

Implementation in Reality: Magistrates and the  
Domestic Violence Act

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## ABSTRACT:

This dissertation examines magistrates' assessment of their experiences in implementing the Domestic Violence Act 116 of 1998. The data has been gathered from in-depth interviews with 6 magistrates from different magisterial jurisdictions in the Western Cape.

This study has uncovered many barriers to implementation of the Act, the greatest issue being the lack of resources throughout the courts. Magistrates as well as the South African Police Services (SAPS) also do not receive adequate training. This results in inconsistency in domestic violence courts as well as problems with the return date at court. This study also acknowledges that socio-economic issues, such as drug addiction and gang violence play a role in the rise and perpetuation of domestic violence.

President Cyril Ramaphosa has committed himself and the government to combatting domestic violence at both the 2018 and 2022 Presidential Summit. However, domestic violence is still on the rise. Building on the work of similar studies, this dissertation argues for the President and the government to acknowledge their failing efforts, and to improve the communication between themselves and those implementing the Act.

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# **TABLE OF CONTENTS**

ABSTRACT

ACKNOWLEDGMENT

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

CHAPTER 1: INTRODUCTION	1
1.1 What is Domestic Violence?	1
1.2 Domestic Violence in South Africa	2
1.3 Court Process and Key Role Players	4
1.4 Magistrates and the Domestic Violence Act	5
1.5 Presidential Response	7
1.6 Aim of this Dissertation	8
CHAPTER 2: LITERATURE REVIEW	10
2.1 Legislation	10
2.1.1 <i>The Prevention of Family Violence Act 133 of 1993</i>	10
2.2 The Domestic Violence Act 116 of 1998	12
2.3 Implementation of the Domestic Violence Act	14
2.4 Domestic Violence Amendment Act	23
2.5 Responses to Domestic Violence in Present Day South Africa	25
2.5.1 National Strategic Plan	26
CHAPTER 3: METHODOLOGY	29

3.1	Sample Size	29
3.2	Data Collection	30
3.3	Interview Strategy	31
3.4	Data Analysis	34
3.5	Limitations	34
3.6	Ethical Considerations	35
CHAPTER 4: FINDINGS		37
4.1	Protection Orders	37
	a) Number of New Applications	37
	b) Information Included on the Application Form	39
	c) Granting of Interim Protection Orders	41
	d) Urgent Applications	42
4.2	Return Dates and Breaches	42
4.3	Abuse of the System	44
4.4	Training	45
4.5	Community-Based Issues	46
4.6	Police	48
4.7	Lack of Resources	49
4.8	Recommendations from Magistrates	51
	a) Court Processes	52
	b) Awareness and Education	52
	c) Personnel	53
4.9	Innovative Process in Reality	55

a)	Application Process	55
b)	Return Dates	56
c)	Programmes	56
CHAPTER 5: DISCUSSION		57
5.1	Attitude of the President and Government	57
5.2	2001 to 2022: Has There Been Any Improvement in Implementation?	59
5.3	What is the Problem?	62
5.3.1	Patriarchy and Society	63
5.3.2	“A Protection Order is Just a Piece of Paper”	65
CHAPTER 6: CONCLUSION		67
BIBLIOGRAPHY		69

## **LIST OF ABBREVIATIONS AND ACRONYMS**

DV	Domestic Violence
DVA	Domestic Violence Act
IPO	Interim Protection Order
NSP	National Strategic Plan
PO	Protection Order



## **CHAPTER 1**

### **INTRODUCTION:**

South Africa is a country plagued by domestic violence. Women are abused, violated, and killed every day, many by people they know. In response to this, the Domestic Violence Act (DVA)<sup>1</sup> was promulgated and came into effect in 1999. At first glance it seems like a victim-friendly piece of legislation, offering wide protection to victims of domestic violence throughout South Africa. However, many challenges have since arisen with the implementation of the Act. These include the large magnitude of protection order applications, problems with the return date, as well as the lack of training of personnel and the lack of resources experienced by the courts. These challenges/barriers to implementation are well documented in the earlier days of the DVA's implementation. However, there has been little updated research in respect of the current implementation and whether there have been any improvements.

#### **1.1 What is Domestic Violence?**

To know what constitutes domestic violence, one needs to know what constitutes a domestic relationship. A domestic relationship exists where the complainant and respondent are married to each other or are in a romantic and/or intimate relationship with one another. The two parties could also be parents of a child or related to one another (whether by blood or adoption). A domestic relationship also exists between people who live together or share a residence.<sup>2</sup> It is important to note that domestic relationships do not solely exist between a man and woman who are in a romantic and/or intimate relationship. This is important as it broadens the scope of individuals who can experience domestic violence and who consequently need the protection of the law.

Domestic violence includes physical, emotional, sexual or verbal abuse. It can also be economic or psychological abuse. Further behaviour that

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<sup>1</sup> The Domestic Violence Act 116 of 1998.

<sup>2</sup> Ibid, p2.

constitutes domestic violence is that of intimidation, harassment, damage to property and any other controlling or abusive behaviour that may cause harm to the safety or wellbeing of the complainant.<sup>3</sup>

## 1.2 Domestic violence in SA:

South Africa is one of the most dangerous places in the world to be a woman. We have some of the highest rates of domestic violence, to the point where we are facing a domestic violence pandemic. It is a social ill that affects all that reside in the country regardless of age, race, socio-economic position and sexual orientation. However, it has been found that women are more at risk than men for incidents of domestic violence.<sup>4</sup> Statistics SA's 2016 Demographic and Health Survey has estimated that one in five South African women have experienced physical domestic violence. The survey also shows that 17% of women between 18 and 24 years old had experienced domestic abuse from a partner.<sup>5</sup> In 2023, the Department of Justice and Constitutional Development says it deals with over 50 000 domestic violence cases annually.<sup>6</sup> Statistically, the Western Cape has the highest number of domestic-violence related murders.<sup>7</sup> These murders are often the result of a pattern of domestic violence over time, which include threats to kill or harm the victim and sometimes occur due to the woman seeking a protection order or having been granted a protection order. This suggests that the act of seeking a protection order poses a risk to the victim and could result in their death.<sup>8</sup>

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<sup>3</sup> Ibid, pp 2-3.

<sup>4</sup> UNODC, Global Study on Homicide 2018 (Vienna, 2018)

<sup>5</sup> <https://welstand.solidariteit.co.za/en/1-5-south-african-women-victims-domestic-abuse/#:~:text=South%20Africa%20has%20one%20of,rights%20abuse%20in%20South%20Africa.>

<sup>6</sup> <https://www.sabcnews.com/sabcnews/more-than-50-000-cases-of-gbv-and-femicide-reported-annually/>

<sup>7</sup> South African Police Service Police recorded crime statistics situation in the Republic of South Africa 12 months April to March ((2018/19) available at

[https://www.saps.gov.za/services/april\\_to\\_march2018\\_19\\_presentation.pdf](https://www.saps.gov.za/services/april_to_march2018_19_presentation.pdf).

<sup>8</sup> Echeburúa, E et al. (2008) 'Assessing risk markers in intimate partner femicide and severe violence a new assessment instrument' Journal of Interpersonal Violence 925-39.

Domestic violence is not a singular act but rather a cycle. The cyclical nature of domestic violence includes the victim seeking assistance of the courts after the abuse but then withdrawing the application when the abuser seeks to make amends with the victim. Many of the victims forgive their abusers and trust that the abuse will stop.<sup>9</sup> Research has also shown that many victims do not report abuse due to factors, including, the fear of retaliation by the abuser, the desire to protect their family and financial dependence on the abuser.<sup>10</sup> Some victims separate from their abuser in order to remove themselves from the situation, however many of them are at risk of being murdered by their abuser shortly after the separation. This cyclical pattern of domestic violence can contribute to the negative perceptions held by the court staff of repeat complainants who apply for protection orders and then revoke their application numerous times.<sup>11</sup>

Substance abuse has been known to trigger abusive behaviours which lead to domestic violence.<sup>12</sup> When under the influence, substance abusers may not be able to make rational decisions which means that they are not likely to appreciate a protection order. Therefore, the strength of a protection order lies in the ability of the complainant to report a breach and also relies on the response by the police to such a report.

Another contributor to the high rates of domestic violence is the patriarchal nature of society and the cultural norms and ideologies that many South Africans practice. Feminist research further explains that domestic violence is a consequence of patriarchy, which is a system that gives men the power (and makes it easier for men) to dominate and control women.<sup>13</sup> These structures are based on the belief that there is a biological difference

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<sup>9</sup> Agnes Tshidi Seabi (2010) *Marriage, Cohabitation and Domestic Violence in Mpumalanga*, MSocSci dissertation, University of Pretoria.

<sup>10</sup> Mshweshwe L. (2018) Support for Abused Rural Women in the Eastern Cape: Views of Survivors and Service Providers. Doctoral dissertation, University of Johannesburg.

<sup>11</sup> Govender, D. (2015) 'Is domestic violence being policed in South Africa?' 28 *Acta Criminologica* 43.

<sup>12</sup> Centre for the Study of Violence and Reconciliation, 'Substance abuse in South Africa, its linkages with gender-based violence and urban violence' (2017).

<sup>13</sup> Dobash, R.E. and Dobash, R.P. (2017) "When women are murdered," *The Handbook of Homicide*, pp. 131–148.

between men and women and therefore men are entitled to more power<sup>14</sup>. Without knowing it, many of us perpetuate patriarchal notions, even though it is mainly the men who reap the rewards.

### 1.3 Court Process and Key Role Players:

The DVA makes provision for victims to apply for protection orders (PO) against abusers and also sets out the application process. To apply, complainants can go to the local police station or can approach the magistrate court closest to them, during courts hours. In practice this is dependent on the court's capacity. The police officer will explain the procedure to the complainant and they can then choose whether they want to open a criminal case, apply for a protection order, or both. If necessary, the police will take the complainant to a medical professional to assess any injuries the complainant might have as a result of the abuse. This medical assessment can then be used as evidence in a criminal case or when applying for a protection order.<sup>15</sup> The police officer will then refer the complainant to the magistrate's court for them to apply for a protection order.

The court clerk provides the complainant with an application form. The clerk has the duty to inform applicants about the DVA and to help the complainant complete the application, which will detail the nature of the abuse suffered. The completed application form is then sent to the magistrate, who will determine if the information supplied is sufficient enough to grant an interim PO. An interim PO will only come into force once it has been served, by the police or sheriff, on the respondent with the return date indicated.<sup>16</sup> A warrant of arrest can be issued by the magistrate if the respondent violates the conditions of the interim PO. The clerk of the court will give the warrant to the complainant once issued.

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<sup>14</sup> Sultana, A. (2010). *Patriarchy and women's subordination: a theoretical analysis*. Arts Faculty Journal, 1-18.

<sup>15</sup> <https://www.vukuzenzele.gov.za/domestic-violence-what-do#:~:text=The%20clerk%20of%20the%20court,the%20file%20number%20issued%20safe.>

<sup>16</sup> Ibid.

#### 1.4 Magistrates and the Domestic Violence Act:

Magistrates have an important role to play in decision-making with regards to domestic violence. The duties of the magistrate are set out in the DVA. Magistrates have to, firstly, issue interim protection orders if they are satisfied that a respondent's behaviour constitutes domestic violence and that the applicant will suffer undue hardship if a protection order is not issued immediately. If they issue an interim protection order, they're satisfied that the respondent's behaviour constitutes domestic violence and the interim order was properly served on respondent, then a magistrates may grant a final protection order.<sup>17</sup>

Magistrates are guided by an array of principles.<sup>18</sup> They should treat each case fairly, with seriousness, expeditiously and be sensitive to the gender, race, class, culture of the parties involved.<sup>19</sup> Magistrates should also treat cases with the appropriate urgency and consider the "perceived risk" to the applicant without minimising the risk. A fair hearing should also be given to all parties. The aforementioned guidelines are to be used as a reference manual and guide for magistrates who have not attended training courses relating to the relevant legislation.<sup>20</sup>

A further article on magistrates and the DVA<sup>21</sup> broadly described the duties of magistrates in domestic violence cases. Firstly, if they are satisfied that evidence of domestic violence exists, they can issue and *ex parte* interim protection order. Secondly, magistrates can grant final protection orders.<sup>22</sup> Artz's study shows that magistrates generally believe that the DVA is a useful as well as progressive piece of legislation. It was said that the law is "very good" and only needed minor revisions. The findings show that there is a space shortage at the courts, as well as large caseloads and a lack of

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<sup>17</sup> Artz, L. (2003) *Magistrates and the Domestic Violence Act: Issues of Interpretation*. Institute of Criminology, University of Cape Town: South Africa. Pp 9.

<sup>18</sup> The Magistrate Working Group on the Implementation of the Domestic Violence Act (1) and The Lower Court Management Committee. (2008) *Guidelines for the Implementation of the Domestic Violence Act for the Magistrates*. Pretoria: Department of Justice and Constitutional Development.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Artz, L. (2003) *Magistrates and the Domestic Violence Act: Issues of Interpretation*. Institute of Criminology. University of Cape Town: South Africa.

<sup>22</sup> Ibid, pp 9.

dedication to domestic violence cases.<sup>23</sup> The high number of applications can make the court feel like an assembly line, where all cases start to look the same. This suggestion is that more magistrates are needed in this area.<sup>24</sup>

Magistrates are also frustrated due to the lack of specifically allocated resources to effectively implement the Act.<sup>25</sup> The DVA should not be the only remedy used to address domestic violence. As one magistrate explained, “It is not the be-all and end-all ... it’s just an option”. Government has put a lot of resources into “talking about the problems of domestic violence” but little is reflected in reality.

Magistrates supported the establishment of specialised domestic violence courts, as these matters were usually conducted “informally” in chambers. The seemingly “casualness” of the proceedings did not send a sufficiently serious message to the parties, especially the offenders. In some courts domestic violence cases are placed given the lowest priority on the court roll, as most magistrates still view domestic violence as a “family matter” and therefore are not interested. It is for all of these reasons that the need for independent domestic violence courts was highlighted.

A study was also done in Birmingham<sup>26</sup> stating that the magistrates’ court is an integral element in the criminal justice system as it is where majority of criminal cases will be finalised.<sup>27</sup> Similarly, magistrates attitudes towards domestic violence are important, and any response to domestic violence requires understanding and commitment from the magistrates.<sup>28</sup> It is also crucial that the magistrates understand the reality of domestic violence where they are practising.<sup>29</sup> Hence research into magistrates’ understanding and sentencing of DV cases is long overdue.<sup>30</sup> An exploratory study studied magistrates’ sentencing decisions and the effects of certain factors on

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid, pp 17-18.

