

**THE DOMESTIC VIOLENCE AMENDMENT ACT 14 OF 2021 AND THE IMPERATIVE OF
BETTER POLICING IN SOUTH AFRICA**

by

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Table 1: Indicators of, and Responses to, the Gaps in the Domestic Violence Legal Framework

List of Acronyms

BPA –	Beijing Platform for Action
CEDAW –	Convention on the Elimination of All Forms of Discrimination against Women
CGE –	Commission for Gender Equality
CSPS –	Civilian Secretariat for Police Service
DOCS –	Department of Correctional Services
DOJ & CD –	Department of Justice and Constitutional Development
DOH –	Department of Health
DSD –	Department of Social Development
DV –	Domestic violence
DVA 1998 –	Domestic Violence Act 116 of 1998
DVAA 2021 –	Domestic Violence Amendment Act 14 of 2021
GBV –	Gender-based violence
ICD –	Independent Complaints Directorate
IPID –	Independent Police Investigative Directorate

LGBTQ+ –	Lesbian, gay, bisexual, queer, intersex, asexual and more
JTM –	Joint Tagging Mechanism
MPS –	Municipal Police Service
NCOP –	National Council of Provinces
NPA –	National Prosecuting Authority
NPS –	National Strategic Plan
SAPS –	South African Police Service
UN –	United Nations

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Dedication

I dedicate this study to survivors and victims of domestic violence in South Africa.

DECLARATION

I declare that this study, "The Domestic Violence Amendment Act 14 of 2021 and the Imperative of Better Policing in South Africa," which is submitted to the University of South Africa in fulfilment of the academic requirements for the Master of Laws (LLM) is my original work. I also declare that the work has not been presented for the award of any degree at any other university. All sources that were consulted in the study have been duly acknowledged both in the footnotes and in the references.

Finally, no part of this dissertation can be reproduced by any means without the prior permission of the author or University of South Africa.



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Abstract

The domestic violence phenomenon is a vexatious issue in many societies across the world today. In South Africa, it is a compelling problem that the country's law system and communities grapple with daily. Hence, domestic violence legislations have been introduced, and in recent years, the legal framework for curtailing domestic violence was further broadened with the introduction of the Domestic Violence Amendment Act 2021. The objective of this study therefore was to examine whether the 2021 amendment has addressed the failings and inadequacies of the earlier legislations vis-à-vis policing domestic violence. The study, using a socio-legal approach, adopted desk-based methods of data collection, and relied on symbolic interactionism and patriarchal perspectives for theoretical grounding. From a critical analysis of the legislations, case laws, statutes, international treaties and conventions, regulations, Bills, textbooks, working papers, journal articles, and other internet-based materials reviewed, the study found that beyond the institutional failures already reported as the reason for South African Police Service's (SAPS) inability to adequately enforce the Domestic Violence Acts, the inherent patriarchal nature of the members of SAPS contributes significantly to the prevalence of domestic violence because SAPS' officers will not be able to prosecute domestic violence if they do not see it as a problem. The study therefore recommends that beyond law reforms, the government should facilitate a shift from the norm, which is the apparent acceptance of the subjugation of women within and outside domestic spheres. This should be accompanied by promoting a national orientation agenda that will focus on attitude and behaviour change for the fight against domestic violence to have impact. Community involvement and strict enforcement of compliance rules in the police service about domestic violence prosecution may also lessen the prevalence of domestic violence in South Africa.

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1. Introduction

In recent years, domestic violence has eaten into the fibre of societies affecting countless lives globally.¹ On average, approximately 24 people are physically abused per minute by an intimate partner in the United States amounting to more than 10 million women and men being violently abused in a year.² Statistics have shown that South Africa has the highest recorded number of cases of gender-based violence in the world.³ A retrospective National Study of Female Homicide in South Africa in 1999 found that 8.8 women per 100,000 population were killed by intimate partners in 1999. As at that time, it was the highest femicide rate ever reported globally. Since then, cases of domestic violence have been on the upward swing.⁴ According to population-based studies in South Africa, the prevalence of intimate partner violence (IPV) ranges between one-in-five and one-in-three women reporting physical IPV in their lifetime.⁵

The Domestic Violence Amendment Act (DVAA 2021) is a significant step forward in the legal frameworks aimed at reducing the country's alarming rates of domestic violence.⁶ It is a tool for protecting victims, prosecuting offenders, and possibly changing societal attitudes. However, its effectiveness is heavily dependent on the proactive and skilled enforcement efforts of the South African Police Service (SAPS), which is tasked with enforcing the Act. This study delves into the critical link between the DVAA 2021 and effective policing in South Africa. It explores the Act's key provisions, shedding light on how it empowers the SAPS agencies to act decisively against domestic violence. This study seeks to provide insights into how the South African policing landscape can adapt and evolve to meet the demands of a society. This will lead to swift and effective responses

¹ Ntasha Bhardwaj and Jody Miller, 'Comparative cross-national analyses of domestic violence: Insights from South Asia' (2021) 16(3) *Feminist Criminology* 351.

² Vivian Hui and Rose Eva Constantino, 'The association between life satisfaction, emotional support, and perceived health among women who experienced intimate Partner violence (IPV) – 2007 behavioral risk factor surveillance system' (2021) 21 *BMC Public Health* 1.

³ Nobuhle Judy Dlamini, 'Gender-based violence, twin pandemic to COVID-19' (2021) 47(4) *Critical Sociology* 583.

⁴ Dlamini, 'Gender-based violence, twin pandemic to COVID-19' 583.

⁵ Nonhlanhla Sibanda-Moyo, Eleanor Khonje and Maame Kyerewaa Brobbey, 'Violence against women in South Africa: A country in crisis' (2017) 10.

⁶ Domestic Violence Amendment Act 14 of 2021.

to domestic violence and the forging of a path towards a safer and more secure future for all its citizens.

This first chapter lays out the general overview of this dissertation and introduces concepts that underlie it. The research topic, “Domestic Violence Amendment Act and the imperative of better policing in South Africa” are being considered vis-à-vis the key research variables that the topic encapsulates. The chapter will provide background information on domestic violence, and then consider efforts at policing domestic violence as provided for by the laws of South Africa within the context of this study. It lays out the research objectives and questions, problem statement, literature review of existing works within the South African jurisdiction, hypothesis of the study and definition of the key concepts used in this study.

1.1 Problem Statement

The prevalence of gender-based violence (GBV) remains a major burden on the justice system globally.⁷ In Africa, GBV is one of the existential problems facing the continent. It is one of the challenges that women in sub-Saharan Africa and other sub regions on the continent are exposed to.⁸ It is particularly assuming a worrying dimension in South Africa where it has been described as a pandemic almost on the same footing with COVID-19.⁹ Research has shown that the most pervasive form of GBV in South Africa is domestic violence.¹⁰ In August 2019, there was national outrage following two gruesome domestic violence incidents. These involved Jesse Hess and Leighandre “Baby Lee” Jegels.¹¹ Jesse Hess, a first-year student at the University of Cape Town and her grandfather, Lategan were found dead in their homes in Cape Town. Lategan was found tied and gagged in the bathroom while Hess was found naked on her bed, strangled with a belt and duct tape around her mouth.¹² Nearly three years later, Hess’ second cousin, was found guilty

⁷ Wijegunasekara JLHR and Wijesinghe KDP, ‘Health Sector Interventions to address Gender Based Violence: In Sri Lanka’ (2020) 6 *The Journal of Medical Research* 246-248.

⁸ Muluken Dessalegn Muluneh, Virginia Stulz, Lyn Francis and Kingsley Agho, ‘Gender-based violence against women in sub-Saharan Africa: a systematic review and meta-analysis of cross-sectional studies’ (2020) *International Journal of Environmental Research and Public Health* 903.

⁹ Dlamini, ‘Gender-based violence, twin pandemic to COVID-19’ 583.

¹⁰ Lori Heise, and Mazedra Hossain, ‘Measuring intimate partner violence’ (2017) STRIVE technical brief 1.

¹¹ Jenni Evans, ‘Jesse Hess cousin found guilty of murdering her and her grandfather’ *News24* (South Africa, 09 May 2022) <<https://www.news24.com/news24/southafrica/news/jesse-hess-cousin-found-guilty-of-murdering-her-and-her-grandfather-20220509>> accessed 12 January 2024.

¹² Reddy Shani, ‘GBV: Accused in the Meghan Cremer and Jesse Hess Murders Appear in Western Cape High Court’ *Daily Maverick*, (South Africa, 27 November 2020) <<https://www.dailymaverick.co.za/article/2020-11-27-accused-in-the-meghan-cremer-and-jesse-hess-murders-appear-in-western-cape-high-court>> accessed 12 January 2024.

of the vile act.¹³ Leighandre Jegels, a boxing champion, was shot dead in East London (South Africa) by her ex-boyfriend whom she had a protection order against.¹⁴ There are many other incidents which contribute to the negative experiences of domestic violence in the country.¹⁵

In responding to this situation, the Government of South Africa introduced legislations to further combat gender-based violence. The Domestic Violence Act¹⁶ (DVA 1998) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act amongst others are such laws in place for the protection of women against GBV in South Africa.¹⁷ This is commendable because laws are vital to creating an environment of change. The associated sanctions may serve a deterrence function. Section 12 of the Constitution of the Republic of South Africa protects the country's residents from violence and inhuman treatments and prescribes appropriate sanctions.¹⁸ The enactment of the DVA 1998 served to implement section 12 of the Constitution in prohibiting violence in the home. Notwithstanding the provisions of the Constitution and the Act, cases of domestic violence have persisted.¹⁹ The increasing spate of violence against women led to sharp criticism of the DVA 1998 and its eventual amendment.²⁰ The President of the Republic of South Africa, Cyril Ramaphosa, on 25th January 2022, assented to the DVAA 2021,²¹ which appears to be a decisive response to the pervasive violence against women in the country.

The 2021 amendment has significantly increased the responsibilities of the South African Police Services (SAPS) by the inclusion of sections that enhance the protection of victims and survivors.²² This is because of the realisation by the government that law enforcement is central to the successful implementation of the Act.²³ However, the SAPS is failing to live up to its full responsibilities in terms

¹³ Okhule Hlati, 'Justice at last for slain Jesse Hess, grandad' Cape Times (South Africa, 20 July 2022) <<https://www.iol.co.za/capetimes/news/watch-justice-at-last-for-slain-jesse-hess-grandad-e9baceaf-ec0c-4a46-8015-be1c228ee7ec>> accessed 12 January 2024.

¹⁴ Ndlovu Hlengiwe, 'Entangled battlefields: Challenges of precarity for womxn under COVID-19' (2021) 35(4) Agenda 112.

¹⁵ Carilee Osborne, 'SA is in a state of 'psychic emergency' (2019) 74 New Agenda: South African Journal of Social and Economic Policy 19.

¹⁶ Domestic Violence Act 116 of 1998.

¹⁷ Act 14 of 2021.

¹⁸ Section 12 (1) Everyone has the right to freedom and security of the person, which includes the right— (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way. (2) Everyone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.

¹⁹ Christina Beninger, "The effectiveness of legislative reform in combating domestic violence: a comparative analysis of laws in Ghana, Namibia and South Africa." (2014) 32 Netherlands Quarterly of Human Rights 77.

²⁰ Act 116 of 1998.

²¹ Act 14 of 2021.

²² Sections 2(A), 4(A), 7(2)(b), 8(4)(5), 9.

²³ Helene Combrinck and Lorenzo Wakefield, 'Going the extra mile: Police training on domestic violence' (2010) 31 SA Crime Quarterly 127,34.

of enforcing the DVA 1998. These shortcomings are well documented in literature.²⁴ While some police officers were often insensitive to the victims of domestic violence, some others did not fully understand the DVA 1998 or their responsibilities under the national instruction. They also lacked the ability to apply the provisions in practical problem-solving scenarios. Some officers had a faulty conceptualisation of domestic violence as they tended to treat non-violent cases with levity.²⁵ This diminished the ability of the police to combat domestic violence in South Africa leading to a feeling of helplessness and hopelessness in the South African judicial system. These challenges made the enforcement of the DVA 1998 difficult. The objective of this study therefore is to examine whether the 2021 amendment has addressed the reasons for the non-implementation of the DVA 1998 by the members of SAPS.

1.2 Research Questions

1. What is the relationship between “policing” and domestic violence under South African laws?
2. What are the roles of the police under the Domestic Violence Act in South Africa and the reported experiences of victims/survivors of domestic violence?
3. Have recent legal interventions responded to reported issues surrounding the roles of the police in DV cases?

1.3 Research Objectives

1. To analyse the roles of the police under the legal framework for domestic violence in South Africa;
2. To examine whether there are reported experiences of victims or survivors in the enforcement of the roles imposed on the police in the fight against domestic violence;

²⁴ Combrink and Wakefield, 'Training of Police on the Domestic Violence Act. Research report' 12.

²⁵ Kholofelo Mothibi and Happy Mathew Tirivangasi, 'Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women's Access to Justice' (2022) 1 Violence Against Women and Criminal Justice in Africa: Palgrave Macmillan, Cham 125.

3. To consider whether recent legal interventions responded to reported issues surrounding the roles of the police in domestic violence cases.

1.4 Literature Review

The literature outline for this study will centre around the two important areas of this study namely, exploring the concept of domestic violence and policing domestic violence in South Africa. The prevalence of domestic violence has led to a body of works that focuses on the phenomenon. According to the United Nations, domestic abuse, also called domestic violence or intimate partner violence, is any pattern of behaviour that is used to gain or maintain power and control over an intimate partner. It includes any behaviour that frightens, intimidates, terrorises, manipulates, hurts, humiliates, blames, injures, or wounds someone. Domestic violence can occur within a range of relationships including couples who are married, living together or dating.²⁶ While this definition limits the victims of domestic violence to intimate partners, its actual scope has broadened in recent times. What a complainant in a domestic violence case needs to show is that he or she is in a “close relationship” with the perpetrator. The criteria for determining what constitutes a close relationship set out in Section 1 of the DVAA 2021 include the degree of trust between the persons as well as the level of each person’s dependence on, and commitment to, the other person. Also, the length of time the relationship has existed, the frequency of contact between the persons, and the degree of intimacy between the persons are considered.

Therefore, domestic violence transcends intimate or sexual relationships but must be within a domestic relationship. The complainant and respondent may be married currently or previously unmarried but living together or engaged/dating. They may be the parents of a child or persons with parental responsibilities for a child (or children). They may also be family members related by consanguinity, affinity, or adoption. It is worth mentioning that domestic violence is not limited to heterosexual relationships but also same-sex relationships.²⁷ According to the South African Police Service, what is regarded as domestic violence includes sexual abuse, physical assault, damage to

²⁶ United Nations Organisation, ‘What is Domestic Abuse’ (2019)<<https://www.un.org/en/coronavirus/what-is-domestic-abuse>> accessed on 25 September 2022.

²⁷ Rollè Luca, Giulia Giardina, Angela Calderera, Eva Gerino and Piera Brustia, ‘When intimate partner violence meets same sex couples: A review of same sex intimate partner violence’ (2018) 9 *Frontiers in psychology* 1506.

property or anything of value. It also includes stalking, economic abuse, emotional abuse and any controlling or abusive behaviour that threatens safety, health, or well-being of the victim.²⁸

The victims of domestic violence may be males, females, children and even the elderly.²⁹ However, there is overwhelming evidence in the literature that shows that women are, often, more susceptible to domestic violence.³⁰ It has been found that it is difficult to determine the instances of domestic violence involving male victims. Women who are violent to men or their male partners are more likely to avoid arrest even when the male victim contacts the police. Female perpetrators are usually viewed by law enforcement officers as victims rather than offenders.³¹ This sentiment is rife because violence against women is the rule rather than the exception. For example, out of the 28 474 domestic violence-related crimes reported to SAPS between January and March 2022, 23 960 bordered on violence against women. The reported crimes ranged from murder to attempted murder, rape, common assault, and common robbery to malicious damage to property.³²

While there is no generally accepted cause of domestic violence, the search for possible solutions is ongoing. Marcela and Papacek, in trying to understand why domestic violence persists in the world, categorise the risk factors of domestic violence into three.³³ First, individual factors which include excessive consumption of alcohol and narcotics, mental illness, strong temperament, poverty, and predispositions to domestic violence that are encoded in individuals from their original family communities. The prevailing culture in a society such as family arrangements where the man has control as the head of the family while the woman is a subordinate is another factor. Thirdly, factors depending on the nature, character, and linkage that arise in a relationship, which include conflicts within the family relationship and conflicts relating to economic imbalances.

Extant literature on domestic violence has linked it to patriarchy. South Africa has a strong patriarchal system of social structures that encourage men to dominate, oppress and exploit women

²⁸ South Africa Police Service website <https://www.saps.gov.za/resource_centre/women_children/domestic_violence.php> accessed 2 January 2024

²⁹ Denise Hines and Emily Douglas, 'The reported availability of US domestic violence services to victims who vary by age, sexual orientation, and gender' (2011) 1 Partner abuse 2, 3.

³⁰ Nonhlanhla Sibanda-Moyo, Eleanor Khonje and Maame Kyerewaa Brobbey, 'Violence against women in South Africa: A country in crisis 2017' (2017).

³¹ A guide to family law: Domestic violence and abuse (2016). <<http://www.divorcelaws.co.za/domestic-violence.html>> accessed on 31 August 2022.

³² Police Recorded Crime Statistics, Republic of South Africa, Fourth Quarter of 2021/2022 Financial Year (January to March 2022) 34.

³³ Tittlová Marcela and Petr Papacek, 'Factors contributing to domestic violence' (2018) 6(2) International Journal of Entrepreneurial Knowledge 118.

in the public and private spheres.³⁴ There is an inflexible gender hierarchy which is enforced through cultures that place men in dominant positions in the home and influences male assertiveness and domination of women.³⁵ Furthermore, Enaifoghe, Dlelana and Durokifa argue that the systematic gender inequality in contemporary society that disempowers women, girls and other minority groups in the society stifles their voices.³⁶

In recent years, the spike in the number of domestic violence cases globally and in South Africa has been likened to the COVID-19 pandemic. Domestic violence has been referred to as a shadow pandemic growing amidst the COVID-19 pandemic by the United Nations.³⁷ With the partial and complete lockdowns imposed by countries in a bid to inhibit the spread of the virus, victims of domestic violence and perpetrators were confined in their homes. Proponents of this position have argued that the stay-at-home strategy worsened physical, psychological, and sexual abuses in the home.³⁸ The strict restrictions and movement controls due to lockdowns and home quarantining may have in some cases prevented women from escaping the home to seek help from friends and family, shelter centres, and victim-survivor groups.³⁹

Domestic violence is associated with a wide spectrum of negative health outcomes, from direct injuries resulting from attacks to long-term trauma.⁴⁰ The health impacts can be immediate, long-lasting and/or fatal. Some survivors of domestic violence also suffer from post-traumatic stress disorder (PTSD), depression, anxiety, and low self-esteem. Suicidal thoughts or attempts may also arise in some victims while some may resort to alcohol and/or drug abuse.⁴¹

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- ³⁴ Nelly Stromquist, 'Women in the Third World: An Encyclopedia of Contemporary Issue' [2014] Routledge 1
- ³⁵ Linda Mshweshwe, 'Understanding domestic violence: masculinity, culture, traditions' (2020) 6 Heliyon E05334.
- ³⁶ Andrew Enaifoghe, Melita Dlelana, Anuoluwapo Abosedo Durokifa and Nomaswazi Dlamini. 'The Prevalence of Gender-Based Violence against Women in South Africa: A Call for Action' (2021) 10, African Journal of Gender, Society & Development 117.
- ³⁷ United Nations Organisation 'The Shadow Pandemic: Violence against Women during Covid-19' <<https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19>> accessed on 2 September 2022.
- ³⁸ Olayinka Ilesanmi, Modupe Ariyo and Aanuoluwapo Afolabi, 'Domestic violence amid the COVID-19 lockdown: a threat to individual safety' (2020) 3 Global Biosecurity 1.
- ³⁹ Noman Abu Hanifa, Mark Griffiths, Sajeda Pervin and Mohd Nazari Ismail, 'The detrimental effects of the COVID-19 pandemic on domestic violence against women' (2021) 134, Journal of Psychiatric Research 111-112.
- ⁴⁰ Sarah Wendt, 'Constructions of local culture and impacts on domestic violence in an Australian rural community' (2009) 25 (2) Journal of Rural Studies 175-184.
- ⁴¹ Marianne Sipila, Tuovo Hakulien, Mika Helminen, Johanna Seppanen, Eija Paavilainen and Paiivikki Koponen, 'Alcohol abuse, psychological distress and suicidal thoughts are associated with intimate partner violence among parents with children.'(2018) 12 Mental health and Prevention 77.

In South Africa, a study carried out by KPMG has shown that the economic cost of domestic violence is enormous.⁴² It drains resources from not only the victims and perpetrators but also presents significant costs to businesses, government, and civil society. The costs include health, justice, and other service costs, including loss of earnings and revenue. The society pays the cost for the persistence of domestic violence.⁴³ A study conducted by Thorpe found that in addition to the costs borne by the victim, there are five key Government departments that also incur significant costs because of their responsibility in implementing the legislation in the fight against domestic violence. These are the SAPS, the Department of Justice, and Constitutional Development (DOJ&CD), the Department of Health (DoH), the Department of Social Development (DSD), and the Department of Correctional Service (DOCS). According to Thorpe, the amount spent by government departments on matters related to gender-based violence for the 2012/2013 financial year was R311,051,687.58. The Department of Justice & Constitutional Development, Department of Health, and the National Prosecuting Authority (NPA) spent R106 855 823, R115 945 270, and R47 645 606 respectively in the same year.⁴⁴

Children in a household where violence persists are not left out of the negative impacts of domestic violence. Michele avers that the harm caused by domestic violence can be physical, emotional, behavioural, cognitive, and social with the effects are overlapping.⁴⁵ Whereas the definition of domestic violence in DVAA 2021 has been broadened and now covers the exposure of children to domestic violence, it still does not recognise its indirect impacts on children. Although many children suffer direct abuse which may involve physical, emotional, verbal, and psychological abuse, others may be indirectly affected by the violence witnessed in their homes either by seeing or hearing it take place or by merely being aware without seeing or hearing. Research shows that the impact of domestic violence on a child can begin even before the birth of the child because of the distress the mother of the child experiences.⁴⁶ According to Hornor (cited in Pingley), children of preschool age who are familiar with domestic violence show withdrawn social behaviours, heightened anxiety, and

⁴² Bafana Khumalo, Sisonke Msimang and Katie Bollbach, 'Too costly to ignore – the economic impact of gender-based violence in South Africa' (2017) <<https://assets.kpmg/content/dam/kpmg/za/pdf/2017/01/za-Too-costly-to-ignore.pdf>> accessed on 10 September 2022.

