



REQUEST FOR AN INQUIRY
 UNDER THE OPTIONAL
 PROTOCOL OF CEDAW

ALTHOUGH **NON-MARRIED** **RELIGIOUS** **DOWN** **VICTIM'S** **ETHNIC** **PSYCHOLOGICAL** **DESTRUCTION**
PASSIVE **UNWANTED** **SEXUAL** **INTELLECTUAL** **PHYSICAL**
FREQUENCY **VICTIM** **LEGAL** **PHYSICAL**
SYCHOLOGICALLY **PERPETRATED** **OBJECTS** **ONAL** **NEED** **DOMESTIC** **ALSO** **STRIKING**
IMINATION **INSULTS** **THREATS** **VIOLENCE** **PARTNER** **VERBAL**
CRIMINAL **ABUSE** **SOCIAL** **VICTIMIZATION**
SPOUSAL **HARM** **FORMS** **INCLUDE** **DEPRIVATION** **EXPRESSIONS**
IMPONENT **SPIRITUAL** **CONTROL** **NONVERBAL** **POSTURES** **ASSAULT** **PUSHING** **CONTACTS** **IMPENDING** **IMPORTANT** **THROWING** **RESOURCE**
TING **SEVERITY** **MILITARY** **ASSAULT** **FORCED** **CLASSES** **FINANCIAL** **MEN** **RESOURCES** **PERMANENT**
OTHER **KNOWN** **CONTROL** **ASSAULT** **FORCED** **CLASSES** **FINANCIAL** **MEN** **RESOURCES** **PERMANENT**

TABLE OF CONTENTS

| | |
|---|----|
| NATIONAL CEDAW TASK TEAM | 4 |
| LIST OF ACRONYMS USED IN THIS REPORT | 5 |
| Context..... | 6 |
| Background | 7 |
| Under reporting | 8 |
| Profile of the abuse in this study | 9 |
| Survivors /Victims of domestic violence | 10 |
| Who are the Perpetrators? | 13 |
| Reasons for this problem | 14 |
| Perpetuation of stereotypes..... | 14 |
| Effects of the violence on women | 17 |
| Impact of domestic violence | 18 |
| Ukutwala | 18 |
| Responsibility, Guilt and Shame..... | 19 |
| Domestic violence and the impact on Women’s Health | 20 |
| Domestic violence and HIV/AIDS | 20 |
| Women and pregnancies..... | 21 |
| Depression, Anxiety and Post-traumatic Stress Disorder | 22 |
| Substance Use | 22 |
| Killing of women in domestic violence disputes | 22 |
| Impact of domestic violence on children..... | 23 |
| Impact on families..... | 23 |
| What are the contributory factors..... | 25 |
| PART 1 - Conclusion | 26 |
| PART 2 – Legal framework and state responses | 27 |
| Chapter Nine institutions..... | 27 |
| Women’s Ministry | 27 |
| Effectiveness of state action..... | 28 |
| National Police Instruction regarding Domestic Violence 1999..... | 28 |
| state obligations..... | 34 |
| African Charter on Human and Peoples’ Rights (Ratified by South Africa on 09/07/1996)..... | 38 |
| Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Ratified by South Africa on 17/12/2004) | 40 |
| SADC Protocol on Gender and Development | 41 |
| Conclusion | 43 |

| | |
|---|----|
| Domestic Violence Act 116 of 1998..... | 44 |
| Rights of Victims | 44 |
| Police Officer/Peace Officer’s Obligations..... | 44 |
| Clerks of Court’s Obligations..... | 45 |
| Court’s Obligations..... | 46 |
| Prosecutors | 46 |
| The Guideline for the Implementation of the Domestic Violence Act for Magistrates | 47 |
| MAGISTERIAL OBLIGATIONS..... | 47 |
| INFORMATION OBLIGATIONS OF MAGISTRATES..... | 49 |
| National Police Instruction regarding Domestic Violence 1999..... | 50 |
| Jurisprudence by the courts..... | 54 |
| S v Baloyi 2000 (2) SA 425 (CC) | 54 |
| Ahmed Raffik Omar v Government of the Republic of South Africa 2006 (2) SA 289 (CC)..... | 55 |
| Context of the Act | 56 |
| Scheme of the Act | 56 |
| The applicant’s case..... | 57 |
| The Minister of Safety and Security V Paul Johannes Venter And Two Others (570/09) [2011] ZASCA 42 (29 March 2011) | 60 |

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LIST OF ACRONYMS USED IN THIS REPORT

| | |
|--------------|---|
| AIDS | AQUIRED IMMUNE DEFICIENCY SYNDROME |
| CEDAW | CONVENTION ON THE ELIMINTION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN |
| DV | DOMESTIC VIOLENCE |
| HIV | HUMAN IMMUNE DEFICIENCY VIRUS |
| ICD | INDEPENDENT COMPLAINTS DIRECTORATE |
| NGO | NON-GOVERNMENTAL ORGANISATION |
| NIDV | NATIONAL INSTRUCTIONS ON DOMESTIC VIOLENCE |
| OP | OPTIONAL PROTOCOL |
| SAPS | SOUTH AFRICAN POLICE SERVICES |

REQUEST FOR AN INQUIRY UNDER THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

CONTEXT

Some 60 Non-Governmental organisations developed South African's first share report on the convention on the elimination of all forms of discrimination against women and submitted this to the CEDAW committee in 1998. The focus of that report was on violence against women in South Africa because this was seen at that time as a critical problem facing women. 14 years later, violence against women continues to plague the lives of the majority of women in the country who live at the very least with the constant threat of some form of violence against women or with the reality of such violence.

The Concluding observations of the 1998 report called on the state to address various areas of concern with respect to violence against women. Some of the concluding observations were taken up by the state and some improvements resulted.

However, research studies undertaken by various institutions and NGO's, annual reports of the national prosecuting authority (NPA) together with daily media reports and reports from women themselves, show that the state's responses to violence against women have not reduced the levels of violence against women or changed the nature of this problem in society as required by the convention.

The state failed to comply with the conventions reporting requirements and reneged on 3 reporting periods. This has had the effect of limiting the progress that could have been made and diluted the gains that the state has made.

The state reported in January 2011 and since receiving the concluding observations, has made a concerted effort to fast track changes in respect of women's rights generally and violence against

women specifically. Most notably, the state has recently established a National Council on Gender Based Violence that aims to pull together all state responses in the country in order to strengthen then and to have a more coherent, integrated response to ending violence against women. The establishment of this council is not without problems. It is modelled on the South African National Aids council which itself faces numerous challenges in terms of what it is addressing. A great deal of criticism has been levelled at the national council on gender based violence the structure of it being the most controversial. Only 2 NGO's from one province were invited to participate.

After a protest, more NGO's were invited to participate. The problem is that the council is not reflective of women across the country and the state departments outweigh civil society participation yet civil society has the most comprehensive response in the country currently and arguably the best analysis of the problems that lead to the high levels of violence against women.

BACKGROUND

Violence against women is endemic in South Africa. The annual reports of the National Prosecuting authority, indicate that almost 300 000 women applied for protection orders through the courts in 2010/2011.

Studies undertaken by the Medical Research Council and Gender links indicate that 51,2% of all women interviewed had experienced violence against women in one or another form while 78,3% of men admitted to having committed acts of violence against women.

Emotional violence was the most prevalent form of abuse with 43,7% of women having been subjected to such violence and 65,2 % disclosed that they had perpetrated some this form of VAW.

33,1% of women revealed in the study that they had experienced multiple forms of violence and on multiple occasions (30,8%).

The study further reported that 30,8% of women experienced and 43,4 % of men perpetrated more than one episode of physical violence. Some men justified physical violence as a corrective measure of wrong behaviour. 25% of women and 33% of men interviewed perceived social norms and endorsing punishment. 22.3% of men agreed that men had a right to punish their wives compared with 8.8% of women.

25,2 % of women had the experience of being raped by a man whether a husband or boyfriend, family member, stranger or acquaintance while an even high 37,4% of men admitted to ever raping a woman. More women had experienced sexual violence than men. 4,7 % said they had perpetrated violence over a woman in the last year.

Overall 22,3% of ever partnered women had experience economic abuse and 28,5% of ever partnered men disclosed having perpetrated economic abuse.

Nearly half the women, 9,3% who said this has ever occurred had experience economic violence in the past year (compared to 5% of men who said they had perpetrated such acts).

UNDER REPORTING

Data from the SAPS April 2008-March 2009 shows that 3207 men and 120903 women reported being victims of domestic violence with 11789 men and 970 women recorded as perpetrators.

Using the STATS SA mid- year estimate for Gauteng for 2009, an estimated 0.09% of men and 0.3% of women reported a case of domestic violence over the time period.

Many women seek help from our offices having suffered from domestic violence for years. They say that they were afraid of reporting because they suffered discrimination from those they sought help from. They are told that they must "bear" with their partners or behave better. Women are made to carry the blame for the violence in their lives and they carry the burden of shame in their families and communities - Masimanyane Counsellor

These figures for victimization of women are way below the one in five (18,1%) women who said they have experienced violence in the past year in the survey. This discrepancy is indicative of the high rate of underreporting of violence against women. Only 3% of women who had been raped by a partner or non-partner in the survey had reported this to the police. Sexual violence by an intimate partner was least often reported. With only 2,1% of women experiencing this ever reporting. Only 7,8% raped by a stranger or acquaintance had reported the incident to the police. Thus, women had only reported one in 13 non partner rapes and only one in twenty five of all rapes."

"I did not know that if I refused to have sex with my husband it is actually rape. He often forces me to have sex with him. I cannot see myself reporting him for rape. What would people think of me? He would be put out of the church. He is an elder."

A woman reporting to an NGO about the domestic violence in her life.

Analysis of the SAPS dataset of all crimes committed in Gauteng coded as domestic violence for the period 2008-2009 proved problematic.

It is unclear under what circumstances data capturers use the DV variable and this may have varied from station to station.

A further study undertaken by the Gender, Health and Justice Research Unit at the University of Cape Town looked into the attrition rate of domestic violence complainants in 8 magistrate's courts in the Western Cape. DV applicants were interviewed and asked why they applied for protection orders but did not return to court for finalisation of the order.

84% of applicants for protection orders were women. 74,7% of applications for protection orders were brought against intimate partners with the remaining being brought against family members. Women applying for protection orders against an intimate partner made up 64,4% of applications with the next biggest percentage comprising women wanting protection from family members. The majority of applicants were between the ages of 20 and 39.

PROFILE OF THE ABUSE IN THIS STUDY

Physical abuse was the most commonly reported form of victimization with nearly 3 in 4 (72%) reporting that they had experienced at least one type of physical assault. Sexual abuse or rape was reported in 16,5% of the cases with all the cases brought by female applicants against their intimate partner. This means that of the female intimate partner applications approximately 1 in 4 women had experienced sexual abuse or had been raped by their intimate partner.

Economic abuse was reported in 58% of the sample with 57% of women and 67% in the intimate partners categories; Verbal abuse was the most frequently reported form of abuse (94%) with percentages in the 90's in all four categories of applicants.

Given the descriptions of abuse, it is unsurprising that 41% of the applicants asked that their abusers be removed from their premises. In 14% of the cases applicants requested emergency medical Rescue and in 19 % of cases applicants requested restricted contact with children. Considering that a gun was used in 13 % of the cases, only 2% of applicants requested the removal of a firearm.

46 applicants asked that their abusers be prohibited from entering their work and / or home premises.