<sup>25</sup> Ibid, pp 16.

<sup>26</sup> Gilchrist, E & Blissett, J. (2002). ‘Magistrates’ Attitudes to Domestic Violence and Sentencing Options’, in *The Howard Journal* Vol 41 No 4. Pp 348.

<sup>27</sup> Ibid, pp 349.

<sup>28</sup> Ibid, pp 349.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid, Pp 350.

sentencing decisions.<sup>31</sup> Most of the factors lead to the incident being categorised as a family matter and not a criminal one.<sup>32</sup> This is coupled with magistrates minimising the severity of assault if it was committed against a partner, and even trying to excuse the perpetrator in these situations.<sup>33</sup> Furthermore, magistrates might try to blame the victim for the perpetrator's actions.<sup>34</sup> This exploratory study clearly identifies the need for training to inform magistrates about the reality of domestic violence so that their decision making at court can be informed.<sup>35</sup> This research can be viewed as a pilot project, suggesting that further research is needed.

On the return date the proceedings will only start if both the complainant and respondent are present at the court. Both parties will have an opportunity to present and argue their case. The magistrate will then decide whether to grant a final PO. The conditions of the final order must be made clear to the complainant as they may differ from those of the interim protection order. It must also be emphasised that these conditions are permanent and can only be changed by a court of law.<sup>36</sup>

If there is a violation of the final protection order, the applicant must take the warrant of arrest and report to the police station. The respondent will be arrested and charged for breach of a PO and then prosecuted in the criminal court. If found guilty, they can be sentenced to a fine/imprisonment or both.<sup>37</sup>

### 1.5 Presidential Response:

In 2018, President Cyril Ramaphosa and his government created a National Strategic Plan (NSP)<sup>38</sup> with the aim of ending gender-based violence and femicide.<sup>39</sup> The NSP sets out to provide a “cohesive strategic framework” to

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid, pp 360.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid,

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid,

<sup>38</sup> National Strategic Plan on Gender-Based Violence and Femicide: Human Dignity and Healing, Safety, Freedom & Equality in Our Lifetime, 2020.

<sup>39</sup> Ibid, p3.

guide the national response to domestic violence crisis in which South Africa finds itself.<sup>40</sup> He confidently said that “as government, we will continue to support this NSP by ensuring that it is integrated into government planning processes, that the necessary resources are made available, and that it yields concrete and tangible results.”<sup>41</sup>

The South African government further attempted to improve the laws regulating domestic violence, by promulgating the Domestic Violence Amendment Act 14 of 2021 (“the New Act”)<sup>42</sup> which came into effect on 28 January 2022. This new Act was intended to modify the Domestic Violence Act 116 of 1998 (“the Old Act”) and includes important new definitions which broaden the existing definition of domestic violence to include elder and spiritual abuse, as well as controlling behaviour.<sup>43</sup> Protection order can also now be applied for electronically, which eliminates having to go to the court.<sup>44</sup>

It is against this backdrop that the President convened the Presidential Summit on Gender-Based Violence and Femicide in November 2022, titled “Accountability, Acceleration and Amplification, NOW”. The summit was intended to provide an opportunity for feedback and accountability with respect to the issues that were raised in the 2018 Summit.

### 1.6 Aim of this Dissertation:

In an attempt to answer the question of why the DVA is not been implemented effectively, this dissertation examines magistrates’ assessment of their experiences of magistrates working with the Act<sup>45</sup>. This study will show that there are barriers to the implementation of the Act. The aim is to put forward an updated account of magistrates’ experiences in order to ascertain whether there has been any improvement in implementation over the past twenty years. The answer to the question of domestic violence is,

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<sup>40</sup> Ibid, p16.

<sup>41</sup> Ibid, p4.

<sup>42</sup> The Domestic Violence Amendment Act 14 of 2021.

<sup>43</sup> Ibid, s1.

<sup>44</sup> Ibid, s4.

<sup>45</sup> Ibid.



however, as complex as domestic violence itself. Real change requires both a systemic response and change in societal behaviour and attitudes<sup>46</sup> and calls for reliable and credible data.<sup>47</sup> This data, gained by conducting studies such as the present one, should be a key factor in allocating resources, implementation, evaluation and reviewing of programmes and policies.<sup>48</sup> This is the call that this study is answering.

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<sup>46</sup> National Strategic Plan on Gender-Based Violence and Femicide: Human Dignity and Healing, Safety, Freedom & Equality in Our Lifetime, 2020. P32.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

## CHAPTER 2

### LITERATURE REVIEW:

#### 2.1 Legislation:

In an attempt to address the problem of domestic violence, the *Prevention of Family Violence Act (133 of 1993)* and the *Domestic Violence Act (116 of 1998)* were passed.

The *Prevention of Family Violence Act* allowed for parties in a customary, civil or common law marriage, who feared any violence from their partner, to obtain an interdict in the magistrate's court.<sup>49</sup> It also focused on ill-treatment of children and made marital rape an offence. However, due to its limited nature, the DVA was enacted. This Act aimed to introduce a broad definition of domestic violence and recognise that domestic violence was/is a plague in South Africa. The DVA also attempted to broaden the scope of who could apply for protection orders. Overall, the aim was to maximise the protection of victims of domestic violence and to introduce measures which organs of the state must give effect to.

On 14 April 2023, the Domestic Violence Amendment Act (14 of 2021) came into operation. This Act is a further response to the increasing rate and severity of domestic violence in South Africa. It intends to amend the DVA by amending and inserting certain definitions and provisions of certain laws. The Amendment Act also aims to regulate protection orders.

#### 2.1.1 The Prevention of Family Violence Act 133 of 1993:

The Prevention of Family Violence Act<sup>50</sup> was passed after lobbying by social and legal activists and various women's groups.<sup>51</sup> The *Prevention of Family*

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<sup>49</sup> Novitz, T. (1996) The prevention of family violence act 1993, OpenUCT Home. University of Cape Town. P1.

<sup>50</sup> The Prevention of Family Violence Act 133 of 1993.

<sup>51</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). *Monitoring the implementation of the domestic violence act: First research report, 2000-2001*. Cape Town: Institute of Criminology, University of Cape Town. Pp 2.

*Violence Act 133 of 1993*<sup>52</sup> was the first attempt from the country's legislature to address domestic violence specifically. The Act also makes provision for the offence of marital rape and ill-treatment of children.<sup>53</sup> There were however a few limitations. For example, only individuals who are parties to a heterosexual marriage can apply for an interdict. Same-sex couples, couples who are not married, parents and children are excluded from the ambit of the Act.<sup>54</sup> There is also no definition of violence nor is there any reference to the grounds upon which the interdicts can be granted.<sup>55</sup> There was also no clarity as to whether magistrates were allowed to make an order that modified existing access orders or whether they can make an order to evict the respondent from the property that they own.<sup>56</sup> The Act is also silent on the appeal process, if any. The Act therefore could not adequately address the problem of family violence as the content was flawed and limited.

As a result, the South African Law Commission began a project in order to investigate domestic violence in its entirety. A team of experts were selected and tasked with creating a new Act, which would give effect to the concerns of various groups on all sides.<sup>57</sup> This team of experts mainly focused on the narrow ambit of the Act's application. The Act only allowed those who were married by civil, customary or common law to access an interdict, meaning that many unmarried couples as well as same-sex couples had to find alternate legal remedies. The Act also failed to give a definition of domestic violence and in doing so open up the gate for judicial officers to use wide discretion in determining what constituted domestic violence. This resulted in a variety of opinions in different jurisdictions.<sup>58</sup> It was also not clear under the Act whether emotional or psychological abused qualified as abuse. Domestic violence was therefore left for the individual magistrates and judges to determine. The new draft Act emphasised that domestic violence is linked to

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<sup>52</sup> *The Prevention of Family Violence Act 133 of 1993*

<sup>53</sup> *Ibid*, p24.

<sup>54</sup> *Ibid*, p26.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid*, p27.

<sup>57</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). *Monitoring the implementation of the domestic violence act: First research report, 2000-2001*. Cape Town: Institute of Criminology, University of Cape Town. Pp 2.

<sup>58</sup> *Ibid*.

a myriad of other issues, such as psychological, financial and social issues, as well as maintenance of children and/or spouses and divorce.<sup>59</sup> This draft Act went through various alterations and changes, but on 28 November 1998, the version we know today (*Domestic Violence Act 116 of 1998*) was assented to and then became operational in December 1999.<sup>60</sup>

## 2.2 *The Domestic Violence Act 116 of 1998:*

The DVA is a comprehensive piece of legislation with its main aim being to address the exorbitant levels of domestic violence in South Africa and to protect victims from domestic violence by providing accessible legal instruments which aim to prevent further domestic abuse.<sup>61</sup> The DVA acknowledges that domestic violence is a grave social ill and that it is usually the most vulnerable in society that are affected.<sup>62</sup> The aim of the DVA is to give those that are affected, the maximum protection that the law has to offer and also to introduce measures which put pressure on organs of state to give full effect to the policies and provisions the Act puts forward.<sup>63</sup>

The Act marks a noteworthy shift in South African law from legislation with a limited ambit, to giving domestic violence an extensive legal definition that aims to encompass women's experiences of abuse and violence.<sup>64</sup> The Act also sets out a list of abuses which include physical, verbal, sexual, psychological and economic abuse. Furthermore, intimidation, stalking, damage to property and harassment is also considered abuse for the purposes of the Act.<sup>65</sup> The Act also broadens the definition of a domestic relationship which in turn means that more complainants will be entitled to legal remedy under the Act.

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<sup>59</sup> Ibid, p3.

<sup>60</sup> Ibid.

<sup>61</sup> South Africa Demographic and Health Survey 2016, pp 355.

<sup>62</sup> Domestic Violence Act 116 of 1998, pp 1.

<sup>63</sup> Ibid.

<sup>64</sup> Parezee, P., Artz, L. and Mout, K.. (2001). *Monitoring the implementation of the domestic violence act: First research report, 2000-2001*. Cape Town: Institute of Criminology, University of Cape Town. Pp 3.

<sup>65</sup> Ibid.

What the Act does well is to give specific duties to the police and criminal justice personnel. Due to this, more resources have been put into policing domestic violence, which includes the training of police and the role-players in the court system.<sup>66</sup> The Act also gives a formal definition to other types of domestic violence, not just physical or sexual abuse. Whereas before the Act a police officer would not readily assist a complainant in a same-sex relationship or a complainant who was subjected to emotional, verbal or psychological abuse. The Act, however, has expressly included these types of abuses,<sup>67</sup> and gives court the power to grant protection against “any other controlling or abusive behaviour towards the complainant, where such conduct harms, or may cause imminent harm to the safety, health or wellbeing of the complainant”.<sup>68</sup> Because the Act has broadened the scope of recognised abuse, more complainants have access to relief from the court.<sup>69</sup>

An important type of abuse that requires acknowledgment is that of economic abuse. The Act rightly includes economic abuse within the array of abuses from which applicants may seek protection.<sup>70</sup> Emergency monetary relief can also be granted, which allows the complainants to access emergency funds in order for them to provide for their immediate safety and well-being.<sup>71</sup>

While recognising that the Act has theoretically brought in a lot of reform, we cannot shut our eyes to the shortfalls. These shortfalls are mainly due to the societal and political realities that South Africa faces. South Africa is a country where patriarchy and toxic masculinity are prevalent. Women still have less access to economic opportunities and therefore it is easier for them to become victims economically abusive partners. The Act doesn't necessarily take the societal positionality of women into account and assumes that we live in a just and equal country, which is far from the truth.

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<sup>66</sup> Smythe, D and Artz, L (2005). *Money Matters: Structural Problems with Implementing the DVA* in Empowering Women for Gender Equity No. 66, Gender-Based Violence Trilogy Volume 1,1: Domestic Violence. Pp 24.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid, pp 25.

<sup>69</sup> Ibid, pp 25.

<sup>70</sup> Ibid, pp 27.

<sup>71</sup> Ibid.

In other words, the Act is optimistic at best and delusional and/or ignorant at worst.

### 2.3 Implementation of the Domestic Violence Act:

The problems magistrates face with implementation of the DVA forms part of larger implementation issues. Most researchers want to know how the DVA is being implemented and tend to offer criticism and recommendations where applicable. Parenzee<sup>72</sup> said that for South Africa's DVA to be effective, everyone responsible for the implementation must be held accountable.<sup>73</sup>

It is expected that legislation like the DVA, presents a number of implementation difficulties, as it aims to regulate human interactions and relationships.<sup>74</sup> For magistrates, who are creatures of statute (legal entities that are created by statute) some of these difficulties are related to the extent to which they are empowered to "interfere" in issues, including custody/access to children and a variety of property rights which would ordinarily be dealt with by the High Court.<sup>75</sup>

The DVA marks an important shift in South African law because it has acknowledged and defined violence against women.<sup>76</sup> On paper the Act seems to provide some relief to victims of abuse in the way of protection orders, but inconsistencies are present in the application of the law by the police and criminal justice personnel. Police duties include informing victims of their rights and responsibilities, helping them find shelter and medical treatment, explaining the contents and meaning of a notice and arresting the abuser, to name a few. These duties are in place so that the police know what is expected of them, therefore limiting the amount of discretion police use in assisting victims. When police use a wide discretion, it can sometimes

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<sup>72</sup> Parenzee, P. (2018) *A Law Isn't Enough To Stop Domestic Violence* - ISS Africa. [online] ISS Africa.

<sup>73</sup> Ibid.

<sup>74</sup> Artz, L., & Smythe, D. (2005). *Bridges and Barriers: Five Year Retrospective on the Domestic Violence Act*. Acta Juridica, pp 210.

<sup>75</sup> Ibid.

