

THE DOMESTIC VIOLENCE ACT 116 OF 1998: OFFENCES, DEFENCES, ECONOMIC ABUSE, IMMINENT HARM AND THE CRIME OF DOMESTIC ABUSE– WHAT IS NEW?*

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SUMMARY

Recent tragedies relating to gender-based violence have drawn attention to the current state of our relevant law. This article focuses on domestic violence – a species of gender-based violence. It assesses the current state of the Domestic Violence Act 116 of 1998; in particular, it focuses on the offences and defences, as well as on the definition of economic abuse and the concept of imminent harm in relation to domestic abuse. The proposals to amend the definition of these concepts have culminated in the passing of the Domestic Violence Amendment Act 14 of 2021. The bulk of the amendments have not commenced. Nevertheless, this article also comments on the impact that these amendments will have on the thesis of this article. It also sheds some light on the proposed stand-alone crime of domestic abuse.

1 INTRODUCTION

The promise of the Domestic Violence Act¹ (DVA) is a South Africa that is free of violence emanating from a private source. It is hoped that this freedom can be achieved through the use of both civil and criminal sanctions. With this in mind, the DVA consists of a combination of civil and criminal sanctions. For instance, the process of obtaining a protection order (the primary sanction) is purely civil.² However, the current legal position is

* This article is based on my LLM dissertation on domestic violence – Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act 116 of 1998 for Combating Domestic Violence in South Africa* (LLM dissertation, University of KwaZulu-Natal) 2017. It is also dedicated to my late son, Okuhleliwe Elamigugu Sibisi, who was born on 21 September 2022 and passed away on the same day.

¹ 116 of 1998.

² Sibisi “Understanding Certain Provisions of the Domestic Violence Act: A Practitioner’s Perspective” 2016 *DR* 22 23.

that breach of a protection order is a criminal act for which the accused may be prosecuted and sentenced to a fine or imprisonment of up to five years, or both such fine and imprisonment in the case of a first offender.³

Much has been said about protection orders and the DVA in general; one might add that it appears that so much effort has been invested in the drafting of the DVA that little attention was paid to how the legislation would be implemented.⁴ It therefore comes as no surprise that there are implementation gaps in the DVA. Cases of domestic violence continue to be reported, inducing public shock. It should be mentioned that with the necessary training on implementation, cases of police officers who have gone beyond the call of duty have been reported.⁵ However, the implementation of the DVA is not the duty of police officers alone.⁶ It is submitted that every instance of domestic violence signifies a failure by the State to eradicate domestic violence. Allowing domestic violence to prevail is a breach of the State's constitutional mandate in section 12 of the Constitution⁷ to protect citizens from any form of violence emanating from a private source.⁸

Glaring incidents of domestic violence have incited arguments for the creation of a crime of domestic abuse in its own right.⁹ This argument is gaining momentum. Legalbrief reported that, as part of the Women's Day commemoration on 9 August 2019, the President of the Republic of South Africa, President Cyril Ramaphosa, delivered a speech in which he announced, among other measures, that the DVA will be strengthened by recognising domestic abuse as a "crime in its own right".¹⁰ He also announced that the definition of domestic violence would be extended to include economic abuse and to provide for a clearer definition of imminent harm.¹¹ These announcements draw attention to the current state of the DVA, and in particular the offences for which it provides. These

³ S 17 of the DVA.

⁴ Parenzee, Artz and Mout *Monitoring the Implementation of the DVA: First Research Report 2000–2001* Based on research conducted by the Consortium on Violence against Women (2001) 22.

⁵ Smit and Nel "An Evaluation of the Implementation of the Domestic Violence Act: What Is Happening in Practice?" 2002 15(3) *Acta Criminologica* 45 51.

⁶ The courts are also responsible for implementation of the DVA. Smit and Nel 2002 *Acta Criminologica* 54 point out that the courts do not have enough personnel to manage caseloads. This was in 2002, barely three years after the implementation of the DVA. Recent research indicates that there are still structural issues regarding implementation; Phasha *Exploring Domestic Violence: A Case Study of the Victimisation of Women and Children in Mankweng Policing Area, Limpopo Province, South Africa* (MA dissertation, University of Limpopo) 2021 41.

⁷ The Constitution of the Republic of South Africa, 1996.

⁸ S 12(1)(c) of the Constitution. See also Ndou "The Powers of the Court in Terms of Section 7(2) of the Domestic Violence Act 116 of 1998: *KS v AM* 2018 (1) SACR 240 (GJ)" 2019 *Obiter* 241.

⁹ Ncube *Protection Orders in South Africa: The Effectiveness of Implementation and Enforcement for Victims of Gender-Based Violence* (MPhil dissertation, University of Cape Town) 2021 49.

¹⁰ Saxby "Domestic Violence Act to be Strengthened" (2019-08-10) <https://legalbrief.co.za/policy-watch/legislation-domestic-violence-act-to-be-strengthened/> (accessed 2019-08-14).

¹¹ *Ibid.*

announcements also raise questions about the adequacy of the recognition that the DVA gives to economic abuse as an act of domestic violence, and the definition of imminent harm.

