents, for instance those who are cohabiting. Studies show that economic abuse is very prevalent.³⁶⁷ Economic abuse is defined as:

- '(a) The unreasonable deprivation of economic or financial resources to which a complainant is *entitled to under law* or which the complainant *requires out of necessity*, including household necessities for the complainant, and mortgage repayments or payment of rent in respect of shared residence;
- (b) Unreasonable disposal of household effects or other property in which the complainant has an interest.'³⁶⁸

Therefore the court, when issuing a protection order, is empowered to 'impose' on the respondent obligations to continue paying rent or a mortgage, if applicable.³⁶⁹ The court is also empowered to order the respondent to pay emergency monetary relief (E.M.R.) to the complainant.³⁷⁰ Such orders or obligations may only be made with due regard to the 'financial needs and resources of the complainant and the respondent'.³⁷¹ These provisions are novel to the DVA. No similar provisions existed under the Prevention of Family Violence Act. It is submitted that this provision is recognition of the link between domestic violence and economic oppression.³⁷²

It appears that these provisions are applicable even if there is no pre-existing legal duty on the respondent to provide for the complainant. Section 1 (ix) (a) of the DVA makes it clear that necessity is also a ground to impose such order. It is trite in law that there is no legal duty to provide for a girlfriend or cohabitee. However, the DVA once

³⁶⁶ D. Smythe and L. Artz 'Money matters: structural problems with implementing the DVA' (2005) *Agenda* 66 24, 25. These authors also state instances where woman are not employed on farms in their own rights, but as secondary to their male partner's employment. If the male is dismissed, the same will follow for the woman. The woman will therefore avoid doing anything that may lead to his dismissal, such as having him prosecuted for the abuse.

³⁶⁷ *Ibid* 7.

³⁶⁸ Section 1 (ix) (a) and (b).

³⁶⁹ Section 7 (3).

³⁷⁰ Section 7 (4).

³⁷¹ See subsections (3) and (4) of section 7.

³⁷² Parenzee, Artz and Moulton (note 204 above; 67).

again confers a special right on a complainant who is not married to the respondent. The basis of this special right is necessity or the respondent's unwelcome conduct towards the complainant. In other words, the act of domestic violence which triggers the granting of a protection order is the basis of the duty. The circumstances under which this special right may be conferred are determined with due regard to the scope of this machinery which is outlined below. Married woman may also benefit from this provision. This is useful because while married woman may approach a maintenance court, the chances of getting immediate relief are low especially in light of the back-log in our maintenance system.³⁷³

While a legal duty to maintain is not necessarily a pre-requisite for making an order to discharge rent, mortgage or E.M.R., it is however submitted that the court may only make an order for the respondent to pay rent or mortgage instalments if it is his contractual duty to do so. This duty will of course exist in instances where the respondent is the tenant or mortgagor. The court merely enforces the respondent's pre-existing obligations towards a third party, consequently benefiting the complainant. Logic dictates that the court should not order the respondent to take over the complainant's lease or mortgage payment if he or she was not a party to that agreement. Doing otherwise would upset the established principle of freedom of contract.

Even if it happens that as a result of the domestic violence, the complainant who is a party to any of these agreements, is unable to discharge his/her obligations in terms of an agreement, the court may not order the respondent take over the agreements. In this instance the court will order the respondent to provide E.M.R.³⁷⁴ The complainant continues being a party to the agreement, save the respondent will have a duty to discharge necessary payment for the time of the emergency. These provisions were included also to prevent the respondent from stopping rental or mortgage payments, thus leading to the eviction of the complainant or attachment of the property by the bank.³⁷⁵

³⁷³ Artz (note 65 above; 27).

³⁷⁴ Govender (note 73 above; 9).

³⁷⁵ Ibid.

It is interesting to note that the provision for rent and mortgage payments is phrased in such a way that it creates the impression that the court may simply order the respondent to take over the complainant's obligations in cases where the complainant, as a result of the domestic violence, is unable to discharge her contractual obligations. This is incorrect. As it is pointed out above, the court does not force strangers into a contractual relationship. The provision simply empowers the court to order the respondent to *continue* discharging his pre-existing obligation if doing otherwise will affect the complainant and any children residing with her.³⁷⁶ If the respondent is not a party to any such obligation, the court simply makes an order for E.M.R. which will serve the same purpose.

It is said the court may order the respondent to provide emergency monetary relief to the complainant only for expenditure that is a direct consequence of the domestic violence. Emergency monetary relief is defined as:

'...compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including –

- (a) Loss of earnings
- (b) Medical and dental expenses
- (c) Relocation and accommodation expenses; or
- (d) Household necessities.³⁷⁷

It is submitted that the intention behind this provision is to allow victims to have access to emergency funds to provide for their immediate needs, those of their children³⁷⁸ and to ensure that they are not left destitute by the respondent's possible withdrawal of financial support.³⁷⁹ Since a legal duty to maintain is not a prerequisite for making an order of this nature, it goes without saying that the respondent may be required to

³⁷⁶ K. Moodaliyar 'The Abused Women In South Africa: Statutory Implications And The Use Of Mediation To Resolve Domestic Violence Disputes' (Unpublished LLM dissertation, University of KwaZulu-Natal, 2000) 59.

³⁷⁷ Section 1 (x) (a) – (d) of the Domestic Violence Act.

³⁷⁸ Smythe and Artz (note 366 above; 27).

³⁷⁹ Artz and Smythe (note 187 above; 209).

provide E.M.R. for the benefit of children that are not even his, provided that he had assumed a fatherly role other than adoption.

There are numerous reservations about these provisions. It is argued that it may be a substitute for maintenance.³⁸⁰ Further, they are open to abuse by unscrupulous complainants because the Act does not state the maximum duration of these orders. There are also questions on how these provisions should be implemented. For instances, should they be implemented like a maintenance order? While maintenance orders are in the hands of, among others, maintenance officers, maintenance investigators, sheriffs and the department of justice, it is not precise as to who should enforce rent, mortgages and E.M.R. orders.³⁸¹ These are considered next.

(b) The relation between rent, mortgages, E.M.R. and maintenance

There is a relationship between the provisions for rent, mortgages, emergency monetary relief and maintenance. For this reason, some have argued that the DVA has invoked maintenance provisions. The following has been said in this regard:

Magistrates suggested that some complainants use the Domestic Violence Act when the maintenance system fails them - either when they have been unsuccessful in securing a maintenance order or when they have waited a long time for the maintenance order to be served, granted or varied. As expected, there were a range of opinions surrounding both the purpose and application of E.M.R.³⁸²

The notion that rent, mortgages, E.M.R. and maintenance are the same is not necessarily true. There are distinctions between these remedies.

In order to obtain a maintenance order, the respondent must first have a legal duty to maintain the applicant. Such a duty will exist between husband and wife, between

³⁸⁰ Parenzee, Artz and Moulton (note 204 above; 27).

³⁸¹ Ibid 68. The authors also question the enforceability of these order, or whether they are just ineffective. One cannot certainly expect police officers to monitor compliance with such orders.