<sup>76</sup> Artz, L. (2001) Policing the Domestic Violence Act: teething troubles or system failure, *Agenda*, 16:47, pp 5-6.

lead to the victims being left with little to no protection and limited options. The police officials can therefore become gatekeepers of justice.<sup>77</sup>

It does not always follow that applicants will be granted the protection that they seek.<sup>78</sup> Ideally the protection requested should be founded on the facts stated in the application and should be granted accordingly by the magistrate. There is a big difference between how victims experience abuse (as per their affidavit) and the tendency by court personnel to narrowly categorise the abuses reported by applicants. The confusing nature of the application form and the application process is most likely the cause of this.<sup>79</sup> It appears that at each level of the justice system, women's stories are subject to categorisation: with clerks of the court who reduce those stories to neat standardised terminology and magistrates sometimes resorting to a similarly standardised checklist when ordering protection.<sup>80</sup> Magistrates are, in some instances, also using their knowledge, or lack thereof, about DV to grant particular conditions to applicants for more comprehensive protection, even though applicants have not specifically applied for such protection.<sup>81</sup>

Magistrates have said that application forms do not always contain the level of detail necessary to found an application for relief under the Act.<sup>82</sup> There are a high number of applications being made meaning that there is little time to consult with applicants.<sup>83</sup> Therefore, in this context we can see magistrates who are both competent and concerned becoming desensitised, resorting to scripting and falling back on stereotypes.<sup>84</sup>

Since 2000, The Consortium on Violence Against Women has been monitoring the implementation of the DVA, to understand its constraints and limitations with regards to implementation. A comprehensive study was done which examined the implementation of the DVA from the perspective of

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<sup>77</sup> Ibid, pp 7.

<sup>78</sup> Artz, L., & Smythe, D. (2005). Bridges and Barriers: Five Year Retrospective on the Domestic Violence Act. Acta Juridica. Pp 207.

<sup>79</sup> Ibid, pp 208.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid, pp 209.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

criminal justice personnel. The study involved 60 interviews with the personnel, analysis of court records and monitoring family and domestic violence trials. Most interim protection orders were granted, but magistrates varied in their granting of particular conditions of a protection order. Most magistrates were also slow to grant “additional conditions” such as the seizure of weapons, but this could be because these sections were incomplete or blank in the applications. After hours applications were also almost never issued. Overall, it was found that magistrates differ in their interpretation and application of the DVA. What stood out was their varying approaches to seemingly basic procedural aspects of implementation. The findings of this study encourage further analysis of the issue.

In an effort to further and continuously understand the how the DVA translates into criminal justice practice, a consortium<sup>85</sup> of organisations worked together to monitor the implementation of the Act. As part of their research, they looked at implementation on an operational level. They asked what was happening in the daily practice of implementing the law and drew on the experiences of criminal justice personnel and individuals who had the job of attempting to utilise the law. This section of the research ultimately wanted to uncover how the relevant provisions were actually being interpreted by those whose duty it was to implement it.<sup>86</sup>

The above research found out that magistrates are using their knowledge about domestic violence in order to grant particular conditions to applicants. This results in more extensive protection, even though applicants have not specifically applied for such protection.<sup>87</sup> It was also reported that any signs of physical violence or the threat of thereof in the applicant’s affidavit unequivocally resulted in a decision to grant the protection order. This was the case regardless of whether the applicant requested the relevant

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<sup>85</sup> The consortium consisted of the Gender, Law & Development Project of the Institute of Criminology (Faculty of Law, University of Cape Town); the Gender Project of the Community Law Centre (University of the Western Cape); Rape Crisis Cape Town; a health consultant; and the Women on Farms Project. It operated from 2001 to 2004 under a grant from the Open Society Foundation.

<sup>86</sup> Artz, L., & Smythe, D. (2005). *Bridges and Barriers: Five Year Retrospective on the Domestic Violence Act*. Acta Juridica, pp 202.

<sup>87</sup> Ibid, pp 208.



protection or not.<sup>88</sup> However, the data from the study illustrates that magistrates remain conservative when it comes to granting protection orders in relation to sexual, psychological/emotional and economic abuse.<sup>89</sup>

Throughout the above study, magistrates informed researchers of numerous issues being faced. These scenarios represented both the complexity of presiding over domestic violence matters, as well some deep biases that the magistrates have about the 'intentions of women' in applying for protection orders.<sup>90</sup> This suggests that magistrates possess a scepticism about sexual, psychological/emotional and economic abuse. One of the explanations given by magistrates as to why there are inconsistencies in the way they handle different kinds of abuses, is that of "sketchy" application forms.<sup>91</sup> These application forms were said to be inadequately and insufficiently completed, therefore not containing the information needed to be granted sufficient relief under the DVA.<sup>92</sup> This could be as a result of the high number of applications being made, as it leads to little time to consult with applicants.<sup>93</sup> Magistrates also stated that it is not always possible to read the applicant's affidavit against the application form, even though this is an essential step as it constitutes the basis for the decision to grant a protection order.

Further research was done based on the research done by the Consortium on Violence against Women. The aim of the study was to monitor the implementation of the DVA.<sup>94</sup> In doing so, interviews were conducted with various criminal justice personnel, including magistrates. Most of the personnel commended the DVA and saw it as a positive development in our law but then also expressed their concerns about the feasibility of implementation. One of the main barriers to implementation is that of the lack of resources. There are expectations of the courts to fulfil the obligations set out in the DVA, however, no additional resources have not been made

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid, pp 208-209.

<sup>90</sup> Ibid, pp 209.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid..

<sup>93</sup> Ibid.

<sup>94</sup> Parezee, P., Artz, L. and Mout, K., (2001) *Monitoring the implementation of the domestic violence act: First research report, 2000-2001*. Cape Town: Institute of Criminology, University of Cape Town. Pp 78.

available.<sup>95</sup> This has resulted in a lack of resources in courts to effectively implement the legislation.<sup>96</sup> The courts do not have sufficient staff to manage the large caseloads, nor can they manage the administrative responsibilities associated with the implementation of the DVA.<sup>97</sup> Another barrier to implementation that the consortium uncovered was that of secondary traumatisation. This is the trauma that the court personnel experience when dealing with domestic violence. This traumatisation is made worse by the fact that the DVA has assigned them duties to help victims of domestic violence, but they cannot fulfil these duties as there is a lack of resources.<sup>98</sup> The participants interviewed all blamed other groups for the problems with implementation, but in reality, it seems that every sector is struggling to fulfil the tasks expected and assigned to them by the DVA. It can be said that most of the participants are dealing with emotionally demanding and complex cases, and they are not getting the sufficient support or opportunities for to debrief and voice their frustrations. As a result, the interviews acted as a space for the participants to vent their frustrations.<sup>99</sup>

Along with the above, the attitudes of the court personnel are another barrier to the implementation of the DVA.<sup>100</sup> If the aim is to end domestic violence then we as a society have to shift our perspectives and attitudes. It does not help if the legislation is progressive legislation but it is enforced by those with unprogressive attitudes. In reality, many of those dealing with domestic violence do not understand its dynamics and have their own personal views on the problem. Many harbour deeply problematic views, which include being outright sexist as well as having views that women who are abused have done something to deserve it.<sup>101</sup> Deciding whether to grant specific conditions must be treated with individual attention and not be based on preconceptions. To avoid “personal biases”, magistrates should base their decisions off a thorough interrogation of the facts. However, magistrates’

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid, pp 81.

<sup>97</sup> Ibid, pp 82.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid, pp 83

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

opinions vary, which can result in uneven or inconsistent assistance from the courts.<sup>102</sup>

There is also an issue of culture. This is especially important in the context of South Africa. Each culture in South Africa has their own subtleties which needs to be understood when implementing the DVA.<sup>103</sup> For example, a Xhosa speaking magistrate would better understand a Xhosa speaking couple because there would be an element of relatability which would help them to effectively discuss the couple's situation.<sup>104</sup> A certain level of sensitivity is also required towards the circumstances that bring the complainants to court for protection. It is therefore important that the options to ensure access to justice are constantly re-evaluated within different communities and cultures.<sup>105</sup> This in turn requires resources to be allocated and a committee of some sorts to oversee this. Trained personnel will also be needed conduct regular evaluations of communities' satisfaction with the court system, but also to gage the views and experiences of the communities that the court attempts to assist. Which communities are recognised and how often? This is a good question, but one that needs to be discussed and decided amongst policymakers and key role players.

Due to the lack of resources, law enforcement agents do not have the adequate knowledge and understanding they require to implement the DVA effectively.<sup>106</sup> Training is not a priority and this has resulted in the court, magistrates in particular, not knowing what they are required to do.<sup>107</sup> In the study done by the Consortium on Violence against Women, a magistrate stated that magistrates are not always trained and informed about their responsibilities before enactment of the legislation. They go on to say that this infrastructure needs to be set up before enacting the legislation.<sup>108</sup> The

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<sup>102</sup> Artz, L., (2016). TOUGH CHOICES: Difficulties facing magistrates in applying Protection Orders. South African Crime Quarterly, (8).

<sup>103</sup> Ibid, pp 84.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Parenzee, P., Artz, L. and Moul, K., (2001) *Monitoring the implementation of the domestic violence act: First research report, 2000-2001*. Cape Town: Institute of Criminology, University of Cape Town. Pp 85.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

training on the DVA for court officials has varied. Some receive no training at all, while others receive 1-2 days of training. Out of the individuals who were trained, they stated that they only received about an hour of actual training and that it was impossible to fully comprehend the DVA in the allocated time for training.<sup>109</sup> Furthermore, they were not given any guidance regarding the real issues that they confront on a daily basis when dealing with the DVA. As a result, many court officials leave training feeling uncertain about their role in the implementation of the DVA.<sup>110</sup>

Another barrier to implementation identified by the consortium<sup>111</sup> is that of abuse of the DVA. All laws are open to abuse, and this is true of the DVA as well. Due to the wide definition of domestic violence, as introduced by the Act, there is now room for misuse.<sup>112</sup> This misuse can occur from the police, court officials or the applicants and respondents. An example given by an interviewee of the study stated that many people come to court to apply for a counter-protection order where parties want protection orders against each other. In other cases, people attempt to use the DVA as a way to get a protection order from abuse, but they continue being abusive.<sup>113</sup> The problem with the abuses and misuses of the DVA is the potential of them to discredit the Act as a whole and perpetuate stereotypes and prejudices regarding the survivors of domestic violence.<sup>114</sup>

Magistrates in the *Paranee, Artz and Moul*<sup>115</sup> study also concerned regarding the lack of training received on how to handle breaches of the protection order.<sup>116</sup> This led to confusion when the sentencing of breaches came around. There is a debate regarding what the appropriate sanctions for breaching a protection order should be.<sup>117</sup> During the sentencing stage, the magistrates try to balance the competing needs of the family with the need to communicate to the respondent that violence will not be tolerated. Some

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<sup>109</sup> Ibid, pp 85.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid, pp 86.

<sup>113</sup> Ibid, pp 87.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid, pp 88

<sup>116</sup> Ibid.

<sup>117</sup> Ibid, pp 90.

magistrates have created their own guidelines, but most of them hand down suspended sentences because sometimes sending the respondent to jail can create more suffering.<sup>118</sup> Some magistrates, however, believe that putting the respondent in jail can act as a deterrent to any future violence. It is clear that there is no simple solution to the issue of sentencing breaches of the protection order. The Sentencing Framework<sup>119</sup> is an initiative that has tried to create more uniformity in sentencing breaches of a protection order. Its aim is to provide the judiciary with sentencing guidelines that are proportional to the crimes committed by the offender. However, what the framework views as serious offences (breaches) needs to be revised. As well as how to balance the rights of the victim with those of the offender.<sup>120</sup>

The interpretation of the DVA, specifically certain terms and phrases, also poses a problem. The phrases “imminent harm” and “undue hardship” have been used in the legislation but remains undefined. This leaves it open for interpretation and the subjectivity of could leave some of the applicants without protection.<sup>121</sup> This is proven by the inconsistency across the courts in defining undue hardship. In the study by the consortium, one magistrate interpreted undue hardship as harm being present in the moment coupled with a history of severe abuse. Another magistrate sees it as a consideration when the applicant perceives that they are in danger.<sup>122</sup> What is defined as imminent harm is also left open to personal discretion. This includes the complainant’s safety and risk, as well as what constitutes a serious act of abuse.<sup>123</sup> Therefore, there is still a gap between the complainant’s experiences and the magistrates’ view as to whether there is a reasonable possibility of harm. It is ultimately the magistrates’ interpretation that matters.<sup>124</sup> However, if the information given in the affidavits and applications is vague, then the magistrates do not feel fully equipped to make the

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<sup>118</sup> Ibid, pp 90.

<sup>119</sup> Sentencing Framework (Discussion Paper 91, South African Law Commission)

<sup>120</sup> Parenzee, P., Artz, L. and Moulton, K., (2001) *Monitoring the implementation of the domestic violence act: First research report, 2000-2001*. Cape Town: Institute of Criminology, University of Cape Town. Pp 90

<sup>121</sup> Ibid, pp 93.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid, pp 94.

<sup>124</sup> Ibid, pp 94.

finding.<sup>125</sup> Emotional abuse is another problem that the courts have to deal with. Emotional abuse is a pattern of degrading or humiliating conduct towards an applicant.<sup>126</sup> It is the most common reason given when applicants report a breach of the protection order. Emotional abuse is a very new concept in the legal sphere and as such courts have had a difficult time interpreting what it should mean. This is mainly due to the lack of guidance from the legislature and/or no training being provided.<sup>127</sup> Magistrates are therefore forced to come up with their own guidelines, one being that the history of the relationship in question must be investigated. It is therefore important that there is sufficient detail and information set out in the applications and affidavits.<sup>128</sup>

Despite there being a clear mandate from Parliament, the Constitutional Court and the DVA, magistrates are still unwilling to apply provisions set out in the DVA. Based on the explored literature, the reasons include administrative difficulties, seemingly dishonest applicants and a fear of usurping the functions of the maintenance court. Magistrates do not necessarily have the power and resources to fix these issues themselves but they should take steps to make the best judgment in spite of them. Local data on magisterial interpretation of the DVA is, therefore, necessary in improving overall decision-making.

Therefore, even though the DVA is regarded as progressive by many, it is of no effect if those responsible for the implementation have a limited or swayed view of the DV problem. Consequently, it is difficult to evaluate the overall impact of the Act if it hasn't been implemented effectively in reality. It is therefore essential to monitor the implementation of the DVA, to ensure that appropriate systems, procedures and training are in place.<sup>129</sup> By engaging with the drafting of the DVA, the development of the regulations, the intricacies of its implementation, and also monitoring compliance, it can be seen that the in order to develop effective state responses to domestic

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<sup>125</sup> Ibid, pp 94.