⁴³ Khumalo, Msimang and Bollbach, 'Too costly to ignore – the economic impact of gender-based violence in South Africa'

⁴⁴ Jen Thorpe, 'Financial year estimates for spending on gender-based violence by the South African Government.' (2014) Parliament of the Republic of South Africa. <http://www.ghju.uct.ac.za/sites/default/files/image_tool/images/242/documents/gender-based-violence-budget.pdf> accessed 10 September 2022.

⁴⁵ Michele Lloyd, 'Domestic violence and education: Examining the impact of domestic violence on young children, children, and young people and the potential role of schools' (2018) 9 *Frontiers in psychology* 3.

⁴⁶ Kathryn Howell, Sarah Barnes, Laura Miller-Graff, Sandra Graham-Bermann, 'Developmental variations in the impact of intimate partner violence exposure during childhood' (2016) 8 *Journal of Injury and Violence Research* 43-57.

are more fearful. At school age, the effects of witnessing domestic violence can affect their educational abilities. Children who are exposed to domestic violence also have a higher chance of being perpetrators of such abuses when they grow up. The relationship between domestic violence and psychopathy has been clearly demonstrated in a study carried out by Monika and Koenigs. Their findings suggest that witnessing household violence and aggression affects a child's developmental trajectory and can contribute to the development of psychopathic traits.⁴⁷

Until recently, domestic violence had been treated as a private matter which did not require the interference of the public. The UN General Assembly on the 22nd of December 2003 adopted Resolution 58/147 that specifically addresses domestic violence and entitled, 'Elimination of Domestic Violence against Women'.⁴⁸ The resolution recognises domestic violence against women and girls as a human rights issue and a societal problem. The resolution recognises that "domestic violence is of public concern and requires States to take serious action to protect victims and prevent domestic violence". It emphasises the obligation of States to exercise due diligence to prevent, investigate, and punish the perpetrators of domestic violence against women and to provide protection to the victim. The resolution calls on States to, among other things, implement legislations that prohibit domestic violence as well as to review these laws and regulations periodically to ensure their effectiveness in eliminating domestic violence. It also enjoins States to ensure proper investigation and prosecution of perpetrators, establish and/or strengthen police response procedures to ensure that all appropriate action is taken to protect victims, and prevent further acts of domestic violence.⁴⁹

With these, many States have enacted domestic violence laws having proactive police response at their core. These laws aim to increase arrest rates, hold offenders accountable, reduce repeat offending, and contribute to the safety of victims. This response perhaps validates Stubb's opinion that international responses to violence against women also shape the policing of domestic violence in local contexts, sometimes in unanticipated ways.

CEDAW emphasises that it is the responsibility of States to prosecute and punish perpetrators of domestic violence. In some countries, there has been a criminalisation of domestic violence offences

⁴⁷ Pingley, 'The impact of witnessing domestic violence on children: A systematic review' 8

⁴⁸ United Nations General Assembly 'Elimination of Domestic Violence against Women' (2003) <[Elimination of domestic violence against women \(A/RES/58/147 of 22 December 2003\)](#)> accessed 26 September 2022.

⁴⁹ United Nations General Assembly. Resolution adopted by the General Assembly on 22 December 2003 on the report of the Third Committee. <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/503/40/PDF/N0350340.pdf?OpenElement>> accessed 26 September 2022

or an application of criminal sanctions to the breach of civil orders.⁵⁰ The police service is the frontline institution when it comes to dealing with domestic violence cases. It has a vital role in assisting victims seek recourse for the abuse. Police officers are referred to as ‘gatekeepers’ in the criminal justice system, and they play an important role in shaping victims’ initial experiences of GBV. They are often a victim’s first point of contact in the criminal justice process and hold the key to the effective implementation of the laws laid down in the fight against domestic violence. When effective, they play a vital role in ensuring safety for the victim and accountability for the perpetrator; when ineffective, they can do significant harm. Domestic violence is a global problem and laws have been enacted in different countries empowering the police to combat it. Some examples include New Zealand’s Family Violence (Amendment) Act, Ghana’s Domestic Violence Act, and Chile’s Domestic Violence Law.⁵¹ Policing domestic violence, according to a study, is a complicated task as it does not just consist of one crime but a long list of abuses which may include sexual, emotional, verbal, psychological, economic abuse harassment, damaging property, stalking, entrance into the plaintiff’s property without his or her consent where he or she is not living with the abuser, and any behaviour that may cause immediate harm to the complainant.⁵²

Paradoxically, a high number of domestic violence cases globally remain unreported.⁵³ Research indicates that victims’ reluctance to involve the police was strongly influenced by the social shame, stigma and humiliation expected from self-identifying as a victim and seeking help from police; this was the case for both men and women.⁵⁴

In South Africa, the first attempt to deal with domestic violence through legislation was the Prevention of Family Violence Act.⁵⁵ The legislation was further developed and strengthened through the DVA 1998, which is widely considered one of the more progressive examples of such legislation internationally.⁵⁶ In spite of the passing of the 1998 legislation, domestic violence persisted, and this led to a few protests across the country. With the recent nationwide protests in response to the high level of GBV, the government of South Africa, to curb the scourge, has made

⁵⁰ Julie Stubbs, ‘Searching for integrity in domestic violence policing’ (2016) *Integrity in the criminal process: From theory into practice* 58.

⁵¹ Domestic Violence Act of 2007 (New Zealand); Domestic Violence Act No. 737 of 2017 (Ghana); Ley 20.066 de Violencia Inframiliar (Chile).

⁵² Mothibi and Tirivangasi, ‘Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women’s Access to Justice’ 125.

⁵³ Kimberly Tatum, and Rebecca Pence, ‘Factors that affect the arrest decision in domestic violence cases’ (2015) 38 *Policing: An International Journal of Police Strategies and Management* 59.

⁵⁴ Heidi Mogstad, Dominique Dryding and Olivia Fiorotto, ‘Policing the private Social barriers to the effective policing of domestic violence’ (2016) 56 *South African Crime Quarterly* 11.

⁵⁵ The Prevention of Family Violence Act of 1993.

⁵⁶ Lisa Vetten, ‘Domestic violence in South Africa’ [2014] ISS Policy Brief 71.

attempts to amend relevant laws critical to the control of GBV. One of such laws is the DVAA 2021. The DVAA 2021 foregrounds law enforcement as central to the successful implementation of laws in the society.⁵⁷ Therefore, the DVAA 2021 gives more specific powers and duties to the SAPS than the previous DVA 1998.

Domestic violence cases reported at the police station are attended to by the member of SAPS on duty.⁵⁸ Section 3 (A) of the DVAA 2021 empowers SAPS officers to enter a residence without a warrant to interrogate and obtain a statement where such officers have received a report of possible physical violence. The officers may also process an application for a protection order on behalf of a complainant.⁵⁹ The DVAA 2021 introduces the domestic violence safety monitoring notice that mandates SAPS officers to contact the complainant at regular intervals either electronically or by visiting him or her, to check on the well-being of the complainant.⁶⁰ Section 5(8)(1) of the DVAA 2021 places an obligation of forwarding of the certified copies of an interim protection order and warrant of arrest, issued by the court, to a police station of the complainant's choice. Section 8(4) of the DVAA 2021 obliges a member of the SAPS to receive the warrant of arrest and an affidavit wherein it is stated that a respondent had contravened the provisions of the protection order. Furthermore, where the officer concerned believes there are reasonable grounds to suspect the complainant is suffering or may suffer harm must immediately arrest the respondent. The court may recommend that the complainant go to a police station to press criminal charges against the respondent.⁶¹ The court, in terms of section 9(1) of the DVAA 2021, may also order SAPS officers to seize any weapon in the possession and control of the respondent. Section 18(b) of the DVAA 2021 stipulates that failure by a member of SAPS to comply with an obligation in terms of the Act constitutes misconduct contemplated in the South African Police Service Act.⁶²

These duties, which are just some of the responsibilities that the DVAA 2021 prescribes for SAPS, are enormous and will require SAPS to redouble its efforts at controlling domestic violence. In ensuring the compliance of the member of SAPS with the legislations set out to fight domestic violence, the National Instruction 7 of 1999 provides clear directions to members of SAPS on how to respond to a complaint of domestic violence to comply with the obligations imposed upon them in terms of the Domestic Violence Act. The SAPS official website has laid down the options available to a person who has been abused. A victim has the right to apply for a protection order at the nearest

⁵⁷ Combrinck and Wakefield, 'Going the extra mile: Police training on domestic violence' 127.

⁵⁸ Section 2 of the DVAA 2021.

⁵⁹ Section 3(a) of the DVAA 2021.

⁶⁰ Section 4(A) of the DVAA 2021.

⁶¹ Section 7(b) of the DVAA 2021.

⁶² Act of 1995.

magistrate's court or lay a criminal charge at the police station where the abuse constitutes a crime. Members of SAPS are expected to be committed to treating victims of domestic violence with sensitivity and care as well as taking reasonable steps to protect the complainant from any further danger. They are also to assist the complainant with finding access to medical attention, shelter, and victim counselling.⁶³

The DVAA 2021 provides the right of protection through a protection order against a respondent (an alleged perpetrator of domestic violence), obtained by a complainant who makes such allegation. A protection order is a form of injunctive relief that prevents the respondent from carrying out further abuse on the complainant. A protection order is usually accompanied by a warrant of arrest that is suspended unless there is a breach of the protection order. Through a civil order, the contravention of a provision of a protection order by the respondent may result in a criminal trial and if found guilty will be liable on conviction to a fine or imprisonment.⁶⁴ If the court is satisfied that the respondent is committing or has committed an act of domestic violence or that the complainant is suffering or may suffer harm if the order is not issued immediately, it issues an interim protection order against the respondent.⁶⁵ An interim protection order is meant to alleviate the suffering of the complainant immediately and further looking at the matter if a final protection is granted. In another report published in 2017, Vetten states that in 2015/16, 275 536 applications were made for protection orders. Of these, approximately 99 076 (or 35.9%) were made final and 39 550 warrants of arrest were issued for violation of the terms of a protection order.⁶⁶

As earlier stated, the law does not criminalise domestic violence in South Africa and only civil remedy of the issuance of a protection order is available to a victim in a domestic violence case. But section 17 of DVAA 2021 prescribes some offences/crimes which may be committed in respect to the DVAA 2021. A violation of the provisions of a protection order by the respondent amounts to a crime under section 17 of the DVAA 2021. Publishing any information that reveals the identity of the parties to a proceeding or contravening any court directive regarding information on the proceedings amounts to a crime. Furthermore, section 2(B) of the DVAA 2021 criminalises not reporting an act of domestic violence committed against a child, a person with disability or an older person to a social worker or a member of SAPS. Domestic violence may constitute activities which are not necessarily criminal in nature, but a range of common law crimes may be committed during the abuse. This includes

⁶³ Section 5 of the DVAA 2021.

⁶⁴ Section 17 of the DVAA 2021.

⁶⁵ Section 5 of the DVAA 2021.

⁶⁶ Lisa Vetten, 'Aluta continua: Police accountability and the Domestic Violence Act 1998' (2017) 59 South African Crime Quarterly 10.

murder, attempted murder, rape, kidnapping, malicious injury to property, housebreaking, or extortion.⁶⁷ Whenever an act of domestic violence that constitutes a crime has been committed against a complainant, the complainant has the right to approach a police station.

These protection mechanisms have been put in place for the protection of victims and survivors of domestic violence and are to be enforced by SAPS, although at present, domestic violence is still rife in South Africa as implementation of the relevant provisions of the law stipulating these protections remains a problem.⁶⁸

1.5 Hypotheses of the study

The roles of the SAPS in curtailing domestic violence are critical to the success or otherwise of the Domestic Violence Amendment Act. The inability of SAPS to enforce domestic violence laws may compromise the fight against domestic violence. Gender inequality and patriarchy could derail the goals the DVAA 2021 aims to achieve.

1.6 Research Methodology

The research paradigm that underlies this study is the inequality paradigm, which involves the social construction of interconnected, interlocking hierarchies of race, class, gender, and human/nature domination, and many other adopted for this study method used in this study is a qualitative research technique called desk-based research. The desk-based method is used in this study. This method has been adopted because of the potential difficulties that embarking on quantitative study may portend. Also, the goal is to gather in-depth insights into the phenomenon of domestic violence rather than collecting and analysing numerical data. Primary and doctrinal sources such as legislations, case laws, statutes, international treaties and conventions, regulations, and bills are used. This study also follows a socio-legal approach. This means that the law is considered within a social context. Symbolic interactionism and patriarchal perspectives are also deployed to examine the law from a sociological standpoint.

⁶⁷ South African Law Reform Commission, Issue Paper 42 (Project 100) Domestic Violence: The Criminal Response (SALC 2021) 27.

⁶⁸ Mshweshwe, 'Understanding domestic violence: masculinity, culture, traditions' 1.

1.7 Conclusion

This chapter has provided a general outline of the research by presenting a review of existing literature on domestic violence in South Africa and its multi-faceted impacts on individuals and society. The chapter also highlights the statement of the problem, research objectives and questions, scope, contributions to knowledge. The goal of the chapter has been to provide broad overview or general ideas about domestic violence and set the tone for the research report and provide the foundation upon which the subsequent chapters will be built. The next chapter focuses on the linkage between policing and domestic violence.

CHAPTER TWO

EXPLORING POLICING AND DOMESTIC VIOLENCE

2. Introduction

Policing and domestic violence are strongly connected phenomena requiring sensitive and effective law enforcement responses.⁶⁹ Domestic violence is usually a hidden crime occurring within private spaces and thus presents unique challenges to the police.⁷⁰ The roles of law enforcement in these situations include prevention, intervention, and support for victims, while also holding perpetrators accountable. This chapter focuses on the first objective of this study which is to explore the relationship between policing and domestic violence. The chapter, among other things, examines the concept of domestic violence and analyses some of the definitional misconceptions regarding its meaning, the social contexts within which it occurs, and the legal and/or legislative framework for policing it.

2.1. Domestic Violence

Domestic violence, a global phenomenon, has negatively affected an appreciable number of people around the world. This phenomenon remains a major burden on the justice system globally.⁷¹ Despite the existence of legal protections and statutory instruments aimed against it, there continues to be a prevalence of violent behaviour in households and societies across the world. There is a dearth of reliable data on domestic violence globally and this is because what happens in private, hidden from observing eyes, is almost impossible to quantify. The number of cases around the world is just an indication of what has been measured.⁷² On average, approximately 20 people per minute are physically abused by an intimate partner in the United States each day. This implies that more than 10 million women and men are being violently abused yearly.⁷³ In 2021, a report was released by Statistics South Africa stating that one in five women has suffered abuse in the hands of their

⁶⁹ Heidi Mogstad, Dominique Dryding and Olivia Fiorotto, 'Policing the private Social barriers to the effective policing of domestic violence' (2016) 56 *South African Crime Quarterly* 13.

⁷⁰ Doraval Govender, 'Is domestic violence being policed in South Africa?' (2015) 28(2) *Acta Criminologica: African Journal of Criminology and Victimology* 5.

⁷¹ Wijegunasekara JLHR and Wijesinghe KDP, 'Health Sector Interventions to address Gender Based Violence: In Sri Lanka' (2020) 6 *The Journal of Medical Research* 247.

⁷² Sharon Horne, 'Domestic violence in Russia' (1999) 54(1) *American Psychologist* 55.

⁷³ NCADV STATISTICS (2021) <<https://ncadv.org/STATISTICS>> accessed on 5 May 2023

partners with some leading to murder.⁷⁴ Out of 902 women murdered, between October and December 2021, 232 were directly linked to domestic violence.⁷⁵

Domestic violence frequently occurs in the home – where an individual is supposed to enjoy love and protection from harm - and perpetuated by members of the immediate families of the abused.⁷⁶ The family, which is to be a place where individuals seek love, safety, security, and shelter does not live up to that expectation any longer. People live in constant fear within their homes and because domestic violence is a hidden abuse occurring behind closed doors, most victims are subjected to a repeat exposure.⁷⁷ The idea that the family/home is a peaceful and protective environment for its members is slowly becoming a myth considering empirical evidence that suggests that it is also a place that imperils life, and breeds some of the most drastic forms of violence perpetrated against women and girls.⁷⁸ Some commentators define domestic violence, also referred to as family violence, as “violent actions perpetrated by members of a family against one another with the intention of inflicting physical or psychological pain on the victim.”⁷⁹

The above definition strengthens a common misconception that stems from the assumption that violence is only associated with violent abuse. Domestic violence is not limited to violent actions but includes many types of abuse ranging from verbal, emotional, financial, or economic abuses and even spiritual abuse. A better definition that places emphasis on domestic violence not consisting of just ‘violent acts’ is given by the United Nations. It defines domestic abuse/violence or intimate partner violence as any pattern of behaviour that is used to gain or maintain power and control over an intimate partner. It includes any behaviour that frightens, intimidates, terrorises, manipulates, hurts, humiliates, blames, injures, or wounds someone.⁸⁰

As is reflected in the DVAA 2021, the scope of domestic violence is far-reaching, as children, relatives and even friends have been abused within domestic settings. A complainant in a domestic

⁷⁴ Integrated Emergency Response, ‘Domestic Violence Statistics in South Africa’ (2022) <[Domestic Violence Statistics in South Africa - Integrated Emergency Response \(ier.co.za\)](#)> accessed on 12 June 2023.

⁷⁵ Integrated Emergency Response, ‘Domestic Violence Statistics in South Africa’

⁷⁶ Shalu Nigam, ‘COVID-19, lockdown and violence against women in homes.’ [2020] Lockdown and violence against women in homes 2.

⁷⁷ Wendi Goodlin and Christopher Dunn, ‘Three patterns of domestic violence in households: Single victimization, repeat victimization, and co-occurring victimization.’ (2010) 25 Journal of Family Violence 109.

⁷⁸ UNICEF, A Digest on ‘Domestic Violence Against Women and Girls’ (2000) <[digest6e.pdf \(unicef-irc.org\)](#)> Accessed on 23 May 2023.

⁷⁹ Van der Hoven, A.E., 1988. ‘Social factors conducive to family violence’ (1988) 1(1) Acta Criminologica: African Journal of Criminology & Victimology 34.

⁸⁰ United Nations Organisation ‘What is Domestic Violence’ (2019) <[What Is Domestic Abuse? | United Nations](#)> accessed on 8 May 2023.

violence case needs to show that he or she is in a 'close relationship' with the perpetrator.⁸¹ Anyone can be a victim or survivor of domestic violence, regardless of age, race, gender, sexual orientation, faith, or class. Victims of domestic abuse may also include a child or other relative or any other household member.⁸² This is reflected in the Oxford Law Dictionary definition of domestic violence as any incident of violence, threatening behaviour, or abuse (psychological, physical, sexual, financial, or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.⁸³

At the mention of the term 'domestic violence', most people think it only occurs within heterosexual relationships. The picture of a male and female relationship is what comes to mind. Domestic violence has been seen as a gendered issue where a female is always perceived as the victim with the perpetrator always a male.⁸⁴ Although men also suffer physical and psychological abuse by female perpetrators, the view of men as victims of domestic violence is not studied as much as it is for women. Also, domestic violence against men often goes unrecognised since men are probably less likely than women to report such incidents for fear of embarrassment, fear of ridicule and the lack of available support services.⁸⁵ This sentiment is rife because violence against women is the rule rather than the exception as heterosexual women constitute the largest victim group. Out of the 39,289 domestic violence-related crimes reported to the SAPS between October to December 2022, 29,692 bordered on violence against women.⁸⁶ The reported crimes ranged from murder to attempted murder, rape to common assault, common robbery to malicious damage to property. Female perpetrators are usually viewed by law enforcement officers as victims rather than offenders.⁸⁷ It is difficult to determine the instances of domestic violence involving male victims. Women who are violent to men or their male partners are more likely to avoid arrest even when the male victim contacts the police. Violence against women is far more common than violence against men. The lesbian, gay, bisexual, transgender, queer, intersex, asexual and more (LGBTQ+) communities are not exempted from this ugly scenario as the number of domestic violence cases within the queer community keeps rising.⁸⁸ Although, there is a dearth of information

⁸¹ Section 1 of DVAA 2021.

⁸² United Nations Organisation 'What is Domestic Violence'.

⁸³ Oxford University Press (2023) <[Domestic violence - Oxford Reference](#)> accessed on 9 May 2023.

⁸⁴ Richard Adams, 'Domestic violence and the male victim: A study of the prevalence of domestic violence in homosexual male partnerships, and the laws and social policies that exist to control and prevent it' (2020) 12 Plymouth Law and Criminal Justice Review 120.

⁸⁵ Babette Drijber, Udo Reijnders and Manon Ceelen, 'Male Victims of Domestic Violence' (2013) 28 J Fam Violence 173.

⁸⁶ Police Recorded Crime Statistics, Republic of south Africa, Third Quarter of 2022/2023 Financial Year (October to December) 35.

⁸⁷ A guide to family law: Domestic violence and abuse (2016). <<http://www.divorcelaws.co.za/domestic-violence.html>> Accessed on 31 August 2022.

⁸⁸ Rollè Luca, Giulia Giardina, Angela Caldarera, Eva Gerino and Piera Brustia, 'When intimate partner violence meets same sex couples: A review of same sex intimate partner violence' (2018) 9 Frontiers in psychology 1506.

on domestic violence in same-sex relationships, it is increasingly recognised in both policy and practice that DV occurs across all population groups including lesbian, gay male, bisexual or transgendered individuals.⁸⁹

The SAPS defined domestic violence as sexual abuse (whether in marriage or otherwise), physical abuse and assault. It also includes damage to property or anything of value, stalking, economic abuse. Emotional abuse and any other controlling or abusive behaviour that threatens safety, health, or well-being are also regarded as domestic violence.⁹⁰ The DVAA 2021 broadens the scope of domestic violence by including spiritual abuse, elder abuse, exposing a child to domestic violence as well as the use of electronic communications services in perpetrating the abuse.

