

RECENT DEVELOPMENTS IN THE AREA OF WOMEN'S RIGHTS IN SOUTH AFRICA: FOCUS ON DOMESTIC VIOLENCE AND FEMICIDE

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*'Women's rights are human rights'*¹

1 INTRODUCTION

Although women comprise about 52% of the South African population², it has been acknowledged that they constitute one of the most marginalised and vulnerable groups in this country. One of the social mechanisms, which have contributed to their historical disadvantage, is the gender-based violence that women suffer in various forms. Nevertheless, our constitutional dispensation has provided the vehicle for legislative and judicial intervention to deal with the prevailing violence increasingly perpetrated against women, and for the progressive empowerment of women. It has also enabled women's groups to lobby around issues for the advancement of their rights. Recent years have seen various legal developments to attempt to improve the position of women in the areas of *inter alia* domestic violence, sexual offences³, and family law.⁴ In this paper, however, I have attempted to focus on some of the more distinctive developments that have affected women's rights directly or indirectly in the areas of domestic violence and femicide.

2 INTERNATIONAL INSTRUMENTS

Various international instruments recognise that extensive discrimination continues to be practised against women, and that one of the most pervasive forms of discrimination against women is the endemic violence which women suffer on a global scale, particularly at the hands of men.⁵ These instruments also acknowledge that violence against women is a manifestation of the unequal power relations between men and women, which has forced women into a subordinate position in relation to men, and has impeded their full advancement in the social, cultural, political and economic spheres of society.

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¹ Article 14 Fourth World Conference on Women, Beijing Declaration, 1995.

² Statistics South Africa *The People of South Africa Population Census, 1996: Census in Brief* (1998); Central Statistics *Women and men in South Africa* (1998) 3.

³ See South African Law Commission *Executive Summary and Draft Bill of Discussion Paper 85, Sexual Offences: The Substantive Law* Project 107.

⁴ This refers to the family courts established in terms of Regulation No. 19458, the passing of the Maintenance Act 99 of 1998, the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, and the Guardianship Act 192 of 1993 as amended.

⁵ Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180 of 18 December 1979 – ratified by South Africa in 1995; Declaration on the Elimination of Violence against Women GA Res 48/104 of 1993.

International and regional instruments⁶ have furthermore recognised and entrenched a number of human rights, which are impacted on directly by the gender-specific forms of violence committed against women. These include: the rights to life; dignity; integrity of the person; liberty and security of the person; to enjoy the best attainable state of physical and mental health; not to be subjected to any form of exploitation and degradation; and particularly prohibiting any form of torture, cruel, inhuman or degrading treatment or punishment.

3 SOUTH AFRICA

Within the South African context, the *Women's Charter and Aims* in 1954 claimed that:

The level of civilization which any society has reached can be measured by the degree of freedom that its members enjoy. The status of women is a test of civilization. Measured by that standard, South Africa must be considered low in the scale of civilized nations.

Forty years later, *The Women's Charter for Effective Equality (1994)* acknowledged that domestic violence and sexual violence are still pervasive, and that women continue to live under the threat of violence, and continue to experience violence.⁷ In fact, if one were to use the 'test for civilization' espoused in the *Women's Charter and Aims (1954)*, then recent statistics in relation to violence against women indicate that South Africa would still not be considered a civilized nation. The following information illustrates this point:

- South Africa has the highest statistics for violence against women in the world (for a country not at war).⁸
- Violence against women occurs in different instances including, *inter alia*, domestic violence, rape, other forms of sexual assault and femicide. The violence that women experience differs from the type of violence experienced by men. For example, women are susceptible to domestic violence and sexual assault in a way that men are not.⁹
- Although men are sometimes the victims of domestic violence, the large majority of victims of this socio-economic evil are women.¹⁰

⁶ Articles 1, 3 and 5 of the Universal Declaration of Human Rights GA Res 217A(III) of 10 December 1948; Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180 of 18 December 1989 – ratified by South Africa in 1995; Declaration on the Elimination of Violence against Women GA Res 48/104 of 1993; Articles 3(2), 4, 5, 6 and 16(1) of the African Charter on Human and Peoples' Rights (1981) – ratified by South Africa in 1996.

⁷ Article 10.

⁸ Masimanyane CEDAW Working Group *NGO Shadow Report to CEDAW: South Africa: Violence Against Women* (1998) 3.