³⁸² Artz (note 65 above; 27).

parent and children³⁸³ and between grandchildren and grandparents.³⁸⁴ It will not exist with cohabitees or between boyfriend and girlfriend. Second, the respondent must have the ability to provide for the applicant.³⁸⁵ On the other hand, with respect to rent, mortgages and E.M.R., strictly speaking, there is usually no legal duty on the respondent to provide for the applicant. As it has been stated above, the DVA creates a special right for the applicant. The basis of this right is necessity or the unwanted behaviour of the respondent.³⁸⁶

A different process is followed when applying for a maintenance order. This process is set out in the Maintenance Act. The process is facilitated by maintenance officers and maintenance investigators. The process of obtaining a maintenance order can be frustrating and exhaustive in cases where the respondent does everything in his power to thwart the applicant's efforts.³⁸⁷ On the other hand an order for rent, mortgage or E.M.R. can be obtained with relative ease and speed. The applicant can even obtain it without the respondent's knowledge. However this is amongst controversial subjects in the law of domestic violence which have been discussed extensively above.

Unlike a maintenance order, an order for rent, mortgage or E.M.R. cannot be made as a stand-alone order.³⁸⁸ A complainant cannot approach the court and apply for a protection order solely on the grounds that she requires some funds which she believes the respondent should provide. An order for rent, mortgage or E.M.R. is only made analogous to another order. For instance the respondent might be ordered in the protection order not to assault the complainant, not enter the shared residence and to continue discharging rent or mortgage payments and provide E.M.R. for the complainant.

³⁸³ Section 15 of the Maintenance Act 99 of 1998.

³⁸⁴ *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C). In this case the court overturned its own decision that grandchildren were not entitled to receive maintenance from the estate of their grandparents as held in *Barnard v Miller* 1963 4 SA 426 (C). *Petersen* was influenced by the Constitution taking into account the best interest of a child in terms of section 28 (2).

³⁸⁵ Section 7 (1) (b) (ii) and (2) (e) (ii); section 8 (1) (b).

³⁸⁶ Section 1 (x) (a).

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

The similarities between maintenance and rent, mortgage and E.M.R. are that the court is required to make provision for exactly the same needs. The courts may stipulate the duration which the order shall run in each case. However both Acts are silent on the duration leaving it to the discretion of the presiding officer to determine the duration of the order. The Namibian DVA provides for a maximum period of six months.³⁸⁹ This is commendable because it is a reminder that the purpose of a statute of this kind is to provide speedy temporary relief while the complainant gets back on his/her feet.

The drafters of the DVA were aware of the thin line between the provisions for rent, mortgages, E.M.R. and maintenance. Section 7 (7) (b) provides that

(a) If the court is of the opinion that any provision of a protection order deals with a matter that should, in the interest of justice, be dealt with further in terms of any other relevant law, including the Maintenance Act, 1998, the court must order that such a provision shall be in force for such limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law.

This provision provides a clear guide; however, as it will be seen below, it affords presiding officers an opportune reason to avoid taking a decision if an application involves an order for rent, mortgage or E.M.R. While this may be seen as a way of ensuring that a matter is heard by a proper forum, E.M.R. presents a different scenario. If a court hearing an application for E.M.R. refers the matter to another court, the applicant will be placed in a worse of position because, in its very nature, E.M.R. will require the matter to proceed by way of action proceeding as it does not fall within the jurisdiction of a maintenance court. E.M.R. includes loss of earnings, medical and dental expenses, and costs of relocating and household necessities. This position is further complicated by the fact that E.M.R. is unique to the DVA. Furthermore it will not make sense to refer E.M.R. to maintenance court as it will overburden the court, more

³⁸⁹ Section 15 (e) of the Namibian Domestic Violence Act.

especially in cases where there is no legal duty on the respondent to maintain the complainant.

(c) When should an order to pay rent, mortgages and E.M.R. be made?

The courts are not unanimous on this question. As it has been hinted above, they are not even unanimous on whether these should be granted at all.³⁹⁰ Some presiding officers would rather refer the matter to a maintenance court for consideration.³⁹¹ Some even held the view that the complainant should first deal with the question of maintenance in the maintenance court and then apply for a protection order once the question of maintenance has been dealt with.³⁹² However this is not the correct approach. The DVA provides that a court may not refuse to impose a condition on the ground that another remedy is available to the complainant.³⁹³ Nonetheless it is important to consider the stage at which such orders may be made; whether they may be made at interim or final stage.

By its very nature, E.M.R. is urgently required. This in turn supports an argument that such order may be granted as part of an interim protection order. However, may a similar approach be adopted with respect to rent and mortgages? Put differently may any order to this effect be granted at interim stage? The DVA places emphasis on the means test. The court must have regard to the financial needs and the resources of the complainant and the respondent.³⁹⁴

It is submitted that it is difficult for a domestic violence court to adequately consider the means test for two reasons. Unlike a designated court, that is, a maintenance court, a domestic violence court is not properly staffed to deal with the means test. Second, the matter is usually brought as a matter of urgency thus depriving the court of the time to apply itself accordingly. The documents required to assess the matter are usually

³⁹⁰ Parenzee, Artz and Moulton (note 204 above; 69).

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Section 7 (7) (a).

³⁹⁴ Section 7 (3) and (4) of the Domestic Violence Act.

not before the court and in the absence of the necessary role-players, it is less likely that the respondent will volunteer the correct information unless it favours his case.

Granting an order for E.M.R. at interim stage may be tantamount to granting an ineffective order especially where the respondent does not have the money to adhere to the court order. On the other hand, rent and mortgages may be granted at whatever stage. The reason for this is simple. It will be recalled from above that rent and mortgages are simply an order for the respondent to continue making payment. The respondent is already a party to the respective contracts and presumably making the necessary payments. This is not a new obligation but mere strengthening of an existing obligation. Whatever the circumstances may be, the court is given the power to grant such orders where circumstances require so. It cannot fail in its duties due to the difficulties may present themselves. Each case should of course be decided on its own merits.

(d) How long shall an order be valid for?

One of the burning questions about the provision for rent, mortgage and E.M.R. is the duration for which such an order may operate. The DVA provides that if the court is of the opinion that another court can deal with such matter, it may make an order valid for a limited period as the court determines to afford the parties concerned an opportunity to seek appropriate relief.³⁹⁵ One wonders what the position would be if the court does not have such opinion, or if no other court is able to deal with the matter. It has been submitted above that a girlfriend cannot approach a maintenance court for relief with respect to herself because there is no duty on the respondent to maintain her. This leaves a domestic violence court being the only competent forum to order the respondent to pay rent, mortgages or E.M.R with respect to a girlfriend.

As it has been stated above, in Namibia a related order may only be made for a maximum of 6 months.³⁹⁶ In South Africa nothing prevents the court from making an

³⁹⁵ Section 7 (7) (b).

³⁹⁶ Section 16 (e) of the Namibian Domestic Violence Act.

indefinite order in this regard. This will induce a sense of shock especially in cases where the respondent does not have a duty to maintain the complainant. Logic dictates that the court should specify the duration at all times rather than making an indefinite order or refraining from making an order altogether.³⁹⁷ An indefinite order means the respondent has to continue making payments until such time is able to have the protection order set aside or varied in this regard. In determining the duration of the order, the court should take into account the means test, the duration of the relationship and affected children.