In 2021, the DVA was significantly amended by the Domestic Violence Amendment Act¹² (Amendment Act). However, save for section 19A, the provisions of the Amendment Act will come into operation on a date to be proclaimed by the President in the *Government Gazette*.¹³ Nevertheless, the following should be noted: section 26 of the Amendment Act inserts section 19A into the DVA. The latter section came into operation on 28 January 2022, the date on which the Act was published in the *Government Gazette*.¹⁴ Section 19A deals with the issue of directives by the Director-General for Justice on the implementation of the DVA.¹⁵

This article may be seen as a follow-up to the President's speech alluded to above. It opens by discussing the offences currently provided for by the DVA. This is done with reference to the DVA, case law and existing research. It also considers possible defences to a charge in terms of the DVA. The provisions of the Amendment Act are also discussed insofar as they deal with offences. This is followed by a discussion on the current definition of economic abuse and imminent harm. The Amendment Act is also discussed in this regard. Finally, the article considers the viability of domestic violence as a stand-alone crime and draws conclusions.

2 THE OFFENCES CREATED BY THE DVA

2.1 General

Section 17 of the DVA deals with offences. It currently provides for four offences: (i) contravention of any prohibition, condition, obligation or order imposed in terms of a protection order;¹⁶ (ii) publishing information that may, directly or indirectly, reveal the identity of any party to the proceedings;¹⁷ (iii) publishing of other prohibited content in disregard of a court order;¹⁸ and (iv) wilfully making a false statement in a material respect.¹⁹

The DVA also indirectly criminalises a failure to report child abuse and endorses the conviction of a husband for the rape of his wife. Sections 4 and 5 of the Prevention of Family Violence Act²⁰ were not repealed by section 21(1) of DVA. Section 4 of the Prevention of Family Violence Act criminalises the failure of certain persons to report knowledge of child abuse. It should also be noted that section 110(1) of the Children's Act²¹ makes it mandatory for certain people to report child neglect or abuse to a designated

¹² 14 of 2021.

¹³ S 28(1) of the Amendment Act.

¹⁴ S 28(2) of the Amendment Act.

¹⁵ S 19A must be read with s 18A and 18B of the DVA. However, the latter await proclamation.

¹⁶ S 17(a) of the DVA.

¹⁷ S 17(b) of the DVA.

¹⁸ S 17(c) of the DVA.

¹⁹ S 17(d) of the DVA.

²⁰ 133 of 1993.

²¹ 38 of 2005.

child protection officer, social worker or police officer,²² although it is not clear whether failure to heed the Children's Act in this regard is an offence.²³ It is submitted that contravention of these provisions should be criminalised by the Children's Act. Section 5 of the Prevention of Family Violence Act provides for the conviction of a husband for the rape of his wife. Clearly, sections 4 and 5 are indirectly preserved by the DVA.

The offences that relate to publishing information that may, directly or indirectly, reveal the identity of a party to the proceedings, and to publishing any other prohibited content in disregard of a court order, are already provided for elsewhere. They are not unique to the DVA and are not discussed below. However, the offence of wilfully making a false statement in a material respect is discussed. It should be noted that although conduct of this nature may be prosecuted as perjury,²⁴ or in the manner provided for in section 9 of the Justices of the Peace and Commissioners of Oath Act,²⁵ false statements are rife in domestic violence matters. For this reason, this offence is discussed alongside the crime of contravening a protection order. It is worth adding that section 9 of the Justices of the Peace and Commissioners of Oath Act criminalises knowingly making or confirming a false statement before a commissioner of oaths, or making a false affirmation. The sentence is the same as for perjury.²⁶

2 2 Contravening any prohibition, condition, obligation or order imposed by a protection order

This offence is commonly referred to as "breach of a protection order" or "violation of a protection order".²⁷ It is the most common of all offences provided for in the DVA. A protection order must prohibit the respondent from engaging in an act of domestic violence. As is seen below, when issuing a protection order, the court must specify the acts of domestic violence that the accused may not commit against the complainant. It is submitted that a prohibition, condition, obligation or order in a protection

²² The duty to report rests on any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre, who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, to report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

²³ However, s 305(5) of the Children's Act provides that any owner, lessor, manager, tenant or occupier of premises on which the commercial sexual exploitation of a child has occurred, commits an offence if he or she does not report the exploitation to the police. It is submitted that it must be shown that the person either knew or ought to have known that exploitation was taking place. In the absence of such knowledge, no offence is committed.

²⁴ Burchell *Principles of Criminal Law* 5ed (2016) 876; Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 3ed (2018) 530.

²⁵ 16 of 1963. See also Burchell *Principles of Criminal Law* 881; Kemp *et al Criminal Law* 531.

²⁶ S 9 of the Justices of the Peace and Commissioners of Oath Act.