Notwithstanding, for this research, the scope of domestic violence is limited to abuse between intimate partners and violence against female partners in a relationship. Many authors have referred to domestic violence as “wife abuse, marital assault, woman battery, spouse abuse, intimate partner violence” and lots more.⁹¹ A more productive definition of what constitutes domestic violence is given by Ganley. Ganley defines this menace as a pattern of assaultive and coercive behaviours, including physical, sexual, and psychological attacks, as well as economic coercion, that adults or adolescents use against their intimate partners.⁹²

2.1.1. Patriarchy at The Root of Domestic Violence in South Africa

Extant literature has linked the rise in the cases of domestic violence to patriarchy. A patriarchal society is one dominated and ruled by men.⁹³ It presupposes the superiority of male over female, upholding women’s dependence, and reliance on men. Patriarchy prescribes the subordination of women to men in all spheres of life. Hill, quoting Allan Jonathan in her book *See what you made me do* set out four elements of patriarchy as it related to our society and men’s oppression of women.⁹⁴

⁸⁹ Catherine Donovan and Marianne Hester, ‘Domestic violence and sexuality: what’s love got to do with it?’ (2015) Policy Press 2.

⁹⁰ South Africa Police Service, ‘Domestic Violence’ <https://www.saps.gov.za/resource_centre/women_children/domestic_violence.php> accessed 15 January 2023

⁹¹ Gideon Uchechukwu Nwafor, Jammy Seigha Guanah and Loveth Okowa-Nwaebi, ‘Facebook Users’ Perspective of the Social menace of Domestic Violence in Imo State, Nigeria’ (2007) 7(2) International Journal of Gender Studies and Research 183.

⁹² Anne Ganley, ‘Understanding domestic violence’ [1995] Improving the health care response to domestic violence: A resource manual for health care providers 6.

⁹³ Sinenhlanhla Chisale, ‘Deliver us from patriarchy’: A gendered perspective of the Evangelical Lutheran Church in Southern Africa and implications for pastoral care’ (2020) 41(1) Verbum et Ecclesia 2.

⁹⁴ Jess Hill, ‘See what you made me do: Power, Control and Domestic Abuse’ (Black Inc 2009) 142.

Although Hill's book is set in Australia, same patriarchal attitudes can be seen in the South African society. First, society is male dominated as positions of power are predominantly held by men. Secondly, though more subtly, society is male-identified, meaning that society favours a set of masculine values, for example, control, strength, competitiveness, and self-sufficiency.⁹⁵ Thirdly, society is male-centred which means that society focus on the exploits of men and boys. Finally, the entire system of patriarchy is centred on an obsession of control.⁹⁶ There is an inflexible gender hierarchy, which is enforced through culture that places men in dominant position in the home and this influences male assertiveness and domination of women.⁹⁷ The systematic gender inequality in contemporary society disempowers women, girls and other minority groups in the society stifles their voices, so they are not heard.⁹⁸ The hierarchy places women at the bottom rung of the ladder and this informs the need for men to exert themselves, being at the top rung of the ladder by means of control and coercion.

South Africa has a strong patriarchal system embedded in her social structure.⁹⁹ Despite having a constitution that entrenches equal rights, discriminatory practices, structural inequalities, cultural factors; prejudices, patriarchy, and sexism are still prevalent in South Africa.¹⁰⁰ While patriarchy is operational in the society, it thrives within a domestic setting, the home. The male head of household (in his position as father or husband) is the direct oppressor and beneficiary of the subordination of women.¹⁰¹ Women are seen as owned by men and have no autonomy over their own lives. Men are driven by the power and control that come with this ownership. When this entitlement is lost or there is a feeling that it is lost, aggression and violence become inevitable.¹⁰² This is the deliberate outcome for a man to get back control and reinstate submission of the woman. Johnson describes patriarchy's 'obsession' with control as a key factor in men's use of violence.¹⁰³ According to this author, because violence is the most extreme instrument of control, the capacity for violence (whether or not individual men actually make use of it) is central to the cultural definition of manhood. We see the agreement of Triegaardt and Batley in their definition of domestic violence as an

⁹⁵ Hill, 'See what you made me do: Power, Control and Domestic Abuse' 143.

⁹⁶ Allan G. Johnson, 'The Gender Knot: Unraveling our patriarchal legacy' (2005) Philadelphia, PA: Temple University Press 5.

⁹⁷ Linda Mshweshwe, 'Understanding domestic violence: masculinity, culture, traditions' (2020) 6 Heliyon 2.

⁹⁸ Andrew Enaifoghe, Melita Dlelana, Anuoluwapo Abosedo Durokifa and Nomaswazi P. Dlamini, 'The Prevalence of Gender-Based Violence against Women in South Africa: A Call for Action.' (2021) 10 African Journal of Gender, Society & Development 117.

⁹⁹ Nelly Stromquist, 'Women in the Third World: An Encyclopedia of Contemporary Issue' [2014]. Routledge, 34.

¹⁰⁰ Mary-Anne Plaatjies Van Huffel, 'Patriarchy as empire: a theological reflection' (2011) 37 *Studia Historiae Ecclesiasticae* 3.

¹⁰¹ Michael Haralambos, Martins Holborn and Robin Heald, 'Sociology. Themes and Perspectives' (7th edn, HarperCollins Publishers Limited 2008) 113.

¹⁰² Mutondi Mulaudzi 'Corrective rape and the war on homosexuality: Patriarchy, African culture and Ubuntu' (Master's Thesis, University of Pretoria 2018) 18

¹⁰³ Johnson, 'The Gender Knot: Unraveling our patriarchal legacy' 5.

imbalanced power that is maintained by a pattern of coercive tactics of control carried out by actual or threatened physical, sexual, psychological, economic or verbal abuse, which places an individual with whom there is a past or present intimate relationship, in fear.¹⁰⁴ Hill also emphasises this position that the traditional notions of masculinity – particularly male entitlement – are at the core of men’s violence against women.¹⁰⁵ To some radical feminist theorists, male domination and power is not only inherent in physical strength but also in the institutions and structures of the society and combating male dominance as highly significant in dealing with domestic violence.¹⁰⁶

2.2 Legislative Framework regulating Domestic Violence in South Africa

Every society has laws that draw the line between what is deemed acceptable and what is unacceptable within that society. Laws protect the rights and freedom of the citizens of that country, guaranteeing protection to individuals against all forms of discrimination whether based on gender, race, or religion.¹⁰⁷ Laws enable individuals to fight for and receive equal opportunity. Society cannot function without the presence of a sound legal system that is effectively enforced with the help of social institutions. It is commendable that South African domestic violence laws are enacted having regards to the Constitution of South Africa and the international commitments and obligations of the State towards ending violence against women.

2.2.1 The Constitution of the Republic of South Africa, Act 108 of 1996

The 1996 Constitution of South Africa is the supreme law of the land. One of the main aims of the Constitution is to improve the quality of life of all citizens and unleash the potential of each person.¹⁰⁸ Enshrined in the Constitution is the Bill of Rights which ensures the rights of all the people in South Africa affirming the values of human dignity, equality, and freedom.¹⁰⁹ The whole essence of domestic violence contravenes the rights provided for in the Constitution. Section 12(1)(c) of the Constitution states that a person should be free from all forms of violence from either public or private

¹⁰⁴ Jean D. Triegaardt and Mike Batley, ‘Domestic Violence in South Africa: A Restorative Justice Response’ (2006) Pretoria University Law Press 141.

¹⁰⁵ Hill, ‘See what you made me do: Power, Control and Domestic Abuse’ 146.

¹⁰⁶ Abena Asefuaba Yalley and Molatokunbo Seunfunmi Olutayo. ‘Gender, masculinity and policing: An analysis of the implications of police masculinised culture on policing domestic violence in southern Ghana and Lagos, Nigeria’ (2020) 2 Social Sciences & Humanities 2.

¹⁰⁷ Marie Juul Petersen, ‘Promoting Freedom of Religion or Belief and Gender Equality in The Context of The Sustainable Development Goals: A Focus on Access to Justice, Education and Health Reflections from the 2019 Expert Consultation Process’ (2020) The Danish Institute for Human Rights 34.

¹⁰⁸ The Constitution of South Africa, 1996.

¹⁰⁹ Sections 7 to 38 of the 1996 Constitution.

sources. In Section 205, the Constitution established the SAPS and gives it the responsibility of preventing, combating, and investigating crime. SAPS has the responsibility of protecting and securing the inhabitants of South Africa and their property as well. Also, the responsibility of upholding and enforcing the law. This means that members of SAPS must execute these duties towards victims of domestic violence while also respecting their rights, dignity, and equality.

The Constitution established a few other mechanisms designed to deal with domestic violence. The first is the South African Human Rights Commission as set out in section 181. This Commission has the function to monitor and assess the observance of human rights in South Africa. It has powers to investigate, report on the observance of human rights and take steps to secure appropriate redress where human rights have been violated. The Commission educates and carry out research on human rights in South Africa. The Commission must require information from relevant organs of state on the measures taken towards the realisation of the rights in the Bill of Rights. It must also report any proposed legislation that may contravene the provisions of Chapter 3 of the Constitution or any International Law.

The Constitution also established the Commission for Gender Equality (CGE) under Chapter 9 as an independent state institution to support and promote the culture of human rights in the country.¹¹⁰ The CGE is charged with a broad mandate to promote respect for gender equality and the protection, development, and attainment of gender equality, and to make recommendations to Parliament on any legislation affecting the status of women in South Africa.¹¹¹ Furthermore, the CGE is committed to creating a society free from gender discrimination and any other forms of oppression. The mandate of the CGE is achieved through monitoring, investigating, conducting research, education, and awareness, advocacy, and lobbying, and reporting on issues concerning and or affecting gender equality. The Commission for Gender Equality Act¹¹² places on the CGE the burden to monitor South Africa's compliance with all international and regional instruments signed, acceded to, and/or ratified that impact directly or indirectly on issues of gender equality in the country. Section 187 of the South African Constitution provides for the CGE's functions as "to promote respect for gender equality and the protection, development, and attainment of gender equality." The CGE is also empowered to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality as regulated by national legislation.¹¹³ The CGE's enabling Act further ameliorates upon its

¹¹⁰ Section 119 of the 1996 Constitution.

¹¹¹ The Preamble of the Commission for Gender Equality Act No. 39 of 1996.

¹¹² Act 39 of 1996.

¹¹³ Commission for Gender Equality 'The Implementation of the Beijing Platform for Action in South Africa' (2014) 25 <[cge-beijing-platform-1.pdf](#)> accessed on 31 May 2023.

functions and clearly cites as a key part of its mandate is to monitor the States compliance with international conventions. Section 11 of the CGE Act further provides for the CGE to monitor compliance with international conventions and charters acceded to or ratified by South Africa and to prepare and submit reports to Parliament pertaining to any such convention, covenant or charter relating to the object of the Commission. The CGE aims to transform society by exposing gender discrimination in laws, policies, and practices; advocating for change in sexist attitudes and gender stereotypes; and instilling respect for women's rights as human rights.¹¹⁴ Although the institution has a particular interest in the development of women, it pays attention to the gendered needs and concerns of both women and men in the public and the private spheres.¹¹⁵

2.2.2 The Domestic Violence Amendment Act 14 of 2021

South Africa's earliest legislation specifically dealing with domestic or family violence was passed in 1993 is the Prevention of Family Violence Act.¹¹⁶ This Act made provision for an abused to approach a judge or magistrate, who had discretionary power to grant an interdict prohibiting an abuser from assaulting the victim or requiring compliance with conditions.¹¹⁷ A suspended warrant of arrest was simultaneously issued, which, if breached, led to the arrest of the abuser. This Act was amended by the DVAA 2021 following criticism by some women's movements. The Prevention of Family Violence was seen as a cynical ploy by the apartheid government to win female voters. Its rushed promulgation and the absence of consultation with women's groups were viewed as a failure to address the actual needs of abused women¹¹⁸ The DVA 1998 was in operation and catering to the needs of victims of domestic abuse by the issuance of protective orders against the abusers. But with the increasing number of cases and heavy protests all over the country, law reform was necessary. The DVAA 2021 was thereby enacted to cure the defects of its predecessor.

The DVAA 2021 is presently the primary legislation in place for the fight against domestic violence in South Africa. It defines and regulates domestic violence. Assented to by the President on 25 January 2022, the Act appears to be a decisive response to the pervasive violence against women

¹¹⁴ Commission for Gender Equality 'The Implementation of the Beijing Platform for Action in South Africa'

¹¹⁵ Commission for Gender Equality 'The Implementation of the Beijing Platform for Action in South Africa'

¹¹⁶ Act 133 of 1993; Morei Neo, 'Domestic violence in South Africa: women and children under siege?' (2014) 20(5) *Mediterranean Journal of Social Sciences* 932.

¹¹⁷ Joanne Fedler, 'Lawyering domestic violence through the Prevention of Family Violence Act 1993 - an evaluation after a year in operation' (1995) 112 S. African LJ 231.

¹¹⁸ Act 133 of 1993.

in South Africa. The Act enhances the protections available to survivors of domestic violence and addresses practical challenges and gaps that are evident in its predecessor.

The very first change that can be noticed in the DVAA 2021 is the extension and revision of some definitions of domestic violence. The inclusion of ‘coercive behaviour’, ‘controlling behaviour’, ‘elder abuse’, ‘expose a child to domestic abuse’, ‘sexual harassment’ and spiritual abuse’ has broadened what an act of domestic violence consists of under the DVA 1998.¹¹⁹

The Act also revised the definition of harassment, physical abuse, sexual abuse, emotional, verbal, or psychological abuse and intimidation.¹²⁰ Another notable change are the introduction of electronic submission of applications for protection orders, the Domestic Violence Safety Monitoring Notice,¹²¹ and obligations for electronic communication service providers. The DVAA 2021 places mandatory reporting obligations on adults and certain functionaries – medical practitioners, health care personnel, social works, educators, and care givers. These functionaries are to report to a social worker or SAPS where they believe or suspect an act of domestic violence has been committed against a child, disabled person, or elderly person.¹²² Furthermore, the Act places a responsibility on prosecutors as it provides that no prosecutor is to refuse to prosecute a person who has violated the terms of a protection order.¹²³ It also provides for an Integrated Electronic Repository which is an online platform that make accessible order of functionaries in the criminal justice system.¹²⁴ In strengthening the fight against domestic violence in South Africa, the DVAA 2021 also adds to the responsibilities of SAPS. These roles of the police will be further highlighted and discussed in the next chapter.

Outside of the domestic framework, South Africa has acceded to several international and regional human rights agreements with regards to the fight against domestic violence which the nation's main domestic violence statute complies with. These instruments include amongst others, CEDAW, the Beijing Platform for Action (BPA) and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa and the Millenium Development Goals.

¹¹⁹ Section 1 of DVAA 2021.

¹²⁰ Dakalo Singo, ‘A New Chapter in the Fight Against Gender-Based Violence?’ (2023) <[A new chapter in the fight against gender-based violence? - Werksmans](#)> accessed on 22 May 2023.

¹²¹ Section 4(A).

¹²² Section 2(A).

¹²³ Section 2(3).

¹²⁴ Section 6A.

2.2.3 United Nations Convention on the Elimination of all Forms of Discrimination Against Women

CEDAW was adopted by the UN General Assembly in 1979. Often described as the international Bill of Rights for women, its aim is to improve the life of women around the world. By going beyond other human rights conventions which applies equally to both men and women, it provides a more focused protection of human rights for women.¹²⁵ Article 1 of CEDAW describes discrimination against women as any action based on sex that aims to impede or nullify women's equal enjoyment of human rights and fundamental freedoms in all areas, irrespective of their marital status. This encompasses political, economic, social, cultural, civil, or any other field.¹²⁶ Although this definition does not outrightly talk about domestic violence, it is deducible that domestic violence is a form of restriction and exclusion that impairs the enjoyment of the human rights and freedom of women. Article 2 urges states to condemn and eliminate discrimination against women in all forms by embodying the principle of equality of men and women in their national constitutions and legislations and including sanctions where appropriate. It also places on States the responsibility to ensure legal protection of women against any act of discrimination and to modify or abolish any existing law, customs and practices which constitute discrimination against women.¹²⁷ In achieving the goal of eliminating discrimination, the convention also spells out equal access to education, employment and health care, giving women the right to undertake financial and other transaction in their own name; and protecting the special needs of women in developing countries, as measures countries shall undertake in achieving this goal.¹²⁸

2.2.4 Beijing Declaration and Platform for Action

The Beijing Declaration and platform for Action of 1995 (BPA) is a visionary outline for the empowerment of women. It is the most comprehensive global policy framework and blueprint for action and is a current source of guidance and inspiration to realise gender equality and the human rights of women and girls, everywhere.¹²⁹ The Platform for Action covers 12 critical areas which are: poverty, education and training, health, violence; armed conflict, economy; power and decision-

¹²⁵ All Answers Ltd, 'An Analysis of the CEDAW' <<https://www.lawteacher.net/free-law-essays/international-law/an-analysis-of-the-cedaw.php?vref=1>> accessed 23 May 2023.

¹²⁶ Convention on the Elimination of all Forms of Discrimination Against Women (adopted on 18 December 1979, entered into force on 3rd September 1981) 1249 UNTS 13 (CEDAW) art 1.

¹²⁷ CEDAW art 2.

¹²⁸ CEDAW art 2 through 16.

¹²⁹ UN Women 'Beijing Declaration and Platform for Action Beijing+5 Political Declaration and Outcome' (2014) <[PFA E Final WEB.pdf \(unwomen.org\)](#)> accessed on 31 May 2023.

making, institutional mechanisms; human rights, media, environment, and the girl child. For each critical area of concern, strategic objectives are identified, as well as a detailed catalogue of related actions to be taken by governments and other stakeholders, at national, regional, and international levels. Its mission is to remove all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural, and political decision-making. This means that the principle of shared power and responsibility should be established between women and men at home, in the workplace and in the wider national and international communities. Equality between women and men is a matter of human rights and a condition for social justice and is also a necessary and fundamental prerequisite for equality, development, and peace.

The BPA provides for women to play a critical role in the family. It recognises the fact that women make great contribution to the welfare of the family and the environment and maternity, motherhood, parenting, and the role of women in procreation must not be a basis for discrimination nor restrict the full participation of women in society. This is significant as most women are considered unimportant in families, and this negatively impacts their input in the society. Furthermore, it provides for the advancement of women and the achievement of equality between women and men are a matter of human rights and a condition for social justice and should not be seen in isolation as a women's issue. They are the only way to build a sustainable, just, and developed society. Empowerment of women and equality between women and men are prerequisites for achieving political, social, economic, cultural, and environmental security among all peoples.

The BPA for Action further provides for the need for States to promote equality and non-discrimination under the law and in practice by amongst others prioritizing the full and equal enjoyment by men and women of all human rights without distinction of any kind as to race, colour, or sex. This may be achieved by reviewing national laws, including customary laws and legal practices in the areas of family, civil, penal, labour, and commercial law to ensure the implementation of the principles and procedures of all relevant international human rights instruments by means of national legislation. States need to also take urgent action to combat and eliminate violence against women, which is a human rights violation, resulting from harmful traditional or customary practices, cultural prejudices, and extremism. It also provides for gender-sensitive human rights education and training to public officials, including police and military personnel, corrections officers, health and medical personnel, and social workers, including people who deal with migration and refugee issues, and teachers at all levels of the educational system, and make available such education and training also to the judiciary and members of parliament in order to enable them to better exercise their

public responsibilities. States are also to review and amend criminal laws and procedures, as necessary, to eliminate any discrimination against women in order to ensure that criminal law and procedures guarantee women effective protection against, and prosecution of, crimes directed at or disproportionately affecting women, regardless of the relationship between the perpetrator and the victim, and ensure that women defendants, victims and/or witnesses are not revictimised or discriminated against in the investigation and prosecution of crimes. Finally, they are to encourage the development of gender-sensitive human rights programmes.

The success of the BPA requires States to be committed, adopting its provisions in their national laws, and adhering to them. It will also require adequate mobilisation of resources at the national and international levels as well as new and additional resources to the developing countries from all available funding mechanisms, including multilateral, bilateral and private sources for the advancement of women; financial resources to strengthen the capacity of national, subregional, regional and international institutions; a commitment to equal rights, equal responsibilities and equal opportunities and to the equal participation of women and men in all national, regional and international bodies and policy-making processes; and the establishment or strengthening of mechanisms at all levels for accountability to the world's women.

2.2.5 The Protocol to the African Charter on Human and People's Rights, on the Rights of Women in Africa and the Millennium Development Goals

This Protocol came into force on 25 November 2005 and was ratified by the South African on the 20 May 2019. A major concern of this Protocol was that despite ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by State parties and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa continue to be victims of discrimination and harmful practices.¹³⁰ This Protocol recommends the condemnation and elimination of any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls. It also ensures the rights of women are promoted and protected to enable them to enjoy fully all their human rights. Its provisions are like the Beijing Platform for Action. It places responsibilities on State parties as it places emphasis on enactment of national legislations that promote the principle of equality between men and women. It provides that States are to commit themselves to modify the

¹³⁰ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa <[37077-treaty-charter on rights of women in africa.pdf \(au.int\)](#)> accessed on 24 December 2023.

social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.¹³¹ An outstanding addition to the fight against violence against women provided for by this Protocol is for States to punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims.¹³²

2.2.6 South Africa's Compliance with International Laws on Women's Rights

South Africa has fared well in terms of domesticating some of the international laws and conventions bordering on domestic violence into her domestic violence legislation. Although not verbatim, the South Africa Constitution as well as other legislations on the rights of women embodies principles provided for in international human rights conventions. South Africa is one of the most compliant countries in Africa (with only one or two possible exceptions) that has done the most to meet the international standards required of her regarding fight against domestic violence.¹³³ Section 39(1)(b) of the Constitution goes even further to specifically provide for South African courts, tribunals, and forum that they “must consider international laws” in the interpretation of the Bill of Rights enshrined in the Constitution. Expanding on Section 39(1)(b), Dugard states that it requires South African courts to consult all sources of international law recognised in Article 38(1) of the Statute of the International Court of Justice: international conventions, international customs, principles of law recognised by civilised nations, judicial decisions and teachings of publicists.¹³⁴ The constitutional right to be free from all forms of violence and the constitutional requirement to consider international law as well as the obligations imposed by international human rights organisations creates enormous scope for the protection and development of women's rights to be free from violence in South Africa.¹³⁵

¹³¹ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2005, art II chapter 2.

¹³² Article IV Chapter 2(e) of the Protocol to the African charter on Human and People's Rights on the Rights of Women in Africa 2005.

¹³³ Dee Smythe, 'South Africa's response to domestic violence' In *Due Diligence and Its Application to Protect Women from Violence*, (2009) Brill Nijhoff 162.

¹³⁴ Dugard J, "South Africa" in David Sloss (ed), 'The Role of Domestic Courts in Treaty Enforcement: A Comparative Study' (Cambridge University Press 2009) 28.