3.3.6. Access to children or no-contact order

(a) General remarks

'Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level... It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or gain control over another person.'³⁹⁸

It is known that in violent families the children often find themselves having to choose between parents. They watch as the weaker parent is abused. They tend to think that they are the cause of the violence and blame themselves for everything that happens.³⁹⁹ It should also be borne in mind that by virtue of age, children are often unable to express their feelings in words; therefore they express themselves through negative behaviour such as being violent to their peers or misbehaving at school.⁴⁰⁰ In worse cases children are direct victims. Therefore it is argued that in one way or another children are always victims of domestic violence – whether directly or

³⁹⁷ Artz (note 65 above; 27).

³⁹⁸ *S v Baloyi* (note 6 above; 87B).

³⁹⁹ Madzivhandila (note 23 above; 40).

⁴⁰⁰ The National Department of Social Development (note 21 above; 18); Heaton (note 8 above; 266 – 267)

indirectly. With this in mind, Padayachee, writing before the advent of the DVA, regarded children as 'unintended victims'.⁴⁰¹

It goes without saying that the interest of children must be taken into account when crafting machinery to eradicate domestic violence. It is at this point that the Prevention of Family Violence Act must be commended. This Act made it mandatory for any person who examined, treated or cared for a child in circumstances that 'ought to give rise to the reasonable suspicion that such child has been [*deliberately*] ill-treated' to report such circumstances to the police, commissioner of child welfare or a social worker.⁴⁰²

Section 7 (6) of the DVA enables the court, if it is satisfied that it is in the best interest of any child, to (a) refuse the respondent contact with such child⁴⁰³; or (b) order contact with such child on such conditions as it may consider appropriate⁴⁰⁴. The court may order supervised contact.⁴⁰⁵ Recognising that children are more prone to domestic violence, the DVA makes it possible for children to apply for protection orders without the assistance of a parent or a guardian. While these are good initiatives, but for reasons interrogated below, the courts seldom grant access orders.⁴⁰⁶ Further, this dissertation is not privy to any information regarding the issue of a protection order to a child applicant. Nonetheless it is submitted that children ought to benefit from both parents.⁴⁰⁷ A drastic order refusing a parent access to his child should only be made if the abuse is directed at the child.⁴⁰⁸ This is supported by the provision that an unassisted minor is able to apply for a protection order against a parent or a guardian.⁴⁰⁹

⁴⁰¹ A. Padayachee 'Children: the secondary victims of domestic violence' (1994) 7 (2) *Acta Criminologica* 50.

⁴⁰² Section 4 (a) and (b) of the Prevention of Family Violence Act.

⁴⁰³ Section 7 (6) (a) of the Domestic Violence Act.

⁴⁰⁴ Section 7 (6) (b).

⁴⁰⁵ Artz (note 65 above; 28).

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Parenzee, Artz and Moulton (note 204 above; 72).

⁴⁰⁸ *Ibid.* See also *B v B* 2008 (4) SA 535 (W) where the court set aside an interim order on the ground that the violence was not directed to the child.

⁴⁰⁹ Section 4 (4).

Be that as it may, there are other reservations relating to access to children. Many question duration for which it may operate. Some ask if the court may make such an order as an interim measure without the knowledge of the respondent. There are also practical difficulties associated with this provision. It cannot be enforced as a stand-alone order.⁴¹⁰ For instance, if the respondent is denied access to his children, the court has to order the respondent to move out of the home unless the child will be taken by social services. The court might also have to order the respondent to pay rent or mortgages and emergency monetary relief.⁴¹¹ There are also those who argue the closeness between no-contact orders and custody.

(b) The relation between custody and no contact orders.

Custody of a child usually entail that one parent will have exclusive rights to make decision with respect to matters that pertain to the child. In certain instances courts may make a joint custody order. This way, both parents exercise rights with respect to that child. Where a court grants one parent exclusive custody, it will usually allow the other parent access to the child. It will refuse access in cases where a parent is a danger to the child. Custody orders usually follow a divorce order or made in conjunction with a divorce order. It is because of these that one has to assess the relation between custody and no contact orders.

As it has been pointed out, a domestic violence court may make an order in a protection order refusing the respondent access to his/her child. The notion that a child should benefit from both parents makes it difficult for the court to make such an order especially where the domestic violence complained of is not directed at the child but one of the parents, usually the mother. It goes without saying that refusal of access to the child will automatically result in only one parent accessing all rights with respect to

⁴¹⁰ *Andrews v Narodien* 2002 (1) SACR 336 (C). In this case the parents of the minor child regarding visitation issues. The applicant (the father) had applied for a protection order solely for the purpose of access to the child. The court held that an order of this nature can only be made as ancillary to another order – see 352B.

⁴¹¹ Parenzee, Artz and Moulton (note 204 above; 73) point out that a no contact order is analogous to a maintenance order as a respondent might refuse to voluntarily maintain the child while he is denied access or contact with his child. They also point out that some mothers may refuse fathers who do not maintain their children access.

the child to the exclusion of the respondent. This is similar to a custody order. In practice, a protection order issued in favour of the mother will always protect a child as well. Terms such as 'the respondent is ordered not to assault the respondent or any person residing with the respondent' are familiar'.

A no contact order may be present in various disguises. An order barring the respondent who shares a child with the complainant from entering the latter's residence⁴¹² may be tantamount to a no contact order if the child lives with the complainant. An order against stalking may also be regarded as a no contact order. This is the case unless the court makes a specific order regarding the child or the respondent. It is submitted that whenever a court makes an order with respect to a complainant who shares children with the respondent, it must pronounce on the position regarding the children.

Now that the closeness between custody and a no contact order has been highlighted, further questions arise. Custody issues fall within the exclusive jurisdiction of the high court or children's court as upper guardian unless the matter is a divorce matter heard in a regional court.⁴¹³ Domestic violence matters fall within the jurisdiction of a district court and almost all matters are heard there except those cases for unlawful arrest which end up in the high court. The burning question is: Is it therefore competent for a district court to exercise authority over matters that originally fell within the jurisdiction of a superior court? This question must be answered in the affirmative because the DVA confers such powers on a district court. It must be pointed out however, that there are some discrepancies. A high court and a regional court hearing a custody matter have the benefit of professionals such as social workers and a family advocate. A district court (domestic violence court) does not have such benefits due to budgetary constraints; placing it is a compromised position. Perhaps the point of departure is that the aim of the DVA is to bring speedy relief in times where there is no time to comply with all the processes.⁴¹⁴

⁴¹² Section 7 (1) (e) of the Domestic Violence Act.

⁴¹³ Artz (note 65 above; 28).

⁴¹⁴ Ibid.

(c) When should a no-contact order be made?

Should a no contact order be made at interim or final stage?⁴¹⁵ There is an argument that if the order is made at interim stage, it will result in the respondent being denied access to his child without an opportunity to state his case.⁴¹⁶ But when one considers the vulnerability of children, the court is justified in making a no contact order at interim stage as any delay in this regard might place the child in greater danger in cases where the violence is directed at the child thereby defeating the purpose of the DVA which is to bring speedy relief. If the respondent feels aggrieved by this, he has the opportunity to appear in court and oppose the confirmation of such order.

(d) How long should a no-contact order remain?

While an order refusing the respondent contact or access to his child may be justified; but, may it last forever or until the child attains majority?⁴¹⁷ The DVA does not set any duration, however it appears to confer discretion on the courts to grant an order for a limited time. But this applies if the court is of the opinion that it is in the interest of justice for another court to hear this matter.⁴¹⁸ For instance it is in the interest of justice for a court to make a no-contact order for a limited time, and then refer the matter to a high court to determine custody. There is no provision in the DVA that suggest that the legislature had intended that no contact orders should be referred to the high court for confirmation or something to this effect. This provides room for a no contact order to be made indefinite, that is, until the child attains majority. The legislature did not intend this. Setting a specific duration is much desired.