²⁷ S 17(a) of the DVA.

order must be stated in such a way that there is no doubt regarding what is expected of the respondent. Any ambiguity in the order must favour the respondent. A vague protection order contravenes the principle of legality. The principle of legality requires that laws must be clear and not vague.²⁸ Vagueness is also a factor in an accused person's right to a fair trial.²⁹

2 2 1 *The elements of the offence*

(i) A protection order

There must be a valid protection order or an interim protection order before there can be a breach of a protection order.³⁰ A final protection order, once issued, is presumed to be valid unless proved otherwise.³¹ It is open to the respondent to challenge the validity of a protection order by proving that the process of obtaining it was flawed. Proper process requires that the respondent must have been served with a notice of the application for a protection order and advised of the right to oppose the application on the return date.³² If a court issues an interim order, a copy thereof must be served on the respondent.³³ An interim protection order, if not served, is of no force and effect.³⁴ The DVA also requires that the accused must have been served with sufficient information in order to oppose the application. The information envisaged includes affidavits deposed to by the complainant.³⁵

The person who serves a protection order must explain the nature of the documents and their consequences. In *S v Mazomba*,³⁶ the court held that no conviction could follow unless it was shown that the person serving the document had explained the contents of the document to the accused.³⁷ Failure to comply with these procedural requirements renders a protection order vulnerable to being struck down. During a trial for contravention of a protection order, the original protection order and a return of service must be produced by the prosecution as evidence in court.³⁸ However, if the State cannot produce the protection order, but the accused admits receiving it, the

²⁸ Lubaale "Covid-19 Related Criminalization in South Africa" 2020 SACJ 684 690.

²⁹ Lubaale 2020 SACJ 690.

³⁰ *S v Zondani* 2005 (2) SACR 304 (Ck).

³¹ *Seria v Minister of Safety and Security* 2005 (5) SA 130 (C) 144D–E, in which the plaintiff's wife had deceived the plaintiff into thinking that they had reconciled while she obtained a final order. This deception was shown to be the reason that the plaintiff did not oppose the application despite being aware of the return date. On the return date, the wife asked the plaintiff to wait in the car while she went inside the court to "withdraw" the application; inside the court, she obtained a final protection order citing the plaintiff's non-attendance.

³² S 5(5) of the DVA requires that the return date must not be less than 10 days after the date of service of an interim order or such other documents as envisaged in s 5(4) of the DVA.

³³ S 5(3)(a) of the DVA.

³⁴ S 5(6) of the DVA.

³⁵ S 5(3) and (4) of the DVA.

³⁶ *S v Mazomba* [2009] ZAECBHC 1.

³⁷ *S v Mazomba supra* par 9. See also *Todt v Ipser* 1993 (3) SA 577 (A) 589 B–C, where the court noted that judgments are void where there has been no proper service.

³⁸ *Brandt v S* [2006] 4 All SA 136 (NC) 143.

accused may still be convicted for contravening the order. In *S v Bangani*,³⁹ the State could not produce the original protection order; nevertheless, the court was satisfied that the protection order existed based on the accused's own admission.⁴⁰

Since an interim protection order is valid until the return date, the respondent cannot (under the interim protection order) be convicted for conduct that was committed after the return date. Unless it is confirmed, the interim protection order falls away on the return date. The principle is that the respondent cannot breach an order that has lapsed. In line with the principle of legality, the accused cannot be convicted of conduct that was not a crime at the time of conviction.⁴¹ Even if a new protection order is subsequently obtained, the principle of legality determines that criminal laws should not apply retrospectively.⁴²

(ii) Breach or contravention

The second requirement to prove the crime is that the respondent must have contravened a prohibition, condition, obligation or order in the protection order. The respondent is in breach of a protection order if they engage in conduct that is prohibited by the order or fail to conduct themselves in a manner stipulated by a protection order.⁴³ This is in line with the requirement that a protection order must state what is expected of the respondent. The issuing court must use language such that the respondent understands what is expected of them. Of course, some conduct may easily be inferred without it having to be spelled out.

In *S v Sehume*,⁴⁴ the protection order ordered the accused not to "assault, threaten, insult and abuse the applicant in any manner"⁴⁵ However, among other things, the accused was convicted of "breaking 2 x window panes, the property of Merriam Sehume [the complainant]".⁴⁶ On review, the court held that the conviction for breach of a protection order was incorrect because the order had not interdicted damage to property. In the court's view, this conviction would have been correct had one of the conditions been "not to commit any act of domestic violence".⁴⁷ It is submitted that the accused's conduct could not be inferred as being included in the prohibitions in the protection order. However, nothing prevented the prosecution from prosecuting the accused for malicious damage to property.

³⁹ *S v Bangani* (E) (unreported) 17-10-2007 Case no 255/07.

⁴⁰ This was confirmed in *S v Ben* (ECG) (unreported) [5 June 2018] Case no CA&R 140/2018 and *S v Ndiye* (CA/R 244/2018) [2018] ZAECGHC 103 (25 September 2018). In *Ndiye supra* par 3, the court stated: "the accused knew all along what he was charged with. He pleaded guilty to that charge".

⁴¹ Lubaale 2020 SACJ 690.

⁴² *Ibid.*

⁴³ Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 47.

⁴⁴ *S v Sehume* (NWHC) (unreported) 01-03-2001 Case no 15/2001.

⁴⁵ *Sehume supra* par 25.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

(iii) Unlawfulness

It goes without saying that the conduct of the respondent must be unlawful in order for it to constitute a crime. Breach of a protection order is *prima facie* unlawful. It must be borne in mind that only conduct prohibited by a protection order is unlawful. However, if a protection order does not prohibit conduct, unless such conduct can be inferred from the wording of the order, it will not be unlawful for the purposes of a conviction for breach of a protection order.