SURVIVORS /VICTIMS OF DOMESTIC VIOLENCE

Women and girls who fall victim to domestic violence cut across all ages given that the phenomenon of child brides and forced marriages (Ukutwala) exists as a cultural practice in some areas in the country resulting in fairly large numbers of girls experiencing forced marriages and the problems that accompany this phenomenon.

Domestic violence survivors are found across all racial, ethnic, religious and cultural backgrounds, economic status, sexual orientation, educational and skills level. However it has been shown that women from marginalised communities including rural disabled women, unemployed women and women with low skills levels are particularly vulnerable together with women from urban or rural settings and informal settlements who struggle to access their socio-economic rights that are enshrined in the Constitution.

They find it more difficult to escape domestic violence as they are dependent on their perpetrators for their economic survival. Domestic violence has no age boundaries and includes women as in the senior years of 60, 70 and even their 80's. Some reports from civil society organisations indicate that older women are vulnerable to being put out of their homes by husbands wanting to take younger wives or sons wanting to take possession of the family home after a women's spouse has died.

The Gender Links and Medical Research Council's prevalence study indicated that 51% of all women recruited for the study had experienced some form of gender violence in their life time. 78.3% of all men said that they had perpetrated some form of violence against women. About 1 in 5 women experienced and over 29% of men said that they had perpetrated violence in the past month.

The National Prosecuting Authority has recorded the following reports of domestic violence over the last 5 years.

| DOMESTIC VIOLENCE STATISTICS | | | |
|-------------------------------------|---------------------|-------------------------|--------------------------|
| 2006/2007 | | | |
| REGION | APPLICATIONS | TEMPORARY ORDERS | PROTECTION ORDERS |
| Eastern Cape | 13903 | 10511 | 5400 |
| Free State | 3594 | 1947 | 2094 |
| Gauteng | 25750 | 16883 | 14861 |
| Limpopo | 8865 | 6156 | 4311 |
| Mpumalanga | 6901 | 3914 | 3393 |
| North West | 3665 | 1869 | 1981 |
| Northern Cape | 1791 | 1030 | 760 |
| Western Cape | 25856 | 15860 | 14715 |
| Kwa Zulu Natal | 29535 | 17254 | 15498 |
| Total | 119860 | 75424 | 63013 |

In 2006/7 we note that the National Prosecuting Authority started a simple system of collecting information on the number of protection orders being applied for and the action taken in terms of those applications. It was the start of the Process.

| DOMESTIC VIOLENCE CASES PER REGION | | | | | |
|---|---------------------|--------------------------|-------------------------|------------------------|---------------------------------|
| 2007/2008 | | | | | |
| REGION | APPLICATIONS | PROTECTION ORDERS | WARRANT EXECUTED | CASES WITHDRAWN | CASES PROCEEDED TO TRIAL |
| Eastern Cape | 20,653 | 6,861 | 516 | 1,360 | 3,226 |
| Free State | 9,233 | 3,596 | 375 | 908 | 3,989 |
| Gauteng | 44,000 | 22,688 | 3,406 | 5,508 | 14,833 |
| Kwa-Zulu Natal | 27,836 | 12,530 | 862 | 4,080 | 9,904 |

| | | | | | |
|----------------------|----------------|---------------|--------------|---------------|---------------|
| Limpopo | 11,326 | 6,210 | 267 | 700 | 3,429 |
| Mpumalanga | 11,574 | 5,433 | 335 | 1,710 | 2,981 |
| North West | 7,365 | 3,844 | 677 | 881 | 2,342 |
| Northern Cape | 4,661 | 1,800 | 198 | 410 | 2,433 |
| Western Cape | 30,699 | 17,148 | 1,987 | 3,231 | 4,169 |
| Total | 167,347 | 80,110 | 8,623 | 18,788 | 47,306 |

DOMESTIC VIOLENCE STATISTICS

2009/2010

| PROVINCE | OLD APPLICATIONS | NEW APPLICATIONS | TOTAL APPLICATIONS | ORDERS GRANTED | MADE FINAL | SET ASIDE | WITHDRAWN/STRUCK OFF THE ROLL | WARRANT ISSUED FOR BREACH |
|-----------------------|-------------------------|-------------------------|---------------------------|-----------------------|-------------------|------------------|--------------------------------------|----------------------------------|
| Eastern Cape | 6,410 | 34,852 | 41,262 | 17,346 | 10,655 | 1,573 | 6,729 | 1,523 |
| Free State | 5,551 | 15,297 | 20,848 | 8,440 | 5,152 | 2,302 | 2,053 | 1,431 |
| Gauteng | 10,646 | 39,965 | 50,611 | 29,435 | 15,269 | 6,622 | 10,708 | 2,511 |
| Kwa Zulu Natal | 15,979 | 43,592 | 59,571 | 28,870 | 14,409 | 11,762 | 9,032 | 2,954 |
| Limpopo | 6,533 | 15,874 | 22,407 | 11,783 | 8,110 | 2,101 | 2,092 | 635 |
| Mpumalanga | 3,273 | 14,354 | 17,627 | 10,096 | 5,294 | 2,116 | 3,105 | 1,123 |
| North West | 4,318 | 13,058 | 17,376 | 8,006 | 3,461 | 696 | 2,521 | 1,303 |
| Northern Cape | 3,580 | 7,924 | 11,504 | 4,426 | 1,989 | 705 | 2,102 | 282 |
| Western Cape | 10,024 | 40,316 | 50,340 | 22,757 | 12,839 | 3,277 | 11,024 | 3,186 |
| Total | 66,314 | 225,232 | 291,546 | 141,159 | 77,178 | 31,154 | 49,366 | 14,948 |

We see a 71% increase in the number of women seeking protection orders between the 2006/7 and the 2007/2008 reports. In 2006/7, 52% of protection orders were granted while only 47% were granted in 2007/8 reporting period. Reporting improved in the 2007/8 period as new categories were included by the state. These were Warrants executed, Cases Withdrawn and Cases that Proceeded to trial. These are useful inclusions as it provides a much better picture of how the state is responding to women accessing this protection mechanism. We learned that 11% of cases were withdrawn while only 28% proceeded to court in this reporting period. It is important to ask the question why women are withdrawing their call of protection orders.

In the 2009/2010 reporting period, we note that there is a 57% increase in the number of people who applied for protection orders. This is substantial and may be attributed to an increase in community knowledge, less fear amongst women and men in respect of reporting these social crimes and/or it may be that there is greater confidence in the state's responses to applicants seeking assistance from the criminal justice system.

We note that 48% of applicants orders were granted while 26% of them were made final. 16,9% of cases were withdrawn while 10,6% were set aside. The number of warrants issued for breaches of the protection orders amounted to 0,51% or 14948 orders.

We note that the state is making some efforts to address domestic violence more constructively through the capturing of more detailed statistics and categories of statistics. We can see though that the protection orders are not providing applicants, the majority of whom are women, with the full support they require. The state has to check on why there continues to be a large number of cases withdrawn, or struck off the role as well as why such a low number of cases actually proceed to court or have warrants issued in breach of the court orders.

WHO ARE THE PERPETRATORS?

According to studies the perpetrators of violence against women are mostly men, who women are married to, have been married to or are in relationships with them and or have been in relationship with them. Men in rural settings and urban settings are both likely to be perpetrators. Perpetrators are from all educational and economic backgrounds and from all racial groups. There are some arguments that black men are more likely to be perpetrators of domestic violence but this is not true. The demographics of the country which has a population of 79.2% black African people will show

higher numbers but this does not indicate that it is a phenomenon that affects this community only. White communities are much smaller but domestic violence is a high in those communities as in any other. Racializing the problem does not help women as all women in the country are vulnerable to the problem of domestic violence.

Given that perpetrators are from all economic, educational, classes and racial backgrounds it is clear that it is patriarchy, culture, tradition as well as religion that contributes to various forms of discrimination against women and results in their oppressions in all communities and across the whole society.

REASONS FOR THIS PROBLEM

PERPETUATION OF STEREOTYPES

The high levels of violence against women in South Africa point to the low regard for women and their human rights. This is perpetuated by the power dynamics between men and women and is evidence by the normalization of violence against women.

Apartheid separated people into specific ethnic groups each given a particular value in the society. White people were at the top of the value chain while black African people who formed the majority in the country, were given the lowest status. The entire society was organised around this principle of racial segregation. It informed the economic, social, cultural, political, educational experiences for each racial group. This has resulted in much of the prevailing current racial stereotypes in the country.

Added to this, we have the gender profiling which during both colonial times and apartheid were informed by the views of women by those oppressors. What we see is that women carry a racial stereotype as well as a gendered stereotype. This is played out in most institutions in the country as well as by the media.

Masimanyane commissioned a study on violence against women which was conducted by Desiree Lewis now at the University of the Western Cape. She explained the historical underpinning of stereotyping of South African women as follows:

“The colonial heritage is important in explaining the escalation of gender-based violence for two main reasons. One reason is that it explains the development of specific kinds of gender identities and their associated behaviour.

Like gender relations, colonial relations shape social identities in such a way that some persons acquire a sense of themselves as dominant in relation to totally dehumanised and objectified "others".

This accounts for why certain social relationships are rooted in actions and attitudes that are particularly aggressive and ruthless. Ideologies that assume that certain people are entirely inferior or inhuman rationalise excessive forms of abuse.

The formal end of colonialism or apartheid does not necessarily lead to the eradication of these models. In postcolonial societies, their impact endures in, for example, media reports, certain kwaito (song) lyrics, or advertising images that perpetuate stereotypes of black women's bodies. Any inquiry into violent identities in postcolonial contexts must therefore squarely address ways in which hegemonic stereotypes are embedded in culture, ideology and consciousness. The impact of images and representation on consciousness and ideology often remains unaffected by the formal measures that seek to prevent violence.

A second reason for the significance of the colonial legacy is that it instituted violence as a constant and inescapable aspect of social, political and domestic life. The institutionalising of brutal and coercive rule means that all forms of social organisation hinge on the use or threat of force. The naturalising of authoritarianism in society impacts strongly on women, since if a society is violent, it will be violent towards women as the most socially subordinate members of society (see Mama, 2000). This authoritarianism is exemplified in militarism, a social system in which governance revolves wholly around the use of force and the demand for total obedience from subjects”.

This analysis clearly shows the difficulties faced by women in South Africa and why they are being subjected to such high levels of violence against women. The evidence is very strong that responses from the state are inadequate, weak, inconsistent and ad hoc. This leads to a lack of due diligence by state agents which gives rise to a culture of impunity.

We can also better understand why the economic, social and cultural situation of women is not improving and continues to contribute to women's vulnerability. It explains the normalization of violence against women in the country.

Some of the reasons for the high levels of violence against women in South Africa can be contributed to the political, social economic and cultural environment. Women and girls suffer discrimination in all aspects of the low regard for women in families, in communities and society as a whole. At the start of our democracy, there was a strong commitment made to advancing gender equality. This led to the progressive constitution that the country enjoys. Gender equality was enshrined as a principle in this globally revered instrument. This political will, led to the establishment in Chapter Nine of the constitution of a number of Institutions aimed at ensuring a fully democratic, non- sexist and equal society in which every citizen fully enjoys their human rights.

Lisa Vetton - The Right and the Real. At the start of the democracy, the Women's National Coalition had champion feminists such as Thenjiwe Mthintso, Mavivi Mayakayaka Manzini, Pregs Govender and others. These women, prior to the 1994 change of government, worked village to village, town to town, city to city conscientising women about their rights. They developed the Women's Charter of Effective Rights which they later fought to have included in the constitution.

