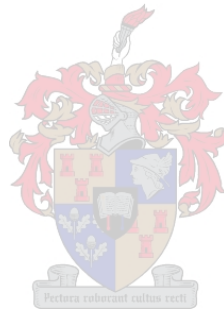


The essential need for empathy:

A study evaluating the legislative provisions aimed at protecting domestic violence victims against secondary victimisation by the police

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Thesis presented in fulfilment of the requirements for the
degree of Master of Laws in the
Faculty of Law at Stellenbosch University



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March 2021

DECLARATION

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ABSTRACT

This study sets out the broad context of violence against women in which we find ourselves in South Africa and then moves on to narrow that scope to the domestic violence context specifically. The study then reviews, analyses and critiques the applicable domestic violence legislation, namely the Domestic Violence Act and the National Instructions on Domestic Violence to be adhered to by the South African Police Service as well as legislation relevant to secondary victimisation of victims of crime within South Africa, namely the Service Charter for Victims of Crime along with its Minimum Standards.

In order to study how these applicable legislative documents have found operation independently and in conjunction with one another and to what extent it has been conducive to protecting domestic violence victims against secondary victimisation by the police, jurisprudence is used to review practical examples thereof. By means of jurisprudence and commentary thereon such as academic authors, it is also possible to get a firm grip on the damage which may be caused by the police to domestic violence victims in the case of secondary victimisation.

Research questions pertaining to the adequacy and thoroughness of the current legislative landscape to make provision for the protection of domestic violence victims against secondary victimisation by the police are possible to answer due to the analyses of legislative measures and jurisprudence described above.

The argument made is that in order for domestic violence victims to possibly be adequately protected against secondary victimisation by the police, legislative interventions need to be explicit to this effect. It is also possible to read into legislatively implied standards that an approach of empathy together with explicit protective measures need to be motivated and advocated for in order for domestic violence victims to not only be protected from secondary victimisation by the police, but also for the police to be deemed trustworthy in the eyes of such victims in order to be able to address domestic violence as a problem at large.

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I acknowledge and commend Captain Anneke van der Vyfer for not bearing any resemblance to the average member of police which is displayed in this thesis. You are the embodiment of how empathy is an essential in the treatment of (domestic violence) victims. May you forever be a candle of hope to those plunged into darkness.

I acknowledge my brave aunt, who has consistently assured me of her belief and pride in me.

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I express appreciation for the closest friend of my soul, who told me with conviction in her voice that according to her I am the most suitable person to embark on this endeavour. Your belief made me believe more.

Dedication

Dedicated to every single soul who has ever felt forgotten by the criminal justice system. In every word of this thesis forgotten is not what you are.

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CHAPTER ONE

1 Introduction

1.1 Domestic violence and secondary victimisation

Domestic violence is characterised by a pattern of degrading, humiliating conduct and possessiveness towards a victim privately or publicly, which includes verbal, psychological, sexual and physical abuse, as will be expanded on further later in this thesis. The domestic violence crime rate in South Africa has increased over the past twenty years, but the conviction rate has declined.¹ Researchers have attributed the decline in conviction rates partly to the withdrawal of charges by victims, because of their dependence on perpetrators.² Specifically relevant to this study, research has also found that secondary victimisation of domestic violence victims by the police has caused victims to withdraw charges.³

The concept of secondary victimisation was first used in the 1980s by women's non-governmental organisations, one of which was the National Organization for Victim Assistance (NOVA) created in the United States in 1975, to describe women's experiences within the criminal justice system and their reluctance to report cases to the police.⁴ Secondary victimisation is the additional trauma caused by stereotyping, victim-blaming attitudes and behaviours by service providers in social and legal systems, including the police, towards victims of violence. Responses like these

¹ South African Police Services Annual reports 1996-2015 <https://www.saps.gov.za/about/stratframework/annual_report/2015_2016/saps_annual_report_2015_2016.pdf> (accessed 13-05-2020).

² J Aldridge "Identifying the Barriers to Women's Agency in Domestic Violence: The Tensions between Women's Personal Experiences and Systematic Responses" (2013) *Social Inclusion* 1 1 3 12; D Patterson "The linkage between secondary victimization by law enforcement and rape case outcomes" (2011) *J Interpers Violence* 26 328; J Calton & Cattaneo L B "The effect of procedural and distributive justice on intimate partner violence victims' mental health and likelihood of future help-seeking" (2014) *American Journal of Orthopsychiatry* 84 4 329 340; E Sleath & Smith L L "Understanding the factors that predict victim retraction in police reported allegations of intimate partner violence" (2017) *Psychology of Violence* 7 1 140 149; A Aizer "Gender Wage Gap and Domestic Violence" (2010) *Am Econ Rev September* 100 4 1847 1859; J Gupta et al "Gender norms and economic empowerment intervention to reduce intimate partner violence against women in rural Côte d'Ivoire: a randomized controlled pilot study" (2013) *BMC International Health and Human Rights* 13 46.

³ M S Laxminarayan "The heterogeneity of crime victims: Variations in procedural and outcome preferences" (2012) Nijmegen: Wolf Legal Publishers, 16 days of activism against gender violence campaign 2006 *Lancet* 368 1260 69.

⁴ Council of Europe "Preventing and Combating Domestic Violence against Women A learning resource for training law enforcement and justice officers" (2016) 19 <<https://rm.coe.int/16805970c1>> (accessed 10-06-2020); M Manikis "Contrasting the Emergence of the Victims' Movements in the United States and England and Wales" (2019) *Societies* 2019 9 35 5.

toward victims of violence include disbelief, disinterest, judgement, lack of empathy and support, insensitivity, conditional help, inappropriate questioning, alienation and omitting information. Victim-blaming behaviours have been recorded as resulting in additional stress and trauma for victims.⁵ A lack of empathy displayed when dealing with a sexually assaulted woman may result in the woman being re-traumatised by those events. For example, the re-traumatisation when recounting a rape to an unempathetic service provider has been described as the experience of a “second rape” to the victim. These responses often cause victims to experience minor to severe physical, psychological and emotional trauma which may lead to social difficulties.⁶ The effects of secondary victimisation are not in line with a victim-centred approach to the handling of domestic violence victims.⁷ The criminal justice system, specifically the police, has caused withdrawal of charges by victims of domestic violence due to insensitive treatment.⁸ There are a growing number of victims of intimate partner violence who publicly speak about abuse, who regard the community rather than the police as a refuge. In 2017 many cases of intimate partner violence which featured on social media in South Africa were repeat offences which had not been reported to the police before resulting in the deaths of the victims.⁹ This may be indicative of a tendency of victims of domestic violence to not report the crimes committed against them to the police.

In a recent report responding to the need for more to be invested in combating gender-based violence, government has acknowledged that victims face secondary trauma when reporting cases to the police, which includes a violation of their human dignity and prevents them from receiving the necessary support and justice.¹⁰ This

⁵ R Campbell & Raja S “Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence” (1999) *Violence and Victims* 14 3 261 275.

⁶ Department of Social Development “National Policy Guidelines For Victim Empowerment” (2009) 2 <<https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>> (accessed 12-05-2020).

⁷ Council of Europe “Preventing and Combating Domestic Violence against Women A learning resource for training law enforcement and justice officers” J E Williams “Secondary victimization: Confronting public attitudes about rape” (1984) *Victimology* 9 66 81.

⁸ L Vetten “Addressing domestic violence in South Africa: Reflections on strategy and practice” (2005) Centre for the Study of Violence and Reconciliation South Africa [www.un.org › egm › docs › experts › vetten.vaw.pdf](http://www.un.org/egm/docs/experts/vetten.vaw.pdf) (accessed 13-05-2020).

⁹ M Ngwako “Karabo Mokoena’s ritual killing shock” (2017) *Sunday World* 5 June 7; S Manda “Another day, another death – yet one more woman murdered in SA” (2017) *Mail & Guardian* 19 May; Z Mapumulo “When love kills” (2017) *City Press* 21 May.

¹⁰ S Shoba “Government releases report on emergency R1.6bn plan to combat gender-based violence” (20 May 2020) <<https://www.dailymaverick.co.za/article/2020-05-20-government-releases-report-on-emergency-r1-6bn-plan-to-combat-gender-based-violence/#gsc.tab=0>> (accessed 09-06-2020).

inefficiency and the exacerbation of the suffering of domestic violence victims is displayed further in the examples of lived realities and jurisprudence referred to in this thesis.

Many women have reported a lack of interest and empathy shown by police officials in cases of intimate partner violence, which was outlined in a research report by Mathews and Abrahams and is expanded on below. The further victimisation and reinforcing the feeling of helplessness can be seen in a statement made by a woman from Paarl who reported being told that “they can actually do nothing, as it is a house problem”. A woman from Delft reported that “a police official told her unless this Protection Order is finalised, there is nothing they can do”. Another woman reported that “they can’t help me, I must go and apply for an interdict”. Police officials appeared to have only advised women in these cases to apply for interdicts without reflecting on their roles and responsibilities. Inadequate police assistance has also been reported by women who have been made to feel accountable instead of vindicated for the abuse they suffered. One woman said “the police told me that it is partly my fault... because I went to drink with them”. Another woman reported that police officials were reluctant to accept a charge, questioning the seriousness of women following through with charges. A woman from Mbekweni reported that they could not assist her as “I will stop the case because he is my boyfriend”. Another woman reported that a police officer questioned her story and wanted “to hear the perpetrator’s side of the story”.¹¹

A 2017 South African dissertation on the secondary victimisation of domestic violence victims, specifically women, by the police found that 75% of the twenty-four participants would not report incidents of domestic violence to the police in the future. Due to the unhelpful nature of service provided by the South African Police Service (“SAPS”) 62.5% stated that they would not report incidents to the police in the future because it is pointless. The study found that there was a definite link in a decrease in

¹¹ S Mathews & N Abrahams “Combining Stories and Numbers: An Analysis of the Impact of the Domestic Violence Act (No.116 of 1998) on Women” (2001) The Gender Advocacy Programme & The Medical Research Council (Gender & Health Research Group) <<http://196.21.144.194/gender/domesticviolence.pdf>> (accessed 02-12-2019) 26 27.

the reporting of domestic violence incidents and secondary victimisation perpetrated by the SAPS against victims.¹²

Secondary victimisation may occur when a serious lack of understanding of a victim's situation is displayed upon reporting domestic abuse to the police. In Bukiwe's study 33.3% of the respondents felt that the police did not show understanding at all, while 25% of the respondents were neutral in their perceptions. The highest percentage of the respondents, namely 29.2% also reported that the police did not show any concern to them. Victims need to feel that their stories and suffering related to domestic abuse matter to law enforcement, but when police fail to be attentive to their needs this causes victimisation, as was the case in Bukiwe's study where the majority of victims (33.3%) reported that the police did not pay attention to them.¹³ Police attitudes that victims reported included the statement "I would have liked for the police to not look at my situation as a joke".¹⁴ Women are victimised when told that their painful stories are not worthy of legal intervention, specifically by members of the police who are supposed to assist and protect them. Women are victimised when brushed off by police, who regard their situations as undeserving of legal intervention, as was the case in 12.5% of participants' cases.¹⁵ The police's failure to assist victims reinforces the hopelessness they may feel, for instance declining to arrest perpetrators as was reported by 4.2% of the participants. One respondent was told directly that they cannot help her, only advising her to run away from the perpetrator to save her life. This sends the message to victims that they are alone, their rights are not taken to heart and that the abuses they suffer are inevitable and unavoidable. The respondent's interaction with the police caused her to feel hopeless and sceptical of possible protection that could be provided by the police. Attitudes displayed by the police towards victims caused 16.7% of them to say "I would have liked for the police to treat me with

¹² N Bukiwe "The prevalence and impact of secondary victimisation on the victims of Domestic Violence perpetrated by the South African Police Services in Durban, South Africa" (2017) Department of Criminology and Forensic Studies University of KwaZulu-Natal 83 97.

¹³ N Bukiwe "The prevalence and impact of secondary victimisation on the victims of Domestic Violence perpetrated by the South African Police Services in Durban, South Africa" 71.

¹⁴ N Bukiwe "The prevalence and impact of secondary victimisation on the victims of Domestic Violence perpetrated by the South African Police Services in Durban, South Africa" 86.

¹⁵ N Bukiwe "The prevalence and impact of secondary victimisation on the victims of Domestic Violence perpetrated by the South African Police Services in Durban, South Africa" 93.

respect”.¹⁶ They reported that the police displayed mistrust and disrespect toward their testimonies of abuse.¹⁷

There is not a lot of research presently on the prevalence and extent of secondary victimisation of domestic violence victims by the SAPS. This is the context within which an increased number of domestic violence incidents towards women by intimate partners is noted together with very low statistics on the prosecution of those cases.¹⁸ The Constitutional Court has stated that the inefficiency of the criminal justice system towards domestic violence victims intensifies their feeling of helplessness and reinforces the idea that the violence they suffer is somehow acceptable.¹⁹ Victims of domestic violence have continuously received the message from the starting point of law enforcement, namely the police, that the violence they experience is somehow acceptable and that it cannot be prevented, causing secondary victimisation. This shows that members of the police have often declined to intervene in or trivialised domestic violence matters due to these negative attitudes and institutional inadequacies.²¹ The need to address the secondary victimisation of victims of domestic violence by the police can thus be seen in how the failure to do so contributes to the difficulties faced in terms of bringing perpetrators of domestic violence to justice.

1 2 Jurisprudence and secondary victimisation

Jurisprudence illustrates how secondary victimisation of domestic violence victims by the police has occurred in practice. These violations happen when legislative obligations in respect of domestic violence cases are not complied with or inadequately acted upon with the required seriousness. The consequential negative effects it has on the victims’ lives are also displayed thereby. The humiliation and degradation which can be caused to a victim of domestic violence is clear in *Naidoo v*

¹⁶ N Bukiwe “The prevalence and impact of secondary victimisation on the victims of Domestic Violence perpetrated by the South African Police Services in Durban, South Africa” 86.

¹⁷ N Bukiwe “The prevalence and impact of secondary victimisation on the victims of Domestic Violence perpetrated by the South African Police Services in Durban, South Africa” 69 86.

¹⁸ South African Police Services Annual Report 2014/2015 <https://www.saps.gov.za/about/stratframework/annual_report/2014_2015/SAPS_AR_2014-15_for_viewing.pdf> (accessed 13-05-2020).

¹⁹ *S v Baloyi and Others* 1999 CCT29/99 ZACC 19 15 (CC).

²¹ Harvard Law Review “Developments in the Law: Legal Responses to Domestic Violence” (1993) Harvard Law Review 106 2 1498 1552.

*Minister of Police*²². The police official concerned here, contrary to assisting the victim to lay charges in terms of the relevant legislative duties imposed on members of the police discussed later in this thesis, tried to force the victim to reconcile with the perpetrator. When this failed, he victimised her further by arresting her alongside the perpetrator after motivating him to lay a counter charge. The victim suffered a further assault while in custody, only for the charge against her to be withdrawn at court. Secondary victimisation often coincides with further abuses that would not have been caused to the victim if not for the specific instances of police inaction. The failure to effect an arrest warrant in terms of a protection order (a court order which prescribes and prohibits certain behaviours for an alleged abuser, which will be discussed later in the thesis) may cause a victim to suffer not only the disregard by the police to their plea for help, but also further violation by a perpetrator which they were not protected from.²³ Ignorance displayed by police towards various pleas for help in respect of harassing behaviour and the subsequent rape of the victim by the perpetrator is another example of secondary victimisation in the form of disregard of a victim together with further abuse.²⁴ The failure to regard reported assaults and suicidal behaviour by an abuser as serious may not only cause the victim to doubt themselves and the importance of their safety because of police inaction, but also cause them physical injury and trauma when further assaults and eventual suicide by the perpetrator do occur.²⁵ The referenced cases are discussed in detail in this thesis in order to analyse to what extent the different legislative instruments applied to combat secondary victimisation.

1 3 Domestic violence context in South Africa

Domestic violence against women in South Africa is a difficult problem to address, even before one considers the additional complexity of secondary victimisation of victims as outlined above.

²² 2015 20431/2014 152 (SCA); D Smythe "Missed opportunities: confiscation of weapons in domestic violence cases" (2004) *SA Crime Quarterly* 19, 21; P Parenzee et al "Monitoring the Implementation of the DVA: First Research Report".

²³ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E).

²⁴ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA).

²⁵ *Dlanjwa v Minister of Safety and Security* 20217/2014 2015 ZASCA 147 (SCA).

Statistics concerning this type of crime, alongside a crime such as rape, are not easily obtainable. These crimes are widely under-reported and poorly recorded due to it often occurring in the private spaces of individuals by persons known to them. The SAPS thus faces limitations in compiling figures of domestic violence specifically. One way in which to possibly estimate the prevalence of domestic violence is to consider figures of crimes related thereto, namely sexual offences against women and femicide, which is most commonly understood as the murder of females by males.

The estimate of women raped per 100,000 is 138 and as a result South Africa has been called the “rape capital of the world”.²⁶ This figure is obtained by conflating the 2016-17 South African Police Service statistics, in which 80% of the reported sexual offences were rape, together with Stats SA’s estimate that 68.5% of the sexual offences victims were women.²⁷ The police noted 443,387 rapes over the past decade until 2019, but only 230 out of 1,000 sexual assaults are reported.²⁸ Reported rapes increased by 3.9% from 2018 to 41,583 in 2019 which is the highest rate in four years.²⁹

The 2020 murder statistics in South Africa showed an increase of 1.4% from 2019, to 21,325 reported cases. This comes down to 58 people murdered daily at a rate of 35.8

²⁶ N Sibanda-Moyo et al “Violence Against Women in South Africa A Country in Crisis” 5 (2017) Centre for the Study of Violence and Reconciliation 18 < <https://www.csvr.org.za> › pdf › CSVr-Violence-Against-Women-in-SA> (accessed 5-11-2019).

²⁷ The Citizen “SA is a nation of abusers, stats show” (2018) <<https://citizen.co.za/news/south-africa/1958535/sa-is-a-nation-of-abusers-stats-show/#:~:text=%E2%80%9CUsing%20the%202016%2D17%20South,per%20100%20000%20as%20138%20>> (accessed 5-11-2019).

²⁸ M Cohen & Vecchiato P “Horror of gender-based violence revealed in South African report” (2019) <<https://www.biznews.com/undictated/2019/09/12/murder-rape-sexual-assault-crime-stats>> (accessed 24-01-2020); Department of Justice “National Crime Victimization Survey 2010-2016” <<https://www.rainn.org/statistics/criminal-justice-system>> (accessed 18-11-2019).

²⁹ R Malukele “Crime against Women in South Africa An in-depth analysis of the Victims of Crime Survey data” (2018) Crime Statistics Series Volume V, Statistics South Africa, Report No. 03-40-05 8 < <https://www.statssa.gov.za/publications/Report-03-40-05> > (accessed 5-11-2019); N Sibanda-Moyo et al “Violence Against Women in South Africa A Country in Crisis” 5; South African Human Rights Commission “Unpacking the gaps and challenges in addressing gender-based violence in South Africa” (2018) Research Brief 17 < <https://www.sahrc.org.za/home/21/files/SAHRC%20GBV%20Research%20Brief%20Publication.pdf>> (accessed 24-01-2020); South African Human Rights Commission “Protecting women and children is everyone’s responsibility” <<https://www.sahrc.org.za/index.php/sahrc-media/news/item/1466-gender-based-violence>> (accessed 14-11-2019); L Xingwana “Stop Violence Against Women” (2003) Department of Women, Children & People with Disabilities (DWCPD) <https://www.saferspaces.org.za/uploads/files/Stop_Violence_Against_Women_-_Report.pdf> (accessed 2-12-2019).

people per 100,000 population.³⁰ South Africa has one of the highest femicide rates in the world, with the recorded number being five times higher than the global average. In 2009 the World Health Organisation recorded a worldwide average femicide rate of 2.4 per 100,000 while the South African femicide rate was 9.6 per 100,000.³¹ Three women are killed by their intimate partners daily, one every eight hours.³² The South African Medical Research Council's Gender and Health Research Unit's femicide study in 2009 indicated that in terms of cases where perpetrators had been identified, 57.1% were intimate partners.³³ Recent studies reveal that globally six women are killed every hour by men around the world, mostly by men in their own family or their partners. In the United Kingdom a woman is killed by a man every three days. The latest United Nations figures show that 137 women across the world are killed every day by a partner or a family member. About 50,000 women are murdered per year by people they know and ought to trust.³⁴ In the year for 2019-2020 a total of 2,695 women were murdered in South Africa. This comes down to a woman being murdered every three hours. The South African average of femicide has thus consistently been much higher than that of the global average.³⁵

Police statistics, as a result of underreporting and the private nature of abuse paint an inaccurate picture of the extent of violence against women as defined broadly in South Africa, not to mention domestic violence specifically.³⁶

³⁰ Staff Writer "South Africa crime stats 2020: everything you need to know" (2020) <<https://businesstech.co.za/news/government/421424/south-africa-crime-stats-2020-everything-you-need-to-know/>> (accessed 19-01-2021).

³¹ G Makou "Femicide in South Africa: 3 numbers about the murdering of women investigated" (2017) <<https://africacheck.org/reports/femicide-sa-3-numbers-murdering-women-investigated/>> (accessed 19-03-2020).

³² T Mathebula "SAPS data on gender-based violence falls short of illustrating the real problem" (2019) <<https://www.news24.com/Columnists/GuestColumn/saps-data-on-gender-based-violence-falls-short-of-illustrating-the-real-problem-20190326>> (accessed 19-03-2020).

³³ Anonymous "#DontLookAway: Most domestic violence, sexual abuse cases go unreported" (2018) <https://www.iol.co.za/capeargus/opinion/dontlookaway-most-domestic-violence-sexual-abuse-cases-go-unreported-18221487> (accessed 19-03-2020).

³⁴ D Bloom "As the UK publishes its first census of women killed by men, here's a global look at the problem" (2020) <<https://www.weforum.org/agenda/2020/11/violence-against-women-femicide-census/>> (accessed 19-01-2021).

³⁵ Africa Check "FACTSHEET: South Africa's crime statistics for 2019/20" (2020) <<https://africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201920#:~:text=In%202019%2F20%2C%20a%20total,is%20murdered%20every%20three%20hours>> (accessed 19-01-2021).

³⁶ R Malukele "Crime against Women in South Africa An in-depth analysis of the Victims of Crime Survey data"; N Sibanda-Moyo et al "Violence Against Women in South Africa A Country in Crisis"; South African Human Rights Commission "Unpacking the gaps and challenges in addressing gender-based violence in South Africa" (2018) Research Brief 17 <<https://www.sahrc.org.za/home/21/files/SAHRC%20GBV%20Research%20Brief%20Publication.pdf>> (accessed 24-01-2020); M Cohen & Vecchiato P "Horror of gender-based violence revealed in South

It is quite apparent from the above that the problem of domestic violence is complex and most probably understated. In order to address this problem it is important to address factors which complicate the addressing of the problem itself too. One such factor is secondary victimisation of victims. Secondary victimisation of domestic violence victims therefore needs to be addressed properly in terms of legislation in order to prevent the further exacerbation of this difficult problem.

1.4 Focus of the study

This thesis focuses specifically on the SAPS' role in the secondary victimisation of women as domestic violence victims in South Africa. The South African Law Commission has found that the police have neglected domestic violence matters in the past and have been found to be ignorant of the law, insensitive and even hostile to domestic violence victims and reluctant to accept charges of assault against male partners.³⁷ Police are the first encounter domestic violence victims have with the criminal justice system and their actions toward and treatment of domestic violence victims determine the level of trust victims have in the police and the criminal justice system as a whole. The manner of dealing with victims determine whether or not a victim decides to report a crime as well as considerations of whether to do so in future.³⁸

It is assumed, as a point of departure, that a lack of enthusiasm and attitudes held by the police in approaching domestic violence cases has caused secondary victimisation of domestic violence victims. This theme is explored in Altbeker's article, which is expanded on further in this paragraph. Police might frequently see incidents of abuse as petty, especially where emotional abuse is concerned,³⁹ without consideration that it may be a potential ticking time bomb to more severe future abuses. Many police may

African report"; Department of Justice "National Crime Victimization Survey 2010-2016" <<https://www.rainn.org/statistics/criminal-justice-system>> (accessed 18-11-2019); South African Human Rights Commission "Protecting women and children is everyone's responsibility"; L Xingwana "Stop Violence Against Women".

³⁷ C Bendall "The Domestic Violence Epidemic in South Africa: Legal and Practical Remedies" (2010) *Women's Studies* 39 110; South African Law Commission "Research Paper on Domestic Violence", (1999) 89 90 <<https://www.justice.gov.za/salrc/rpapers/violence.pdf>> (accessed 18-11-2019).

³⁸ L Vetten "Addressing domestic violence in South Africa: Reflections on strategy and practice" (2005) Centre for the Study of Violence and Reconciliation, South Africa <<https://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf>> (accessed 09-06-2020); M Wolf et al "Barriers to Seeking Police Help for Intimate Partner Violence" (2003) *Journal of Family Violence* 18(2) 121 129.

³⁹ A Altbeker "Policing Domestic Violence The enthusiasm gap" (2005) *SA Crime Quarterly* 12 15 16.

view domestic issues as something to be resolved at home and are reluctant to intervene.⁴⁰ Due to the nature of the police's work, which aims for finalisation of cases, the prospect of withdrawal of charges by victims might cause them to not pay very much attention to domestic abuse complaints as it may not seem as the best use of their time.⁴¹ The fact that most police officials are male potentially exacerbates the attitude that domestic abuse is not a serious issue, especially in a country such as South Africa where many males are often affected by the patriarchal society they grew up in.⁴² As a result many males might not regard all forms of domestic violence towards a woman at home as truly a crime.⁴³

Police attitudes are likely to determine how members of the police assess and respond to reported incidents of domestic violence, which may as a consequence enable access to justice to victims or deprive them thereof. A better understanding of the effects police attitudes might have on victims in terms of secondary victimisation is thus important.⁴⁴ Without adequate trust in the police to assist domestic violence victims, the police as the protector of citizens against crime, cannot be part of the solution to eradicate domestic violence. The police are obliged to act within a specific legislative framework, including legal instruments which will be discussed later in this thesis, when it comes to the expected standard of dealing with victims of domestic violence. As a point of departure to address the mistrust the public has in the police, specifically in the area of domestic violence, it is important to understand if and how legislative instruments fall short in order that they may be addressed and adapted wherever they are lacking.