<sup>126</sup> Ibid, pp 95.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Artz, L. (2001) Policing the Domestic Violence Act: teething troubles or system failure, *Agenda*, 16:47, pp 13.

violence an ongoing process is needed.<sup>130</sup> One of the reasons for ongoing research and/or reports is not only due to the multiple weaknesses throughout the implementation of the DVA but also role-players, such as magistrates, respond to those weaknesses.<sup>131</sup>

#### 2.4 The Domestic Violence Amendment Act:

In 2023, President Cyril Ramaphosa signed multiple amendment acts into law, aimed at strengthening efforts to end domestic violence in South Africa.<sup>132</sup> This includes the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, the Criminal and Related Matters Amendment Bill, and the Domestic Violence Amendment Bill.<sup>133</sup> The Domestic Violence Amendment Act<sup>134</sup> came into effect on 14 April 2023. The original DVA has a definitions chapter, whereas the Amendment Act calls it definitions and interpretations. The Amendment Act has new definitions for words such as ‘capture’, ‘coercive behaviour’, ‘caregiver’, ‘child’ and ‘Director-General’. There are also new definitions relating to electronic communication.<sup>135</sup> The words ‘undue hardship may be suffered’ were also removed and replaced with ‘complainant is suffering or may suffer harm’ because of domestic violence.<sup>136</sup> These new definitions and interpretations are likely meant to clarify certain definition issues that arose from the original Act, as well as broaden the scope of the Act and its reach.

The Amendment Act makes provision for a court manager to prepare a roster for the clerks who work with applications and also to provide afterhours contact details, including weekends and public holidays. This roster must be

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<sup>130</sup> Ibid.

<sup>131</sup> Artz, L., & Smythe, D. (2005). *Bridges and Barriers: Five Year Retrospective on the Domestic Violence Act*. Acta Juridica, pp 224.

<sup>132</sup> <https://www.derebus.org.za/enhancing-effectiveness-strengthening-protection-for-domestic-violence-victims-through-the-amendment-act/>

<sup>133</sup> [Criminalising gender-based violence is not enough - The Mail & Guardian \(mg.co.za\)](https://www.theguardian.com/australia-news/2023/apr/14/criminalising-gender-based-violence-is-not-enough)

<sup>134</sup> Domestic Violence Amendment Act 14 of 2021

<sup>135</sup> Ibid, s2.

<sup>136</sup> <https://www.derebus.org.za/enhancing-effectiveness-strengthening-protection-for-domestic-violence-victims-through-the-amendment-act/>

sent to police stations and be put on the Department of Justice's website.<sup>137</sup> It follows that an application for a protection order may be considered afterhours, if there is a reasonable belief that the applicant is currently suffering or may suffer physical harm if the matter is not dealt with immediately.<sup>138</sup> This seems like a logical step, and one in the right direction, as abuse does not only happen during office hours and by the time the complainant can report it or lodge a complaint, they might not be in the position to do. The Amendment Act further states that courts now have jurisdiction where either the applicant or respondent resides, carries on business, or studies, and also where the cause of action arose.<sup>139</sup> Another big change is that a minor child may now bring an application to the court without assistance or consent of an adult.<sup>140</sup>

The Amendment Act also provides for the domestic violence safety monitoring notice.<sup>141</sup> This is applicable when the applicant and respondent live together and there are reasonable grounds that the respondent is a threat to applicant's safety. If satisfied, the court may then issue a domestic violence safety monitoring notice.<sup>142</sup> This notice authorises a Station Commander in the area to direct a local police officer to contact the applicant regularly to find out about their well-being. This contact can be via email. The police officer will also be allowed to visit the residence on a regular basis to see and communicate privately with the applicant.<sup>143</sup> If a police officer is prevented from seeing the applicant or unable to enter the joint residence, the officer may, use reasonably required force.<sup>144</sup> This new provision gives the police more authority and responsibility, something that they will need to be trained to fulfilled. However, if carried out consistently and efficiently, this provision has the potential to make a positive change in the domestic violence landscape.

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<sup>137</sup> Ibid.

<sup>138</sup> Domestic Violence Amendment Act 14 of 2021, s7.

<sup>139</sup> Ibid, s18.

<sup>140</sup> Ibid, s7.

<sup>141</sup> Ibid, s4A.

<sup>142</sup> Ibid, s8(6).

<sup>143</sup> Ibid, s8(7) – (8).

<sup>144</sup> Ibid, s8(7)(c).



Under the Amendment Act, the Director-General must also develop and maintain the integrated electronic repository for domestic violence protection orders.<sup>145</sup> They have to appoint a qualified and experienced administrator of the integrated electronic repository. This administrator must capture all applications, affidavits and any additional information in the integrated electronic repository<sup>146</sup>. One would think that the courts have already been doing this since the original Act but that has clearly not been the case. Applicants are constantly looking for their final orders, which may have been misplaced, and then have great difficulty at court in tracking their file.<sup>147</sup> An integrated electronic repository has the potential to aid the court in securing all documents electronically thus making it easier to retrieve orders.

Overall, the changes to the DVA should help to improve protection and support victims of domestic violence in South Africa, including children. Legally the framework for addressing the pandemic of domestic violence has been strengthened by this Amendment Act.

## 2.5 Responses to Domestic Violence in Present Day South Africa:

Domestic violence has been described as a pandemic that affects many women regardless of their circumstances.<sup>148</sup> In order to emphasize the serious nature and effect that domestic violence has on society in South Africa, the Constitutional Court said that: “All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished”.<sup>149</sup> Research shows that domestic violence is still prevalent despite the current strategies and policies aimed at addressing

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<sup>145</sup> Ibid, s12.

<sup>146</sup> Ibid, s12(2)(a) and (b).

<sup>147</sup> <https://www.derebus.org.za/enhancing-effectiveness-strengthening-protection-for-domestic-violence-victims-through-the-amendment-act/>

<sup>148</sup> Mazibuko, N. C., & Umejisi, I. (2015). “Domestic violence as a 'class thing': Perspectives from a South African township”. *Gender and Behaviour*, 13(1).

<sup>149</sup> *S v Baloyi* 86 2000 (1) BCLR 86 (CC), para 11

it.<sup>150</sup> In addition, South Africa has one of the highest rates of domestic violence in the world.<sup>151</sup> According to the report by South Africa Demographic and Health Survey<sup>152</sup>, over 25% of women in South Africa have reported experiencing domestic violence.<sup>153</sup> The actual rate may be higher than the recorded figures, as many cases are not reported. Due to these statistics, the country has made the prevention of and reductions in levels of domestic violence one of their priorities on the national transformation agenda.<sup>154</sup>

### 2.5.1 National Strategic Plan:

President Cyril Ramaphosa has been very clear in his stance on domestic violence in the media, at the State of the Nation Address and importantly at the first Presidential Summit on Gender-Based Violence and Femicide in 2018. Here he stated that South Africa has one of the highest levels of domestic violence and that it is a “blight on our national conscience, and a betrayal of our constitutional order”<sup>155</sup>. He went on to say that he is aware that South Africa is one of the most dangerous places in the world to be a woman and that we have amongst the highest rates of domestic violence. The President ended this preamble by acknowledging that South Africa is facing a severe crisis and that it must “be brought to a decisive end”.<sup>156</sup> At the end of the Summit the parties in attendance signed a Declaration stating that “government, business, labour and civil society would collaborate to conceptualise, drive and implement concrete measures to eradicate gender-based violence”.<sup>157</sup> The parties to the Declaration at the Summit in 2018, as a way to honour their commitment to combating domestic violence, called the

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<sup>150</sup> Jewkes, R., & Morrell, R. (2018). “Hegemonic masculinity, violence, and gender equality: Using latent class analysis to investigate the origins and correlates of differences between men”. *Men and Masculinities*, 21(4).

<sup>151</sup> Jewkes, R., Fulu, E. et al. (2013) “Prevalence of and factors associated with non-partner rape perpetration: Findings from the UN Multi-country Cross-sectional Study on Men and Violence in Asia and the Pacific”. *The lancet global health*, 1(4).

<sup>152</sup> South Africa Demographic and Health Survey 2016.

<sup>153</sup> Ibid, pp 355.

<sup>154</sup> Ibid.

<sup>155</sup> National Strategic Plan on Gender-Based Violence and Femicide: Human Dignity and Healing, Safety, Freedom & Equality in Our Lifetime, 2020. P2.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid, p3.

implementation of a National Strategic Plan on Gender-Based Violence.<sup>158</sup> The Interim Gender-based Violence and Femicide Steering Committee (IGBFV-SC) facilitated the development of the National Strategic Plan (NSP).<sup>159</sup> The purpose of this NSP was to provide a “multi-sectoral, coherent strategic policy and programming framework to ensure a coordinated national response to the crisis of gender-based violence”.<sup>160</sup> Government departments supported this plan and raised R1,6 billion through budget reprioritisation. This was anchored by 5 important interventions that were to be implemented over the next six months<sup>161</sup>. These were namely:

1. Urgently responding to survivors of domestic violence
2. Broadening the access to justice for survivors.
3. Altering behaviour and social norms by raising awareness as well as prevention campaigns.
4. Promoting accountability
5. Creating more economic opportunities for women<sup>162</sup>

The President emphasised that government would integrate the NSP into government planning processes, ensure that the necessary resources are made available, and see that the NSP results in concrete and tangible results.<sup>163</sup>

In the 2022 Summit, under the theme: “Accountability. Acceleration and Amplification, NOW!”<sup>164</sup>, the President gave a grim recollection of the state of domestic violence in South Africa. It seemed that despite all the programmes and frameworks that had been introduced, domestic violence was on the rise. The President stated that “ending violence against women and children cannot be anything but our foremost priority” as a society and “there can be no greater urgency”.<sup>165</sup> He goes on to say that as a society we must be

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid, p16.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid, p3-4.

<sup>162</sup> Ibid, p4.

<sup>163</sup> Ibid, p4.

<sup>164</sup> <https://www.thepresidency.gov.za/press-statements/president-ramaphosa-address-second-presidential-summit-gender-based-violence-and-femicide>

<sup>165</sup> <https://www.gov.za/speeches/president-cyril-ramaphosa-second-presidential-summit-gender-based-violence-and-femicide-1>

focused on action and results and as a government they need to be critical about those areas of the NSP where there has been little or no progress.<sup>166</sup> The President remarks that we have to ensure that the resources allocated to the eradication of domestic violence are being directed to “where there is the greatest need and where they have the greatest impact.”<sup>167</sup> He acknowledges though that due to the large demand the allocated funds are currently inadequate.<sup>168</sup> The sentiment is shared by Dr Olive Shisana, Co-Chair of the Presidential Summit Planning Committee, who stated that “As a country, we must double our efforts to prevent and respond to GBVF and hold each other accountable to implement the NSP...and accelerate and amplify implementation”<sup>169</sup>.

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<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> <https://www.gov.za/speeches/president-ramaphosa-host-second-presidential-summit-gender-based-violence-and-femicide-20>

## CHAPTER 3

### METHODOLOGY:

The purpose of this study is to examine magistrates' assessment of their experiences in implementing the DVA. The study uses a qualitative design as it aims to put together a detailed account of human behaviour and beliefs within the specific context.<sup>170</sup> Qualitative research is well suited to describing the 'quality' and 'nature' of how people understand and experience the world.<sup>171</sup> Interviews were selected because they are more effective in prompting narrative data which allows researchers to examine the participants' views in greater depth,<sup>172</sup> and because they enable interviewees to "speak in their own voice and express their own thoughts and feelings".<sup>173</sup> One-on-one interviews also allow the magistrates to be honest and fully engage with the questions without the fear of judgment and/or embarrassment. Magistrates also have a reputation to uphold and might not want their colleagues to hear their views. Information for this research was gathered by conducting interviews with magistrates in different jurisdictions of the Western Cape.

#### 3.1 Sample size:

The project interviewed 6 magistrates who work in courts in the Western Cape. In order to gain access to these magistrates, my supervisor (Dr Kelley Moulton) and myself worked in partnership with DGRU<sup>174</sup> (Democratic Governance & Rights Unit), which is based in the Faculty of Law at the University of Cape Town (UCT). The DGRU, helped to gain access to magistrates who were open to participating in the study. I have also reached

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<sup>170</sup> Alshenqeet, H. (2014). "Interviewing as a Data Collection Method: A Critical Review", in *English Linguistics Research* Vol. 3, No. 1. United Kingdom. Pp 39.

<sup>171</sup> Ibid.

<sup>172</sup> Kvale, S. (1996). *InterViews: An introduction to qualitative research interviewing*. Thousand Oaks, CA: Sage.

<sup>173</sup> Berg, B. L. (2007). *Qualitative research methods for the social sciences*. London: Pearson. pp 29.

<sup>174</sup> The DGRU is an applied research and advocacy unit that focuses on supporting judicial governance and providing free access to legal resources in Africa. Their work aspires to strengthen judicial institutions, the rule of law and promote human rights.

out to my network as a legal practitioner, which added some participants. This method has proved quicker than the DGRU process.

Once I received the contact details of potential participants, I made contact with each magistrate. This contact was via email in order to ensure a record of communication. I briefly explained the aim of the research and scheduled a time which suited both of the parties. I then offered magistrates either a face-to-face or ZOOM interview. A consent form was then sent to the magistrate, to be completed and sent back prior to the interview. A consent form was also made available at the start of each face-to-face interview.

### 3.2 Data collection:

The method of interview was discussed with the magistrates beforehand. The face-to-face interviews were recorded on my cellphone using the voice recorder, with the consent of the magistrates. When alternative methods were used (ZOOM or a Whatsapp call), the ZOOM meeting was recorded via the application and the Whatsapp call was recorded using another device. These include interviews conducted via Zoom, Whatsapp video call, face to face or via whatsapp or phone call. The method of interviewing was affected by both the participant and myself. It depended on the access to electronic devices, Wi-Fi and also availability of both the participants and myself to meet up face-to-face. This differed depending on which Court the magistrate works out, where they live and how close this all is in relation myself. I also had to take my employment commitments into account when scheduling interviews with participants.

Five out of six of the interviews were conducted face-to-face. Three were conducted in the magistrates' office at their court, one was at their house, and one was conducted "on the go". For the three magistrates who I interviewed in their offices, they all consented to being recorded and as such I recorded our interviews on my cellphone. For the magistrate who I interviewed at his house, he also consented to being recorded, which I again did with my cellphone. The "on the go" interview was challenging. One of the magistrates said she would have no problem being interviewed but asked me

to join her on her daily walk to do so. I agreed and asked her questions while we walked and was not allowed to record her answers. Once we had completed the walk and she had left, I recorded myself on my cellphone, reciting everything that I could remember from the interview. Overall, the face-to-face interviews were a lot more engaging and information was more easily conveyed and understood.