When these women got into parliament, they worked to put what is known as the national gender machinery in place. This consisted of the Office on the Status of women based in the Presidency and its role was to oversee gender mainstreaming in all government departments. The Commission on Gender Equality was established to oversee the implementation of gender equality across all spheres of society from the family level to community. A committee was established in parliament called the Joint Monitoring Committee on the Improvement in the Quality of Life and Status of women. Its role was to oversee all parliamentary activities and to ensure that they were aligned with the Cedaw Convention and the Beijing Platform for Action.

The constitution is progressive because it enshrines equality and it espouses the right to reproductive rights including safe abortion.

Following the establishment of the new Democracy, many pieces of legislation were enacted. These included the Domestic Violence Act, the Maintenance Act, the Recognition of Customary Marriages Act and the Termination of Pregnancy Act.

EFFECTS OF THE VIOLENCE ON WOMEN

Violence against women has different forms of manifestation in women. Some women manifest in one way while others have various manifestations of the violence on their bodies, their minds, their social status, their economic status and their potential to achieve on an educational, political, social and cultural level. All women who are subjected to any kind of violence will find it difficult to reach their potential. All women interviewed and talked to in response to this initiative, shared some of the negative impacts on their lives.

One of the impacts is Post Traumatic Stress Disorder which is a severe anxiety disorder that results from extreme physical harm or danger. Physical, emotional, sexual and psychological harm experienced by man domestic violence survivors result in some form of PTSD. Some women suffer this for years even after the violence stops.

Male perpetrators of violence against women use power and control over women to break down their confidence and their ability to interact with their families and communities. This leads to the breakdown of their support systems and networks making the survivors contact with her partner the only one she has and this causes further mental harm.

One woman called an NGO telling them that she could not speak with them unless it was between 11am and 2pm when her husband was out of the house. She was afraid of him and he called her every few minutes when he was out of the house to make sure she was not doing anything that he did not want her to do.

She was severely traumatised by her husbands' control over her life and did not believe that she could be assisted. She was eventually helped to get out of the house and was moved to a safe place but it took great effort to assure her that she could be helped.

Women feel guilty and fearful and anxious as well as being severely intimidated by the perpetrator. This results in the systematic isolation and oppression of the women leading ultimately to their silence and disempowerment. They become shrouded in fear and their anxiety levels increase to the point where they are unable to function healthily as human beings.

Trapped in this situation, women focus all their energy on the battering partner and become dependent on their partners in a way that makes them feel totally inadequate and unable to be on

their own. They cannot distinguish their person from that of the perpetrator. This makes it difficult for women to leave a domestically violent relationship and those who do, often return because they have internalised their oppression by the perpetrator.

My husband has been abusing me since the day we were married. He has had affairs with so many women and always blamed me for his behaviour. He beat me up, insulted me, denied me my rights by taking away the money I earned. He even gave me infections and then blamed me saying I was being unfaithful to him. I was too afraid to tell anyone. I tried to leave him then he would promise to change and I would return . This has happened for years and years and years. I really do want to leave now because he has a new woman and both of them are terrorizing me. He told me that he took this woman because I am cold and unresponsive to him. He told me in front of his new mistress.

A month after leaving the man, this woman returned and the abuse has continued unabated.

IMPACT OF DOMESTIC VIOLENCE

Many cases of domestic violence involves sexual violence including rape in marriage and incest. In the Gender Links and Medical Research council study, they found that 25,2% of women had ever experienced being raped by a man including husbands, boyfriends, family members, strangers or acquaintances while 37,4 % of men admitted to ever raping a woman. Women who experience this kind of violence in their domestic relationships are at risk of having unwanted pregnancies, can resort to unsafe abortions, suffer a range of sexually transmitted diseases including HIV and can have other reproductive tract infections or abnormalities.

UKUTWALA

This is a harmful cultural practise of child and forced marriages. Sometimes families are complicit in that a man approaches a family and tells them that he wants to marry their daughter. He offers lobola (bride price) which the family may accept. The girl is completely unaware of this arrangement. She is then waylaid on her way from home or to home and forcibly abducted. She is taken to the home of the man where she is told that she is now his wife. Many such young girls are subjected to rape and become complaint as a result. These young girls suffer untold misery as they take on household duties often being controlled by an older wife or a mother in law who treats her badly.

Some young girls are allowed to attend school to hide the fact that they are married but they have to return to the man's home and carry out the duties of a wife.

Some of these young women fall pregnant and give birth while still very young. Many develop reproductive problems. The sharp rise in maternal deaths can be the result of these forced marriages. Many young women get infected with HIV or get AIDS because the man has multiple concurrent partners. Mostly, their education suffers.

They are not able to complete their schooling and end up poorly educated, dependent upon a man and having to raise several children due to their lack of access to family planning or even health care. Many suffer terribly from rape in their marriages and some die from other forms of violence in their lives.

Jane is a 34 year old woman. She has been married for 14 years to the same man. He is a drug addict and does not work. He sometimes sell drugs. His abuse includes verbal abuse, denigration, financial abuse, and physical violence. The worst though is the sexually abuse. When he is drugged, Jane's husband insists on anally raping his wife using objects that include broom handles and other objects that cause terrible pain to his wife. He threatens to kill her if she does not comply then rages at her for being compliant. This form of sexual abuse has resulted in problems with her reproductive tract including causing infections and constant pain and discomfort. He also has other women and she has had many sexually transmitted infections which she treats herself. Medical help is not possible for Jane as says as she is too scared to tell a doctor what has happened to her.

RESPONSIBILITY, GUILT AND SHAME

Perpetrators blame their victims and in-still a sense of shame in them for the violence. The victim begins to believe that it is her inadequacies that lead to the violence and eventually takes full responsibility for the abusers actions. The victim's shame is exacerbated by societal perceptions that women who suffer domestic violence are flawed in some way or another and therefore are not entitled to dignity and respect. They are denied protection and safety as a result of these perceptions.

One community reported that one of their women reported her abuse to her pastor. He told her that she had to change her behaviour and her husband would change towards her. He told her to return

home after she reported that the violence was too intense so she left. She was made to feel that she was totally responsible for the abuse. She returned home and was killed by her husband. The same pastor buried her.

Domestic violence is more often than not condoned by religious institutions and women are made to carry the blame and the shame for men's violence. Women within these religious institutions uphold the ethos of those institutions and will participate in the blaming and shaming of the own sisters.

Women who are subjected to control by their partners are robbed of their power and are unable to make independent decisions leading to feelings of helplessness and disempowerment which perpetuates the cycle of violence. Women struggle intensely when they are finally able to leave an abuse relationship to gain back their self- image and their Self- esteem.

They may continue to function poorly for a long while which makes the need for counselling and psychological therapy very important.

DOMESTIC VIOLENCE AND THE IMPACT ON WOMEN'S HEALTH

Domestic Violence results in many health conditions and leads to poor health outcomes for women who suffer from this problem. Problems range from slight to sever. Some victims report headaches, gastrointestinal problems, a lower immune system, vulnerability to respiratory ailments, depression, mental health problems and a range of reproductive health problems. Women develop lifelong conditions such as high blood pressure, high levels of cholesterol, diabetes and even arthritis because of the stress of domestic violence. These illnesses are rarely traced back to the phenomenon of domestic violence.

DOMESTIC VIOLENCE AND HIV/AIDS

HIV infections are very prominent in the South African context. Women with violent or controlling male partners are at increased risk of contracting HIV. A survey among 1,366 South African women showed that women who were beaten by their partners were 48 percent more likely to be infected with HIV than those who were not (Dunkle, et al., 2004)ⁱ

It has also been shown that many new infections are the result of multiple concurrent partners with males being at the forefront of this kind of sexual behaviour. Women in customary marriages

expressed feeling vulnerable to sexually transmitted infections including HIV because of multiple marriages. Older women are finding that they are infected because some men feel that it is acceptable to have more than one partner. Many women become infected as a result of this kind of behaviour.

My husband was my first boyfriend. I have never had sexual relations with anyone else while he on the other hand loved many women. Yet, when I tested positive for HIV, he blamed me. Not only did he blame me, but he threw me out of our home and kept the children. No one wanted to support me. I was left with no medical aid, no place to stay etc. He convinced the social workers that I was at fault; that I was a bad mother that I was causing trouble in his life. I lost everything. Because he is an important man in government, everyone believed him.

M. White was the first woman to win a case against the state in a case that is considered a landmark case in the country. Marilyn had a protection order against her husband for his violence towards her. He came to harass her one night. She called the police. The came and took him away but released him later that night rather than effecting the warrant in breach of the protection order. He went back to the house and raped Marilyn. He was HIV positive. Fortunately for her, she did not contract the HIV. Her ex husband has since died as a result of complications from AIDS. M. White won the case which was unsuccessfully appealed by the Minister of Police. She was paid out but the finalisation took some 7 years in the courts and caused her great distress.

WOMEN AND PREGNANCIES

Many women report that they fall pregnant due to domestic violence. Their partners refuse them the use of contraceptives and get violent when the women fall pregnant. Some abusive husbands force their partners to have abortions while others force them to have multiple pregnancies even if those pregnancies are detrimental to their health. Women who cannot fall pregnant suffer the most.

My sister had just graduated with her degree when her husband demanded a baby from her. She tried and tried but could not fall pregnant. After an intense quarrel about him wanting a baby, he took a gun and shot her dead. He was never sent to jail because he claimed that she attacked him and he defended himself. Sister of the victim – Idutywa Eastern Cape

Women often do not get medical care because they are denied it by the controlling partner or because they fear the health professional “finding out”. As a result, their injuries can intensify leading

to a severe health outcome or even a disability. Many women are known to be dying as a result of domestic violence, but it is not reported as such. Head injuries are prevalent in domestic violence cases and these lead to memory loss, impaired thinking, mood and behaviour.

The niece of one of the writers of this Inquiry died as a result of her head being bashed against a wall by her husband. The hospital report said that she died of a brain haemorrhage. We know that in South Africa a woman is killed every six hours but we also know that many women are dying as a result of domestic violence but these deaths are not reported as such.

DEPRESSION, ANXIETY AND POST-TRAUMATIC STRESS DISORDER

Survivors of domestic violence are vulnerable to mental health disorders that are direct results of their victimization. Depression and severe anxiety are common problems for victims of DV relationships. These develop within the adverse conditions of violence and control, but can continue to be clinically significant when the relationship is over. Survivors may also develop Post-traumatic Stress Disorder which is a persisting reaction to trauma. Many women will require mental health treatment for symptoms of such disorders along with counselling that deals specifically with domestic violence recovery.

SUBSTANCE USE

Victims of domestic violence are at risk for developing problematic substance use to cope with ongoing abuse as well as the after effects of abuse. Prescribed medicines are often used to dull the pain of the abuse and this can lead to addictions which in turn can lead to the use of illegal drug usage.

KILLING OF WOMEN IN DOMESTIC VIOLENCE DISPUTES

Most women who are killed are killed by their intimate partner; usually after the relationship has broken down. Some men have a tendency to kill the estranged partner while a significant number of men kill the woman and her children and in some cases, themselves. Domestic violence is almost always a factor in these deaths. Estranged partners have killed women in their homes, at their work places and often in front of family or friends. There have been reports in the media of men killing friends of their estranged partners in their attacks although this is not a widespread phenomenon.

Most murdered women 'killed by partners'

2012-08-21 22:18

Pretoria - Most South African women are killed by their husbands, boyfriends or same sex partners, a Medical Research Council (MRC) study has found.

"In South Africa every one to two women killed are killed by her partner," said MRC gender and health researcher Naeemah Abrahams on Tuesday.

The study, giving comparative figures of 1999 and 2009, indicated an overall decrease in female homicides as well as for intimate female homicides, referred to as femicides.

"Intimate femicide has become the leading cause of female homicide in South Africa," the report said.