⁹ R Emerson Dobash and Russell P Dobash *Women, Violence and Social Change* (1992); John H Laub 'Patterns of Criminal Victimization in the United States' in Arthur J Lurigio et al (eds.) *Victims of Crime* (1990); John Lea and Jock Young 2nd edition *What is to be Done About Law and Order?* (1993); J. Campbell "If I Can't Have You, No One Can": Power and Control in Homicide of Female Partners' in J Radford (eds.) *Femicide: The Politics of Woman Killing* (1992).

¹⁰ People Opposing Women Abuse (POWA) *Women Abuse: The Basic Facts* from <http://www.womensnet.org.za/pvaw/help/abusefac.htm>. Here they state that 95% of the time, women are the victims of violent abuse in their homes. Furthermore, about 31 000 interdicts had been issued in the Western Cape

- Compared to men, women are more likely: to be victimised by men; to know their attacker; to be attacked in their own homes; and to be blamed for their victimisation.¹¹
- More often than not, the violence experienced by women is at the hands of men they know.¹²
- The nexus between violence against women and poverty means that African women who constitute the poorest sector in South Africa, are at greater risk of being subjected to violence than any other group in our society.¹³
- One in every four women in South Africa is regularly battered by her husband, partner or boyfriend. The Department of Justice also estimates that one out of every four women in South Africa is a survivor of domestic violence.¹⁴
- In about 46% of domestic violence cases, children are also abused by the batterer.¹⁵
- An abused woman stays in an abusive relationship for an average period of 10.5 years before leaving. She suffers being battered an average of 39 times before eventually seeking outside assistance.¹⁶
- At least one woman is killed every six days by her male partner, and one in every six women is murdered by her male intimate.¹⁷
- About 41% of female homicides are perpetrated by the woman's spouse or partner.¹⁸ These figures indicate that just under half of all the women killed in South Africa lose their lives at the hands of men whom they know, and who supposedly love them.
- Domestic violence and other related crimes against women and children have increased to such an extent over the past number of years that the South African Police Service (SAPS) was forced to declare these types of crimes a policing priority.¹⁹

in terms of the Prevention of Family Violence Act 133 of 1993 for the period December 1993 to November 1997. Of these about 98% were to women and 2% to men (see note 14).

¹¹ Allison Morris *Women, Crime and Criminal Justice* (1987).

¹² Note 8.

¹³ Noreen Callaghan et al *A Triad of Oppression: Violence, Women and Poverty* Centre for the Study of Violence and Reconciliation from <http://www.wits.ac.za/csvr/artgend.htm>.

¹⁴ Dawn Blaser *Statistics on Violence Against Women in South Africa and Internationally* NICRO Women's Support Centre (1998). Also available from <http://www.womensnet.org.za/pvaw/understand/nicrostats.htm#dvsa>.

¹⁵ Jane Keene and Clare Vale *An investigation into the effectiveness of interdicts granted in terms of the Prevention of Family Violence Act (133) 1993* National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO Western Cape) (1997) 15.

¹⁶ Note 14.

¹⁷ Note 8.

¹⁸ Note 14.

¹⁹ NEDCOR Institute for Security Studies Volume 2 No 4 *Crime Index* July–August 1998.

4 DOMESTIC VIOLENCE

In the recent case of *S v Baloyi*²⁰, the Constitutional Court expressed the view that domestic violence compels constitutional concern because ‘...it is systemic, pervasive and overwhelmingly gender-specific,...[and it] reflects and reinforces patriarchal domination, ... in a particularly brutal form’.²¹ The Court gave recognition to the fact that domestic violence is distinguished by its hidden and repetitive nature, and moreover, that it cuts across race, class, culture, and geographical location.²² The Court, furthermore, found that the state is under a number of direct constitutional obligations to deal with domestic violence and to protect every person’s right to be free from domestic (or private) violence.²³ This is a significant acknowledgement by the Court because it puts to rest the incorrect perception that domestic violence is simply a case of private or domestic disputes between the parties. The Court held that these obligations arise from the constitutional injunction that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.²⁴ And these rights include: everyone’s right to have their dignity respected and protected (section 10); everyone’s right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or *private* sources (section 12(1)(c)), and the right not to be tortured in any way (section 12(1)(d)), nor to be treated or punished in a cruel, inhuman and degrading way (section 12(1)(e)), as well as every person’s right to bodily and psychological integrity (section 12(2)). A violation of these constitutional rights would entitle a victim of domestic violence to claim constitutional damages as an alternative where other remedies have failed.²⁵

4.1 The Domestic Violence Act

The Court in *S v Baloyi*²⁶ found that section 12(1)(c) of the Constitution²⁷ provides the imperative for legislation dealing with domestic violence.²⁸ However, the Court realised that the mechanisms created by this type of legislation could not, by themselves, eradicate domestic violence. Rather, the legislation amounts to a preventive measure, seeking to offer protection to victims of domestic violence, to prevent future misconduct by abusers, and to ultimately promote restorative justice.²⁹

This legislation has been packaged in the form of the Domestic Violence Act 116 of 1998 (hereafter referred to as ‘DVA’) which replaced the Prevention of Family Violence Act 133 of 1993 (hereafter referred to as ‘PFVA’) on 15 December 1999, in

²⁰ 2000 (1) BCLR 86 (CC).

