TOUGH CHOICES

Difficulties facing magistrates in applying Protection Orders[1]

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The second in a series of articles on the Domestic Violence Act considers some of the most difficult issues that magistrates must decide on. These include the temporary removal of the 'abuser' from the common home, emergency monetary relief for 'victims', and orders specifying the terms of contact with children. Magistrates' opinions on these controversial issues vary greatly, with the result that victims get uneven assistance from the courts. Magistrates, however, argue that the variation of opinion reflects their independence and discretion, as well as the various capacities of the lower courts to implement the Act.

In the first part of the series on magistrates and the Domestic Violence Act (DVA), magistrates' opinions about the general substance and workability of the Act were discussed (see *SA Crime Quarterly* No. 7, March 2004). The second part of the series considers magistrates' interpretation of more controversial issues such as the temporary removal of the abusers ('respondents') from the common home, emergency monetary relief, and orders specifying the terms of contact with children.[2]

These issues have been described as the most difficult ones for magistrates to decide upon. The complexity of granting orders that prohibit an abuser's access to his or her residence and/or children, and the obvious problems associated with forcing the respondent to pay for the victim's ('complainants') expenses, is not to be underestimated for lower court magistrates. The variation of opinion does not necessarily imply 'division within the ranks', however. It may instead reflect the variety of cases brought before individual courts, and the varying capacities of the lower courts to implement the Act.

Prohibiting 'abusers' from entering the common home

Although section 7(1)(c) and 7(2)[3] of the DVA provides that magistrates may grant an order that prohibits the respondent from entering his/her residence that is shared with the complainant – or a part of that residence – magistrates are reluctant to enforce this provision. Many believe that this decision, when the respondent is legally entitled by ownership or tenancy to occupy the home, is an extremely sensitive one. Some magistrates argue that it is tantamount to eviction, which is the jurisdiction of the High Court.

Although the Act refers specifically to "prohibiting entry into a shared residence", there is some debate as to whether this prohibition results in the actual removal of the respondent or a temporary restriction from entering the residence. Opinions about removal vary greatly among magistrates, who raise the following important questions about the enforcement of this provision:

- Does section 7 of the DVA *specifically intend* to give the right to remove or temporarily evict the respondent from the shared residence?

- Does section 7 apply to situations in which the respondent has full legal rights to his/her property and therefore full legal rights to occupy the home?
- Should section 7 be applied as an 'exclusion' or eviction order?
- If section 7 can be applied in the same manner as an eviction order, at what stage of the proceedings should it be applied? (Is it fair to grant this condition at the interim stage, when the proceedings are *ex parte*?)[4]
- If section 7 can be applied in the same manner as an eviction order, should this condition only be granted on the Return Date[5] when the respondent can have an opportunity to respond to the allegations of violence?
- Should the prohibition of entry into the shared residence be a temporary measure until formal proceedings are conducted in the High Court to establish permanent removal or eviction from the residence?
- If the DVA gives magistrates the power to prohibit entry into the shared residence for an extended period of time, does the order have the same legal standing as a High Court eviction order?

Some magistrates argue that they will only grant this remedy when the respondent is present to argue his or her side of the case. Others say this approach is incorrect as the Act does not specify at which stage the prohibition may be granted.

The general approach to section 7, however, is to prohibit the respondent from entering the shared residence only at the final stage of the protection order. However, when magistrates believe that complainants are in serious danger of further abuse, the condition will be granted at the interim stage.

But what constitutes 'serious danger' may not be compatible with the complainant's real or perceived vulnerability to further violence. Indeed, the consequences of not thoroughly examining the extent of vulnerability to further violence can have harmful effects on the complainant and her dependents. If Return Dates are set months away, or are postponed due to the fact that the notice to the respondent to appear on the Return Date is not properly served, the period between the granting of the interim order and the finalisation of the final order can be a highly dangerous one for complainants.