In Namibia a provision concerning temporary custody of a child and access to a child is valid until it is superseded by an order of another court.⁴¹⁹ The Namibian lawmakers

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ It is submitted that the age of minority will enable the child to make a decision whether to rekindle a relationship with the respondent or not.

⁴¹⁸ Section 7 (7) (b).

⁴¹⁹ Section 15 (d) of the Namibian Domestic Violence Act.

clearly intended that temporary custody and access issues will be referred to another court for consideration. This is not explicit in our law. However the case of *B v B*⁴²⁰ does suggest that it is possible for a superior court to supersede the protection order with respect to an order pertaining to children.

Also, section 7 (7) of the DVA seems to avail in this regard. This section allows a presiding officer to make a temporary order if he is of the opinion that a matter should be decided by another court. It is unclear, why the presiding officer's opinion features here. The purpose behind any machinery in the DVA is to provide speedy relief until such time when the situation has been remedied by a competent forum. Strictly speaking, the presiding officer cannot hold any opinion as envisaged by the section; he or she should make the order operative for a fixed period and then refer the matter to the correct forum.

Therefore it is proposed that the DVA should be amended to provide for specific durations. Surely this is practical. For instance, the court should make an access order valid for 6 months. At the end of this period the order should fall away; in practice the respondent should not be arrested for making contact with his child. However, should he be violent towards the child or the complaint, the DVA should make provision for his arrest.

3.3.7. Arrests

(a) Arrests in general

In South Africa a decision to arrest is not taken lightly. This is more in light of our political history characterised by the use of such a measure to further a political interest. An arrest limits various rights. On the face of it, it is a direct limitation of the right to freedom of movement. And on a further analysis, it limits the right to human dignity due to the compromised living conditions of awaiting trial prisoners. It limits

⁴²⁰ *B v B* (note 408 above).

employment rights as detention forces a person to be absent from work and this affects their livelihood. This also affects those who are financially dependent on the detainee. The right to quality life is diminished. It should be borne in mind that the right to life entails the enjoyment of life.⁴²¹ It is difficult to imagine how a person can enjoy the quality of life in these circumstances. For some people, an arrest could erode their right to education. In light of the foregoing, a decision to arrest a person is exercised with caution and for a valid reason under limited circumstances as the police may be held delictually liable for unlawful arrests. For these reasons, an arrest is manifestly unlawful and it is up to the state to justify it.⁴²² All that is required of the plaintiff is to show that there was an arrest.⁴²³

In *Botha* above, the position was summarised thus:

‘An arrest constitutes an interference with the liberty of an individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another should bear the onus of proving that his action was justified in law.’⁴²⁴

The reason for an arrest must be to bring the suspect to court and not for any other motive. In *Reynold and others v Minister of Safety and Security*⁴²⁵ the plaintiff was arrested because she refused to hand over the car keys. The court held that the arrest was to coerce the plaintiff to do something and this was unlawful.⁴²⁶ The court pointed out that the plaintiff could not be arrested for obstructing the police in their duty because it is not the duty of the police to mediate domestic violence matters.⁴²⁷ It should be noted that in an attempt to mediate the matter, the police had requested the plaintiff to hand over her husband’s car keys. In *Katise* the court emphasised that

⁴²¹ I. Currie and J. De Waal Currie *The Bill of Rights Handbook* 6th Ed (2013), 267.

⁴²² *Dlamini v Minister of Safety and Security* 2016 (2) SACR 655 (GJ) par 8.

⁴²³ *Ibid* para 9.

⁴²⁴ *Botha v Minister of Police and another* (note 144 above; para 30).

⁴²⁵ *Reynold and others v Minister of Safety and Security* 2011 (2) SACR 594 (WCC).

⁴²⁶ *Ibid* para 48.

⁴²⁷ *Ibid* para 56.

the arresting officer must exercise his discretion to arrest properly, that is, in good faith, rationally and not arbitrarily.⁴²⁸

(b) Arrests in terms of the DVA

Arresting perpetrators of domestic violence is one of the tools in the DVA for combatting domestic violence. While the Prevention of Family Violence Act did provide for an arrest, little guidance was provided regarding the circumstances under which it could be made. In fact, a study of this Act shows that any breach was met with an arrest.⁴²⁹ As will be seen below, under the DVA a breach does not necessarily merit an arrest.

Now, arrests are dealt with in sections 3 and 8 of the DVA. In terms of section 3 read closely with section 40 (1) (q) of the Criminal Procedure Act, a protection order is not a prerequisite for an arrest pursuant to domestic violence. Perhaps, as confusing as it may be, section 3 should be quoted once again because it is also useful to a victim who already has possession of a protection order but for some reason does not have a warrant of arrest.

This section reads:

'3 Arrest by peace officer without warrant

A peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.'

It has been indicated above that two kinds of arrests appear to be permitted here; an arrest without a protection order at all and an arrest without a warrant at the scene of the incident of domestic violence on reasonable suspicion that the respondent has

⁴²⁸ *Minister of Safety and Security v Katise* (note 289 above; para 17).

⁴²⁹ Section 3 of the Prevention of Family Violence Act.

committed an act of domestic violence. Whether an arrest may be carried out in terms of this section without a protection order has been questioned above. Nonetheless the section is useful because, as it has been alluded to above; complainants are not always armed with a warrant of arrest at the time of issuing of a protection order.

In total, there are four different instances under which an arrest may be carried out in terms of the DVA. These are: an arrest with a protection order; an arrest without a protection order; an arrest with a warrant and an arrest without a warrant. These instances overlap. For instance, an arrest for breach of a protection order may be affected on the strength of a warrant. On the other hand it may also be affected without a warrant. For the sake of clarity, the discussion will be carried out under two headings namely, arrest for breach of a protection order without a warrant and an arrest for breach of a protection order with a warrant. It is important to do this because each of these grounds has its own requirements.

(i) Arrest for breach of a protection order without a warrant

It has been stated above that protection orders are the core machinery of the DVA. It has also been stated that a protection order may enjoin a respondent to desist from certain unwanted conduct which falls within the definition of domestic violence. The processes for obtaining a protection order have been extensively discussed above and therefore I shall proceed to the relevant discussions under the present heading.

At hand we are concerned with circumstances where, for some reason, a victim who has a protection order does not have an accompanying warrant of arrest as a result of either loss, destruction or execution. The starting point is the wording of a protection order. The protection order will tell the arresting officer what type of conduct is prohibited. If the conduct committed by the perpetrator is not envisaged in the wording of the protection order, then no arrest may follow pursuant to the protection order.⁴³⁰ If

⁴³⁰ It should be recalled that in terms of section 2 of the DVA the complainant may elect to lay a criminal charge if the conduct complained of is criminalised by either the common law or any statute. If this is not the case, nothing more can be done by the police.

the conduct is envisaged in the protection order, an arrest may follow subject to certain conditions which are stated below. However, it should be borne in mind again that here we are concerned with whether an arrest may follow without a warrant.