(iv) *Mens rea*

Mens rea or culpability in the form of intention must be proved with the accompanying knowledge of unlawfulness.⁴⁸ The accused must know that his conduct is wrongful, failing which, there can be no conviction. The accused must have known about the existence and contents of the protection order and contravened it anyway. Only then can it be said that the accused acted intentionally or with the requisite *mens rea*. In *Mazomba*, the court illustrated the position as follows:

“Since one of the elements that would need to be proved by the state to secure a conviction for such contravention is intent on the part of the accused person, it would be incumbent upon the State to prove that the accused person had intentionally violated the provisions of the protection order after it had been duly and properly served on him and he had been properly advised of, or had become aware of the provisions thereof. Indeed, the certificate in the pro forma return of service of process in terms of Domestic Violence Act no.116 of 1998 ... provides that the functionary serving the order must certify that he/she has handed the original of the notice to the respondent and that he/she had explained the contents thereof to the third respondent.”⁴⁹

Strict or absolute liability does not apply with respect to the DVA. In terms of our law, strict liability will only apply if the legislature specifically provides so.⁵⁰ There is nothing to this effect in the DVA.

2 2 2 *The defences*

The defences available to a person accused of breaching a protection order are numerous. They range from challenging the validity of the order itself, on substantive or procedural grounds, to defences that exclude any of the above elements. In *S v Molapo*,⁵¹ the erstwhile Orange Free State High Court held that the DVA does not deny defences that are good in law. In this case, the court upheld a claim of private defence for an accused who had sworn at his wife (in breach of a protection order). His wife had called him an “*inkwenkwe*” or “boy”. The court held that the complainant had impaired the accused’s dignity by calling him a boy and that the accused was justified in

⁴⁸ Kemp *et al Criminal Law in South Africa* 216.

⁴⁹ *S v Mazomba supra* par 9.

⁵⁰ *S v De Blom* 1977 (3) SA 513 (A).

⁵¹ *S v Molapo* (O) (unreported) 10-08-2006 Case no 213/2006.

defending his dignity by swearing at her.⁵² It further observed that the “complainant was not kind and considerate, she was insulting and demeaning ... Physical wounds heal but those inflicted by words often last forever”.⁵³

The fact that the complainant obtained a final protection order by blindsiding the accused may also provide the latter with a valid defence. In *Seria v Minister of Safety and Security*,⁵⁴ the parties were experiencing marital disputes. The complainant (wife) sought and obtained an interim protection order. Before the return date, the parties “reconciled”. The parties agreed that the complainant would withdraw the application on the return date. On the return date, the parties drove to court together, and upon arrival at the court, the complainant asked the respondent to wait in the car while she went inside the court to “withdraw” the application. Inside the court, the complainant obtained a final protection order in the respondent’s absence. The respondent learned of the final protection order for the first time when he was arrested. He raised the blindsiding as a defence. The court held that he was entitled to open proceedings afresh and defend the matter.⁵⁵

This discussion is not complete without considering the impact of intoxication on prosecutions for breach of a protection order. Intoxication may impair a person’s cognitive and conative functions.⁵⁶ Intoxication also increases the propensity to contravene law, peace and order.⁵⁷ In *S v Chretien*,⁵⁸ the court held that intoxication might provide a complete defence in certain circumstances. If the accused was “dead drunk”, to the extent that he lacked the ability to act consciously, his conduct will not amount to unlawful conduct in the legal sense.⁵⁹ If the accused is so intoxicated that he cannot appreciate the wrongfulness of his conduct and act in accordance with the appreciation, he lacks *mens rea*.⁶⁰ Finally, if the accused is sufficiently intoxicated that he fails to foresee the possible consequences of his intoxication, he lacks the intention to commit a crime. He cannot be convicted for an offence that requires intention. However, he may be convicted for offences that require negligence.⁶¹

With the above discussion in mind, the Criminal Law Amendment Act⁶² is apposite. This Act was passed after the decision in *Chretien*. Section 1(1) provides that if a person knowingly takes an intoxicating substance that impairs his or her faculties to appreciate wrongful conduct and to act in accordance with that appreciation, and commits a crime for which he or she cannot be convicted owing to impaired faculties, that person shall be guilty of

⁵² *S v Molapo supra* par 11.

⁵³ *S v Molapo supra* par 13.

⁵⁴ *Supra* 144D–E.

⁵⁵ *Seria v Minister of Safety and Security supra* 137.

⁵⁶ Kemp *et al Criminal Law in South Africa* 197.

⁵⁷ Kemp *et al Criminal Law in South Africa* 198.

⁵⁸ 1981 (1) SA 1097 (A).