Respondents are generally only prohibited from entering the shared residence for a *temporary* period, until the complainant and respondent agree on the living conditions or until the complainant applies for a formal order to remove the respondent through the High Court.

An exception to this approach is when the court establishes that the violence was of a 'serious nature' and thus warrants the immediate removal of the respondent. Factors that help the application for immediate removal of the respondent include evidence of acts of domestic violence against children and other vulnerable family members, and the existence of criminal charges against the respondent.

Magistrates, however, are cautious about granting restrictive conditions prohibiting respondents from entering areas surrounding the home and other 'common' sites frequented by both parties. Such sites may include places of employment, schools and other family homes. They argue that it is difficult to enforce, particularly in communities where living conditions are crowded. Magistrates do nevertheless acknowledge that concerns about depriving respondents of their right to occupy the shared residence, except under "extreme circumstances", also deny the right of complainants and their children to live in their own homes without violence.

Emergency monetary relief

The Act makes provision for the granting of emergency monetary relief (EMR) which is defined as:

> the compensation for monetary losses suffered by the complainant at the time of the issue of a protection order as a result of domestic violence, including:
> a) loss of earnings;
> b) medical and dental expenses;
> c) relocation and accommodation expenses; or
> d) household necessities.[6]

The intention of the Act is to allow complainants access to emergency funds to ensure that they can provide for their immediate safety and well-being, and that of their dependents. Magistrates stated that some complainants have interpreted this relief as a substitute for maintenance payments, and found some of the requests "unreasonable". The Act, however, is careful not to use the term maintenance to describe this remedy.

Magistrates suggested that some complainants use the Domestic Violence Act when the maintenance system fails them – either when they have been unsuccessful in securing a maintenance order or when they have waited a long time for the maintenance order to be served, granted or varied. As expected, there were a range of opinions surrounding both the purpose and application of EMR.

On the one end of the continuum are magistrates who believe that respondents who are not maintaining their families or the shared residence – as required by the law – are committing what the Act refers to as economic abuse. Referring to sections 1(ix)(a) and (b) of the Act,[7] it would follow that defaulting on maintenance, not paying monthly rent or mortgage payments, and not providing for basic family necessities would all constitute 'economic abuse' and therefore warrant EMR.

Some magistrates suggested that it was perfectly acceptable for the court to provide the complainant with EMR for a temporary period, while the lengthy waiting periods for the appearance of maintenance defaulters in maintenance courts were pending. The Act is clear that a protection order may be granted if there is evidence of any act of domestic violence, including economic abuse. One magistrate defended this position:

> *We are all well aware of the huge delays experienced by maintenance courts. Maintenance hearings are set down months in advance and the courts sometimes have to send the sheriff out three or four times before he receives his summons to appear. This is the case for both new applications, defaulting respondents and for variations of maintenance orders. Some women wait for over a year to get their first maintenance payment. How long do their children have to go without proper food, without school because fees are not paid, without medical care? The maintenance system is a mess and fathers know it. They use the delays to avoid supporting their families. The DVA is clear, it is an immediate and effective remedy. The one part of justice can help the other. If the defaulter ends up double-paying because of back payments, that's his problem. He should have obeyed the maintenance order in the first place. Really, the maintenance court can take the amount of EMR off the payments of maintenance. I would consider that a fair judgment. It provides the applicant with immediate funds and it means he doesn't have to pay twice.*

This view, however, was not shared by other magistrates who considered maintenance a completely separate issue that should be contemplated in the maintenance courts. The idea that EMR could potentially provide the complainant with 'bridging' funds until the maintenance matters were settled, was not viewed favourably.

Instead, the allocation of EMR, it was suggested, should only cover expenses that are a "direct result of domestic violence". This, however, implies that economic abuse is not a 'real' form of domestic violence and that provision for EMR should only be made when other more 'serious' forms of violence are committed by the respondent.