The study also showed that rape homicides, where evidence of being raped was present, had proportionately increased.

Abrahams said the decrease in overall figures came as no surprise because police data indicated homicides had decreased in South Africa in last 10 years.

"We expected to see the same trend in female homicides, which make us confident in our data."

However, a comparison of all the figures indicated that intimacy homicides declined less."

SAPA (South African Press Association)

IMPACT OF DOMESTIC VIOLENCE ON CHILDREN

Children who witness domestic violence suffer severe consequences. Neglect of children by parents in abusive relationships is the first impact. Very young children, suffer retardation of brain development as the brain learns only to detect and respond to the domestic violence. This has a long term impact on their development and wellbeing. There are cognitive, developmental, emotional, physical and psychological impacts that negatively affect all children who witness their mothers being abused or who are part of domestic violence experiences. A significant number of children are witnesses to the killing of their mothers by their fathers in South Africa. This has a profound impact on those children especially in the light of the fact that the country does not have the sufficient professional skills to provide the children with on-going psychological therapy and support. In smaller provinces and areas, the lack of psychologists and social workers is huge due to the denial of educational opportunities to black people in apartheid.

IMPACT ON FAMILIES

Domestic violence has a negative impact on families. Women in domestically violent relationships suffer shame and blame from family members and families themselves will hide the violence due to the shame felt collectively. This leads to isolation of the survivor, her children, even the perpetrator can be isolated. The family is then deprived of normal social interaction in their communities. This leads to the development of anti- social behaviour as it destroys the support mechanisms for the family. The collective impact of high levels of domestic violence tears at the fabric of society leading to fragmentation of communities and societies as a whole. Children run away from their homes to escape the violence. They leave school because there is no support for them from their parents or homes and they are then vulnerable to exploitation on the streets and in communities.

Many children who have left home, engage in early sexual activity including that which has elements of violence to it. This In the South African context leads to high levels of teenage pregnancies, sexually transmitted infections and HIV which is why these two problems exist in high levels amongst young people. Ultimately, the school drop outs and the street children problem and teenage pregnancies all impact on the life- long opportunities of those affected so that the threat of poverty is increased for them.

Many children learn to solve problems using violent means. Girl children who experience domestic violence are prone to specific challenges, which includes, vulnerability to incest. Many men rape their daughters as a mean of humiliating their wives and as a means of control over the girls. Girl children also become vulnerable to prostitution and there is growing evidence that they are also vulnerable to being trafficked. Girl children who witness or experience violence at a young age are thrust into what is Liz Kelly of the United Kingdom calls “A continuum of violence”.

This refers to the vulnerability to other forms of violence that is set up by childhood experiences.

A young woman who sought counselling from one of the women's organisations in the Western Cape, reported that her father was terribly abusive towards their mother. He then raped each of his two daughters when they were just 9 and 10 years old. This young woman ran away from home when she was 15 years old to escape the incest. She was given a lift by a man and he raped her too. Later on she was recruited into prostitution as a means of survival. After a long intervention with this women's organisation, she was employed in an administrative position and later married and now has her own business.

WHAT ARE THE CONTRIBUTORY FACTORS

A study into gender base violence conducted by Desiree Lewis for Masimanyane study reports on the writing of Amina Mama

"In contexts where gender identities overlap with colonial ones, patterns of dehumanisation become even more complex. If colonialism and racism assume that certain persons are culturally and morally inferior, and gender hierarchies assume that women are wholly inferior, then the status of colonised or black women is especially diminished. This status is deeply embedded in different cultural images and texts. In turn, these cultural texts provide models for subjects to define themselves and their place in the world. As systems of representation and self-identification, therefore, both colonial and gender discourses actively perpetuate domination and corresponding acts of violation and abuse".

Furthermore the study asserts

"Apartheid engendered a culture of obedience, fear and deference policed by the ever-present threat of force and punishment. It also led to racial and gender identities intersecting in complex ways. While gender divisions in the domestic sphere assumed the dominance of men, contradictory power relations were played out in the public sphere. In the context of these, black men were designated as rightless and voiceless beings. In his survey of masculinities in Southern Africa, Robert Morrell uses the concepts of {hegemonic} and {subordinate} masculinities to describe ways in which gender is affected by racial lines of power (2001)."

Such situations inevitably affect men's sense of themselves. In much the same way that poverty and unemployment undermine certain men's assumptions of authority, so does racial subordination

compromise certain men's assumptions of dominance. As Fanon (1986) has shown, the resulting psychological complexes are tremendous: they inevitably affect dynamics within families and relations between subordinate men and subordinate women. For certain men, the domestic sphere can become an alternative site for demonstrating ascendancy or for displaced anger.

Horrifying cases of femicide or child abuse in the first decade of democracy need to be examined in relation to a history where men's aggressive authority and absolute entitlement over women was taken to be "normal", where the obedience of women and children in tightly controlled families mirrored the broader social and political organisation of rigid authoritarianism.

Escalating gender-based violence is the symptom of an entrenched gendering process through which South African men, both black and white, have been taught to believe in their unquestionable authority, and their absolute right to control women and children. There has been growing awareness in recent years that this learned masculinity is a central dynamic in fuelling gender-based violence. We see this in studies of masculinity geared towards activism, such as Mager and Blake's *Masculinities in the Making of Gendered Identities: A Getnet Guidebook for Trainers* (2001). As shown below, we also see it in the rise of programmes that centralise men's roles in transforming a generic culture of violence.

PART 1 - CONCLUSION

Domestic violence is clearly a serious problem in South Africa. It is however an almost invisible problem in that the full extent of this phenomenon is not really known. There is enough evidence that domestic violence has a severe impact on women's lives and on the lives of their children, their families and their communities. Domestic violence is eroding their rights to live with dignity, with respect, to be protected, and to be safe and secure at all times and in all spheres of their lives. In too many cases, women are losing their health and even their lives to domestic violence. A drastic change in state response is required to reduce the high levels of domestic violence and to fulfil the state's duty to protect the rights of all its citizens.

PART 2 – LEGAL FRAMEWORK AND STATE RESPONSES

The state has made many efforts to address the high levels of violence against women in the country. The constitution is the most important legal document as it sets out the principles and values that the state subscribes to. South Africa has one of the most progressive and far reaching constitutions in the world because. The South African Constitution contains a Bill of Rights, which enshrine and protects fundamental human rights, including the right to be free from violence. Section 7 of the Constitution obliges the South African state to respect, protect, promote and fulfill the rights in the Bill of Rights, hence placing a positive duty on the state to realize the rights contained in the Bill of Rights.

Section of the Constitution deals with Equality which is proected by section 9 of the constitution of the Constitution:

CHAPTER NINE INSTITUTIONS

Chapter Nine of the Constitution allows for the establishment of various bodies and institutions whose role it is to oversee implementation of State laws and policies and very importantly to monitor and evaluate State actions and to report non action for remedial purposes. Some of those bodies focusing specifically on women includes the Commission on Gender Equality, the South African Human Rights Commission, the Public Protector, whose role it is to oversee or report on issues related to women and their experiences of equality within society, developed a variety of responses to domestic violence. We have several pieces of legislation that protect women and girls with the foremost being the Domestic Violence Act of 1998. The following legislation can be applied to various aspects of domestic violence.

WOMEN'S MINISTRY

In the 2009 general election a ministry called the Ministry for Women, Children and People with Disabilities was established. This was an attempt by government to demonstrate its commitment to addressing the concern of women. Women were not happy and remain cautious about this development because some felt that this Ministry infantilizes women, set them apart as a “special group” rather than acknowledging them as making up more than 50% of the population and being respected as that and treated as a significant group within the country.

The establishment of this government department has had a significant impact in that some other bodies were dismantled.

There was a committee within parliament known as the Joint Monitoring Committee on the Improvement in the Quality of Life and Status of Women which oversaw the workings of Parliament from an equality perspective. We saw the dismantling of the Independent Complaints Directorate who investigated police who failed to adhere to due diligence standards or who committed acts of criminality.

Some tension has arisen between the ministry and the commission on gender equality and this tension can lead to the erosion of further gains made by women in the country.

The Domestic Violence Act is considered globally to be a forward looking law and was premised on the CEDAW convention which is cited in the preamble.

The act is fairly progressive in that it defines domestic violence in accordance with CEDAW, it provides various mechanisms that can protect women if properly applied and it even makes provision for the perpetrator to be excluded from the family home and pay maintenance until the case is brought before the courts.

The Act is comprehensive and takes into account all aspects of protection for the applicant. However, the Act is gender neutral in that it does not specifically speak to women who form the majority of people who suffer from domestic violence and to this end, men have learned to manipulate the act to their own benefit. For Example: A man beats up his wife. She defends herself. He goes to the police station and reports that he has been abused by his wife and she is arrested. Men apply for protection orders against their partners when in most instances, they instigate the violence.

EFFECTIVENESS OF STATE ACTION

Domestic violence is dealt with by the South African Police Services who are the first port of call for women wanting to report acts of domestic violence

NATIONAL POLICE INSTRUCTION REGARDING DOMESTIC VIOLENCE 1999

This National Instruction seeks to provide clear instruction and direction to police members on how they should respond to a complaint of domestic violence in order to meet the obligation in the

Domestic Violence Act. The National Instruction on Domestic Violence (NIDV) lists responsibilities and duties on police in cases of domestic violence complainants.

Paragraph 3 of the NIDV gives the Station Commissioner the responsibility of identifying local organisations that are willing and able to offer counselling and any other support, including medical services and shelter, to complainants of domestic violence. Once these organisations have been identified the Station Commissioner must liaise with them too establish the specific services rendered, time when same is rendered, costs of services and the contact details of the organisations. Once this has been established the Station Commissioner must compile this information as well as information 'relating to hospitals, ambulance services and medical practitioners that maybe utilised to provide medical treatment to complaints.' This compilation must be updated every six months.

Paying attention to the particular circumstances in the station area and available resources, the station commissioner must issue station orders that mandates members under his command to inform complaints about the lists above and how to inform complainants of same. In addition, these orders should specify how station members will assist complainants to gain access to the services once requested by the complainant. The station commissioner is give discretionary powers to issue orders generally relating to the treatment of victims of domestic violence.

The Station Commissioner must ensure that the Community Centre is provided with the Community Service Centre with a copy of The Domestic Violence Act and regulations thereof, The NIDV, lists of organisations above and station orders in relations to Domestic Violence. In terms of Paragraph 4 of the NIDV, the commander of the Community Service Centre (hereafter 'the Centre' must ensure that these documents are always available in the Centre.

In the case of a domestic violence matter being reported, either telephonically or in person, the Centre's Commander or person answering the phone must ensure that a police vehicle is dispatched to attend to the complaint without any unreasonable delay. The crew attending must be informed of the facts of the matter particularly if there has been violence or threatened violence alleged, the particulars of the complainant.

Where a criminal charge is laid, the member receiving the complaint has a duty to open a docket and register it for investigation. In addition, paragraph 10 lists the remedies available to the complainant which are laying a criminal charge and/or the right to apply for a protection order.

Paragraph 5 of the NIDV states that a member dispatched to attend to the scene of the domestic violence must primarily establish if the complainant is in any danger after which the member must take reasonable measures to make sure the scene is secured and afford the complainant protection from any danger. When securing the scene of the domestic violence, paragraphs 6 of the NIDV cautions the members on scene to be careful and discourages them from attending to the scene alone because of the volatility of domestic violence.