This thesis focuses on The Domestic Violence Act 116 of 1998 (the "DVA"), including its possible amendments in terms of the Domestic Violence Amendment Bill of 2020 ("the Amendment Bill"), The National Police Commissioner's National Instruction 7/1999 regarding Domestic Violence ("the National Instruction") and The Service Charter for Victims of Crime in South Africa ("the Service Charter") which was approved by Cabinet in 2004. These specific instruments are the focus of this study,

⁴⁰ A Altbeker "Policing Domestic Violence The enthusiasm gap" (2005) *SA Crime Quarterly* 12 17.

⁴¹ A Altbeker "Policing Domestic Violence The enthusiasm gap" (2005) *SA Crime Quarterly* 12 17.

⁴² A Altbeker "Policing Domestic Violence The enthusiasm gap" (2005) *SA Crime Quarterly* 12 17.

⁴³ A Altbeker "Policing Domestic Violence The enthusiasm gap" 12 17 18.

⁴⁴ E Garcia "Violence against women and victim-blaming in Europe" (2014) *Bulletin, World Health Organization* 92 380 381.

because the standards of service delivery towards domestic violence victims and the prevention of secondary victimisation of domestic violence victims are outlined in these instruments in terms of South African law. This thesis is written on the assumption that if the provisions in legislative instruments relating to secondary victimisation are studied and analysed, it will be clearer to what extent they are effective in protecting victims of domestic violence from secondary victimisation by the police. Although police training is an important dimension in terms of adequate service delivery to domestic violence victims as well, that is not the main focus of this thesis. It is assumed that it will be possible to address and ultimately reduce secondary victimisation of domestic violence victims if the legislative provisions related to the treatment of domestic violence victims by the police are adequately sensitive. This thesis aims to study how this problem of secondary victimisation of domestic violence victims by the police is proposed to be prevented in terms of the standards put in place for dealing with domestic violence victims by/in legal instruments as well as how adequate these measures are in inspiring the level of understanding and attitudes police should have towards these victims.

While there has been some academic attention paid to how police attitudes and treatment of victims play a role in secondary victimisation and affect the rates of reporting domestic violence as well as how the law fails to prevent it, a gap remains in respect of a detailed analysis of the measures put in place by legislative instruments to address the issue of secondary victimisation. Academic research assists in analysing the police's duties with regards to victims which include the duty of giving advice created by the applicable legislation and the duty of care attached thereto, by expanding thereon with reference to jurisprudence.⁴⁵ The limitations of the duties of rendering services to domestic violence victims, namely providing shelter and medical care, circumstances which allow for arresting a perpetrator with and without a warrant,

⁴⁵ H B Kruger "Addressing domestic violence: to what extent does the law provide effective measures?" (2004) 29 (1) *Journal for Juridical Sciences* 152; S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" (2017) University of KwaZulu-Natal School of Law 64 <
https://researchspace.ukzn.ac.za/bitstream/handle/10413/15881/Sibisi_Siyabonga_2017.pdf?sequence=1&isAllowed=y> (accessed 01-06-2019).

confiscation of weapons from a perpetrator and the duty of opening a docket are also expanded on by academic research in the form of a dissertation and jurisprudence.⁴⁶

1 5 Current legal position

1 5 1 *The DVA*

The DVA was the result of efforts of women politicians in the new dispensation of democracy after the abolishment of apartheid.⁴⁷ The DVA replaced the Prevention of Family Violence Act 133 of 1993 (“PFVA”), providing a new, broad definition of domestic violence and addressing the need for oversight of police law enforcement. The DVA aims to provide victims the maximum possible legal protection from domestic abuse. In terms of the DVA domestic violence is defined as different types of abusive behaviour which may cause physical, mental or other harm to a victim thereof.⁴⁸ Due to the current scourge of gender-based violence in the country, there has been renewed focus on curbing it, which include proposed amendments to the DVA in terms of the Amendment Bill.⁴⁹ In line with the goal to offer the maximum possible protection to victims, the DVA defines domestic relationships and types of abuse in such a way as to be inclusive of various instances. The DVA places various duties on the police which include providing domestic violence victims with information regarding the right to press charges and obtain protection orders, assistance in finding shelter or medical attention, arresting alleged perpetrators as well as seizing firearms from them. The Amendment Bill proposes further enhancement of the provision of services to domestic violence victims. A policy brief assists in understanding how the DVA makes provision for a complainant to choose which charges to lay and whether to do so in conjunction with applying for a protection order.⁵⁰ An academic research report

⁴⁶ S Sibisi “Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa” 68 123; *S v Rasena* 2017 1 SACR 565 (ECG); *Kruger v Minister of Police* 2016 7K6 QOD 223 (GNP); *Langa v Minister of Police and Others* 30355/20102014 (GP); *Dlamini v Minister of Safety and Security* 2016 2 SACR 655 (GJ); *Greenberg v Gouws and Another* 2011 2 SACR 389 (GSJ).

⁴⁷ Z Tanzer “Violence Against Women in Post Apartheid South Africa” (2015) Still A Long Road to Justice *IC4HD Violence Against Women Series South Africa* 39.

⁴⁸ See footnote 66.

⁴⁹ Domestic Violence Amendment Bill 2 March 2020; Anonymous “Justice dept works on three laws to curb GBV – Lamola” (2020) <<https://citizen.co.za/news/south-africa/parliament/2287104/justice-dept-works-on-three-laws-to-curb-gbv-lamola/>> (accessed 09-06-2020).

⁵⁰ L Vetten “Domestic violence in South Africa” (2014) South Africa Institute of Security Studies Policy Brief 71 Pretoria < <https://www.files.ethz.ch/isn/185884/PolBrief71.pdf> > (accessed 12-12-2019).

explains how the duty to advise a complainant about provision of shelter should be conducted in order to fulfil the obligation in the DVA related thereto.⁵¹

The main measure of protection the DVA offers victims of domestic violence is a protection order, a court order that sets conditions for an abuser to act in accordance with in order to prevent further abuses.⁵² There are no other mechanisms in terms of the DVA by which an abuser can be held accountable for their behaviour, which makes a protection order a vital part of the DVA's existence. An abuser who contravenes the conditions of a protection order can be criminally charged in terms of the DVA. In the furtherance of protection, the Amendment Bill proposes to make it a criminal offence not to report a domestic violence matter where one has knowledge thereof.⁵³ In the furtherance of keeping police accountable in terms of the execution of these duties, members of the police are guilty of misconduct in terms of the South African Police Service Act 68 of 1995 ("the SAPS Act") if they do not fulfil their duties in terms of the DVA.⁵⁴

Governmental sources such as discussions and workshops as well as academic articles assist in understanding the mandatory provisions of the DVA as well as critique levelled with regards to the amount of discretion allowed for the police in respect thereof.⁵⁵ Non-governmental institutions play a role in the assessment of the DVA, for instance the observation that it imposes two different types of obligations, being administrative and relating to the standard of treatment of domestic violence victims.⁵⁶

1 5 2 *The National Instruction*

The National Instruction aims to provide direction to members of the SAPS in executing duties imposed on them by the DVA. Each police station's commissioner is

⁵¹ K Stone & Lopes C "Policing Responses to Domestic Violence: Exploring reactions by the police to women in need of shelter" (2018) Research Report Heinrich Böll Foundation (HBF) and the National Shelter Movement of South Africa (NSM) <https://www.saferspaces.org.za/uploads/files/Research_paper.pdf> (accessed 12-12-2019).

⁵² DVA Section 6.

⁵³ DVA Section 2B.

⁵⁴ DVA Section 18(4).

⁵⁵ Western Cape Government "Effective implementation of the Domestic Violence Act workshop" (2016) <https://www.westerncape.gov.za/assets/departments/community-safety/_report_on_effective_implementation_of_the_domestic_violence_act_2.pdf> (accessed 12-12-2019).

⁵⁶ L Vetten et al "The Right and the Real: A Shadow Report Analysing Selected Government Departments' Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act" (2010) Johannesburg Tshwaranang Legal Advocacy Centre to End Violence Against Women <<https://shukumisa.org.za/wp-content/uploads/2017/09/The-Right-and-The-Real.pdf>> (accessed 12-12-2019).

obliged to have a compiled list of medical and social services which can be offered to complainants,⁵⁷ which displays a clear standard for treating victims in a respectful manner. This clearly encourages a working relationship with stakeholders in order to compile such a list which can be given to complainants for their information as well as to enable them to choose from shelter options. It might be very difficult to compile such a list of shelter service providers since most shelters are run by NGOs and with inadequate government funding these stakeholders face great challenges in broadening their reach.⁵⁸ The National Instruction aims to provide protection to complainants by obliging the SAPS to attend and secure scenes of domestic violence and offering protection to complainants from alleged perpetrators. In order to do this certain powers are awarded to the police, which include the seizing of firearms and effecting arrests.⁵⁹ Members of the SAPS must provide information to complainants with regards to the options of laying charges or obtaining protection orders as well as make arrangements regarding shelter and medical treatment where necessary. A standard of thorough investigation is set for when charges are laid, in that all available evidence must be gathered, dockets opened and registered without avoiding to do so or directing complainants to alternative measures such as conciliation. Records must be kept of all reported domestic violence incidents as well as all members against whom complaints have been registered for violations of any obligations.⁶⁰

Academic research in the form of a report makes it clear that the provisions of the DVA are to be understood within a framework of accountability and that is why there is reliance on the Police Commissioner to issue national instructions to place clear duties on members of the SAPS when they deal with domestic violence cases.⁶¹

1 5 3 *The Service Charter*

The Department of Social Development manages a Victim Empowerment Program in terms of which the interests of victims of crime must be focused on. This initiative

⁵⁷ National Instruction Section 3.

⁵⁸ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 68 69.

⁵⁹ National Instruction Section 11.

⁶⁰ National Instruction 7/1999 Domestic Violence (1999) *Government Gazette No. 20778* 3.

⁶¹ H Combrinck & Wakefield L "Training for Police on the Domestic Violence Act" (2009) Research Report, Community Law Centre, University of the Western Cape & Saartjie Baartman Centre for Women and Children 11.

brought about the Service Charter.⁶² The Service Charter was created because the country has international obligations under international human rights instruments, such as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985 and the Prevention and Eradication of Violence Against Women and Children Addendum to the 1997 Southern African Development Community Declaration on Gender and Development.⁶³ The SAPS, as part of government, is expected to adhere to a certain standard of conduct in terms of the Service Charter when dealing with victims of crime. Police officials are obliged to take measures to minimise any inconvenience to victims in the investigation of their cases. Services must be provided to victims in such a way that secondary victimisation within the criminal justice process is eliminated. Victims must remain central to the process, be informed which standards of service they can expect whenever they come into contact with the criminal justice system and have measures for recourse when standards are not met. Rights are afforded to victims, which include the rights to fairness, respect and dignity, the right to information, protection, assistance, compensation and restitution.⁶⁴

Discussions on the Conceptual Framework of the Service Charter (“the Conceptual Framework”) assist in understanding what the terms “victim” and “secondary victimisation” mean in terms of the Service Charter.⁶⁵ Understanding the importance of the Service Charter can also be seen in parliamentary discussions about the requirement of its availability in SAPS stations.⁶⁶ The Service Charter is also better

⁶² Department of Justice and Constitutional Development “Service Charter for Victims of Crime in South Africa” (2004) <<https://www.justice.gov.za/VC/docs/vc/vc-eng.pdf>> (accessed 18-12-2019).

⁶³ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) <<https://www.refworld.org/docid/3b00f2275b.html>> (accessed 24-01-2020); Prevention and Eradication of Violence Against Women and Children Addendum to the 1997 Southern African Development Community Declaration on Gender and Development (1997) <<https://www.achpr.org/legalinstruments/detail?id=16>> (accessed 24-01-2020).

⁶⁴ Department of Justice and Constitutional Development “Service Charter for Victims of Crime in South Africa”.

⁶⁵ Department of Justice and Constitutional Development “South African Service Charter Conceptual Framework: Understanding the Victims Charter” (2006) <<https://www.justice.gov.za/vc/docs/projects/2007%20UNDERSTANDING%20THE%20CHARTER.pdf>> (accessed 12-05-2020); Department of Justice and Constitutional Development Gender Directorate “National Implementation Plan Service Charter for Victims of Crime” (2007) <https://www.gov.za/sites/default/files/gcis_document/201409/victimcharter0.pdf> (accessed 12-05-2020).

⁶⁶ Parliamentary Monitoring Group “Domestic Violence Act: Independent Complaints Directorate reports for 2009” (2010) <<https://pmg.org.za/committee-meeting/12374/>> (accessed 12-12-2019).

understood in its aim to eliminate secondary victimisation when the importance of a victim sensitive approach is explained and encouraged by academics.⁶⁷

These legal instruments above are the cornerstones of sources and/or literature reviewed in this thesis. Although the legislative instruments set out a framework within which domestic violence should be addressed and how domestic violence victims should be treated, these standards are not always complied with in reality. Since the promulgation of the DVA it has not necessarily been implemented as efficiently as was hoped.⁶⁸ Although it is acknowledged that implementation of the legislative provisions in place may be a problem, this thesis aims to evaluate how explicitly and thoroughly the legislative provisions which are in place protect domestic violence victims against secondary victimisation by the police. It is assumed – perhaps over-optimistically – that if provisions are explicit enough in the combating of secondary victimisation in terms of standards prescribed to members of the police in dealing with domestic violence victims, these victims might be protected from such victimisation to a greater extent in reality.

1 6 Research Question/s

The main research question this thesis aims to answer is **“To what extent is adequate legislative provision made for the protection of domestic violence victims from secondary victimisation by the police in South Africa?”**

Subsidiary research questions also include:

- “To what extent are the relevant legislative instruments and frameworks aligned so as to provide domestic violence victims with a uniform standard of protection from secondary victimisation by the police?”;
- “What are the shortcomings of legislative provisions in terms of the protection they offer to domestic violence victims from secondary victimisation by the police?”;
- “In which ways can the shortcomings of legislative provisions related to the protection of domestic violence victims from secondary victimisation by the police possibly be addressed?”

⁶⁷ C May & M Mudarikwa “Shortfalls in the Implementation of the Domestic Violence Act” (2012) *The Legal Resources Publication Library* Durban 11.

⁶⁸ P Parenzee et al “Monitoring the Implementation of the DVA: First Research Report” (2012) Institute of Criminology University of Cape Town.

1 7 Methodology

The study of this thesis is done by means of a doctrinal legal methodology whereby legal instruments are analysed and used as points of departure. The focus points of this study are specific legal instruments which include legislation, jurisprudence and policy. The provisions of these instruments related to the obligations placed on the police in upholding a certain standard when dealing with domestic violence victims as well as protecting these victims from secondary victimisation are studied and compared. Secondary sources are made use of in gathering of information, which include governmental instruments such as discussion papers and reports, legislation, policy documents, jurisprudence applicable to the study and academic literature such as dissertations, research reports and journal articles which assist in understanding the legal instruments.

1 8 Chapter outlines

Chapter 1 Introduction

This chapter introduces the reader to the broad context of the problem, the specific focus of the thesis, the methodology and the most prominent literature influences.

Chapter 2 Understanding the legal instruments

The DVA, National Instruction and Service Charter are studied in order to understand them and their provisions relating to standards of treatment of domestic violence victims and the prevention of secondary victimisation of these victims.

Chapter 3 Similarities and dissimilarities between the legislative instruments

This chapter compares and analyses the differences and similarities in terms of the different instruments. The nature of provisions related to standards of dealing with victims of domestic violence, protection and recourse offered to these victims in terms of secondary victimisation as well as the correlation between the instruments' standards for dealing with victims and combating secondary victimisation are studied.

Chapter 4 The manifestation of secondary victimisation in jurisprudence

Specific cases are reviewed as examples of how secondary victimisation has manifested in practice. It is reviewed how provisions within legislative instruments found application in these cases. The knowledge and insights gained from the

previous chapter are relied upon in order to reflect on how these provisions could have possibly found better application to prevent secondary victimisation and what lessons can possibly be learned from the past.

Chapter 5 Findings

Findings in the earlier chapters are summarised and the most important points highlighted. It is evaluated to what extent the main research question and subsidiary research questions have been answered.

Chapter 6 Conclusion

The conclusion summarises how the research problem has been addressed and what the value of the research conducted can possibly be.

CHAPTER TWO

2 Understanding the legal instruments

2 1 The Domestic Violence Act

The preamble of the DVA acknowledges that domestic violence is a severe problem in South Africa and that remedies in place for the protection of victims have not been as effective as required thus far. The DVA was created in line with the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and the rights to equality and to freedom and security of the person are specifically emphasised. The rights to equality, freedom and security of the person can all be understood as important in terms of the vision of the DVA, because domestic violence victims should be treated with respect, fairness and dignity. The DVA strives to provide victims of domestic violence with the maximum protection the law can offer them, which shows that there is a regard for victims’ rights by virtue of protection from harm which may infringe on their rights. The government attempted to show its commitment to eliminate domestic violence by the promulgation of the DVA.

2 1 1 *Introductory terms*

The DVA defines domestic relationships and types of abuse broadly in section 1 thereof.⁶⁹ Domestic relationships include married partners, unmarried partners, same-

⁶⁹ Domestic Violence Act 116 of 1998

“[Section] 1 Definitions

In this Act unless the context indicated otherwise-

“**domestic relationship**” means a relationship between a complainant and a respondent in any of the following ways:

- (a) they are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration;
- (f) or they share or recently shared the same residence;

“**domestic violence**” means,-

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (c) intimidation;
- (d) harassment;

sex partners, mothers and sons as well as people who share living spaces. The Amendment Bill proposes to add to this list people who have shared a living space in a preceding year.⁷⁰ Domestic violence includes physical, sexual, economic, emotional, verbal and psychological abuse as well as intimidation, harassment, stalking, entering a complainant's property without consent, damage to property and any other controlling or abusive behaviours toward the complainant which harm or may cause imminent harm to their safety, health or well-being. The Amendment Bill proposes to add to these types of abuse elder abuse, coercive and controlling behaviour, exposure of children to domestic abuses as well as entering the complainant's workplace or place of study without consent.⁷¹ It is also proposed that controlling or abusive behaviour need not possibly cause imminent harm but need to only inspire the reasonable belief that harm may be caused, not only to the complainant, but to a

-
- (g) stalking;
 - (h) damage to property;
 - (i) entry into the complainant's residence without consent, where the parties do not share the same residence; or
 - (j) any other controlling or abusive behaviour towards a complainant,

where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;

"economic abuse" includes-

- (a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; or
- (b) the unreasonable disposal of household effects or other property in which the complainant has an interest;

"emotional, verbal and psychological abuse" means a pattern of degrading or humiliating conduct towards a complainant, including-

- (a) repeated insults, ridicule or name calling;
- (b) repeated threats to cause emotional pain; or
- (c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security;

"harassment" means engaging in a pattern of conduct that induces the fear of harm to a complainant including-

- (a) repeatedly watching or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
- (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
- (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;

"intimidation" means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear;

"physical abuse" means any act or threatened act of physical violence towards a complainant;

"sexual abuse" means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant;

"stalking" means repeatedly following, pursuing, or accosting the complainant".

⁷⁰ Amendment Bill Section 1(f).

⁷¹ Amendment Bill Sections (hA),(hB),(hC),(hD),(i)(ii).

related person as well. The broadness and inclusivity of the above definitions of different types of relationships and different types of abuse broaden the scope of protection of victims to reach as far as possible to different lives and ways of life of victims. The proposed additions by the Amendment Bill surely will not do any harm, as they only aim to extend this broad protection even further.

Duties are placed upon members of the police in section 2 of the DVA to be complied with at the scenes of crimes or upon receiving reports of domestic violence incidents. These duties include the duties to inform domestic violence victims of their rights to press charges and to obtain protection orders by handing them a notice as well as assisting them in finding shelter or medical attention if the circumstances should necessitate it and if reasonably possible to do so.⁷² The Amendment Bill proposes the addition of a section 2A to enhance the provision of services to domestic violence victims, including the duties of medical practitioners, health service providers, social workers, caregivers, teachers, officials employed in government at public health establishments and providing education. This seems to be a very appropriate and necessary amendment, since these abovementioned services are vital to the protection of victims from abuse and secondary victimisation as well as recovering from the overwhelmingly negative effects of both.

Three primary functions of the police apart from service delivery include the registering of complaints, providing information to complainants and following up on laid complaints.⁷³ Section 2(a) provides that members of the police must “if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice”. This shows the type of phrasing that the Western Cape Government has criticised, since it might have more effect if it was phrased “must hand a notice to the complainant explaining his/her rights” and “must explain those rights and, if reasonably possible, in the language of the complainant's choice”. The mandatory provisions of the DVA, like the aforementioned example, provide for a certain amount of discretion for members of the police when executing their obligations in terms thereof. The DVA phrases obligations in the

⁷² DVA Section 2.

⁷³ Western Cape Government “Effective implementation of the Domestic Violence Act workshop” 7.

manner of stating “if reasonably possible to do so”, but critique by the Western Cape Government suggests that this kind of discretion is too wide. The replacement of such wording with “must do” could ensure greater effectivity and emphasise the importance to members of the police of the duties that are entrusted to them.⁷⁴ It would then be more readily possible to hold members of the police, who do not follow such mandatory provisions, accountable in terms of the DVA and impose certain measures of punishment on them.⁷⁵ It seems that this approach would also be in line with the spirit and aims of the DVA, since quality service and the maximum protection of victims is stated as being important to the government in the preface of the DVA. The duties placed on members of the police in terms of the DVA are positive legal duties, but the way in which they are prescribed in terms of phrases such as “if reasonably possible to do so” do not display the same strength as is displayed by the creation and existence of the legal duties themselves.

The DVA imposes two different types of obligations, being both administrative and relating to the standard of treatment of domestic violence victims by the police.⁷⁶ The helping of victims to obtain certain social and medical services such as shelter and medical treatment as well as the collection of personal items from their residences involve the manner in which victims should be treated during the course of investigations. Domestic violence victims should receive psychological support as well as treatment for any injuries they may have suffered. This indicates that a compassionate standard of care must be upheld in order to affirm the dignity and humanity that a victim may very well have lost to an extent due to the abuse they have suffered. These services are very important, because it is by way of providing these services efficiently that women will not be victimised in the process of the investigation of a case itself. The investigation of a case itself involves the administrative duties of members of the police, which include serving protection orders and notices on alleged abusers to appear in court, arresting alleged abusers who have allegedly breached protection orders or committed crimes, seizing weapons from alleged abusers and

⁷⁴ Western Cape Government “Effective implementation of the Domestic Violence Act workshop” 6 16.

⁷⁵ See footnote 51.

⁷⁶ L Vetten et al “The Right and the Real: A Shadow Report Analysing Selected Government Departments’ Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act” 19.

maintaining records of reports of domestic violence incidents in a prescribed manner.⁷⁷ These duties relate to the quality of investigations of alleged domestic violence offences and creates the impression that investigation should be done thoroughly. These two different categories of duties can however not be separated from one another and have to be executed with efficiency simultaneously in order for a victim to be served in all aspects.

2 1 2 Shelter provision

The duty to advise complainants about shelter provision is critical, since it has far reaching implications with regards to the safety of victims and whether they stay with an abuser or are able to flee to alternative accommodation. Shelters can greatly reduce the risk of victims returning to abusive homes or becoming homeless by providing them with access to safe and secure accommodation. This also underlines the importance of having functional shelters in operation. The availability of social and psychological support at shelters reduces the likelihood of victims engaging in self-destructive actions. These kinds of emotional and mental measures of support along with training programmes and other resources can also assist victims in finding employment and building lives for themselves after the abuse they have endured. The provision of shelters is important, not only because of the fact that shelters offer immediate relief to victims in many respects, but also because they have an influence on the future. The risk of perpetuating cycles of abuse is reduced by the provision of support for children who have been exposed to violence and provision of information to victims about their rights to protection.⁷⁸ Shelters in South Africa operate under severe capacity and human resource constraints. Proper and effective coordination of services for domestic violence victims with actors in the criminal justice system is also necessary.⁷⁹

It is useful to look at how this duty has been adhered to in the past in order to fully grasp what the best way to respond thereto ought to be. Members of the police have been reported to respond unhelpfully to domestic violence victims who were looking

⁷⁷ L Vetten et al "The Right and the Real: A Shadow Report Analysing Selected Government Departments' Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act" 14.

⁷⁸ K Stone & Lopes C "Policing Responses to Domestic Violence: Exploring reactions by the police to women in need of shelter" 5.

⁷⁹ K Stone & Lopes C "Policing Responses to Domestic Violence: Exploring reactions by the police to women in need of shelter" 5.

for assistance to find shelter. These negative responses have been due to a lack of knowledge about the obligation on the members of the police to provide advice and information about the availability and possibility of alternative shelter, a lack of good phone connections to the police services, a lack of familiarity of members of the police with local shelters to refer victims to, providing victims with outdated information with regard to shelters, not returning calls to meaningfully assist with the queries of victims, setting conditions for victims before help would be offered such as requiring personal information, or referring victims to social workers instead.⁸⁰ Members of the police are obliged to assist victims, to provide the contact details of local shelters in a specific area or the contact information of other non-profit or social services organisations in an area or in extreme cases allow victims to spend a night in a police station's trauma room until a member of the police has managed to find alternative accommodation.⁸¹ The availability of shelter services to victims of domestic violence, if expanded and funded to a greater extent by the state, will make it possible for victims who do not necessarily wish to press charges to also find safe accommodation and possibly upliftment by means of information and education.⁸² Extended provision of housing under the Reconstruction and Development Programme (RDP) by the state, could empower women in particular, by reducing the number of women dependent on abusive partners for shelter. One of the reasons why victims do not report or withdraw domestic violence matters is also connected to the fear of losing the little support they get from their abusers.⁸³ This will also make more remedies possible for a victim to possibly have access to, such as common law eviction orders. This approach would be in line with the main goal of the DVA implicit in these provisions, namely to provide victims of domestic violence with maximum protection that the law can provide.⁸⁴ It is clear that this standard of the provision of advice, guidance and information in terms of shelter set by the DVA aims to contribute to the protection of a victim from any further harm after they suffered abuse. Members of the police should endeavour

⁸⁰ K Stone & Lopes C "Policing Responses to Domestic Violence: Exploring reactions by the police to women in need of shelter" 11 22.