Only one out of the six interviews took place electronically. One of the magistrates requested that I Whatsapp call him and the interview was conducted over the phone. However, the signal on both ends was not stable and there was a lot of “can you repeat that?” and “can you hear me?”. In the end I ended up calling the magistrate from my cellphone and not on Whatsapp. The entire interview was recorded on my other cellphone.

No matter which method was chosen, the questions were not sent to the participant beforehand. This was to prevent magistrates from having too much time to think about their answers and possibly not giving a completely honest account of their experiences.

### 3.3 Interview strategy:

To say interviews' only aim is to extracting information, is false. Interviews are social encounters where social relations are formed, and we need to think carefully about how we establish relations with the participants and then encourage them to reflect upon themselves in relation to the present research topic. Participants also need to be reminded that they play a large part in the research process and they also need to be encouraged to open up and elaborate on their views, concerns, interests, relationships identifications etc.<sup>175</sup> However, research interviews can also be seen as hierarchical and instrumental, where the interviewer sets the stage and scripts in accord with their research interests.<sup>176</sup> The interviews are therefore spaces where the interviewer seeks an understanding on the relevant research question and

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<sup>175</sup> Pattman, R., & Carolissen, R. (Eds.). (2018). *Transforming Transformation in Research and Teaching at South African Universities* (1st ed.). African Sun Media.

<sup>176</sup> Kvale, S. (2006). Dominance Through Interviews and Dialogues. *Qualitative Inquiry*, 12(3), pp 485.

the participant serves as a means for the interviewer's knowledge interest.<sup>177</sup> Therefore, the qualitative research interview was a one-way dialogue,<sup>178</sup> where the interviewer was generally the only one who interprets what the interviewee really meant and frames what an interviewee says in order to fit their, the interviewer's, own research interests.

Both have their merits. On the one hand interviews should be conducted in a manner which makes the participant feel involved in the research process and it should be a space where they feel free and safe to open up about their experiences. On the other hand, there is merit in describing interviews as something where the interviewer sets the stage and script in order to meet their research interests. Qualitative research interviewing is therefore valuable for producing knowledge of what happens in reality but we need to be aware of the theoretical, methodological, and ethical concerns relating to the unequal distribution of power.

There are three types of interview styles: unstructured, structures and semi-structured. Each of these have their own advantages and disadvantages. I used a semi-structured interview style in order to have an in-depth conversation about feelings and experiences, but there was also an interview schedule with a list of questions. This helped to ensure that all the participants got asked the same questions and ensured that there was a standard while interviewing. Due to the limited time allocated to this research, there needed to be a level of efficiency. By asking focused questions, it ensured the best use of the time.

The interviews generally lasted between 30 minutes - 1 hour. I did not try to cap the interviews so as not to prevent the magistrates from sharing any valuable information and experiences. However, I did try to keep the magistrates from straying too far from what was being asked. The aim of the questions was to uncover the magistrate's experiences with implementing the DVA which includes the challenges they are facing as well as any interventions to improve conditions. These experiences will ideally provide insight into the implementation of the DVA.

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<sup>177</sup> Ibid, pp 483.

<sup>178</sup> Ibid, pp 484.



The questions are as follows:

1. How long have you been working as a magistrate?
2. How long have you been working at your current court?
3. How well do magistrates and court clerks work together?
4. What training did you receive on the Domestic Violence Act of 1998?
5. How many applications for protection orders do you receive daily (estimate)?
6. Do the applications you receive have sufficient information to grant an interim order?
7. Which circumstances would make you refuse to grant an interim order?
8. In your opinion, what, if anything, could be done to improve the application process?
9. Which applications do you view as being urgent?
  - a. If the application is urgent, please explain, in detail, what your next steps are? And how is this different to a normal application?
10. How does your court deal with the return date? What are the most critical issues around return dates?
11. What are the main reasons why you would not finalise an interim order?
12. Do you hear cases about breaches of final orders?
  - a. If you do, what are your steps and what are the main issues?
13. What are the most difficult cases you see in the domestic violence court?
14. What do you think are the main problems with the system as it works at the moment?
15. What interventions would improve the domestic violence court, or your work as a magistrate?
16. Has your court developed any procedures to make the process easier?

### 3.4 Data analysis:

Discourse analysis was used to analyse the data. This analysis was used because it is a method of analysing qualitative data and is done by closely examining the data to identify themes/patterns. Discourse analysis looks at language in a different way and asks different questions about it. It is the organisation of language by considering the purpose of language in social and cultural contexts. Discourse analysis therefore studies the relationship between language and the context in which it is used.<sup>179</sup>

The first step in the discourse analysis was to transcribe each interview. Once transcribed the data from the interviews was analysed using the following procedure. Firstly, themes and commonalities were identified in the data. This could also be called the coding process. Here colours were assigned to each theme. This assisted in identifying differences and similarities in experiences and located them within wider discourses.<sup>180</sup> Themes were given names, described and were then included in the study's findings under their relevant heading.<sup>181</sup>

The key themes throughout the interviews were the following: training, barriers to implementation, suggestions and innovative processes in reality.

Once the coding process was complete and themes had been identified, they were compared with the data from other studies, as mentioned in the literature review. This data (the experiences of magistrates) was also placed alongside the relevant legislation in order to ascertain whether the two align.

### 3.5 Limitations:

As previously mentioned, the interviews were not all conducted face-to-face, with one interview being conducted over the phone. A major limitation of this

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<sup>179</sup> Kamalu, I. & Osisanwo, A. (2015). "Discourse Analysis" in *Issues in the study of language and literature*. Ibadan: Kraft Books Limited. Pp 170.

<sup>180</sup> Ibid.

<sup>181</sup> Terry, G., Hayfield, N., Clarke, V., & Braun, V. (2017). *The SAGE Handbook of Qualitative Research in Psychology*. London: SAGE Publications Ltd.

was the unstable internet connection that both the magistrate and I experienced.

Another potential issue was that of the varying methods of data collection, i.e., WhatsApp call, face-to-face interview and “on the go” interview. I am aware that an array of collection methods has occurred, but I do not think that it posed a huge problem to the study. Regardless of the collection method, the experiences of magistrates were shared and that is what is important. Certain methods were more engaging, for example the face-to-face interviews, but if magistrates answered the questions posed to them honestly, the aim of the research has been reached. The data from the interviews are still comparable as they are focused on the same questions. Therefore, themes and/or similarities were picked up regarding the answers to the questions.

This study was also limited to the magistrates that DGRU, my supervisor and I had access to. This means that I might not have had a group as diverse as I would have liked. However, this is not a big problem because, as mentioned, the data collected is still useful.

### 3.6 Ethical considerations:

This research aimed to address questions that are of value to society or a specific community. The problems being studied should also lead to interventions that will be of value to the participants and/or the community.<sup>182</sup> Qualitative research, as in this case, is not excluded from ethical considerations. These interviews carried the ethical risk of subjective distress in participants.<sup>183</sup> However, this was a low-risk study as it did not test the magistrates’ knowledge of the DVA nor did it ask about their personal history with domestic violence. It asked magistrates about the scope of their official duties.

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<sup>182</sup> Wassenaar, D. (2006) ‘Ethical Issues in Social Science Research. In *Terre Blanche*’, M., Durrheim, K. and Painter, D. (eds) *Research in Practice: Applied Methods for the Social Sciences*. Cape Town: UCT Press, pp. 69.

<sup>183</sup> *Ibid.*

An ethical risk is that of informed consent of the participant and the assurance of confidentiality.<sup>184</sup> In order to legitimately obtain consent, the magistrates were provided with an explanation of the process, benefits, and risks. They were also informed that they could withdraw from the study at any time.<sup>185</sup>

There was also the risk of magistrates having unpopular opinions and saying things that could get them into trouble with the respective authorities.<sup>186</sup> This is why confidentiality and anonymity were important<sup>187</sup> and everything said in interviews was and will be kept confidential. From a purely ethical standpoint, confidentiality will only be breached if the magistrate consents, the information is already available to the public, and/or the public interest outweighs the interest of maintaining confidence.<sup>188</sup> In order to ensure anonymity, the magistrates will be referred to as follows: “M1”, “M2”, “M3”, “M4”, “M5” and “M6”.

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<sup>184</sup> Ibid.

<sup>185</sup> Jones, J.A. (2012) ‘Ethical Considerations in Criminal Justice Research: Informed Consent and Confidentiality’, *Student Pulse*, 4(08). Pp 2.

<sup>186</sup> Ibid, pp 3.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

## **CHAPTER 4**

### **FINDINGS:**

This dissertation explores magistrates' assessment of their experiences of working with the DVA. Complainants come to the court expecting to be helped effectively and to be provided with an interim protection order to ensure their safety. However, this is not always the case, as the findings in this chapter will explain. The magistrates in this study cite many issues and barriers to the effective implementation of the Act, many of which have been brought up in previous studies conducted by Parenzee, Art and Moul<sup>189</sup> and also MOSAIC<sup>190</sup>. These include, the high number of new applications and the vagueness of the applications received, as well as the issues with granting interim protection orders and the process followed when an application is classified as urgent. Other main issues previously cited, include the problem of return dates, the lack of personnel training and the abuse of the Act and judicial system. It is of importance that the findings of this study be compared to the findings in the aforementioned studies in order to ascertain whether there has been an improvement in the implementation of the Act and if so, what are the barriers still present in the courts.

#### 4.1 Protection Orders:

##### a) Number of New Applications:

The number of new applications received by a court is important as it often dictates how much time a magistrate can spend on each application. The more applications received, the faster the magistrates will have to work in order to get through all the applications and keep the turnaround time to a minimum. Previous research has shown that the high number of applications

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<sup>189</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town.

<sup>190</sup> Rehse, K., Thobane, M., et al. (2021) *Protection orders must protect: exploring the implementation of the Domestic Violence Act (116 of 1998) at local Magistrates' Courts and police stations in Cape Town and the Cape Winelands*. MOSAIC Training, Service and Healing Centre for Women, Cape Town.

has a great impact.<sup>191</sup> A magistrate stated that when there is a large number of applications every day that it begins to feel as if the court is an assembly line. The study concluded that more magistrates dealing with domestic violence are needed.<sup>192</sup>

When asked how many protection order applications they received on a daily basis, the magistrates had varying answers. “M1” and “M2” both said their court receives between 40 and 50 new applications daily. Whereas “M3”, “M4” and “M5” had similar answers, being between 10 and 20 (“M3”) and between 15 and 30 (“M4” and “M5”). The difference between the number of applications is mainly due to the bigger courts servicing a larger community. This should be acknowledged, and resources should be allocated accordingly.

Most of the magistrates interviewed said that the number of new applications they receive on a daily basis is too much for them to handle effectively.

*“...too much for one person to do. So, the new applications are done by anybody and anybody that is free. We sit, and the clerks would bring them and put them in the tea room.” – (“M6”)*

The new applications are therefore split amongst the magistrates that are available, instead of having one/a few magistrates that only deal with domestic violence matters.

It seems that only M6’s court works in the way described above. The other magistrates sit in their offices and wait for the clerks to bring them the applications. This seems to be the common manner of dealing with new applications. The difference is important because it is a sign that some courts are overwhelmed and cannot handle the volume of domestic violence cases. This raises the question of why more magistrates are not allocated to domestic violence cases.

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<sup>191</sup> Artz, L. (2003) Magistrates and the Domestic Violence Act: Issues of Interpretation. Institute of Criminology. University of Cape Town: South Africa. Pp 17-18.

<sup>192</sup> Ibid.

b) Information Included on the Application Form:

It is important that there is sufficient information on the application form as it is what guides the magistrate to make an interim order. However, sometimes the information is vague and needs to be supplemented by asking the applicant to complete an affidavit. All of the magistrates interviewed mentioned that it is the job of the court clerks to help the applicant fill the application in.

*“There is an assistant at the clerks<sup>193</sup>, that sits next to the clerk's office, which oversees that applications are properly completed” – (“M1”)*

*“...they allow for the applicants to come to them and, and explain” – (“M2”)*

The fact that the forms are not being understood by many applicants suggests that the application forms are confusing and/or are not asking direct/unambiguous questions.

One magistrate stated that in order to obtain sufficient information on the applications, they (the magistrate) had implemented an application process at their specific court in which the magistrate will call the applicant in to their office to give more information or clarify any issues.

*“If I read the application and it appears prima facie that there is something that the applicant is not saying, I make a point of calling the person in...So when I do experience that particular issue, I request that they ask that person to come and see me in chambers and the clerk will be bring that person to me and I will ask the questions, where I think there are gaps, but I can only do that when I sense that there is substance in the application” – (“M4”)*

However, “M6” does not agree with the above. They “don't believe that should happen...because presiding officers have to be independent”. This magistrate went on to explain that “*if I was the respondent and I heard that you were the applicant and the magistrate had spoken to you when you*

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<sup>193</sup> The magistrate here is speaking about the services offered by MOSAIC.

*came to court a month ago and checked up things or asked you one or two questions and then made a decision, I would ask the magistrate to recuse himself or herself because to me there's more than semblance of possible bias".* The magistrate believes that it is the clerk's job to get information from the applicant. They further explained that *"if I get a feeling that not everything is being told or not all the truth is being told, and then I send it back and I say, I want more information and so on".*

The difference in thought and working between "M4" and "M6" is an example of the inconsistency among the courts. "M4" does not have an issue with communicating directly with the applicant whereas "M6" does not believe in communicating directly with the applicant, in order to remain independent. This is a clear example of how magistrates make their own rules at their courts and therefore create inconsistency between jurisdictions. This is not necessarily a good thing as all courts need to carry out justice in a consistent manner. One could raise ethical concerns where magistrates are using their discretion in the manner in which they interact with applicants.

The magistrates that work or have worked with domestic violence matters at Wynberg court all make mention of MOSAIC. This is an organisation that *"works to prevent and reduce abuse and domestic violence by providing holistic, integrated services for the healing and empowerment of women through support services, access to justice and training"*<sup>194</sup>. MOSAIC has an office in the Wynberg Magistrate's Court, situated next to the clerks of the court in the domestic violence division. From what the magistrates have said it seems that MOSAIC's role is to help the applicants complete the application form sufficiently, in order to be granted an interim order.