Paragraph 6 further states that the complainant should be interviewed and ascertain if he/she is in danger and if so then the member must offer protection. If there is no danger towards the complainant then the member must in terms of paragraph 5(2) of the NIDV render assistance to the complainant as reasonably required, assist the or make arrangements for the complainant to her suitable shelter and/or medical treatment, then the member should then investigate the alleged incident of domestic violence.

In terms of paragraph 6(4) of the NIDV if the complainant is inside a building or structure, it must be established if there is any reason to suspect that an offence has been committed against the complainant. If so then the complainant may furnish more details on the offence after which the member will then exercise his/her powers to enter premises and building to interview and take a statement from the complainant in order to properly ascertain the status of the complainant and the assistance that can be offered to him/her.

This however does not authorise the member to forcibly enter the premises, instead the members should attempt to communicate with the people inside the dwelling to determine if any of the persons are in danger. However if the police member has reasonable suspicion that the complainant or any other person inside the dwelling is in imminent danger, force may be used to enter premises in order to offer protection. If no such reason then it must be noted.

Paragraph 6(7) of the NIDV points out that part of securing the domestic violence scene may include the arrest of the respondent in terms of paragraph 3 of the Domestic Violence Act. Read together with section 40(1)(q) of the Criminal Procedure Act 51 of 1977, the member is empowered to arrest without a warrant should there be reasonable suspicion that an offence has been committed. In addition should there be firearms involved or allegations that firearms have been used or threatened to be used, then the member must search the place or persons and seize any arm or ammunition and determine if it is licensed, if not then include such offence in docket in terms of paragraph 6(8) and(9).

In the event that the respondent has contravened any the orders contained in the protection order, the complainant may give any member the arrest warrant together with an affidavit stating that the respondent contravened the protection order. In terms of paragraph 11 (2) of the NIDV, once these have been handed to the member and the member is convinced that the complainant may suffer imminent harm due to the alleged breach of protection order, then the respondent must be arrested. Paragraph 11(2)(c) also lists the following as factors that must be considered in determining if the member will suffer harm: risk posed to the safety, health or well-being of the complainant, seriousness of the alleged conduct and the elapsed time since the alleged conduct.

If there are insufficient grounds to arrest the respondent, the member must hand the respondent notice with the first court date and complete the certificate of notice in terms of Paragraph 11(2)(d). A duplicate must be placed in the docket. Police may be required to serve an interim or final protection order, if so ordered then it must be served without delay as it is only binding once it has been served.

Paragraph 12 places an obligation on police to record any reported incidents of domestic violence and the police's responses in the Domestic Violence Register and the station commissioner must see to the accuracy of the records kept. Separate files with separate file numbers must be opened for the pocket book and for every protection order and warrants of arrest received.

The NIDV in Paragraph 13, like section 18 of the Domestic Violence Act deals with complaints related to non-compliance of police. Paragraph 13(2) states that the Commander has the responsibility to institute disciplinary action against a member who fails to comply with an obligation imposed in terms of the Domestic Violence Act or the NIDV. In the event that the Commander is of the opinion

that disciplinary action should not be taken then he/she must apply to the ICD for exemption. This application should be accompanied by a full report stating the reason for exemption application and must be forwarded to the offices of the Area Commissioner within 30 days of receipt of the complaint.

The Area Commissioner should send the report to the Provincial Commissioner within 14 days if he/she also of the opinion that there should be no disciplinary action. If the Provincial Commissioner agrees then he/she must immediately submit such an application to the provincial office of the ICD. The ICD has an obligation to advice on the status of the exemption to the Provincial Commissioner within 30 days of receipt of application.

The Station Commissioner has an obligation to keep a record of the number of complaints received against members under his/her command in respect of failure to comply with the Domestic Violence Act's or the NIDV, the disciplinary proceedings instituted and steps taken as a result of recommendations made by the ICD.

In spite of the efforts by the state to provide women with support and protection against domestic violence, research shows that the implementation of the mechanism are poor.

Lisa Vetton et al formely of Tshwaranang Legal Advocacy Centre conducted a study on women seeking help from the police at Acornshoek in Mmpumalanga province. The focus was on police responses to domestic violence cases reported to police stations at Acornshoek. In the table below, we see that police actions do not follow the national guidelines in most cases and police use tier own analyses and thinking to a situation.

| Table 1: Resolutions of domestic violence incidents recorded in the OB | |
|---|-------|
| | N=373 |
| SAPS cannot find perpetrator | 32.7% |
| No record of follow up | 27.9% |
| SAPS warned perpetrator | 14.5% |
| Victim did not want to pursue criminal charges | 11.3% |
| Case opened | 6.7% |

| | |
|---|-------|
| SAPS asks family member of perpetrator to tell perpetrator to behave / fix problem | 6.2% |
| Family/couple say they will resolve the matter | 5.9% |
| SAPS advises victim to obtain a protection order | 4.8% |
| SAPS cannot find victim | 4% |
| SAPS asks family/families/couple to resolve the problem | 1.9% |
| Other | 11.5% |
| | |

Police are often found to be subverting the law by offering a “warning” to a perpetrator or the police attempt to use mediation to resolve family dispute. All of this counts against the survivors of domestic violence and in some cases has caused the survivor irreparable harm and even led to some deaths.

We called the police when we heard our neighbour’s husband fighting with his wife and threatening to kill her. They came and took him away. Around 2am we woke up to the smell of smoke and when we looked out of the window, our neighbour’s house was on fire. We rushed outside to stop the fire and realised that our neighbor was in the house. Her husband was there. He was shouting that he had promised her would kill her. She died in that fire. The police had warned the man and then released him. He returned to his wife’s home and used petrol to set it on fire.

The South African Police Services have come under fire from Members of Parliament every year for their poor responses to domestic violence. There has been little improvement over time to these responses. In August 2012, the Port Folio Committee on Safety and Security that oversees the police were furious that once again the annual report reflected poor performance by the police in respect of domestic violence. The impact of this is that women are left to face terrible violence from their partners and former partners. Women have lost confidence in the police and many women refuse to report act of violence to the police.

STATE OBLIGATIONS

As a party to the Convention on the Elimination of all form of discrimination against women, the South African government has a duty and an obligation to ensure the safety and security of its citizens. To this end it is obligated to enact and adopt various legislation, policies and regulations in order to meet its duties and obligations. These include the following:

I. International obligations

Convention on the Elimination of All Forms of Discrimination Against Women (Ratified by South Africa on 15 Dec 1995)

Gender-based violence has been recognised as a form of discrimination ‘that seriously inhibits women’s ability to enjoy rights and freedom on the basis of equality with men.’ In South Africa context these rights would include the right to life, the right not to be treated or punished in a cruel, inhuman or degrading way, the right to freedom and security of the person, the right to equality and equal protection and benefit of the law. There can be no doubt that domestic violence is an example of gender-based violence.

The definition of discrimination in CEDAW includes gender-based violence, ‘that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.’

Despite the fact that gender-based violence is not specifically mentioned in the Convention, its existence violates some provisions of this Convention. Articles 2 and 3 of CEDAW establish an obligation on state parties to eliminate discrimination in all its forms. Traditional attitudes which regard women as subordinate to men or as having stereotyped roles propagate widespread practices involving violence ‘which may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.’

In addition, gender-based violence puts the health of women at risk and in terms of Article 12 of CEDAW places an obligation on state parties to provide equal access to health care. This implication here is that should a woman be injured or harmed in any way during domestic abuse the state has an obligation to provide her access to health care services to prevent any further violation to her well-being and rights. Article 16 of CEDAW also necessitates state parties to eliminate gender discrimination in matters relating to marriage and family relations.

South Africa as a state party to CEDAW has obligations and duties towards the elimination of all forms of discrimination against women. As stated above domestic violence is such a form therefore the Convention places obligations that should not be taken lightly. These are elaborated upon in General recommendation 19.

General Recommendation No. 19 (11th session, 1992)- Violence against women

Specific recommendation

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends that:

- (a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;
- (b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;
- (c) States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence;
- (d) Effective measures should be taken to ensure that the media respect and promote respect for women;

- (e) States parties in their reports should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result. They should report on the measures that they have undertaken to overcome violence and the effect of those measures;
- (f) Effective measures should be taken to overcome these attitudes and practices. States should introduce education and public information programs to help eliminate prejudices that hinder women's equality (recommendation No. 3, 1987);
- (g) Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation;
- (h) States parties in their reports should describe the extent of all these problems and the measures, including penal provisions, preventive and rehabilitation measures that have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described;
- (i) Effective complaints procedures and remedies, including compensation, should be provided;
- (j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence or coercion in the workplace;
- (k) States parties should establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;
- (l) States parties should take measures to overcome such practices and should take account of the Committee's recommendation on female circumcision (recommendation No. 14) in reporting on health issues;

- (m) States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control;
- (n) States parties in their reports should state the extent of these problems and should indicate the measures that have been taken and their effect;
- (o) States parties should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities;
- (p) Measures to protect them from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers;
- (q) States parties should report on the risks to rural women, the extent and nature of violence and abuse to which they are subject, their need for and access to support and other services and the effectiveness of measures to overcome violence;
- (r) Measures that are necessary to overcome family violence should include:
 - (i) Criminal penalties where necessary and civil remedies in cases of domestic violence;
 - (ii) Legislation to remove the defence of honour in regard to the assault or murder of a female family member;
 - (iii) Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programs;
 - (iv) Rehabilitation programs for perpetrators of domestic violence;
 - (v) Support services for families where incest or sexual abuse has occurred;

- (s) States parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken;
- (t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:
 - (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
 - (ii) Preventive measures, including public information and education programs to change attitudes concerning the roles and status of men and women;
 - (iii) Protective measures, including refuges, counseling, and rehabilitation and support services for women who are the victims of violence or who are at risk of violence;
- (u) States parties should report on all forms of gender-based violence, and such reports should include all available data on the incidence of each form of violence and on the effects of such violence on the women who are victims;
- (v) The reports of States parties should include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.

South Africa has in fact enacted legislation, guidelines and instruction on how to deal with domestic violence cases, this alone is not enough, the state has to take other positive steps in order to combat domestic violence like prosecution, arrests, training of staff dealing with domestic violence like police officers, magistrates and clerks of court and provision of health care services like counselling to the victims all of which are currently in a state of disarray..

II. Regional Obligations

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (RATIFIED BY SOUTH AFRICA ON 09/07/1996)

In the majority of cases women are the victims of Domestic violence and it should therefore be seen as a form of gender-based violence which limits the ability of women to exercise their right. The Charter has further provisions that are binding in on South Africa as signatories. The obligations:

- **Article 2** of the Charter provides that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.
- **Article 4** states that '[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'
- **Article 5** provides that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'
- **Article 6** states that '[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law.'
- **Article 19** like the Constitution of South Africa acknowledged that '[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

Domestic abuse in its nature is violent, degrading and in some cases life threatening. The victims' dignity and right to equality is not respected and adhered to. It undermines the rights that this Charter sought to protect and advance. The Charter therefore compels government to take positive steps to ensure the protection of women and their rights.

PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (RATIFIED BY SOUTH AFRICA ON 17/12/2004)

In line with section 10 of the Constitution of South Africa which recognises human dignity as both a value that underlies the Constitution and a right in the Bill of Rights, Article 3 states that 'Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.'

Article 3(4) provides that 'State Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.' The obligations of the state parties are not limited to enacting legislation instead they are required to 'adopt and implement appropriate measures' that guarantees the protection of women's rights. Therefore when we evaluate the obligations we need to ensure that we also examine other measures taken by the state or that the state should take including enacting legislations.

