THE ROLE OF “IZINDUNA” AND “AMAKHOSI” IN ERADICATING DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE.

By

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This mini-dissertation is submitted in partial fulfilment of the requirements for the Degree of Master of Laws in Advanced Criminal Justice, College of Law and Management Studies, University of KwaZulu-Natal, Pietermaritzburg.

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2024

Declaration regarding originality

I, Ntombizakithi Ntom'pela Bhengu, declare that:

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Acknowledgements

“For I can do all things, everything through Jesus Christ, who gives me strength”.
(Philippians 4 V 13)

Thank you, God Almighty, for giving me the strength and knowledge to undertake this study. This degree would not have been possible without your everlasting help. Oh Lord, I am grateful.

I wish to acknowledge my late Supervisor, Professor Aifheli Enos Tshivhase with whom I began this academic journey, and who always encouraged me to keep momentum and not give up. May his soul forever rest in peace.

To my incredible Supervisors, Mr Siyabonga Sibisi and Dr. Khulekani Khumalo who did not only take up the reins, but also pushed me to complete my dissertation. Thank you for your sterling guidance, insightful remarks and honest feedback. To my learned friend, Dr. Chantal Badul, thank you for your words of encouragement and guidance during this academic journey.

To my wonderful family, I am sincerely grateful to my husband, Phumulani ‘Babazy’ Bhengu, for his support and patience during the writing of this dissertation. Many thanks to my cheerleaders, my six beautiful children, Zibongele, Amahle, Wenzile, Usenathi, Mpilo, and Gamelihle. I love you so much my ‘Gundanes’ and one day I will write a book about your amazing support and unconditional love.

To my mother Nokuthula ‘Khulu’ Zulu, thank you maNcayiyana for your prayers, for being my pillar of strength and for guiding me with your wisdom. You are the best Ma. I would also like to express my deepest gratitude to my siblings and my in-laws for their prayers and unwavering support.

To my late father Pat ‘Manpower’ Zulu who loved education and to my late sister Zamazulu Zulu who loved me unconditionally; I know this degree would have made you proud. May your beautiful souls forever rest in peace.

Acronyms

BAA	Black Administration Act 28 of 1927
DVA	Domestic Violence Act 116 of 1998
GBV	Gender-based violence
IPO	Interim protection order
PFVA	Prevention of Family Violence Act 133 of 1993
SAJEI	South African Judicial Education Institute
SAPS	South African Police Service
TLGA	Traditional Leadership and Governance Framework Act 41 of 2003
TKLA	Traditional and Khoi-San Leadership Act 3 of 2019
TCA	Traditional Court Act 9 of 2022

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CHAPTER ONE

INTRODUCTION

"……*violence against women is like a second pandemic in South Africa"*[1]

President Cyril Ramaphosa

1.1 Introduction

In the first quarter of 2020, South Africa was struck by the unprecedented COVID-19 pandemic. The virus spread throughout the country, caused the loss of lives and posed a grave threat to the lives of many South Africans, with a cumulative number of roughly 88.9 thousand civilians who lost their lives in South Africa from March 2020 to October 2021.[2] The outbreak of this pandemic has been compared to the widespread of domestic violence and gender-based violence (GBV) directed at women in South Africa.[3] When the president of South Africa addressed the nation on 17th June 2020 he described intimate partner violence perpetrated by men against women as a second pandemic facing the country.[4] The president's comment highlighted the widespread impact of the twin pandemics facing South Africa during the lockdown period.[5] While the scourge of COVID-19 has been conquered, the battle against the pandemic of GBV has yet to be conquered in South Africa.

A day hardly passes without any media report on women being sexually abused, physically abused or being a victim of other forms of abuse in South Africa.[6] This clearly indicates that, while COVID-19 did not introduce the social ill of GBV, it exposed the pre-existing social norms and gender inequality in South Africa.[7] The social ill of

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[1] E Ellis 'Gender-based violence is South Africa's pandemic, says Ramaphosa', available at https://www.dailymaverick.co.za/article/2020-06-18-gender-based-violence-is-south-africas-second-pandemic-says-ramaphosa/ accessed on 09 June 2022.

[2] Statista.com/statistics/1194890/cumulative-number-of-covid-19-deaths-in-south-africa/ accessed on 16/11/2024.

[3] Op cit note 1.

[4] Op cit note 1.

[5] N J Dlamini 'Gender-based violence, twin pandemic to COVID-19' (2021) 47 (4-5) *Critical Sociology* 583.