²¹ At 93 F.

²² At 92 E.

²³ At 93 D.

²⁴ Section 7(2) of The Constitution of the Republic of South Africa Act 108 of 1996 (hereafter referred to as ‘the Constitution’). The Bill of Rights is contained in Chapter 2 of the Constitution. (At 93 D of the judgment).

²⁵ See *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC). Furthermore, these damages could be claimed *inter partes* in light of the acknowledged horizontal application of the Bill of Rights (see *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC)).

²⁶ Note 19.

²⁷ The Constitution of the Republic of South Africa Act 108 of 1996.

²⁸ At 93 B-C.

²⁹ At 97 D-E.

recognition of the fact that the remedies offered by the PFVA were narrow and insufficient, and had clearly proved to be ineffective.³⁰ However, it retained the prohibition on marital rape that had been introduced into South African law for the first time by the PFVA.³¹ The DVA certainly takes a more gender-sensitive approach to the problem of domestic violence. Its application is substantially broader than the PFVA. This is made possible *inter alia* by the widening of the definitions of ‘domestic violence’ and ‘domestic relationships’, and the extension of legal remedies, as well as greater police involvement in cases of domestic violence.

The content of the DVA is largely accredited to submissions made at parliamentary hearings on violence against women which were jointly conducted in 1997 and 1998 by the Portfolio Committee on Justice and the Ad Hoc Committee on Improvement of the Quality of Life and Status of Women.³² One of the failings of this process, however, is the fact that the DVA does not recognise domestic violence as a specific crime. Victims of domestic violence can therefore still only lodge criminal charges of assault or assault with intent to do grievous bodily harm (GBH) and/or malicious damage to property where applicable, in addition to obtaining a protection order. One of the consequences of this is that the police statistics only capture the charge as assault or assault GBH, without reflecting the gender-based nature of the conduct. Without specific data it is therefore difficult to obtain an accurate picture of the incidence of domestic violence.

Nevertheless, the DVA conveys South Africa’s national³³, regional³⁴ and international³⁵ commitments to the elimination of domestic violence for the

³⁰ The NICRO (National Institute for Crime and the Reintegration of Offenders) Women’s Centre conducted a research project at seven courts in the Western Cape in which information was collected from 100 women who had applied for and been granted interdicts in terms of the Prevention of Family Violence Act. Some of the results as at October 1997, indicate that the remedies provided by the Act were ineffective. 51 women were granted final interdicts, 42 temporary interdicts and seven were given notice to appear in court. In only 10 cases were the magistrates not prepared to grant all the protection asked for in the application and six of these cases concerned eviction orders. 40 women asked for eviction orders, of which 33 were granted but only in 12 cases were these fully obeyed by the respondent. 46 women received their final interdicts on the same day they applied, and waited an average of just over two hours for them to be processed, three women had to wait three days before they could pick their orders up, and two had to wait a week. For temporary interdicts, women generally had to wait between one and four weeks. The courts sent the interdict papers to the sheriff in only 20 cases. Seventy of the remaining 80 women said they took the interdict themselves to the sheriff for delivery, 26 women could not afford to pay for the sheriff, and a further eight had to borrow money. Only six were informed about possible financial assistance from the court. In 20 cases, the sheriff delivered the interdict within one day. In other cases it took longer. In one case it took 30 days for the sheriff to deliver the interdict. 55 of the women were abused again after being granted interdicts – 31 received physical abuse, 12 sexual abuse, and practically all of them verbal and emotional abuse. 23 women reported the abuse to the police. In nine cases, the police warned the respondent but did nothing further. In one case, the respondent bribed the police. Only four of the respondents were convicted. The 100 women interviewed had a total of 230 children between them, many of whom would have been affected by the violence.

³¹ Section 5 thereof.