⁵⁹ Kemp *et al Criminal Law in South Africa* 200.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² 1 of 1988.

an offence. Section 1(1) creates an offence in its own right.⁶³ This means that if a respondent contravenes a protection order in circumstances where they are so intoxicated that they are not criminally liable in light of *Chretien*, they may still be convicted of contravening section 1(1) of the Act. The sentence will be the same as that for a breach of a protection order.⁶⁴ Snyman and Hoctor argue that the creation of an offence in section 1(1) was not necessary because, on a proper reading, *Chretien* does criminalise knowingly taking an intoxicating substance that impairs one's faculties to appreciate the wrongfulness of one's conduct, and to act in accordance with that appreciation, and then committing a crime.⁶⁵ These authors also argue that section 1(1) has not yielded much in practice.⁶⁶

2 3 Wilfully making a false statement in a material respect

Section 17(d) of the DVA criminalises the wilful making of a false statement in a material respect. There are three instances where a victim of domestic violence has to make a statement. The first is in the application for a protection order;⁶⁷ the second is when applying for a subsequent warrant of arrest;⁶⁸ and the third is when reporting a breach of a protection order.⁶⁹ However, section 17(d) can only be contravened when a complainant wilfully makes a false statement in a material respect when reporting a breach of a protection order. This is because section 17(d) only criminalises the wilful making of a false statement in a material respect in an affidavit referred to in section 8(4)(a) – an affidavit alleging breach of a protection order.

It is submitted that the rationale behind only criminalising the making of a false statement made in terms of section 8(4)(a) is because such statement initiates the criminal aspects of the DVA. In other words, it brings drastic consequences such as an arrest of the accused. It is submitted that the reason for not criminalising the wilful making of a false statement in the other instances is because those instances only have civil consequences such as the obtaining of a protection order. Furthermore, the respondent does get the opportunity to respond to the allegations against them.

The outcome of limiting the scope of the offence in section 17(d) to statements made in terms of section 8(4)(a) is that only a complainant who wilfully makes a false statement in a material respect when reporting a breach may be convicted of this offence. The exclusion of statements made when applying for a protection order from the scope of section 17(d) must be commended because doing otherwise might have deterred victims from applying for protection orders.⁷⁰

⁶³ Kemp *et al Criminal Law in South Africa* 201.

⁶⁴ Hoctor *Snyman's Criminal Law* 7ed (2020) 199.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ S 4(1) of the DVA read with regulation 4 of the Domestic Violence Regulations.

⁶⁸ S 8(3) of the DVA.

⁶⁹ S 8(4)(a) of the DVA.

⁷⁰ Unfortunately, the opposite is also true. People do make false allegations when applying for protection orders just because they can and there are no consequences for such conduct.

2 3 1 *The elements of the offence*

(i) A false statement

The complainant must have wilfully made a statement in terms of section 8(4)(a) of the DVA. The statement in question must make unfounded allegations against the accused person or the respondent. While a false statement made when applying for a protection order does not suffice for the purposes of a conviction in terms of section 17(d), it may nevertheless lead to civil liability in delict for *contumelia*, discomfort and defamation of character.⁷¹ In *Young v McDonald*,⁷² the court held:

“The very nature of a Domestic Violence Act application brings about the implication of unacceptable and anti-social behaviour by the respondent against the complainant. Rather like defamatory statements, the institution of such proceedings intrinsically impacts injuriously on a respondent’s dignity in the broad sense. Any respondent made subject to a protection order in terms of the Act is also made subject to a warrant of arrest, for example. The applicant must have appreciated this as much, and yet, she proceeded recklessly as to the consequences, actuated, as I have pointed out, by improper motives. In my judgment the magistrate correctly found that the alleged *injuria* has been established.”⁷³

(ii) Wilfulness

The false statement must have been made wilfully. This element relates to the requirement of *mens rea* in the form of intention on the part of the complainant. The complainant must make a false statement with the intention to get the respondent arrested or prosecuted.⁷⁴ It has been stated above that a false statement made with the intention of obtaining a protection order is excluded from the ambit of the offence of wilfully making a false statement in a material respect as envisaged in section 17(d) of the DVA.

The complainant must have knowledge of the unlawfulness of making a false statement. Without this inherent requirement of *mens rea*, there could never be a conviction. It is difficult to imagine a scenario where a complainant would wilfully make a false statement without knowing that such conduct was unlawful. It is submitted that negligence would not suffice for the purposes of section 17(d).

In recent years, the number of people who apply for and obtain protection orders on unfounded allegations is increasing. Respondents who do not appear in court to oppose applications further aid this trend.

⁷¹ Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 41.

⁷² *Young v McDonald* WC (unreported) 09-11-2020 Case no A213/2010.

⁷³ *Young v McDonald* *supra* par 17.

⁷⁴ Sibisi (*Critically Evaluating the Machinery of the Domestic Violence Act* 52) submits that some complainants wilfully make false statements just to get the respondent arrested so that he spends the weekend in custody.

(iii) Materiality

The statement must be false in a material respect. This entails that the statement and the allegations contained therein must have the potential to cause an arrest and subsequent prosecution. It is submitted that if a complainant makes a statement that they were severely assaulted by the respondent, whereas, in fact, they fell and injured themselves, their statement will meet the requirement of materiality because it has the potential to cause the arrest of the respondent and subsequent prosecution.⁷⁵

2 3 2 Defences

There appear to be two defences to the offence of wilfully making a false statement in a material respect. The first is an objective one where the complainant sticks to their version and confirms it as true. This defence is objective because its viability depends on a factual enquiry and the rules of evidence. The second defence is subjective. Here, the complainant concedes that the statement is false and strongly contends that at the time of making the statement they genuinely believed it to be true in all material respects. However, it is submitted that the deponent may still be convicted if the prosecution can prove that the latter was negligent in making the false statement.