It was further suggested that EMR should cover very specific costs associated with domestic violence, such as relocation expenses, payments for rental or bond, medical costs incurred due to the acts of physical domestic violence and other immediate living costs incurred by the complainant as a result of violence. The latter was not adequately defined in the discussions with magistrates.

There was very little consensus about what to provide complainants in terms of EMR. However, magistrates were in agreement that the amount granted should be fixed – in one lump sum or for a limited monthly period – and that the courts should

inform the complainant that they may apply for maintenance at the maintenance court.

Contact orders with children

In terms of section 7(6) of the Domestic Violence Act, if the court is satisfied that it is in the best interests of the child, it may:

a) refuse the respondent contact with such a child; or
b) order contact with such child on such conditions as it may consider appropriate.

Contact orders for children were raised as another serious issue facing magistrates. The ambiguity and the variety of approaches used by magistrates in relation to orders which specify extent of contact that the respondent has with children, was notable during all phases of this study. The *First Report* found that between 10-50% of requests for supervised contact with children (in the research sample) were refused by magistrates. When conditions of contact were granted (in s. 3.1.2.8 of Form 4 of the application), the following conditions were ordered:

- that the respondent not remove the child without the complainant's consent;
- that the respondent not come within a certain distance of the child;
- that the respondent not visit the child at school/crèche/day mother; or
- that the respondent not contact the child in any way, including telephonically.

Granting both interim and final protection orders that limit the respondent's contact with his/her children is a complex and contentious issue for the magistracy. The approach to non-contact or supervised contact orders has been a cautious one but some courts are more willing to entertain contact orders than others.

Magistrates are acutely aware that the decision to limit contact with children is serious, and that the manner in which application forms are currently filled out does not provide the court with sufficient information to make such a weighty decision. As a result, magistrates tend not to use the Domestic Violence Act to establish temporary 'custody' of, or 'access' to children, and feel that the more favourable approach is to refer these matters to the Children's Court or the High Court.

One argument was that granting a no-contact or a supervised-contact order at the interim protection order stage was unfair to the responding party. The interim order, being an *ex parte* order, takes away the respondent's fundamental right to have access to his/her children – an issue that should be the purview of the Children's Court or the High Court. It was suggested that contact orders with children should only be granted at the finalisation of the protection order, when the respondent could argue his or her position.

It was further suggested that when a High Court order is in place, the Magistrate's Court must not grant an order that contradicts the order already in place. When a High Court order has granted particular custodial or access rights to the children, the Magistrate's Court is not in a position to vary the conditions of the order, even though the DVA makes provision for the protection of children either by the removal of the respondent or a regulated 'contact' agreement between the parties.

It was counter-argued, however, that the purpose of the interim protection order was to provide immediate relief to the complainant until the return date. When the magistrate is convinced that an "act of domestic violence" has taken place, his or her duty is to ensure the protection of the complainant and her dependants. Limiting the granting of contact orders to the finalisation stage therefore defeats the objective of protecting complainants from imminent danger.

It was widely accepted that approaching the police or the courts for protection was one of the most dangerous periods for the escalation of domestic violence and, on this basis, every available remedy provided for in the Act should be made available. It was also forcefully argued that the act of domestic violence does not have to be committed solely on the complainant, but that the court should also protect children from the damaging effects of this violence.

When there are existing High Court orders, it was recommended that magistrates should have the

power to grant immediate relief to a complainant until such time that an alteration is made to the High Court order. Magistrates felt strongly that even though, in principle, High Court orders should be varied at the High Court, the Domestic Violence Act should provide a victim of domestic violence with some temporary relief.

Some insisted that when the original High Court order was issued, domestic violence may not have featured in the decision to grant the order. The Domestic Violence Act specifically provides for immediate relief to victims of domestic violence, and on this basis, magistrates argued that they should have the power to intervene in cases in which violence is present and to provide relief to applicants until such orders can be varied in High Court.