[6] I Qoma 'No country for females', available at http:/www.mg.co.za/thoughts-leader/opinion/2024-08-21-no country-for females/ accessed on 18 November 2024.

[7] Dlamini op cit note 5 at 585.

domestic and GBV is widespread throughout the country. It has no boundaries, occurring behind the high walls in the leafy suburbs in urban areas and also occurring behind the doors of rondavel huts in rural areas. Judge Sachs even remarked in the Constitutional case of *S v Baloyi*[8] that what distinguishes domestic violence is its hidden, repetitive character, which cuts across class, race, culture and geography, because it has no boundaries.

Arguably, women in rural areas are more vulnerable to domestic and GBV than the rest of the country.[9] They are more vulnerable as they are also faced with additional challenges that prevent them from accessing justice to seek help and report incidents of abuse. Their vulnerability presents a unique case for three reasons. First, their plight is exacerbated by general barriers that affect access to justice services, such as the overall functionality of the justice system, the accessibility of legal remedies for complainants, and whether these remedies hold individuals and the state accountable for wrongdoing.[10]

Second, in addition to the general barriers, rural women's vulnerability is also elevated by specific barriers that generally affect rural dwellers' access to justice, such as the geographical location of rural areas. Rural and remote areas are mostly located far away from large towns and cities where there are criminal justice institutions such as courts, police stations, and other supportive agencies.[11] Therefore, for rural victims to access criminal justice institutions, they have to travel long distances using public transport, which is mostly lacking in rural areas. Lack of infrastructure is another challenge facing rural dwellers, as many rural areas in South Africa are still characterised by poor infrastructure such as lack of proper roads, no bridges or broken bridges, insufficient transport services and poor service delivery.[12] Research indicates

[8] S v Baloyi & others (CCT 29/99) [1999] ZACC 19;2000(1) BCLR 86;2000(2) SA 425 (CC) paragraph 11 (3 December 1999)

[9] M De Souza Louw 'Evolution of provisions relating to violence against women in South Africa's Traditional Courts Bill' (2020) 1 *Acta Juridica* 87.

[10] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC; 2016(5) BCLR 618 (CC);2016 (3) SA 580 (CC) (31 March 2016).

[11] M Nyethi 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46.4 *De Jure* 913.

[12] R M Pillay 'The impact of Road Infrastructure on Rural Development in South Africa' (2023) 6(7) *International journal of Social Science research and review* 570.

that, because of poor rural road infrastructure, communities in rural areas like Eastern Cape (SA) have to travel long distances to access healthcare services in emergencies before they could reach main roads which would link them to major cities with basic services.[13] This puts on view that, poor rural infrastructure coupled with the remoteness of rural areas also contributes to barriers that denies rural communities access to vital basic services such hospitals, schools and shopping centres.[14] Criminal justice institutions like police stations and courts are also included as they provide vital basic services that protects the dignity and rights of victims. Therefore, victims of domestic and GBV from rural areas who needs urgent protection from acts of domestic and GBV also have these infrastructural barriers to overcome to access justice. It is even worse if there are harsh weather conditions, for example, heavy rainfalls, as victims will face further difficulties travelling to criminal justice institutions to access justice due to inclement weather. In a study by Nyawo and Mashau[15] aimed at assessing the development of the rural network for sustainable livelihood of rural communities within KwaZulu-Natal Province found that, unfavourable weather conditions like heavy rains disturbs transport services in rural areas where there are gravel roads. Gravel roads often deteriorate quickly during rainy/wet season, and that leads to more travelling times which eventually delays local communities' access to basic services and cities.[16]

The third barrier that exacerbates rural women's vulnerability is the cultural barrier. One of the features that distinguish rural women's experiences from those in urban areas is the dominance of cultural practices and norms that are prevalent in rural areas.[17] While some of these cultural practices are commendable for holding the fabric of many African societies together,[18] some practices are damaging to particular

[13]JC Nyawo & P Mashau 'The development of the rural roads network for sustainable livelihoods in South African local municipalities' (2019) 17(1) *Gender and behaviour* 12554.