⁸¹ K Stone & Lopes C "Policing Responses to Domestic Violence: Exploring reactions by the police to women in need of shelter" 13 20.

⁸² S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 70.

⁸³ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 70.

⁸⁴ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 71.

to provide victims with meaningful assistance in order to make access to shelter possible without exhibiting negative attitudes while doing so. This standard also implies that a victim should not suffer from negative responses and secondary victimisation which may follow, when in search of help from the police, in this instance specifically for help in the form of assistance to secure alternative shelter.

2 1 3 Arrest of perpetrators

In order to protect domestic violence victims from abuse by means of arresting alleged perpetrators, police officers are obliged to arrest such alleged perpetrators with and without warrants of arrest in certain sets of circumstances.

A police officer must arrest an alleged perpetrator of domestic violence without a warrant in terms of section 3 of the DVA on a scene of domestic violence if it is reasonably suspected that an act of violence was committed. The arrest of an alleged perpetrator in terms of section 3 of the DVA at the scene of an incident of domestic violence is possible if a police officer reasonably suspects that the respondent has committed an act of domestic violence containing an element of violence against the complainant. The arresting officer may rely on section 40(1)(q) of the Criminal Procedure Act 51 of 1977 (the “CPA”) as well, which provides for an arrest without a warrant where an act of domestic violence with an element of violence was committed. In terms of this provision, if the conduct committed by the respondent does not contain an element of violence, an arrest may not follow even if conduct complained of is prohibited in the protection order. The police officer must then issue a warning to appear in court to the respondent. If an act of domestic violence does not involve any physical violence, for instance, emotional abuse, no lawful arrest may follow. In *Kruger v Minister of Police*⁸⁵ the court confirmed the viability of an arrest without a warrant in domestic violence cases, but stated that emotional abuse as a ground for an arrest did not suffice because it did not contain an element of violence.⁸⁶ In *Langa v Minister of Police and Others*⁸⁷ the court held that an arrest for an “assault by threat” was justified under section 3 of the DVA read with section 40(1)(q) of the CPA.⁸⁸ The court stated that since domestic violence is a broad concept it might be misleading, but an

⁸⁵ 2016 7K6 QOD 223 (GNP).

⁸⁶ *Kruger v Minister of Police* 2016 7K6 QOD 223 (GNP) paras 17 19.

⁸⁷ 2014 (GP) 30355/2010.

⁸⁸ *Langa v Minister of Police and Others* 2014 30355/2010 (GP) paras 19, 61.

arrest may not be effected wherever the committed conduct merely fits within the definition of domestic violence without the presence of violence.⁸⁹ The Amendment Bill advocates to remove the requirement of violence in this respect in order to make an arrest without a warrant on the basis of any offence reasonably suspected of being committed possible.⁹⁰ This seems to be a prudent amendment, since other offences which do not necessarily include violence, like emotional and verbal abuse, can possibly be the indicators of dormant imminent violence approaching.

A member of the police is obliged to arrest an alleged perpetrator in terms of a warrant of arrest in terms of section 8 of the DVA. The procedure involved in such an arrest is initiated by an alleged breach of a protection order having occurred and the suspended warrant of arrest issued together with the final protection order then comes into operation. A complainant must make an affidavit stating that the respondent has contravened some term contained in the protection order. In *Khanyile v Minister of Safety and Security and Another*⁹¹ the actions of the members of the police involved caused the Minister to be held vicariously and delictually liable for effecting an arrest before the complainant had made the required affidavit. A police officer must exercise discretion to evaluate such affidavit's strength before proceeding to effect the arrest. It is very important that police officers should understand and have insight into the specific dynamics involved in domestic violence offences. There are three requirements to be met in section 8(4)(a) of the DVA in order for an arrest to thus be valid: a valid protection order, a warrant of arrest and the proper exercise of discretion on the basis of the statements provided.⁹²

Section 8(4)(b) provides guidelines to follow before effecting an arrest. An arrest in terms of a warrant may only follow if there are reasonable grounds to suspect that the complainant may suffer harm which is imminent. Examples of what is considered as imminent harm follows below. If imminent harm is not present then the police officer must hand a notice to appear in court instead to the respondent in terms of section 8(4)(c). Factors to consider in order to determine whether harm may be called imminent are outlined in section 8(5) of the DVA and should be read with section 8(4)(b)

⁸⁹ *Langa v Minister of Police and Others* 2014 30355/2010 (GP) paras 55 56.

⁹⁰ Amendment Bill Section 3.

⁹¹ 2012 2 SACR 238 (KZD).

⁹² *Seria v Minister of Safety and Security and Others* 2005 5 SA 130 (C) para 144; S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 118.

of the DVA. These factors include the risk to the safety, health or wellbeing of the complainant, the seriousness of the conduct which resulted in an alleged breach of the protection order and the length of time since the alleged breach occurred. It was confirmed in the case of *Dlamini v Minister of Safety and Security*⁹³ that there is no duty on a police officer to conduct a thorough investigation of all facts before effecting an arrest, but there must be a reasonable suspicion which is relied on for this discretion to be exercised properly.⁹⁴

The concepts “reasonable grounds”, “reasonable suspicion” and “imminent harm” are not defined in the DVA, even though factors which may determine the presence of imminent harm are listed as outlined above. These are, however, common terms in law, including criminal law and the consideration of reasonableness in criminal procedure and it is assumed that they retain their usual meanings⁹⁵ Reasonableness is interpreted as relating to the reasonable person’s standards. A suspicion can be regarded as reasonable if a reasonable person in the arresting officer’s position and possessing the same information would have considered that there are sufficient grounds for suspecting that the complainant may suffer imminent harm.⁹⁶ A reasonable suspicion must furthermore also be objective in order that it would be possible for any reasonable person to draw the suspicion in question.⁹⁷ Factors which may influence reasonable observations include the alleged abuser being under the influence of liquor or narcotics, that the complainant has already been assaulted or the fact that the complainant escaped before grievous harm was inflicted after such attempt, would point a reasonable person towards the conclusion that harm is indeed imminent.⁹⁸ Imminent harm plainly means that harm is certain and about to follow.⁹⁹ Imminent harm has also been described as a danger of harm which is nearby and

⁹³ 2016 2 SACR 655 (GJ).

⁹⁴ *Dlamini v Minister of Safety and Security* 2016 2 SACR 655 (GJ) para 19.

⁹⁵ Criminal Procedure Act 51 of 1977 Section 22(b).

⁹⁶ *Seria v Minister of Safety and Security and Others* 2005 5 SA 130 (C) para 145G “(t)he reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest”.

⁹⁷ *Greenberg v Gouws and Another* 2011 2 SACR 389 (GSJ).

⁹⁸ S Sibisi “Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa” 120.

⁹⁹ *Greenberg v Gouws and Another* 2011 2 SACR 389 (GSJ) para 397H; S Sibisi “Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa” 119 120.

about to happen in the very near future.¹⁰⁰ In *Greenberg v Gouws and Another*¹⁰¹ the court held that the arrest of the plaintiff was unlawful because there was no reasonable suspicion that harm on the complainant was imminent. The alleged incident had taken place three days prior to the arrest in this case and the offending words that were uttered by the plaintiff were not directed to the complainant but to her sister. The court held that at the time of the arrest there was no reasonable ground to form a suspicion that the complainant would suffer harm if an arrest on the plaintiff is not effected. The court also noted that the three-day delay before approaching the police pointed to the harm not being quite imminent, in terms of how the word is supposed to be understood.¹⁰² In *Mohlabeng v Minister of Safety and Security*¹⁰³ the court held that there were no reasonable grounds to suspect that the complainant might suffer imminent harm when available evidence showed that the complainant was the one who had assaulted the respondent.¹⁰⁴

The attitudes of police officers once again become important, since they are the ones who exercise the discretion when evaluating a set of facts and the imminence of harm which may be displayed therein. This exercise of discretion may more than often be vital for the protection of domestic violence victims. These attitudes, such as the notion that domestic violence does not readily merit arrest, might complicate the exercise of this discretion to the disadvantage of the victim who might face imminent harm and should be protected. Due to the factor of society's patriarchal influences playing a substantial role in the complexities of exercising such discretion it might be useful to re-evaluate the reasonable person standard so as to include the lived realities and experiences of women as domestic violence victims.

2 1 4 Court orders

A court has certain powers in terms of section 7 of the DVA in order to make certain orders and the conditions in respect of a protection order orders of court. The court may grant the police powers in the furtherance of the health and safety of a

¹⁰⁰ *Kruger v Minister of Police* 2016 7K6 QOD 223 (GNP) para 9.

¹⁰¹ 2011 2 SACR 389 (GSJ).

¹⁰² *Greenberg v Gouws and Another* 2011 2 SACR 389 (GSJ) paras 398G-I; S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 121.

¹⁰³ 2008 TPD 24796/05.

¹⁰⁴ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 122.

complainant, which include the seizing of firearms of a respondent, accompanying a complainant to a shared home to collect personal belongings, ordering the payment of interim monetary relief be paid to a complainant and ordering arrangements with regard to access to children.

2 1 4 1 Protection orders

A protection order is a court order granted in terms of section 6(1) to 6(4) of the DVA which sets conditions for an abuser to act in accordance with in order to prevent further abuses from occurring in the future. Presently protection orders are applied for at magistrates' courts by victims by means of affidavits containing allegations of abuses suffered. The Amendment Bill advocates for the possibility of applying for protection orders online in addition to doing so in person.¹⁰⁵ An interim protection order is granted on the basis of prima facie evidence that abuses of a complainant have occurred. This interim protection order is then served on a respondent after it has been granted. A hearing is scheduled where a respondent is called on to appear and is able to adduce evidence contradicting the allegations of abuse. In case of a respondent not attending or failing to provide a court with any explanation or evidence to the contrary, the protection order is made final and thus an order of court. Due to the nature and construct of a protection order, it is thus dealt with by a court as an offence of contempt of court when the breaching of a condition of a protection order takes place.¹⁰⁶

If an abuser contravenes conditions of a protection order, they can be criminally charged and found guilty of contravening section 17 of the DVA. There is no separate crime defined as domestic violence, only breaching this section of the DVA by means of breaching a specific condition or conditions contained in a protection order. Other offences might be committed in contexts of domestic or intimate partner violence, without amounting to a breach of a protection order. A victim may choose between laying one of the different types of criminal charges that exist, including common assault, assault with the intent to do grievous bodily harm, pointing of a firearm, malicious injury to property, intimidation, rape and attempted murder, without applying for a protection order, or choose to do both.¹⁰⁷ In terms of the above, it is clear that a

¹⁰⁵ Amendment Bill Section 4(5).

¹⁰⁶ DVA Sections 6, 17.

¹⁰⁷ L Vetten "Domestic violence in South Africa" 2.

victim must remain central to the criminal justice system and specifically, the police's process and make certain choices with regard thereto.

2 1 4 2 Seizure orders

A court may order a member of the police to seize a firearm or dangerous weapon of an alleged perpetrator of domestic violence in terms of section 9 of the DVA, if a court is satisfied on evidence before it, that an alleged perpetrator has threatened to harm or kill any person, including the complainant or themselves. It has been suggested that a court must be able to declare a respondent or alleged perpetrator of domestic violence unfit to possess a firearm together with the issuing of a protection order.¹⁰⁸ Section 9(2) of the DVA assigns the ability to make such declarations to the National Commissioner of the SAPS, which may cause delays instead of a court being able to make such order simultaneously with issuing a protection order. When applying section 103 of the Firearms Control Act ("the FCA"), to declare a convicted person unfit to possess a firearm, a court must consider the nature and seriousness of an offence, the connection that the offence has with the use of a firearm and the interest of the community.¹⁰⁹ One can clearly see how these considerations could be present in domestic violence cases due to the presence of violence, aggression and the use of weapons in the commission of such offences. Research has confirmed that firearms are frequently used as a means to threaten victims in domestic violence offences, although it unfortunately does not prompt a court to commence with an inquiry in terms of section 102 of the FCA and section 9(1)(a) of the DVA in such cases. There is furthermore not much research on whether courts or Police Commissioners follow matters up in terms of these provisions in any event.¹¹⁰ Section 103(1) of the FCA states that a person convicted of contravening a protection order and sentenced to imprisonment without the option of a fine is automatically declared unfit to possess a firearm unless they lead evidence as to why such a declaration should not be upheld. Members of the police should thus also be mindful of and consider the potential danger involved in situations where domestic violence victims are possibly exposed to firearms.¹¹¹ Making a declaration of unfitness to possess a firearm a preventative

¹⁰⁸ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 96.

¹⁰⁹ *S v Rasena* 2017 (1) SACR 565 (ECG).

¹¹⁰ P Parenzee et al "Monitoring the Implementation of the DVA: First Research Report" 61.

¹¹¹ D Smythe "Missed opportunities: confiscation of weapons in domestic violence cases" 19, 21.

measure where an alleged perpetrator has access to firearms could give victims of domestic violence greater legal protection from potentially volatile and violent situations and prevent serious injury to and death of victims. The need for orders related to the seizure of dangerous weapons or firearms to be made should indicate to a court that an alleged abuser has an inclination to possess weapons and the DVA should empower a court to consider a declaration of unfitness to possess firearms at such time as well. Without such provision being made, victims are likely to be more at risk of harm, because an alleged abuser will be able to simply acquire new firearms upon the seizure of their firearm until the National Commissioner makes a negative finding.¹¹²

In line with an approach of preventative measures being taken in respect of the possession of firearms by alleged abusers, the need for protection of victims necessitates that the order for the confiscation of a firearm should be made at the interim stage of a protection order already and not only when the final protection order is granted. Such a mechanism will not be arbitrary, since a respondent will be able to argue why their firearm should not be confiscated along with why a final protection order should not be granted against them.¹¹³ It is not always simple to enforce orders relating to the confiscation of an alleged abuser's firearm, since they are able to simply deny the assertion by a victim that they do have a firearm in the absence of a licence to possess one. The possession of such licence, on the other hand, usually indicates that an alleged perpetrator most likely does have a firearm. A victim is also usually unable to assist the court because of the inability to provide particulars in relation to a firearm an alleged abuser possesses.¹¹⁴ Victims generally do not request courts to make orders for the confiscation of firearms in their applications for protection orders, but simply mention the use of firearms by alleged abuser in passing in the affidavits contained in such applications.¹¹⁵

The Amendment Bill advocates for the consideration that an alleged perpetrator's need for a weapon in their employment should not be a factor and that this section

¹¹² S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 96.

¹¹³ D Smythe "Missed opportunities: confiscation of weapons in domestic violence cases" 21.

¹¹⁴ P Parenzee et al "Monitoring the Implementation of the DVA: First Research Report" 64.

¹¹⁵ P Parenzee et al "Monitoring the Implementation of the DVA: First Research Report" 19; S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 97.

should provide for the seizing of any weapon and not only firearms.¹¹⁶ These proposed amendments seem to be in the furtherance of protection of domestic violence victims from violent partners, although a violent partner can obviously be violent without any weapon as well. This mechanism, which allows courts to make orders such as the above, illustrates that the DVA aims to protect victims from further violence and abuses occurring.

2 1 5 Addressing non-compliance

The aim of the DVA to provide maximum protection to domestic violence victims also implies that when protection is not offered, some mechanism must be able to offer some correction or retribution to victims who suffered such failure of protection. Compliance of members of the police with the DVA have been measured more by numbers than by quality of service provided. This can be seen in the focus placed on the quantity of attendees of training sessions and workshops and not the quality of such training.¹¹⁷ Section 18(4)(a) of the DVA provides that a member of the police is guilty of misconduct in terms of the SAPS Act if they do not fulfil their duties in terms of the DVA and must be reported to the Independent Complaints Directorate (“IPID”). The Amendment Bill proposes to change the body to which misconduct is to be reported to the Civilian Secretariat for the Police (“CSP”) and that such reporting should be done immediately.¹¹⁸ Disciplinary consequences may then follow for a non-compliant member.

2 2 The National Instruction on Domestic Violence

The National Instruction¹¹⁹ was created in order to provide clear guidelines to members of the police upon receipt of domestic violence complaints so that they would be able to handle them in a way that would be compliant with the obligations imposed on them in terms of the DVA. Because the National Instruction was created due to the existence of the DVA, it is quite expected and understandable that the National Instruction in section 2 thereof defines the types of abuse and domestic relationships as widely as and greatly similar to the way in which the DVA does.¹²⁰

¹¹⁶ Amendment Bill Section 9(1),(2),(3).

¹¹⁷ Western Cape Government “Effective implementation of the Domestic Violence Act workshop” 7.

¹¹⁸ Amendment Bill Section 19(2).

¹¹⁹ National Instruction on Domestic Violence 7/1999.

¹²⁰ National Instruction on Domestic Violence 7/1999

2 2 1 General assistance

The reporting of an incident of domestic violence must be followed by the SAPS dispatching a vehicle so that assistance may be offered as soon as reasonably

"[Section] 2. Definitions

In this instruction, unless the context otherwise indicates, -

complainant means any person who is or has been in a domestic relationship with another person and who is alleged to be or to have been subjected by such other person (hereinafter referred to as the respondent) to an act of domestic violence and includes any child in the care of the complainant;

domestic violence means any one or more of the following forms of conduct performed by a respondent in respect of a complainant which consists of:

- (a) **physical abuse**, consisting of any act or threatened act of physical violence;
 - (b) **sexual abuse**, consisting of conduct that abuses, humiliates, degrades or violates the sexual integrity of the complainant;
 - (c) **emotional, verbal and psychological abuse**, consisting of a pattern of degrading or humiliating conduct which may consist of —
 - repeated insults, ridicule, or name calling;
 - repeated threats to cause emotional pain; or
 - the repeated exhibition of obsessive possessiveness or jealousy which is such as to constitute a serious invasion of the privacy, liberty, integrity or security of the complainant;
 - (d) **economic abuse**, which may consist of —
 - the unreasonable withholding of economical or financial resources from a complainant who is legally entitled thereto or which the complainant requires of necessity, including the withholding of household necessities from the complainant or refusal to pay mortgage bond repayments or rent in respect of the shared residence; or the unreasonable disposal of household effects or other property in which the complainant has an interest
 - (e) **intimidation**, by uttering or conveying a threat or causing the complainant to receive a threat which induces fear;
 - (f) **harassment**, consisting of a pattern of conduct which induces fear of harm to the complainant, including repeatedly —
 - watching or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
 - making telephone calls to the complainant, whether or not conversation ensues, or inducing another to do so;
 - sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;
 - (g) **stalking**, by repeatedly following, pursuing or accosting the complainant;
 - (h) **damaging of property**, consisting of the wilful damaging or destruction of property belonging to a complainant or in which the complainant has a vested interest;
 - (i) **entry into the residence** of the complainant without consent where the parties do not share the same residence; or
 - (j) **any other controlling or abusive behaviour** towards a complainant where such conduct harms, or may cause imminent harm to the safety, health or well-being of the complainant;
- domestic relationship** means a relationship between a complainant and the respondent where they –
- (a) are or were married to each other in terms of any law, custom or religion;
 - (b) live or lived together in a relationship in the nature of a marriage (whether they are of the same or of the opposite sex);
 - (c) are the parents of a child or have or had parental responsibility for the child (whether or not at the same time);
 - (d) are family members related by consanguinity, affinity or adoption;
 - (e) are or were in an engagement, dating or customary relationship: including an actual or perceived romantic, intimate or sexual relationship of any duration; or
 - (f) share or recently shared the same residence;
- residence** also institutions for children, the elderly and the disabled; and
- respondent** means any person who is or has been in a domestic relationship with a complainant and who allegedly commits or has committed domestic violence against the complainant".

possible to do so in terms of section 4 of the National Instruction. This sets a standard for providing efficient assistance without delay and with concern for a victim's interests.

The responsibilities of SAPS members are set out in section 5 of the National Instruction. These responsibilities include determining whether a complainant is in danger upon arrival on a scene of an alleged domestic violence incident and taking all reasonable steps to secure the scene and protect the complainant.¹²¹ A member of the police must assist the complainant as reasonably required in the circumstances, which include making arrangements regarding shelter and medical treatment.¹²² A member of the police must investigate and gather all evidence in respect of the alleged domestic violence incident.¹²³ The complainant must be located on such scene, separated from the alleged perpetrator and the complainant's safety must be ensured.¹²⁴ A complainant must receive a notice from a member of the police in order to explain the options of laying criminal charges or applying for a protection order.¹²⁵ The laying of a criminal charge by the complainant must be followed by a member of the police opening a docket and registering it for investigation without avoiding doing so by directing the complainant to alternative measures such as conciliation.¹²⁶ This provision seems to be able to assist in preventing secondary victimisation in practice, because the misdirection of matters is to be avoided and efficiency in handling complaints is motivated. The allowance of domestic violence victims to lay charges instead of convincing them not to do so is more desirable and in the furtherance of their protection from secondary victimisation, because it affirms their voices and their dignity when they are empowered to assert that the abuse they went through were indeed wrong and criminal acts.

Members of the police are also granted powers to seize firearms from and arrest alleged perpetrators without warrants in certain circumstances in order to ensure the safety of complainants.¹²⁷

¹²¹ National Instruction Section 5(1).

¹²² National Instruction Section 5(2)(c).

¹²³ National Instruction Section 5(2)(d).

¹²⁴ National Instruction Section 6.

¹²⁵ National Instruction Section 10.

¹²⁶ National Instruction Section 7.

¹²⁷ National Instruction Section 11.

2 2 2 *Access to social services*

In the executing of the obligation by members of the police to direct complainants to service providers, every police station's Commissioner must have a compiled list of medical and social services which can be offered to complainants in terms of section 3 of the National Instruction. This displays a clear standard of treating victims in a respectful and helpful manner. A member of the police must provide a complainant with access to alternative shelter and medical attention, if necessary, in terms of sections 8 and 9 of the National Instruction, respectively. An essential function and effect of section 8 is that it obliges the police to find suitable shelter, to plan for the complainant to find suitable shelter or to coordinate transport services to shelters. The processes involved in finding suitable shelter and medical care for victims of domestic violence require victims or their families or friends to bear transport expenses to a shelter and to be transported to a place of medical treatment by ambulance. Only in exceptional cases, as a last resort and when it is reasonably possible will a police van or other state vehicle be used for the transport of victims to places where they can receive medical attention. In such case victims will be transported at own risk in the state vehicle, which the member of the police driving the vehicle should explain to the victims. This limitation of transport of victims to places where medical attention can be offered to them exists because police vehicles are not necessarily designed to carry patients, members of the police are not necessarily knowledgeable about providing the necessary or emergency medical assistance to injured victims and these members have to attend more readily to criminal matters falling within their job description and mandates than those within the scope of the health department.¹²⁸ Section 8(3) requires any assistance rendered to complainants to be recorded in the Occurrence Book or Pocket Book called SAPS 206. There is also an obligation connected hereto to document actions associated with this duty, which would mean that in theory at least, it should be evidenced that police obligations are either being fulfilled or neglected. This would make it possible to monitor non-compliance and subsequently apply necessary corrective measures, such as disciplinary action against a member of the police.

¹²⁸ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 69 71.

Failure to comply with section 8 constitutes a serious form of misconduct under the SAPS Act, and can consequently cause a set of penalties being imposed upon individual members of the SAPS. Recent reports from the CSP, however, indicate that it appears that incidents of non-compliance with section 2 of the DVA and section 8 of the National Instruction are excluded from monitoring processes, which raises additional questions about the thoroughness of the CSP's monitoring processes in terms of the DVA.¹²⁹

2 2 3 Record-keeping

A record of all reported domestic violence incidents must be kept in terms of section 12 of the National Instruction. Even though domestic violence is not entirely a separate crime, the National Instruction obliges the SAPS to record all reported incidents of domestic violence in the Domestic Violence Register, called the SAPS 508(b), which is supposed to be submitted by the station commander to the area commissioner and eventually to the provincial commissioner on a monthly basis. Compliance with the National Instruction is still very low, as is demonstrated by the CSP's recent DVA monitoring in 2018, which found that only 61% of police stations maintain such Registers.¹³⁰ These forms are not completed fully or properly and while an emphasis remains on physical violence only, cases are not being adequately investigated and followed up on. The approach of checking compliance seem to be more on the fact that forms are being filled in (although that is seemingly not done properly either) than it is on the services which should be offered before the duty concerning the documenting of it arises. The Western Cape Government recommended that the SAPS 508 should be utilised more effectively in order to ensure compliance. It seems to be suggested that a more thorough and extensive form could ensure better compliance and motivate more in-depth investigation. Possible amendments to the form would include a section where a complainant could sign the form in addition to that of the applicable member of the police, verifying that the complainant has been informed of their rights under the DVA, noting whether the alleged perpetrator is in possession any dangerous weapon and whether the complainant wishes it to be

¹²⁹ K Stone & Lopes C "Policing Responses to Domestic Violence: Exploring reactions by the police to women in need of shelter" 6.

¹³⁰ Civilian Secretariat of Police Services "Domestic Violence Report No 11: October 2017-March 2018" (2018) PowerPoint presentation to Portfolio Committee of Police 28-29 August 2018 7.

seized as well as a section to indicate whether the complainant is a disabled person or a child in need of care and protection.¹³¹ The CSP monitors incidents of non-compliance through station visits but a clear reporting channel for non-compliance complaints does not exist for community members. The Western Cape Government suggests that there is a need for a compliance Forum and Standard Operating Procedure (SOP) to address the accessibility for the public to inform the CSP of non-compliance by police stations or officials. This could potentially ensure that undocumented complaints which would not have come to light in any other way are addressed. According to the Western Cape Government, consequences for non-compliance by members of the police should also be more severe as they are currently not serving as a deterrence.¹³²

2 2 4 Addressing non-compliance

The DVA in section 18 creates a framework and basis for accountability which has direct bearing on the National Instruction. There is an absolute reliance on the Police Commissioner to issue national instructions to place duties on members of the SAPS when they deal with domestic violence cases.¹³³ Non-compliance of members of the police with the obligations imposed on them are investigated and disciplinary consequences may follow, as is the case in terms of the DVA. Section 13 of the National Instruction provides that a member of the police who does not comply with these obligations must face disciplinary proceedings. Non-compliance with legislative obligations by members of the police could include the failure to advise complainants of their options, the failure to assist complainants to open cases, the failure to refer victims to places of safety, and the failure to serve protection orders.¹³⁴ A record must also be kept of all complaints against members of the police in violation of these obligations in terms of section 14 of the National Instruction.