³² A total of 32 written submissions were received. Some of these include: Commission on Gender Equality 17 August 1998 from <http://www.womensnet.org.za/news/domvi.htm>; Women and Human Rights Project (Community Law Centre University of the Western Cape); Rape Crisis Cape Town; ANC Parliamentary Women’s Caucus 30 May 1997 from <http://www.womensnet.org.za/pvaw/laws/dvsum.htm>; Women on Farms Project 20 March 1998 from <http://www.womensnet.org.za/pvaw/laws/farms.htm>; South African Human Rights Commission March 1998; Gender Advocacy Programme 20 March 1998; NICRO Western Cape Support for Abused Women Project 6 June 1997.

³³ By having regard particularly to the constitutional entrenchment of the rights to equality (section 9 of Act 108 of 1996), and to freedom and security of the person (section 12 of Act 108 of 1996).

³⁴ African Charter on Human and Peoples’ Rights, ratified by South Africa in June 1996.

achievement of gender equality.³⁶ It notes that domestic violence is a serious crime in our society, and constitutes a grave obstacle to the achievement of gender equality.³⁷ The DVA improves on the PFVA in a number of ways, including the following:

4.1.1 Definition of ‘domestic relationship’

Unlike the PFVA which offered protection only to abused parties in a marital or co-habitational relationship, the DVA extends its remedies to all victims who are or were in a ‘domestic relationship’ with the abuser.³⁸ It includes parties who either are or were married to each other by custom, religion or any law; who live or lived together in a heterosexual or homosexual relationship; who share or recently shared the same residence; who are or were in a relationship of any duration, including those of an actual or perceived romantic, intimate or sexual nature (which could arguably include one-night stands); parents of a child or persons who have or had parental responsibility for that child; and family members related by consanguinity, adoption or affinity. The amendment therefore recognises that abuse does not just occur within the confines of a marriage or a similarly perceived relationship.

4.1.2 Definition of ‘domestic violence’

‘Domestic violence’ in the DVA is defined as: physical abuse, sexual abuse, economic abuse, psychological or emotional abuse, verbal abuse, intimidation, stalking, harassment, damage to property, entry into the complainant’s residence without consent (where the parties do not live together), as well as any other controlling or abusive behaviour towards the complainant.³⁹ This broad definition is a welcome extension to the PFVA which was limited to physical abuse only. It gives recognition to the fact that domestic violence manifests itself in many forms.⁴⁰ The types of abuse recognised by the DVA is also wider than those reflected in the relevant international instruments.⁴¹

4.1.3 Police participation

The DVA widens police participation in the prevention and handling of domestic violence. It places a positive duty on the South African Police Service (SAPS) to assist a complainant and, where necessary, to find suitable shelter and to obtain medical treatment.⁴² The police must inform the victim of her or his rights, including the right to lodge a criminal complaint where applicable.⁴³ Police are authorised to arrest the respondent without a warrant, at the scene of domestic violence, if there is a

³⁵ Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180 (1979), ratified by South Africa in September 1995.

³⁶ Preamble.

³⁷ *ibid.*

³⁸ Section 1(vii).

³⁹ Section 1(viii).

⁴⁰ South African Human Rights Commission *Submission on Violence Against Women* (1998).

⁴¹ For example, Article 2 of the Declaration on the Elimination of Violence against Women GA Res 48/104 of 1993.

⁴² Section 2(a).

⁴³ Sections 2(b) and (c).

reasonable suspicion that an offence containing an element of violence has been committed against the complainant.⁴⁴ The DVA also makes provision for the issuing of national guidelines that must be observed when dealing with incidents of domestic violence. Failure to comply with these guidelines will result in disciplinary action being taken against police officers.⁴⁵ The amendments reflect a legislative attempt to define the role of the SAPS more clearly in light of their problematic implementation of the PFVA. Nevertheless, it has been argued that these changes will be ineffective if the dismissive attitudes of police officers to domestic violence cases remain unchanged, and if they do not receive adequate training.⁴⁶

4.1.4 The protection order

The DVA makes provision for a complainant to apply to court for a protection order (similar to an interdict under the PFVA).⁴⁷ An application may be brought outside of ordinary court hours, if the court is satisfied that the complainant requires urgent intervention.⁴⁸ All proceedings must be held *in camera*, to protect the interests and the identity of the victims of domestic violence.⁴⁹ The protection order is enforceable throughout the Republic.⁵⁰ This is beneficial to a complainant who moves to another jurisdiction and is followed by the respondent. Because victims of domestic violence are disempowered people, the DVA retains the provision that the application can be brought on behalf of the complainant by a third party who has a material interest in the well-being of the complainant.⁵¹ This has been extended to include members of the SAPS as well.⁵² Furthermore, a minor or any person on behalf of a minor may also apply for a protection order without the assistance of the parent or guardian.⁵³

Interim protection order

The PFVA only allowed a court to grant a final interdict. The DVA now directs the court to grant an interim protection order, if it is satisfied that there is a *prima facie* case of domestic violence, even though the respondent may not have been notified of the proceedings.⁵⁴ This will prevent courts from refusing to grant interim orders on the basis that the respondent did not receive notice thereof.⁵⁵ A suspended warrant of

⁴⁴ Section 3.