¹³⁵ Helene Combrinck, 'Positive State Duties to Protect Women from Violence: Recent South African Developments', (1998) 20(3) *Human Rights Quarterly* 666–690.

In addition to domesticating international conventions, South Africa has put measures in place to curtail domestic violence. In a report submitted to the United Nations CEDAW by the South African government, the country laid out the measures taken by the State in addressing domestic violence whilst carrying out her international obligations.¹³⁶ This report is in adherence to Article 18 of CEDAW. Parties are required to submit reports on the legislative, judicial, administrative, or other measures adopted to give effects to the provisions of the Convention in terms of Article 18. The measures taken by the South African government as presented under the fifth periodic report submitted by South Africa under Article 18 of CEDAW include amongst others the translation into all 11 languages and distributing them to lower courts nationwide.¹³⁷ South Africa has also created a "No More Violence" manual to educate service point stakeholders and victims on how to effectively manage domestic violence cases. Another measure taken is the holding of an annual Victims' Rights Week with a focus on the Domestic Violence recourse measures available and sensitise communities on the rights of victims. in South Africa. This was launched in September 2010. Furthermore, the (SAPS) has been charged with informing the Civilian Secretariat for Police of all instances of noncompliance with the DVA 1998 The SAPS is also to maintain and monitor Domestic Violence Register in all police stations to record all reported domestic violence incidents, whether a docket is opened.

Although the domestic legislations largely comply to international standards and measures, the number of domestic violence cases are still on the increase. A 2021 report published by the CEDAW has shown that the scale of domestic violence and femicide is still rife in South Africa.¹³⁸ The SAPS crime statistics between January and March 2023 places domestic violence related crimes at 34,322 reported cases.¹³⁹ This means that there were over 10,000 more cases than for the same period in the previous year.¹⁴⁰ The Committee is of the opinion that South Africa has failed to comply with its obligations under the Convention to effectively investigate, prosecute, and punish cases of domestic violence within the South African society.¹⁴¹

¹³⁶ United Nations Committee on the Elimination of Discrimination against Women, 'Fifth periodic report submitted by South Africa under article 18 of the Convention' (2019) <[5th periodic report submitted by South Africa under article 18 of the Convention, due in 2015](#) :> accessed on 14 July 2023.

¹³⁷ CEDAW, 'Fifth periodic report submitted by South Africa under article 18 of the Convention'.

¹³⁸ United Nations, 'South Africa: Failure to tackle domestic violence (2021) <[South Africa: Failure to tackle domestic violence a violation of women's rights – UN experts | OHCHR](#)> accessed on 13 June 2023

¹³⁹ Police Recorded Crime Statistics Republic of South Africa. Fourth Quarter of 2022-2023 Financial year (January 2023 to March 2023) <[Long version 2022-2023 - 4th Quarter \(January 2023 to March 2023\) - Final \(saps.gov.za\)](#)> accessed on 30 December 2023, 38.

¹⁴⁰ Police Recorded Crime Statistics, Republic of south Africa, Fourth Quarter of 2021/2022 Financial Year 34.

¹⁴¹ Police Recorded Crime Statistics, Republic of south Africa, Fourth Quarter of 2021/2022 Financial Year 34.

2.3 Policing Domestic Violence

Until recently, domestic violence had been treated as a private matter which did not require the interference of the public. The UN General Assembly on the 22nd of December 2003 adopted resolution 58/147 that specifically addresses domestic violence entitled 'Elimination of Domestic Violence against Women'. The resolution recognises domestic violence against women and girls as a human rights issue and a societal problem. It also acknowledges the implications of domestic violence for the socio-economic development of communities and States. The resolution recognises that "domestic violence is of public concern and requires States to take serious action to protect victims and prevent domestic violence". It stresses that States have an obligation to exercise due diligence to prevent, investigate, and punish the perpetrators of domestic violence against women and to provide protection to the victim. The resolution calls on States, among other things, to implement legislations that prohibit domestic violence as well as to review these laws and regulations periodically to ensure their effectiveness in eliminating domestic violence. It also enjoins States to ensure proper investigation and prosecution of perpetrators, establish and/or strengthening police response procedures to ensure that all appropriate action is taken to protect victims, and prevent further acts of domestic violence.¹⁴²

With these, many States have enacted domestic violence laws having proactive police response at their core. These laws aim to increase arrest rates, hold offenders accountable, reduce repeat offending, and contribute to the safety of victims. This response perhaps validates Stubb's opinion that international responses to violence against women also shape the policing of domestic violence in local contexts, sometimes in unanticipated ways.

CEDAW emphasises that it is the responsibility of States to prosecute and punish perpetrators of domestic violence. In some countries, there has been criminalisation of domestic violence offences or an application of criminal sanctions to the breach of civil orders.¹⁴³ The police service is the frontline institution when it comes to dealing with domestic violence cases. It has a vital role in assisting victims who seek recourse for abuse. Police officers are referred to as "gatekeepers" in the criminal justice system, and they play an important role in shaping victims' initial experiences of

¹⁴² United Nations General Assembly. Resolution adopted by the General Assembly on 22 December 2003 on the report of the Third Committee. <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/503/40/PDF/N0350340.pdf?OpenElement>> accessed on the 26 September 2022.

¹⁴³ Julie Stubbs, 'Searching for integrity in domestic violence policing' (2016) *Integrity in the criminal process: From theory into practice* 58.

it.¹⁴⁴ They are often a victim's first point of contact in the criminal justice process. They hold the key to the effective implementation of the laws laid down in the fight against domestic violence. When effective, they play a vital role in ensuring safety for the victim and accountability for the perpetrator; when ineffective, they can do significant harm. Domestic violence is a problem globally and laws have been enacted in different countries empowering the police in carrying out the duties imposed on them to fight this scourge. Policing domestic violence according to a study is a complicated task as it does not just consist of one crime but a long list of abuses which include: sexual, emotional, verbal, psychological, economic abuse harassment, damaging property, stalking, entrance into the plaintiff's property without his or her consent where he or she is not living with the abuser and any behaviour that may cause immediate harm to the complainant.¹⁴⁵

2.3.1 Police Service, Law, Compliance and Police Service Oversight

The South African Police Service (SAPS) under the Constitution of South Africa, is saddled with the responsibility of upholding the law and maintaining law and order within the South African society.¹⁴⁶ The South African Police Service Act¹⁴⁷ (SAPS Act) regulates the affairs of the police force within the South African territory. The preamble of the SAPS Act provides for the need for the police service to ensure the safety and security of all persons and property. The police under the SAPS Act are obligated to uphold and safeguard the fundamental rights of citizens guaranteed under Chapter two of the 1996 Constitution.¹⁴⁸ Domestic violence prohibits the full enjoyment of the fundamental rights of its victim as already established in the earlier part of this work, therefore, it is the duty of the SAPS to safeguard the rights of women within the territory of South Africa. Taking into cognizance this dynamic duty of the police, the DVAA 2021 introduced a comprehensive set of duties both internal and external to the SAPS with an aim of affording victims of domestic violence an all-out protection from domestic abuse that the law can provide. Complainants are entitled to a variety of assistance from the police. From informing them in a written form the criminal and civil remedies due to them by the police to visits at intervals as provided for by the Domestic Violence Safety Monitoring

¹⁴⁴ Sarah Charman, 'Making sense of policing identities: The 'deserving' and the 'undeserving' in policing accounts of victimisation' (2019) *Policing and Society* 6.

¹⁴⁵ Kholofelo Mothibi and Happy Mathew Tirivangasi, 'Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women's Access to Justice' (2022) 1 *Violence Against Women and Criminal Justice in Africa: Palgrave Macmillan*, Cham 125.

¹⁴⁶ Section 205(3) of the 1996 Constitution of South Africa.

¹⁴⁷ South African Police Service Act 68 of 1995.

¹⁴⁸ The Preamble of the SAPS Act.

Notice.¹⁴⁹ Failure to comply with the DVAA's provisions is treated as a form of misconduct in terms of the South African Police Service Act of 1995.¹⁵⁰

In ensuring compliance of the members of SAPS with the provisions of the DVAA 2021 and the Constitution, the National Commissioner of the South African police Service has issued national instructions which outlines the administrative procedures required in dealing with a complaint of domestic violence.

2.3.2 The South African Police National Instruction 7 of 1999

The South African Police Service National Instruction 7 of 1999 gives clear directions on how a member of the SAPS should respond in a domestic violence case to comply with the provisions of the DVA. The National instruction 7 of 1999 provides for the duties of a Station Commander, Community Centre Service commander, and members of SAPS and specifically outlines how these duties are to be carried out. As earlier stated, the duties of members of the SAPS with regards to domestic violence will be discussed extensively in the next chapter. The National Instruction in addition to the duties stipulated therein dealing with complaints against members of SAPS in the discharge of the responsibilities placed on them by the DVA. The duty to receive complaints is placed on the station commander, who receives complaints against members under his or her command in respect of failure to comply with the obligations in terms of the DVA or the National Instruction and goes further to issue disciplinary proceedings against such erring member.¹⁵¹ Section 13(2) of the National Instruction provides for a station commander to apply to the Independent Complaints Directorate for exemption where he or she (the state commissioner) is of the opinion that disciplinary action should not be taken against an erring member of SAPS. It also provides for SAPS 508-form, a form on which the state commissioner keeps record every month and submits to the relevant Area Commissioner before the third working day of each month. The state commissioner also keeps records of the number and particulars of complaints received, the disciplinary proceedings instituted and the decisions which emanated from such proceedings. He or she also keeps records of the steps taken because of recommendations made by the Independent Complaints Directorate.¹⁵²

¹⁴⁹ Section 4(A) of the SAPS Act.

¹⁵⁰ Section 18(2) of the SAPS Act.

¹⁵¹ Section 13 of the National Instruction 7 of 1999.

¹⁵² Section 14 of the National Instruction.

2.3.3 The Independent Police Investigative Directorate (IPID) and the Civilian Secretariat for Police Service (CSPS)

The introduction of statutory monitoring and oversight of police enforcement of the domestic violence law is notable in the National Instruction 7 of 1999 and the DVA 1998.¹⁵³ Formally referred to as the Independent Complaints Directorate (ICD). The aim of the Independent Police Investigative Directorate (IPID) is to ensure independent oversight over the SAPS and the Municipal Police Services (MPS). It also has a duty to conduct independent and impartial investigations of identified criminal offences allegedly committed by members of the SAPS and the MPS and make appropriate recommendations.¹⁵⁴ Although the SAPS has been saddled with the responsibility of investigating and providing assistance to domestic violence victims, complainants who are unsatisfied with the services rendered to them can complain to the station commander and, until early 2012, could also lodge a separate complaint with the ICD.¹⁵⁵ The ICD categorised these complaints as follows: Class I complaints comprised cases where police members were responsible for the deaths of their intimate partners; Class II complaints included cases of rape or assault committed by police members against their intimate partners; and Class III complaints dealt with the police's failure to aid domestic violence complainants. This last category also fell within class IV complaints investigated by the ICD, which were considered the least serious form of police wrongdoing.¹⁵⁶ In an effort to ensure that police who do not uphold the rule of law are held accountable for their actions, the ICD makes recommendations as to how these officers should be dealt with, both departmentally and criminally.¹⁵⁷ Furthermore, the SAPS and the ICD are required to record in details that the complaints received by each agency as well as the disciplinary proceedings instituted as a result. The ICD reports on the recommendations it had made to the SAPS about disciplinary processes, the SAPS details its responses to those recommendations. In 2012, the mandate changed through the IPID Act, 2011 and the function of checking the implementation and compliance to the DVA was shifted to the Civilian Secretariat for Police Service (CSPS), as this body is mandated to oversee the implementation of all policy and legislation by the SAPS. Since April 2012, the CSPS has taken over this role and developed a standardised tool used during oversight visits to police stations. The visits were aimed at identifying challenges with implementation of the DVA by police stations and to equip the police stations with information on the way compliance and implementation can be

¹⁵³ Section 17 and 18(4)(a) of the National instruction.

¹⁵⁴ [Independent Complaints Directorate: Overview | Western Cape Government](#) Accessed on 3 May 2023.

¹⁵⁵ Johan Burger, 'A watchdog without teeth? The Independent Complaints Directorate' (2008) 24 SA Crime Quarterly 28.

¹⁵⁶ Lisa Vetten, 'Aluta continua: Police accountability and the Domestic Violence Act 1998' (2017) 59 South African Crime Quarterly 9.

¹⁵⁷ Burger 'A watchdog without teeth? The Independent Complaints Directorate' 29.

improved focusing on the following areas: Regulatory compliance, record keeping, and services offered to complainants.¹⁵⁸

The CSPA was set up by the Civilian Secretariat for Police Services Act. The CSPA was established by Section 208 of the Constitution. The CSPA is now responsible for the bi-annual reports to Parliament. One of its key oversight roles is to check and evaluate SAPS' compliance with the DVA 1998 and engage with civil society organisations to develop interventions and programmes to improve SAPS' response. The Civilian Secretariat Act places the responsibility of monitoring the implementation of the DVA by the SAPS with the Secretariat. Section 6(1)(c) and (d) of the Civilian Secretariat for Police Service Act mandates the Civilian Secretariat to monitor the compliance with the DVA ¹⁵⁹by the SAPS and make recommendations to the SAPS on disciplinary procedures and measures with regards to non-compliance with the DVA. The CSPA Act also provides for SAPS to cooperate with the Secretariat to enable them monitor and evaluate its compliance with the DVA 1998.¹⁶⁰

For an effective monitoring of the compliance of SAPS to the DVA 1998, the CSPA conducts monitoring visits to police stations around the country. This is done to assess the compliance and implementation of the DVA 1998 by the SAPS at station level. The CSPA looks at record keeping, proper filing of documents, submission of relevant monthly returns and accessibility and maintenance of a Victim Friendly Room (VFR). The CSPA also focuses on administrative non-compliance and operational non-compliance (failure to provide required service under both the DVA and the National Instruction) of SAPS members when dealing with domestic violence. In so doing, it conducts a police station census every five years. The first census was conducted in the year 2018/2019 and the next will be conducted during 2023/2024 financial year.

In March 2022, the CSPA found a sizeable number of non-compliance incidents within the nine provinces.¹⁶¹ It ranged from failure to complete SAPS 508a and SAPS 508b forms, failure to record domestic violence incidents in the Pocket Book and endorse case numbers. The failure of members of SAPS to file/register and timely serve Protection Orders were also recorded., Lack of sign language and other languages interpretation services at police stations to assist with opening of

¹⁵⁸ Vetten, 'Aluta continua: Police accountability and the Domestic Violence Act 1998' 9

¹⁵⁹ Domestic Violence Act 116 of 1998.

¹⁶⁰ Section 32 of the Civilian Secretariat for Police Service Act, 2011.

¹⁶¹ Civilian Secretariat for Police Service, 'Presentation to the Select Committee on and Justice: implementation of the Domestic Violence Act, 1998'.

cases amongst others.¹⁶² There are also a plethora of reported cases that speak to the non-compliance of members of SAPs to the provisions of the DVA.¹⁶³ What is most shocking is the high number of members of SAPS who are perpetrators of domestic violence themselves and their firearms were reportedly not seized in accordance with the DVA and the Firearms Act.¹⁶⁴

2.4 Conclusion

This chapter has explored the concept of domestic violence vis-à-vis the legislative and institutional frameworks put in place by the Republic of South Africa to ensure the rights of all the people and protect them from all forms of violence. It is very clear that, in terms of laws and policing strategies regarding domestic violence, South Africa is very responsive. This is a welcome development, considering the importance of lawmaking to dealing with the monstrous phenomenon of domestic violence. However, it must be noted that it will take more than laws and policy frameworks to stem the tide of domestic violence; prosecuting agencies need to be responsive to their responsibilities. Strict enforcement of these laws will deter violence in the home. The next chapter will centre around the analysis of the failure of SAPS in relation to the Domestic Violence Act 116 of 1998.

¹⁶² CSPS, 'Presentation to the Select Committee on and Justice: implementation of the Domestic Violence Act, 1998'

¹⁶³ Kholofelo and Tirivangasi. 'Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women's Access to Justice' 130.

¹⁶⁴ Firearms Act 60 of 2001.

CHAPTER THREE

AN ANALYSIS OF THE FAILURE OF SAPS IN RELATION TO THE DOMESTIC VIOLENCE ACT 116 OF 1998

3. Introduction

Prior to the enactment of domestic violence laws in South Africa, women had little or no legal remedy for domestic violence. The victims of domestic violence had to resort to common-law crimes of assault or indecent assault (in cases where the abuse was sexual in nature).¹⁶⁵ Domestic abuse had in the past been regarded as a private matter between spouses and, as such, should be settled between them. Although domestic violence laws have brought this menace to the public purview to be dealt with by the authorities, there are still vestiges of the traditional view of the privacy of domestic violence in the South African society today.¹⁶⁶ The DVA 1998 recognised the need to make domestic violence a public matter, and one that should be dealt with and prosecuted by the State. In line with the international instruments on the protection of women's rights, the DVA places on the South African Police Force certain obligations that foster the protection of women. It has been argued by Vetten that the imposition of duties on the police is an attempt to undo the long-standing neglect of domestic violence.¹⁶⁷ The police are the first port of call for victims of violence as they are the protectors of the community.¹⁶⁸ Therefore, additional duties on SAPS should result in a higher level of responsibility and commitment to reaching the expected goal of eradicating domestic violence. Victims can go the police more easily knowing that they are there to assist. The importance of the police service in the fight against domestic violence cannot be overemphasised. Any violation by a member of SAPS of a statutory duty amounts to misconduct and is to be reported to the Independent Complaints Directorate.¹⁶⁹ Every six months, the National Commissioner must report to the Parliament on the number of police misconduct complaints that were filed, the disciplinary actions taken in response to those complaints, and the outcomes of those actions.¹⁷⁰ A complainant may also get redress from a court of competent jurisdiction where the SAPS fails to uphold its

¹⁶⁵ Saras Jagwanth, 'The Prevention of Family Violence Act 1993: A Feminist Critique' (1995) 8(1) *South African Journal of Criminal Justice* 1.

¹⁶⁶ Kristin Anne Kelly, 'Domestic violence and the politics of privacy' [2003] *Cornell University Press* 2.

¹⁶⁷ Lisa Vetten, 'Aluta continua: Police accountability and the Domestic Violence Act 1998' (2017) 59 *South African Crime Quarterly* 4.

¹⁶⁸ Kholofelo and Tirivangasi, 'Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women's Access to Justice' (2021) Springer International Publishing 133.

¹⁶⁹ Charlotte Bendall, 'The domestic violence epidemic in South Africa: legal and practical remedies' (2010) 39(2) *Women's studies* 100-118.

¹⁷⁰ Lillian Artz, 'Policing the Domestic Violence Act: teething troubles or system failure' (2001) 16(47) *Agenda* 5.

responsibilities in domestic violence cases and where liable, the State is held vicariously liable for the failure to protect the victims. The Constitutional Court in *Minister of Safety and Security and Another v Carmichele* dismissing appeal held that the appellants (Minister of Safety and Security and the Minister of Justice and Constitutional Development) were liable for damages for a breach of duty of care.¹⁷¹ The Court found that certain officials of the police had indeed owed the respondent a legal duty to protect the respondent against the risk of violence and they had negligently failed to do so, and such failure was unlawful. Artz has described the police as the gatekeepers of the criminal justice system, as their discretionary powers under the DVA play a primary role in determining the validity and seriousness of a domestic violence incident.¹⁷² The National Instruction 7 of 1999 on Domestic Violence provides for specific instructions to follow in the discharge of their duties to adequately meet the needs of the South African woman.

This chapter will consider the specific obligations placed on members of SAPS by the DVA 1998 and the documented failures in respect to the implementation of the provisions of the Act.

3.1 Laying a Criminal Charge

One of the remedies available to a victim of domestic violence is laying a criminal charge in a police station. Where an incidence of domestic violence has occurred and the abuse is criminal in nature, a civil remedy alone becomes inadequate as the matter transcends a civil case to a criminal matter. An officer of SAPS who attends to a complainant has a duty to inform the complainant of her right to lay a charge or apply for a protection order. It is also crucial for a police officer to inform the complainant that applying for a protection order is not a prerequisite for laying a criminal charge.¹⁷³ Under section 7 of the National Instruction, a police officer has a responsibility of receiving a criminal charge from a complainant. Where a criminal charge is received, a docket is opened by the police officer and registered for investigation. The police officer will then interrogate the complainant before taking a statement and entering the reported crime into the SAPS' Crime Administration System (CAS) file. The officer is not expected to avoid opening a docket or direct the complainant to counselling or conciliation services.¹⁷⁴ This provision is important because as earlier stated, some police officers, in a bid to avoid work, suggest counselling and reconciliation for victims of domestic violence. As witnessed in *Naidoo v Minister of Police*,¹⁷⁵ the police officer attempted to mediate the

¹⁷¹ *Minister of Safety and Security and Another v Carmichele* 2001 (4) SA 938 (SCA).

¹⁷² Artz, 'Policing the Domestic Violence Act: teething troubles or system failure' 5.

¹⁷³ Section 10(2) of the National Instruction 7/1999.

¹⁷⁴ Section 11(4) of the National Instruction 7 of 1999.

¹⁷⁵ *Naidoo v Minister of Police* 2016 (1) SACR 468 (SCA).

situation to avoid starting a docket. It is also noted above that the police officer proposed that the complainant and respondent open dockets against each other for them to mediate and avoid opening a docket altogether. Some of the reasons why a police officer may be slow to open a docket include laziness, negative attitudes toward domestic violence, a rash withdrawal of charges, and vindictive complainants.¹⁷⁶ Police officers are sometimes hesitant to accept a charge because they question women's seriousness in carrying it out.¹⁷⁷ While this reason can be said to be justifiable as time and effort put in a case that ends up being withdrawn cannot be gotten back, it is not enough reason for the police not to attend to a criminal charge from a victim. After a charge has been laid, the attending police officer is expected to render any assistance as maybe necessary to the complainant. The opening of a docket is a critical step in criminal proceedings. A docket indicates that the case will be followed up on. The complainant will then be assigned a case number, which must be used for all future inquiries about the reported criminal case. The completed case docket is then assigned to a police investigator who will conduct the investigation, and all subsequent inquiries can be directed to this detective. After concluding the investigation, the detective in charge of the case will submit the docket for prosecution to the appropriate court. After concluding the investigation, the detective in charge of the case will submit the docket for prosecution to the appropriate court. The complainant will be notified by the detective when he/she is to attend the court hearings.¹⁷⁸

3.2 Protection Orders

Victim protection is a critical component of a coordinated and strategic response to violence against women and domestic abuse, and it must be implemented in tandem with proper and effective prevention, service delivery, and prosecution. In times of immediate danger, establishing physical distance between the victim and the perpetrator is the most efficient strategy to protect domestic violence victims and ensure their safety.¹⁷⁹ Protection orders are obtained for the purpose of protecting victims from further abuse by their abusers. The DVAA 2021 provides this right of protection through obtaining a protection order. A protection order is a form of injunctive relief that prevents the respondent from carrying out further abuse on the complainant. Though a civil order,

¹⁷⁶ Siyabonga Sibisi, 'Critically evaluating the machinery of the Domestic Violence Act 116 of 1998 for combating domestic violence in South Africa' (LLD Thesis, University of South Africa 2017) 52.