Without these duties being created by the National Instruction, it greatly diminishes the necessary oversight on police activity and ensuring that compliance with standards takes place.

¹³¹ Western Cape Government “Effective implementation of the Domestic Violence Act workshop” 7 8.

¹³² Western Cape Government “Effective implementation of the Domestic Violence Act workshop” 19.

¹³³ H Combrinck & Wakefield L “Training for Police on the Domestic Violence Act” 11.

¹³⁴ Parliamentary Monitoring Group “Domestic Violence Act: Independent Complaints Directorate reports for 2009” 1.

2 3 The Service Charter for Victims of Crime

The chief aims of the Service Charter are to eliminate secondary victimisation in the criminal justice process, ensure that victims of crime remain central to the criminal justice process, clarify the service standards that can be expected by victims when they interact with the criminal justice system and make provision for victims' recourse when standards are not met by role-players in the criminal justice system.¹³⁵

The Service Charter affords victims certain rights in the process of the investigation of their cases. These rights include the right to be treated with fairness, respect for dignity and privacy.¹³⁶ This right is expanded on further in the Minimum Standards for the Service Charter ("Minimum Standards") in respect of how members of the police specifically should protect this right of victims.¹³⁷ The reporting of a crime to the police should be followed by the police investigating such crime and reverting to the victim as soon as possible in respect of such investigation.¹³⁸ The police should take measures to minimise any inconvenience to a victim and take a statement from the victim as well as complete the forms necessary to register the crime.¹³⁹ Police officers must refer victims to medical attention or counselling if required in the circumstances.¹⁴⁰ Victims of sexual violence should be interviewed in private by a member of the police.¹⁴¹ Victims should be interviewed in a language that they understand or by means of an interpreter and should be able to choose that a member of the police who is of the same sex as themselves should conduct the interview.¹⁴²

¹³⁵ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" (2004) <<https://www.justice.gov.za/vc/docs/vcms/vcms-eng.pdf>> (accessed 12-05-2020) Preamble 5.

¹³⁶ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim of crime 6 9 1-7.

¹³⁷ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 16 Part III 1.

¹³⁸ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 Part III 1.2,1.3.

¹³⁹ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 Part III 1.4,1.5.

¹⁴⁰ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 Part III 1.6.

¹⁴¹ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 Part III 1.7.

¹⁴² Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 Part III 1.8,1.9.

A victim has the right to be attended to professionally and timeously and to be treated with respect for their dignity and privacy by all persons providing a service to the victim.¹⁴³ The police must during investigations, together with all other service providers down the line (for example prosecutors and court officials), take measures to minimise any inconvenience to a victim.¹⁴⁴ A victim has a right to offer information, which members of the police should take into account while investigating and dealing with the victim's matter.¹⁴⁵ A victim should be consulted throughout the process and be included in the decisions which are made by members of the police.¹⁴⁶ A victim has the right to receive information and should be informed of their rights and how to exercise them.¹⁴⁷ Information should be provided in a language of choice by all service providers a victim comes into contact with throughout the criminal justice process.¹⁴⁸ A victim should be informed of all progress or lack thereof and reasons for certain decisions being made concerning their case.¹⁴⁹ Victims have the right to protection and should not be intimidated, harassed, bribed, corrupted or abused.¹⁵⁰ The police must facilitate a witness protection programme for victims who face such threatening situations.¹⁵¹ Although the way this standard is phrased seems to refer to the context in which an abuser would be the one perpetuating these kinds of threats and manipulations, it sets a clear standard for all who come into contact with the victim of a crime, including the police themselves.

¹⁴³ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 Part III 16 1.1.-1.31; Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 6 1.

¹⁴⁴ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 Part III 1.4.

¹⁴⁵ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" Part III 16 17 2.1-2.7.

¹⁴⁶ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" Part III 16 17 2.3-2.7.

¹⁴⁷ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 7 3.

¹⁴⁸ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 12 22 Part III 1.8-3.26.

¹⁴⁹ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 19 20 Part III 3.1-3.4

¹⁵⁰ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 7 4.

¹⁵¹ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 7 4.

Victims have the right to be assisted and to have access to social, health and counselling services as well as to legal assistance.¹⁵² Members of the police should inform victims of these rights and refer victims to these relevant service providers.¹⁵³ Social service providers must, where possible and available, provide victims with counselling and practical support, make available social service providers or probation officers, help them with the contacting of family members or friends, assist with the experience of symptoms of post-traumatic stress, explain the process that will be followed, help in communicating with the SAPS and prosecutor, refer victims to a professional counselling service if traumatic response is profound and provide access to information and services, including support with regards to the court process.¹⁵⁴ The sensitive manner in which victims are to be treated includes obtaining an interpreter of their language to make them feel at ease.¹⁵⁵ Victims have the right to compensation for loss or damage to property suffered as a result of crimes committed against them.¹⁵⁶ This right is more important in the context of the court process where sentencing can be done in such a way as to include compensation orders in favour of a victim. Victims have a right to restitution in cases where they were unlawfully dispossessed of goods or property or where goods or property have been damaged unlawfully.¹⁵⁷ This is also an aspect important in the context of the court process. Complaints by victims may involve the ways in which they have been treated, the information they have received or the decisions that have been made with regard to their cases.¹⁵⁸ Non-compliance with the Service Charter by government departments or officials can be investigated by a number of different service providers or

¹⁵² Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 8 5.

¹⁵³ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 8 5.

¹⁵⁴ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 28 Part III 5.19-5.21.

¹⁵⁵ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 8 5.

¹⁵⁶ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 8 5.

¹⁵⁷ Department of Justice and Constitutional Development "Service Charter for Victims of Crime in South Africa" Your rights as a victim 9 7.

¹⁵⁸ Department of Justice and Constitutional Development "Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa" 32 Part IV a-c.

institutions.¹⁵⁹ These include the station commissioner of a police station, the Office of the Public Protector, the South African Human Rights Commission, the Commission on Gender Equality, the ICD, Metropolitan Police Offices, the Health Professions Council of South Africa or a lawyer. The Service Charter should be present at the offices of various role-players in the criminal justice system. These offices include courts, the Department of Correctional Services, Directors of Public Prosecutions, prisons, police stations and investigation units, social services or agencies, Metropolitan Police Service offices and public health facilities.¹⁶⁰

The fact that victims are provided with rights that they are entitled to as well as channels through which they are able to report violations of these rights as measure of recourse suggest that the Service Charter is legally enforceable to an extent.

The Conceptual Framework defines the term “victim” as any person who has suffered any kind of harm, including physical, mental or emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions in violation of the country’s criminal law. A victim can also be an immediate family member or dependent of the direct victim in terms of the Conceptual Framework. A person is defined as a victim regardless of the identification, apprehension, prosecution or conviction of a perpetrator and regardless of any familial bond between a victim and perpetrator. Victims are defined in terms of the Conceptual Framework without any prejudice on the grounds of race, gender, sex, pregnancy, marital status, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The framework further defines “secondary victimisation” as a failure to treat a victim with respect and dignity, exhibiting disbelief of a victim’s account, being unsympathetic, blaming a victim and not providing sufficient support services to assist a victim. Examples of where secondary victimisation of victims can occur in practice by members of the police are the instances where members of the police avoid dealing with domestic violence matters which involve their colleagues, not responding on time

¹⁵⁹ Department of Justice and Constitutional Development “Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa” 29 31 Part III 6.1-6.9; Department of Justice and Constitutional Development “Service Charter for Victims of Crime in South Africa” 10 Complaints a-g.

¹⁶⁰ Department of Justice and Constitutional Development “Service Charter for Victims of Crime in South Africa” 5 10.

to attend to an alleged incident of domestic violence, not assisting victims with the completion of the medical injury form called a J88 and not complying with other duties prescribed by the DVA.¹⁶¹ In a 2009 Parliamentary discussion the importance of the Service Charter was highlighted. At that time the availability of the Service Charter in police stations was highly inadequate as only “very few” police stations actually had it present at stations.¹⁶² The question this scenario leaves one with is if only few police stations had the Service Charter present, how many were completely unaware or ignorant of the standards for the treatment of victims described therein?

The Service Charter’s aim to eliminate secondary victimisation by means of employing a victim sensitive approach is not only an appropriate response to approaching victims, but also an effective approach to the training of role-players regarding the legal instruments important in this field of law. Arguably, this approach should also be the broad lens through which the legislative instruments involving the protection of domestic violence victims from secondary victimisation, namely the DVA and the National Instruction, should be understood in order for these instruments to be interpreted in a victim-centred manner.¹⁶³

¹⁶¹ Department of Justice and Constitutional Development “South African Service Charter Conceptual Framework: Understanding the Victims Charter” 4 6; Department of Justice and Constitutional Development Gender Directorate “National Implementation Plan Service Charter for Victims of Crime”.

¹⁶² Parliamentary Monitoring Group “Domestic Violence Act: Independent Complaints Directorate reports for 2009” 3.

¹⁶³ C May & M Mudarikwa “Shortfalls in the Implementation of the Domestic Violence Act” 11.

CHAPTER THREE

3 Similarities and dissimilarities between the legal instruments

3 1 Standards of treatment

3 1 1 *Implicit versus explicit standards*

The DVA and the National Instruction seem to make provision for the protection of domestic violence victims from secondary victimisation, but do so only implicitly by means of setting certain standards of service delivery for members of the police. As can be seen in the above chapter, the DVA and the National Instruction do not ever refer to secondary victimisation directly by name in their respective contents and provisions, nor do they have any provisions directly related thereto. The Service Charter, on the other hand, along with its Conceptual Framework and Minimum Standards, as explained in the previous chapter, define secondary victimisation and then go on to state explicitly that it must be eliminated in the criminal justice process, including within the sphere of the police service, when dealing with victims of crime.

The provisions central and valuable to the study of how the DVA and the National Instruction relate to the standards for treating victims of domestic violence respectively are arguably those referring to the fact that victims must be offered “the maximum protection that the law can offer” and that victims should not be encouraged or redirected to “alternative measures such as counselling” when they clearly wish to press charges against an alleged abuser.¹⁶⁴ These provisions, together, imply the need for the police as an important service provider in the combating of crime and the protection of victims in terms of the law, to not do anything in the course of executing their duties which would harm or cause any kind of disturbance to victims of domestic violence. They also imply and bear a connection with the notion that members of the police must not try to dissuade or convince a victim that an incident was less serious,

¹⁶⁴ Domestic Violence Act 16 of 1998 Preamble

“IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby convey that the State is committed to the elimination of domestic violence”;

National Instruction 7 of 1999 on Domestic Violence

“[Section] 7 Duty to render general assistance to the complainant

(1) in terms of the Domestic Violence Act a complainant may approach the Service for assistance at any time, irrespective of when or where the incident took place. Where a criminal charge is laid by the complainant, it is the responsibility of the member receiving the complaint to open a docket and have it registered for investigation and the member may not avoid doing so by directing the complainant to counselling or conciliation services”.

that they might be overreacting or that they are not worthy of being listened to. Not directing a complainant to counselling in the hope that they might resolve a matter with an alleged abuser in that way, but allowing, assisting an enabling them to press charges against an alleged abuser means that the member of the police had to listen to the complainant, to take to heart what they said and felt, that their voice was heard and that the police force are behind them and fighting for their rights as would be in line with the proviso that the maximum protection the law can offer must be offered to domestic violence victims. Similarly, the provisions in the DVA and the National Instruction relating to and seizure of weapons of an alleged abuser,¹⁶⁵ when complied with, implies certain standards of treatment of victims. The execution of arrests¹⁶⁷ or

¹⁶⁵ Domestic Violence Act 116 of 1998

“Seizure of arms and dangerous weapons

[Section] 9 (1) The court must order a member of the South African Police Service to seize any arm or dangerous weapon in the possession or under the control of a respondent, if the court is satisfied on the evidence placed before it, including any affidavits supporting an application referred to in section 4(1), that-

- (a) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon; or
- (b) possession of such arm or dangerous weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the respondent’s-
 - (i) state of mind or mental condition;
 - (ii) inclination to violence; or
 - (iii) use of or dependence on intoxicating liquor or drugs;

National Instruction 7 of 1999 on Domestic Violence

“[Section] 11 Specific powers and duties of members in terms of the Domestic Violence Act

(1) Seizure of arms and dangerous weapons in terms of a court order

(a) The court may, in terms of section 7(2)(a) of the Domestic Violence Act, order a member to seize any arm or dangerous weapon in the possession or under the control of a respondent”.

¹⁶⁷ Domestic Violence Act 116 of 1998

“Arrest by peace officer without warrant

[Section] 3 A peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant”;

Domestic Violence Act 116 of 1998

“Warrant of arrest upon issuing of protection order

[Section] 8 (1) Whenever a court issues a protection order, the court must make an order-

- (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form;
- (4) (a) A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service.
- (b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17(a).
- (c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which-
 - (ii) specifies the name, the residential address and the occupation or status of the respondent;
 - (iii) calls upon the respondent to appear before a court, and on the date and at the time, specified in the notice, on a charge of committing the offence referred to in section 17(a);

seizures of weapons without delays or excuses implies that members of the police are willing to take the pleas of victims for help seriously, that their desperation for help and protection is heard, that they are worthy of protecting and that they are not alone. Although not explicitly stated, these provisions arguably strive to ensure that domestic violence victims are treated with nothing but respect and dignity in the process of dealing with an incident of domestic violence.

The DVA and the National Instruction prescribe different duties for members of the police in terms of providing certain services and being the agents who refer victims to the range of services that they do not provide themselves. The provision of services is where the focus of the study of provisions related to protection from secondary victimisation lies, since secondary victimisation usually takes place when a victim interacts with members of the police and other role-players or service providers within the criminal justice system or social systems. As discussed in the previous chapter, these provided services range from administrative duties to services of a more social kind, including referral to medical and social or psychological help. The existence of these different types of services all mean something and imply the standards of treatment which victims of domestic violence should receive from members of the police. The implicit nature of protection against secondary victimisation lies within

(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account-

- (a) the risk to the safety, health or wellbeing of the complainant;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; and
- (c) the length of time since the alleged breach occurred. (6) Whenever a warrant of arrest is handed to a member of the South African Police Service in terms of subsection (4)(a), the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge”;

(2) Arresting a person with a warrant who contravenes a protection order

(a) Where a respondent has contravened any prohibition, condition, obligation or order contained in a protection order, a complainant may hand the warrant of arrest together with an affidavit, wherein it is stated that the respondent contravened such protection order, to any member

(b) If, upon receipt of the warrant of arrest together with the affidavit, referred to in subparagraph (a) (above), it appears to the member that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order, the member must arrest the respondent for contravening the protection order on the strength of the warrant.

(c) In considering whether or not the complainant may suffer imminent harm, a member must take the following into account:

- (i) the risk to the safety, health or well-being of the complainant
- (ii) the seriousness of the conduct comprising the alleged breach of the protection order; and
- (iii) the length of time since the alleged breach has occurred (e)Whenever a warrant of arrest is handed to a member of the Service as contemplated in subparagraph (a) (above), the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge”.

these implicit standards. When these implicit standards are not upheld or members of the police fall short by way of inadequate responses in relation thereto, victims will suffer not only due to the inefficiency of the system denying them justice but also due to members' failure to pay attention to these standards.

The DVA and the National Instruction provide that members of the police must advise, inform and assist domestic violence victims to possibly obtain alternative shelter as well as medical attention.¹⁶⁸ The provision of these services imply that victims' injuries and lives must be cared for. Their injuries, although there seems to be an emphasis on physical injuries by noting the provision of medical attention, must receive care and be addressed as well as the fact that they should be provided with safe alternative living arrangements. The dignity and humanity of domestic violence victims should thus be protected by means of ensuring that they do not suffer from physical wounds or wounds caused on a deeper level such as psychological or mental harm by living with abusers and having no other accommodation options. It is only logical to deduce that the policy behind such striving towards dealing with victims of domestic violence in a way as to protect them from literal and figurative "wounding" so to speak, would also be in agreement with the notion that members of the police themselves should

¹⁶⁸ Domestic Violence Act 116 of 1998

"Duty to assist and inform complainant of rights

[Section] 2 Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported-

(a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment";

National Instruction 7 of 1999 on Domestic Violence

"[Section] 8 Duty to assist the complainant to find suitable shelter

(1) In terms of the Domestic Violence Act, a member must assist the complainant to find suitable shelter or make arrangements for the complainant to find suitable shelter.

(b) at the request of the complainant and where it is reasonably possible to do so, contact on behalf of the complainant an organisation which may render relevant assistance to the complainant and

(c) at the request of the complainant, assist in arranging transport for the complainant to a suitable shelter or an organisation that may be able to render relevant support and/or counselling";

National Instruction 7 of 1999 on Domestic Violence

"[Section] 9 Duty to assist the complainant to obtain medical treatment

(1) In terms of the Domestic Violence Act a member must assist the complainant to obtain medical treatment or make arrangements for the complainant to obtain medical treatment.

(2) To comply with this duty, a member must comply with any station orders issued by the station commissioner in this regard as provided for in paragraph 3(6) (above) and must at least

(a) ask the complainant whether he or she requires medical treatment; and, if so,

(b) assist or make arrangements for the complainant to receive medical treatment; and

(c) if a criminal charge has been laid, issue a J88 and SAPS 308 to the complainant for completion by a registered medical practitioner".

not wound victims by causing any secondary victimisation in the process of protection being offered to them, in order to reduce their sufferings.

The DVA and the National Instruction are understandably very similar in the ways it were drafted. It also bears a similarity in terms of the implicit nature of standards of dealing with domestic violence victims. This is not surprising, because the National Instruction exists due to the DVA necessitating its existence in terms of the mandate given to the Police Commissioner, as explained previously. The DVA brought about a “symbolic message” to the criminal justice system as a whole on how domestic violence victims should be treated.¹⁶⁹ This further emphasises the implicit nature by means of which standards of treatment are integrated into the DVA and as consequence, into the National Instruction as well. These implicit standards of treatment means that the DVA and the National Instruction, situated within the criminal justice system, are also sending a symbolic message to members of the police and those who come into contact with these legislative instruments how domestic violence victims should be treated. The standard of treatment of domestic violence victims in a dignified and respectful manner is contained in the DVA and the National Instruction hereby, albeit only implicitly.

As mentioned above and explained in the previous chapter, the Service Charter is much more explicit in the stating of standards of dealing with victims of crime. It is understandable that this more policy based type of document and a product of the Department of Social Development will differ quite a bit from the DVA and the National Instruction, which are more fully-fledged legal documents. It is, however, still useful to contemplate their similarities and differences, because of the importance of the issue of secondary victimisation of domestic violence victims by members of the police and how these instruments can possibly be able to coexist and strive in harmony to address it.

3 1 2 *Partial versus holistic approaches*

The Service Charter starts off in its preamble by setting the tone for how the whole document and its related documents, namely the Minimum Standards and Conceptual

¹⁶⁹ L Artz & Smythe D “Bridges and barriers: A five year retrospective on the Domestic Violence Act” (2005) *Acta Juridica* AJ 200 202.

Framework, must holistically be approached and from the outset acknowledges the need to address and also to eliminate secondary victimisation.¹⁷⁰ This is a clear statement about how important a victim-sensitive approach is for the framework in terms of which the Service Charter is to be interpreted and understood as well as how victims of crime should be dealt with as an overall standard.

The DVA and the National Instruction, however, do not create this type of umbrella approach in terms of the treatment of victims. The DVA and the National Instruction together do aim to provide the “maximum protection” from domestic violence to victims which the law can offer, rightly so. They do not, however, create or introduce an overarching victim-centred and victim-sensitive spirit in terms of which the legislative documents should be interpreted and understood, which approach would likely more readily allow and enable the legislative instruments to more explicitly offer protection to domestic violence victims against secondary victimisation. What the DVA and the National Instruction arguably more readily do is to create duties in terms of specific services to be delivered. By the creation of those duties to deliver certain services to victims of domestic violence, one is able deduce and detect implied standards of care that should be upheld when dealing with these victims. This is, however, arguably a more piecemeal kind of approach in terms of specific provisions and the specific duties related to them than the Service Charter, which creates a more all-encompassing lens through which the treatment of victims should be understood and how the legal instruments, which can offer protection to victims from ill treatment or secondary victimisation, should operate.

¹⁷⁰ The Service Charter for Victims of Crime 2004

“PREAMBLE

The Government of South Africa generally and agencies involved in the criminal justice system specifically:

...

Hereby adopt this Victims’ Charter

To provide for the consolidation of the present legal framework in South Africa relating to the rights of and services provided to victims of crime and to:

- eliminate secondary victimisation in the criminal justice process;
- ensure that victims remain central to the criminal justice process;
- clarify the service standards that can be expected by and are to be accorded to victims whenever they come into contact with the criminal justice system; and
- make provision for victims’ recourse when standards are not met”.

3 2 Protection and recourse

The protection and recourse offered in the DVA and the National Instruction to victims of domestic violence from secondary victimisation by the police relate mainly to the disciplinary consequences which may follow for members of the police who do not comply with the obligations and duties of service delivery imposed on them.¹⁷¹ The body which must review non-compliance and deal with disciplinary proceedings against members of the police, as mentioned previously, is proposed to change from the ICD to the CSP in terms of the Amendment Bill, but there does not seem to be any indication that the mechanism will change much apart from that. There is once again, no specific acknowledgement of or punishment for members of the police who make themselves guilty of secondary victimisation of domestic violence victims in terms of these provisions. There is, however, once again a focus on the implicit standards required to be complied with in the execution of duties by the members of the police in terms of the DVA and the National Instruction. Non-compliance with duties relate implicitly and indirectly to secondary victimisation of victims, because members of the police who do not adhere to obligations either fully or partially and thus inefficiently, will surely affect how victims and their cases of domestic violence are dealt with. This

¹⁷¹ Domestic Violence Act 116 of 1998

“Application of Act by prosecuting authority and members of South African Police Service

[Section] 18 (3) The National Commissioner of the South African Police Service must issue national instructions as contemplated in section of the South African Police Service Act, 1995 (Act No. 68 of 1995), with which its members must comply in the execution of their functions in terms of this Act, and any instructions so issued must be published in the Gazette.

(4) (a) Failure by a member of the South African Police Service to comply with an obligation imposed in terms of this Act or the national instructions referred to in subsection (3), constitutes misconduct as contemplated in the South African Police Service Act, 1995, and the Independent Complaints Directorate, established in terms of that Act, must forthwith be informed of any such failure reported to the South African Police Service”;

National Instruction 7 of 1999 on Domestic Violence

“[Section] 13 Complaints regarding non-compliance by members and notification of such non-compliance to the Independent Complaints Directorate

(1) In terms of the Domestic Violence Act, a failure by a member to comply with an obligation imposed in terms of the Act this National Instruction constitutes misconduct. Disciplinary proceedings must therefore be instituted, in accordance with regulation 8 of the Discipline Regulations, against a member who fails to comply with an obligation imposed in terms of the Domestic Violence Act or this National Instruction”;

National Instruction 7 of 1999 on Domestic Violence

“[Section] 14 Keeping of record of complaints against members

(1) Every station commissioner must keep a record of

(a) the number and particulars of complaints received against members under his or her command in respect of any failure to comply with obligations in terms of the Domestic Violence Act or these instructions;

(b) the disciplinary proceedings instituted as a result thereof and the decisions which emanated from such proceedings; and

(c) steps taken as a result of recommendations made by the Independent Complaints Directorate”.

point will be displayed in practical terms in the jurisprudence discussed in the next chapter. A victim whose case is not dealt with in an appropriate manner, in terms of the duties and implied standards set in these legislative instruments, will likely be disgruntled and disheartened due to not receiving help, assistance or justice after gathering the strength and bravery to report an incident of domestic violence to the police, who should have attempted to offer “the maximum protection the law could offer”. Secondary victimisation can thus be a specific form of or consequence of non-compliance with duties in terms of the provisions of these legislative instruments, although not directly mentioned.

The Service Charter, specifically in terms of the Minimum Standards, once again sets out a more explicit kind of complaints guide in terms of secondary victimisation, due to specific reference to how victims are treated by the police.¹⁷² Although secondary victimisation of victims by the police is not specifically mentioned as a cause for complaint against members of the police, the fact that how victims are treated is listed as a specific cause for complaint makes it very different from the DVA and the National Instruction. The inclusion of this explicit detail regarding the treatment of victims by the police bears a more direct relation to disciplinary or other consequences due to incidents of secondary victimisation of victims by members of the police than the

¹⁷² Department of Justice and Constitutional Development “Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa” 32

“COMPLAINTS MECHANISMS

All the departments, institutions and agencies involved in the case aim to provide a high standard of service, but things sometimes go wrong. If they do, the departments, institutions and agencies want to know what happened. This part of the document tells you what you can do if you are not satisfied with-

- a. the way you have been treated;
- b. the information you have received; or
- c. decisions that have been made.

The South African Police Service

- 1. You can file a complaint about a police officer, a police service policy, practice or procedure, by writing to the Station Commissioner of the police station concerned”;

Department of Justice and Constitutional Development “Minimum Standards On Services for Victims of Crime For Implementing the Service Charter For Victims of Crime in South Africa” 36

“Alternative Complaints Mechanisms:

20. If you remain dissatisfied with the way in which your complaint has been attended to by the role-players or service providers in the criminal justice process, you may have recourse to the services provided by the following organisations:

- a. The Office of the Public Protector
- b. The South African Human Rights Commission
- c. The Independent Complaints Directorate
- d. The Commission on Gender Equality
- e. The Health Professions Council of South Africa
- f. A lawyer of your own choice and at your own expense”.

approach of the DVA and the National Instruction in terms of non-compliance with duties plainly related to service delivery.

3.3 Correlation between instruments

The three instruments central to this study, as outlined and studied up to this point, clearly strive toward the same goal and that is to protect victims of domestic violence mainly by providing services to them in the furtherance of their well-being. The instruments, however, go about reaching or aspiring to reach that goal in different ways. It is clear that these instruments are not in conflict with one another, but can be seen as forming a bigger picture or a puzzle together, as a guide to how domestic violence victims ought to be treated by members of the police in terms of South African law.