It appears that an arrest may certainly follow in terms of section 3 of the DVA at the scene of the incident by a peace officer if he or she reasonably suspects that the respondent has committed an act of domestic violence containing an element of violence against the complainant. The arresting officer may also rely on section 40 of the Criminal Procedure Act which permits an arrest without a warrant; and specifically section 40 (1) (q) which permits arrests pursuant to an act of domestic violence with an element of violence. If the conduct committed by the respondent does not contain an element of violence, an arrest may not follow; even if conduct complained of is envisaged in the protection order. In this case the police officer must issue a warning to appear in court to the respondent.⁴³¹

The law requires that there must be some form of physical violence inflicted or imminent for an arrest to follow.⁴³² If an act of domestic violence does not involve any physical violence, for instance, emotional abuse, no lawful arrest may follow.⁴³³ In *Kruger v Minister of Police*⁴³⁴ the court confirmed the viability of an arrest without a warrant, but discounted emotional abuse as a ground for an arrest for domestic violence because it did not have an element of violence.

However, in the *Langa*⁴³⁵ case above, the court held that an arrest for an 'assault by threat' was justified under section 3 of the DVA read with section 40 (1) (q) of the DVA. It is submitted that the court erred in this regard as an assault of this nature does not involve an element of physical violence. It is conceded that the concept of 'domestic violence' can be misleading to some because it includes behaviour that does not

⁴³¹ Section 8 (4) (c).

⁴³² *Kruger v Minister of Police* 2016 (7K6) QOD 223 (GNP).

⁴³³ Ibid paras 17 and 18.

⁴³⁴ *Kruger v Minister of Police* (note 432 above; para 19).

⁴³⁵ *Langa v Minister of Police* (note 248 above).

include any physical violence, thus easily leading to a conclusion that any conduct that fits within the definition suffices for an arrest.

(ii) *Arrest for breach of a protection order pursuant to a warrant.*

Another way to affect an arrest for breach of a protection order is through a warrant. The same guidelines apply as above, that is, the wording of the protection order will define prohibited conduct. For the sake of the discussion we assume that the conduct is prohibited and ask ourselves what are the requirements to arrest the respondent in the circumstances?

Section 8 of the DVA deals with warrants of arrest; it must be borne in mind that warrants are conditionally suspended pending compliance with the terms of the protection order. The suspension of the warrant may be lifted due to a breach of the protection order. Section 8 (4) sets out the process to be followed. Usually the complainant approaches a police station with a copy of a protection order and the suspended warrant. At the police station, the complainant must depose to an affidavit stating that the respondent has 'contravened a prohibition, order, obligation or order contained in the protection order'.⁴³⁶

A police officer who receives the documents mentioned above must decide on the strength of the affidavit whether to affect an arrest or not. In other words the police officer is called to exercise a discretion based on the facts before him.⁴³⁷ A police officer may attract liability if he acts in the absence of one of the documents, say the protection order. In *Khanyile v Minister of Safety and Security and another*⁴³⁸, the police were held delictually liable for affecting an arrest before the complainant had made an affidavit as envisaged.⁴³⁹

⁴³⁶ Section 8 (4) (a); Sibisi (note 164 above); in *Seria* (note 18 above; 144) the court identified three requirements to be met in terms of section 8 (4) (a). These are: (i) a valid protection order, (ii) a warrant of arrest and (iii) proper exercise of discretion [based on the statements].

⁴³⁷ See generally *Kruger v Minister of Police* (note 432 above).

⁴³⁸ *Khanyile v Minister of Safety and Security and another* (note 189 above).

⁴³⁹ *Ibid* para 3.

Section 8 (4) (b) provides a guideline for before affecting an arrest. This section provides:

'8 Warrant of arrest upon issuing a protection order

.....

(4) (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...'

Consequently an arrest pursuant to a warrant may only follow if there are reasonable grounds to suspect that the complainant may suffer harm which is imminent. Otherwise, the police officer must hand a notice to appear in court to the respondent in terms of section 8 (4) (c). The following factors must be taken into account in deciding whether harm is imminent: the risk to the safety, health or wellbeing of the complainant;⁴⁴⁰ the seriousness of the conduct comprising an alleged breach of the protection order;⁴⁴¹ and the length of time since the alleged breach occurred.⁴⁴²

There is no duty on a police officer to conduct a thorough investigation of all facts before affecting an arrest.⁴⁴³ It is enough for him to rely on reasonable suspicions and once the jurisdictional facts for an arrest are present, he may arrest. However, a police officer may not simply rely on the complainant's say so. In *Dlamini*⁴⁴⁴ the court observed the following:

'The arresting officer is not required to conduct a hearing before affecting an arrest. Whether an arrested person should be released, and if so, subject to what

⁴⁴⁰ Section 8 (5) (a).

⁴⁴¹ Section 8 (5) (b).

⁴⁴² Section 8 (5) (c).

⁴⁴³ Cases cited immediately above and below suggest that the arresting officer should at least investigate on the essentials relevant to domestic violence. It is submitted that for the purposes of domestic violence, section 8 (5) of the DVA must be considered very closely.

⁴⁴⁴ *Dlamini v Minister of Safety and Security* (note 422 above).

conditions, arises for later decision by another person and that is the safeguard to the arrestee's constitutional rights. Once the jurisdictional requirements are satisfied the peace officer has a discretion as to whether or not to exercise his or her powers of arrest. Obviously, the discretion must be exercised properly.⁴⁴⁵

The concepts 'reasonable grounds' 'reasonable suspicion' and 'imminent harm' are not defined in the DVA. But these are common terms in law and it is assumed that they retain their usual meaning. The concept 'reasonable grounds' has been interpreted to refer to that which is reasonable according to a reasonable man's standards. In *Seria*⁴⁴⁶ it was held that a suspicion would be reasonable if a reasonable man in the arresting officer's position and possessing the same information would have considered that there are good or sufficient grounds for suspecting that the complainant may suffer imminent.⁴⁴⁷ The court further illustrated:

'...(t)he reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest.'⁴⁴⁸

A reasonable suspicion must be objectively sustainable on the grounds that would induce a reasonable person to draw such a suspicion.⁴⁴⁹ Indicators such as influence of liquor and that the respondent has already assaulted the complainant, that the respondent had attempted to inflict grievous injuries but for the complainant escaping are grounds that would point a reasonable person towards the conclusion that harm is imminent.

Imminent harm means harm is certain and about to follow.⁴⁵⁰ In *Kruger* (above), the court held that imminent harm is

⁴⁴⁵ Ibid par 19.

⁴⁴⁶ *Seria v Minister of Safety and Security and another* (note 18 above).

⁴⁴⁷ Ibid 145F.

⁴⁴⁸ Ibid 145G.

⁴⁴⁹ *Greenberg v Gouws and another* 2011 (2) SACR 389 (GSJ); see also Sibisi (note 164 above; 53).

⁴⁵⁰ *Greenberg* (note 449 above; 397H).