*"If they don't understand something then there's also an office next to the domestic violence clerk's office...they are from Mosaic. They assist the applicant. So (the applicant) can go (there) instead of sitting on the bench outside and completing the form." – ("M2")*

*"In Wynberg they have MOSAIC who helps and that's a big help having an NGO or some organization, somebody there who does not*

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<sup>194</sup> <https://mosaic.org.za/about-us/>



*represent anybody in the system, assisting people in doing that...the affidavits have been a lot better". – ("M6")*

The utilisation of an organisation like MOSAIC suggests that the courts are struggling to service the applicants effectively and have therefore needed the services of an independent service provider. The question becomes why the clerks of the court cannot adequately assist the applicants.

c) Granting of Interim Protection Orders:

When it comes to when to grant interim protection orders magistrates had different opinions. "M1" said that if there was sufficient information on the application which pointed to even a "*slight threat*" then they would have to grant an interim order. The rest of the magistrates recognised that they have to "*err on the side of caution*" because they are creatures of statute, which means they have to follow what has been set out in the relevant legislation. But these magistrates also shared the opinion that many of the people who are applying for the orders are not in any "*real danger*" and they are "*unscrupulous*". "M6" and "M4" both expressed that they are careful in granting interim orders because of the effects thereof as the respondent "*can immediately be arrested*" ("M6"). Therefore, magistrates should "*be very careful with each application that (they) received*" ("M4").

The difference in opinions and the magistrates' use of discretion is important because it means that there is inconsistency in the granting of interim protection orders. This creates a problem for 2 reasons. Firstly, it results in an inconsistency throughout jurisdictions which could lead to applicants applying at different courts until they obtain their required result. Secondly, it amounts to the magistrates creating their own guidelines, which have not been given by legislation. This runs outside of the scope of magistrates' duties and powers.

These responses are very similar to those received from magistrates in MOSAIC's study<sup>195</sup>, where magistrates stated that the act of physical violence is an important determinant as to whether to grant an interim protection order.<sup>196</sup>

d) Urgent Applications:

It was clear that there was a general consensus among the parties about what constitutes an urgent application. Most magistrates said that they would only view "*life and death situations*" ("M1") as urgent. One magistrate made an example of "*a life threat...a threat to burn the house down...a threat that will kill you*" and went on to say that most times "*drugs are involved*" ("M4"). The same magistrate then went on to specify that "*some form of physical abuse*" must be involved for it to be considered an urgent application, or "*where a child has been exposed to that physical abuse*".

However, as with MOSAIC's study<sup>197</sup>, some magistrates' perceptions of "urgent" and "violence" differ, especially based on their jurisdiction. Some magistrates only viewed the application as urgent if the violence is extreme and imminent.<sup>198</sup> Whereas another magistrate viewed threats of violence as urgent, depending on the degree thereof.<sup>199</sup>

4.2 Return Dates and Breaches:

Once an interim protection order is granted, the magistrate will allocate a return date when the respondent and applicant will have to come to court and the respondent will have to prove why the interim protection order should not be made into a final order of court. Notice of this date must be served on the

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<sup>195</sup> Rehse, K., Thobane, M., et al. (2021) *Protection orders must protect: exploring the implementation of the Domestic Violence Act (116 of 1998) at local Magistrates' Courts and police stations in Cape Town and the Cape Winelands*. MOSAIC Training, Service and Healing Centre for Women, Cape Town.

<sup>196</sup> Ibid, p56.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid, p57.

<sup>199</sup> Ibid.

respondent by the sheriff. In practice the return date has been a problem for many courts because the respondent's either don't appear in court despite sufficient service or the magistrate is not satisfied that there has been sufficient service on the respondent. This has been pointed out in the Parenzee, Artz and Moul<sup>200</sup> study as well as in the present study.

In the present study "M1" said that the critical issue is that the "*respondent has no respect for the order*". This means that the respondent will not abide by the order given by the court and will continue to carry out the abuse or behaviour that the applicant wants to put an end to. While "M4" saw the biggest issue being the long wait for a return date, saying that in their court the soonest date is the "end of February". This magistrate went on to say that applicants also "*do not think that they need to come back*" on the return date because "*they already have an interim order and see that as final*".

Another issue with the return date is the difficulty in proving that there has been sufficient service on the respondent. Sufficient service means that the respondent has been informed of the proceedings against them and have been made aware that they need to attend a specific court on the allocated date. Magistrate "M6" cited two potential reasons for this, namely "*the police haven't done their job, or two, a lack of infrastructure*". The magistrate also went on to explain that a lot of the time a return of service is not presented in court and/or the court is not satisfied that the respondent has been sufficient made aware of the application and return date. As a result, the magistrate will order that the respondent be sufficiently served and that a return of service be provided in court on an allocated date. The interim order will therefore not be made into a final order of the court at the first court hearing.

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<sup>200</sup> Parenzee, P., Artz, L. and Moul, K. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town.

### 4.3 Abuse of the System:

In Parenzee, Artz and Moul<sup>201</sup> it was said that the broad definition of domestic violence has opened the door to abuse and misuse by all parties involved<sup>202</sup>. In the present study, magistrates also feel that complainants abuse the Act as well as the judicial system. Magistrate “M1” mentions how people tend to go “*forum shopping*” and “*run around from one jurisdiction to the next*” if they do not get the order they feel they are entitled to. The same people often also tell different stories at each court they go to and then the magistrates “*need to establish who's telling the truth and who's telling lies*” (“M1”). Knowing who is telling the truth is generally a difficult task and one that can be assisted by obtaining all the relevant information from the complainant by way of application form. This has clearly been a problem as the application forms have proved to be ambiguous. The other half of it is the respondent’s side of the story. This can only be ascertained if the respondent appears on the hearing date. However, even if both parties fully tell their side of the story, the magistrate has to use some discretion, and analysis of the evidence, to make a decision.

Majority of the magistrates in the present study have experienced applicant who attempt to abuse either the Act or the court system. “M5” believes that most complaints “*are nonsense*” and that the applicants “*will manipulate and use that protection order to get at each other...so they almost use it as a weapon to actually fight with each other*”. This wastes time and resources, which are already scarce, but there are not “*really enough sanction on people that bring those applications*” (“M5”).

Magistrate “M4” shares similar experiences to the above and explained that people “*do it just because they want to prove a point*”, adding that people often have “*ulterior motives*”. There are also many instances where respondents will bring a counter-application. This was also raised in

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<sup>201</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town.

<sup>202</sup> Ibid, p86.

Parenzee, Artz and Mout<sup>203</sup>. These are difficult cases and it is often difficult to uncover who is telling the truth. These cases often get very complicated and most times there is little to no “*real truth*” (“M4”) in the matter.

This is interesting as it is a clear display of magistrates using their discretion and opinion of the community they are serving, to come to a conclusion. This raises some concerns as magistrates are dismissing domestic violence matters based on their view of what entails domestic violence and who is entitled to it. The magistrates are not acting in accordance with the relevant legislation but are rather using their own guidelines in order to make a decision, and ultimately are making their own laws. It is a difficult situation to be in because a balancing act needs to occur between providing protection to the applicant/complainant but also being as effective and efficient as possible so as not to delay any granting of final orders, which would be delayed by those who are abusing the system.

#### 4.4 Training:

As noted in the study conducted by MOSAIC<sup>204</sup>, magistrates with permanent appointments generally receive training at the Justice College in Pretoria and also attend follow-up training provided by the South African Judicial Education Institute (SAJEI). This training is mainly focused on procedure, and not on the complexities of domestic violence<sup>205</sup>.

There was a similar level of variability among the magistrates in this study and the magistrates in MOSAIC’s study, when it came to the issue of training. “M1” and “M4” both explained that compulsory intensive training was provided on the DVA and that they attended a workshop in Pretoria for this training. “M1” went on to say that there used to be something called the Justice College, where magistrates would be trained by been given examples and trained on how to deal with said DV matters. Both magistrates emphasised that the Department of Justice made provision for magistrates to

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<sup>203</sup> Ibid, p87.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid, p55.

receive this training. “M1” also explained that they themselves provide training to other magistrates in their jurisdiction and at certain other centres. On the other hand, a magistrate at the same court as well as “M6” said that when they were under contract employment that they didn’t receive any formal training, but that they had to shadow another more experienced magistrate for a couple of weeks. However, when “M2” became a permanent magistrate they were sent on compulsory courses, one of them being *Family Law, Domestic Violence and Harassment*.

Magistrate “M5” had a quick and simple “No” response when asked whether they received training on the DVA.

The variation in training of magistrates is important because it again creates inconsistency within the judicial system. The degree of training, or lack thereof, results in magistrates who either practice in a manner that the legislation provides for and has been taught to them or, they will practice in a manner that is acceptable in the courts that they are in, as learned from the other magistrates who they shadowed. The latter includes the use of discretion and could potentially be perpetuating the systems and guidelines that the magistrates in the specific courts have created.

#### 4.5 Community-Based Issues:

It would be naïve to look at the area of domestic violence as an isolated problem. Rather, we must put it into context and critically think about how present society impacts the domestic violence matters magistrates see coming into the courts. The domestic violence court is a place where many interlinked social problems play out. The applications often make mention of these issues as contributing factors to the domestic violence faced. Most of the courts in this study are situated in areas where there are big drug and gang violence issues. As a result, these issues were raised throughout the interviews with both magistrates “M4” and “M5”, who had a lot to say on the topic of drugs, gang violence and the role of culture. When asked, the other four magistrates did not elaborate on these issues.

Magistrate “M5” stated that a protection order is going to mean nothing to a person that is “*high on tik*”, as it is “*only a piece of paper*” and “*doesn't bother them*”. This is because, as “M4” explained, “*drugs alter people's head and ability to think clearly, and also make people do things that you would not imagine*”. Both these magistrates believe that while society continues to abuse drugs a protection order will never truly be effective. This is because when a person has abused drugs, they most likely cannot appreciate the wrongfulness of their actions and therefore will continue to carry out the behaviour that the protection order aims to prevent/stop.

In addition to the drug problem, “M5” believes that South Africa has “*massive socioeconomic problems*” and that there is a “*continuing history of Apartheid*”. So, the entire system of granting protection orders is “*rather pointless because the main issues that are causing these problems are not being addressed*” (“M5”).

Another issue that was also raised in Parenzee, Artz and Moul<sup>206</sup> is that of the role of culture and society's attitude towards women. In the aforementioned study a woman is seen as having the same status as a child (in the Xhosa culture). This cultural problem is outlined in the present study by both “M4” and “M5”. It has been emphasised that in many cases it is evident that “*women are deemed to be these second-class citizens*” (“M5”) and are also “*regarded as property*” (“M4”). Both magistrates recognise that culture affects the behaviour and beliefs of people and should be respected but both have also witnessed the consequences of this. “M4” elaborated on this, telling a story of a respondent who “*would rather kill*” the woman “*than to let her go*” because he saw her as his property.

Drug abuse, involvement in gangs and cultural norms and ideologies are highly influential over an individual's behaviour. This includes the area of domestic violence and its prevention due to the fact that these factors can create an environment that can either foster or mitigate violence and the consequences thereof.

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<sup>206</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town. P84.

#### 4.6 Police:

Possibly the most complained about aspect of implementing the DVA is the police and the role they play in implementing the DVA. The police are possibly the most important role players in the practical implementation of the DVA<sup>207</sup> because even though the magistrates grant the order, the process relies on the police to carry out the order. Parenzee, Artz and Moul<sup>208</sup> explain what the DVA requires the police to do and what this means in practice. These include serving notices and protection orders on the respondents, arresting respondents who have breached a protection order, taking statements from the complainant and assisting them in filling out an affidavit/application form for a protection order.

However, in the experiences of the magistrates the police are “*generally very lazy*” (“M5”) and “*not all the police officers understand what is going on*” (“M4”). They will not easily open a docket, but instead, many police officers tell the complainants to “*first get a protection order*” before coming to the police station. This is contributing to the “*influx of applications*” at the courts and also “*flooding the courts with incorrect information*” (“M4”), because applicants believe that they first need a protection order before they can go to the police. Although, in reality the police need to deal with all matters that come before them and not “*send people to court for almost anything*” (“M4”). This is an abuse of the court system as the police “*realise that magistrates are creatures of statute*” and know that magistrates will have to help the applicant (“M5”).

Another issue the magistrates have with the police is that of service, as “*some of them don't know how to serve properly*” (“M3”). This creates a big problem when it comes to the return date because if the magistrate is not satisfied that the respondent has been notified of the proceedings, then they might postpone the matter for proper service to be affected or the matter

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<sup>207</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town. P11.

<sup>208</sup> Ibid, p11-13.



could be struck off the roll. This leaves the complainant vulnerable to the very abuse that they are seeking to stop.

Most of the magistrates further went on to say that it is not their job to train the police but noted that the police did indeed need training. Magistrate “M3”, however does try to *“train them in an informal way”*, especially when it comes to the serving of notice. This is because *“service is often defective when they come for a court date and then has to be postponed for service to be affected properly”*. This creates unnecessary delay and puts the complainant in a vulnerable position. “M3” also believes that the magistrates and police should have a good working relationship and as such she makes sure that she is *“friendly”* with the police she comes into contact with.

#### 4.7 Lack of Resources:

The lack of resources in the courts is the biggest barrier to implementation that was identified by the magistrates who took part in this study, was that of the lack of resources. South Africa generally claims to have a lack of resources. However, it is surprising that the area of domestic violence is experiencing this same problem, as it is a topic that has taken up a lot of space in the media and presidential speeches have focused on the combatting of domestic violence.

*“The legislature, the government, the minister, everybody, talks about gender-based violence and how important it is and how it must be prioritised and we must take a strong stand”* (“M6”) but they point out that some courts do not have a physical courtroom dedicated to domestic violence cases. In these jurisdictions the magistrate has to conduct the return date hearings in their office, which is generally small. This raises a number of problems. Firstly, *“it doesn't give the parties the feeling that they're in court”* (“M6”) and also *“downplays the seriousness of what is happening, particularly to the respondent, because it's just in an office”* (“M6”). In the same vein, some courts do not even have a *“table for them (complainant) to write, to fill out the application form”* (“M3”). This is something small that can be easily remedied but *“the people in power are doing nothing about it”* (“M3”).

There are further infrastructure issues, namely the availability efficiency of technology.

