Fighting Domestic Violence - South Africa

1. Legal provisions

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# Executive summary

Domestic violence is a serious and common threat that the women and children of South Africa face on a daily basis. It is often concealed and frequently goes unpunished. A deep understanding of the historical, political and social context of South Africa is important when looking at the nature and extent of violence against women. The systemic effects of colonization and Apartheid in South Africa have exacerbated the impact of domestic violence, especially as it relates to Black women and continues to contribute to their vulnerability. The society is still subjected to patriarchal norms, which are enshrined in the religious and cultural customs of the country. This coupled with the fact that violence is often used to solve conflict in South Africa makes domestic violence an everyday reality for many women and children.

Victims of domestic violence are, however, afforded legal remedies for acts of domestic violence committed against them. As a point of departure, this is underpinned by the notion that the Constitution of South Africa gives every person the right to dignity, equality, freedom and security of person, which includes the right to be free of all forms of violence from either public or private sources.[1]

What follows is a comprehensive summary of the South African legal framework governing domestic violence, as well as the international commitments and obligations of the government of South Africa. This includes an in-depth analysis of the key provisions of the Domestic Violence Act, No. 116 of 1998. More specifically, this memorandum investigates the recourse, aid and remedies offered to victims of domestic violence, including the issuance of protection orders, which are granted by courts to protect victims against perpetrators of domestic violence. However, the mere issuance of such a protection order is not enough, and the real test of the South African legal system is ensuring the enforceability of protection orders and providing for suitable remedies available to victims. Accordingly, this memorandum also considers the enforceability and accessibility of the enforcement mechanisms available, including the relevant court procedures followed by the state should a victim choose to lay criminal charges against her abuser. Various aspects of this procedure will be analyzed in this memorandum, including the role of the police and courts, the standard of proof necessary to convict an abuser of a criminal offense, possible defenses the abuser may raise and penalties that may be imposed by the court. Finally, this memorandum examines the South African legal framework surrounding various special issues, such as battered woman syndrome, domestic violence in the workplace and housing rights of domestic violence victims, to name a few.

# 1.1 What are the relevant statutes and codes?

The Constitution of the Republic of South Africa, 1996 ("**Constitution**")

The Domestic Violence Act, No. 116 of 1998 (DVA)

The Protection from Harassment Act, No. 17 of 2011 ("**PFH Act**")

The Maintenance Act, No. 99 of 1998 ("**Maintenance Act**")

The Children's Act, No. 38 of 2005 ("**Children's Act**")

The Criminal Law Amendment Act, No. 105 of 1997 ("**Criminal Law Amendment Act**")

Criminal Procedure Act, No. 51 of 1977 (CPA)

Firearms Control Act No. 60 of 2000 ("**Firearms Control Act**")[2]

Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 ("**Criminal Law (Sexual Offences and Related Matters) Amendment Act**")

# 1.2 What is the controlling case law?

*S v Ferreira and Others* 2004 (4) All SA 373 (SCA).

*Rautenbach v Minister of Safety and Security* 2017 (2) SACR 610 (WCC).

*S v Engelbrecht* 2005 (2) SACR 41 (WLD).

*S v Baloyi* 2000 (2) SA 425 (CC).

*Trainor v S* 2003 (1) All SA 455 (SCA).

# 1.3 What are the specific parts of the court system that address domestic violence?

The entire South African judicial system has a role to play in addressing domestic violence in South Africa. The magistrates' court (South Africa's lowest court) is the first court a victim of domestic violence will come into contact with when applying for a protection order under the DVA. Where children are involved in an instance of domestic violence, a family court (a specialized magistrates' court) may be the appropriate court to approach to protect the interests of the child. The superior courts (high court, Supreme Court of Appeal and the Constitutional Court of South Africa), also have a role to play in addressing domestic violence to the extent that complainants bring matters relating to domestic violence before them.

# 1.4 What are potential causes of action?

Domestic violence is any of the following conduct, where such conduct harms, or may cause imminent harm to, the safety, health or well-being of the victim:[3]

physical abuse

sexual abuse

emotional, verbal and psychological abuse

economic abuse

intimidation

harassment

kidnapping

stalking

damage to property

entry into the victim's residence without consent, where the parties do not share the same residence

any other controlling or abusive behavior toward a victim

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