¹⁷⁷ Shanaaz Mathews and Naeemah Abrahams, 'Combining stories and numbers: an analysis of the impact of the Domestic Violence Act (No. 116 of 1998) on women' (2001) *Gender Advocacy Programme*, MRC 27.

¹⁷⁸ Reporting a crime to SAPS <[reporting a crime to saps.pdf \(withtank.com\)](https://www.withtank.com/2017/06/22/reporting-a-crime-to-saps/)> accessed on 22 June 2023.

¹⁷⁹ Rosa Logar and Johanna Niemi, 'Emergency barring orders in situations of domestic violence: Article 52 of the Istanbul Convention. A collection of papers on the Council of Europe Convention on preventing and combating violence against women and domestic violence' [2017] University of London Press 5.

the contravention of a provision of a protection order by the respondent may result in a criminal trial and if found guilty will be liable on conviction to a fine or imprisonment.¹⁸⁰ The following sections will discuss and briefly analyse the procedure for the application for a protection order and the provisions that accompany this court order.

3.2.1 Application for a Protection Order

Section 4 of the DVA 1998 lays down the procedure for the application of a protection order. Any complainant can apply to the court for a protection order. This application can also be done on *ex parte* basis, that is on behalf of the complainant by anyone concerned about the wellbeing of the complainant. This person could be a counsellor, health service provider, member of the South African Police Service, social worker, or teacher. This *ex parte* application for protection order is done with the written consent of the complainant except the court is satisfied that the complainant is a minor, mentally retarded, unconscious; or a person whom the court is satisfied is unable to provide the required consent.¹⁸¹ An application for a protection order is lodged with the clerk of the court. It can also be done electronically. The court considers the application outside of ordinary court hours if the court “is satisfied from the information provided in the application, that a reasonable belief exists, that the complainant is suffering or may suffer harm, if the application is not dealt with immediately”.¹⁸² Accompanying an application for protection are supporting affidavits by persons who are aware of the facts of the abuse.¹⁸³ The court, after considering the application and the supporting evidence and is satisfied that the respondent is committing or has committed an act of domestic violence and that the complainant is suffering or may suffer harm issues an interim protection order.¹⁸⁴ This is necessary as an interim protection order serves as an immediate protection for the victim from her abuser pending the hearing of the matter for which a final protection order is granted.

3.2.2 Interim Protection Order

Section 5 of the DVA 1998 requires that the court, as soon as reasonably possible, to consider the application for protection order upon receiving it. The application for a protection order must be

¹⁸⁰ Section 17 of the DVA 1998.

¹⁸¹ Section 4(3) of DVA 1998.

¹⁸² Section 4(5) of DVA 1998.

¹⁸³ Section 4(6) of DVA 1998.

¹⁸⁴ Section 5(2) of DVA 1998.

applied for on Form 2 of the Annexure to the Domestic Violence Regulations 1999. A complainant in this Form is required to fill in her particulars, the particulars of the person who has committed the abuse against her, the persons affected by the abuse and how they are affected. A complainant is also expected to inform whether the persons affected suffer from a disability as well as give a detailed information regarding the domestic violence. A complainant must also in Form 2, give reasons as to why the court should treat her application as urgent. The court then considers the affidavits attached to the application and may call for additional oral evidence. This evidence adduced to forms part of the record of proceedings.¹⁸⁵ Before the court issues an interim protection order or even a final protection order, it also considers whether there is any other order against either the complainant or the respondent which is in relation to the application.¹⁸⁶ Where the court finds such other application still pending between the parties, the court may order for both the prior and present application to be dealt with or adjourn the present matter and give directions notifying the parties and service of documents. If existing orders are already in place, the court must not issue a protection order that contradicts the existing order and make records of the existing order in the court file. In a case where there is an existing order or pending application, but the court is satisfied that there is need for urgent relief from an act of domestic violence, the court issues the protection order, notwithstanding any prior order. The court orders that the protection order remains in force for a limited period to give the complainant an opportunity to apply for amendment or setting aside of such order.¹⁸⁷

Where there is no pending order and the court is satisfied with the prima facie evidence, it issues an interim protection order. In a research report, the reduction in overall impairment in victims of domestic violence was shown to be significantly influenced by interim protection order, showing an improvement in the victims' functioning and more successful coping on the emotional, cognitive, and behavioural levels after applying for an interim protection order.¹⁸⁸ Upon the issuance of an interim protection order, copies of the order and evidence are served on the respondent by the court clerk, sheriff, or peace officer.¹⁸⁹ An interim protection order will also contain a notice to the respondent, calling on him to show cause on the return date specified in the order why the interim protection order should not be made final. The return date should not be less than ten days after the respondent was served with the interim protection order with the provision that the return date may be anticipated by the alleged perpetrator upon not under 24 hours' documented notice to the applicant

¹⁸⁵ Section 5(1) of DVA 1998.

¹⁸⁶ Section 5(C) of DVA 1998.

¹⁸⁷ Section 5(C)(3) of DVA 1998.

¹⁸⁸ Tertia Vogt, and Abraham P, Greeff, 'The impact of an Interim Protection Order (Domestic Violence Act 116 of 1998) on the victims of domestic violence' (2010) 91(1) Families in Society 45-51.

¹⁸⁹ Section 5(3) of DVA 1998.

and the court.¹⁹⁰ Section 5(6) of the DVAA 2021 further provides that the interim protection order is not enforceable or valid until it is served on the alleged perpetrator. After service has been carried out, copies of the interim protection order and of warrant of arrest are forwarded to the police station of the complainant's choice.¹⁹¹ Section 5(9) of the DVAA provides for the longevity of an interim protection order. It states that "an interim protection order issued in terms of this section remains in force until it is set aside by a competent court." It is the reflection of this study that this provision section 5(9) of the DVAA clears the doubt experienced under the 1998 Act as to the lifespan of the interim protection order as opposed to a final protection order. Now, we know that an interim order is equally enforceable with the same legislative power as the protection order and its validity is until the final protection order is issued or at a time decided by the court. A breach of it carries same penalty as a final protection order.¹⁹² The court may choose to extend or discharge an interim protection order. Section 6(2) of the DVAA 2021 provides for the extension of an interim order by the court when there is a dispute of fact upon trial of the matter and the court requires both parties to adduce further evidence. Also, an interim protection order can be extended or discharged where the complainant does not appear in court or where both parties are absent on the return date.

3.2.3 Final Protection Order

Where the respondent fails to show up on the return date, and the court is content with how they were served with the interim protection order, and after careful consideration of evidence finds on a balance of probability that the respondent has committed or is committing an act of domestic violence, final protection order is issued.¹⁹³ The court will hear the case if the respondent shows up on the return date to contest the issuance of a protection order. Giving the respondent the opportunity to show cause why the final protection order should not be issued is in line with the principle of *audi alterem partem*.¹⁹⁴ The principle is a fundamental concept of natural justice.¹⁹⁵ It simply means that none should be condemned of anything without being heard. It ensures a just and fair hearing. After the issuance of the final protection order, the court clerk captures it as well as the accompanying warrant of arrest and a copy of the return of service of both on the integrated electronic repository.¹⁹⁶ The final protection order prohibits the respondent from committing either

¹⁹⁰ Section 5(5) of DVA 1998.

¹⁹¹ Section 5(8) of DVA 1998.

¹⁹² Jenni Evans, 'Magistrate raises alarm over police station about protection orders' News24 24 August 2018' <[Magistrate raises alarm over police confusion about protection orders | News24](#)> accessed on 22 July 2023.

¹⁹³ Section 6(1)(A) of DVA 1998.

¹⁹⁴ Kachidobelu John Bielu, 'Fair Hearing in Judicial Adjudication in Nigeria' (2020) 14 Unizik Law Journal 2.

¹⁹⁵ Jyotsana Singh and Pratyasha Sahu. 'Audi Alteram Partem: A Fundamental Principle of Natural Justice.' (2022) 2 Indian J. Integrated Rsch 1.

¹⁹⁶ Section 6(6) of DVA 1998.

by himself or by enlisting the help of another to commit any act of domestic violence. It also prohibits the respondent from entering a residence shared by the complainant and himself or the complainant's workplace or place of studies (this done by the court only if it is in the best interest of the complainant).¹⁹⁷ The respondent is also prohibited from disclosing any electronic communication as specified by the protection order.¹⁹⁸

Section 7(5) of the DVA 1998 provides for the exclusion of the complainant's physical, home, study and work addresses and contact details or related persons to whom the protection order relates from the protection order, unless the nature of the terms of the order necessitates the inclusion of such particulars. This is to protect the safety, health, or wellbeing of the complainant, especially for victims who may have been put in shelters or provided with alternative residence. The court may also make an order for the seizure of any weapon in the possession or control of the respondent and impose any other conditions it deems reasonably necessary to protect and provide for the safety, health, and well-being of the complainant. Just like the interim protection order, service on the respondent validates and gives effect to the contents of the order.¹⁹⁹ The final protection order remains in force for life until it is set aside by the court and a notice of appeal does not invalidate or suspend the order.²⁰⁰ Section 12 of the DVA 1998 leaves no one in doubt as to what the court has jurisdiction to issue protection orders. It indicates that any court within the vicinity where the complainant or respondent is temporarily or permanently based, employed, studying, conducting business, or where the cause of action took place can issue a protection order. This means that protection orders already provide extensive coverage and ensures the victim's safety regardless of location. Once issued, a protection order is enforceable throughout the Republic of South Africa.²⁰¹ This aspect favourably benefits victims as it allows them protection irrespective of their whereabouts and victims can move freely around South Africa.

A final protection order is accompanied by the authorisation of the issuance of a warrant of arrest on the respondent.²⁰² The warrant of arrest is suspended and executed subject to compliance with any prohibition, condition, obligation, or order in the protection order. Upon a breach of the final protection order by the respondent, a complainant hands the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any

¹⁹⁷ Section 7(1) of DVA 1998.

¹⁹⁸ Section 7(1)(g) of DVA 1998.

¹⁹⁹ Section 6(7) of DVA 1998.

²⁰⁰ Section 6(7)(b) of DVA 1998.

²⁰¹ South African Police Service website, 'Applying for Protection orders' <[Services | SAPS \(South African Police Service\)](#)> accessed on 24 June 2023.

²⁰² Section 8 of DVA 1998.

prohibition, condition, obligation, or order contained in a protection order, to any officer of the South African Police Service. The police have a duty to execute the warrant of arrest as earlier explained in section 3.2 of this chapter.

3.2.4 Breach of Protection Order

While the application for a protection order is a civil relief, a breach of the conditions and obligations of a protection order is a criminal offence. As earlier discussed, section 17 of the DVA specifies what offence a respondent who contravenes a protection order is guilty of. A complainant who has suffered an abuse after a protection order has been issued may hand over the warrant of arrest together with an affidavit wherein is stated that the respondent has contravened any provision of the protection order to a member of SAPS.²⁰³ The officer of SAPS considers whether there are reasonable grounds to suspect that the complainant would suffer harm because of the alleged breach. If so, the officer immediately arrests the respondent. If not, the officer hands a written notice to the respondent.²⁰⁴ This notice contains the name, residential and work addresses, and the occupation of the respondent. The respondent is called upon to appear in court on a date and time specified in the notice. A certificate signed by the officer to the effect that the original copy has been handed over to the respondent and that the member has adequately explained the import thereof to the respondent is also contained in the notice delivered to the respondent. Immediately the notice is served, the officer is required to forward a duplicate of the original notice to the clerk of the court concerned. This duplicate copy of the notice suffices as proof of service during court proceedings.²⁰⁵

3.2.5 SAPS and Protection Orders

In addition to the duties already mentioned above, the DVA 1998 and the National Instruction 7 of 1999 have placed on SAPS some set obligations to ensure the protection of victims through the protection order. When an interim or a final protection order is issued by court of competent jurisdiction, a SAPS officer may be ordered by the court to serve the protection order on the respondent.²⁰⁶ An officer charged with this service is expected to, without delay, serve the protection order on the respondent because it only becomes effective and binding on the respondent once it is served. If an issued protection order remains unserved, the complainant remains in danger and

²⁰³ Section 8(4) of the DVA 1998.

²⁰⁴ Section 8(5) of the DVA 1998.

²⁰⁵ Section 8(5)(d).

²⁰⁶ Section 11(3) of the National Instruction 7/1999.

prone to even further abuse. The CSPS referred to the police's uncertainty regarding who must serve protection orders and emphasised SAPS' lack of fundamental knowledge of the DVA 1998. Most victims had to serve their own protection orders because the police claimed that the Department of Justice was primarily responsible for doing so.²⁰⁷ This leaves the victim prone to further abuse during personal service of the protection order to the respondent. Several encounters were raised by civil society organisations at public hearings held by the Parliament in connection with the passage of the DVA 1998.²⁰⁸ One major failure noted was that of failure to serve protection orders on offenders of domestic violence. It was also found by CEDAW that most victims who applied for protection order did not get it.²⁰⁹ The official figures show that out of 143,824 requests for protection orders in 2018-2019, only 22,211 were granted – and in many of these situations, the abuser was simply told to sleep in another room of the same house by the protection order. Knowledge gap – on the part of police officers - was discovered by some victims when they tried to report domestic violations. They were turned away because they did not possess a protection order.²¹⁰ The same report found that police officers had difficulties differentiating between interim protection and final protection. This led to some officers claiming they could only assist a victim when the protection order issued them has been finalised. This is a violation of the provisions of the domestic violence laws of South Africa. The only difference between the interim and final protection order is with the interim order, the respondent is given an opportunity to be heard by the court whether to finalise the order or not. The magistrate finalises the order after hearing from both the complainant and respondent. In some stations, protection orders were rendered useless, according to oversight visits made by the CSPS between October 2017 and March 2018.²¹¹ Nearly 25% of the police stations visited did not serve the respondent with a protection order within two months of the date it had been granted. Furthermore, even after serving protective orders, they are not always properly enforced.²¹²

²⁰⁷ Amanda Spies A, 'Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa's Domestic Violence Legislation' (2019) 63(1) Journal of African Law 27.

²⁰⁸ Parliamentary Monitoring Group, 'Strategic report on public hearings on the implementation of domestic violence act for portfolio committee on women, youth, children and persons with disabilities' <<https://static.pmg.org.za/docs/2009/091118strareport.pdf>> accessed on 2 February 2024.

²⁰⁹ UN Press Release (2019) <[South Africa: Failure to tackle domestic violence a violation of women's rights – UN experts | OHCHR](#)> accessed on 31 July 2023.

²¹⁰ Jenni Evans, 'Magistrate raises alarm over police station about protection orders' News24 (South Africa 24 August 2018) <[Magistrate raises alarm over police confusion about protection orders | News24](#)> accessed on 22 July 2023.

²¹¹ Kholofelo and Tirivangasi. 'Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women's Access to Justice' 135.

²¹² Stone Kelly and Claudia Lopes, 'Policing responses to domestic violence: exploring reactions by the police to women in need of shelter' [2018] Heinrich Boll Foundation & National Shelter Movement of South Africa 4.

The court may, in the protection order, a police officer to accompany the complainant to a place to assist with arrangements regarding collection of their personal property.²¹³ A police officer must demand admission and notify the occupant of the purpose for which they demand admission. Where the police officer is restricted from entering the premises by the respondent, the respondent will be guilty of contempt of the court and the act also contravenes the provisions of the protection order. The police officer may use such force as may be reasonably necessary in the circumstances.²¹⁴ This is to ensure the safety of the complainant and all necessary steps to ensure the safety of the complainant is expected to be taken by the officer(s). The police have not always lived up to the expectation of the DVA 1998 and the National Instruction 7 of 1999 in ensuring the safety of victims as they collect their personal belongings from a shared residence. A case in point is that of *Basdew NO v Minister Safety and Security*,²¹⁵ as discussed later in this study. Other duties imposed on members of SAPS in relation to domestic violence matters are discussed in the following sections.

3.3 Duty to Receive Reports and Advise Complainants

The very first duty imposed on a member of the SAPS is to receive complaints from a victim. On receipt of the complaint, if it be by telephone, the police officer is expected to obtain sufficient information regarding the identity of the complainant, whether violence has allegedly been threatened or already carried out and without any delay dispatch a police vehicle from the appropriate station to attend to the matter.²¹⁶ If a complainant reports the abuse in person at station, the police officer who receives such report must render adequate assistance to the complainant. The police officer must start by handing a notice over to the complainant and explain the contents of the notice. The contents of the notice include the rights and remedies available to the complainant.²¹⁷ The notice also contains information on what assistance the police can render like finding a suitable shelter, assistance with medical treatment etc. Section 10(3) of the National Instruction 7 of 1999 states that the notice must be provided in the language of the complainant's choice. The police officer has a duty to ascertain what language the complainant understands and explain the contents of the notice in that language to her or find someone who understands the language if the police officer does not understand it. When this is done, the police officer requests the complainant to sign in the Occurrence Book or a Pocket Book, which symbolises that the

²¹³ Section 11(4) of the National Instruction 7/1999.

²¹⁴ Section 11(4) (c) of the National Instruction 7/1999.

²¹⁵ *Basdew NO v Minister Safety and Security* 2012 (2) SACR 205 (KZD)

²¹⁶ Section 4 of the National Instruction 7 of 1999.

²¹⁷ Form 1 to the Regulations in terms of the Domestic Violence Act, 1998 <[dv-Form01.pdf \(justice.gov.za\)](#)> accessed on 20 June 2023

complainant has been adequately informed of her rights.²¹⁸ There is a high possibility that a victim of domestic violence on first contact with the police may not be aware of the remedies available to her or even have any knowledge of what to do. The first responsibility of the attending police officers is to inform and explain the contents of the notice. This first step is of high importance. Ncube has stated awareness is an integral part of protection and if the victim lacks information on the process of obtaining a protection order and their rights after obtaining one, they may not get the protection due to them. The police should therefore provide the victim information on the process of such procedure.²¹⁹

In assisting a victim, the member of SAPS is also to advise the complainant on the need to lay a charge with the police if the conduct constitutes a criminal offence. The notice also highlights the need to apply for a protection order. Under South African laws, domestic violence does not amount to a crime unless the act done to the victim was criminal in nature. Domestic violence may constitute activities which are not necessarily criminal in nature, but a range of common law crimes may be committed during a domestic abuse. Some of such crimes are murder, attempted murder, rape, kidnapping, malicious injury to property, housebreaking, or extortion.²²⁰ Conversely, there are other components of domestic violence which are not criminal in nature namely verbal, psychological, emotional, or even spiritual abuse.²²¹ Under the DVA1998, survivors of domestic violence have two protection options available to them. One option is the right to apply for a Protection Order and the second is the filing of a criminal charge in a Police Station, where the abuse constitutes a criminal offence under the law. Although both protection options can be used independently of each other, a survivor has the right to both options where a crime has been committed by the abuser.²²² The police must advise the complainant to apply for Protection Order or lay a criminal charge where necessary or both. Although these processes should run parallel, the South African Law Commission has in a report noted the refusal of some police officers in processing a criminal charge in the absence of a Protection Order.²²³ If the criminal and protection components of DV are seen as prerequisites for each other, rather than parallel processes, it leaves victim, and survivors and the public vulnerable. By ignoring the criminal components, the victims or survivors and the public

²¹⁸ Section 10(4) of the National Instruction 7 of 1999.

²¹⁹ Mongiwa Pamela Ncube, 'Protection Orders in South Africa: The Effectiveness of Implementation and Enforcement for Victims of Gender-based Violence' (Master's thesis, University of Cape Town 2021) 46.

²²⁰ South African Law Reform Commission, Issue Paper 42 (Project 100) Domestic Violence: The Criminal Response (SALC 2021) 27.

²²¹ Section 1(viii) of the DVA 1998.

²²² Section 14(2) (c) of the National Instruction 7 of 1999.

²²³ P Andrews, 'The Constitutional Court provides succour for victims of domestic violence: *S v Baloyi* 2000' (1999) South African Journal on Human Rights 34.

are left vulnerable. By ignoring the protection order procedure, the victim or survivor is left vulnerable whilst the criminal process takes its course.

The proper implementation of these provisions of the DVA 1998 and the National Instruction 7 of 1999 to assist victims especially with regards to explaining and giving advice, over the years has not seen. There have been reported scenes of police only responding to the report of a domestic violence incident hours after or even the next day. Women were often asked to come back another time when the police officers are not busy or advised to go directly to the magistrates' court without the police keeping any record of the incident.²²⁴ Research has shown that its execution has been hampered by lack of knowledge as a large number of police officers are not aware of what is required of them.²²⁵ Combrink and Wakefield in their comprehensive study of violence against women in South Africa, point out that the greatest problem with the implementation of the domestic violence law seem to lie with the police.²²⁶ In an interview carried out by Combrink in 2016, it was revealed that 40 percent of police officers interviewed had no idea what Form 1 was and were unable to explain its contents.²²⁷ Most female victims characterised their encounters with SAPS as frustrating, with many reporting they have lost confidence in the police service's ability to give necessary help. Many people spoke about the police with a sense of powerlessness and despair, describing officers as "careless and corrupt".²²⁸ Survivors of domestic abuse interviewed by Govender also stated that their reports of domestic violence were rejected by the police as a domestic disagreement warranting just a social services' intervention or a warning from the police.²²⁹ Victims have reported that officials are not patient enough when assisting them and victims are often subjected to secondary victimisation. All these are encumbrances to the administration of justice in domestic violence cases. If the victims have no confidence in the justice system or the police service, they are less likely to report domestic violence incidents for redress. The next section focuses on SAPS' responsibility to make arrests.

²²⁴ Melissa Steyn and Mikki Van Zyl, 'The prize and the price: Shaping sexualities in South Africa' (2009) HSRC Press Books 186.