[14] Ibid.
[15] Ibid at 12563.
[16] Ibid.
[17] Jili F H S *An Exploration of the Role of Traditional Courts in Combating Crime: A Study of the Maphumulo Traditional Tribe, Stanger* (unpublished Master of Social Science, University of KwaZulu-Natal, 2020) 41.
[18] C A Hingston & T L Auselime 'Violated by heritage: African women and harmful traditional practices' (2019) *African Journal of Gender, Society & Development* 51.

groups in society such as women.[19] This is the case where these dominant cultural practices and norms are rooted in gender inequality, leading women to normalise and internalise GBV,[20] and ultimately not expose acts of domestic and GBV that arise from these cultural practices. They are not reported due to rural women's fear of reprisal or social ostracism when reporting or exposing acts of domestic violence perpetrated by their intimate partners, as these acts are accepted as norms.[21] Examples of these practices are well reflected in some African cultures where wife beating and battering, female genital mutilation, wife burning, and hard labour are accepted as the norm.[22] The customs of '*ukuthwala*'[23] (bride abduction) and '*ukungena*' (spouse inheritance) are further examples of customary practices that are still prevalent and accepted in some rural areas.[24] Yet, they expose rural women to various forms of abuse including emotional, sexual, physical, and psychological abuse.

The harsh realities faced by rural women who are victims of domestic and GBV have been observed by the author of this dissertation, who serves as a magistrate in a rural court. On the first working day of the week (usually Mondays), the Family Court is inundated with a high volume of new protection order applications. These applications are connected to abuse that women have endured over the weekend. Acts of domestic and GBV tend to peak over weekends and, since courts are closed on weekends and public holidays, the victims are only able to apply for emergency relief on the first court day of the week. Therefore, victims who are from remote areas who, for example, experience acts of abuse on a Friday evening or during the weekend, must wait until Monday or the first available court day to access the nearest Magistrate's Court and

[19] H S Ntuli 'Conflict between traditional cultural practices for women and South African Government laws' (2019) 17 *Gender and Behaviour* 12711.

[20] A Nkanisa 'Society has failed women at every level, more so rural womxn' available at https://www.dailymaverick.co.za/article/2020-01-23-society-has-failed-women-at-every-level-more-so-rural-womxn/ accessed on 09 September 2022.

[21] U Bob et al. 'Gender-based violence in rural areas in South Africa: impacts on home-based learning during the Coronavirus Disease 2019 Pandemic' (2022) 29 (1) *Alternation Interdisciplinary Journal for the Study of Arts and Humanities in South Africa* 351.

[22] Hingstone & Auselime op cit note 18 at 53.

[23]Ukuthwala' is a form of abduction that involves the kidnapping of a girl or a young woman by a man and his friends with the intention of compelling the girl or young woman's family to endorse marriage negotiations. Ntuli op cit note 19 at 12718.

[24] S Z Ntshangase 'Women's agency and re-alignment of the cultural tradition of *ukungena or ukungenwa* in Neliswa Zulu's play, Isiko Nelungelo' (2022) 42(1) *South African Journal of African Languages* 38.

apply for a protection order which is issued in terms of the Domestic Violence Act as amended (hereafter the DVA).[25]

The DVA is the only piece of South African legislation which seeks to afford victims of domestic abuse the maximum protection that the law can provide.[26] The Act seeks to achieve this objective by enabling the Magistrate's Court to provide urgent relief to victims of domestic violence in the form of an interim protection order (IPO) (see Appendix 1) issued as an interdict to immediately stop any acts of domestic abuse and in certain circumstances also order the alleged abuser to carry out a positive act. It is an urgent application, therefore, the process of obtaining this interdict is intended to be speedy, simple and effective. In order to be more accessible to victims of abuse, the DVA makes provisions for the application of protection orders after court hours and outside of court days if there is an emergency.[27] Even though this after-hours service is available in terms of the Act, victims who are in remote rural areas have the challenge of physically accessing Magistrate's Courts and police stations which are located far from rural areas and thus are less likely to enjoy the benefits of these provisions. However, the legislature has identified this gap and other shortfalls in the DVA and made a deliberate move to amend the DVA.

One of the amendments to enhance accessibility of the remedies of the DVA was the introduction of new ways of applying for a protection order which is not only limited to 'in-person' applications which require the complainant to be physically present in court. The new method provides the complainant with the option of applying for a protection order electronically or through an online portal.[28] This alternative method first requires the victim to have access to an electronic device like a smartphone or laptop in order to process the electronic application and have data and internet connectivity. Furthermore, the area where the victim is located needs to have sufficient network coverage to transmit electronic communication and access to electricity may also be a factor.