Like the constitution of South Africa *Article 4* guarantees every woman the respect of her life, integrity and security of the person. *Articles 4* goes as far as listing a number of obligations that state parties must undertake including:

- a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;*
- b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;*
- c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;*
- d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;*
- e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;*
- f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;*

g) *provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;*

Again, the obligations for state parties are quite extensive and go beyond just enacting legislation and prosecuting perpetrators or simply promoting specific rights of women. For example c, d, f and i above create obligations on state parties to attempt to understand the causes of violence against women, discourage cultural and traditional practices that embolden violence against women. These are positive obligations on the state parties to explore and research the cause of domestic violence in order to address the causes as a way of combatting violence.

In the event of violation of women's rights in this Protocol, Article 25 provides that 'States Parties shall undertake to provide for appropriate remedies to any woman whose rights or freedoms, have been violated and ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.' The repetition of the word 'competent' suggests an obligation on the state parties to adequately provide training for the judiciary, administrators and any other relevant authorities dealing with cases of violence against women. In the context of domestic violence training would have to be provided to the Magistrate, Clerks of the Court, prosecutors, police officials and any other stakeholders.

SADC PROTOCOL ON GENDER AND DEVELOPMENT

Part six of the Protocol addresses gender based violence and it creates an obligation on state parties to enact and enforce legislation prohibiting all forms of gender based violence. Gender based violence is defined in the protocol as 'all acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.'¹

Intrinsic to the obligation above is the requirement on state parties to combat the following in order effectively prohibits and combat gender based violence:

¹ Article 1 of SADC Protocol on Gender and Development.

- State parties must take measure including legislation where appropriate, to discourage traditional norms and cultural practices that exacerbate gender based violence² and sexual harassment.³
- State parties shall provide accessible information on services available to survivors of gender based violence. The following services should be made available to victims, effective and responsive police, prosecutorial, health, social welfare and other services to redress gender based violence. Training must be made available to the service providers, must be community sensitization programmes regarding services must be done

State parties should ensure that perpetrators of gender based violence, including domestic violence, rape, sexual harassment and other forms of violence are prosecuted by a court with competent jurisdiction. The protocol goes further to state that ‘laws on gender based violence provide for the comprehensive testing, treatment and care of survivors of sexual offences, which shall include emergency contraception, ready to access post exposure prophylaxis at all health facilities to reduce the risk of contracting HIV and prevent the onset of sexually transmitted infections.’⁴

The protocol mandates state parties to ensure that gender based violence cases are conducted in a gender sensitive environment. This is important because experiences of victims of violence influences the attitudes of potential victim’s attitude should they become victims. In addition to the above, the state has an obligation to provide ‘counselling services, legal and police units that provide dedicated and sensitive services to survivors of gender based violence’⁵

The state’s obligation is not only limited to victims of gender based violence, the protocol obligates the state to put in place mechanisms that facilitate social and psychological rehabilitation of perpetrators of gender based violence.⁶

² Article 21 of SADC Protocol on Gender and Development.

³ Article 22 of SADC Protocol on Gender and Development.

⁴ Article 20 of SADC Protocol on Gender and Development.

⁵ Article 20(7) SADC Protocol on Gender and Development.

⁶ Articles 20(4) SADC Protocol on Gender and Development.

CONCLUSION

It is the consortiums view that the information provided in this document fulfills the requirements of the Optional Protocol to CEDAW under article 8. We argue that women are experiencing grave and systematic violations of their human rights because of the extremely high levels of domestic violence. We acknowledge that the state has put mechanisms in place to address violence against women generally inclusive of domestic violence but the evidence is strong through research and women's own testimonies that indicate that state actors fail to adhere to due diligence standards at all times when addressing domestic violence.

We believe that the country needs a new analysis and new approaches to effectively deal with this problem and to ensure that all women live free of all forms of discrimination against them including that of domestic violence.

We request the CEDAW committee to conduct an inquiry into the high levels of domestic violence in South Africa with a view to finding ways to eradicate this form of oppression

RIGHTS OF VICTIMS

In terms of the Domestic Violence Act victims have the following right:

- In terms of Section 4(5) victims of domestic violence have the right to bring an application for a protection order after hours if the court is satisfied that the applicant will suffer undue hardship if the application is not dealt with immediately.
- **Section 7(4)** court may order the respondent to pay emergency monetary relief in light of the financial needs and resources of the complainant and the respondent.
- **Section 7(7)(a)** applicant may not be refused a protection order on the basis that other remedies are available to them.
- **Section 8(4)(a)** report violation of the protection order to SAPS and may hand in arrest warrant together with protection order to SAPS.
- **Section 10** may apply for variation or setting aside of protection order.

POLICE OFFICER/PEACE OFFICER'S OBLIGATIONS

The Act places certain obligations and duties on the state. More detailed responsibilities and obligations are discussed under the NIDV section below but for the purposes of the Act the following are applicable:

- **Section 2 of the DVA** – states that at the scene of DV or as soon as the incident of DV is reported, the officer MUST render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
- **Section 3 of the DVA:** peace officer may arrest without an arrest warrant any respondent at the scene of domestic violence when there is reasonable suspicion that an offence related to violence has been committed.
- **Section 8(4)(b)** if it appears to SAPS when a violation is reports that the complainant ay suffer imminent harm because of the breach of PO then the member MUST arrest the respondent.
Section 8(4)(c)Should there be no evidence then or insufficient grounds for arrest then SAPS

should give notice calling upon the respondent to appear before court on the specified date.

Section 8(4)(d) then copies of this notice would then be forwarded to the clerk of court.

- **Section 8(6)** SAPS must inform the complainant of his/her right to simultaneously lay a charge against the respondent if applicable.
- **Section 9(2)** SAPS must receive seized weapons.
- **Section 18** stipulates that failure by a member of the South African Police Service to comply with an obligation imposed in terms of this Act or the National Instructions referred to below, constitutes misconduct as contemplated in the South African Police Service Act, 1995, and the Independent Complaints Directorate, established in terms of that Act, must immediately be informed of any such failure reported to the South African Police Service. Unless the ICD directs otherwise in any specific case, the South African Police Service must institute disciplinary proceedings against any member who allegedly failed to comply with their obligations.

The Independent Complaints Directorate must, every six months, submit a report to Parliament regarding the number and particulars of matters reported to it in terms of subsection (4) (a), and set out the recommendations made in respect of such matters. The National Commissioner of the South African Police Service must, every six months, submit a report to Parliament regarding steps taken as a result of recommendations made by the Independent Complaint Directorate.

CLERKS OF COURT'S OBLIGATIONS

As clerks are the crucial to the application for a protection order the Act places obligations on the clerks. The obligations are as following:

- **Section 4(2)** clerks of the court must inform an applicant who does not have legal representation of the following:
 - The relief provided by the Act
 - The right to lodge a criminal complainant against the perpetrator where a criminal offence has been committed
- **Section 6(5)** when the protection order is issued the clerk of the court MUST cause the original of the order to be served on the respondent, the a certified copy of the order together with the arrest warrant is given to the complainant

- **Section 6(6)** the clerk should also forward certified copies of the protection order and the warrant of arrest to the police station of the complainant's choice.
- **Section 8(3)** must issue further arrest warrants after the complaint applies for it in the prescribed manner in the event of the arrest being executed or lost.
- **Section 10(3)** the clerk of court must forward notice of variation or setting aside of order to both the applicant and respondent.

COURT'S OBLIGATIONS

The Family Court (Magistrates Court) and Regional Magistrates Courts has jurisdiction over matters pertaining to the issuing of protection orders and addresses violations of the protection orders. Further details are provided for under the 'Guideline for Magistrate' section below. The responsibilities and obligations on Magistrates in terms of the Act are the following:

- **Section 5(1)** – courts must consider the application as soon as is reasonable possible
- **Section 5(2)** – should the court be satisfied that there is a prima facie case of DV that respondent is committing or has committed DV and the applicant will suffer undue hardship even though there has not been notice to respondent, the court must issue an interim protection order.
- **Section 6(1)** if the respondent does not appear on the return date and the court is satisfied that the IPO has been served on the respondent and there is a prima facie case that the respondent has committed domestic violence then the court
- **Section 8(1)** when the court makes an order it must make an order authorising the issuing of an arrest warrant but suspend execution of the arrest warrant on condition that the respondent complies with the Act
- **Section 9(1)** the court must order SAPS to seize any arms or dangerous weapons in the control of the respondent if there is evidence to suggest that the respondent threatened or expressed an intention to cause harm to the complainant and possession of such is not in the best interests of the complainant.

PROSECUTORS

Section 18 no prosecutors shall refuse to institute or withdraw a charge in DV cases unless authorised to do so in writing.

THE GUIDELINE FOR THE IMPLEMENTATION OF THE DOMESTIC VIOLENCE ACT FOR MAGISTRATES

The Preamble of the Guideline for the Implementation of the Domestic Violence Act explicitly states that the guidelines are not intended to limit judicial independence or discretion. The preamble further provides that the guideline should be read with the legal obligations of Magistrates prescribed by their governing Act itself.⁷

MAGISTERIAL OBLIGATIONS

The guiding principles create a number of enumerated obligations for magistrates presiding over cases of domestic violence. Magistrates are under an obligation to consider the following factors:

- a) The treatment of each case seriously, fairly, expeditiously and with sensitivity to race, class, gender, and culture of the parties involved;
- b) Treat each case with the appropriate urgency required;
- c) Consider the potential lethality of domestic violence;
- d) Fully interrogate and consider each case;
- e) Fully consider the “perceived risk” to the applicant;
- f) Deal with applications for Protection Orders promptly;
- g) As applicants may make after-hours applications for Protection Orders as provided for in the Domestic Violence Act, provision should therefore be made to ensure that magistrates are available to grant after hours applications;
- h) Avoid minimising the abuse or the perceived risk that the applicant believes she is in

⁷ The Magistrates’ Court Act 32 of 1944.

- i) If the applicant withdraws an application for a Protection Order (from hereon P.O), such withdrawal should never be used against the applicant if she applies for a subsequent order.
- j) The respondent should have a fair opportunity to file an opposing affidavit or to respond to the application orally in court.
- k) As a norm, magistrates should:
 - Interview the applicant and where necessary, obtain *viva voce* evidence from her
 - The magistrate should fully record the proceedings including the rights explained to the parties.
 - The magistrate should only sign the warrant of arrest when proof of service on the respondent is made available.
- l) Magistrates should make orders in terms of s7(6) regarding access to or contact with minor children ancillary to a protection order as envisaged in section 7(1) of the Act.
- m) Magistrates should deal with domestic violence matters *in camera*.
- n) Where making provision for the removal of the respondent, Magistrates should consider *inter alia*:
 - The safety, health and well-being of the applicant, child(ren) or any other person affected by acts of domestic violence;
 - The applicant's perceived risk of further harm or violence;
 - The personal or material interest of the applicant; and
 - The best interest of any child(ren) affected;
- o) If a child applies to court for a protection order, the court must consider the application, and if it deems fit, grant an interim protection order. If the court finds the child to be a child in need of care, the court must then refer the child to the Children's Court in terms of s11(1)(c) of the Child Care Act.