²²⁵ Siyabonga Sibisi, 'Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating Domestic Violence in South Africa' (Master's thesis, University of KwaZulu-Natal 2017) 65.

²²⁶ Helene Combrink and Lorenzo Wakefield, 'Training of Police on the Domestic Violence Act. Research report' [2009] Community Law Centre and the Saartjie Baartman Centre for Women and Children 12.

²²⁷ Combrinck and Lorenzo Wakefield, 'Going the extra mile: Police training on domestic violence' (2010) 31 SA Crime Quarterly 30.

²²⁸ Shanaaz Mathews and Naeemah Abrahams, 'Combining stories and numbers: an analysis of the impact of the Domestic Violence Act (No. 116 of 1998) on women' [2001] Gender Advocacy Programme, MRC 5.

²²⁹ Doraval Govender, 'Is domestic violence being policed in South Africa?' (2015) 28(2) Acta Criminologica: African Journal of Criminology and Victimology 32.

3.4 Duty to Make Arrests

Arrests can be done by members of SAPS where a court of competent jurisdiction issues a protection order against the respondent with an accompanying warrant of arrest.²³⁰ A protection order is usually accompanied by the authorisation of the issuance of a warrant of arrest on the respondent. This warrant of arrest is suspended subject to the compliance with any condition or obligation imposed on the respondent by the protection order. Where an act of domestic violence is committed after the issuance of an interim or final protection order, a complainant may inform the police service of a breach of the obligations provided for in the protection order. This is done by transmitting the warrant of arrest together with an affidavit stating that the respondent has breached any obligations contained in the protection order.²³¹ A police officer is thus empowered by section 8(5) of the DVA 1998 to, with immediate effect, arrest a respondent if he suspects that the complainant is suffering or may suffer harm because of an alleged breach of the protection order. At the point of arrest of a respondent for breach of a protection order, the case is no longer civil, but rather a criminal case. Section 17(1)(a) provides for offences that a respondent may be guilty of under the DVA 1998. A respondent, if found guilty is liable upon conviction to a fine or imprisonment for a period not exceeding five years or to both fine if he is a first-time offender or if it is a second or subsequent conviction, to a fine or imprisonment for a period not exceeding 10 years. As stated earlier in this chapter, the law does not create an offence of domestic violence, however, a breach of the provisions of a protection order constitutes a criminal offence against the respondent. As Sonjani has pointed out, the reason that domestic violence cannot be prosecuted by itself is that there are some acts that constitute domestic violence, some of which can be regarded as civil matters and cannot be prosecuted as criminal matters before a court.²³²

Where the police officer does not have sufficient grounds to arrest the respondent, the officer must warn the respondent to appear in court. A reasonable ground has been defined as what is reasonable to a reasonable man. It means that the moment of arrest, either the fact or the circumstances within the knowledge of the police officer were sufficient to cause a prudent person to believe that the respondent committed or is committing the offence.²³³ In determining whether the complainant is suffering or may suffer harm because of the respondent's breach of the obligations under the protection order issues by the court, the officer of the SAPS takes into consideration the

²³⁰ Section 8(1)(a) of DVA 1998.

²³¹ Section 8(4) of DVA 1998.

²³² Sonjani Thembisile Baker 'An evaluation of the handling of domestic violence cases in the Alice cluster by South African Police Service officials' (PhD thesis, University of South Africa 2011) 45.

²³³ Law Insider 'Reasonable Grounds to Believe definition' <[Reasonable grounds to believe Definition | Law Insider.](#)> Accessed on 7 June 2023.

risk to the safety, health, and wellbeing of the complainant or related person or the damage of their property. The officer also must consider the seriousness of the conduct that comprises an alleged breach of the protection order, the length of time since the alleged breach occurred, and the nature and extent of the harm previously suffered in the domestic relationship.²³⁴ The police officer also has the responsibility to inform the complainant of their right to lay a criminal charge simultaneously against the respondent and explain the procedure.²³⁵ Executing an arrest warrant for breach of a protection order necessitates quickly assessing facts, as there is usually no time to determine whether the complainant will suffer imminent harm if the suspect is not arrested.²³⁶

Where a victim phones a police station to report domestic violence, in the absence of a protection order, an attending police officer is expected to enforce this duty of arrest if it would ensure her safety regardless of the lack of a protection order. The lack of a mechanism to protect victims in this situation will be self-defeating, rendering the provision of prompt relief a myth rather than reality. Section 3 of the DVA 1998 provides a solution in this regard. It allows a police officer to arrest, without warrant, any respondent at the scene of an incident of domestic violence who he/she reasonably suspects to have committed or is committing an abuse with a criminal element against a complainant. On getting to a domestic violence scene, a police officer is expected to take reasonable care because of the volatility of the case and secure the scene. The police officer must first determine whether the complainant is in immediate danger and ensure his or her safety. This is done by entering the building and interviewing the complainant.²³⁷ Where a police officer must interview a complainant who is inside a private dwelling place, he or she may not forcefully enter that dwelling place but must first seek admission. In such a case where the police officer is refused admission and he or she perceives that the complainant is in imminent danger, then the police officer is authorised to use minimum force to gain entrance. The minimum force is required in circumstances where there is a cry for help from within the building, visible injuries or weapons, obvious signs that a struggle has occurred or the account of a witness that a crime has been committed and that the complainant could reasonably be expected to be injured and in need of medical care. Although 'minimum force' is what is advised to be used by police officers, this author thinks it may not suffice because every second the complainant spends inside the private dwelling with the abuser brings her a step closer to a tragic end. Improving on this, the DVAA 2021 in section 3A provides that a police officer must audibly demand admission to the residence and state for what purpose he seeks to enter. Where he/she is refused admission then force as may be reasonable to

²³⁴ Law Insider 'Reasonable Grounds to Believe definition'

²³⁵ Section 8(5) of the DVA 1998.

²³⁶ Siyabonga Sibisi, 'Understanding certain provisions of the Domestic Violence Act: a practitioner's perspective: practice note' (2016) De Rebus 22.

²³⁷ Section 6 of the National Instruction 7 of 1999.

overcome resistance can be used. The Act goes further to include breaking the door or window as reasonable force that can be used. This is commendable as the safety and wellbeing of a complainant should be paramount. Police officer should ensure the safety of the complainant. Doing this may require the separation of the complainant from the respondent and this may require arresting the respondent without the issuance of a warrant of arrest by the court.²³⁸

Research has shown that the most common incidents to which police officers were called for were domestic disturbances with little or no physical violence, although in most cases threats have been made.²³⁹ However, arrests have seldom been made in these instances. Instead, members of SAPS are well known for hearing out the parties and offering some advice - talking to parents or a priest. Also, they advise not minding how volatile the situation is to go obtain a protection order or find a way to live with each other. It must be acknowledged that situations were treated quite differently when there was any indication of more severe violence, especially if bloody injury was involved. Indeed, it appeared that this was the yardstick by which police action was measured: if blood had been spilt, arrests were made; if not, the parties were urged to go to bed and occasionally instructed to consider initiating the procedure of obtaining a protection order the following morning.²⁴⁰ This opinion supports that of Robinson, Pinchevsky and Guthrie when they opined that non-physical abuse goes 'under the radar' as the use of physical violence is at the forefront of many officers' expectation about domestic violence and it can hinder the effective prosecution of domestic violence by the police.²⁴¹ This downplays the devastating effects of injury-free violence.²⁴² Doing this means they fail to live up to the expectations of the laws regulating domestic violence in the South African society.

Also, not assessing the truth in the complainant's case or lack of ignorance of the provisions of the DVA 1998 has been a cog in the wheel with regards to police officers carrying out this duty to arrest effectively. This has resulted in a series of suits against the State for unlawful arrests. In the matter of *Lebaka v. The Minister of Safety and Security and Another*,²⁴³ an unlawful arrest by SAPS personnel occurred because of their ignorance of the DVA 1998 where the suspected offender was detained for violating an order against him. Prior to his arrest, the offender was discovered dozing

²³⁸ Section 7 of the National Instruction 7 of 1999.

²³⁹ Antony Albeker. 'Policing domestic violence: The enthusiasm gap' (2005) (12) South African Crime Quarterly 3.

²⁴⁰ Antony Albeker. 'Policing domestic violence: The enthusiasm gap'

²⁴¹ Amanda L, Robinson, Gillian Pinches and Jennifer Guthrie, 'Under the radar: Policing non-violent domestic abuse in the US and UK' (2016) 40 International Journal of Comparative and Applied Criminal Justice 195-208.

²⁴² Jennifer A. Guthrie and Adrienne Kunkel, 'No more trapping me!': Communication scholarship in the service of women experiencing domestic violence and substance abuse' (2016) 64(4) Communication Quarterly 434.

²⁴³ *Lebaka v. The Minister of Safety and Security and Another* (A114/2007) [2008] ZAECHC 18.

off inside the house, which he was forbidden from entering in accordance with the terms of the protection order. He initiated court proceeding alleging illegal/unlawful arrests. The police claimed to have made an arrest without the use of a warrant that was authorised and provided for in Section 3 of the DVA 1998. The alleged offender informed the court that he was not aware of it because he had not been served with a protection order. The court found and held that the alleged offender was not aware of the Protection Order and could not have violated it. This is supported by the DVA's section 5(6), which declares that the Protection Order is void and ineffective until served on the respondent.

Sadly, there are also cases of complainants being arrested when they go to police stations to report domestic violence. A case in point is that of *Naidoo v Minister of Police*, where instead of assistance being rendered to her, she was arrested and detained overnight pursuant to a criminal charge laid against her by the abuser at the instance of the police officer. She was dehumanised and subjected to a violation of her rights to dignity, freedom and security of person and bodily integrity. She instituted a delictual action in court against the Minister of Police and certain members of SAPS. Naidoo claimed that the defendants were guilty of failure to comply with the legal duties owed her, unlawful arrest, and assault. Upholding the appeal, the defendants were ordered to pay damages.²⁴⁴ What Naidoo suffered in the hands of the members of SAPS led to secondary victimisation.²⁴⁵

3.5 Duty to Assist to Find Shelter and Obtain Medical Treatment

Section 3 of the National Instruction 7 of 1999 instructs station commanders to coordinate with Department of Welfare, local community police forum and other authorities. These authorities are to collaborate with institutions that offer support services to domestic violence victims.

Such support services include counselling, medical services, and shelter. The station commander is expected to find out from these institutions the specific services they provide, their working times, fees, and contact details. All these details are to be kept with the station commander and updated every 6 months.²⁴⁶ A complainant of an incident of domestic violence may in some circumstances have to leave home and seek refuge in a shelter. Shelters reduce the risk of a victim going back to

²⁴⁴ *Naidoo v Minister of Police* 2016 (1) SACR 468 (SCA).

²⁴⁵ Secondary Victimisation has been defined by Wikipedia as a term that describes negative reactions of institutions or individuals to victims of a crime. It may involve victim-blaming, insensitivity, and further violations of the victims' rights.

²⁴⁶ Section 6(4) of the National Instruction 7 of 1999.

abusive homes and relationships. They provide social and psychological support, and this decreases the likelihood of victims engaging in self-destructive actions. In most domestic violence cases, the victims are dependent on their abusers and reporting the abuse to the police may render them homeless. For the well-being and safety of the complainant, an attending member of police must assist such complainant to find shelter. The officer is expected to provide the complainant with the names, contact details of the shelter and relevant organisations that provide support for victims.²⁴⁷ A police officer is to, at the request of the complainant, contact the support organisations on behalf of the complainant. Arrangement of transportation for the complainant to a suitable shelter should be done by either contacting family members or friends of the complainant with a request to provide transportation or arrange a taxi at the expense of the complainant or a willing family member or friend. Transporting a complainant in a police vehicle should only be a last resort if other means fail.²⁴⁸

On the other hand, a police officer assisting a complainant with medical treatment must first enquire from the complainant whether she needs medical treatment, then assist, or make arrangement for the complainant to receive treatment if that is the case. In a case where a criminal charge has been laid, the police officer must issue a J88 and SAPS 308 to the complainant for completion by a registered medical practitioner.²⁴⁹ Where violence is alleged to have occurred, the J88 form is used as evidence. It provides a thorough account of the findings of the complainant's medical checkup. The J88 is important because it acts as the first line of defence against any injury that the complainant may have experienced.²⁵⁰ This is important, especially since the trial may commence when the victim may have healed physically. Given that some people's bodies heal more quickly than others, it may be very challenging for the victim to demonstrate that any injuries were inflicted on her in the absence of a J88 form.

Additionally, according to paragraph 9(3), any aid provided to a complainant must be noted in the Occurrence Book or Pocketbook (SAPS 206). This record includes the circumstances surrounding the case of the complainant as well as a description of the injuries sustained by the complainant. This record serves as evidence to show whether police duties are either fulfilled or neglected. The

²⁴⁷ Section 6(1) of the National Instruction 7 of 1999.

²⁴⁸ Section 8 of the National Instruction 7 of 1999.

²⁴⁹ Section 9 of the National Instruction 7 of 1999.

²⁵⁰ Section 9 of the National Instruction 7 of 1998.

South African Police Service Act of 1995 holds a police officer accountable for wrongdoing if they do not follow through on their obligation to assist.

In a report by Stone and Lopes, it was found that although the above is provided for in the DVA and the National Instruction 7 of 1999, this has not entirely been the case in practice. Information about shelters is not easily accessible in most police stations as police officers have no knowledge about shelters in that area or they have no resource or it takes a long time to contact these shelters.²⁵¹ The finding of Stone and Lopes also reveal that police officers have a misunderstanding about who is to render assistance to domestic violence victims by claiming that domestic violence falls under the ambit of the Department of Social Development (DSD) and as such best suited to be dealt with by social workers. The issue of lack of sign language and other languages interpretation services at police stations to assist with opening of cases has also been enumerated.²⁵² Other complainants have been misinformed on the need to first apply for protection orders or lay a charge before receiving assistance from a police officer. The failure of some members of SAPS in assisting victims of domestic violence has left many women subject to repeated abuse as they completely lose trust in the justice system and accept their 'helpless' state. This failure also renders the laws powerless as they become mere words on paper not backed by the will and skills to enforce.

3.6 Seizure of Firearms and Dangerous Weapons

In South Africa, when a domestic violence complaint involving weapons is filed, the law recognises the relationship between firearms and domestic abuse and allows police or court officials to remove firearms. As a result of this, section 9 of the DVA 1998 empowers a member of SAPS by a court order to seize any arm or dangerous weapon in the possession or under control of the respondent. This duty is to be undertaken regardless of the employment of the respondent. The court makes this order after considering the evidence placed before it. The court before making this decision takes into consideration whether the respondent has threatened or expressed an intention to kill or injure himself or any person in a domestic relationship by means of dangerous weapon.²⁵³ It also considers whether the possession of such dangerous weapon is not in the best interest of the respondent or any other person in a domestic relationship because of the respondent's state of mind or mental condition, inclination to violence or use of intoxicating liquor or drugs.²⁵⁴ The weapon seized is kept

²⁵¹ Stone and Lopes 'Policing responses to domestic violence: exploring reactions by the police to women in need of shelter' 20

²⁵² Presentation to the Select Committee on Security and Justice (n 165) 24.

²⁵³ Section 9 of DVA 1998.

²⁵⁴ Section 9(1) of DVA 1998.

by SAPS and a copy of the record of the evidence concerned is directed by court to be submitted to the relevant station commander and to the National Commissioner of the South African Police Service.²⁵⁵ It must be given a distinctive mark, tagged with a SAPS 13 tag, and kept for such a period as the court may determine.

The presence of a firearm in a domestic violence situation can escalate the violence and raise the victim's chances of incurring catastrophic injuries. In more than half of all intimate relationship killings, a firearm is used, and incidents of intimate partner violence with a firearm are 12 times more likely to result in death than equivalent occurrences without a gun.²⁵⁶ In non-fatal cases, abusers use firearms and deadly weapons to instil terror, cause injury, or keep victims' hostage during violent assaults. Access to firearms fosters coercive control strategies. Knowing that an abuser has access to a weapon can be detrimental to a survivor's autonomy, safety, will, and consent.²⁵⁷ Domestic abusers who are armed also represent a threat to people who are not part of their household and to themselves as there are reported cases of homicide-suicide domestic violence cases.²⁵⁸ These are the reasons why this duty is so vital.

However, a lot of murders of victims using firearms have been recorded in South Africa because of the failure of officers of SAPS in removing firearms from the possession of abusers. In the case of *Basdew NO v Minister of Safety and Security*,²⁵⁹ a case for loss of support stemming from an incident in which a mother of three minor children was shot and killed by her ex-husband. The plaintiff sued in her capacity as curator-ad-litem. The deceased had sought protection from the police in the middle of the night following a domestic violence episode. She told the cops that her husband was abusive and that he had a firearm that she was scared he would use. The officers accompanied the deceased to her residence to get her belongings.²⁶⁰ On getting to the home, the police asked the husband whether he was in possession of a firearm, he denied. One would have expected the police to do more than just put a question to him. Maybe keep him under monitoring while the deceased was in the house or search the house for the firearm seeing there were clear warning signs that he posed a serious threat to the physical safety of the deceased. He left the police officers in the sitting room, walked up to the deceased while she was busy gathering her belongings, shot,

²⁵⁵ Section 9(2) of DVA 1998.

²⁵⁶ Saltzman LE, Mercy JA, O'Carroll PW, Rosenberg ML and Rhodes P H, 'Weapon involvement and injury outcomes in family and intimate assaults.' (1992) 267(22) JAMA 3043-3047.

²⁵⁷ Julie M. Kafka and others. 'What is the role of firearms in nonfatal intimate partner violence? Findings from civil protective order case data' (2021) 283 Soc Sci Med 114212.

²⁵⁸ Jane Koziol-McLain and others. 'Risk Factors for Femicide-Suicide in Abusive Relationships: Results from a Multisite Case Control Study' (2006) 21(1) Violence Vict 3.

²⁵⁹ *Basdew NO v Minister of Safety and Security* 2012 (2) SACR 205 (KZD).

²⁶⁰ *Basdew NO v Minister of Safety and Security* 2012 (2) SACR 205 (KZD).

and killed her. A claim for lack of support was filed on behalf of her three children. The police were held accountable by the court for failing to safeguard the deceased from foreseeable harm in that they failed to seize the firearm or prevent the husband from using it.

Non-compliance with this duty has also largely been seen where members of SAPS are perpetrators of domestic violence. This is particularly worrisome, considering that those charged with the responsibility of protecting women are also perpetrators of this same act. Statistics has shown that one hundred and forty-seven police officers are alleged perpetrators of domestic violence and eighty-nine are already convicted of domestic violence in all nine Provinces.²⁶¹ Out of the two hundred and thirty-six alleged and convicted abusers, only seventy-five firearms have been reportedly seized from their possession.²⁶² Even the most innovative and forward-thinking laws will be rendered powerless if those in charge of enforcing them do not believe they are necessary.²⁶³ *Minister of Safety and Security and Another v Madyibi*,²⁶⁴ *and Dlanjwa v Minister of Safety and Security*²⁶⁵ are two examples in which SAPS failed flatly to safeguard women from its own members. In both cases, police officers shot and injured their wives with state-issued firearms taking their own lives. Fortunately, both wives survived and filed claims against the police for failing to protect them. In *Madyibi's* case, she claimed lack of support.²⁶⁶ She alleged that after reporting an incident of domestic abuse to a police station, the station commander neglected to dispossess her husband despite being aware of his violent behaviour and history of domestic violence. The trial court held in her favour. An Appeal was dismissed on grounds that the conduct of the police was wrongful, and a breach of the legal duty imposed on them by constitution and legislation.²⁶⁷ *Dlanjwa*, on the other hand, also said that she had previously requested that her husband be disarmed because he was violent and had threatened to murder her, but to no avail.²⁶⁸ She had also acquired a protection order, but the police had provided little aid. Police officials testified that she was lying because no records of the incidents were found in the police station.²⁶⁹ Following an investigation, the court determined that the police had failed to keep sufficient records as required by law, emphasising the police's constitutional and legislative duty to safeguard members of the public, particularly

²⁶¹ Briefing by SAPS on the Implementation of the Domestic Violence Act, 1998 to Select Committee on Security and Justice, [2022] 28.

²⁶² Briefing by SAPS on the Implementation of the Domestic Violence Act, 1998 to Select Committee on Security and Justice, 28.

²⁶³ Amanda Spies, 'Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa's Domestic Violence Legislation' (2019) 63(1) *Journal of African Law* 53.

²⁶⁴ *Minister of Safety and Security and Another v Madyibi*, 2010 (2) SA 356 (SCA).

²⁶⁵ *Dlanjwa v Minister of Safety and Security* 2015 ZASCA 147.

²⁶⁶ *Minister of Safety and Security and Another v Madyibi*

²⁶⁷ *Minister of Safety and Security and Another v Madyibi*

²⁶⁸ *Dlanjwa v Minister of Safety and Security* [2015] ZASCA 147 para 3.

²⁶⁹ *Dlanjwa v Minister of Safety and Security* (Para 8)

women.²⁷⁰ The court ruled in her favour as well. The police's refusal to search for and seize firearms, especially when an abuser is known to be in possession of a firearm, is of major concern in these cases. The availability of a firearm considerably raises the chance of a fatal domestic violence, especially if there is a history of violent behaviour.²⁷¹

A seized weapon may be returned to the respondent by SAPS only by order of court.²⁷² The court makes this order on the condition that the value of the weapon so seized is below the amount determined by the Minister of Justice and Correctional Services.²⁷³ As of 31 March 2023, the amount determined for this purpose is R200.²⁷⁴ Also, this is done if the court is satisfied that returning the weapon will enhance the safety of the respondent.²⁷⁵ Forfeiture of the weapon to the State may also be ordered by the court in cases where a final protection order has been issued against the respondent. Where this is done, the clerk of the court informs the station commander and the National Commissioner of Police. The station commander goes further to consider whether the respondent is fit to repossess the firearm and if he is in possession of a licence, permit, or any other authorisation in terms of the Firearms Control Act, 2000. When a decision has been made, the National Commissioner of SAPS is informed.²⁷⁶ While this is the provision of the law, returning a weapon to a respondent after a protection order has been issued against him may, in the opinion of this present author, not be a thoughtful decision. This is because, a respondent may, in revenge choose, to violate the protection order not minding the consequences and kill or maim the complainant.

Also, there are situations where victims of domestic violence have killed or maimed their abusers with weapons found in their shared residence.²⁷⁷ This may have been done in self-defence or vengeance but all in a bid to put an end to the abuse. While this is not within the scope of this study, it speaks to the need for police officers to seize weapons from homes where domestic violence is rife.