*“There's no Wi-Fi at the court...and people are always struggling with the printers and things because everything is outdated.”* – (“M3”)

The courts are wanting to move over to an online application process, but the lack of tech readiness is a significant barrier. In theory, an online application process could work but in reality, especially with the lack of infrastructure, it might make the application process less efficient. For example, the court's idea of having the court clerks process applications from home seems like a feasible idea in theory but in practice there are many issues that could arise, namely, *“which laptop is she going to use? Which computer is she going to use to generate an application?”* (“M3”). Therefore, even though the magistrates know that an online system is most likely going to be introduced, they doubt it will work *“because the system that is available now is not even being used properly”* (“M3”). It is therefore clear that the *“facilities and infrastructure does not support the hype coming from above”* (“M6”).

The lack of resources is also evident in the application process. *“The magnitude of the applications makes it very difficult for the department to effectively do something”* (“M4”). It is not the case that magistrates do not want to help every complainant effectively, however they *“are only as good as the resources allow”* them to be. The other issue with regards to the applications is that many times the complainant does not understand Afrikaans or English and therefore they are not able to explain their situation fully. Usually, in these cases, an interpreter would step in to assist. However, there is a shortage of interpreters and magistrates often *“struggle to secure the services of an interpreter”* (“M2”). The same was found in the study conducted by MOSAIC, wherein there was limited access to interpreters.<sup>209</sup> There could be a myriad of reasons for this shortage but magistrate “M2” believes that it is simply because the *“powers that be”* are not doing the job of

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<sup>209</sup> Rehse, K., Thobane, M., et al. (2021) *Protection orders must protect: exploring the implementation of the Domestic Violence Act (116 of 1998) at local Magistrates' Courts and police stations in Cape Town and the Cape Winelands*. MOSAIC Training, Service and Healing Centre for Women, Cape Town. P67

making sure the court is “*fully and sufficiently*” staffed. For example, in one of the jurisdictions there is only “*one permanent clerk of the domestic violence division and 2 volunteers*” (“M3”). This same court gets over 20 new applications per day. This is clearly disproportionate. The staff members that are employed at court, however, “*lack passion*” and are only “*chasing a salary*” (“M3”).

Another big problem, as mentioned under “*community-based issues*” is the issue of drug abuse. A lot of the time the complainant does not want a protection order but rather wants to get the respondent the help they need for their drug addiction.

*“You have the complainant who’s the wife or the mother and they’re standing there...begging us...saying this is not who I got married to or this is not my son. They need help with the drugs. Then they tell us this person is a completely different person without the addiction. And they basically forced them to go to the court system because they want the courts to help them.” – (“M2”)*

In an ideal system, the respondent would be referred to a rehabilitation program but due to the lack of resources this is not possible. As a result of the respondents not getting the help they need, the cycle of abuse continues, regardless of whether a protection order is issued or not.

#### 4.8 Recommendations from Magistrates:

Once the barriers to implementation have been identified the next rational question we should ask ourselves is how can we eliminate these barriers and improve the implementation of the DVA?

All of the magistrates that were interviewed had suggestions as to what they believe would work in the domestic violence courts.

a) Court Processes:

“M1” suggested that a more effective process needs to be established for the storing of the final protection orders. They tell the story about a complainant who came to the court looking for her protection order from 5 years ago and the court could not find it. “M1” suggests that the court adopt a system similar to that of the Deeds Office, where the clerk of the court would be able to search on a database for protection orders and it would be easily accessible.

Another thing that needs to be improved is that of the length of time the applicants have to wait to come back on the return date. At most courts the return date is more than 3 months. This is supposed to leave enough time for sheriff to give the respondent notice, but it can be argued that it can also leave more time for the complainant to be abused.

*“It would be ideal if you can within 14 days have that other person here so that the complainant doesn't have to suffer” – (“M4”)*

b) Awareness and Education:

One of the main suggestions that the magistrates made is that of awareness and education of the public. ‘M1” states that *“there is a dire need for awareness”* and that we need to use the people we have at our disposal (magistrates, law student and attorneys) and perhaps set up information centres in shopping centres on a monthly basis, in order to bring awareness to the issue of domestic violence. These *“information centres”* should also aim to educate the public on the issue of domestic violence and the court process to follow. The hope is that if more of the public is educated that there would be a decrease in both complainants and respondents.

*“People don't know that they can come to court and get an order. Not everybody knows about it...And is it free? And don't I need a lawyer? They think it's a very costly exercise. They don't know that it's a free service.” – (“M1”)*

“M1” also explained how he goes to certain women’s centres and “*gives talks and lectures where the public is invited...to create more awareness*” and also to answer any questions these women and the public have.

The other reason why education is seen as an important way to improve the implementation of the DVA is because if the public is educated as to “*what a protection order is and what it is not*” (“M5”) then the misuse and abuse of these orders should decrease. It is important that the public is made aware that the “*main aim isn't to get a conviction or to just finalise the case. You must send the parties to a better environment*” (“M2”). Complainant must also be made aware that the “*DVA is made to protect them and just as there's a responsibility on the accused person to not breach, the complainant also has a serious responsibility that they're holding in their hands*” (“M2”).

c) Personnel:

As mentioned previously, the magistrates take issue with how the police are handling domestic violence cases. This can be remedied with the proper training and oversight. “M6” suggested that “*training is a big thing, training to different degrees of all the role players.*” This encompasses the magistrates as well, as many stated previously that they did not receive any training or the training that they did receive was insufficient and outdated. An argument could be made that by the Department of Justice not providing sufficient and ongoing training to the domestic violence magistrates, they are themselves hindering the implementation of the DVA.

*“The government needs to actually invest in its people...And unfortunately that's not happening” – (“M5”)*

In the event that the matter goes to trial, the applicant will be represented by a prosecutor from the National Prosecuting Authority (NPA). However, these prosecutors are “*inundated*” (“M2”) and usually meet the applicant on the day and spend 30 minutes consulting with them, usually on a bench outside of the courtroom if not in the actual courtroom. It can be argued that those 30 minutes is not enough time for the applicant to fully explain what has

happened, nor is it long enough for the prosecutor to sufficiently prepare for a trial. The suggestion by “M2” is that “there should proper, more sensitive consultation rooms for victims because court is a stressful environment”.

Aside from the personnel and role players already mentioned, “M3” suggests that “government institutions or programs can work together because right now they all work individually”. This includes social workers, psychologists and other socio-economic role players. “M3” further stated that a domestic violence court should be like a “shopping centre” where the abovementioned professionals have offices right next to the courtroom to offer the complainants more support. This is because although the court is an arm of the law, domestic violence is not solely a legal problem, but a social one. Therefore, it needs to be addressed holistically.

At the end of the day, as previously mentioned, a protection order holds very limited power in reality. “It’s the parties that hold the power in order to end the cycle” (“M6”).

#### 4.9 Innovative Processes in Reality:

Taking into consideration all the barriers to implementation of the DVA, magistrates have started innovative processes and programmes in their own courts. Most of the magistrates that were interviewed explained that they are under immense pressure from the Department of Justice to deal with the issue of domestic violence, but because they haven’t been given sufficient resources to do so, they have had to use their own initiative. This includes making the application process more accessible to the public, attempting to keep the waiting period for a return date short and making use of programmes like mediation to resolve disputes.

##### a) Application Process:

“M1” explained that there is a women’s organisation called The Saartjie Baartman Centre for Women and Children that helps complainants complete

application forms and then brings those forms to court. This helps the complainant gain access to the court without necessarily having to go to court physically.

At magistrate “M4”’s court, he has implemented a policy that if the complainant is at court and their application is refused, they *“have the right to ask why”*. If the complainant does this, they will have the opportunity to speak to “M4” in his chambers and he *“will explain to the complainant, it doesn't mean that the application will be accepted, but at least I can explain...why the application is not successful, or I can advise to supplement the affidavit”*. “M4” has also made an effort to condense the application form to ask direct and unambiguous questions, in an attempt to streamline the application process.

b) Return Dates:

The issue of the return date has been discussed previously, especially the long period of time that the applicant has to wait to come back to court. Magistrate “M2”, however, stated that at her court they try to *“keep the dates short...usually less than a month”*. Sometimes the time period goes over a month because of the large volume of new applications daily, but if this happens then the *“clerks will go and inform the senior magistrate”* and they will then appoint magistrates from other divisions to help with the caseload *“just so that the parties don't have to wait so long for the day”*.

c) Programmes:

It is clear from all the abovementioned issues and barriers to implementation of the DVA that the magistrates cannot solely be expected to deal with the issue of domestic violence. It requires a holistic approach.

Magistrate “M6” agrees with this holistic approach and as such mentions an intervention process that his court has put in place. At the court there is a “free mediation process”. The magistrate will identify matters that could

possibly be mediated and ask the parties at the return date whether they are open to mediation. The parties can then either agree and then the magistrate will not proceed with the protection order. If the parties do not agree then they will follow the next steps in the court process. "M6" says that he explains to the parties that if they agree to mediation that they must go in with "an open mind" and the mindset to "give and take and to reconcile". The mediation is also not a "one stop shop". The applicant can come back to court if the agreement doesn't work but as per "M6" the mediation programme has a 90% success rate.



## **CHAPTER 5**

### **DISCUSSION:**

The main aim of this research was to uncover magistrates' assessment of their experiences with implementing the DVA. Based on the findings the implementation of the DVA is not as effective as it should be. This is evident by the many barriers to implementation as cited by the magistrates which means that while the intention of the legislation might be, it doesn't always remedy the problem in reality.<sup>210</sup> This is because despite the legislation and the President's stance on domestic violence (including the National Strategic Plan), there cannot be real change if patriarchal norms and stereotypes that exist in our society are perpetuated.

To elaborate on the above statement, the discussion will explore the attitude of the President and the promises of his government towards domestic violence and its eradication, as well as the role that patriarchal norms play in the perpetuation of domestic violence. It will then be determined whether there has been an improvement in implementation from the Parenzee, Artz and Moulton study<sup>211</sup> conducted in 2001, to the present study, and if not, then what are reasons.

#### 5.1 Attitude of the President and Government:

President Cyril Ramaphosa has made his stance on domestic violence clear through many speeches, national addresses and media interviews. He stated at the 2018 Gender-based Violence and Femicide Summit<sup>212</sup> that domestic violence is an ill that has affects all areas of society and that the government is committed to combatting domestic violence by creating a permanent structure to guide its implementation, as well as having a specific domestic

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<sup>211</sup> Parenzee, P., Artz, L. and Moulton, K.. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town.

<sup>212</sup> <https://www.gov.za/speeches/president-cyril-ramaphosa-gender-based-violence-and-femicide-summit-1-nov-2018-0000>

violence budget over the next 3 years<sup>213</sup>. As a result, the National Strategic Plan (NSP) was developed, as a multi-sectoral strategic framework to eradicate domestic violence in South Africa<sup>214</sup>. Ramaphosa went on to say that all South Africans need to be a part of the implementation of this National Strategic Plan<sup>215</sup>. Government departments supported this plan and raised R1,6 billion through budget reprioritisation. This was intended to broaden the access to justice for survivors of domestic violence, fund awareness and prevention campaigns and improve the existing architecture<sup>216</sup>. The President emphasised that the government would continue to support the NSP by ensuring that the necessary resources are made available where needed, and that the NSP results in concrete and tangible results<sup>217</sup>. At the follow-up Summit in 2022, the President gave an update on the NSP and the domestic violence issue in South Africa. In short, he said that the government had failed, as domestic violence is on the rise despite all the programmes and frameworks that had been introduced<sup>218</sup>. The President again reaffirmed the need to make ending domestic violence a priority and stated that there is “no greater urgency”. He went on to say that as a society we must focus on action and results and the government needs to be critical about those areas of the NSP where there has been little or no progress.<sup>219</sup> The President emphasised the importance of ensuring that the resources allocated to the eradication of domestic violence are being directed to “where there is the greatest need and where they have the greatest impact”<sup>220</sup>. In addition he acknowledged that the allocated funds are currently inadequate, due to the large amount of need.<sup>221</sup> Dr Olive Shisana, Co-Chair of the Presidential Summit Planning Committee, agreed with the President and stated that “As a country, we must double our efforts to prevent and

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<sup>213</sup> National Strategic Plan on Gender-Based Violence and Femicide: Human Dignity and Healing, Safety, Freedom & Equality in Our Lifetime, 2020. P3.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid, p4.

<sup>216</sup> Ibid, p3-4.

<sup>217</sup> Ibid, p4.

<sup>218</sup> <https://www.gov.za/speeches/president-cyril-ramaphosa-second-presidential-summit-gender-based-violence-and-femicide-1>

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

respond to GBVF and hold each other accountable to implement the NSP...and accelerate and amplify implementation”<sup>222</sup>. However, even though Ramaphosa’s government has often said that the eradication of domestic violence is priority, there is still a vast gap between promises and implementation<sup>223</sup>, as admitted by the president himself during the 2022 Summit, as well as made clear throughout the present study.

## 5.2 2001 to 2022: Has There Been Any Improvement in Implementation?

Effective enforcement of the DVA requires sufficient resources as well as passionate individuals who care about the problem. Most magistrates that were interviewed in this study pointed out that the expectations placed on the judicial system were unrealistic as these expectations don’t take the realities of the courts and the magnitude of the domestic violence problem into account. However, in order to determine whether implementation of the Act have improved or not, the findings in this study have to be compared to the findings of the two previous studies conducted by MOSAIC<sup>224</sup> and Parenzee, Art & Moulton<sup>225</sup>.

In the 2001 study conducted by Parenzee, Art & Moulton<sup>226</sup>, it was discovered that the police and their agents do not have the knowledge and/or understanding of the steps they need to take to implement the legislation correctly. This was echoed in the study conducted by MOSAIC<sup>227</sup> which identified the lack of adequate training and gaps in knowledge of the

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<sup>222</sup> Ibid.

<sup>223</sup> <https://www.dailymaverick.co.za/article/2022-11-06-presidential-summit-on-gender-based-violence-makes-promises-promises-and-more-promises/>

<sup>224</sup> Rehse, K., Thobane, M., et al. (2021) *Protection orders must protect: exploring the implementation of the Domestic Violence Act (116 of 1998) at local Magistrates’ Courts and police stations in Cape Town and the Cape Winelands*. MOSAIC Training, Service and Healing Centre for Women, Cape Town.

<sup>225</sup> Parenzee, P., Artz, L. and Moulton, K.. (2001). *Monitoring the implementation of the domestic violence act: First research report, 2000-2001*. Cape Town: Institute of Criminology, University of Cape Town.