Important for this study, are how these instruments provide for the protection of domestic violence victims from secondary victimisation by members of the police. Although the DVA and the National Instruction are implicit in nature and arguably do not do enough to address this problem as a specific and serious one, the impact of the problem on victims can still possibly be addressed in terms of these instruments indirectly. These instruments thus do not exclude the possibility of protection for victims of domestic violence from secondary victimisation by members of the police. These instruments clearly bear a great reliance and are dependent on the Service Charter and its Minimum Standards, which more readily identifies secondary victimisation as a problem necessary to mention in its own right, to give members of the police guidance and greater insight into the specific problem of secondary victimisation of victims by the police. The Service Charter does not mention any type of victim of crime specifically, since its definition of the word “victim” is quite broad, as explained previously. The Service Charter, however, applies to all crimes and in concert with the DVA and the National Instruction equally. It thus becomes an instrument which offers guidance with regards to how domestic violence victims specifically, should be treated as well. It is useful to look at how all of these instruments together have and should find application in terms of practical examples. The next chapter studies jurisprudence displaying how secondary victimisation of domestic violence victims by members of the police has occurred.

CHAPTER FOUR

4 The manifestation of secondary victimisation in jurisprudence

The above chapters set out the legal provisions which are or can possibly be used presently in the protection of domestic violence victims from secondary victimisation by members of the police. This chapter explores how sufficient these legal provisions have been in certain practical instances in the protection of actual domestic violence victims who suffered secondary victimisation at the hands of members of the police.

4 1 *Naidoo v Minister of Police*¹⁷³

4 1 1 *Facts*

The domestic violence victim in this case was the appellant, who appealed against a lower court decision to the Supreme Court of Appeal in order to obtain delictual damages from the Minister of Police for the emotional and physical harm she had suffered due to actions of members of the police.¹⁷⁴

The appellant was in an abusive relationship with her former husband for several years. An incident of physical assault by her former husband resulted in her ending up unconscious and injured. The appellant was hospitalised for her injuries subsequent to this assault and was discharged the following day.¹⁷⁵ Two days after the assault she approached a police station and wished to lay a criminal charge against her former husband in terms of the DVA. The member of the police who assisted her told her she could not lay a charge and had to first obtain a protection order from the magistrates' court. She followed the instruction and went to the magistrates' court thereafter. Once at the magistrates' court and requesting the assistance she was told to ask for, she was told that a protection order was not a prerequisite for laying a criminal charge against her former husband. She was also told that she could apply for a protection order after she laid a criminal charge if she so wished.¹⁷⁶ The appellant then returned to the police station and interacted again with the same member of the police who had referred her to the court.

¹⁷³ 2015 20431/2014 152 (SCA).

¹⁷⁴ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) 1 Summary.

¹⁷⁵ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 6.

¹⁷⁶ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 7.

This member of the police then referred the appellant to an inspector Molefe for further assistance. Mr Molefe requested information regarding the contacts on the appellant's phone and contacted her former husband, requesting him to come to the police station. Upon his arrival at the police station, Mr Molefe spoke to him privately and afterwards told the appellant to speak with her abuser and try to sort matters out with him.¹⁷⁷ This was after the appellant made it clear that she wished to lay a criminal charge against him. Despite being sent from the police station to court and back to the police station again in the midst of her recent abusive and traumatic experience, the appellant persisted this far to obtain justice for the assault committed against her. Justice was, however, not what the appellant received. Mr Molefe, even when assured by the appellant that there were no chances of reconciliation with her abuser and that she definitely wished to proceed with laying charges against him, did not assist her. Mr Molefe instead, told the appellant that if she did not resolve the matter with her former husband he would lay a counter charge of common assault against her and that she will then also be arrested alongside him.¹⁷⁸ This is what then happened and the appellant was arrested alongside her abuser, only because she did what she thought was right by reporting the assault committed against her by her abuser to the police. The following morning the appellant was to be taken to court for her first appearance on the counter charge of common assault laid against her. Another member of the police, Mr Mampeile, was impatient with the appellant when she had to get into the police van en route to court that morning. The appellant said she wished to speak to Colonel Perumal at the police station, but Mr Mampeile would not give her an opportunity to speak or entertain her request. Mr Mampeile threw the appellant into the police van, which caused her to suffer additional physical injuries and swelling on the right side of her body, just three days after being assaulted by her former husband. Colonel Perumal arrived on the scene and the appellant was moved to sit in the cab of the police van on the way to court.¹⁷⁹

At court the counter charge of common assault against the appellant was withdrawn by the prosecutor.¹⁸⁰ The appellant went through all this additional trauma for nothing.

¹⁷⁷ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 8.

¹⁷⁸ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 9.

¹⁷⁹ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 10.

¹⁸⁰ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 10.

The appellant subsequently went to a doctor, who identified her injuries caused by Mr Mampeile as soft tissue injuries to her arm and leg and recorded severe swelling. The appellant subsequently also received counselling sessions and was eventually referred to a psychologist, Mr Louw. Mr Louw testified that the appellant suffered from post-traumatic stress disorder, specifically because of her interaction with members of the police and how they treated her. This is a very practical example of how a domestic violence victim may re-experience their trauma as alluded to earlier in this thesis, due to the unempathetic nature of the interaction with a member of the police. This infliction of secondary victimisation on the appellant, as a domestic violence victim, by the police, was stated by the psychologist as being the greatest contributing factor to her struggling to overcome the assault by her former husband. Mr Louw concluded that although the assault by her former husband affected her, there was a definite causal link between the flashbacks, depression and other symptoms which the appellant experienced and the way in which she was treated specifically by the members of the police. Mr Louw stated that the vulnerability of the appellant in this specific situation, after being assaulted by her long term abuser, was exacerbated and intensified by the manners in which the members of the police treated her.¹⁸¹

The appellant did nothing wrong, but was treated as if she had and was not treated in good faith by the members of the police. In the process of the members of the police avoiding investigating the incident of abuse which she had reported, her rights to dignity, freedom, security of her person and bodily integrity were all infringed upon.

4 1 2 Application of instruments

The DVA and the National Instruction prescribe, in section 2 and section 7 respectively, that members of the police have certain duties to comply with when dealing with domestic violence victims. It is clear that in this case, none of the members of the police who were involved acted in line with these obligations toward the victim of domestic violence, the appellant. The ultimate goal of the DVA and the National Instruction together, to provide domestic violence victims with the maximum protection that the law can offer, was not reached. The members of the police, in this case, at no point explained to the victim the rights which she had. The members of the police have a duty to give advice to a victim of domestic violence. In this case the victim of domestic

¹⁸¹ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) paras 11-13.

violence was also prevented at first from enforcing her right to lay a criminal charge against an abuser when she wished to do so. She was furthermore, punished by being arrested for not wanting to resolve or settle the matter by means of alternative measures, such as the conciliation or mediation with her former husband which Mr Molefe tried to force upon her. This was also an act in direct contravention of Mr Molefe's obligations as member of the police in terms of section 7 of the National Instruction in terms of which a member of the police should not avoid assisting a victim of domestic violence who wishes to lay charges, as explained previously. Some members of the police often try to mediate matters to avoid opening dockets, as in this case. This is to avoid the processes and effort attached to that process. The opening of a docket is very important for criminal proceedings, because it tracks what happens with a matter. An investigating officer is allocated to investigate a matter with a unique case number and a CAS number. The victim is then able to follow up on the matter by using these references. Certain procedures must be followed when a docket is opened before it can be legitimately closed. A senior public prosecutor must approve withdrawals, after a victim and investigating officer is interviewed. The victim must also make a withdrawal statement. A presiding officer must be informed in open court of such withdrawals. All these role players must act independently of each other. Members of the police often prefer to attempt mediating matters instead of opening dockets in cases where both the complainant and the perpetrator lay charges.¹⁸² This speaks of members of the police displaying tendencies of laziness or a negative attitude towards domestic violence, the withdrawal of charges connected thereto and spiteful complainants.¹⁸³ Although these situations can understandably be frustrating for members of the police, it is not an excuse to not execute their legislative duties in terms of the DVA and the National Instruction. Withdrawal of charges should rather be dealt with by means of the empowerment and education of victims.¹⁸⁴

During the trial, Mr Molefe was asked about his experience in dealing with domestic violence cases. Although he said that he had dealt with a lot of domestic violence

¹⁸² S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 80.

¹⁸³ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 80.

¹⁸⁴ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 80; *Langa v Minister of Police and Others* 2014 30355/2010 (GP) para 39.

cases, his response to whether he knew the contents of the National Instruction was “not quite sure”. Mr Molefe also testified that it would be wrong to advise a victim of domestic violence that they could not lay a criminal charge against an abuser without a protection order,¹⁸⁵ although that is what he himself did in this case. Mr Molefe conceded in his testimony that he did not attend to the appellant as soon as he could have, since he first contacted her former husband in order to devise a plan for them to mediate the matter amongst themselves.¹⁸⁶ More concerning than this plan for mediation which was devised, was that Mr Molefe threatened the appellant, a domestic violence victim, who was only recently assaulted, with arrest if she did not agree to abandon her wish to lay a criminal charge. The breach of this legal duty was found to be inconsistent with the conduct of a reasonable member of the police. Mr Molefe failed to take reasonable steps to assist the appellant as a domestic violence victim in these circumstances, which caused her harm.¹⁸⁷ As if it was not enough that the appellant was not heard or paid attention to by the member of the police whom she relied on to assist her, he then wrongfully arrested her as well. Mr Molefe could not explain to the court why he deemed it necessary to arrest the appellant on a charge of common assault.¹⁸⁸ By his actions, Mr Molefe contravened his legal duties in terms of the DVA and National Instruction towards the appellant to assist her as a domestic violence victim. Mr Mampeile, similarly, contravened his legal duty to the appellant to provide her with assistance and failed to treat her with respect and regard for her human rights. In terms of section 18(4)(a) of the DVA these members of the police would have been liable, at least in theory, to face disciplinary actions in terms of the SAPS Act, which would regard these incidents as constituting misconduct. The Minister of Police could thus be held vicariously liable for the various forms of harm caused to the appellant by these members of the police. The court subsequently awarded the appellant delictual damages in terms of all three incidents, namely forcing a mediation instead of providing assistance, unlawful arrest and physical assault, which caused her humiliation, psychological, emotional and physical harm.¹⁸⁹

¹⁸⁵ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 13.

¹⁸⁶ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) paras 32.

¹⁸⁷ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 33.

¹⁸⁸ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 13.

¹⁸⁹ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 58.

The court emphasised and criticised the lack of respect which the members of the police displayed to the victim of domestic violence in this case as “a dreadful series of traumatic, humiliating, dehumanising and flagrant violations of the appellant’s right to dignity, freedom, security of her person and bodily integrity”.¹⁹⁰ The court unfortunately did not look at the DVA and the National Instruction together with the Service Charter. It was clear from the facts of this case that the members of the police, on the face of it, never even considered the standards for treating the victim concerned in terms of the victim centred approach proposed by the Service Charter. It did not seem to ever be of concern to them that the elimination of secondary victimisation in the criminal justice process is important in terms of police work. If they had considered it, maybe then they would have been more cautious not to be the cause thereof to this specific domestic violence victim. The victim, in this case was not central to the process these members of the police went about following. The victim was not informed about what was supposed to happen in terms of the investigation of her case, what the standards of service was that she could expect and what actually happened. The victim was not treated in a way as to guard her human dignity and make her feel respected. In terms of the specific rights a victim has according to the Service Charter, this victim was also not served by the members of the police. The reluctance and avoidance displayed by the members of the police to pay attention and listen to the victim clearly was in contravention with the right of fairness, respect and dignity afforded to her. The right to offer and receive information was violated by means of the members of the police not being willing to listen to what the victim had to say or what she felt should happen in her case. The right to protection of the victim was not upheld by the members of the police, in that the victim was forced to make amends with her abuser, which if she had done, could have caused her to suffer more abuse. The police also threatened and intimidated her by means of the suggestion and materialisation of arresting her. The victim was also further abused by being physically harmed. Due to all of the above rights being violated, the victim also was not afforded her right to be assisted, since she was only disappointed and harmed by the actions of the members of the police. In the end, the only rights of the victim in terms of the Service Charter which were upheld to some extent, were the rights to restitution and compensation, only due to

¹⁹⁰ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 2.

the court's intervention that delictual damages were to be paid to the victim by the Minister of Police.

The duties imposed on members of the police which are in the spotlight in terms of this case are the ones relating to providing domestic violence victims with information about the process and the rights they are afforded, not directing such victims to other means of resolving a conflict, such as mediation, as well as paying attention to the treatment of victims in terms of the respectful and dignified manner the Service Charter proposes. It is clear that the members of the police in this case displayed a flagrant disregard of the duties prescribed to them in terms of the DVA and the National Instruction. A concerning fact is that Mr Molefe, as a seemingly senior member of the police, could not even confirm his familiarity with the National Instruction at trial.¹⁹¹ This also highlights the need for members of the police to receive sufficient training on what the duties imposed on them in terms of the DVA and the National Instruction mean.¹⁹²

The conduct of the members of the police in this case displayed how a lack of knowledge and insight into domestic violence cases and how to deal with them can easily result in the secondary victimisation of a victim. The domestic violence victim in this case was victimised not only by her abuser, but by members of the police, which are both supposed to be refuges and places of safety and relief.¹⁹³

One could argue that this was a clear case of failure by the members of the police to implement the measures in place as well. This study is, however, is not primarily about a lack of efficient implementation, but rather a study on what measures the law does provide for in terms of the protection of domestic violence victims from secondary victimisation by members of the police. Although the argument that no obligations or measures, no matter how proper, set out in legislative instruments will amount to anything if they are not efficiently implemented is not invalid, that does not mean that legislative instruments should not be evaluated in order to make sure that they do provide clear and proper measures for such protection in this area of the law. The argument made here is that when measures or provisions in place in legislative

¹⁹¹ *Naidoo v Minister of Police* 2015 20431/2014 152 (SCA) para 7.

¹⁹² S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 65.

¹⁹³ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 66.

instruments are clear enough and make sufficient provision for the protection of domestic violence victims from secondary victimisation by members of the police, the failure to protect victims might still be lessened. The possibility of secondary victimisation of domestic violence victims by members of the police might be at least reduced if legislative provisions sufficiently display insight into and emphasise the seriousness of the problem of secondary victimisation and the need to address it.

4 2 *The Minister of Safety and Security and Others v WH*¹⁹⁴

4 2 1 *Facts*

The domestic violence victim in this case was the respondent. The respondent had claimed damages from the Minister of Safety and Security and three members of the police for the rape she suffered after the members of the police failed to arrest her estranged abusive husband upon him breaching the protection order she had against him. These parties, as appellants in this case, appealed to the full court of the Eastern Cape Provincial Division against the award of damages to the respondent by a single judge in the trial court.¹⁹⁵

The respondent was granted an interdict in terms of the PFVA in 1996 already. The respondent had in the past suffered emotional, verbal and physical abuse by her husband and so had her children. Although this estranged husband was not permitted in terms of the protection order to be on the premises of the respondent, she did not enforce the protection order for many years. According to a clinical psychologist involved in the trial it is not uncommon for a victim of domestic violence such as the respondent to attempt to avoid further conflict by not enforcing her protection order, should the abuser not cause her any harm while being present on the premises.¹⁹⁶ This interdict was later deemed to have been granted in terms of the DVA and stamped again to that effect when the respondent felt the need for it to be enforced again. The protection order was thus in force and prohibiting the respondent's estranged husband from entering her premises. As is the standard practice, a warrant of arrest with its validity suspended until such time when a breach of the protection order occurs, was also granted. The respondent had become frightened and felt threatened due to her

¹⁹⁴ 2009 4 SA 213 (E).

¹⁹⁵ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) para 1.

¹⁹⁶ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) para 3.

estranged husband continuously demanding money from her, money which she had no way of giving him. Arrangements were then made for the police to come to her home at a certain time so that they could arrest the husband for being there in violation of the protection order. The daughter of the respondent made these arrangements with the police and also assured them that the respondent had the required protection order with the suspended warrant of arrest with her for them to legally arrest her estranged husband. The police agreed and said that there would be no problem attending to the matter, but did not arrive at the respondent's home at the arranged time, but only later that afternoon.¹⁹⁷

The respondent testified that she showed the members of the police who arrived her protection order and the warrant of arrest attached thereto at the gate of the yard. She then advised them that her estranged husband was on the premises, inside the house, in contravention thereof. The members of the police entered the premises, spoke to the husband and according to the respondent, took his side in the matter without listening to her.¹⁹⁸ The members of the police did not pay attention to her needs and it was suggested that it was a civil matter not much to do with them. This attitude displayed by a member of the police reminds one of the introductory chapter of this thesis, where attitudes were assumed to likely play a great role in the cause of secondary victimisation of domestic violence victims. Here, a domestic violence incident or threat thereof, was again seen as a family matter to be avoided to be handled by members of the police. The respondent was also asked by one member of the police why she was making allegations against such a nice man, and wanted to know if she had been drinking.¹⁹⁹ The domestic worker of the respondent testified too and confirmed these facts during testimony on trial.

This case is a clear example of members of the police showing disregard for a victim of domestic violence. This particular victim was not listened to, not treated with respect and human dignity, but instead accused of being the problem in the situation by the suggestion that she had been drinking. Another problem with this statement being

¹⁹⁷ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) paras 4.

¹⁹⁸ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) para 5.

¹⁹⁹ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) para 5.

uttered towards a victim of domestic violence is that it implies that a victim would be less worthy of receiving police protection from an abuser if they had been drinking. Such an attitude would victimise a victim as well. Members of the police should not look for ways to insult or ridicule a victim, but to assist and support them in order for them to be empowered by their interactions with the police. The members of the police subsequently found excuses not to arrest the estranged husband in the present case, could not provide alternative help such as removing the respondent from the presence of the abuser and could only manage to say that they would return later before they simply left the scene. The police, however, never returned and left the respondent alone to deal with the threatening situation she had most probably felt and sensed that she was facing. After these members of the police left without rendering any assistance to the respondent, the husband gloated over it in demeaning terms for the respondent to be victimised by. The respondent, after years of trauma and abuse, scraped together the decisiveness and boldness to have the protection order granted to her years ago stamped again and deemed an order in terms of the DVA. She managed to do this, even while bearing the burden of wanting to avoid conflict by not enforcing the protection order, as noted by the psychologist. The respondent took a brave step by doing something she had avoided doing for so long, only to have the police absolutely crush the faith she had placed in them as her last resort. The resorting to an application for a protection order has also been described as being a “brave exercise of agency” by an abused woman.²⁰⁰ This is probably due to the fact that such application involves the speaking out with regards to domestic violence incidents. The respondent, having had a gut feeling worth listening to as she had felt threatened by her husband during the preceding weeks, was let down and not protected by the members of the police when they were called on and had the duty to do so. The husband raped the respondent three days after the police visit.²⁰¹ The members of the police denied ever being showed the protection order and warrant of arrest by the respondent upon entering the premises on their visit. They went further and said that she never requested their help to remove her husband from the scene and allegedly told them that she had resolved the matter with her husband and that they would soon separate amicably. One member of the police even testified that the

²⁰⁰ L Artz & Smythe D “Bridges and barriers: A five year retrospective on the Domestic Violence Act” 225.

²⁰¹ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) para 16.

husband showed them that he had already packed a bag to move out in terms of this amicable agreement between the parties. The trial court made a credibility finding by looking at all of the evidence offered by the parties and ultimately made a finding in favour of the respondent.²⁰² The four appellant parties, namely the Minister of Safety and Security and the three members of the police were held jointly and severally liable in delict for damages caused to the respondent by the rape committed against her by her estranged abusive husband.²⁰³

This case mainly dealt with the question whether the cause of the rape of the respondent by her estranged husband was linked factually closely enough to the inaction by the members of the police, who refused to arrest him, for them to be held liable for it. The court confirmed the trial court's finding that the respondent should receive damages for the rape she suffered, because it was due to the police's negligent and wrongful failure to arrest the husband only a few days before he raped her.²⁰⁴

4 2 2 *Application of instruments*

This case did not expressly deal with the duties imposed on members of the police in domestic violence cases in terms of the provisions of the relevant legal instruments, but it is still possible to review the case alongside such provisions. This is not only possible, but furthermore also important to do, because the case dealt with a domestic violence victim who suffered secondary victimisation caused by members of the police.

The duty of the members of the police when dealing with victims of domestic violence most clearly contravened in this case is the duty related to arresting an alleged perpetrator following to the breach of a condition contained in a protection order. The DVA and the National Instruction, respectively in section 8 and section 11(2) thereof, set out the duty to arrest alleged perpetrators of domestic violence upon the alleged breach of a protection order, as explained earlier. This case did not discuss how the members of the police involved neglected their legal duty to arrest the alleged abuser in terms of the obligations imposed on them by the DVA and the National Instruction

²⁰² *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) paras 7-11.

²⁰³ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) para 1.

²⁰⁴ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) paras 1, 16, 17.

to do so specifically, but does involve the negligence of the police to not effect an arrest which was found to be wrongful for the purposes of the law of delict.

One of the things that comes to mind in this case, is whether the approach of the members of the police to the victim of domestic violence would have been different if they had been confronted with a mandate for a more victim sensitive approach in terms of the legislative duties imposed on them by means of the DVA and the National Instruction. The same argument made regarding the previous case of *Naidoo v Minister of the Police* is also applicable here, namely that there is a possibility that legislative provisions, if drafted with the required insight and sensitivity in order to ensure protection of domestic violence victims from secondary victimisation by the police, will lessen the possibility of the occurrence thereof even if implementation issues exist as well. The standard of treatment of a domestic violence victim connected to the duty of arresting an alleged domestic violence perpetrator was clearly not upheld in this case. The respondent did all she had to do in order to be able to request of the police to execute this duty without hesitation. She had a valid protection order and a breach thereof had taken place in the presence of the members of the police due to the husband of the respondent being present on her premises. The refusal of the members of the police to arrest the husband, even after the pleas of the respondent to do so, most likely reinforced the idea and the feeling with the respondent that she was completely alone in the situation of abuse which she felt threatened by. The police did not act in her interests, but instead most likely fuelled the fire of abuse of the perpetrator by causing him to feel in control and able to do whatever he wanted after they left. As mentioned in the introductory chapter, this displays the way in which members of the police can cause secondary victimisation alongside further abuses when they do not act in accordance with their legal duties in terms of the relevant instruments.

The members of the police also did not assist or provide any alternatives to the victim of domestic violence in this case when she asked to go with them after they refused to arrest her husband. This is connected with the contravention of another duty imposed on members of the police to provide alternative accommodation in terms of the DVA and the National Instruction in section 2 and section 5 respectively, as explained earlier. By not trying to assist the victim in such a way, the members of the

police displayed a lack of concern for her safety and possibly also for her life, as she clearly felt threatened. The members of the police not only failed to arrest the alleged perpetrator of domestic violence in this case, but also did not attempt to assist the victim in any other manner either. Even if there was a specific issue with arresting the alleged perpetrator, the members of the police could have assisted the victim in other ways. They did not however, assist the respondent in any way, which likely points to an overall reluctance to assist the victim in general.

The victim centred approach outlined by the Service Charter would have made a great impact if it was adhered to in this case of dealing with an incident of domestic violence. The victim, in this case was not empowered nor protected, but kept a victim by the members of the police who did not protect her rights. The victim was made to be re-victimised by her abuser, not only by the rape which the case centres around, but simply by the abuser gloating over the fact that she was left alone without any assistance or support to deal with him. The victim in this case was clearly not treated with respect, dignity or fairness. What would have been fair of the members of the police would have been to give the victim the reasonable benefit of the doubt even if they deemed the husband believable, but not just take his side right from the start. It is clearly unfair to not pay attention to the plea of a victim of domestic violence when their initial need for a mechanism of the nature of a protection order dated back as far as 1996. The victim's right to be protected was also infringed by the comments and inaction of the police. The victim was not only exposed to more harmful violence committed against her by her abuser, but had to endure abusive comments from the members of the police themselves as well. A victim-centred approach, which would have more readily and thoroughly assessed the victim's state of mind and perspective, was not present and the victim was not assisted, but rather left to her own devices. The court also made a comment in line with such a victim-sensitive approach in this case. The counsel for the appellants argued that it was an intolerable burden on members of the police to have to protect victims from the possible harm which may be caused to them by their abusers and regarded it as too remote for them to prevent.²⁰⁵ The court, however, rejected this contention, stating

²⁰⁵ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) para 17:

"There is in my opinion no merit in the argument that the damage in this case is too remote. In the light of the purpose of issuing a protection order and a warrant it cannot logically be submitted that violence

that this type of situation where legal duties placed on members of the police to protect innocent lives from the danger of abusive or dangerous individuals, is not regarded as unjustifiably burdensome. Policy considerations, such as that members of the police should treat innocent citizens with dignity and protect abused persons rather than cause them further harm, were thus noted as dictating that the victim in this case should receive a remedy or compensation for the damages she had suffered due to the actions of members of the police.²⁰⁶ It has previously been stated in *Carmichele v Minister of Safety and Security*²⁰⁷ that the police has a duty to protect citizens from dangerous individuals who may cause them harm, especially where the potential to cause harm has been illustrated before by the actions of such dangerous individuals.²⁰⁸ This stance taken by the court indicates that a victim's interests must be taken to heart and that although it might be a heavy and an onerous duty on the members of the police to always bear the protection of victims in mind when dealing with cases, it is an unavoidably important task. This understanding of a victim-centred approach for members of the police to enforce applies to all victims of crime, including domestic violence victims and the way in which the Service Charter requires victims to be treated with respect and dignity.

to the person of the respondent was not a reasonably foreseeable consequence of the police failure to take action. Nor can it be submitted that the consequence of rape was not proximately or directly connected to the failure of the police to take action. The close connection in place and time is self-evident - the respondent was raped within a few days of the wrongful omission to take proper and adequate steps for her protection at her home as required by the order of court. Nothing happened between the police omission and the rape which can properly be regarded as a novus actus interveniens. The suggestion by counsel was that the respondents' failure to seek further police protection on the Sunday, Monday and Tuesday may constitute a novus actus. In the light of the failure of the police to provide protection on the Saturday, this is not only entirely that the police can be exonerated from liability for a negligent omission on the Saturday because they were not afforded the opportunity of making the same negligent omission on the Sunday or the Monday. Mr Notshe also suggested that the imputation of liability in the circumstances of this case places an intolerable burden on the police. This kind of policy consideration can indeed have impact upon the principles of remoteness of damage. It is a relevant consideration. But this kind of situation has recently been considered by the courts and found not to be over-burdensome in modern society. See, for example, the two *Carmichele* judgments (2001 (4) SA 938 (CC); and 2004 (3) SA 305 (SCA)) and *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741). On the facts and circumstances of this case, no sound reasons of policy suggest themselves to justify denying the respondent a remedy".