[25] 116 of 1998 as amended.
[26] Preamble of the DVA as amended.
[27] S 4(5) of the DVA as amended.
[28] Regulation 7(1)(a), (b) of the Regulations in terms of the DVA 116 of 1998 as amended.

Whilst this is a commendable initiative to afford effective and rapid response to victims of violence, victims in rural areas are still faced with a lack of adequate infrastructure for technology-based electronic applications and will find it difficult to access this alternative method of applying for a protection order. The difficulty will be caused by the fact that the complainant who would like to lodge an application for a protection order electronically or through the online portal, will need to have internet access. South Africa has been plagued by the recurring problem of load shedding (electricity blackouts) which also affects the quality of the internet connection. The situation is exacerbated in some remote rural areas where there is limited network coverage.[29] Residents of Lusikisiki in the rural areas of Eastern Cape province (KZN) knows this problem very well, as they often experience prolonged power outages and power cuts which disrupt little network service that they have.[30] Cell phones attached to sticks in yards or strapped on tree branches in a desperate search for network coverage are a common sight in remote rural areas with limited network coverage.[31] South Africa is generally bombarded by poor communications infrastructure challenges in the rural areas, and that impacts the availability of network, as well as signal which is very weak and at times unavailable.[32] Therefore, victims of violence who opt to rely on an electronic application will, apart from needing the necessary technology (such as a smartphone or computer), also be faced with load shedding and internet access barriers to access remedies provided by the DVA.[33]

The reality facing South Africa is, that although Section 34 of the Constitution guarantees the right to access the courts and provides any aggrieved party with the right to have their disputes resolved by the application of law, the mere existence of

[29] B Dube 'Rural online learning in the context of COVID 19 in South Africa: Evoking an inclusive educational approach' (2020) 10(2) *REMIE: Multidisciplinary Journal of Educational Research* 144.
[30] H. ka Canham 'Contemplating South Africa's great depression…in the dark' available at https://mg.co.za/thought-leader/opinion/2023-02-28-contemplating-south-africas-great-depression-in-the-dark/ accessed on 09 March 2025.

[31] Z. Auntony 'Hamstrung by lack of connectivity' available at https://mg.co.za/africa/2024-06-27-hamstrung-by-lack-of-connectivity/ accessed on 09 March 2025.

[32] MP Kelebongile 'South Africa Rural University Students' Experiences of Open Distance E-Learning Support' (2024) 23.4 *International Journal of Learning, Teaching and Educational Research* 51.
[33] Ibid at 52.

this right does not ensure practical access to the judicial system. There are still various barriers that people encounter when trying to enforce their right to have access to justice in terms of Section 34 of the Constitution.

However, while there are barriers and challenges limiting rural complainants' access to remedies provided by the DVA which are dispensed by Magistrate's Courts, there is an untapped potential for unlimited access to justice offered by the traditional justice system. This system is dispensed by traditional courts which are physically accessible to the community making it easy for persons to simply walk to the traditional court if they need services offered by it. Traditional leaders who preside in these courts are members of the community and can be reached at any time, including weekends and public holidays, should there be an emergency. It is this untapped potential in the form of traditional leaders and traditional courts that offers unlimited access to justice that motivated this research. Therefore, what this study sought to explore was how traditional leaders can best serve and protect rural women who are victims of domestic and GBV should they be given authority in terms of Section 5(2) of the DVA to issue IPOs as an interdict to immediately stop acts of such violence.

1.2 Problem statement

Violence against women is a pervasive and persistent problem throughout South Africa.[34] The pervasiveness of this 'second pandemic' is well displayed by the rate at which women are killed and raped in South Africa. The statistics show that one woman is being raped every three hours.[35] The rate at which women are killed by intimate partners in South Africa is five times higher than the global average.[36] The South African Police Service (SAPS) crime statistics for the first quarter of 2023/2024 show that 969 women were killed because of domestic violence-related incidents within the first three months of 2023 and 15 000 women were victims of assault with intent to do

[34] De Souza Louw op cit note 9 at 88.

[35] A Gouws 'Violence against women is staggeringly high in South Africa different way of thinking about it is needed' available at https://theconversation.com/violence-against-women-is-staggeringly-high-in-south-africa-a-different-way-of-thinking-about-it-is-needed-195053 accessed on 10 February 2024.