⁴⁵ Sections 18(2) and (4).

⁴⁶ Note 40.

⁴⁷ Section 4(1). In its submission to the South African Law Commission on 'Domestic Violence' *Discussion Paper No 70 (1997)* 3, the Gender Unit at the Department of Justice suggested that another term be used instead of 'interdict', so that it could be better understood by the community, and would be more expressive of the relief being sought.

⁴⁸ Section 4(5).

⁴⁹ Sections 11(1)(a) and (b), 11(2)(a).

⁵⁰ Section 12(3).

⁵¹ Section 4(3).

⁵² *ibid.*

⁵³ Section 4(4).

⁵⁴ Sections 5(2)(a) and (b).

⁵⁵ NICRO Western Cape Support for Abused Women Project *Changes Proposed by the SA Law Commission in respect of the Prevention of Family Violence Act 133 of 1993 (1997)*.

arrest must be issued contemporaneously with the interim order, in anticipation of the respondent breaching the conditions set out therein.⁵⁶ If the warrant is lost, destroyed or already executed and cancelled, the clerk of the court must issue a further warrant of arrest.⁵⁷ Unfortunately, police officers have discretion to decide whether or not to arrest the respondent.⁵⁸ Although certain factors are outlined to guide them in their decision-making,⁵⁹ the discretion could be abused by police officers who have received insufficient training, and who are gender-insensitive to domestic violence cases.

Final protection order

The DVA makes provision for a return date whereby the respondent is afforded the opportunity to appear in court. This effectively deals with the problem encountered by the PFVA in terms of which the *audi alteram partem* principle had been violated, because provision had only been made for one interdict to be granted, without requiring the presence of the respondent at court.

The court must grant a final order on the return date specified in the interim order, if it finds, *on a balance of probabilities*, that the respondent is committing or has committed an act of domestic violence.⁶⁰ If the respondent fails to appear, the court must still issue a final order, provided it is satisfied that proper service has been effected on the respondent, and that *prima facie* evidence exists that the respondent is committing or has committed an act of domestic violence.⁶¹ The court may not refuse to grant protection orders merely because there are other legal remedies available to the complainant.⁶² Furthermore, the court cannot amend or set aside a protection order, unless it is satisfied that the complainant has made application freely and voluntarily.⁶³ This provision recognises the fact that the complainant may be manipulated by the respondent. The DVA also does not place a time limit on the duration of the final protection order. This is a welcome change, because in certain magisterial districts, such as Mitchell's Plain (Western Cape), interdicts granted under the PFVA were only valid for one year.⁶⁴

Relief granted in terms of interim and final protection orders

Unlike the PFVA which provided for limited relief only, the DVA grants the court wide powers in respect of both interim and final protection orders. It may prohibit the respondent from:⁶⁵

- committing any act of domestic violence
- enlisting the assistance of any other person to commit an act of domestic violence

⁵⁶ Section 8.

⁵⁷ Section 8(3).

⁵⁸ Section 8(4)(b).

⁵⁹ Section 8(5).

⁶⁰ Section 6(4).

⁶¹ Section 6(1).

⁶² Section 7(7).

⁶³ Section 10.

⁶⁴ Note 55.

⁶⁵ Section 7(1).

- entering a residence shared by the complainant and the respondent
- entering a specified part of such shared residence
- entering the complainant's residence (if they do not live together)
- entering the complainant's place of employment
- committing any other act specified in the protection order.

The court may also order the seizure of dangerous weapons in the possession, or under the control of the respondent, and that a police officer accompany the complainant to assist with the collection of personal property.⁶⁶ Significantly, to alleviate financial hardships borne by the complainant, the court may order the respondent to pay the rent or mortgage, as well as emergency monetary relief to the complainant.⁶⁷ Where a child is involved, the court may refuse the respondent any contact with that child, if the court is satisfied that this would be in the best interests of the child.⁶⁸ This provision offers protection to children, and prevents respondents from gaining control over complainants through their children.