‘...the danger of harm of a certain degree of immediacy that activates the protection...that is to harm which is impending, threateningly ready to overtake or coming on shortly.’⁴⁵¹

In *Seria* the court observed the following:

‘If something is possible or even likely it is not true to say that it is "imminent", which word connotes an event which is both certain and is about to occur. Imminent peril' is described in West's Legal Thesaurus Dictionary as 'such position of danger to the plaintiff that if existing circumstances remain unchanged injury to the plaintiff is reasonably certain'. The phrase 'imminent harm' finds expression in the Canadian Criminal Code. The Ontario Court of Appeal in *R v Adams* described the concept as follows: (I)t is the danger of harm of a certain degree of immediacy that activates the protection. . . That is to say a harm which is impending threateningly, ready to overtake or coming on shortly. It is safe to say therefore that 'imminent harm' is harm which is about to happen, if not certain to happen.’⁴⁵²

In *Greenberg v Gouws*⁴⁵³ the court held that the arrest of the plaintiff was unlawful because there was no reasonable suspicion that harm on the complainant was imminent. In this case, the alleged incident had taken place three days prior to the arrest; and the offending words (coughing blood) that were uttered by the plaintiff were not directed to the complainant but to her sister. The court held that at the time of the arrest there was no reasonable ground to formulate a suspicion that the complainant would suffer harm if an arrest on the plaintiff is not affected. The court also noted that had the complainant feared for her safety, she would have reported the incident immediately. There was no reason for a three day delay in coming to the police.⁴⁵⁴

⁴⁵¹ *Kruger* (note 432 above; para 9).

⁴⁵² *Seria* (note 18 above; 146A – C).

⁴⁵³ *Greenberg* (note 449 above).

⁴⁵⁴ *Ibid* 398 G – I.

In *Mohlabeng v Minister of Safety and Security*⁴⁵⁵ the court held that there were no reasonable grounds to suspect that the complainant might suffer imminent harm where the evidence showed that it is the complainant who had assaulted the respondent.

- (c) What is the distinction between arrests in terms of the DVA and arrests in terms of the Criminal Procedure Act?

The distinctions between an arrest in terms of the DVA and an arrest in terms of the Criminal Procedure Act are only procedural – in essence they are one and the same for various reasons.

The DVA provides for an arrest in terms of sections 3 and 8 (4) (b). Perhaps before one can proceed to look at the distinctions between the DVA and the CPA (if any), it is worthwhile to first consider the DVA. Besides the warrant of arrest, the distinction between section 3 and section 8 (4) (b) of the DVA lies in the wording; in section 3 the requirement for an arrest is a suspicion on reasonable grounds that the perpetrator has committed an act of domestic violence against the complainant for which violence is an element. On the other hand, section 8 (4) (b) allows an arrest on a suspicion based on reasonable grounds that the complainant 'will' suffer imminent harm. Section 3 speaks of something that has already taken place hence the use of the word 'has'; while section 8 (4) (b) refers to the imminence of the harm or the violence. In summary section 3 permit an arrest amid violence that has passed while section 8 (4) (b) permit an arrest amid imminent harm. In other words both these sections require violence and there is no substantive distinction as such – of course one requires a warrant of arrest; instead there is a procedural distinction based on the time of the violence or harm.

Section 40 (1) (q) of the Criminal Procedure Act permits an arrest of a person who is suspected of having committed an act of domestic violence for which violence is an element. This wording is similar to that of section 3 of the DVA. The only difference is that section 3 permits an arrest at the scene of the incidence while the CPA does not

⁴⁵⁵ *Mohlabeng v Minister of Safety and Security* (TPD) unreported case no 24796/05 of 28 January 2008.

have such a restriction. There are two major similarities. The first is that violence is a requirement for both; and second, they arguably permit an arrest in the absence of a warrant and/or a protection order.

Going back to the question in the heading; it would appear that there is no substantive difference between an arrest in terms of the various provisions of the DVA and section 40 (q) of the CPA. The only distinction lies in the procedure, and of course the circumstances of each case will determine the procedure and consequently the correct Act under which an arrest will be carried out.

An arrest is a very sensitive subject; much more when there are relationships involved and scores to settle. It goes without saying that this machinery may easily lend itself to abuse. At the same time there is a cry that this machinery is not being used especially in sensitive matters such as domestic violence. Some police officers preferred negotiating the matter instead of taking the necessary measure and affecting an arrest. Some just did not regard domestic violence as meriting an arrest. Now a police officer who fails to affect an arrest where circumstances merit it commits a breach of duty for which he may be held personally liable for any damages suffered by a complainant as a result of the omission. The omission may be referred to the Civilian Secretariat for Police (CSP) for consideration and recommendation. The CSP may recommend the dismissal of the police officer.

3.3.8. Sentencing

Sentencing is the most crucial aspect of criminal proceedings. The court gets the opportunity to pass message not only to the accused person before it, but also to potential perpetrators. The court also gets the opportunity to strengthen public confidence in the courts and the rule of law. In *Phillips*⁴⁵⁶ the court stated the position regarding the sentencing of domestic violence perpetrators as follow:

⁴⁵⁶ *Director of Public Prosecutions v Phillips* (SCA) unreported case no 271/2011 of 14 November 2011.

'It goes without saying that a more balanced approach to sentencing was required (See *S v Swart* 2004 (2) SACR 370 (SCA) para 13). A clear message needs to be sent to both the respondent and those who might be minded to disregard protection orders granted in terms of the Domestic Violence Act that such conduct will not be countenanced by our courts. This court's abhorrence of the respondent's conduct in this regard must therefore be reflected in the imposition of an appropriate sentence.'⁴⁵⁷

Domestic violence matters are mostly heard in district magistrate courts. The maximum penal jurisdiction of the district court is 3 years.⁴⁵⁸ Section 17 of the DVA provides for a maximum sentence of five years for domestic violence. Previously it was argued in the magistracy that a district court should not hand a sentence exceeding three years and that if the court is of the view that a higher sentence should be handed, it shall refer the matter to the regional court for sentencing.

In *S v Qhekiso*⁴⁵⁹ the district court had sentenced the accused – a repeat offender of domestic violence - to five years. The district head of the judiciary was of the view that the sentence was exceeding the authority of a district court. Further, she continued, there was nothing in the DVA that gave a district court authority to exceed its punitive jurisdiction. The court held that this supposition was incorrect. It had regard to section 92 (1) of the Magistrates' Courts Act⁴⁶⁰ which allows a district court to exceed its penal jurisdiction if an Act of parliament permits this.⁴⁶¹ Furthermore, the DVA defines a 'court' as a district court and therefore the court held that the district court was justified in exceeding its normal penal jurisdiction of three years.⁴⁶²

It must be mentioned, once again, that the maximum sentence in the DVA is an improvement from its predecessor, the Prevention of Family Violence Act as latter

⁴⁵⁷ Ibid para 26.

⁴⁵⁸ Section 92 (1) (a) of the Magistrates Court Act 32 of 1944.

⁴⁵⁹ *S v Qhekiso* (FSB) unreported case no 166/2015 of 17 September 2015.

⁴⁶⁰ Magistrates' Courts Act 32 of 1944.

⁴⁶¹ *Qhekiso* (note 459 above; para 6).

⁴⁶² *Qhekiso* (note 459 above; para 9).

prescribed a fine or maximum 12 months imprisonment.⁴⁶³ The reason for the capping of penal jurisdiction of the DVA is unclear and should be reviewed as there may be circumstances that are so gruesome that they merit a sentence that exceeds the 5 years.

The DVA only recognises a fine and/or imprisonment for sentencing. It has been argued that direct imprisonment may not be the best option in cases of domestic violence where the accused is a breadwinner.⁴⁶⁴ It has been suggested that counselling or community service should be considered as well. Periodical imprisonment has also been suggested for more serious cases where the accused is employed in order to allow him to continue working to support his family. Suspended sentences do not receive favourable support as the respondent does not learn anything from it.