2 4 The Domestic Violence Amendment Act⁷⁶

The Amendment Act, once proclaimed, will have an impact on the offences in the DVA. The offences discussed above are retained. The Act makes significant improvements to the sentencing of offenders who contravene protection orders. A first offender may be sentenced to a fine or imprisonment not exceeding five years or both.⁷⁷ A second or subsequent offence may result in a sentence of a fine or imprisonment not exceeding 10 years or both.⁷⁸ In convictions of wilfully making a false statement in a material respect, an offender may be sentenced to a fine or imprisonment not exceeding two years or both.⁷⁹ A fine or imprisonment not exceeding four years is prescribed for a second or subsequent offence.⁸⁰ In addition, the Amendment Act criminalises certain conduct by third parties. Failure to attend court and remain in attendance until excused by the court when subpoenaed is an offence for which a third party may be sentenced to a fine or imprisonment not exceeding six months or both.⁸¹

It is submitted that this latter offence is controversial. Some witnesses may be employed. Court proceedings sit during work hours. A witness may

⁷⁵ *Ibid.*

⁷⁶ 14 of 2021.

⁷⁷ S 17(1)(i)(aa) of the DVA as amended by Act 14 of 2021

⁷⁸ S 17(1)(i)(bb) of the DVA as amended by Act 14 of 2021.

⁷⁹ S 17(1)(ii)(aa) of the DVA as amended by Act 14 of 2021.

⁸⁰ S 17(1)(ii)(bb) of the DVA as amended by Act 14 of 2021.

⁸¹ S 17(2) of the DVA as amended by Act 14 of 2021.

have to miss work in order to attend court. The witness is thus presented with two evils: they either risk losing their jobs or going to prison. Witness fees may not be sufficient to cover the costs of travelling to court, or to make up for lost wages and food for the day. The legislature should look into these issues.

3 ECONOMIC ABUSE AND IMMINENT HARM

As stated above, part of the President's announcement on Women's Day 2019 was the planned inclusion of "economic abuse" in the definition of "domestic violence". He also announced the intention to clarify the meaning of "imminent harm". This part of the article turns to the current provisions of the DVA dealing with economic abuse and imminent harm.

3.1 Economic abuse

Section 1(ix) of the DVA defines "economic abuse" as

- "(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 shared residence;
- (b) the unreasonable disposal of household effect or other property in which the complainant has an interest."

In essence, economic abuse is an act of domestic violence for which the complainant may obtain a protection order. Economic abuse includes failing to make regular payments for maintenance, mortgage or rent as per a court order. It also includes failing to pay emergency monetary relief (EMR) to the complainant as ordered by the court issuing a protection order. An order for EMR must be made simultaneously with a protection order. EMR includes relief for loss of earnings,⁸² medical and dental expenses,⁸³ relocation and accommodation expenses⁸⁴ or household necessities.⁸⁵ It is submitted that there must be a causal connection between an act of domestic violence and the need for EMR. In other words, the need must have been caused by the respondent's abusive behaviour toward the complainant.⁸⁶

The inclusion of economic abuse as an act of domestic violence is commended. The possibility of loss of economic support is one of the leading reasons that victims do not report domestic violence. It is submitted that the possibility of losing financial support is devastating for victims who otherwise have no legal basis for claiming financial support from their abusers – for example, those who are cohabiting.⁸⁷ Such victims remain

⁸² S 1(x)(a) of the DVA.

⁸³ S 1(x)(b) of the DVA.

⁸⁴ S 1(x)(c) of the DVA.

⁸⁵ S 1(x)(d) of the DVA.

⁸⁶ S 1(x) of the DVA. See also Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 102.

⁸⁷ Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 100; see Heaton and Kruger *South African Family Law* 4ed (2016) 261; see also Skelton and Carnelley (eds)

passive and endure abuse in return for financial support. The DVA makes it possible for victims of domestic abuse to ask for financial relief as well as EMR; victims may also claim monetary relief for their dependent children.

While the DVA does provide relief from economic abuse, the award of relief is open to abuse. Unscrupulous “victims” may use the relief to bypass the process of obtaining maintenance in a maintenance court.⁸⁸ With this in mind, it must be noted that the DVA provides that a court may not refuse to issue a protection order, or impose any terms in the order, only because another legal remedy is available.⁸⁹ However, if the court is of the opinion that it is in the interests of justice that the matter be dealt with in terms of any other relevant law, such as the Maintenance Act,⁹⁰ it must make an order for interim relief in order to afford the victim sufficient opportunity to seek appropriate relief in the appropriate venue.⁹¹

Various reservations have been expressed about the provisions relating to economic abuse and EMR. As shown above, some see it as a substitute for maintenance.⁹² These provisions are open to abuse by unscrupulous complainants. The DVA does not place an upper limit on the period for which EMR may be obtained; this is left to the discretion of the presiding officer.⁹³ There is also the long-standing question of who should see to the implementation of EMR. Is it the responsibility of police officers, maintenance officers, maintenance investigators, sheriffs or the department of justice? Parenzee, Artz and Moul⁹⁴ bring into question the enforceability of these orders, arguing that one cannot expect police officers to monitor compliance.