- p) When an application is brought on behalf of the applicant, the presiding officer should bear in mind that:
- The applicant must have a material interest in the well-being of the complainant;
 - Such application must be brought with the written consent of the complainant unless the exceptions in section 4(3)(a) to (d) are applicable.
- q) When considering emergency monetary relief in terms of section 7(4):
- The emergency monetary relief should be preceded by a financial enquiry on the applicant's needs and the respondent's ability to satisfy such need; and
 - The magistrate should explain the nature and the importance of the monetary relief and inform the applicant to lay a maintenance complaint

INFORMATION OBLIGATIONS OF MAGISTRATES

- a) The Magistrate should: Explain to the applicant the temporary nature of the interim protection order;
- b) Inform the applicant of his/her legal options, including securing maintenance, custody, evictions and divorce;
- c) Explain to the applicant that she can make supplementary statements to the police or court, should she have any additional information;
- d) Inform the applicant what she can do if the respondent breaches the conditions of the protection order *viz* laying a criminal charge;
- e) Explain the applicant's right to call witnesses and her right to have them subpoenaed on her behalf;
- f) Explain to the applicant why the court has added or removed particular provisions applied for in the application for the interim order and the extent to which the court can intervene;

- g) If not granted, explain to the applicant the reason why the interim protection order was not granted;
- h) Explain to the applicant that she must return to the court on the return date at the time and place of a hearing. Further, she should be informed that if she fails to attend or remain in attendance, in the case where disputes arise, the matter might be struck off the roll and the warrant of the respondent' arrest might be cancelled;
- i) Explain that the respondent can challenge the action;
- j) Ensure when signing the order, that the respondent's right to challenge the application is indicated on the order;
- k) The Magistrate should also explain the applicant's right to withdraw or amend the application.

NATIONAL POLICE INSTRUCTION REGARDING DOMESTIC VIOLENCE 1999

This National Instruction seeks to provide clear instruction and direction to police members on how they should respond to a complaint of domestic violence in order to meet the obligation in the Domestic Violence Act. The National Instruction on Domestic Violence (NIDV) lists responsibilities and duties on police in cases of domestic violence complainants.

Paragraph 3 of the NIDV gives the Station Commissioner the responsibility of identifying local organisations that are willing and able to offer counselling and any other support, including medical services and shelter, to complainants of domestic violence. Once these organisations have been identified the Station Commissioner must liaise with them to establish the specific services rendered, time when same is rendered, costs of services and the contact details of the organisations. Once this has been established the Station Commissioner must compile this information as well as information 'relating to hospitals, ambulance services and medical practitioners that maybe utilised to provide medical treatment to complaints.' This compilation must be updated every six months.

Paying attention to the particular circumstances in the station area and available resources, the station commissioner must issue station orders that mandates members under his command to

inform complaints about the lists above and how to inform complainants of same. In addition, these orders should specify how station members will assist complainants to gain access to the services once requested by the complainant. The station commissioner is give discretionary powers to issue orders generally relating to the treatment of victims of domestic violence.

The Station Commissioner must ensure that the Community Centre is provided with the Community Service Centre with a copy of The Domestic Violence Act and regulations thereof, The NIDV, lists of organisations above and station orders in relations to Domestic Violence. In terms of Paragraph 4 of the NIDV, the commander of the Community Service Centre (hereafter 'the Centre' must ensure that these documents are always available in the Centre.

In the case of a domestic violence matter being reported, either telephonically or in person, the Centre's Commander or person answering the phone must ensure that a police vehicle is dispatched to attend to the complaint without any unreasonable delay. The crew attending must be informed of the facts of the matter particularly if there has been violence or threatened violence alleged, the particulars of the complainant.

Where a criminal charge is laid, the member receiving the complaint has a duty to open a docket and register it for investigation. In addition, paragraph 10 lists the remedies available to the complainant which are laying a criminal charge and/or the right to apply for a protection order.

Paragraph 5 of the NIDV states that a member dispatched to attend to the scene of the domestic violence must primarily establish if the complainant is in any danger after which the member must take reasonable measures to make sure the scene is secured and afford the complainant protection from any danger. When securing the scene of the domestic violence, paragraphs 6 of the NIDV cautions the members on scene to be careful and discourages them from attending to the scene alone because of the volatility of domestic violence.

Paragraph 6 further states that the complainant should be interview and ascertain if he/she is in danger and if so then the member must offer protection. If there is no danger towards the complainant then the member must in terms of paragraph 5(2) of the NIDV render assistance to the complainant as reasonably required, assist the or make arrangements for the complainant to her

suitable shelter and/or medical treatment, then the member should then investigate the alleged incident of domestic violence.

In terms of paragraph 6(4) of the NIDV if the complainant is inside a building or structure, it must be established if there is any reason to suspect that an offence has been committed against the complainant. If so then the complainant may furnish more details on the offence after which the member will then exercise his/her powers to enter premises and building to interview and take a statement from the complainant in order to properly ascertain the status of the complainant and the assistance that can be offered to him/her.

This however does not authorise the member to forcibly enter the premises, instead the members should attempt to communicate with the people inside the dwelling to determine if any of the persons are in danger. However if the police member has reasonable suspicion that the complainant or any other person inside the dwelling is in imminent danger, force maybe used to enter premises in order to offer protection. If no such reason then it must be noted.

Paragraph 6(7) of the NIDV points out that part of securing the domestic violence scene may include the arrest of the respondent in terms of paragraph 3 of the Domestic Violence Act. Read together with section 40(1)(q) of the Criminal Procedure Act 51 of 1977, the member is empowered to arrest without a warrant should there be reasonable suspicion that an offence has been committed. In addition should there be firearms involved or allegations that firearms have been used or threatened to be used, then the member must search the place or persons and seize any arm or ammunition and determine if it licensed, if not then include such offence in docket in terms of paragraph 6(8) and(9).

In the event that the respondent has contravened any the orders contained in the protection order, the complainant may give any member the arrest warrant together with an affidavit stating that the respondent contravened the protection order. In terms of paragraph 11 (2) of the NIDV, once these have been handed to the member and the member is convinced that the complainant may suffer imminent harm due to the alleged breach of protection order, then the respondent must be arrested. Paragraph 11(2)(c) also lists the following as factors that must be considered in determining if the member will suffer harm: risk posed to the safety, health or well-being of the complainant, seriousness of the alleged conduct and the elapsed time since the alleged conduct.

If there are insufficient grounds to arrest the respondent, the member must hand the respondent notice with the first court date and complete the certificate of notice in terms of Paragraph 11(2)(d). A duplicate must be placed in the docket. Police may be required to serve an interim or final protection order, if so ordered then it must be served without delay as it is only binding once it has been served.

Paragraph 12 places an obligation on police to record any reported incidents of domestic violence and the police's responses in the Domestic Violence Register and the station commissioner must see to the accuracy of the records kept. Separate files with separate file numbers must be opened for the pocket book and for every protection order and warrants of arrest received.

The NIDV in Paragraph 13, like section 18 of the Domestic Violence Act deals with complaints related to non-compliance of police. Paragraph 13(2) states that the Commander has the responsibility to institute disciplinary action against a member who fails to comply with an obligation imposed in terms of the Domestic Violence Act or the NIDV. In the event that the Commander is of the opinion that disciplinary action should not be taken then he/she must apply to the ICD for exemption. This application should be accompanied by a full report stating the reason for exemption application and must be forwarded to the offices of the Area Commissioner within 30 days of receipt of the complaint.

The Area Commissioner should send the report to the Provincial Commissioner within 14 days if he/she also of the opinion that there should be no disciplinary action. If the Provincial Commissioner agrees then he/she must immediately submit such an application to the provincial office of the ICD. The ICD has an obligation to advise on the status of the exemption to the Provincial Commissioner within 30 days of receipt of application.

The Station Commissioner has an obligation to keep a record of the number of complaints received against members under his/her command in respect of failure to comply with the Domestic Violence Act's or the NIDV, the disciplinary proceedings instituted and steps taken as a result of recommendations made by the ICD.

S V BALOYI 2000 (2) SA 425 (CC)

Complainant laid charge of assault against police and was eventually granted an interdict – appellant assaulted complainant again which was reported to the police and he was arrested. He was brought before a magistrate and he was convicted and sentenced to twelve months imprisonment.

On appeal he alleged that the section (s 170 of Criminal Procedure Act) under which he was convicted placed a reverse onus on him and this was unconstitutional as going against the rights of the accused to a fair trial. He appealed to TPD and it the reverse onus was found unconstitutional and sent to the Constitutional Court for confirmation. Constitutional Court found that the section did not actually place a reverse onus on the accused and therefore did not go any further as to whether the section was a violation of his rights.

The appeal was based on the Prevention of Family Violence Act 133 of 1993 which at that time was about to be replaced by the current Domestic Violence Act but the court felt that the constitutionality inquiry into the Act was still necessary. For the purpose of this review the comments of the court on domestic violence are still very relevant.

The court recognised that all crime generally has harsh effect on society however what sets domestic violence apart from the other crimes is that it is hidden, repetitive in character and its immeasurable ripple effects in our society and family life. The court confirmed that section 12(1) of the Constitution created an obligation to enact legislation that deals with domestic violence. Read with section 7(2) of the constitution, section 12(1) gives the state the obligation to protect the right of everyone to be free from domestic violence.⁸

The court further stated that there is a series of constitutional obligations that creates obligations on the state including the right to bodily and psychological integrity section 12(2), the right to dignity,⁹ the right not to be subjected to torture¹⁰ and the right not to be treated or punished in a cruel, inhuman or degrading way.¹¹

The court pointed out another aspect to domestic violence is that is systematic, pervasive and overwhelmingly gender specific which bring in a different constitutional concern.¹² It reinforces

⁸ Paragraph 11

⁹ Section 10 of the Constitution.

¹⁰ Section 12(1)(d) of the Constitution.

¹¹ Section 12(1)(e) of the Constitution.

¹² Paragraph 12.

patriarchal domination and the constitution promises non-sexist societies as one of the foundational values not to mention the right to equality is undermined when 'spouse-batterers enjoy impunity.'¹³ 'The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behaviour are normalised rather than combatted. Yet it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied.'¹⁴ The court reiterated that the international obligations of South Africa particularly the freedom from fear which is one the fundamental rights in the preamble of the Universal Declaration of Human Rights¹⁵ and the obligation discussed under CEDAW and the African Charter on Human and People's rights.

AHMED RAFFIK OMAR V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA 2006 (2) SA
289 (CC)

Facts

Mr. Ahmed Raffik Omar, the applicant, and Ms Halima Joosab, the third respondent, were married according to Islamic law. The relationship was abusive. Several protection orders under the Domestic Violence Act were issued against the applicant. This application was sparked by proceedings regarding one of these orders. In terms of section 8(1) of the Act, the court annexed to its order a suspended warrant of arrest. When the applicant allegedly breached the terms of the order, the warrant was executed.¹⁶

The applicant sought an order declaring section 8 of the Act constitutionally invalid in the High Court. Tshabalala JP dismissed the application. The applicant then applied to the Constitutional Court for leave to appeal against the decision of the High Court. Van der Westhuizen J, writing for a unanimous Court, dismissed the application as the applicant's case was found to be without merit and held no reasonable prospect of success. The Constitutional Court looked at the applicant's objections in light of a thorough understanding of section 8, within the purpose and scheme of the Act as a whole.

¹³ Paragraph 12.

¹⁴ Paragraph 12.

¹⁵ Paragraph 13.

¹⁶ This was however subsequently suspended.

CONTEXT OF THE ACT

The Constitutional Court reiterated that “[d]omestic violence brutally offends the values and rights enshrined in the Constitution”¹⁷ and there is a constitutional requirement to deal effectively with domestic violence as held in *S v Baloyi*¹⁸. The Court added that “South Africa has a duty under international law to prohibit all gender-based discrimination... and to take reasonable and appropriate measures to prevent the violation of those rights.”¹⁹

The Constitutional Court further stated that there is “the need to combine civil and criminal remedies to address [domestic violence]... [and that] [i]t is understandable for the legislature to enact measures that differ from those generally applicable to criminal arrests and prosecutions...”²⁰ as held in *Baloyi*.²¹ That said, the Court stated clearly that fundamental rights and fair trial procedures guaranteed in the Constitution cannot be disregarded.²²

SCHEME OF THE ACT

The main legal remedy provided by the Act is a protection order. The role of law enforcement is addressed in the Act under section 2, and the Constitutional Court emphasised that this section clearly spells out the essential role the police play in providing protection against domestic violence and in empowering the victims thereof.