²⁰⁶ *The Minister of Safety and Security and Others v WH* 2009 4 SA 213 (E) para 17.

²⁰⁷ 2001 (4) SA 938 (CC).

²⁰⁸ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

4 3 *The Minister of Safety and Security v Venter*²⁰⁹

4 3 1 *Facts*

The domestic violence victims in this case were the respondents, the first respondent being the life partner of the second respondent, who was the ex-wife of the abuser. The appellants appealed against a judgement made by the High Court, which granted the respondents delictual damages following members of the police not executing their duties in terms of the DVA and the National Instruction, to the Supreme Court of Appeal.²¹⁰

The respondents moved in together with the two children from the second respondent's marriage after both of their marriages ended.²¹¹ The ex-husband became abusive towards the second respondent and jealous of the relationship which formed between herself and the first respondent. These abusive acts and behaviours of the ex-husband ranged from constant phone calls, abusive text messages, threats to kill them and threats to burn down their house.²¹² The respondents approached a police station for advice on what to do in these circumstances, as they did not want the ex-husband to continue being able to lawfully come to their house and be on their premises. The members of the police involved did not give any advice or make any recommendations other than the statement that they could not do anything before the ex-husband actually entered their house.²¹³ No assistance was offered to the respondents. The respondents also approached the magistrates' court to enquire about obtaining protection orders. They were told that they needed a case number from the police station before they could proceed with the application for a protection order.²¹⁴

In July 2002 there was an incident when the ex-husband came to fetch his children at the respondents' home. Members of the police arrived at the house after the respondents contacted the police, but they could not do anything since the ex-husband

²⁰⁹ 2011 570/09 42 (SCA).

²¹⁰ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) 1 Summary, para 1.

²¹¹ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 3.

²¹² *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 4.

²¹³ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 5.

²¹⁴ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 6.

manipulated the situation by means of the divorce order stating he had access to the children.²¹⁵

Less than a month after this incident, in August 2002, the ex-husband's abusive behaviour escalated to an incident where he threatened the second respondent and his children. The respondents approached and required the members of the police to help them to keep the ex-husband away from their property. The member of the police who handled this complaint told the respondents that there was nothing the police service could do.²¹⁶ No member of the police made an effort or contacted the respondents again to follow up on this complaint or the concern raised by the respondents.

Less than two months after this incident, in October 2002, the ex-husband collected the children again, after which he called the second respondent and told her she should return to him and that he will kill the children and himself if she went to the police.²¹⁷ The respondents felt threatened and scared, which caused them to deem it necessary to approach the police after these threats. Once again, assistance was not what the respondents received from the members of the police. An inspector named Mr de Koker did not believe that the respondents had a case and refused to take the statement of the second respondent until the respondents' attorney and a police captain convinced the inspector to do so. When Mr de Koker eventually took a statement from the second respondent regarding these threats that were made, he was still not enthusiastic to assist them and did so reluctantly and in brief terms only. Mr de Koker also did not ensure that the second respondent attested to the statement which she had made.²¹⁸ A case docket was opened due to the insistence of the police captain. The second respondent had a conversation with another member of the police the following day, Sergeant Naude, to display her wish for the investigation to proceed and to warn the Sergeant not to contact her ex-husband since she feared for the children who was with him should he be provoked. Although the children got home safely the following day, the members of the police still did not proceed with the

²¹⁵ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 7.

²¹⁶ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 8.

²¹⁷ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 9.

²¹⁸ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 10.

investigation into the ex-husband's abusive behaviour or to offer any assistance to the respondents.²¹⁹

It was a little more than a week later that the incident around which this case revolved occurred. The ex-husband unexpectedly arrived at the house of the respondents, after having told the second respondent the day before that they must meet some time. At that time, the second respondent was at home alone with one of the children. The second respondent testified that she had hesitated, but let her ex-husband into the house, since the child was seen by his father through the window. She feared he would be aggravated and provoked if he was kept away from his child. The ex-husband professed that it was "elimination day", he lead the second respondent outside and showed her that he had a crossbow and handcuffs in his car. He told her that he was going to handcuff her to the bed and kill her partner once he got home.²²⁰ Upon entering the house again, the ex-husband shot at various items in the house with the crossbow. In a violent rage of destroying items in the respondents' house, the ex-husband threatened the second respondent to go to the bedroom and undress or he would cause more damage. In the bedroom the ex-husband saw the firearm the respondents kept for protection, and it only fuelled his violent behaviour, which led him to rape the second respondent.²²¹ The first respondent arrived at the house later, after being told by the mother of the second respondent that she was worried after the second respondent did not return her call earlier that day.²²² The first respondent was shot in the arm by the ex-husband while he was trying to open the locked front door. After this the ex-husband chased the first respondent while firing shots at him. Fortunately, the first respondent found a place to hide to avoid being killed. The ex-husband was arrested and committed suicide two days later in the police cells.²²³

The court found that the appellant was the factual and legal cause of the harms caused to the respondents. The fact that the respondents continuously and on various occasions reported being threatened by the ex-husband should have caused the belief in the members of the police that this man was a real danger and that they had to

²¹⁹ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 11.

²²⁰ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 12.

²²¹ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 13.

²²² *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 15.

²²³ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 16.

make more of an effort to assist the respondents and offer them protection in terms of the law.²²⁴ Although the respondents could have done more to protect themselves from the ex-husband, such as laying common law charges namely trespassing or intimidation, or obtaining protection orders or a common law interdict, the court found that they could not be said to have been solely responsible for the harm they suffered.²²⁵ The court noted that the members of the police were negligent to a far greater extent than the respondents, since they bear the duty to protect victims of domestic violence and have clear guidelines to follow in order to execute this duty in terms of the DVA and the National Instruction. Furthermore, the court noted that it is the mandate of the SAPS in section 12(1)(c) of the Constitution to guard every person's right to be protected from violence in their private lives.²²⁶ The court apportioned the percentage of negligence to the respondents at 25%, stating that the members of the police were three times more negligent than they were. The delictual damages ordered to be paid to the respondents was thus granted to them at 75% of the original claimed amount.²²⁷

4 3 2 *Application of legal instruments*

As discussed previously, the DVA and the National Instruction provide in section 2 and section 5 respectively, that domestic violence victims should be informed of their rights and must be assisted so as to provide them with the maximum protection that the law can offer.

The members of the police in this case, not on one, but on four different occasions which were necessitated by the behaviour of the ex-husband, did not render

²²⁴ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) paras 29-30.

²²⁵ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 17.

²²⁶ The Constitution of the Republic of South Africa, 1996

"[Section] 12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent";

The Minister of Safety and Security v Venter 2011 570/09 42 (SCA) paras 18-19.

²²⁷ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) paras 33-35.

assistance to the respondents. The respondents were at no point, during all of these different interactions with members of the police, informed of what the process would have been to apply for a protection order, what its effects would be or shown any kind of support or understanding for the threats that they had faced.

If the members of the police had explained the rights of the respondents to obtain protection orders to them, what it could have been able to protect them from, and what the consequences thereof could have been for the ex-husband if he breached the conditions thereof, then the respondents might have been able to properly consider this form of protection. Due to the members of the police not providing thorough or barely any information whatsoever to the respondents, they did not have enough information to even think of the options they had available to them in depth. If the members of the police had provided proper information to the respondents, then they would have known and be assured thereof that they were in their full rights to request that the ex-husband should be prohibited from entering their premises and that it was a form of abuse that could be punished by law threatening them with death or harm.²²⁸ The standard of care attached to the duty to give advice to domestic violence victims is that of a reasonable person in the same position as the member of the police.²²⁹ In this case the member of the police who was supposed to give advice to the victims of domestic violence about protection orders did not only fail to give proper advice, but also gave wrong advice in respect of needing a case number before a victim could apply for a protection order.²³⁰

The respondents would have also been able to know, if the members of the police informed them, that the court could have ordered the police to remove weapons in the possession of the ex-husband in terms of the DVA and the National Instruction in section 9 and section 11 respectively. The respondents, in line with the above argument, did confirm on trial that if they were properly informed of their rights and the

²²⁸ A C Madzivhandila "The Policing Of Domestic Violence In The Tshwane Policing Presinct" (2015) Unpublished MTech dissertation University of South Africa 28; S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 14.

²²⁹ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 64.

²³⁰ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 64.

way in which the DVA operated by the members of the police they would have taken steps to protect themselves in terms thereof.²³¹

The actions of the inspector, Mr de Koker, were also in direct contravention of the National Instruction, specifically section 5 thereof. A member of the police should not hesitate to take a statement from a domestic violence victim, nor should they need any motivation to do so. A member of the police should take a statement properly in order to fulfil their duty related to gathering all evidence available in order to investigate a matter as thoroughly as they possibly can. Mr de Koker did not pay attention to the needs of the victim of domestic violence, with specific reference to the second respondent, being the one who mainly and directly suffered from the threats made by the ex-husband. The second respondent was not served by the police or assured that she was worthy of being listened to or protected. Mr de Koker displayed an attitude of disinterest towards the second respondent from the start. He was forced to some extent to comply with his obligations to take a statement and open a docket by the respondents' attorney and a police captain, but the statement was not even taken properly as it was not attested to and overall these motivations did not remind him of the importance of the protection of domestic violence victims and his duties in terms thereof. He proceeded to not do any further investigations regarding the docket he had opened thereafter. Mr de Koker did not display great insight into the importance of the duties entrusted to him to protect the second respondent as a victim of domestic violence in this case. This attitude displayed to the respondents an uncaring police service, not interested in their right to be heard and not understanding what was at stake should they not be heard.

The respondents explained that they did not want to aggravate the ex-husband by obtaining a common law interdict to prevent him from entering their premises or a protection order against him,²³² but this does not seem to be the only cause for their reluctance to do so. The conduct of the members of the police, in particular Mr de Koker, in dealing with the second respondent and the matter as a whole dissuaded the respondents from attempting to take further action in terms of the DVA. The

²³¹ *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 25.

²³² *The Minister of Safety and Security v Venter* 2011 570/09 42 (SCA) para 26.

respondents suggested that the belief Mr de Koker instilled in them was that the ex-husband's behaviour was to be accepted and that not much could be done to address it, let alone hold him liable for the harmfulness and wrongfulness thereof. Hereby, the member of the police did not uphold the rights of the victims of domestic violence to dignity and respect. What happened instead, was that the respondents as victims of a domestic abuser were treated without concern for their dignity and not protected from victimisation by the member of the police in this form.

In accordance with the rights and the services afforded to victims of crime in terms of the Service Charter, the respondents were not central to the process of the members of the police in this case. If the respondents were viewed as the focal point of the investigation, then the members of the police would have listened to their pleas for help and would have made an effort to find ways in which to assist them by offering them solutions of protection which would have put their minds at ease. If the police had done this, in the execution of all their duties prescribed by the DVA and the National Instruction, they would have simultaneously protected the right of the respondents as victims of domestic violence to be treated with fairness, respect and dignity. Evidently, the consequences of not offering the respondents all the services which they could have been offered by the members of the police was continuous harassment, living in fear, an incident of rape and a gun-shot injury to the respondents. The members of the police hereby also failed to guard the rights to be protected which are afforded to the respondents as victims of crime in terms of the Service Charter. This illustrates once more that the execution of duties by members of the police in terms of the DVA and the National Instruction implicitly facilitates the victim-centred approach which is strongly encouraged and prescribed by the Service Charter. If the victim-centred approach had been employed in this way by the members of the police in respect of this incident of domestic violence, the respondents would not have been let down and would ultimately not have been victimised by the lack of concern shown for their rights to dignity and respect. It seems that members of the police cause secondary victimisation when they do not know how to handle a situation, what advice to give or what to do.²³⁴

²³⁴ S Sibisi "Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating domestic violence in South Africa" 66.

4 4 *Dlanjwa v Minister of Safety and Security*²³⁵

4 4 1 *Facts*

The domestic violence victim in this case was the appellant. The appellant appealed to the Supreme Court of Appeal against a decision of the Eastern Cape Local Division which denied the appellant's delictual claim against the Minister of Safety and Security. This delictual claim was for general damages, medical expenses, loss of earnings and loss of support arising from the death of the appellant's abusive policeman husband who injured her and thereafter killed himself with his SAPS issued firearm.²³⁶ This took place after the appellant had requested help from the police on various occasions, to no avail, after being repeatedly threatened by her abusive husband.

The appellant's claim arose from the fact that the members of the police failed to dispossess her husband of his SAPS issued firearm, failed to introduce disciplinary steps against him and to have him criminally charged despite previous requests by her for assistance and protection. They furthermore also had knowledge of the fact that the husband abused alcohol, had a violent temper, displayed suicidal tendencies, assaulted her, pointed the firearm in his possession at her and threatened to shoot her and kill himself. The appellant obtained a protection order against her husband for these reasons. The appellant alleged that the members of the police failed to take measures to protect her from being injured by her husband and to prevent him from killing himself, which they should have done, in accordance with their legal duty towards her as a victim of domestic violence.²³⁷

The appellant married her husband in 2004 and after a short while the marriage had become destructive in 2005. The husband displayed signs of possessiveness, accused the appellant of deceit, questioned his paternity to their triplets and had a continuous problem with her long working hours. The husband meanwhile had issues at work, where he was investigated for dealing with stolen vehicles and had his firearm confiscated, although the appellant saw it in his possession again after this dispossession. The displays of jealousy by the husband soon escalated to physical

²³⁵ 2015 20217/2014 ZASCA 147 (SCA).

²³⁶ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) paras 1-2; 1 Summary.

²³⁷ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 3.

assaults and threats that he would shoot the appellant with his firearm. The husband always promised he would turn away from his violent behaviour after such incidents and the appellant did not want him to be arrested.²³⁸

After the appellant arrived late at home again after work one night in February 2006, her husband again displayed great anger, which scared the appellant. The appellant then went to the police station and requested that they should take possession of her husband's firearm, in the fear that he might go through with his threats and shoot her. The member of the police who assisted the appellant on this occasion, Warrant Officer Dyantyi, remarked that he knew her husband was a violent person and did not want to be involved in the matter himself. The appellant was sent home with two other policemen accompanying her, one of which was Warrant Officer Madyibi. At the house, these policemen merely calmed the husband, before leaving, without further action being taken or assistance being offered to the appellant.²³⁹

On an afternoon in March 2006 the appellant returned home from work to find her husband furious at home, because she did not answer her cell phone which happened to have been switched off and at home all day. The husband pointed his firearm at the appellant and attempted to assault her as well. Although the landlady calmed the husband down, the appellant still did not feel at ease and proceeded to sleep at a friend's house. The next morning the appellant reported this incident of the previous night to a police station, where she spoke to Warrant Officer Dinwayo and Sergeant Zikolo. The appellant once again requested that the members of the police should seize her husband's firearm for her safety. The appellant was advised to obtain a protection order, which she did. She did not make use of the option to lay criminal charges as she did not want her husband to be arrested. A final protection order was granted after the requisite process was followed, but because the husband could not afford alternative accommodation, both parties remained in the common home. Instead of making an order to effect different living arrangements for the parties, an order was made for the parties to go for counselling.²⁴⁰

²³⁸ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 4.

²³⁹ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 5.

²⁴⁰ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 6.

One day in April 2006, two weeks after the final protection order was granted, the appellant arrived late at home after spending some time with her friend. The husband called for her to come to him while she attended to the babies, but sensing danger she did not go to him. The husband proceeded to enter the room and struck the appellant on the head with his firearm, which caused her to fall. The appellant lost consciousness after hearing a shot being fired and woke up in the hospital with gunshot wounds to her face, chest and leg. She was also informed that her husband had killed himself in this incident.²⁴¹

All the members of the police involved in assisting the appellant had denied on trial that she ever requested of them to seize her husband's firearm, that she informed them that she was threatened with the firearm and that she was assaulted by her husband. The members of the police involved in the first visit of the appellant to the police station, Warrant Officer Dyantyi and Warrant Officer Madyibi, testified on trial that she only requested them to help her because her husband refused to let her into their house in the early hours of one morning after she had worked late. This incident was, however, not recorded in the Occurrence Book, as it was deemed trifling. The member of the police involved in the second visit of the appellant to the police station, Warrant Officer Dinwayo, testified on trial that the appellant only reported that she had been threatened with assault by her husband. The appellant was advised to obtain a protection order or lay criminal charges and this was so recorded in the Occurrence Book of the police station.²⁴²

There was a dispute on trial about the details involved in the allocation of the firearm to the husband, because the police station to which it was allocated had not done an inventory of their armoury in a long time. The fact that the firearm in question was not documented as allocated to the husband officially, caused the trial court to conclude that no liability arose from the police's failure to monitor or assess the husband's suitability and/or fitness to possess the firearm. The trial court, however, found that the members of the police still had a legal duty to assist the appellant, by the mere fact

²⁴¹ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 7.

²⁴² *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 8.

that she had reported to them that her husband threatened her with a firearm he had in his possession.²⁴³

The court found that the appellant was overall credible in the substance of her testimony with regards to reporting the incidents of threats with the firearm and assaults committed against her by her husband to the police, even though she mixed up dates of incidents a bit. The court had found that the members of the police were obliged to investigate and assist the appellant in order to protect her even if she elected only to obtain a protection order. Their failure to do so was wrongful and negligent.²⁴⁴

The Minister of Safety and Security, as the respondent, appealed to the full court following the decision by the trial court that liability should ensue due to the members of the police having acted wrongfully and negligently. The majority of the full court did not agree with the trial court on most points. The full court did not agree with the trial court's findings of credibility with regard to the appellant's testimony. The court held it against the appellant that she did not want her husband to be arrested simultaneously with initiating the process to obtain a protection order. It was held against the appellant that she was not one hundred percent sure of the dates of the incidents she had reported. The appellant was criticised for not having filled in the application for the protection order to the effect of requesting her husband's firearm to be seized from him. The court regarded this failure as a sign that the appellant was being dishonest and concluded that she did not really report to the police the threats by her husband with his firearm or the possession thereof. The court concluded that the members of the police were not presented with the protection order and had no knowledge thereof, so they had no legal duty to act in terms thereof and protect the appellant.²⁴⁵

The appellant's appeal in this case to the Supreme Court of Appeal against the full court's decision was centred around the question whether the appellant indeed did report the assaults on her and threats made to her by her husband with his firearm to the police. Counsel for the appellant argued that the full court failed to evaluate the flaws in the defence case and to balance the flaws in the appellant's testimony with

²⁴³ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) paras 9-10.

²⁴⁴ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para10.

²⁴⁵ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) paras 11-12.

the probabilities thereof in order to determine her credibility. The minority judgement of the full court, exactly to this effect, made a point that the credibility of the appellant was not properly considered. According to the minority judgement of the full court the fact that the husband did exactly what he had threatened to do six weeks after the appellant reported him to the police and exactly as she described it, made it very unlikely that she fabricated the incidents which she reported.²⁴⁶

The appeal court held that, because of the fact that the full court was faced with two irreconcilable versions, it ought to have properly evaluated the credibility of all witness testimony and the most probable version had to be decided thereby, even if it did not seem to be the only one which could be deemed reasonable.²⁴⁷

The defence version contained many flaws. The members of the police mostly failed to take statements and make notes in the Occurrence Book as they were obliged to. As a result, they could not provide any supporting evidence of what they actually did to assist the appellant.²⁴⁸

Regarding the first incident, Warrant Officer Dyantyi could not properly remember what had happened and mostly relied on Warrant Officer Madyibi's recollection thereof. Warrant Officer Dyantyi said that he relied only on Warrant Officer Madyibi's account since it was trifling and denied ever being told by the appellant that her husband was in possession of a firearm.²⁴⁹

Warrant Officer Dyantyi could not properly explain not recording the reported incident in the Occurrence Book. Warrant Officer Dyantyi's actions furthermore did not show that he thought this incident was too trifling to record, because he proceeded to dispatch two officers to accompany the appellant home after his own comment that he knew the husband of the appellant was a violent person.²⁵⁰

Sergeant Zikolo was deceased at the time of the trial and could not testify with regards to the second time the appellant reported an incident to the police. Warrant Officer Dinwayo's involvement in this encounter with the police could not be accounted for. All the Occurrence Book stated with regards to this incident was that the appellant had complained of domestic violence, but not what exactly it meant. This vague entry was made together with a simple line that the appellant's rights were explained to her and

²⁴⁶ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) 13.

²⁴⁷ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 14.

²⁴⁸ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 15.

²⁴⁹ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 16.

²⁵⁰ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 17.

that she chose to obtain a protection order. The fact that Sergeant Zikolo explained to the appellant that she could lay a charge or obtain a protection order can easily lead to the inference that he deemed it serious enough an incident to warrant giving advice about protective measures such as these.²⁵¹

The appeal court agreed with the trial court and the full court's minority judgement that the appellant's testimony was not perfect, but referred to the fact that the "test to apply is not whether a witness is truthful or reliable in all that they say, but whether on a balance of probabilities the essential features of the story which they tell are true".²⁵²

The appellant remained certain of the types of incidents which occurred and what actions and threats they entailed, even if the dates were sometimes uncertain.²⁵³ The appeal court found it understandable that the appellant could not precisely remember all the specific dates, due to the abusive circumstances she had been enduring for years. The appeal court did not find an issue with the explanation the appellant offered as to why she had not reported previous abusive incidents when her husband threatened her with his firearm. The appellant explained the complexities involved in forgiving her husband when he begged for forgiveness and that she desperately wanted to believe he would change when he assured her that he would.²⁵⁴ Unlike the full court's minority judgement, the appeal court found no issue reconciling the fact that the appellant did not want her husband to be arrested with her request for the police to seize his firearm. The court held that if the appellant really wanted her husband to escape all legal consequences for his actions, she would never have approached the police about the confiscation of his firearm either.²⁵⁵

The appeal court also did not see how it could be fair to blame the appellant, as a lay and unsophisticated young woman, for not understanding her rights in terms of the DVA before being informed thereof or not seeking further police help when it was not offered. It was not her responsibility to oblige or further motivate the members of the police to do their work, since it was their legal duty to do so.²⁵⁶ The members of the police have to protect victims of domestic violence in terms of the DVA as well as in

²⁵¹ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 18.

²⁵² *Santam Bpk v Biddulph* 2004 5 SA 586 (SCA) para 10.

²⁵³ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 19.

²⁵⁴ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) paras 20-21.

²⁵⁵ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 22.

²⁵⁶ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 23.

terms of section 12(1)(c) of the Constitution which entails the right to freedom and security of the person.²⁵⁷ The members of the police were also criticised by the appeal court due to the fact that the protection order had in fact been served on them ten days before the tragic incident occurred and this was evidenced by documents which formed part of the pre-trial. A Warrant Officer was also found as having tried to conceal this fact by tampering with the Domestic Violence Register at the police station. Due to this information having been provided to the police, the members of the police were most likely aware of the threats involving the husband's firearm being made to the appellant before the incident occurred.²⁵⁸ The members of the police had breached their legal duty to protect the appellant from harm, by making no attempt to protect the appellant and knowing that a harmful incident could possibly have occurred. The appeal court also stated that the members of the police or other related officials were the ones who had the duty to direct the appellant in respect of how to fill in the protection order. The appellant could not be blamed for not filling in the request for the seizure of weapons part, as she was simply following directions from the member of the police who helped her fill in her application. Furthermore, the court which granted the protection order could have also ordered the police to seize the firearm from the husband of its own volition in terms of section 9 of the DVA, upon reading the contents contained in the application for the protection order.²⁵⁹

The appeal court in the end held that there was a legal duty owed to the appellant, that the members of the police breached this duty by failing to offer protection to the appellant and that there was a causal link between the failure to provide such assistance and protection to the appellant and the harm suffered by the appellant. Negligence and wrongfulness on the part of the members of the police and their inaction was confirmed as having been proven. The appeal court allowed the appeal to succeed and set aside the full court's majority judgement.²⁶⁰

²⁵⁷ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 24.

²⁵⁸ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) 26.

²⁵⁹ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) para 27.

²⁶⁰ *Dlanjwa v Minister of Safety and Security* 2015 20217/2014 ZASCA 147 (SCA) paras 30-32.

4 4 2 *Application of legal instruments*

The legal duty imposed on the members of the police which is primarily of concern in this case is the duty to seize firearms or dangerous weapons from an alleged perpetrator of domestic violence, which is provided for in section 9 and section 11 of the DVA and the National Instruction, respectively. Although the order to seize an alleged perpetrator's firearm is made by a court of law, it is arguable that the members of the police could have assisted the appellant more to bring such need to the attention of the court. Other legal duties which were not complied with by members of the police in this case include the general duty to give advice and inform victims of domestic violence of their rights in terms of section 2 and section 5 of the DVA and the National Instruction, respectively, as well as not recording domestic violence incidents sufficiently in the Occurrence Book in terms of section 8(3) of the National Instruction. These incidents of non-compliance with their legal duties in terms of the applicable legal provisions, meant that the members of the police ultimately did not even attempt to meet the aim of the DVA, to offer the maximum protection to the concerned victim of domestic violence that the law could have possibly offered.