The Amendment Act will amend the definition of “economic abuse”. The word “reasonable” in the definition of “economic abuse” will be discarded. Economic abuse will include deprivation of financial resources for education expenses to which the complainant is entitled.⁹⁵ Economic abuse will also include the disposal of household property in which the complainant has an

Family Law in South Africa (2010) 210–211 where the authors note that the legal position with respect to the duty of support for cohabitants is unclear. Prior to the Civil Union Act 17 of 2006, courts applied different approaches, depending on whether the cohabitants were same sex or opposite sex. In *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T), the court found that a duty of support did exist between same-sex couple. However, in the absence of an agreement, courts have not been inclined to make a similar finding with respect to opposite-sex cohabitants. This distinction, which is clearly discriminatory, was influenced by the facts that prior to the Civil Union Act, same-sex cohabitants did not have the option to legalise their union, whereas this option was available to opposite-sex cohabitants who simply elected not to marry. It is submitted that since the promulgation of the Civil Union Act, the discrimination on the grounds of gender can no longer be justified.

⁸⁸ Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 102.

⁸⁹ S 7(7)(a) of the DVA.

⁹⁰ 99 of 1998.

⁹¹ S 7(7)(b) of the DVA.

⁹² Parenzee *et al Monitoring the Implementation of the DVA* 27.

⁹³ S 7(7)(b) of the DVA.

⁹⁴ *Monitoring the Implementation of the DVA* 68.

⁹⁵ Par (a) of the definition of “economic abuse” in s 1 of the DVA as amended by Act 14 of 2021.

interest without the latter's consent.⁹⁶ It is submitted that in including the deprivation of financial resources for education expenses, the legislature may have had parental responsibilities and rights in mind. It is also not clear why the word "reasonable" was removed from the definition of economic abuse. A respondent may have a valid reason for not providing financially. Courts will probably interpret this provision as if this word is still part of the definition.

The Amendment Act will also extend the categories for which EMR may be awarded.⁹⁷ The Act has not addressed some of the concerns discussed above regarding the application and implementation of economic abuse and EMR provisions. For instance, the court could have clarified the maximum period for which the complainant may claim EMR. EMR should not remain in operation forever. To this end, regard must be had to Namibia, where similar relief is valid for six months. Section 15(e) of the Namibian Combating of Domestic Violence Act⁹⁸ provides that terms relating to maintenance are valid for any period set by the court not exceeding six months. It is submitted that reference to maintenance may be construed as EMR. Further, although, like South Africa, Namibian courts have a discretion under this provision, this discretion is limited to six months.⁹⁹

3.2 Imminent harm

The concept of imminent harm is not defined in section 1 of the DVA. However, it does appear in section 8(4)(b). This provision deals with the execution of a warrant of arrest. It provides that if it appears to a police officer that there are reasonable grounds to suspect that the complainant will suffer imminent harm owing to breach by the respondent, the latter must be arrested forthwith. In determining whether the victim will suffer imminent harm, the police officer must take into account

- "(a) the risk to the safety, health or wellbeing of the complainant;¹⁰⁰
- (b) the seriousness of the conduct comprising an alleged breach of the protection order¹⁰¹ and
- (c) the length of time since the alleged breach occurred."¹⁰²

It is submitted that imminent harm retains its ordinary meaning. In *Kruger v Minister of Police*,¹⁰³ the court held that imminent harm is "the danger of harm of a certain degree of immediacy ... that is ... impending, threateningly ready to overtake or coming on shortly".¹⁰⁴ In *Seria v Minister of Safety and Security*, the court observed:

⁹⁶ Par (b) of the definition of "economic abuse" in s 1 of the DVA as amended by Act 14 of 2021.

⁹⁷ Definition of "emergency monetary relief" in s 1 of the DVA as amended by Act 14 of 2021.
⁹⁸ 4 of 2003.

⁹⁹ Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 107–108.

¹⁰⁰ S 8(5)(a) of the DVA.

¹⁰¹ S 8(5)(b) of the DVA.

¹⁰² S 8(5)(c) of the DVA.

¹⁰³ 2016 (7K6) QOD 223 (GNP).

¹⁰⁴ *Kruger v Minister of Police supra* par 9.

“If something is possible or even likely it is not true to say that it is ‘imminent’, which word connotes an event which is both certain and is about to occur. ‘Imminent peril’ is described in West’s Legal Thesaurus Dictionary as ‘such position of danger to the plaintiff that if existing circumstances remain unchanged injury to the plaintiff is reasonably certain’... It is safe to say therefore that ‘imminent harm’ is harm, which is about to happen, if not certain to happen.”¹⁰⁵

It is submitted that the meaning of “imminent harm” is clear. When the President announced in 2019 that the legislature would clarify the meaning of “imminent harm”, one speculated that perhaps the concept would be defined in section 1 of the DVA, or a different definition assigned to it in the context of domestic violence. Even the latter speculation is problematic; it is very difficult to think of a definition of “imminent harm” outside of its ordinary meaning as illustrated above. Anything outside the ordinary meaning might lead to the fallacious assumption that every form of breach of a protection order is ground for an arrest.¹⁰⁶

The Amendment Act has not defined imminent harm. Instead, all references to imminent harm in the DVA will be removed. Does this imply that the police have been given a green light to treat every case of domestic violence as an emergency for which they may arrest? Steyn¹⁰⁷ submits that removal will now make it possible for police to arrest offenders in cases that do not involve physical violence. Steyn further submits that emotional harm and verbal abuse can be indicators of dormant but approaching imminent harm. Whatever the legislature intended, what is clear is that this part of the amendment is a recipe for civil litigation, unlawful arrest and police brutality.