<sup>226</sup> Ibid.

<sup>227</sup> Rehse, K., Thobane, M., et al. (2021) *Protection orders must protect: exploring the implementation of the Domestic Violence Act (116 of 1998) at local Magistrates’ Courts and police stations in Cape Town and the Cape Winelands*. MOSAIC Training, Service and Healing Centre for Women, Cape Town.

police<sup>228</sup>. The police also face obstacles when it comes to service of protection orders as there are also not enough police officers and/or vehicles, and the serving of protection orders are not made a priority<sup>229</sup>. The present study has a lot of similarities with the two previous studies.

It can clearly be seen that the problems with the police and/or the challenges the police are facing, have not changed nor improved. There is still the issue of the lack of training of the police, which has a ripple effect on the domestic violence courts and the safety of the complainant. The police are not the only officials who are not receiving adequate training, the magistrates are also lacking training. In 2001, magistrates explained that the amount of training varied from none at all to a short training workshop, with it being impossible to fully understand the Act in the short amount of training time<sup>230</sup>. The magistrates in the MOSAIC study shared those sentiments, emphasising the inadequate training provided on the complexities of domestic violence<sup>231</sup>. Magistrates in the present study had different training experiences. Those working on a contract basis did not receive any formal training but rather had to shadow permanent magistrates. Magistrates have received varied degrees of training, none of which was said to be sufficient. A small improvement can however be seen in the training being offered to the magistrates who deal with domestic violence matters, as some of the magistrates in this study cited having received formal training from the Department of Justice. However, there is no consistency in training throughout jurisdictions as magistrates in one jurisdiction received formal training, whereas in other jurisdictions magistrates either had to shadow one another or they received no training of any kind. This has a big impact on the implementation of the Act as it will not necessarily be implemented the same way at every court. This makes the court seem unreliable to a complainant and might deter them from lodging a complainant, affecting their access to justice. The lack of training, who get training and the content of the training all still remain concerns for magistrates. This is because many of them feel that the lack of consistent

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<sup>228</sup> Ibid, p37.

<sup>229</sup> Ibid, p92.

<sup>230</sup> Ibid, p85.

<sup>231</sup> Ibid, p55.

formal training throughout all jurisdictions have critical implications for the effective implementation of the legislation<sup>232</sup>.

The application forms have long been highlighted as problematic. A lot has been said regarding the application forms for protection orders. In the study by Parenzee, Artz and Moul<sup>233</sup> the magistrates called for the application forms to be altered to include clearer and more specific questions which would help them to make a decision<sup>234</sup>, and could help the language barrier issue due to a shortage of translators<sup>235</sup>. The MOSAIC study emphasised the importance of receiving full and detailed affidavits. There was also a focus on the granting of interim protection orders (IPOs).<sup>236</sup> The present research has shown that magistrates are still calling for the same changes to be made to the application process, in order to assist them to grant IPOs. However, at Wynberg court, there is a MOSAIC office which helps the applicants fill out the forms. This aims to ensure that the application form is filled out correctly and sufficiently. This is an asset to the court and the magistrates in Wynberg call on the courts in other jurisdictions to follow suit. The application process still has its challenges, namely the lack of translators, unclear and ambiguous questions and inconsistency in the assistance that the applicants are provided with when filling in the application form. This can also boil down to a lack of resources and infrastructure issue.

As with all laws, the DVA is open to abuse and misuse.<sup>237</sup> Magistrates in the 2001 study explained that respondents often abused the Act by way of a counter-protection order.<sup>238</sup> However, the magistrates in the present study felt that both applicants and complainants abuse the Act and in turn the protection orders. The abuse of the Act is another issue that has not been resolved.

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<sup>232</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town. P86.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid, p53.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid, p57

<sup>237</sup> Ibid, p86.

<sup>238</sup> Ibid, p87.

The lack of resources and infrastructure is a common thread throughout the three studies in question. Interviewees in the Parenzee, Artz and Moul study<sup>239</sup> emphasised that in reality the implementation of the DVA is near impossible as there are limited resources. For example, there are not enough offices for the court personnel and insufficient space allocated to applicants<sup>240</sup>. In addition, not all courts have a designated domestic violence court, leaving magistrates with no choice but to run trials in their chambers. Technology and the relevant infrastructure at the courts is also outdated. Overall, most of the barriers to implementation can be seen as a lack of resource and infrastructure issue. This stems from the failure of the government to effectively and sufficiently fund the eradication of domestic violence. The court is not the only underfunded and understaffed sector dealing with domestic violence, so is SAPS. This results in a delay in the service of protection orders and also compromises the safety of the complainants. Another discovery was the lack of technology used in the courts. Since 2001, our society has become increasingly dependent on technology and the internet. Therefore, to see that the courts do not have an online system in place or that the Wi-Fi and printers don't work is surprising. The question is if the technology exists and is fairly accessible, why are courts not utilising it, or why is there not infrastructure in place at the courts?

### 5.3 What is the Problem?

The most important and effective way to create real change in the area of domestic violence, is the shifting of society's attitudes.<sup>241</sup> The overarching problem and barrier to implementation could be said to be the patriarchal society in which we live, and the beliefs and stereotypes held on to by said society. The patriarchal nature of society does not prioritise the needs of

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<sup>239</sup> Ibid, p82.

<sup>240</sup> Rehse, K., Thobane, M., et al. (2021) *Protection orders must protect: exploring the implementation of the Domestic Violence Act (116 of 1998) at local Magistrates' Courts and police stations in Cape Town and the Cape Winelands*. MOSAIC Training, Service and Healing Centre for Women, Cape Town. P53.

<sup>241</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). *Monitoring the implementation of the domestic violence act: First research report, 2000-2001*. Cape Town: Institute of Criminology, University of Cape Town. P83.

those affected by domestic violence, which in most cases are women, as many times women are seen as inferior and second-class citizens. ‘Society’ encompasses everyone that lives in South Africa, including the police and court personnel. Those responsible for implementing the DVA do not necessarily have an understanding of the dynamics and complexities of domestic violence.<sup>242</sup> It was therefore rightly concluded in the Parenzee, Artz and Moults study<sup>243</sup> that it is pointless for us to have the most progressive and inclusive legislation if those that are meant to enforce it do not believe that it is necessary.

### 5.3.1 Patriarchy and Society:

We need to understand the patriarchal nature of South African society to understand domestic violence<sup>244</sup>. South Africa is home to a patriarchal system consisting of social structures that encourage men to dominate and oppress women. These structures are based on the belief that there is a biological difference between men and women and therefore men are entitled to more power<sup>245</sup>. We have all been born into the patriarchal system and most of us perpetuate patriarchy, even though it is mainly the men who reap the rewards<sup>246</sup>. By taking a feminist approach to domestic violence, we are arguing that domestic violence is a consequence of patriarchy and the social structures that exist<sup>247</sup>.

African culture and societal stereotypes are the breeding grounds of patriarchal structures and ideologies. In the MOSAIC study<sup>248</sup>, a magistrate

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<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> T.J. Mudau & O.S. Obadire (2017) The Role of Patriarchy in Family Settings and its Implications to Girls and Women in South Africa, *Journal of Human Ecology*, 58:1-2, 67-72.

<sup>245</sup> Sultana, A. (2010). *Patriarchy and women's subordination: a theoretical analysis*. Arts Faculty Journal, 1-18.

<sup>246</sup> Mshweshwe, L. (2020) "Understanding domestic violence: Masculinity, culture, traditions," *Heliyon*, 6(10).

<sup>247</sup> Dobash, R.E. and Dobash, R.P. (2017) "When women are murdered," *The Handbook of Homicide*, pp. 131–148.

<sup>248</sup> Rehse, K., Thobane, M., et al. (2021) *Protection orders must protect: exploring the implementation of the Domestic Violence Act (116 of 1998) at local Magistrates' Courts and police stations in Cape Town and the Cape Winelands*. MOSAIC Training, Service and Healing Centre for Women, Cape Town.

expressed that social context and culture were very important factors he considered when making a decision in domestic violence matters.<sup>249</sup> The magistrate went on to share an experience where he attempted to change the way a respondent (an African male) thought about women and their place in society. In the African culture, there is a strong belief that men are superior and women are their subordinates. Coupled with this is the belief that a woman belongs to a man, in the same way a child does.<sup>250</sup> It is views such as this that legitimises patriarchy and preserves men's superiority and dominant position and subordination of women<sup>251</sup>. There is also a certain view of what a "proper" man should be like. This includes a man's ability to dominate and have control over his female partner<sup>252</sup>. This dominance is usually associated with physical strength and power, as well as sexual dominance, all of which is linked to domestic violence<sup>253</sup>.

Due to the cultural view that women need to take care of the children and ensure the family's wellbeing, many women will internalise cultural norms and put the family above their own wellbeing<sup>254</sup>. The need to protect the results in women not seeking help from the family.

However, patriarchal values are not just found in the greater society, but also exist in the minds of magistrates and police. Some magistrates are sceptical about sexual, psychological/emotional, and economic abuse and only prioritise physical abuse.<sup>255</sup> Magistrates are holding onto deep biases about the 'intentions of women' when applying for protection orders.<sup>256</sup> The abuse and misuse of the legislation by certain complainants could be a reason for

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<sup>249</sup> Ibid, p63.

<sup>250</sup> Ibid.

<sup>251</sup> Tonsing, J. C., & Tonsing, K. N. (2019). Understanding the role of patriarchal ideology in intimate partner violence among South Asian women in Hong Kong. *International Social Work*, 62(1), 161–171.

<sup>252</sup> Dery, I. (2021). "Give her a slap or two... she might change": Negotiating masculinities through intimate partner violence among rural Ghanaian men. *Journal of interpersonal violence*, 36(19-20), 9670-9690.

<sup>253</sup> Basse, S. A., & Bubu, N. G. (2019). Gender inequality in Africa: a re-examination of cultural values. *Cogito*, 11(3), 21-36.

<sup>254</sup> Mogstad, H., Dryding, D. and Fiorotto, O., (2016) 'Policing the private: Social barriers to the effective policing of domestic violence' *South African Crime Quarterly*, (56).

<sup>255</sup> Ibid.

<sup>256</sup> Artz, L., & Smythe, D. (2005). Bridges and Barriers: Five Year Retrospective on the Domestic Violence Act. *Acta Juridica*, pp 209.



this scepticism and stereotypes of women being deceitful.<sup>257</sup> However, the problem lies when the magistrates cite this abuse of the legislation and the system as a blatant response to domestic violence. The challenge therefore is to make sure that these misuses and abuses don't discredit the Act nor the complainant in domestic violence cases.<sup>258</sup>

### 5.3.2 "A Protection Order is Just a Piece of Paper":

Resources and Infrastructure plays an essential role in the effective implementation of the Act. It has previously been mentioned in this study that the lack of infrastructure within the court and police have led to the ineffective enforcement of rights of complainants.<sup>259</sup> In the Parenzee, Artz and Moulton study<sup>260</sup> one magistrate remarked that infrastructures need to be set up before the enactment of legislation.<sup>261</sup> In the present study, most magistrates pleaded for more social services to be made available to both the complainant and respondent. These include, but are not limited to, social workers and substance abuse rehabilitation services. The issue of drug abuse came up many times throughout the interviews in this study. In the instance when the complainant does get a protection order, they are not necessarily protected from violence or abuse. A Magistrate in the present study stated that a protection order is going to mean nothing to a person that is on drugs, as it is only a piece of paper. According to a different magistrate in this study, this is because drugs alter people's ability to think clearly and rationally. Both these magistrates believe that while society continues to abuse drugs a protection order will never truly be effective. Another magistrate explains how mothers beg for their abusive children to be sent to a rehabilitation centre, but that this is a near impossible request.

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<sup>257</sup> Parenzee, P., Artz, L. and Moulton, K.. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town. P88.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid, p107.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

In addition to the drug problem, there are massive socioeconomic problems and also a continuing history of Apartheid. Furthermore, this gives rise to the domestic violence and cultural issues that we are facing. So, the entire system of granting protection orders can be seen as pointless because the main issues that are causing these problems are not being addressed.

Without the relevant infrastructure to assist both complainants and respondents, not just with the court processes, but with their socio-economic issues, the ills of society could negate the purpose of a protection order. It also forces the question of whether the government is prioritising the eradication of domestic violence.

## **CHAPTER 6**

### **CONCLUSION:**

The DVA<sup>262</sup> has been called a progressive piece of legislation due to its inclusive view of domestic violence.<sup>263</sup> This dissertation set out to explore the experiences of magistrates working with the DVA<sup>264</sup> in order to reveal whether there have been any barriers to the implementation of the Act and if so, what is causing them. This research was also compared to that of Parenzee, Artz and Moul<sup>265</sup> and MOSAIC.

The findings indicate that there has been little improvement in implementation since the two previous studies. There is still a major lack of training, infrastructure and resources throughout the court system. This despite the commitment made by the President and his government to make resources available where needed. The government's actions, therefore, need to match their rhetorical commitment and make improvements in real terms.

This dissertation, however, argues that the eradication of domestic violence requires more than tangible resources, but that it also requires a societal behaviour and mindset shift. This includes a shift in the mindsets of the magistrates as well. This research recognises the role of patriarchy, cultural norms and values, and the social context in which domestic violence occurs in South Africa. The findings of this study demonstrate that domestic violence is not just the result of a man abusing a woman, but it is also a result of the complex interplay of patriarchy, culture and the complex social context we find ourselves in. Magistrates are not immune to this patriarchal society and the decisions they make could reflect this. We therefore require a more

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<sup>262</sup> Ibid.

<sup>263</sup> Parenzee, P., Artz, L. and Moul, K. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town. P10.

<sup>264</sup> Domestic Violence Act 116 of 1998.

<sup>265</sup> Parenzee, P., Artz, L. and Moul, K. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town.

inclusive and nuanced remedy, rather than a purely legal one.<sup>266</sup> This could include incorporating sensitivity and context-specific training into the training magistrates receive, or potentially having an organisation such as MOSAIC hosting workshops at each magistrate court. However, it is going to depend on the magistrates' willingness to participate and alter their mindset.

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<sup>266</sup> Parenzee, P., Artz, L. and Moul, K.. (2001). Monitoring the implementation of the domestic violence act: First research report, 2000-2001. Cape Town: Institute of Criminology, University of Cape Town. P103.

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