Legal representation

Applicants in certain magisterial districts are sometimes denied legal representation.⁶⁹ However, the DVA clearly provides for legal representation at all stages of the proceedings.⁷⁰ If the complainant is not legally represented, the clerk of the court must inform the victim of available relief, and of the right to lodge a criminal charge against the respondent.⁷¹

Breach of order

Under the DVA, it is an offence to breach the conditions of a protection order. On conviction, the respondent is liable to a fine or imprisonment not exceeding a period of five years.⁷² This is a considerable increase in penal jurisdiction, because the PFVA only allowed courts to impose a period of imprisonment not exceeding 12 months.⁷³ It is regrettable that the recommendation that the court be directed to make an additional order for rehabilitative counselling was not included, as this could have assisted in remedying the problem of domestic violence in South Africa.⁷⁴

⁶⁶ Section 7(2).

⁶⁷ Sections 7(3) and (4).

⁶⁸ Section 7(6).

⁶⁹ Women and Human Rights Project (Community Law Centre University of the Western Cape), Rape Crisis Cape Town, ANC Parliamentary Women's Caucus (1997) *Violence Against Women in Relationships: Summary of Proposals* from <http://www.womensnet.org.za/pvaw/laws/dvsum.htm>.

⁷⁰ Section 14.

⁷¹ Section 4(2).

⁷² Section 17(a).

⁷³ Section 6(b) of the PFVA.

⁷⁴ Women and Human Rights Project (Community Law Centre University of the Western Cape), Rape Crisis Cape Town, ANC Parliamentary Women's Caucus (1997) *Violence Against Women in Relationships: Summary of Proposals* from <http://www.womensnet.org.za/pvaw/laws/dvsum.htm>.

5 FEMICIDE

Femicide occurs when women are murdered by their intimate male partners (including husbands, boyfriends or common-law partners, as well as men from whom they are estranged, separated or divorced).⁷⁵ Given the alarming statistics set out earlier in this paper, the manner in which the criminal justice system has handled the perpetrators of this heinous crime is extremely frightening. Below is an example of the narrow extent that the judicial system has adopted in dealing with these types of cases.

In *S v Ramontoedi*⁷⁶, the accused killed his wife in the maintenance office at the Johannesburg Magistrates' Court. After being charged with murder, he pleaded self-defence.⁷⁷ The Court rejected his testimony, convicted him, and sentenced him to a mere three years correctional supervision.⁷⁸ During sentencing, the Court acknowledged that the sentence for inter-family murder would normally merit a long period of imprisonment, given the increase in South Africa of inter-family violence resulting in death.⁷⁹ However, in this matter, the Court imposed a lighter sentence, based on its deduction that the accused had been provoked over a long period of time. The Court arrived at this conclusion in light of the accused's testimony that he had suspected his wife of conducting an extra-marital affair, and that the child born during the course of the marriage was not his. I wish to submit that the Court's deduction was unsubstantiated, given that the accused had not pleaded provocation at all. In fact, the Court admitted that it was 'in the dark as to what that provocation actually was and the degree of it'.⁸⁰

The Court accepted evidence that the accused had accosted the deceased en route to the maintenance office.⁸¹ The Court even said that '(b)ecause the deceased feared the accused ... it is noteworthy, ... that (she) thought it necessary to obtain a police escort on the morning of the maintenance hearing'.⁸² Despite the fact that the accused had displayed violent tendencies, and that the deceased feared him, I submit that the Court did not investigate the possibility that the murder had been a culmination of violent behaviour by the accused. Instead, the Court was intent on finding some type of 'plausible' justification for the actions of the accused, hence the Court's insistence that the accused had been provoked.

⁷⁵ Karen Stout ' "Intimate Femicide": Effect of Legislation and Social Services' *Femicide: The Politics of Woman Killing* (1992) J Radford and Diana E.H. Russell (eds) 133. Lisa Vetten also uses this definition in her article entitled *Man Shoots Wife* from <http://www.womensnet.org.za/pvaw/understand/manshoots.html>. See also The Joint Committee on the Improvement of the Quality of Life and Status of Women *Violence Against Women Hearings* (1998).

⁷⁶ Unreported Case No: 188 / 96 Witwatersrand Local Division 23 June 1996.

⁷⁷ At 2 of the judgment.

⁷⁸ In terms of section 276(1)(i) of Act 51 of 1977. At 5-6 of the sentence.

⁷⁹ At 2-6 of the sentence.