The court records that were analysed for the *First Report* showed that violence against women had considerable effects on children. Some of the effects of witnessing domestic violence on children included:

- insomnia/restlessness;
- acute anxiety;
- diarrhoea and vomiting;
- abdominal pain;
- eating problems (such as not eating or excessive eating);
- notable problems at school when violence intensified (i.e. poor performance or troubles with teachers or peers);
- depression/sadness;
- bed-wetting;
- running away from home/staying with other family members/refusing to come home;
- poor general health (chronic cold or flu symptoms; exhaustion); and
- increasingly aggressive behaviour/discipline problems.

The report also argued that the magistrates presiding over domestic violence cases should request a report from a social worker on the child. One magistrate suggested that with respect to children as applicants or dependents of the protection order:

> *We need permanent social workers at court dealing with domestic violence cases. In fact, we need a special domestic violence court, or at minimum we need to legislate a social workers report, which must be attached to the application. High court won't deal with access/custody issues regarding children without a social worker's report, surely the same should happen in the case of lower courts who are also expected to address these issues through this legislation.*

Recommendations regarding the child (as an applicant for a protection order) and in terms of the placement of children:

- If a child applies to the court for a protection order, the court must consider the application, and if it deems fit, grant an interim protection order. The court must then, if it finds the child to be in need of care, refer the child to the Children's Court in terms of section 11(1)(c) of the Child Care Act.
- When adult applicants request, as part of the protection order, an order for the placement of children (i.e. structured or specific visits), the magistrate should inform the applicant that the arrangement is a *temporary* one. When making provision for the placement of children, magistrates must consider:
  - the safety, health and well-being of the applicant, child/children or any other person affected by the domestic violence;
  - the applicant's perceived risk of further harm or violence;
  - the personal and material interests of the applicant; and
  - the best interests of the child/children.

Like the concerns surrounding the prohibition of respondents from entering the shared residence, magistrates are cautious about making decisions that may appear to be the purview of the High Courts. The development of guidelines for presiding over cases that involve contact orders with children must be compatible with a number of other legal

instruments, namely the Child Care Act, remedies available through the High Court for the custody and access of children, and the forthcoming Children's Bill. Since the latter has not been finalised, magistrates felt that decisions relating to contact with children can only be decided on the facts presented before them, and what is currently set out in the Act itself.

Endnotes

1 Sections of this article were originally published as L Artz, *Magistrates and the Domestic Violence Act: Issues of Interpretation*, Institute of Criminology, Faculty of Law, University of Cape Town, 2003.

2 The results of this research are based on the opinions of magistrates themselves and not the author. This study was conducted to investigate the various approaches by magistrates in implementing the Act. Broadly, the study involved the re-examination of our monitoring database on the DVA (see P Parenzee, L Artz & K Moult, *Monitoring the Domestic Violence Act: First Report*, Institute of Criminology, Faculty of Law, University of Cape Town, 2001), in-depth interviews with magistrates from each of the nine provinces, the analysis of the outcomes of two major conferences (including over 350 magistrates and High Court judges, facilitated by this author and her associates) as well as the outcomes of monthly meetings with the 'Domestic Violence Working Group'; a group consisting of magistrates representing each province, the Justice Training College, the Gender Directorate of the Department of Justice and the author.

3 7(1) The court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from:
(c) entering a residence shared by the complainant and the respondent: provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant.
7(2) The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant …

4 *Ex parte*, refers to court proceedings where the respondent is not in attendance and decisions are made in absence of the respondent. Decisions made at *ex parte* hearings are only enforceable until the Return Date, when both the applicant and the respondent appear before the magistrate.

5 Return Date is the date set by court, once an interim protection order has been granted, when both the applicant and respondent appear before the magistrate. The magistrate may finalise the protection order on the return date, or should the respondent provide reasons for why the protection order should not be finalised, in whole or in part, the order may be set aside (cancelled) or varied (changed).

6 Section 1(x)(a).

7 Sections 1(ix)(a) and (b) define 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 or 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.