²⁷⁰ *Dlanjwa v Minister of Safety and Security* (Para 30)

²⁷¹ Spies 'Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa's Domestic Violence Legislation' 53.

²⁷² Section 9(3) of the DVA 1998.

²⁷³ Section 9(3) of the DVA 1998.

²⁷⁴ Government Gazette, 'Domestic Violence Act: Determination of value of weapon' (South Africa, 14 April 2023) <[Domestic Violence Act: Determination of value of weapon \(www.gov.za\)](http://www.gov.za)> accessed on 16 July 2023.

²⁷⁵ Section 9(3) of the DVA 1998.

²⁷⁶ Section 9(4) of the DVA 1998.

²⁷⁷ Brenda Midson, 'Coercive Control and Criminal Responsibility: Victims Who Kill Their Abusers' (2016) 27(4) Criminal Law Forum 417.

3.7 Keeping of Records

Members of the South African Police Service have a duty to keep records of incidents of domestic violence reported in any police station across the county. Section 12 of the National Instruction 7 of the 1999 lays down the prescribed manners by which this duty is to be carried out. The Domestic Violence Register (SAPS 508[b]) is prescribed by the Regulations of the DVAA to be accurately kept for the purpose of accurately recording cases. A police officer is expected to fully document how they responded to every case of domestic violence regardless of whether a docket (for abuses with criminal nature) was opened or not.²⁷⁸ All SAPS 508(a) forms completed within a month must be kept in a file with reference number 39/4/2/3 every month.

Section 7(4) of the National instruction 7 of 1999 provides for the recording of any assistance given to a complainant at Community Service Centre. This is to be recorded in the Occurrence Book when a complainant reports an incident of domestic violence. Where assistance is rendered by a police officer in a place other than the Community Service Centre, recording of such assistance rendered must be done in the officer's Pocketbook. If an officer of SAPS attends the scene of an incident of domestic violence and no charges were laid or arrests made, the officer is required to record the reasons why that was the case in his/her Pocketbook (SAPS 206).

In cases where a protection order has been issued, particulars thereof are expected to be entered into the SAPS 508(b). Every file must be allocated a case number to ease finding it.²⁷⁹ Protection orders are accompanied by a suspended warrant of arrests issued by the court, and both are filed separately. All filed documents are, by law, to be kept in an accessible place so they can readily be available even after hours for checking purposes in the event of a breach of the protection order.

However, a 2018 report by Stone and Lopes highlights the failure of police stations in keeping reports. According to them, 61% of police stations are non-compliant with the provisions of the law in maintaining domestic violence registers.²⁸⁰ During a visit by the CSPA in 2021, it was found that most police stations and officers failed to complete SAPS 508a and 508b forms.²⁸¹ A good number of officers had also failed to record domestic violence incidents in the Occurrence Book or Pocket

²⁷⁸ Section 12 of the National Instruction 7 of 1999.

²⁷⁹ Section 12(5) of the National Instruction 7 of 1999.

²⁸⁰ Stone and Lopes, 'Policing responses to domestic violence: exploring reactions by the police to women in need of shelter' 2.

²⁸¹ CSPA, 'Presentation to the Select Committee on Justice: implementation of the Domestic Violence Act, 1998' 23

Book and submit entry. The CSPA also found gross failure in filing/registering a protection order as well as endorsing a case number. This poor record-keeping underlies the paucity of reliable statistics for domestic violence. Also, this may result in lack of evidence in cases where court proceedings are instituted leading to inability for the victims to get desired justice. Some protection orders served by sheriffs are not recorded, and there are no copies preserved at the police station. This puts the victim at risk if they misplace their copy of the protective order.²⁸²

3.8 Police Non-compliance with the Provisions of the DVA

Where a SAPS' officer fails to carry out the obligations placed on them by the DVAA 2021 and the National Instruction 7 of 1999, a complainant can approach a court of competent jurisdiction and claim damages against the State. The State is vicariously liable for the actions of the erring member of SAPS. This can be seen in the above mentioned decided cases.

The National Instruction 7 of 1999 provides that a failure by a member of SAPS to comply with an obligation imposed in terms of the DVAA 2021 and the National Instruction constitutes a misconduct.²⁸³ As a result, disciplinary actions must be taken against a member who disobeys a requirement set forth in the DVAA 2021 or the National Instruction.²⁸⁴ The station commander of that member is responsible for taking appropriate disciplinary action. When the commander feels that disciplinary action should not be taken against a particular officer, the commander must request an exemption from the Independent Complaints Directorate.²⁸⁵ Such application shall be made to the office of the Area Commissioner within thirty days after receipt of the complaint and shall be accompanied by a report fully setting forth the reasons for the exemption requested. Every station commissioner is required to keep a SAPS 08-Form to record the quantity and details of complaints made against officers under his or her supervision for any infraction of the DVA 1998 or these instructions.²⁸⁶ Also, the disciplinary proceedings instituted as a result and decisions which emanated from such proceeding are also recorded. The steps taken because of recommendations made by the Independent Complaints Directorate should also be recorded by the station commander.

²⁸² CSPA, 'Presentation to the Select Committee on and Justice: implementation of the Domestic Violence Act, 1998' 23

²⁸³ Section 18 of the National Instruction 7 of 1999.

²⁸⁴ Section 18 (1) of the National instruction 7 of 1999.

²⁸⁵ Section 18(2) of the National instruction 7 of 1999.

²⁸⁶ Section 18(4) of the National Instruction 7 of 1999.

3.9 Patriarchy, SAPS and Domestic Violence

Research indicates that victims' reluctance to involve the police was strongly influenced by the social shame, stigma and humiliation expected from self-identifying as a victim and seeking help from police.²⁸⁷ Following the report of the CSPS to Parliament on the neglect of the provisions of DVA 1998 by SAPS and much worse the culpability of SAPS' officers in the issue of domestic violence, one wonders what hope survivors of domestic violence have. The police have an attitude of disregarding domestic violence and not providing the requisite assistance to victims. While police failure to adequately prosecute domestic violence cases and render assistance to victims have been greatly attributed to institutional failures like lack of training on the implementation of the DVA 1998 and lack of adequate resources, there are other factors that can hinder police from reaching its full potential in eradicating domestic violence.²⁸⁸ Research has shown that to understand an individual's behaviour, there is need to understand the covert, subjective rationales underlining such behaviour.²⁸⁹

A sociological theory, symbolic interactionism, applies to the phenomena of domestic violence and its policing. The leading proponent of symbolic interactionism, George Herbert Mead (1863-1931) was concerned with explaining social actions in terms of the meaning that the individual gives to them.²⁹⁰ He accepted that a society has a culture, and that this culture suggests appropriate types of behaviour for roles. The theory advances that people interact with others based on actions or meanings that are derived from their everyday interactions.²⁹¹ One can understand fundamental aspects of our social experiences through the symbolic interactionist lens like gender and race. This is because having no biological bases at all, race and gender are social constructs that function based on what we believe to be true about people, given what they look like.²⁹² In Mead's view,

²⁸⁷ Heidi Mogstad, Dominique Dryding and Olivia Fiorotto, 'Policing the private Social barriers to the effective policing of domestic violence' (2016) 56 South African Crime Quarterly 11.

²⁸⁸ Kholofelo and Tirivangasi. 'Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women's Access to Justice' 136.

²⁸⁹ Ruth Lister, 'Citizenship: feminist perspectives.' (2017) Bloomsbury Publishing 113.

²⁹⁰ Michael Haralambos, Martins Holborn and Robin Heald, 'Sociology. Themes and Perspectives' (7th edn, HarperCollins Publishers Limited 2008) 881.

²⁹¹ Howard Judith A, and Jocelyn A Hollander, 'Gendered situations, gendered selves, a gender lens on social psychology' (2000) 25(2) Signs 538.

²⁹² Ashley Crossman, 'Symbolic Interaction Theory' <[What Is Symbolic Interactionism? \(thoughtco.com\)](https://www.thoughtco.com/what-is-symbolic-interactionism/)> Accessed on 1 June 2023.

individuals initiate and direct their actions as they are influenced by the attitudes or expectations of others.²⁹³

This helps us understand what goes on in the mind of an individual police officer who disregards and renders little or no assistance to a domestic violence victim. In a patriarchal society, the interaction between a police officer and a victim may also be determined by the preconceived views held in the society.²⁹⁴ Patriarchy is grossly imbedded within the South African society as earlier stated in this work and this fuels domestic violence in homes across the country.²⁹⁵ The stereotypes on gender roles, with men often exercising dominion and control over women is highly evident. According to Lister, male violence towards women both within and outside the home, as well as the fear it fosters, weakens their status as citizens.²⁹⁶ Women's capacity to act as citizens is restricted if they are unable to move and act freely in the public sphere and are frightened in the private sphere due to the danger of violence. This may pose problems for police officers taking cases of domestic violence who cannot see beyond these stereotypes.²⁹⁷ Some authors have argued that the masculine culture of police increases the negative gender stereotyping, which consequently affects how they perceive and respond to gender-based cases.²⁹⁸ They argue that the cause of male dominance is hinged on the patriarchal structure of society that is built on male superiority, female subordination, sex-stereotyped roles, and expectations including occupations like the police force.²⁹⁹ While we know that there are female police officers, the police force is made mainly up of men. These male officers are also part and parcel of the patriarchal make-up of the society. Research has shown that a masculine culture is evident in law enforcement and an officer's existing traditional gender views may crop up in the discharge of his duties.³⁰⁰ This affects their beliefs, stereotypes, and reaction to domestic violence. Some feminist theories have also argued that the 'patriarchal mindset' of men in the police service is what makes them to still view domestic violence as a private matter that should not be interfered with.³⁰¹ This concept of privacy connotes that

²⁹³ Haralambos, Holborn and Heald, 'Sociology. Themes and Perspectives' 113.

²⁹⁴ Yalley, Abena Asefuaba, and Molatokunbo Seunfunmi Olutayo. 'Gender, masculinity and policing: An analysis of the implications of police masculinised culture on policing domestic violence in southern Ghana and Lagos, Nigeria.' (2020) 1 Social Sciences & Humanities Open 2.

²⁹⁵ Linda Mshweshwe, 'Understanding domestic violence: masculinity, culture, traditions' (2020) Heliyon 6

²⁹⁶ Ruth Lister, 'Citizenship: feminist perspectives.' (2017) Bloomsbury Publishing 113.

²⁹⁷ Kholofelo and Tirivangasi. 'Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women's Access to Justice' 136.

²⁹⁸ Rabe-Hemp, C. 'Policewomen or policewomen? Doing gender and police work' (2008) 4 Feminist Criminology 114–129.

²⁹⁹ Evan Stark, and Anne Flitcraft, 'Women at risk: Domestic violence and women's health' [1996] Sage Publications 1.

³⁰⁰ Daniel Lockwood, and Ariane Prohaska, 'Police officer gender and attitudes toward intimate partner violence: How policy can eliminate stereotypes.' (2015) 10 International Journal of Criminal Justice Sciences 77.

³⁰¹ Lockwood, and Prohaska, 'Police officer gender and attitudes toward intimate partner violence: How policy can eliminate stereotypes' 78

violence against women is immune from sanction, acceptable and part of family life. It also infers that what goes on in a violent relationship should not be the subject of state or community intervention, that is, it is an individual and not a systemic problem.³⁰² Although the private has become public by providing legislative protection to women who find themselves in a battering relationship, the implementation of this protection and actual remedies are still shrouded in a system that protects masculine power and privilege.³⁰³ The social mores of the culture in which they reside as well as local ideas about gender relations and a woman's standing are reflected in the attitudes of the police against domestic violence.

3.10 Conclusion

In conclusion, there has not been major progress in the fight against domestic abuse in South Africa because of the inconsistent and incorrect application of the law by police officers. The DVA 1998, and the expansion of the roles played by SAPS officers in the fight against domestic violence are both positive developments. However, the problem lies with the legislation's ineffective implementation, and this goes beyond institutional setbacks like lack of training or resources; rather, it is a result of the gender inequalities that exist in South African society. This has made the progressive legislation a mere theoretical exercise rather than a practical one and the need for the amendment of the DVA.³⁰⁴ The next chapter of this study analyses the amended domestic violence law and how it deals with the foundational issues of gender inequality in the country.

³⁰² E.M Schneider, 'The violence of privacy' in M Albertson, Fineman and R Myldtiuk (eds) *The Public Nature of Private Violence* (1994) Routledge 53.

³⁰³ Spies 'Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa's Domestic Violence Legislation' 53.

³⁰⁴ Lillian Artz, 'Violence against women in rural Southern Cape: exploring access to justice within a feminist jurisprudence framework.' (1999) (Master's thesis, University of Cape Town) 47.

CHAPTER FOUR

THE DOMESTIC VIOLENCE AMENDMENT ACT 14, 2021 AND GENDER INEQUALITY IN SOUTH AFRICA

4. Introduction

Domestic violence in South Africa has its roots in the strong patriarchal system that the nation is suffused in.³⁰⁵ Fighting against the systemic imbalance is expected to be at the core of any war against domestic violence. The inability of the SAPS to implement the DVA 1998 as well as other related regulations has also been traced to the inequality of the feminine gender to the masculine.³⁰⁶ Gender inequality is one of many forms of systemic inequality in the South African society. The need for more comprehensive domestic violence laws has been established in the earlier chapters of this study. The ultimate need for the protection of survivors of domestic violence is at the forefront of all laws enacted to combat this scourge. With the amendment of the DVA 1998, we expect to see a safer and more balanced society for women in both the private and public spheres. This chapter focuses on the DVAA 2021, and whether the remedies and solutions prescribed reach the root cause of domestic violence in the society and what sustains it.³⁰⁷

4.1 Amendment of the DVA 1998 and its Underlying Cause

The presence of a domestic violence law since 1998 that describes a wide range of legal interventions involving the police has not changed the reality of women in South Africa.³⁰⁸ Domestic violence and mistreatment of women and children have exhibited a consistent upward trend, and those subjected to such acts receive minimal, if any, protective measures. Consequently, the situation for women remains not only unimproved, but also worsening, as the number of women falling victim to violence and abuse continues to rise in South Africa.

³⁰⁵ Mshweshwe, 'Understanding domestic violence: masculinity, culture, traditions' (2020) 6 Heliyon 1.

³⁰⁶ Kholofelo Mothibi and Happy Mathew Tirivangasi, 'Police Capacity Building in Dealing with Domestic Violence Cases in South Africa: An Entry Point to Women's Access to Justice' (2022) 1 Violence Against Women and Criminal Justice in Africa: Palgrave Macmillan, Cham 125.

³⁰⁷ Domestic Violence Amendment Act 14 of 2021.

³⁰⁸ Penny Parenze, 'A law isn't enough to stop domestic violence' ISS Today (South Africa, 31 October 2018) <[A law isn't enough to stop domestic violence - ISS Africa](#)> accessed on 3 January 2024.

Following the 2018 Summit on gender-based violence and femicide,³⁰⁹ the South African government released a National Strategic Plan (NSP) for the years 2020-2030. The NSP emphasises crucial state intervention in the fight against violence against women, which includes the establishment of services aimed at helping victims. These services are designed to enable survivors to leave the system and emphasize support throughout the process. Empowering survivors to heal from trauma is an essential aspect of achieving justice within the framework of the NSP. The NSP assessed gaps within the existing legal framework for gender-based violence in South Africa, prior to the amendment of the DVA 1998. Although the NSP relates to a gender-based violence that is, violence against women as an umbrella term, research has found that domestic violence is the most common form of violence experienced by women in South Africa.³¹⁰ To assess the gaps, the NSP laid out some recommended indicators to measure the effectiveness of state responses. Table 1 below highlights some of the indicators and responses to identify the gaps within the legal framework.

Table 1: Indicators and Responses to the Gaps in the Domestic Violence Legal Framework

Indicator	Response
Ratification of the Convention on the Elimination of Discrimination Against Women and other human rights instruments, protection of women's equality in the Constitution and abolition of discriminatory laws.	South Africa has ratified CEDAW, and women's equality is guaranteed by the Constitution.

³⁰⁹ The Presidency of South Africa (2019) Presidential Summit Against Gender-Based Violence and Femicide Declaration 2 November 2018.

³¹⁰ Luvo Kasa and Yolanda Unathi Saunders, 'The Role of Culture in Gender-Based Violence and its Impacts on the lives and wellbeing of women: Implications of Social work' (2022) 78(12) PONTE International Journal of Science and Research 41.

<p>An effective legal framework, statute and procedural law that provides access to justice, redress, protection, and compensation.</p>	<p>The DVA 1998 provides access to justice, protection, and compensation. The governance mechanisms for implementing the legal framework are not fully effective.</p>
<p>Criminalisation of all forms of violence against women and the prosecution of its perpetrators.</p>	<p>Forms of violence are criminalised, but there is a high low level of underreporting and a low rate of convictions. There are also gaps in the criminal justice system, with impunity continuing and a lack of attention to victims' rights.</p>
<p>Increased awareness and sensitivity of professionals and officials.</p>	<p>Government officials were trained, but there was no evidence of the quality and efficiency of training. Few government departments could provide data on the number of trained persons, and there was no evidence of the impact of training. All first-line workers need continuous psychological and social support and feedback.</p>
<p>Addressing structural inequalities in the promotion of women's advancement</p>	<p>There is a need to focus on changing social norms that tolerate and perpetuate GBV in South Africa. The discussion on risk factors showed the need to address societal-level factors such as patriarchy to effectively prevent VAW – more efforts on this are needed in South Africa.</p>

Source: National Gender-Based and Femicide Strategic Planning 2020-2030 (2018).

The NSP specified measures to be embarked on to bridge the identified gaps. Among them is the strengthening of the legal framework which involves an amendment of the DVA to be more victim-centred and to implement recommendations from reviews and address gaps.³¹¹ The NSP recommends the enhancement of the implementation of current laws and policies. This will enhance the effectiveness of the police, judiciary, and healthcare services that are already mandated by law to respond to domestic violence cases. It is important to reassess and update existing legislation that specifically addresses various forms of violence against women to ensure alignment with international standards and best practices.³¹² The DVAA 2021 therefore is a deliverable from the National Strategic Plan of Gender-based Violence and Femicide, which was called for at the November 2018 Presidential Summit against Gender-Based Violence and Femicide (GBVF).³¹³

4.1.2 Amending the Domestic Violence Act 116 of 1998

The procedure for making and amending national legislation in South Africa is outlined in Chapter 4, sections 74 to 77 of the Constitution. This section provides the framework and the requirements that must be met for new and amended bills to become law. The term 'bill' refers to a nascent law. However, when viewed in the context of parliamentary proceedings, it signifies a preliminary version of a suggested parliamentary action. A bill is the draft version of a law or act. It may be proposing either an entirely new act, or an amendment to an existing Act, or it can simply repeal an existing Act.³¹⁴ The authority to make, amend or repeal laws in the national sphere of government lies in the Parliament while the provincial legislatures have same power in the provincial sphere. The South African Constitution distributes legislative powers between the central and provincial governments based on the subject matter of the legislation.³¹⁵ The nine provincial legislatures are allowed to legislate on the subjects listed in Schedule 4 of the Constitution called the functional areas, which include crucial matters like agriculture education and health services. The matters under the functional areas are of concurrent national and provincial legislative competence.

³¹¹ National Gender-based Violence and Femicide Strategic Planning 2020-2030 (2018) 58.

³¹² National Gender-based Violence and Femicide Strategic Planning 2020-2030 (2018) 58.

³¹³ Government of South Africa Media Statement <[President Cyril Ramaphosa assents to laws that strengthen fight against Gender- Based Violence | South African Government \(www.gov.za\)](#)> (2022) accessed on 13 August 2023.

³¹⁴ Parliamentary Monitoring Group 'The Legislative Process' <[The Legislative Process. | PMG](#)> accessed on 16 August 2023.

³¹⁵ Victoria Bronstein, 'Reconciling regulation or confronting inconsistency? Conflict between national and provincial legislation' (2006) 22(2) South African Journal on Human Rights 283.

Under Chapter 4 of the South African Constitution, 1996, there are four main types of Bills that come before Parliament namely:

1. Bills amending the Constitution (Section 74)
2. Ordinary Bills that do not affect provinces (Section 75)
3. Ordinary Bills that affect provinces (section 76)
4. Money Bills (section 77)

Tagging a Bill, that is classifying a Bill into any of the four categories determines the procedure through which the bill may become law. Tagging is done by the Joint Tagging Mechanism (JTM).³¹⁶ The JTM is a committee which consists of the Speaker and the Deputy Speaker of National Assembly and the Chairperson and the permanent Deputy Chairperson of the National Council of Provinces.³¹⁷ Bills that explicitly address schedule 4 matters fall within the constitutional provisions specified in section 76(3) and bills falling under section 44(3) of the Constitution. Section 44(3) stipulates that “legislation concerning a subject reasonably essential or supplementary to the proficient exercise of a power relating to any matter in Schedule 4 is, for all intents, regarded as legislation regarding a matter listed in Schedule 4”.³¹⁸ On the other hand, bills that do not relate to matters outlined in Schedules 4 and that do not pertain to any other subjects detailed in section 76(3) are readily classified as section 75 Bills.³¹⁹

The Domestic Violence Amendment Bill (B20B-2020) was introduced by the National Assembly as a Section 75 Bill.³²⁰ That means the process through which it is passed into law is prescribed in section 75 of the Constitution. Although, the laws subject to the Section 75 process are significant to the citizens of the provinces, just like all national matters, these laws do not pertain directly to

³¹⁶ Parliamentary Monitoring Group, ‘The Legislative process’

³¹⁷ Parliamentary Monitoring Group, ‘The Legislative process’

³¹⁸ Section 44(3) of the 1996 Constitution of South Africa.

³¹⁹ Christina Murray and Richard Simeon, ‘Tagging bills in Parliament: section 75 or section 76?’ (2006) 123(2) South African Law Journal 242.