⁸⁰ At 3 of the sentence.

⁸¹ At 8 of the judgment.

⁸² At 8-9 of the judgment.

6 THE WAY FORWARD

The sentence imposed in the *Ramontoedi*⁸³ case clearly sent a message to abusive men that the courts will ‘understand’ if they are provoked into killing their wives, and will give them a lighter sentence. My submission is that even if provocation is proven, it is unacceptable that courts should consider provocation as any type of justification for a violent outburst resulting in femicide. Furthermore, given the increasing statistics for intimate femicide, strong arguments can be advanced for the imposition of more stringent sentences as a deterrent for these types of crimes.⁸⁴

The *Ramontoedi*⁸⁵ case constitutes a blow for the advancement of women’s rights in South Africa. It particularly highlights the court’s ignorance and lack of understanding of the phenomena surrounding this type of violence against women in our society, for example, the battered woman syndrome. Within the context of domestic violence and its extreme form of femicide, there is therefore a clear indication that extensive training is required with regard to the dynamics of these two areas in respect of all the relevant role-players, including clerks, police officials, prosecutors, attorneys, advocates, judicial officers, and district surgeons. In other words, to ensure the effective interpretation and application of the DVA, the role-players must receive mandatory training about the causes and effects of domestic violence and femicide. To date, there is no national initiative co-ordinating such training. Training has only been occurring on an *ad hoc* basis by some non-governmental organisations (NGOs)⁸⁶ and Justice College.⁸⁷ This is problematic because NGOs should really only be playing a supplementary role in respect of training, particularly in light of the state’s constitutional obligation to deal with domestic violence effectively. Furthermore, *ad hoc* training is insufficient. The state therefore needs to organise and implement a nationally co-ordinated programme of training that will be sustainable on an ongoing basis. NGOs could be co-opted as part of this programme.

Despite the fact that the DVA could be regarded as one of the most progressive pieces of legislation which attempts to offer victims of domestic violence the widest possible protection, the real work has only just begun. The actual interpretation and implementation of the legislation is the real test of the extent of its effectiveness. Thus, a properly co-ordinated monitoring strategy in respect of all the relevant role-players on a national level is required. Again, no such strategy exists, despite the constitutional obligation placed on the state to deal effectively with domestic violence. There is also no proper monitoring strategy in respect of femicide matters or in cases where battered women kill their intimates as a result of constant abuse. Various NGOs have undertaken the task of monitoring the implementation of the DVA in a few selected areas,⁸⁸ but it is questionable whether their findings will be a

⁸³ Note 75.

⁸⁴ Lisa Vetten quoted in *The Sunday Times* 2 August (1998) editorial page.

⁸⁵ Note 75.

⁸⁶ Such as the Law, Race and Gender Research Unit, University of Cape Town, which incorporates training on domestic violence into their broader framework of social context training for magistrates and prosecutors.

⁸⁷ This is the official training centre for magistrates and prosecutors in South Africa. It is situated in Pretoria.

⁸⁸ For example, a consortium of three NGOs in the Western Cape have raised funding to conduct monitoring of the implementation of the Domestic Violence Act 116 of 1998 in Cape Town, Mitchells Plain and George. The

true reflection of what is happening on the ground level in all the regions of South Africa. At best, their findings will be specific to the areas targeted for their research.

Some of the problems that have been noted thus far on an *ad hoc* basis in the Western Cape include the following:

- A magistrate was reluctant to grant a protection order on the basis that the respondent's attorney raised the point that Muslim law permits chastisement of a wife by her husband (the parties had been married to each other by Muslim rites). The magistrate therefore postponed the matter to afford the parties the opportunity of bringing in experts in Muslim law to confirm or deny this point. Unfortunately, the complainant was left without any kind of protection from further abuse by her husband during the interim period.
- A magistrate was unwilling to grant an exclusionary order, preventing the husband from entering the shared premises of the parties on the basis that the parties had been married to each other in community of property. This was done irrespective of the fact that the matrimonial property regime of the parties is irrelevant to the inquiry of whether the complainant is in need of protection or not, and the extent of that protection.
- It has been found that men have been abusing the system by applying for protection orders for the sole reason of evicting their partners from the common home. It seems that these applications are being granted because magistrates are not applying their minds to the circumstances of the case, nor are they alerting themselves to the fact that caution needs to be exercised when the applicant is a male (given the statistics indicating that victims of domestic violence are usually women).
- An anomaly exists in the application form for the protection order,⁸⁹ in that the form requires the applicant to include her/his residential address, yet the magistrate, upon granting the protection order, may order that the address of the complainant not be revealed to the respondent. The problem is that the DVA instructs the clerk of the court to serve a copy of the order, suspended warrant of arrest, and the application form filled in and signed by the applicant on the respondent. The respondent would therefore know where the complainant is despite the intention of the legislation to prevent the respondent from finding the complainant and continuing to inflict harm.
- Various NGOs have placed trained volunteers at some of the courts to assist complainants in filling out application forms for protection orders. However, these volunteers do not have full knowledge of the law, including customary and religious law, and are therefore not always able to advise complainants about all the existing remedies. For example, a Muslim woman who has received a final *talaq* (Muslim pronouncement of divorce) and is seeking a protection order during her *idda* period⁹⁰ (waiting period) could very well also ask the court to grant a