3.4. SOMETHING TO CONSIDER – WOMEN IN RURAL AREAS

Domestic violence in rural areas presents a different challenge. Little research has been done in this regard. This is largely due to the absence of material or records on reported incidents. One would find such records in the police stations or the courts. However, there is a scarcity of police stations and courts in the rural areas. Most of these services are located in the cities. It is hard to get to the cities, especially when there is an emergency.

Protection orders are issued by courts, served and monitored by the police. The reality is that women in rural areas will have a hard time obtaining a protection order. For them, this involves going to and from town. With little or no money, they are highly likely to abandon the whole process. Even if they eventually obtain it, it will be hard to have it executed immediately. The delay of going to town to access a police station will defeat the aim of the DVA, which is to provide immediate relief.

⁴⁶³ Section 6 (b) of the Prevention of Family Violence Act. See also the South African Law Commission (note 104 above; 8).

⁴⁶⁴ South African Law Commission (note 104 above; 125).

When one considers these difficulties, a question that immediately comes to mind is whether this is a shortcoming of the DVA or outside the DVA. It is submitted that if a woman who resides in a rural area does finally make it to a court and apply for a protection order, they will get one if they meet the requirements. And if they finally make it to a police station to execute a protection order, it shall be executed. This in essence means that the DVA is working, save for the discussions in chapter 3. Therefore the issue with women in the rural areas is not a shortcoming of the DVA but an indication of the state's neglect of rural areas as far as the provision of some social services is concerned.

One is inclined to argue that the Traditional Courts Bill should not have been dismissed. While it might not have adequately implemented the DVA, at least it purported to create some legal forum for women in the rural areas to report incidents of domestic violence. There is room for an argument that traditional courts are in a better position to implement the DVA. While a presiding officer in a magistrates' court is usually oblivious to the matter, and treated it as it appear on paper, a presiding officer in a traditional court will have more insight into the matter as he resides in the same community. A little training can strengthen things such as impartiality.

CHAPTER FOUR

SUMMATION OF ARGUMENTS, RECOMMENDATIONS AND CONCLUSION

4.1. INTRODUCTORY REMARKS

The purpose of this dissertation was to critically evaluate the machinery in the Domestic Violence Act for combating domestic violence in South Africa. Domestic violence takes place against the backdrop of section 12 of the Constitution as well as international law. This being the case, combating it is not only a moral obligation, but also a legal obligation in terms of international law and the Constitution. In essence this means that any advances made towards the combating of domestic violence are actually a realisation by the state of its legal mandate. On the other hand, failure means the state commits a breach of its duty.

This dissertation turns on the machineries in the DVA, setting out the nature of each of the machinery, the challenges facing such machineries, and the extent of the proper implementation of that machinery by relevant institutions, particularly the criminal justice system.

The DVA offers two sets of machinery; the ones that flow outside a protection order and ones that flow from a protection order. A victim of domestic violence who does not have a protection order may derive some remedies from the DVA; these are the right to receive advice on their rights in terms of section 2 of the DVA; civil action for violation of their right in terms of section 2; the arrest of the perpetrator in terms of section 3 of the DVA and section 40 (1) (q) of the Criminal Procedure Act and opening of a docket. It was also argued that, while a perpetrator may be arrest in terms of the DVA, he cannot be charged under the same Act because its only recognises the breach of a protection order as an offence. This has prompted the argument for the creation of a stand-alone offence of domestic violence.

It was pointed out in chapter three while the argument for the creation of a stand-alone crime of domestic violence is well in place, it presents some practical difficulties. Four issues were raised with this argument. The first deals with protection orders, whether they will fall away if the call for the offence goes through? Second, will the proposed offence allow room for reconciliation as a protection order does? It should be recalled that a protection order only criminalises non-compliance. On the other hand it appears that the proposed offence will criminalise transgressions right from the start without giving the respondent an opportunity to desist from the unwanted behaviour. The third issue is the definition of this proposed offence. It is submitted that the current definition of 'domestic violence' is commendable; however, it came about with a protection order in mind. Therefore if we do away with protection orders, a new definition must be in place. Finally, how will offenders be sentenced under the proposed offence? There is a belief amongst academics that the proposed offence will carry with it a higher sentence.⁴⁶⁵ Currently, the DVA provides for a maximum sentence of 5 years imprisonment or a fine. Therefore the point of departure is that if the offence goes through, it should be redefined and the sentencing should be reviewed taking into account the gravity of some cases.

The machineries that flow from a protection order are summarised below.

(a) *Ejection of the respondent*

A court may make an order ejecting the respondent from the common home or part thereof. The respondent may be ejected from his own home in favour of the respondent. Such order is not dependent on a legal duty to provide for the complainant. It is argued that the basis of this duty is the respondent's unwanted conduct towards the complainant. This is a special right created by the DVA. Four issues arise regarding such an order.

First, at what stage should such an order be made? Should the order be made at interim stage without notice to the respondent? Or should the courts make such order

⁴⁶⁵ Furusa and Limberg (note 212 above; 5).

on the return date? It was submitted that the courts should not shy away from making such an order at interim stage especially in cases where there is a serious threat on the complainant. Unfortunately, often the respondent will only become aware of the order when he has to move out⁴⁶⁶, however, this is justified for two reasons. The respondent is the author of his own demise and he can always anticipate the return date and defend the matter much earlier.

Second, is the ejectment order the same as an eviction? Practically these two remedies serve the same purpose. However, the former is temporary and it is only available to a victim of domestic violence. The latter is permanent and it is only available to an owner of property or someone with legal title. The requirements for each of these remedies are not the same. The requirements to obtain the latter are onerous, while the former is easily accessible under permitting circumstances.

(b) Seizure of firearms and dangerous weapons

In domestic violence cases firearms are normally used to threaten the complainant, however if used, they are deadly. Section 8 and 9 of the DVA permits the seizure of any firearm or dangerous weapon from the respondent to ensure the safety of the complainant. Various arguments were made about this machinery including the fact that magistrates have a difficult time implementing it. However it should be highlighted once again that while the DVA is able to simultaneously issue a protection order and dispossess the respondent of a firearm or a dangerous weapon, it does not alter his fitness to possess same thereby making it possible for him to acquire another one.

The only thing that the DVA provides for is the referral of the matter to the national commissioner of police to consider declaring the respondent unfit to possess a firearm in terms of section 102 of the Firearms Control Act. In the alternative, section 103 of the Firearms Control Act provides that on conviction for breach of a protection order, unless the court finds otherwise, the respondent is unfit to possess a firearm. This is an anomaly and probably goes against the spirit of the DVA which to provide a speedy

⁴⁶⁶ *Lebaka* (note 324 above).

remedy. Section 103 only kicks in once the damage has been inflicted; that is, on conviction. The DVA is unable to play a preventative role in this regard.

The difficulty in confiscating firearms is exacerbated largely by the fact that the complainant often does not have much knowledge about the firearm in the possession of the respondent. If the complainant is unable to give a correct description of the firearm, the court cannot make an order. Other difficulties arise when the respondent has more than one firearm and the protection order speaks of a firearm. The main question is “which one”? It is also difficult to confiscate a firearm from a respondent who does not have a licence to possess same. He can simply deny ever handling one.