On the first visit to the police, none of the members of the police explained the appellant's rights as a victim of domestic violence to her. The appellant approached the police due to her fears that her husband's threats to shoot her might materialise. The members of the police, however, did not provide any information to the appellant about how she could possibly handle the volatile situation she was complaining about and bringing to their attention. The members of the police should have advised the appellant about her rights and courses of action which were available to her to take, such as the obtaining of a protection order which would have included the seizure of her husband's firearm and the laying of criminal charges. As stated above, the most concerning part was that one of the members of the police did not even need more evidence to be able to state that he knew the husband of the appellant was violent. This knowledge alarmingly did not prompt the member of the police to make more of an effort to assist the appellant. If these members of the police had acted in terms of their obligations they would not have needed excuses as to why the specific incident was not recorded as required in the Occurrence Book. The fact that an incident of domestic violence is not recorded, such as was the case here, shows that the incident was possibly not considered as seriously as it should have been. This can arguably

also be a display of a type of attitude by members of the police to not take domestic violence incidents too seriously in general. The appellant was simply accompanied home after confiding in the police that she felt threatened by her husband. The appellant even had a member of the police tell her that he knew her husband was violent, but still did not do anything to assist her. This displayed an attitude of unhelpfulness and consequently a disregard for the appellant's safety as a victim of domestic violence. The lack of assistance offered to the appellant in this case as well as the lack of genuine concern being displayed to her safety and rights lead to the appellant returning home without any difference being made by her visit to the police station. Even though indirectly, this can potentially cause secondary victimisation to a victim of domestic violence because the members of the police failed to take their legal duties seriously. The failure of the members of the police to inform the appellant of her rights and how they may possibly be able to assist, had the effect of not asserting the importance of those rights in her mind, even while acknowledging that she was indeed facing a violent man at home. This means that even though the appellant had the right to be protected from the domestic violence she experienced and reported, the place she went to for refuge, in effect denied her that right and refuge.

The second time the appellant requested help from the police to seize the firearm of her husband, she did receive a little advice. This measure of advice and help which she received was insufficient though. The note made in the Occurrence Book about this incident only stated that some kind of domestic violence had occurred between the appellant and her husband. The lack of detail in the note might display the failure of the members of the police involved to look at the matter in depth or try to assist the appellant more thoroughly. The appellant was advised that she could obtain a protection order and lay criminal charges, but nowhere was it specifically stated that she was advised how the protection order could be a mechanism to enable the seizure of her husband's firearm to be effected. A member of the police assisted the appellant with filling in her application for the protection order when she had opted to apply for one, but did not guide her to fill it in so that a specific request would be made to the court to order that the police should seize her husband's firearm. The members of the police are the ones who should give such advice, since it is linked to their duties that they have the power to execute such orders. The information contained in the application for the protection order should have prompted the member of the police to

give this advice and guidance to the appellant. By failing to do so, the appellant was not given the maximum protection from domestic violence which the law could have offered her in the specific circumstances. The insufficient assistance offered to the appellant on this occasion again displays a lack of deeper concern for what harm could possibly ensue should the measures the law had to offer not be utilised to its full effect. If the members of the police fully advised the appellant about the protection order and specifically with regard to the provision made for the court to be able to order the seizure of her husband's firearm, she might have been spared more threats and harm caused thereby. The members of the police failed to advise or help the appellant with her quest to have her abusive husband's firearm seized. Again the appellant returned home after this complaint to the police, without being meaningfully assisted in the one specific regard that was concerning her the most. Thereby, her voice was once more dampened so to speak and not heard as she should have been. When the police as the institution which is supposed and legally obliged to help and care about the abuse a victim of domestic violence has suffered, does not assert the importance of a victim's voice in this sense, it can cause them to experience secondary victimisation.

Finally, the fatal incident this case centred around occurred and with her husband still being in possession of his firearm, the appellant was injured to the point of unconsciousness. As mentioned earlier, this case is an example of how the failure of members of the police to execute and uphold the standards required in terms of their legal duties toward domestic violence victims can result in secondary victimisation along with further abuses and harm. If the appellant had been properly informed, guided and assisted by the members of the police to bring it under the court's attention that her husband was in possession of a firearm, which he threatened to use to her detriment, the probability of her suffering this incident would have at the very least been lessened.

In line with the spirit of the Service Charter, a victim-centred approach in this case would have meant that the members of the police involved would have made the appellant's voice and pleas for help as a victim of crime the priority in the handling of her complaints and requests. A greater effort would have been made to ensure that the appellant would have been safer by means of having her husband disarmed. Although it would have been possible for the husband to acquire a different firearm or

weapon if he was dispossessed of his, as stated in a previous chapter, it would have added a measure of protection and reduced the likelihood of the appellant being threatened, injured or otherwise harmed by the use of a firearm.

The appellant was not treated by the members of the police in a way which would or could minimise inconvenience or reflect respect for her human dignity and fairness. The appellant complained multiple times and showed her concern for what harm her husband might have been capable of causing with his firearm. These concerns were, however, not taken into account as seriously as they should have been in order to prevent the incident which happened in the end. By means of not upholding this standard to their full capabilities, the members of the police infringed upon the appellant's rights to be treated with respect for her dignity and with fairness in the process of handling her complaints as a victim of crime and of domestic violence in particular. The appellant provided information to the members of the police which made it clear that her rights, specifically the right to freedom and security of the person, as well as potentially her right to life, were in danger of being violated. The appellant, however, received little information in return from the members of the police on how she could handle these infringements and potential future violations of her rights caused by the abuse she suffered. The failure of the members of the police to sufficiently uphold these standards in order to guard the appellant's rights had the effect of offering insufficient protection and assistance to the appellant, in that she did not know how a protection order could possibly be utilised to have her husband dispossessed of his firearm. A victim-centred approach would have enabled the members of the police, to pay attention to what the appellant was alleging had happened to her from the start, and what harm it could potentially cause if the threats that were allegedly made to her would have materialised. If this approach and standard of dealing with a victim and one of domestic violence specifically, had been upheld, the appellant's rights would have been affirmed and not treated as an afterthought, as was exactly the case regarding the abuse she had suffered primarily.

4 5 Preliminary sentiments

The examples of actual domestic violence victims who have suffered secondary victimisation at the hands of members of the police in the various instances of jurisprudence above illustrate that the problem of such victimisation is quite serious and harmful. It is clear that the problem of secondary victimisation of domestic violence

victims by members of the police should be addressed to a greater extent in the future than it has been in the past. Therefore it is important to review and analyse the current legal provisions, to what extents they are adequate in protecting domestic violence victims from secondary victimisation by the police and what kinds of legal protection might possibly be more adequate in doing so.

CHAPTER FIVE

5 Findings

5.1 Adequacy of legislative provision

“To what extent is adequate legislative provision made for the protection of domestic violence victims from secondary victimisation by the police in South Africa?”

The focus of the DVA and the National Instruction, owing its existence to the DVA, shares the clarity that the primary and collective aim of these legislative instruments is to offer victims of domestic violence the maximum protection from domestic violence which the law can possibly provide. These legislative instruments, however, clearly do not primarily exist and strive to address or to alleviate the secondary victimisation which victims of domestic violence might suffer due to members of the police not adhering to these duties and the standards of treatment of domestic violence which they imply. This is understandable due to the fact that the DVA and the National Instruction were enacted in order to address and regulate a great variety of aspects regarding domestic violence in the country. One specific problem such as secondary victimisation which may be inflicted on domestic violence victims by members of the police cannot reasonably be its primary aim. In evaluating the extent to which these legislative instruments and their provisions are adequate for the protection of domestic violence victims from secondary victimisation by members of the police, it is important to estimate how exactly this specific protection is prioritised within these instruments.

As discussed earlier in this thesis, there are various legislative duties which are placed upon members of the police when interacting with domestic violence victims. The duties imposed on members of the police in terms of the DVA and the National Instruction set implicit standards for members of the police to adhere to when handling domestic violence victims and their cases. These standards were set and these duties were imposed on members of the police by the enactment of these legislative instruments in order to protect victims of domestic violence from suffering abuses or suffering further abuses in case they already suffered some form of domestic violence. As alluded to in earlier chapters, there is arguably implicit provision made for the protection of domestic violence victims from secondary victimisation by the members

of the police. This argument is found in the fact that non-compliance with the legislative duties imposed by the DVA and the National Instruction by members of the police is punishable and can lead to disciplinary action.²⁶¹ As mentioned earlier, it is possible that non-compliance with these legal duties by members of the police may result in secondary victimisation of domestic violence victims. This is so because it is often in the process of the negation of legal duties by members of the police that victims of domestic violence feel let down and disheartened in some way or another by the SAPS, as the institution which is supposed to care about their suffering and their protection from additional suffering.

The fact that legislative duties are placed on the members of the police when dealing with victims of domestic violence means that the treatment of these victims is prioritised to an extent in terms of the implicit standards set by virtue of those duties. This is so because members of the police are required, by virtue of these legislative duties, to employ certain implicit standards of treatment whenever interacting with victims of domestic violence. Unlike the Service Charter and its Minimum Standards, there is no explicit acknowledgement or recognition of the existence of the problem of secondary victimisation of victims of crime by members of the police in the DVA or the National Instruction. The lack of such explicit recognition of the problem prevents the DVA and the National Instruction, as domestic violence legislation, from placing adequate emphasis on the importance of it to be addressed. As mentioned in the introductory chapter of this thesis, the most concerning consequence of not addressing this problem is a loss of trust in the SAPS by victims of domestic violence.²⁶² The importance of maintaining or ensuring trust in the SAPS cannot be overstated, since this can have the consequence of creating an additional impediment to alleviate the broader problem of domestic violence for which the SAPS itself will then solely be responsible. When members of the police cause distrust by virtue of their actions it may affect how legitimate these victims and citizens generally regard the SAPS as a whole as an institution.²⁶³ This can be quite tragically ironic, since the

²⁶¹ See footnote 51.

²⁶² See footnote 35.

²⁶³ P Homolova "Theories of Police Legitimacy – Its Sources and Effects" (2018) *Acta Universitatis Carolinae. Philosophica et historica* 2 / *Studia Sociologica* 102; T R Tyler "Psychological perspectives on legitimacy and legitimation" (2006) *Annual Review of Psychology* 57 375 400; A Z Huq et al "Acts that legitimate: Widening the array of predicate policing practices" (2016) Public Law and Legal Theory Working Paper No. 570 University of Chicago; W Lyons "Partnerships, information and public safety:

SAPS is the institution which is supposed to support victims and not add to their woes and suffering.

The lack of explicit recognition of the problem of secondary victimisation of domestic violence victims by the police, specifically in the DVA and the National Instruction, has the consequence that there also exists a lack of explicit protection being offered to such victims in terms of the specific problem. It is acknowledged and noted that implementation problems will always possibly exist and cause secondary victimisation as well, as the jurisprudence also displays in previous chapters. The probability of the protection of victims from a certain action, inaction or specific type of victimisation in this case, will however likely be higher if provision for such protection is made explicitly rather than implicitly in legislative instruments. The fact that the extent of the provision for the protection of domestic violence victims from secondary victimisation by members of the police is exclusively implicit in nature in the provisions of the DVA and the National Instruction seems to display that the protection offered in terms of this victimisation is mostly inadequate. In line with the existing aim that the DVA should offer the maximum protection from domestic violence to victims that the law is able to provide, it should also be able to ensure the maximum protection of these victims from secondary victimisation by members of the police. It makes no sense to strive to protect victims of domestic violence from harm in their domestic spaces only for them to be harmed in the form of secondary victimisation by members of the police instead or in many cases, as well. It will, thus, not be possible to work towards the aim of offering the maximum possible protection of domestic violence victims from secondary victimisation by the police if such protection is only implicit. Adequate protection of domestic violence victims from secondary victimisation by members of the police needs to be ensured by explicit provision for the protection of victims from such victimisation.

5 2 Uniformity of instruments

“To what extent are the relevant legal instruments and frameworks aligned so as to provide domestic violence victims with a uniform standard of protection from secondary victimisation by the police?”

Community policing in a time of terror” (2002) *Policing: An International Journal of Police Strategies & Management* 25 3 530 542.

5 2 1 *Recognition*

The relevant legislative instruments, if one views them collectively, seem to share a strong stance being taken in terms of the protection of victims of crime and domestic violence specifically, from harm. This shared strong stance towards the protection of victims of domestic violence from harm in general does, however, not extend to the protection of these victims from secondary victimisation by members of the police specifically. These relevant legislative instruments do not seem to share a uniform understanding of secondary victimisation by members of the police as a specific type of harm which domestic violence victims need to be protected from.

The DVA and the National Instruction, as seen in the earlier chapters of this thesis, namely chapters two and three, never makes any mention of secondary victimisation at all and consequently never mentions or provides any specific protection to domestic violence victims from such victimisation. Although the DVA and the National Instruction are seemingly silent on the problem of secondary victimisation, the Service Charter is not completely.²⁶⁴ The Service Charter specifically mentions the existence of the problem of secondary victimisation of victims of crime and the need for it to be eliminated in the criminal justice process, which is described in its Minimum Standards as well. The members of the police are also identified in the Minimum Standards as agents within the criminal justice system which may play a role in the problem of secondary victimisation of victims of crime. The statement made by the Service Charter in the description of its chief aims, that secondary victimisation of victims of crime should be eliminated, shows that protection of victims from such victimisation is and should be prioritised.

It is clear that the Service Charter's explicit recognition and prioritisation of the protection of victims of crime from secondary victimisation in the criminal justice system does not seem to be incorporated, at the very least not explicitly, in the DVA and the National Instruction. If the DVA and the National Instruction would have shared this recognition and prioritisation of the protection of domestic violence victims specifically, from secondary victimisation by members of the police, it could have greatly contributed to effect and ensure the existence of a uniform standard of such protection between the relevant legislative instruments. This is, however, not the case

²⁶⁴ See footnote 62.

due to the lack of such recognition in the DVA and the National Instruction. The extent to which the relevant legislative instruments are currently aligned in terms of its recognition of the problem of secondary victimisation is insufficient to collectively be able to create a uniform legislative standard of protection of domestic violence victims from such victimisation by members of the police.

5 2 2 Recourse

It is important that victims of DV have access to recourse in the case of secondary victimisation by police. Holding perpetrators of harm accountable affirms that protecting victims is a priority. It is possible that victims of domestic violence might be protected from future secondary victimisation by members of the police if members who have made themselves guilty thereof in the past are adequately held accountable and punished sufficiently for such actions. Adequate punishment for members of the police for the infliction of secondary victimisation on domestic violence victims can serve as a deterrent. Deterrence as a legal principle in this context would mean that police officials are so acutely aware of the consequences, preferably and potentially far-reaching, that may follow should they act in a way which might inflict secondary victimisation on a victim that they will tread lightly not to do so. The adequate punishment and deterrence of members of the police serve as part of the provision of protection to domestic violence victims from secondary victimisation by the members of the police. The manner in which the relevant legislative instruments are aligned in terms of measures of recourse offered to victims of domestic violence upon suffering incidents of secondary victimisation is also relevant to the evaluation of the extent to which the instruments are aligned in order to provide a uniform standard of protection offered to these victims in terms of such victimisation.

Provision is made for recourse to victims of domestic violence following secondary victimisation by members of the police in terms of the relevant legislative instruments. The DVA and the National Instruction understandably do not currently make specific or explicit provision for recourse to victims of domestic violence who suffer due to incidents of secondary victimisation by members of the police, since these instruments do not even define secondary victimisation as a problem, nor do they provide specific protection to victims from such victimisation. The implicit provision of recourse made for these victims by these instruments mainly relate to the disciplinary consequences

which may follow for members of the police upon non-compliance with their legislative duties toward these victims. As explained in previous chapters, with specific reference to chapters three and four, the non-compliance with legislative duties by members of the police toward victims of domestic violence may make such members guilty of secondary victimisation simultaneously, since such non-compliance often involves the poor responses to and ineffective dealing with domestic violence victims and their cases. This can be seen in the practical examples of jurisprudence in chapter four. Secondary victimisation of domestic violence victims might be one specific type or consequence of non-compliance by members of the police with their legislative duties in terms of these relevant legislative instruments.

The Service Charter together with its Minimum Standards offer a more detailed list of the institutions, in addition to a police station's commissioner, which a victim of crime may approach in order to make a complaint due to ill treatment or secondary victimisation inflicted by role players within the criminal justice system, such as members of the police. These various mentioned institutions have been alluded to in an earlier chapter of this thesis,²⁶⁵ but what is important to note in the current context is that the Service Charter seems to be more explicit with regards to stipulating which institutions may be approached for recourse than the DVA and the National Instruction. While the DVA and the National Instruction merely make provision for disciplinary procedures for members of the police who make themselves guilty of non-compliance with their legislative duties, the Service Charter, specifically in its Minimum Standards, explicitly names various institutions who will be able to provide recourse to victims in case it is not provided sufficiently by a police station's commissioner.

The same extent of alignment which can be observed above between the relevant legislative instruments in terms of the recognition of the problem of secondary victimisation can be greatly observed in respect of the provision of recourse as set out in the instruments. The DVA and the National Instruction barely scrape the surface in their provisions regarding disciplinary consequences for non-compliant members of the police in comparison to the Service Charter in its Minimum Standards which lists various institutions which victims of crime are able to approach in terms of the provision

²⁶⁵ See footnote 93.

of recourse after suffering from secondary victimisation inflicted by members of the police. Although not mentioned in the DVA and the National Instruction, victims of domestic violence are able to make use of the mechanisms for recourse set out in the Minimum Standards, but failing to make these provisions of recourse explicit in the DVA and the National Instruction as well might cause victims to not be informed thereof. It is important to ensure that all relevant legislative instruments are aligned in terms of the provision of recourse described therein, because this will make it more probable that domestic violence victims who have suffered incidents of secondary victimisation are informed of where to report and pursue justice for the harms that have been inflicted on them by members of the police. The relevant legislative instruments, due to the above, also do not seem to be aligned to a sufficient extent in respect of the provision of recourse in order to be able to create a uniform standard of protection to victims of domestic violence from secondary victimisation by members of the police.

5 2 3 Importance of uniformity

It is logical that making provision for the protection of victims of domestic violence from secondary victimisation, would be advanced if the relevant legislative instruments addressing the specific problem of domestic violence have a uniform standard for the provision of such protection. It is possible for related legislative instruments to differ, because they often address different aspects of a specific problem. It is, however, arguable that only by means of the explicit and consistent recognition of the need for provision being made in the relevant legislative instruments for the protection of domestic violence victims from secondary victimisation, will it prevent the issue from disappearing into the background. Ensuring uniformity of the standard of protection of these victims from such victimisation in the relevant instruments will affirm it as a priority and arguably make it harder for role players such as members of the police to not comply with obligations which would be in the furtherance of such protection. Achieving a uniform standard of protection of domestic violence victims from secondary victimisation is closely linked to the fact that the relevant legislative instruments should have a uniform standard of treatment of these victims. Uniformity of standards for dealing with victims of domestic violence is important, because the mistreatment or secondary victimisation of these victims usually starts with the non-adherence to certain acceptable standards of treatment by members of the police. The uniformity of the standards of treatment and of the protection of domestic violence

victims from secondary victimisation in the relevant legislative instruments might be able to make the actual protection of these victims from such victimisation more efficient and watertight.

The importance of uniformity of standards of protection of victims of domestic violence from secondary victimisation by members of the police as displayed above, necessitates that the relevant legislative instruments improve their present lack of alignment.

5.3 Shortcomings

“What are the shortcomings of legislative provisions in terms of the protection they offer to domestic violence victims from secondary victimisation by the police?”

The fact that the DVA and the National Instruction are not explicitly aligned with the Service Charter’s aim to eliminate secondary victimisation in the criminal justice process, as indicated earlier in the thesis and above, is only the first notable shortcoming these legislative instruments display in terms of the protection of domestic violence victims from such victimisation. The lack of such explicit alignment with and reception of the aim to eliminate secondary victimisation as stated in the Service Charter in the DVA and the National Instruction, specifically within the context of domestic violence legislation, is a shortcoming in terms of the protection of domestic violence victims from such victimisation. This shortcoming is mentioned first, because of the fact that an underlying policy or aim logically and naturally sets the tone for how a piece of legislation is constructed and interpreted. Although the DVA, in its preamble, clearly states that its aim is to offer the maximum protection that the law is able to provide to protect victims from domestic violence, this does not have explicit bearing on protecting victims from secondary victimisation in the process as well. As mentioned before, victims of domestic violence may be implicitly protected from secondary victimisation by members of the police due to these members having to commit to a standard of offering maximum protection from domestic violence and thus from harm to these victims, in terms of the DVA. There is, however, no explicit aim formulated in the DVA’s preamble or anywhere else in the DVA or the National Instruction to indicate a similar commitment to provide the maximum protection to domestic violence victims from secondary victimisation caused by role players in the criminal justice process, such as members of the police, that they are able to in terms

of the law. The policy underlying the aim of eliminating secondary victimisation within the criminal justice system as noted in the Service Charter, is unfortunately not explicitly and thus not adequately received in the DVA and the National Instruction in order to make this aim specifically relevant to the protection of domestic violence victims from such harm inflicted by members of the police. The DVA and the National Instruction thus arguably fall short in terms of their underlying policy due to the fact that the elimination of secondary victimisation of domestic violence victims within the criminal justice process is not introduced or stated in a way which explicitly prioritises it as an aim within these legislative instruments.

The analyses above, in 5 2 1 and 5 2 2, with regard to the legislative provisions which provide for the recognition of secondary victimisation of domestic violence victims by members of the police and the recourse offered to victims in that context make it apparent that there is a lack of explicitness in the relevant legislative instruments with regard to such provisions. These provisions with regard to the recognition of the problem and the recourse offered to domestic violence victims in terms of secondary victimisation by members of the police, together, are instrumental in understanding the extent of protection offered to victims from such victimisation in terms of the legislative instruments. The fact that the provisions which set out the protection offered to domestic violence victims from secondary victimisation by members of the police in the DVA and the National Instruction are implicit in nature, has the effect that the problem thereof is not clearly and explicitly prioritised within these legislative instruments. The lack of prioritising the problem of secondary victimisation of domestic violence victims by members of the police in this way has the consequence that explicit provisions with regard to the problem and the protection of victims from this type of harm is not found in these legislative instruments. Even without taking into account possible implementation problems which may exist within the SAPS, the DVA and the National Instruction within its provisions do not place the importance of the matter of secondary victimisation of domestic violence victims from secondary victimisation by members of the police at the forefront in order to enable adequate protection to victims from such victimisation. The exclusively implicit nature of the protection from secondary victimisation by members of the police offered to domestic violence victims is a serious shortcoming found in the DVA and the National Instruction.

The shortcoming of explicit provisions for the protection of domestic violence victims from secondary victimisation by members of the police in the relevant legislative instruments has the consequence that there is also a shortcoming of explicit provisions for the punishment of members who make themselves guilty of inflicting such harm within these instruments. As discussed earlier in the thesis, specifically in 5.2.2 above, it is an important part of affirming the dignity of and protecting domestic violence victims from secondary victimisation by members of the police to hold the members who make themselves guilty of such actions accountable for the harm inflicted thereby. There are, however, no provisions contained in the relevant legislative instruments providing for the specific implications such as specific punishments or disciplinary consequences for members of the police who make themselves guilty of secondary victimisation of domestic violence victims. A matter which is closely connected with the shortcoming of the provision for specific ways in which members of the police are to be held accountable for their actions when they inflict harm by means of secondary victimisation on victims of domestic violence is the provision of guidelines for these victims to report such incidents. The Service Charter at least provides a list of institutions which a domestic violence victim, as a victim of crime, may approach in order to report or complain about an action of a role player in the criminal justice system which may have caused them harm. The DVA and the National Instruction, however, do not provide any guidelines to domestic violence victims on what to do or who to report to when an incident of secondary victimisation by members of the police do occur. These legislative instruments fall short in terms of the provision of guidance offered to domestic violence victims to complain, report or obtain justice in respect of the harms they suffer in relation to secondary victimisation by members of the police.

5.4 Addressing shortcomings

“How can the shortcomings of legislative provisions related to the protection of domestic violence victims from secondary victimisation by the police possibly be addressed?”

The need for the policy underlying domestic violence-related legislative instruments, with specific reference to the DVA and the National Instruction in this case, to include the aim of addressing secondary victimisation as well as protecting domestic violence victims from such victimisation is apparent from the above discussion. Underlying

policies in legislative instruments are able to set a certain tone for how a legislative instrument is to be understood, interpreted and applied by the role players, such as members of the police, who are imposed duties on thereby. In the case of domestic violence legislation this would mean that members of the police will be bound to execute their legislative duties toward domestic violence victims in a victim-sensitive manner and with care not to inflict secondary victimisation on them by disregarding their rights. The fact that the policy displayed in the DVA and the National Instruction does not make such an aim to protect domestic violence victims from secondary victimisation by members of the police explicit, suggests that it would be beneficial for the promotion of such an aim if the policy of these legislative instruments would be amended and/or supplemented to that extent. It is likely that the launching of intensive educational training and workshops for members of the police will be beneficial with regards to the importance of such an aim being present in their approach to the handling and treating of domestic violence victims and their cases. This will enable members of the police to obtain insight into why their behaviours and conduct, when dealing with domestic violence victims, need to be informed by the standard of respect for these victims' rights and the furtherance of their protection from all harms, including secondary victimisation. Members of the police will also likely be able to develop a greater understanding about and insight into the correlation between how their actions, if not sufficiently cautious and thought through, may inflict harm by means of secondary victimisation on victims of domestic violence and can thereby negatively influence the public's perception of and trust in them.²⁶⁶

The lack of explicit standards being present within the DVA and the National Instruction in terms of the protection of domestic violence victims from secondary victimisation is also a vital shortcoming to address, as explained above. The need thus exists for the explicit and specific recognition of the problem which domestic violence victims face, namely secondary victimisation by the police. Domestic violence victims need to be protected from secondary victimisation by members of the police by virtue of explicit protective measures alongside the recognition of the problem. The consequences for members of the police who make themselves guilty of secondary victimisation of domestic violence victims need to be clearly provided for in the relevant

²⁶⁶ See footnote 130.

legislative instruments, in order to adequately hold such members accountable. The secondary victimisation of domestic violence victims by members of the police thus needs to be defined as a specific type of non-compliance with the legislative duties which members have toward these victims.

The reform of relevant legislative instruments or the promulgation of additional legislative instruments in order to make specific and explicit provision for the protection of domestic violence victims from secondary victimisation by members of the police will be a step in the right direction towards better protection of these victims from such victimisation. As mentioned before in this thesis, implementation issues cannot be discounted, but the provision of explicit protection to domestic violence victims from secondary victimisation by members of the police within relevant legislative instruments will be able to ensure, at the very least, that a greater probability of protection of these victims from such victimisation exists.