4 DOMESTIC ABUSE AS A CRIME IN ITS OWN RITES

Like many other jurisdictions around the world, domestic violence was not criminalised in South Africa until the passing of the Prevention of Family Violence Act. Prior to this, a victim of domestic violence had to rely on the protection available under the common law. Arguably, as advocated by some authors, domestic violence is still not criminalised, as there is no crime of “domestic violence” or “domestic abuse”.¹⁰⁸ What is criminalised is the commission of the various acts in contravention of a protection order. These acts are criminalised only once they are prohibited by way of a protection order. If an act is envisaged in the DVA, but not prohibited in a protection order, then arguably, unless such an act is also a crime in terms of the common law, the respondent has not committed any offence.¹⁰⁹

¹⁰⁵ *Seria v Minister of Safety and Security supra* 146A–C.

¹⁰⁶ This was the position under s 3 of the Prevention of Family Violence Act. This section provided for the arrest following a breach of an interdict. The type of breach was not important for the purposes of an arrest.

¹⁰⁷ Steyn *The Essential Need for Empathy: A Study Evaluating the Legislative Provisions Aimed at Protecting Domestic Violence Victims Against Secondary Victimization by the Police* (LLM dissertation, Stellenbosch University) 2021 26.

¹⁰⁸ Ncube *Protection Orders in South Africa* 49.

¹⁰⁹ *Ibid.*

There is growing argument for a stand-alone crime of domestic violence.¹¹⁰ This argument is not concrete. It loses sight of the fact that the concept of domestic violence does not refer to a specific act.¹¹¹ Instead, it is a grouping of various acts that may be defined as domestic violence in terms of section 1 of the DVA.¹¹² The argument also fails to address the problems that will be encountered in trying to identify the definitional elements of “domestic violence”.¹¹³ This difficulty emanates solely from the fact that the concept represents a group of divergent acts, some involving physical violence and others involving emotional violence. Therefore, if one accepts that domestic violence is not a single act but a series of acts under the umbrella of domestic violence, it should be easy to accept that domestic violence is in a way criminalised in South Africa.

The argument for a stand-alone offence of domestic abuse should not be jettisoned yet. Perhaps it is possible to compress the various criminal acts that comprise acts of domestic violence and label them as “domestic abuse”. In that case, if a person is convicted for conduct that is prohibited in a protection order, that person may be convicted of domestic abuse. All that the State has to prove is that the person committed the prohibited conduct. For example: X and Y are in a relationship. X is very abusive towards Y, and the latter obtains a protection order against X. The protection order prevents X from assaulting, swearing or stalking Y or committing any other criminal act against Y, her relatives or her property. Should X assault Y, the former may be convicted of domestic abuse. The same should result if X is convicted of swearing at Y.

So that the record of the accused is not vague, it should also reflect the conduct in respect of which the accused was convicted – for example, “domestic abuse – rape”, “domestic abuse – assault” or “domestic abuse – stalking”. In this way, those dealing with an accused’s criminal record are able to determine the conduct underlying a conviction and to make an informed decision with respect to issues such as the accused’s access to children.

5 CONCLUSION

This article has critically discussed the offences currently provided for by the DVA. It has provided original input on what these offences entail in practice. With regard to the President’s announcement in 2019, it has also discussed the provisions of the Amendment Act. It has shown that the Amendment Act has done very little to meet the expectations created by the President’s announcement. For instance, little has been done to define economic abuse. Equally, the legislature has failed to provide the much-needed clarity

¹¹⁰ Parenzee *et al* *Monitoring the Implementation of the DVA* 5 and 11. See also Furusa and Limberg “Domestic Violence Act: Does It Protect? A Review of Literature Surrounding the South African Domestic Violence Act Focusing on the Socio-Economic and Legal Consequences of the Legislation” (July 2015) www.knowledgeco-op.uct.ac.za (accessed 2016-02) 8.

¹¹¹ Ncube *Protection Orders in South Africa* 49.

¹¹² See *KS v AM* 2018 (1) SACR 240 (GJ) par 18, where the court refers to a “pattern of conduct”.

¹¹³ Sibisi *Critically Evaluating the Machinery of the Domestic Violence Act* 128.

regarding EMR. The legislature has also removed all references to imminent harm. This move will create uncertainties and no doubt be a recipe for civil litigation for unlawful arrests and police brutality. The argument for a stand-alone crime of domestic violence has also been considered. While a crime of domestic violence is not practically viable, the argument in favour of a stand-alone crime may assist the criminal justice system in keeping accurate records when a person is convicted for contravening a protection order.