With respect to the confiscation of dangerous weapons, it was argued that the difficulty involved is that in domestic violence cases almost everything is a dangerous weapon. For instance one normally regards a spoon as crockery; however it can easily turn into a weapon. At the same time the court cannot confiscate such things for two reasons. There are useful for day to day living and they are easily obtained in the market.

(c) Rent, mortgages and emergency monetary relief

Domestic violence may take the form of economic deprivation. Sometimes the act of domestic violence itself may result in the complainant incurring certain expenditure such as medical expenses. Economic deprivation may be summarised as the unreasonable withholding of financial benefits (e.g. food, water, electricity, rent or mortgages) that the respondent is entitled to under law or necessity.⁴⁶⁷ In the circumstances the DVA enables the court to make an order compelling the respondent to continue making providing such benefits and to compensate the respondent for expenses incurred as a result of the domestic violence in the form of emergency monetary relief (E.M.R.).

⁴⁶⁷ Section 1 (ix) (a) and (b).

It is highlighted once again that this machinery may either arise out of a legal duty to provide or out of necessity as a result of the respondent's unwanted conduct towards the complainant. In most instances it arises in the absence of a legal duty to provide on the part of the respondent, thereby conferring a special right on the complainant who otherwise would not be entitled to any financial relief from the respondent.

Three issues should be highlighted regarding this machinery. First some have pointed out that it resembles a maintenance order; second, the question of how long this order shall be valid for remains outstanding as the DVA does not set durations; and third, who shall see to the implementation of same. Maintenance is implemented by maintenance court personnel, whereas a domestic violence court does not have this benefit.

(d) Access to children or no-contacts orders

Children are 'unintended victims' of domestic violence.⁴⁶⁸ This is because the domestic violence inevitably affects the children be it directly or indirectly. Section 7 (6) of the DVA enables the court, if it is satisfied that it is in the best interest of any child, to (a) refuse the respondent contact with such child⁴⁶⁹; or (b) order contact with such child on such conditions as it may consider appropriate⁴⁷⁰. The court may order supervised contact.⁴⁷¹

It was shown that the courts are reluctant to make an order denying the respondent access to his children. This is because it is accepted that children should benefit from both parents.⁴⁷² It was argued that because of the vulnerability of children, courts should grant no-contact orders as early as possible if tangible evidence presents itself. However a court cannot make a stand-alone no-contact order, otherwise it falls within jurisdiction of the high court. In other words a person cannot approach a domestic

⁴⁶⁸ Padayachee (note 401 above).

⁴⁶⁹ Section 7 (6) (a) of the Domestic Violence Act.

⁴⁷⁰ Section 7 (6) (b).

⁴⁷¹ Artz (note 65 above; 28).

⁴⁷² Parenzee, Artz and Moulton (note 204 above; 72).

violence court solely to obtain a no-contact order. It has to accompany another order as a result of an act of domestic violence.⁴⁷³

The duration of a no-contact order is unclear. The DVA does not set any duration in this regard. It is argued that as the DVA stands, there is nothing sinister if a no-contact order is made indefinite. There is no justice in this as it allows a short cut to custody. The DVA should enable the court to set duration.

(e) *Arrests*

The DVA provides for the arrest of a perpetrator for breach of a protection order. It has been alluded to in chapter 3 that an arrest may also occur in the absence of a protection order. However an arrest under the DVA in the absence of a protection order may be an exercise in futility. Therefore two kinds of arrests are prevalent in the DVA:

- (i) Arrest without a warrant of arrest (section 3 of the DVA read with section 40 (1) (q) of the Criminal Procedure Act)
- (ii) Arrest with a warrant of arrest (section 8 of the DVA).

A person may, at the scene of the incident of domestic violence, be arrested for breach of a protection order without a warrant of arrest on a reasonable suspicion that he has committed an offence that involves the element of violence against the complainant. It was pointed out that the concept 'domestic violence' can be misleading in this regard because not all acts of domestic violence involve an element of violence.

A police officer may also execute a warrant of arrest in terms of section 8 (4) (b) of the DVA if there is reasonable ground to believe that the complainant may suffer imminent harm if the respondent is not arrested. It is clear that not every act of domestic violence merits an arrest. If there is no warrant of arrest, the arrest in question has to be carried under section 3 of the DVA; and a warrant of arrest is executed in terms of section 8

⁴⁷³ Ibid 73.

(4) (b) on reasonable ground to believe that the complainant will suffer imminent harm if it is not executed.

Above it was also highlighted that section 3 can only be invoked after the facts; that is, after an act with an element of violence has been inflicted. Section 8 on the other hand permits an arrest for 'imminent' or future harm. This being the case, it is concerning that police officers continue to misinterpret these sections resulting in action for unlawful arrest against the state.⁴⁷⁴ It was submitted that because of the drastic nature of an arrest, it should be made when circumstances permit and the police must be aware of this.

(f) *Sentencing*

Sentencing is a very important aspect of criminal proceedings. In domestic violence matters the court also gets to send out a strong message to would-be perpetrators through this machinery that certain behaviour will not be tolerated. Currently the DVA allows a maximum of 5 years imprisonment or a fine.⁴⁷⁵ This dissertation is highly critical of setting a maximum sentence especially for something as evil as domestic violence. A minimum sentence of 5 years suggests that the harm inflicted, no matter how appalling, cannot merit more than 5 years maximum sentence or a fine. This should not be the case as it trivialises a victim's cause.

(g) *Counter protection orders*

Chapter two discussed counter protection orders. A counter protection order is a protection order applied for by the respondent in response to the complainant obtaining one. Magistrates are not unanimous about how to handle such application. Some magistrates are of the view that since it does not appear to be a genuine application, it should be rejected. Other magistrates are in favour of hearing the application on the

⁴⁷⁴ See Sibisi (note 164 above).

⁴⁷⁵ Section 17.

grounds that the respondent also has a right to be heard. The latter view was favoured in this dissertation.

4.4. RECOMMENDATIONS

In light of the totality of arguments raised in this dissertation, the following core recommendations are made:

- The legislature must look into the legal protection available to victims who do not yet have a protection order. This will coincide with the response to the argument for a stand-alone domestic violence offence.
- The DVA must be amended to provide for the duration of orders made in a protection order.
- The DVA must be amended to empower the court to simultaneously issue a protection order and pronounce on a respondent's fitness to possess a firearm.
- The DVA must prohibit the refusal to hear an application for a counter protection order on the ground that there is a pre-existing order.
- The legislature must consider ways to implement the DVA in rural areas where victims have limited access to justice.

4.5. CONCLUSION

The main purpose of this dissertation was to critically evaluate the machinery of the DVA for combating domestic violence in South Africa. In chapter one it was made clear that in South Africa domestic violence is very rife. Various attempts have been made to overhaul this social evil over recent years; most notable of these is the passing of the DVA. The purpose of the DVA is to provide maximum protection to victims of domestic violence by issuing protection orders. The DVA makes it possible for the courts to make certain orders which this dissertation refers to as machineries.

This dissertation has critically evaluated these machineries by setting out the nature of the machinery, the problems associated with the implementation of the said

machinery and possible solutions. The discussions were backed up by published research, case law and legislation. To cement these, important recommendations are made above. Domestic violence is a serious issue in society. It is therefore important that we have tested machinery in place to adequately root it out.

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