It might be possible to promulgate a new legislative instrument or to amend the existing relevant legislative instruments, with specific reference to the DVA and the National Instruction, in order to make explicit provision for the protection of domestic violence victims from secondary victimisation by members of the police.

Although it is possible to promulgate a new legislative instrument related to the DVA and the National Instruction in order to address secondary victimisation of domestic violence victims by members of the police, it might be more appropriate and suitable to amend the existing frameworks within these instruments to this effect instead. The DVA and the National Instruction are not unsatisfactory legislative instruments generally, but the need does exist to explicitly address and make provision for the protection of domestic violence victims from secondary victimisation by members of the police. It might be most suitable to address the issue in terms of and within the existing legislative frameworks related to domestic violence. The DVA and the National Instruction might be able to be amended to the effect of introducing a separate chapter or section dealing exclusively with secondary victimisation of domestic violence victims by members of the police. Addressing the issue within these existing legislative instruments instead of promulgating a whole new legislative instrument, will most likely ensure that the issue is prioritised within the context in which it is most vital. Thereby, members of the police will be bound to standards of treatment specifically and explicitly relating to the protection of domestic violence victims from secondary victimisation,

along with all their other existing duties toward these victims. The existing relevant legislative instruments, with specific reference to the DVA and the National Instruction, will then be able to encapsulate a comprehensive whole of all the duties members of the police should adhere to, including those relating to the specific protection of domestic violence victims from secondary victimisation by members. Examples of such ideal explicit provisions would include specific recognition of how domestic violence victims should be treated, their rights as victims, specific recognition of the importance of the prevention of secondary victimisation, specific recognition of what conduct may constitute secondary victimisation, specific and accessible recourse options for aggrieved victims and specific punishments for members of the police for any non-compliance with or violation of such provisions.

Along with the specific provisions and duties with regard to the protection of domestic violence victims from secondary victimisation by members of the police, it will also be possible to make provision for the specific consequences which may follow in the case of members' non-adherence to these provisions and/or duties and the causing of harm to victims in terms of such victimisation. Consequences could possibly range from specific disciplinary consequences within police structures (such as suspensions of various lengths), civil law consequences (such as delictual claims) or even criminal law consequences (such as criminalisation of conduct) depending on the seriousness of the violation of the provisions and/or duties in question as well as the extent of harm caused to a specific domestic violence victim in a particular instance. It will also be possible to express support and empathy to domestic violence victims who have suffered incidents of secondary victimisation by members of the police, by making provision for explicit guidelines to assist and advise these victims on how to report such matters and seek compensation and/or justice for the harms they have sustained.

Amendments such as the above examples of possible explicit provisions will be able to ensure that the DVA and the National Instruction is brought to be more in line with the Service Charter, specifically with regards to its aim that the elimination of secondary victimisation of victims of crime within the criminal justice system should be prioritised. Such amendments will be able to have the effect of sufficiently incorporating this aim and ideal expressed by the Service Charter into the DVA and the National Instruction, while affirming its specific importance and relevance in the context of domestic violence legislation and domestic violence victims.

CHAPTER SIX

6 Conclusion

6 1 The present

The findings made in this thesis display that the present extent of legislative provision for the protection of domestic violence victims from secondary victimisation by members of the police is at most limited. This limited extent of provision for such protection can be seen in the fact that the main legislative instruments dealing with domestic violence matters, namely the DVA and the National Instruction, exclusively make implicit provision for this protection. This implicit provision for such protection is created by certain legislative duties being imposed on members of the police in terms of the DVA and the National Instruction, which implicitly sets certain standards of treatment which members should comply with when dealing with domestic violence victims and their cases. These implicit standards of treatment display that domestic violence victims should be treated with respect, dignity and with a concern for their rights as well as prioritising their safety and well-being in situations where they may be harmed by domestic violence or abuse. The manner in which this provides for the implicit protection of domestic violence victims from secondary victimisation by members of the police, is that when these victims are treated by members in line with concern for their rights it will be less likely that they are victimised in this way, because of the fact that such victimisation usually occurs when victims' rights are not taken to heart. This link between the implicit protection of domestic violence victims from secondary victimisation by members of the police and the violation of victims' rights in the case of non-compliance with standards of treatment in terms of legislative obligations owed to these victims, is also clearly displayed in different ways and to different extents in the jurisprudence reviewed.

The various practical examples displayed in the jurisprudence reviewed in chapter four of this thesis make it clear that domestic violence victims, especially women in this thesis, have suffered and presently do still suffer from harms caused to them due to secondary victimisation by members of the police. The incidents of secondary victimisation of domestic violence victims by members of the police which are displayed in the reviewed jurisprudence, were clearly due to these members not

complying effectively with the legislative obligations imposed on them in terms of the DVA and the National Instruction and thereby meant that these members did not sufficiently adhere to the standards of treatment of victims implied by those legislative obligations. The non-compliance or inefficient compliance with legislative obligations, in terms of the DVA and the National Instruction, by members of the police thus not only leads to a violation of those obligations alone, but also leads to a violation of the standards of treatment of victims implied by those obligations and eventually a violation of the rights of these victims. The violation of the rights of these victims frequently then results, to some or other extent, in secondary victimisation of these victims. The implicitness of the protection offered to these victims in these legislative instruments from such victimisation by members of the police is again displayed in this paragraph.

Explicit protection of domestic violence victims from secondary victimisation by members of the police is clearly a gap in the DVA and the National Instruction, being the legislative instruments in closest connection with domestic violence matters and thus victims thereof. The finding of inadequate protection was made in this thesis by virtue of the implicitness of the provision of protection to domestic violence victims from secondary victimisation by members of the police in the DVA and the National Instruction. Due to the lack of explicit provision of protection of these victims from such victimisation by members of the police, there is consequently also a lack of explicit provision for holding members who make themselves guilty of treatment which is or could lead to secondary victimisation, accountable. Presently, provision is only made by the DVA and the National Instruction for disciplinary consequences and a finding of misconduct in terms of the SAPS Act for members of the police who do not comply with their legislative duties as stipulated in these legislative instruments. Domestic violence victims are once again only protected from secondary victimisation implicitly by these provisions for accountability, since such victimisation by members of the police might only be addressed as a consequence or side effect of non-compliance with their legislative duties.

The best way to describe the present provision of protection to domestic violence victims from secondary victimisation by members of the police is thus protection to a limited and implicit extent and as consequence an inadequate response to addressing

a very real and damaging problem, not only to the victims thereof but to the reputation of the SAPS as well.

6 2 The possibilities

The findings made in this thesis display mainly two possible routes which may be followed in order to strengthen and expand the extent to which the existing legislative framework provides for the protection of domestic violence victims from secondary victimisation by members of the police. These two routes, as can be seen above are additional legislation or amendments to the existing legislative instruments, with specific reference to the DVA and the National Instruction, in order to provide for the protection of domestic violence victims from secondary victimisation by members of the police to a greater and more adequate extent.

6 2 1 *Additional legislation*

One route to follow in order to better provide for the legislative protection of domestic violence victims from secondary victimisation by members of the police is the enactment of new legislation. As discussed previously, this might not be the best option, since the measures provided thereby will not be directly integrated into the DVA and the National Instruction, in order to provide for such protection in the context of domestic violence matters and victims thereof specifically. This thesis also has displayed, in the examples of jurisprudence and otherwise, that there is a need to specifically provide protection to these victims in terms of such victimisation by members of the police.

For the purpose of contemplating the introduction of additional legislation as measure of protection to domestic violence victims from secondary victimisation a recent example is briefly looked at. An example of such legislation is the Victim Support Services Bill (Victim Bill) of 2019 which was published for comment by the Department of Social Development of South Africa in the Government Gazette on the 17th of July 2020.

The Victim Bill aims to provide measures for the protection and promotion of the rights of victims of violent crimes. It is also acknowledged in these aims that secondary victimisation is a problem which should be prevented when victims and their cases are

dealt with. The Victim Bill aims to provide for the education and empowerment of victims by ensuring that support services are efficient.²⁶⁷ The purpose of the Victim Bill is defined as creating a victim-centred approach regarding the promotion of victims' rights, since presently the criminal justice system mostly focuses rather on the rights of accused persons.²⁶⁸ The Victim Bill also recognises the problem of secondary victimisation and the need for it to be reduced in its preamble.²⁶⁹ Like in the Service Charter, it is a welcome and much needed observation in legislation dealing with the treatment of victims of crime to recognise the importance of addressing secondary victimisation, because as can be seen in this thesis, victims' rights cannot be adequately protected without addressing such victimisation.

The Victim Bill specifically defines secondary victimisation in its definitions in section 1, as harm indirect in relation to the crime committed against victims, but caused by the way in which they are treated by service providers, which would once again, for purposes of this thesis, include members of the police.²⁷⁰ Victims are broadly defined in section 1 of the Victim Bill as any persons who have suffered any kind of harm, either directly or indirectly, irrespective of whether the perpetrator is brought to justice.²⁷¹ Such a broad variety of victims are thus all to be protected by this Bill if it becomes legislation, but only to victims of violent crimes. If the Victim Bill in its present

²⁶⁷ Victim Support Services Bill 2019

"To provide a statutory framework for the promotion and upholding of the rights of victims of violent crime; to prevent secondary victimisation of people by providing protection, response, care and support and re-integration programmes; to provide a framework for integrated and multi-disciplinary co-ordination of victim empowerment and support; to provide for designation and registration of victim empowerment and support services centres and service providers; to provide for the development and implementation of victim empowerment services norms and minimum standards; to provide for the specific roles and responsibilities of relevant departments and other stakeholders; and to provide for matters connected therewith".

²⁶⁸ Memorandum on the objects of the Bill -Victim Support Services Bill, 2020-

"1. PURPOSE OF THE BILL

[...] The purpose of the Bill is [...] to bring the victim to the centre of the justice system in order to ensure that the rights applicable to a perpetrator are also extended to a victim to the extent that is applicable".

²⁶⁹ Victim Support Services Bill, 2019

"PREAMBLE

[...]WHEREAS it is necessary to mitigate secondary victimisation of victims of violent crime".

²⁷⁰ Victim Support Services Bill 2019

[Section 1] "secondary victimisation" means the victimisation that occurs, not as a direct result of the criminal act, but through the response of officials, service providers, the community and individuals".

²⁷¹ Victim Support Services Bill 2019

[Section 1] " "victim" means any person who has suffered physical, emotional, spiritual or psychological harm as a result of a violent crime, either committed or directed against him or her, or his or her family members, irrespective of whether any perpetrator is identified, apprehended, and prosecuted or convicted".

form becomes legislation, it will be able to offer protection to domestic violence victims, but only in respect of those who suffered violent crimes.

The objects of the Victim Bill are outlined in section 2 and include providing a framework of support services to victims of violent crime, protecting these victims' rights, treating these victims with dignity and without discrimination, reducing secondary victimisation as well as strengthening the efficiency of service providers and the ways in which they operate.²⁷² The objects of the Victim Bill are to be applauded, since thereby an explicit and clear aim is introduced to provide efficient services to victims in order to protect them from harm related to the violation of their rights. The strengthening of the protection of the rights of victims also goes hand in hand with the protection of victims from secondary victimisation.

Similar to the Service Charter, the Victim Bill also sets out certain rights afforded to victims in section 5. These rights are phrased very much like the Service Charter's and include victims' rights to be treated with dignity, to be offered assistance, to share information, to be protected and to receive compensation in terms of the crimes committed against them where applicable.²⁷³ Once again, like the Service Charter, the Victim Bill introduces the recognition of important rights, which if protected will also be beneficial towards the protection of victims from secondary victimisation. Additional to this, the Victim Bill specifically acknowledges secondary victimisation in section 7,

²⁷² Victim Support Services Bill 2019

"Objects of Act

[Section] 2. (1) The object of the Act is to-

- (a) provide a framework within which victim support services must be provided to victims of violent crime;
- (b) provide for and protect the rights of victims;
- (c) direct that all service providers dealing with a victim treat such victim with dignity and respect regardless of their citizenship, race, gender, culture, religious and personal circumstances;
- (d) make provision for the referral of a victim or a person suspected to be a victim to the relevant service provider;
- (e) provide that a victim is assisted to access victim support service programmes and services from the Department and relevant service providers;
- (f) clarify the roles and responsibilities of service providers and the relevant departments in the provision of victim empowerment services;
- (g) mitigate secondary victimisation".

²⁷³ Victim Support Services Bill, 2019

"Rights of victim [Section] 5. (1) A victim has the right, which includes-

- (a) to be treated with dignity and privacy,
- (b) to receive information;
- (c) to offer information;
- (d) to receive protection;
- (e) to receive assistance;
- (f) where applicable to apply for compensation and restitution in terms of the Criminal Procedure Act; 1997 (Act No. 51 of 1977)".

where it is stated that all relevant service providers will have to implement a code of conduct for the protection of victims' rights and thereby the prevention of secondary victimisation.²⁷⁴

In terms of the specific roles and responsibilities of service providers in Chapter 3 of the Victim Bill, the SAPS' role is dealt with in section 12. The role of the SAPS in the protection of victims' rights involves treating victims in a victim-friendly manner, keeping victims informed about their cases and the logistical arrangements in relation thereto such as court dates and to keep victims fully informed regarding the decision-making in respect of their cases.²⁷⁵ The main way in which these measures relate to the protection of domestic violence victims from secondary victimisation by members of the police is the emphasis on a victim-friendly approach, which is presently a shortcoming within the DVA and the National Instruction. Monitoring of the SAPS' compliance is to be the responsibility of the CSP once the Victim Bill becomes legislation.²⁷⁶ The specific provision for monitoring the SAPS' response to this legislation, which specifically includes the protection of victims' rights, is a step in the right direction to providing protection to domestic violence victims from secondary victimisation by members of the police. Although this provision of protection is still mostly implicit by means of reference to the protection of victims' rights and not such victimisation specifically, it is more closely related to such protection than the outlining of duties in the DVA and National Instruction. This assertion is also strengthened when looking at section 37 of the Victim Bill, which again emphasises the protection of victims' rights to dignity and respect.²⁷⁷

²⁷⁴ Victim Support Services Bill 2019

"Secondary victimisation [Section] 7. Every relevant department, associated profession, and service provider must implement a code of conduct that directs the employees to treat victims in accordance with the rights of victims as set out in section 5 and thereby prevent secondary victimisation".

²⁷⁵ Victim Support Services Bill 2019

"Minister responsible for Police [Section] 12. (1) The Minister responsible for police must in the prescribed manner, where applicable, provide—

(a) private victim-friendly area at each of its stations".

²⁷⁶ Victim Support Services Bill 2019

"Civilian Secretariat for Police [Section] 13".

²⁷⁷ Victims Support Services Bill 2019

"South African Police Service facilities

[Section] 37. The South African Police Services must provide a private room where victims may be interviewed and statements taken in a confidential respectful and dignified manner".

6 2 2 Amendments

The main reason why the amendment of the existing legislative instruments might be more suitable and effective in providing for the protection of domestic violence victims from secondary victimisation by members of the police, rather than additional legislation, is the fact that placed in its most appropriate context, provisions for such protection and relief to victims might be outlined in a more specific manner. The importance of such possibility being brought to life is displayed by the fact that although secondary victimisation is explicitly acknowledged as a problem necessary to address and to protect victims from within the provisions of the Victim Bill, these provisions do not go into depth with regards to how exactly protection from such victimisation is to be provided.

Although the Victim Bill acknowledges the importance of addressing and protecting victims from secondary victimisation, it only aims to do so in respect of victims of violent crime.²⁷⁸ There is no conclusive definition provided for how violent a crime would have to be in order for a victim thereof to be able to benefit from the protection offered in terms of the Victim Bill. This might create a grey area which might become difficult to navigate when deciding what degree of “violent” will be deemed violent enough. Amendments in terms of the specific domestic violence related legislation, namely the DVA and the National Instruction, might be able to prioritise such protection not only for those who suffer violent crimes but for all domestic violence victims. Only protecting a certain category of victims will not be beneficial to the advancement of protection of all domestic violence victims from secondary victimisation by members of the police, since all victims may suffer from secondary victimisation regardless of the seriousness of the initial crime committed against them. This can also be seen in the jurisprudence reviewed in this thesis, since secondary victimisation may in many different scenarios result in additional trauma and in overall difficulty of dealing with the incident of domestic violence, specifically because of such victimisation. Chapter four of this thesis displayed how secondary victimisation may take place in different ways in reality, including additional physical injuries or harm to that of the initial abuse (inflicted by an abuser themselves or a member of the police), insulting words and

²⁷⁸ Victim Support Services Bill 2019

“Application of Act

[Section] 3. Except where expressly provided for in this Act, this Act applies to victims of violent crime, all service providers, and relevant departments”.

conduct, degrading treatment, disregarding attitudes, not being taken seriously and being blamed rather than assisted by members of the police.

Specific and explicit provision for the protection of domestic violence victims from secondary victimisation by members of the police in the DVA and the National Instruction by means of amendments thereto will also be able to address an issue completely neglected by the Victim Bill, namely measures of recourse. Creating a section or chapter specifically dedicated to addressing the issue of secondary victimisation of victims within the context of domestic violence in the relevant existing legislative instruments will make it possible to thoroughly address all matters in relation to forming a solid basis for such protection. As discussed previously in this thesis, provision of measures of recourse and holding members of the police who make themselves guilty of secondary victimisation of domestic violence victims accountable, is an important part of protection of these victims from such victimisation. Without sufficient consequences for those members of the police who make themselves guilty of secondary victimisation of domestic violence victims, these victims will not be defended and their voices will likely once more be silenced. Providing for measures to hold members of the police accountable for victimisation of these victims will display that it is prioritised in these legislative instruments and also provide deterrence to those who make themselves guilty thereof. The provision of measures involving the protection of domestic violence victims from secondary victimisation by members of the police without the provision of consequences in the case of non-compliance with such measures of protection, will possibly have the effect of a mild recommendation rather than a strong legal obligation.

6 3 The essential need for empathy

Empathy is defined by the Cambridge Dictionary as the ability to share the feelings of someone else and envisioning what it would be like to experience that person's circumstances.²⁷⁹ The Merriam-Webster Dictionary defines empathy as understanding, awareness and sensitivity to the thoughts, experiences and feelings of

²⁷⁹ Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/empathy>> (accessed 09-09-2020).

others. It involves the capacity to imagine what another person feels, thinks and experiences in any given situation.²⁸⁰

In the present context empathy would mean making an effort to understand, be aware of and be sensitive to the feelings and thoughts that domestic violence victims may have as well as the abuse they may have experienced or are still experiencing.

6 3 1 *Standards of treatment*

The main aim of the DVA and the National Instruction, collectively, is to provide the maximum protection to domestic violence victims from abuse which the law can possibly offer. This standard of care towards domestic violence victims at the very least implies that these victims do and should matter. Domestic violence victims are not to be directed to other means, such as mediation and conciliation by members of the police. These victims are thus, by the above indications, supposed to be served and listened by members of the police. The fact that these victims are supposed to be listened to places emphasis on the importance that their voices should be heard and matter. There would be no standard for offering a maximum measure of protection to victims if they were supposed to be treated as an afterthought. One can only deduce from that, that victims indeed must be engaged with in a meaningful manner. This can also be seen in the provision that victims should not be directed to alternative means of the resolution of a matter, but instead be given a chance to speak and voice their concerns. These standards, together, imply that domestic violence victims should be given the space to voice whatever they feel and whatever they are going through or have gone through in terms of the abuses they have suffered. It is clear that the suffering of domestic violence victims matters and should matter to members of the police. Meaningfully listening to and empathising with domestic violence victims in the above ways can and will likely affirm their dignity and protect them from secondary victimisation.

The provision made in the DVA and the National Instruction for the seizure of weapons from and the arrests of alleged perpetrators of domestic violence suggests that domestic violence victims should be deemed worthy of protection from harm. These

²⁸⁰ Merriam-Webster Dictionary <<https://www.merriam-webster.com/dictionary/empathy>> (accessed 09-09-2020).

victims should not be treated without taking into account that it matters that they are protected from harm. This is an important attribute of the approach which should be followed when dealing with domestic violence victims, since members of the police will have to consider whether what they are doing is in the furtherance of such protection to victims from any kind of harm. The reasons why these victims would need to be protected comes to mind and places the challenge before members of the police to consider what these victims may actually feel because of the threats they may face in respect of alleged perpetrators and/or the weapons being used against them.

Shelter and medical attention are the main services which should be provided to domestic violence victims in terms of the DVA and the National Instruction. As mentioned earlier in this thesis, protection from physical harms or wounds comes to mind when thinking of medical attention and protection from harms which may be caused by staying in a certain place, when thinking of shelter. These standards imply that it matters what happens to domestic violence victims following incidents of abuse. The wounds which domestic violence victims sustain due to the abuses they suffer arguably matter in terms of the DVA and the National Instruction, not only on a physical level but also in terms of their psychological, emotional and mental well-being which may be adversely affected due to staying trapped in toxic environments of abuse without the option of alternative shelter. Members of the police should be challenged to have concern and understanding for the bewilderment and vulnerability which domestic violence victims may display at the times when they are in need of being provided with these services. Displaying empathy with the circumstances and living arrangements of domestic violence victims which may have threatened their well-being, will likely enhance the protection of these victims from secondary victimisation.

The Service Charter's aims include the elimination of secondary victimisation of victims of crime in the criminal justice process, that victims must remain central to this process, that the service standards which can be expected must be clarified to victims and that recourse must be provided where victims are not served in the ways they ought to be. The Service Charter thus demonstrates that victims of crime are worthy of being treated with respect and fairness as well as an aversion to cases where this standard of treatment is not adhered to. The fact that the Service Charter, in addition to stipulating these aims, provides for victims of crime to launch complaints relating to

the ways in which they were treated by service providers such as members of the police, with the SAPS as well as certain other institutions,²⁸¹ also demonstrates that it matters and should matter how victims are treated. Service providers, such as members of the police, should thus be mindful of how they treat victims of crime in order not to make these victims feel or be led to draw the conclusion that they or what they voiced or voice in respect of the harms they suffered, did not or do not matter to the criminal justice system or service providers related thereto. Members of the police are thus challenged by this standard to relate to victims in an empathetic way which would affirm rather than denounce their right to be treated with dignity and respect. Thereby, better protection will likely be offered to domestic violence victims from secondary victimisation by members of the police.

6 3 2 *Attitudes*

The assumption made in the beginning of this thesis has clearly been a real factor in terms of the extent of protection of domestic violence victims from secondary victimisation by members of the police. The ways in which members of the police dealt with and responded to domestic violence victims in terms of this thesis, with specific reference to the reviewed jurisprudence, were not only arguably influenced by laziness, incompetence or ignorance, but also by the ways in which they thought and how they felt about dealing with domestic violence matters and victims thereof. The focus of this study, however, was not primarily on determining to what extent such attitudes do exist within the police service, but rather to deal with the harm caused to victims of domestic violence by secondary victimisation which may be a result of such attitudes.

A measure of disinterest by members of the police when dealing with domestic violence matters has been shown in this thesis. Displaying disinterest in domestic violence matters or in the concerns voiced by domestic violence victims, who seek help from the police service, likely sends the message to those victims that the criminal justice system, specifically the police service, is not interested in what they have to say and/or in what harm they have sustained on any level. The reluctance of members of the police to help domestic violence victims is closely related to disinterest in these

²⁸¹ See footnote 95.

matters, since a member may be reluctant to help or assist these victims because of their disinterest in these matters for whatever reason. This disregard by members of the police of domestic violence victims in the form of displaying attitudes of disinterest can thus cause secondary victimisation to these victims, especially in cases where such disinterest is displayed in respect of serious concerns of these victims.

Attitudes which can probably be even more damaging to domestic violence victims, by means of secondary victimisation, than pure disinterest, are those which display negativity in some way. This thesis has referred to examples where members of the police have uttered statements which seemed to display the blaming of these victims for the abuses they suffered or the outright refusal to believe them as being credible. Domestic violence victims hereby, will likely not only feel unimportant to the criminal justice system or the police service in particular, but possibly degraded and humiliated as well. Secondary victimisation can thus be inflicted on these victims by members of the police who display attitudes which are demeaning rather than empowering, making their approach to these victims possibly seem closer to that of the abusers of victims than that of the institution which is supposed to help victims achieve justice.

This thesis also displayed incidents where domestic violence victims were disrespected, in ways ranging from not being respected in their choices with regard to their cases to not being respected in their rights. The displaying of attitudes involving disrespect to victims, by members of the police, often result in secondary victimisation of such victims, since the violation of victims' rights often take place in the process.

The incidents of domestic violence which victims report are many times trivialised by members of the police, as alluded to in this thesis. Members of the police who display attitudes which trivialise incidents which caused or may cause domestic violence victims some type of harm can likely make such victims feel that the suffering they endured or fears they live with are not acknowledged or empathised with and might also feel that there is no hope that the abuses they suffer will ever stop being inevitable. Trivialisation of domestic violence matters by members of the police thus causes victims to suffer secondary victimisation.

The lack of explicit provisions in legislative instruments related to domestic violence matters, to address the importance of a more victim-centred engagement by members of the police with such matters and victims, results in not specifically providing for measures to hold members of the police to account for incidents where such

disinterest, victim-blaming, disrespect and/or trivialisation of matters translate into the secondary victimisation of such victims.

The importance of a victim-centred approach, which would prioritise the protection of domestic violence victims from secondary victimisation by members of the police, has been discussed extensively in this thesis and clearly involves empathy as an essential ingredient. Showing interest and respect in good faith to domestic violence victims, their suffering and their voices when they gather the bravery to speak out about the abuses they have been exposed to is important for the creation of trust in the police service and also for the empowerment of these victims. Domestic violence victims should be dealt with by members of the police, not only in a victim-centred manner, but in an empathetic manner, displaying at least some measure of understanding and insight regarding the trauma these victims have been through or are presently going through. It is not an easy or simple task, and necessitates intensive training for members of the police to cause certain members to adapt or change their attitudes, in the case of these attitudes being to the detriment of a victim-centred approach or to the protection of domestic violence victims from secondary victimisation. Legislative instruments, however, should play a role in the incorporation of empathy as essential in the standards of treatment of domestic violence victims and provide for the explicit and specific protection of these victims from secondary victimisation by members of the police.

CHAPTER SEVEN

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