consortium consists of the Gender Project, Community Law Centre (University of the Western Cape), Institute of Criminology (University of Cape Town) and Rape Crisis (Cape Town).

⁸⁹ Form 2 of the domestic violence regulations.

⁹⁰ This is the waiting period, which commences immediately upon the pronouncement of the final and irrevocable *talaq* and ends three months thereafter. During this time, the husband is under a religious obligation to maintain (*nafqah*) the wife. The *nafqah* in its narrowest form comprises food, clothing and lodging. This right to maintenance during the *idda* period was recognised in *Ryland v Edros* 1997 (1) BCLR 77 (CC).

maintenance order in her favour for the duration of her *idda*. There is nothing that precludes the court from granting this type of relief in the protection order since the DVA specifically makes provision for the granting of economic orders.

However, a volunteer who is unaware of this right of a Muslim woman would not advise her to include that in the Founding Affidavit with the result that the court would not be able to *mero motu* grant that particular relief as part of the final order.

Furthermore, research into the PFVA conducted in rural areas indicated that rural women (who constitute one of the most vulnerable groups to domestic violence)⁹¹ experienced a number of problems specific to their location that were not being experienced in the urban areas.⁹² I wish to submit that these problems could be similarly experienced in relation to the DVA, but definitive research needs to be undertaken to ascertain this.

7 CONCLUSION

It seems that for every step taken forward, there are usually a few steps taken back. The same is true of domestic violence and femicide. While attempts have been made to deal positively with the problem of domestic violence (albeit on one level only, that is, the passing of the DVA), no similar efforts are evident in relation to femicide. Femicide cannot be seen in isolation from domestic violence. The former is a result of the latter. It is illogical that while domestic violence is now being considered in a more serious manner than previously, femicide is being treated as dismissively as domestic violence once was.

These two social evils can only be effectively combated once a holistic approach is adopted by the state, in tandem with the relevant role-players and NGOs. This approach must allow for a nationally co-ordinated programme in respect of both monitoring of the implementation of the DVA, as well as judgments and sentences handed down in femicide matters and where battered women kill their intimates. It must also include a nationally co-ordinated strategy in respect of training around the substantive and procedural issues relating to domestic violence and femicide targeting all the relevant role-players who are instrumental for the effective implementation of the legislation. It is only through the adoption of these approaches that substantive justice can be rendered to both the victims and perpetrators of gender-based violence, and to protect and give substantive effect to the constitutional rights of victims to be free from gendered forms of violence.

⁹¹ Women on Farms Project *Submission on Domestic Violence, Access to Justice, Maintenance* (1998) from <http://www.womensnet.org.za/pvaw/laws/farms.htm>. Also, in a study conducted in the rural Southern Cape, it was found that about 80% of women were victims of domestic violence – see Lillian Artz Gender Project Institute of Criminology University of Cape Town (1997). Referred to in Lillian Artz *Submission by the Institute of Criminology: Gender Analysis* Institute for Security Studies: Cape Town Crime Survey (1998) 4.

⁹² Applications for interdicts are difficult to access because often women have to go to the urban areas to obtain them. Women have to utilise costly and unreliable transport systems. This means that an application could take an entire day, resulting in a loss of a day's wages. Violations of orders usually involve contacting the police telephonically, but telephones are a limited resource on farms. The work and accommodation of women on farms is dependent on them having a relationship with a male labourer. They automatically lose their work, income, and accommodation if the man is arrested and loses his job. There are few support services for these women, and no safe accommodation if they have to leave their homes. See Women on Farms Project *Submission on Domestic Violence, Access to Justice, Maintenance* (1998) from <http://www.womensnet.org.za/pvaw/laws/farms.htm>.