The Constitutional Court discussed section 5 which deals with the court’s consideration of an application, section 6 which deals with the issuing of a final protection order and section 7 which describes the court’s powers in respect of a protection order. The Constitutional Court then analysed section 8. Whenever a court issues a protection order, the court must make an order authorising the issue of a warrant for the arrest of the respondent and suspend the execution of the warrant subject to compliance with the order. The warrant will remain in force unless the protection order is set aside, or it is cancelled after execution.

¹⁷ At para 17: “According to section 1 non-sexism is a founding value of our state. In addition, human dignity, the achievement of equality and the advancement of human rights and freedoms are recognised as founding values. Section 12(1)(c) provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from public or private sources. This right must be understood in conjunction with the rights to dignity, life, equality (which includes the full and equal enjoyment of all rights and freedoms) and privacy.”

¹⁸ *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) paras 11-13. In para 12 Sachs J states that “it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied.”

¹⁹ Para 17; see further *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62.

²⁰ Para 18.

²¹ *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at paras 16-19.

²² Para 19.

A complainant may hand the warrant of arrest together with an affidavit stating that the respondent has contravened the order to any member of the police, and if it appears to that 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 police must arrest the respondent for allegedly committing the offence.

However, if the police member concerned is of the opinion that there are insufficient grounds for arresting the respondent, he or she must hand a written notice to the respondent which calls upon the respondent to appear before a court on a charge of committing the offence. In considering whether or not the complainant may suffer imminent harm, the police must take into account (a) the risk to the safety, health or wellbeing of the complainant; (b) the seriousness of the conduct comprising an alleged breach of the protection order; and (c) the length of time since the alleged breach occurred.

The Constitutional Court held that this provision “[was] clearly intended to provide a mechanism to ensure compliance with protection orders and to protect complainants against further domestic violence. It also foreshadows a later criminal prosecution for breaching the protection order.”²³

The Constitutional Court highlighted that in terms of section 10, a protection order may be varied or set aside by the court, and a complainant or a respondent may give written notice to the other party and apply to the court for variation or rescission of the order. The court must be satisfied that good cause has been shown for variation or setting aside of the order and that the application was made freely and voluntarily. The latter shows that the legislature was “being mindful of the vulnerability of the victims of domestic violence and of power relations in family and domestic situations...”²⁴

THE APPLICANT’S CASE

The Constitutional Court had to decide if section 8 of the Act was unconstitutional. The applicant submissions and the Court’s response in regard to domestic violence and reasoning of the court are discussed as follows:

1.1 The applicant submitted that section 8(1) of the Act violates the right of access to courts, guaranteed in section 34 of the Constitution, by making it mandatory for the court issuing a

²³ Paragraph 28.

²⁴ Paragraph 31.

protection order to authorise a warrant of arrest, in the absence and without the knowledge of the respondent.²⁵

The Constitutional Court stated that if notice of the interim order proceedings was given to the respondent, the very source of the threat of violence, that this would defeat the object of protection as the complainant would be placed in serious danger.

Furthermore, the Court stated that an interim protection order has no force until the respondent has been served, which allows the respondent the opportunity to contest the issue at a proper hearing. At a hearing, the court will then decide to grant a final order or not on all the evidence.²⁶

The Constitutional Court further noted that it is not uncommon for the law to provide for interim relief to protect a party who feels threatened by the immediate conduct of another, and that it was the legislature's intention to adapt established and well-known procedures to meet the needs related to domestic violence and codify them in the Act.²⁷ The Court therefore held that section 8(1) does not violate section 34.

1.2 The applicant submitted that section 8(4) allows for arbitrary arrest in violation of section 12(1)(a) of the Constitution, by providing for the arrest of a respondent who does not have knowledge of the proceedings and by allowing the police no discretion as to the credibility of the allegations made by a complainant; that the section bestows the functions of a court onto police officials.²⁸

The Court held that the interim protection order and attached arrest warrant have no force until the respondent has been served. In this way, the respondent will have knowledge of the order prior to an arrest.

The Court emphasised that section 8(4) arrests must be seen in the context and purpose of the Act in terms of ensuring immediate police protection to a complainant who faces imminent harm. The suspended warrant can only be executed after a police member has received an affidavit by the complainant that the order has been contravened.²⁹

Section 8(4) further only requires police officials to accept the contents of the affidavit and to act when it appears that reasonable grounds exist to suspect that the complainant faces imminent harm from the alleged breach of the protection order.

²⁵ Paragraph 34 (a).

²⁶ Paragraph 37.

²⁷ Paragraph 38.

²⁸ Paragraph 34(b).

²⁹ Paragraph 40.

In terms of the applicant's submission that the police are "clothed" with the powers of the prosecutor and court, the Court held that the police will only arrest the respondent if he or she believes there are reasonable grounds in the complainant's affidavit to believe that there is imminent harm.³⁰ The police member has discretion in this regard, and must consider several factors when considering if imminent harm will follow.³¹

As to the possibility that the complainant will lay a false allegation, the Constitutional Court stated that a complainant will be criminally liable for intentionally making false allegations,³² and that there is no time to approach a magistrate to obtain a warrant of arrest, for instance, as the complainant needs immediate police protection. The context and purpose of the Act was again stressed.

The Court held the arrests authorized by section 8(4) do not violate section 12(1)(a) of the Constitution.

- 1.3 The applicant submitted that the procedure provided for in section 8 of the Act is open to misuse, exploitation or manipulation and the Act does not contain sufficient safeguards.³³

The Court held that there is a possibility that complainants will exploit, manipulate or misuse the procedure provided by section 8, but that the potential to exploit a statute does not render the Act unconstitutional. Further, the Constitutional Court stated that the possibility of manipulation is far outweighed by the potential of the Act to afford police protection to the victims of domestic violence.³⁴

The Court further stated that it is of critical importance that lawyers, as officers of the court with a responsibility to uphold the Constitution and the law, do not exploit or manipulate the Act to gain a tactical advantage in divorce proceedings or custody battles.³⁵

³⁰ Paragraph 45.

³¹ Paragraph 48.

³² Paragraph 47.

³³ Para 34 (e)

³⁴ Para 60.

³⁵ Para 58 - 62.

Facts

On 21 October 2002 Mr. Wyngaardt (whitey) raped his former wife Christa (the second respondent and then shot and injured Mr. Venter the first respondent. Whitey was arrested and committed suicide in police custody.

The second respondent was married to Whitey. Two children were born of their marriage. The first respondent and his wife were friends and frequent visitors to the Van Wyngaardt home. Both marriages ended and after First respondent's wife left him, second respondent moved into First respondent's home with her children. Whitey initially had no problems with the arrangement but as the first and second respondents' relationship became more intimate Whitey became jealous.

He made continual telephone calls, sent abusive text messages to the second respondent and threatened to set their house on fire and kill them. As a result of Whitey's increasingly erratic and threatening behavior the second respondent approached the Brakpan police station during June 2002 to seek advice on how he could deter Whitey from coming to his house. They told him that they could only act if Whitey physically tried to enter the house. At about the same time the first respondent, accompanied by second respondent also approached the Brakpan Magistrate's Court to find out how he could obtain an interdict to prevent Whitey from entering his property. He was informed that he had to obtain a case number from the police before he could take the matter further. The respondents did not, however, pursue this course

On 27 July 2002 Whitey arrived at the respondents' house. First respondent telephoned the police for assistance. They arrived promptly. However, Whitey persuaded them that he had merely come to fetch his children, which he was entitled to do in terms of the divorce decree that granted him access to them. In these circumstances the police were constrained to permit him to take the children with him. This distressed the respondents. They felt that Whitey had manipulated the situation to his advantage. Whitey's conduct became even more threatening after this incident prompting the first respondent to approach the Brakpan police again on 20 August 2002.

On 11 October 2002 he collected the children from the respondents' house and, shortly afterwards, he telephoned the second respondent. This time he threatened to kill the children and himself should she go to the police. He wanted her to return to him.

On 21 October Whitey arrived at the respondents' house unexpectedly. She was hesitant to let him in but decided to open the door for him. He entered and said ominously that it was 'elimination day'.

She asked what he meant. He replied that she would soon find out. He told her to accompany him to his car. She did. He then took out a crossbow and a set of handcuffs from the boot. He told her that he was going to kill First respondent with the crossbow when he returned and that he would use the handcuffs to handcuff her to the bed.

They entered the house where he used the crossbow to shoot at and damage several items in the house. While doing this he told her to go to the bedroom and undress. He threatened to cause even further damage if she did not obey. She complied. He followed her and began scratching around one of her wardrobes. He found First respondent's firearm which is usually hidden in a safe but had been kept in the bedroom so that second respondent could protect herself from her erstwhile husband. The discovery of the firearm seemed to spur on the intruder. He then raped her.

They then collected the other child from school on Whitey's insistence. They took both children to second respondent's sister's home. Whitey did not want the children to be at home when First respondent returned from work. They returned to the respondents' home and waited for First respondent to return. According to First respondent, he had received a telephone call from second respondentsmother earlier. She told him that she had phoned second respondent and feared that something was wrong. He also tried to telephone second respondent but there was no response. He then decided to go home to investigate. He arrived home at about 15h00 and saw Whitey's car parked outside. This heightened his anxiety. He walked to the front door and tried to open it, but was not able to because it was locked. He then walked to one of the side windows here he saw second respondent. She began screaming while trying to warn him to run away. Fearing that both children were inside with second respondent and Whitey he instinctively tried to gain entry through the front door by force. Whitey fired a shot through the door. The bullet struck him on his arm. He then tried to flee but Whitey pursued him by car and fired more shots at him. Fortunately he found a place to hide. The police arrived shortly afterwards and arrested Whitey.

The respondents sued the Minister of Safety and Security for damages based on the failure of the police to perform their legal duty to assist the respondents to take steps to protect themselves under the Act.

In this matter, the SCA held that both the Domestic Violence Act and the NIDV placed a duty on the police to advise persons of their rights and to assist them in asserting same.³⁶ These rights were enacted as a result of the duty imposed on the state in terms of section 12(1) of the Constitution of South Africa. This is confirmed in the preamble of the Domestic Violence Act that identified the

³⁶ Paragraph 18

purpose of the Act as affording victims of domestic violence maximum protection from abuse. The Court confirmed the duties of the states in section 2 as was highlighted above in the discussion of the obligation and duties of the police created by both the Act and the NIDV.³⁷ The details of these obligations and duties can be seen above.

The court noted that the Act was specifically enacted to deal 'effectively with family violence, since criminal justice was palpably unable to do so'³⁸ as was held in *Omar v Government of the Republic Of South Africa* discussed above. The Court further stated that the aim of the Act would be undermined if those responsible to enforce it i.e. SAPS members abortively render assistance as stipulate by both the Act and the NIDV.³⁹ Furthermore, the 'efforts of the Act would come to nought if the police, as first point of contact in giving effect to these rights and remedies, remain distant and aloof' to their obligations.

In light of the obligations above, the Court ordered the Minister of Safety and Security to pay damages to the respondents for failing to advise them to apply for a protection order when they went seeking assistance at the police station.

¹Tshwaranag Legal Advocacy Centre Fact Sheet on violence against women

³⁷ Paragraph 20 - 24.

³⁸ Paragraph 27

³⁹ Ibid.