³²⁰ Domestic Violence Amendment Bill <[Domestic Violence Amendment Bill B20-2020 \(www.gov.za\)](http://www.gov.za)> accessed on 21 August 2023

provincial government affairs.³²¹ An ordinary bill that does not affect the provinces can only be introduced in the National Assembly.³²² A bill drafted by a government department and refined by state law advisers is submitted by the relevant minister to the cabinet. The bill is tabled or introduced at the National Assembly.³²³ This introduction commences the First Reading. The bill is after that, made public in the Government Gazette.³²⁴ The bill is subsequently directed to the appropriate committee within the National Assembly which considers the bill and accepts, makes amendments, or rejects it. This consideration involves public consultations. The Second Reading commences as the bill is debated and voted on at a sitting of the National Assembly, where the bill is only passed if there is a majority of votes in favour of it. Once the bill has been passed, it is referred to the National Council of Provinces (NCOP) The NCOP is a council of provinces that participates in the national legislative process.³²⁵ Each delegate votes for or against a bill individually. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting provinces".³²⁶ Upon receiving a Bill, the NCOP can pass it as it is or pass it subject to amendments proposed by the council or reject it.³²⁷ A bill passed as it is without any amendment proposed is submitted to the president for assent. Where the NCOP rejects a bill or proposes its own amendments, it is returned to the National Assembly.³²⁸ The National Assembly has the power to pass it with or without considering the amendments of the National Council of Provinces. It can also decide not to proceed with it.³²⁹ Once passed, the president must assent to and sign the bill into law or refer it back to the National Assembly if the president has any reservation on the constitutionality of the bill.³³⁰ Where the President assents to and signs the bill, it becomes law binding on all and sundry. An Act is published and appears in the Government Gazette and comes into effect on a date determined by the president.

The Domestic Violence Amendment Act was introduced to the National Assembly by the Minister of Justice and Correctional Services on 06 September 2020.³³¹ After much deliberation by the Portfolio Committee on Justice and Correctional Services and Public Submissions, the bill was passed and sent to the NCOP for concurrence on 03 June 2021. It was assented to by the President on 25

³²¹ Murray and Simeon, 'Tagging bills in Parliament: section 75 or section 76?' 240.

³²² Section 75 of the 1996 Constitution of South Africa.

³²³ Section 75(1) of the 1996 Constitution of South Africa.

³²⁴ Parliamentary Monitoring Group 'Bills Explained' <[Bills Explained | PMG](#)> accessed on 23 August 2023.

³²⁵ Section 42(2) of the 1996 Constitution of South Africa.

³²⁶ Section 42(4) of the 1996 Constitution of South Africa.

³²⁷ Section 75(1) (a) of the 1996 Constitution of South Africa.

³²⁸ Section 75(1) (c) of the 1996 Constitution of South Africa.

³²⁹ Section 75(1) of the 1996 Constitution

³³⁰ Section 79(1) of the 1996 Constitution of South Africa.

³³¹ Act 14 of 2021.

January 2022 amending several provisions of its predecessor, the DVA 1998 and published in the Government Gazette number 45824 on 28 January 2022.

4.1.3 Outstanding Amendments/ Inclusions

The purpose of the Domestic Violence Amendment Bill is to amend the Domestic Violence Act.³³² The amendment aimed at enhancing the efficiency and accessibility of services and affording victims strengthened protection against domestic violence. Rehse, supporting the amendment of the DVA 1998 highlights that the revisions introduced by the new Act will introduce an enhanced protection order framework. This framework will eliminate previous administrative obstacles and shortcomings that hindered the ability of victims to effectively seek protection and justice within the system.³³³ The previous chapters of this work have touched on some of the amendments made by the DVAA 2021. The following sections will further highlight notable changes made to the DVA 1998.

4.2 Introduction of Electronic Application Process for Protection Orders

Electronic application for a protection order is a novel process of applying for a protection order introduced by DVAA 2021. This is highly commendable, as an electronic application is in line with the rapid increase in the use of technology and it simplifies the process of application. A complainant submits the application to an electronic address of the court with jurisdiction.³³⁴ Section 4(5) of the DVA 1998 provides for an application to be brought outside the ordinary court hours or days in case of urgent applications. Domestic violence incidents occur at times where both parties are available at home which is during odd hours of the day or during holidays. Recently, with the global lockdown due to the global pandemic, COVID-19, a spike in domestic violence cases was recorded.³³⁵ It is very important for a victim to be able to access help and protection in emergency situations. The applications for protection order can be submitted at any time of the day. This means it can also be prepared and lodged with the court for consideration outside normal court hours. If the magistrate believes there are sufficient grounds to grant an interim protection order, they will be able to grant it without the applicant presenting at the court. MOSAIC has described the electronic application for

³³² Preamble of the DVAA 2021.

³³³ Newswire, 'New Domestic Violence Act Amendments Promise Heightened Protection For Victims – Here's What That Means' <[New Domestic Violence Act Amendments Promise Heightened Protection For Victims - Here's What That Means \(iafrica.com\)](#)> accessed on 28 August 2023.

³³⁴ Section 4(1)(b).

³³⁵ Endurance Uzobo and Aboluwaji D. Ayinmoro, 'Trapped between two pandemics: domestic violence cases under COVID-19 pandemic lockdown: a scoping review' (2023) 43(3) *Community Health Equity Research & Policy* 324.

protection order as a simplified process that increases the access to justice in a way that has not been seen before in South Africa.³³⁶

4.2.1 Domestic Violence Safety Monitoring Notices

The DVAA 2021 also contains provisions for safety monitoring notices. This notice is made by the court for the relevant SAPS station. It is to monitor the safety of any person who has been awarded a protection order, but who still must share a residence with the respondent or their abuser. The safety monitoring notice places a duty on members of SAPS in relation to protection of victims in section 4(A) of the DVAA 2021. The domestic violence safety monitoring notice can be applied for by a complainant alongside a protection order where she shares a joint residence with the respondent and there are reasonable grounds to believe that the respondent poses a threat to the safety of the complainant. When such a notice is issued by the court, the duty falls upon the station commander serving the area where the complainant resides. This duty entails regular contact with the complainant through electronic service or visits to the joint residence. The purpose of these interactions is to check on the complainant's safety and to facilitate private communication. This is done to further ensure the safety of the complainant at all stages of the domestic violence proceedings. This notice can be issued before or after the protection order is issued.³³⁷ Where a police officer is prevented from seeing the complainant, he or she has the power to overcome such resistance with reasonable force, which may include breaking the doors or windows. Section 4A (11) of the DVAA 2021 provides for what is expected of a SAPS' officer at the expiration of a domestic violence safety monitoring notice. The officer must file a report containing relevant information about the notice to the court clerk.

4.2.2 Integrated Electronic Repository for Protection Orders

An introduction of section 6A by the DVAA 2021 provides for the development and maintenance of an integrated repository for domestic violence protection orders. This is to be done by the Director-General: Justice and Constitutional Development. All applications for protection order and the supporting affidavit are to be captured and stored on the integrated electronic repository.³³⁸ This is

³³⁶ Newswire, 'New Domestic Violence Act Amendments Promise Heightened Protection For Victims – Here's What That Means' Newswire (South Africa, 31 January 2022)(<[New Domestic Violence Act Amendments Promise Heightened Protection For Victims - Here's What That Means \(iafrica.com\)](https://iafrica.com/news/new-domestic-violence-act-amendments-promise-heightened-protection-for-victims-here-s-what-that-means)> accessed on 28 August 2023.

³³⁷ Section 4(A) of the DVAA 2021.

³³⁸ Section 4(3)(7) of the DVAA 2021.

a system that aims to digitise and centralise records of domestic violence protection orders and related matters.³³⁹ A copy of interim and final protection when issued to a complainant is also expected to be recorded in the integrated electronic repository. This system of recording provides a centralised system for retrieving domestic violence protection order applications and orders issued.

4.3 The Domestic Violence Amendment Act 14 of 2021 and Gender Inequality

Most of the comments received from public submissions on the Domestic Violence Amendment Bill was on the non-implementation of the DVA 1998 and enforcement difficulties. These issues were taken into consideration as the DVA 1998 as amended provides clarity as what role-playing departments must do as well safeguards to protect against abuse of process.³⁴⁰ While this is commendable, it has already been established in this study that the persistence of domestic violence in the society and the nonchalant attitude of members of SAPS to this scourge is rooted in the masculinity culture at play in the South African society.³⁴¹ This likely means that a continued abuse of the process of enforcing the DVAA 2021 is foreseen if this issue of gender inequality and imbalance is not addressed. A critical look at domestic violence reports after the implementation of the DVAA 2021 found that the number of domestic violence related matters are still on the rise. Between April and June 2023, 33088 cases of domestic violence were recorded by SAPS, and they ranged from malicious damage to property to murder.³⁴² There most certainly will be thousands of cases that are not reported. Although the DVA 1998 as amended recognises domestic violence as a form of gender-based violence, it does not expressly address the underlying cause of this scourge.³⁴³ One wonders whether the law recognises the disadvantaged place of women in the society. The UN Women's Rights had in a report in 2021 urged the South African government to take effective and adequate measures to ensure that the root cause of patriarchy and gender stereotypes are dealt with.³⁴⁴ One expects that with this amendment more light would be shed on the procedures for tackling what fuels domestic violence in South Africa – gender inequality. One preventive measure recommended by the Committee on the Elimination of Discrimination against Women that if taken seriously by lawmakers will go a long way in the fight against domestic violence

³³⁹ Section 6(A) of the DVAA 2021.

³⁴⁰ Domestic Violence Bill – Joint Submissions <[Domestic Violence Amendment BillB20-2020-Joint-SubmissioRIA-APC-ALT-FWA.pdf \(researchictafrica.net\)](#)> Accessed 3 January 2024

³⁴¹ Mshweshwe, 'Understanding domestic violence: masculinity, culture, traditions' 1.

³⁴² Police Recorded Crime Statistics, First Quarter of 2023-2024 Financial Year (April 2023-June 2023).

³⁴³ The DVAA 2021

³⁴⁴ United Nations <[South Africa: Failure to tackle domestic violence a violation of women's rights – UN experts | OHCHR](#)> Accessed on 09 September 2023.

is found in the CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. It provides for state parties to:

Adopt and implement effective legislative and other appropriate preventive measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes, inequality in the family and the neglect or denial of women's civil, political, economic, social, and cultural rights, and to promote the empowerment, agency, and voices of women.³⁴⁵

The DVAA as amended has made several salient additions to the domestic violence legislation but without expressly dealing with foundational issues of inequality, women may not be able or unwilling to take advantage of the protection it prescribes.³⁴⁶ Law reform may prove ineffectual if it clashes with ingrained beliefs about gender dynamics and masculinity within the population of the country.³⁴⁷ This therefore means that the DVAA 2021 does not comprehensively deal with the problem of domestic violence in South Africa. Achieving a win in the fight against domestic violence in South Africa requires laws that expressly speak to the issue of inequality in the society just as section 9(3) and subsection 4 of the Constitution of South Africa ensure the right to equality of persons in the country. These provisions prevent any person from suffering discrimination on many grounds including gender.

Although domestic violence has been made a public issue, one that is now legislated on by the state, it remains a social issue.³⁴⁸ According to Spies, the most important, and least acknowledged ingredient of social change to end domestic violence, lies in the shifting of attitudes.³⁴⁹ Progressive legislation enforced by those with un-progressive attitudes can create hostility and resentment on the part of law enforcement agents towards complainants.³⁵⁰ There is a link between the non-implementation of domestic violence legislation by members of the South African Police Force and the patriarchal mindset. The mindset in police officers has been said to increase the negative

³⁴⁵ CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19.

³⁴⁶ Cynthia Bowman, 'Domestic Violence: Does the African Context Demand a Different Approach?' [2003] *International Journal of Law and Psychiatry* 3.

³⁴⁷ Bowman, 'Domestic Violence: Does the African Context Demand a Different Approach?' 12.

³⁴⁸ Myrna Dawson, 'Domestic homicide review processes as a method of learning' (2021) *The Routledge international handbook of domestic violence and abuse* 673.

³⁴⁹ Amanda Spies, 'Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa's Domestic Violence Legislation' (2019) 63(1) *Journal of African Law* 54

³⁵⁰ Spies, 'Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa's Domestic Violence Legislation' (2019) 63(1) *Journal of African Law* 54.

gender stereotyping, which consequently affects how they perceive and respond to gender-based cases.³⁵¹ Also, a male police officer's traditional gender view may colour his views on domestic violence.³⁵²

4.4 A Social Norms Approach to Ending Domestic Violence in South Africa

Changing social norms is key to ending all forms of gender-based violence. With a change comes a change in the ideas and behaviours of people. But doing that has not been an easy task.³⁵³ This is because it is imbedded in the very thread and fibre of people in the society, men and even women inclusive.³⁵⁴ While laws prescribing measures for already abused victims are important, more encompassing preventive steps will work better in putting a stop to domestic violence in South Africa. This step starts with a change in the way women are viewed and treated.³⁵⁵ In a bid to deal with gender inequality as the underlying cause of domestic violence, the CEDAW in her General Recommendation No. 35 provides some recommendations if taken seriously and enforced alongside the protective measures provided for in the DVA as amended will go a long way in preventing domestic violence in South Africa. Involving the active participation of representatives of women's organisation in developing effective measures to address and eradicate stereotypes and practices which condone or promote structural inequality of women with men.³⁵⁶ Such measures to be developed includes the integration of content of gender inequality into school curricula at all levels both in private and public. It also involves an increase in creating awareness programmes to promote an understanding that gender-based violence is unacceptable and harmful and dismantle the commonly held notion that victims are responsible for these abuses. Another measure to be adopted should be the use of media to propagate this message of eliminating gender stereotypes relating to women as well as strengthening the capacity of national human rights institutions to monitor or consider complaints regarding any media portraying gender-discriminating images or promoting violence against women. Another important measure that should be in place is the provision of mandatory and recurrent capacity-building, education, and training for members of the judiciary and

³⁵¹ Rabe-Hemp C, 'Policewomen or policemen? Doing gender and police work' (2008) 4 *Feminist Criminology* 114.

³⁵² Daniel Lockwood and Ariane Prohaska, 'Police officer gender and attitudes toward intimate partner violence: How policy can eliminate stereotypes' (2015) 10 *International Journal of Criminal Justice Sciences* 77.

³⁵³ Catherine Albertyn, 'The stubborn persistence of patriarchy'? Gender equality and cultural diversity in South Africa.' (2009) 2 *Constitutional Court Review* 208.

³⁵⁴ Albertyn, 'The stubborn persistence of patriarchy'? Gender equality and cultural diversity in South Africa.'

³⁵⁵ Gokila G. Krishnan, IMA English, Amritapuri Campus and India Anagha Arjun.'Men in a Patriarchal Society and Issues' (2020) 11 *Technology* 502.

³⁵⁶ CEDAW General recommendation No. 35 on Gender-based Violence against Women, (updating general recommendation No. 19).

law enforcement officers. Other personnel to be trained are forensic medical personnel, social and welfare personnel. The training should enhance the understanding of how gender stereotypes and bias lead to gender-based violence against women and inadequate responses to it. Also, the power dynamics that characterises intimate partner should be focused on and how it affects their work to eliminate factors that lead to revictimisation.

4.5 Conclusion

The DVAA 2021, although a progressive legislation does not adequately respond to domestic violence in South Africa. This is because it does not tackle the fundamental problem of gender inequality and the implementation of it lies majorly on the South African Police Service that is laden with the same patriarchal mindset. Legal changes or amendments are not enough for a successful fight against domestic violence. Both legal as well as social change, which includes a change in consciousness and behaviour, are necessary to address the incidence of domestic violence. As Hill puts it, gender inequality is at the root of domestic violence; therefore, gender equality is the cure.³⁵⁷ The next chapter is the concluding chapter, and it summarises the research report and makes recommendations that may strengthen the fight against domestic violence in South Africa.

³⁵⁷ Jess Hill, 'See what you made me do: Power, Control and Domestic Abuse' (Black Inc 2009) 341.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5. Introduction

This study focuses on a social problem that has troubled the Republic of South Africa – domestic violence whose pervasiveness in the country is not debatable as evident in official records and scholarly research.³⁵⁸ It must be mentioned that official records hardly cover all aspects and incidents of domestic violence because of certain extenuating circumstances which prevent official reporting of violence in the home.³⁵⁹ This study's underlining motivation is to expand knowledge about domestic violence and the expectation is that as knowledge about the phenomenon expands and percolates both governmental and community structures, its occurrence will markedly reduce.

There are three objectives that this study aimed to explore, and they are:

- Analysing the roles of the police under the legal framework for domestic violence in South Africa.
- Examining whether there are reported experiences of victims or survivors in the enforcement of the roles imposed on the police in the fight against domestic violence.
- Considering whether recent legal interventions responded to reported issues surrounding the roles of the police in DV cases.

The crux of the study is to examine whether the 2021 amendment has addressed the inadequacies of the DVA 1998 and the concomitant SAPS' enforcement challenges in relation to the curtailment of domestic violence.

³⁵⁸ Police Recorded Crime Statistics, First Quarter of 2023-2024 Financial Year (April 2023-June 2023).

³⁵⁹ Nonhlanhla Sibanda-Moyo, Eleanor Khonje and Maame Kyerewaa Brobbey, 'Violence against women in South Africa: A country in crisis' (2017) 1.

5.1 Summary of Findings

This section summarises the major findings of the research vis-à-vis domestic violence, legislation, and enforcement – policing - in South Africa and the summary covers the three objectives set for the research and the corresponding research questions. Each of the research objectives will be represented below and the findings connected thereby will be briefly discussed with them.

Objective one: To analyse the roles of the police under the legal framework for domestic violence in South Africa.

The equivalent research question for the above objective is as follows:

What is the relationship between “policing” and domestic violence?

This objective was explored in the second chapter of this study. In answering the question, the chapter explored the concept of domestic violence vis-à-vis the legislative and institutional frameworks put in place by the Republic of South Africa to ensure that the rights of all people and protect against infringements of their rights. From literature review, it is found that, in terms of laws and policing strategies regarding domestic violence, South Africa is very responsive. This is a welcome development, considering the importance of lawmaking dealing with the monstrous phenomenon – domestic violence. It is believed that strict enforcement of these laws by the SAPS will deter violence in the home.

Objective two: Was to examine whether there are reported experiences of victims or survivors in the enforcement of the roles imposed on the police in the fight against domestic violence.

The equivalent research question for the above objective is as follows:

What is the role of the police in cases of domestic violence in South Africa and the reported experiences of victims of survivors of domestic violence?

Chapter three of this report covered the above research objective and question. In this chapter, the considered Act was the DVA 1998. For this Act, recent body of work on domestic violence in South Africa shows that there was no major progress in the fight against domestic abuse in South Africa because of the inconsistent and incorrect application of the law by police officers. Some of the widely reported failings of the Act and its implementation include ineffective implementation, institutional setbacks such as lack of training or resources, and the socially entrenched gender inequalities that exist in the South African society. This has made the designated legislation a mere theoretical exercise rather than a practical one and the need for amendment of the DVA 1998.

Objective three: To consider whether recent legal interventions responded to reported issues surrounding the roles of the police in DV cases.

The equivalent research question for the above objective is as follows:

Have recent legal interventions responded to reported issues surrounding the roles of the police in DV cases?

While the DVAA 2021 is believed to be an enactment on the 1998 Act, its implementation by SAPS and courts has not been as effective as planned. The failure of implementation by relevant institutions belies the recurrence of domestic violence. Legal changes or amendments are not enough for a successful fight against domestic violence. Government has promulgated laws to combat domestic violence, however, it needs to channel efforts into socio-cultural change - within the citizenry -, which may propel a change in attitude and behaviour towards the phenomenon of domestic violence. As it has been argued, gender inequality is at the root of domestic violence; therefore, gender equality is the cure.

5.2 Recommendations

This study recommends a suite of actions for the control of domestic violence and the enforcement challenges in relation to domestic violence legislation, especially the DVAA 2021. These recommendations are discussed below.

5.2.1 The Imperative of a National Orientation Agenda Against Domestic Violence

The South African government (or concerned government departments) should deploy a consistent national orientation agenda against domestic violence. Schools, mass media, religious organisations, and traditional institutions can play a key role in this regard. Increased awareness and the concomitant understanding of redress mechanisms available to survivors and/or victims may, in the long run, lessen the occurrence of domestic violence. Such an effort may also help to instil attitudinal changes towards domestic violence.

5.2.2 Performance Evaluation of SAPS' Prosecution of Domestic Violence Perpetrators

The police regulatory institutions need to regularly monitor and appraise the activities of the SAPS with respect to the prosecution of domestic violence with a view to ensuring that there is compliance to the related extant laws. Police officers who fail to diligently investigate domestic violence incidents or provide statutory police service to victims and/or survivors of domestic violence such as home visit and lawful seizure of weapons should be duly reprimanded. This will serve as deterrence to others who trifle with domestic violence. The roles of SAPS are very important in the fight against the domestic violence phenomenon.

5.2.3 Community Involvement in the Fight Against Domestic Violence

Community leaders, such as traditional rulers and local leadership of youth, women, and men groups should be encouraged to be at the vanguard of the fight against domestic violence in their jurisdictions since they are closer to victims of domestic violence. They may support the efforts of local authorities and SAPS by being watchdogs in their domains and reporting incidents of domestic

violence to the SAPS in cases where the victims are unable to do so. The community effort at taming domestic violence may also be a reliable means to domestic violence surveillance, thus providing a more accurate and evidence-based data on the phenomenon. The involvement of community structures may also deter people from being violent in the home because of sanctions from or loss of social standing in the community.

5.2.4 Periodic Review and Finetuning of Domestic Violence Laws

Often, social problems such as domestic violence are hydra-headed and may manifest in forms not envisaged by the law system. It will therefore be incumbent on the law system to be immediately responsive in terms of lawmaking in such circumstances. Where apparent deficiencies about the provisions of the current legislative framework for combating domestic violence have been identified, it will be appropriate to make the needed amendment to address those deficiencies. It is noteworthy however such timeous response will require that the necessary resources are made available to the concerned Departments or agencies in the justice system.

5.3 Conclusion

From the foregoing, the study has shown the existential nature of domestic violence in South Africa and the different efforts that government has directed towards its control. As the study shows, there is indeed a commitment on the part of government to stem the tide of this reprehensible menace. The 2021 Amendment Act is a testament to the government's commitment in this regard. The amendment offers better possibilities for curtailing violence in the home. The DVAA 2021 has responded to most of the challenges that the previous Acts did not cover. It is noteworthy that the full picture of the performance of the Amendment Act may not be fully known for a few years because it is barely two years. However, the appraisal of the performance of SAPS based on the March 2022 official report from Civilian Secretariat for Police Service (CSPS) highlights some of the weaknesses in the Act's implementation by SAPS. This shows that whilst lawmaking is essential to dealing with a social problem, attitude and behaviour are also critical elements that also need to be upscaled to match the law. Government – national, provincial, and municipal – need to be proactive by constantly finetuning the deterrence systems against domestic violence. Community involvement, a disciplined and compliant SAPS, responsive law system, and national orientation agenda are recommended proposals for tackling domestic violence in South Africa.

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