[36] Ibid.

grievous bodily harm.[37] These alarming SAPS statistics indicate that women continue to bear the brunt of violent attacks in South Africa.[38]

It is noteworthy that women from rural households and communities are not excluded from these SAPS statistics. Like their counterparts in urban areas, women and girls from these rural communities are also predominately vulnerable to domestic and GBV.[39] Domestic violence is also highly prevalent in rural areas.[40] The only difference is that victims in rural areas are less likely to get prompt help to escape acts of domestic and GBV as compared to victims of the same violence in urban areas. South Africa's rural areas are, in general, disadvantaged by the lack of access to ordinary public services,[41] inadequate support from government agencies, limited resources, as well as institutions aimed at assisting victims of violence.[42] All these barriers have an impact of limiting access to justice for victims who want to promptly escape acts of domestic and GBV. Furthermore, the experience of rural women who are victims of abuse is particularly dire because of other social issues in rural areas which are linked to domestic violence.[43] Social issues such as poverty, unemployment, cultural patriarchy and gender-specific roles are more entrenched in rural areas and they create more risks for women and girls in these areas.[44]

While there are barriers and challenges limiting rural complainants' access to Magistrate's Courts and Family Courts, there are traditional courts which are geographically accessible to the rural community. The traditional justice dispensed by traditional courts and traditional leaders still remains accessible to rural communities. Traditional courts provide an important avenue for cheaper, closer and more familiar access to justice for millions of South Africans.[45] It is mainly for this reason, that most

[37] https:/www.saps.gov.za/accessed on 03 September 2023.
[38] V.Cruywagen 'Statistic of out-of-control violence - 969 women murdered in South Africa in just three months' available at https://www.dailymaverick.co.za/article/2023-05-30-statistic-of-out-of-control-violence-969-women-murdered-in-south-africa-in-just-three-months/ accessed on 10 January 2024.
[39] Bob et al. op cit note 21 at 342.
[40] Jili op cit note 17 at 35.
[41] A Nicolaides & N.E Dludla 'Sustainable rural development and socio-economic upliftment of marginalised communities in South Africa' (2023) *OIDA International Journal of Sustainable Development* 2.
[42] Bob et al. op cit note 21 at 341.
[43] Ibid at 341.
[44] Ibid at 341.
[45] De Souza Louw op cit note 9 at 90.

of rural residents rely almost exclusively on the traditional justice system as their only effective and available channel to seek restitution for legal matters and injustices.[46] Traditional courts and traditional leaders thus still play a vital role in the administration of justice in rural areas and communities. However, even though traditional courts and traditional leaders are easily accessible to the community and serve as a first port of call for justice to millions of citizens in rural areas,the question is: What role could be played by traditional leaders and courts to meet the needs of rural women faced with acts of domestic and GBV?

1.3 Objectives of the study

The objective of this study is to explore the role that could be played by the institution of traditional leadership in matters that relate to domestic and GBV in rural areas. This study seeks to explore the role of traditional leaders and traditional courts in addressing the severe social issue of domestic and GBV against women in South Africa. Therefore, the focal point of this study was to explore the legal role of traditional leaders as judicial officers in responding to complaints of domestic and GBV, particularly when urgent intervention is needed, such as the issuing of an IPO to immediately stop acts of abuse. The intention was to assess how far traditional leaders can go in enhancing access to justice for rural women victims of domestic and GBV if given the authority to issue IPOs in terms of the DVA which provides urgent relief from the scourge of domestic and GBV.

The role and suitability of traditional courts and traditional leaders to handle domestic and GBV matters have been researched in the past.[47] However, the role of traditional leaders in fighting the scourge of intimate partner violence by also issuing IPOs in terms of the DVA has not been explored. Yet, traditional leaders have an influence in rural areas because they understand the social context and dynamics of their society. The writer submits that the influence of traditional leaders in promoting positive

[46] Jili op cit note 17 at 39.

[47] W Jennifer & J Klusener 'The Traditional Courts Bill: a woman's perspective' (2013) 29 (2) *South African Journal on Human Rights* 286; W S Mnisi 'Regulating vernacular dispute resolution forums: controversy concerning the process, substance and implications of South Africa's Traditional Courts Bill' (2012) 12 (1) *Oxford University Commonwealth Law Journal* 153; N Gasa 'The Traditional Courts Bill: a silent coup?' (2011) 35 *South African Crime Quarterly* 28.

behaviour change and reversing the epidemic trends of violence directed at women cannot be ignored.

1.4 Research questions

The key research question in this dissertation was:

Do traditional leaders have a role to play in eradicating domestic and GBV in rural areas?

The sub-questions were:

(i) What role could be played by traditional leaders as judicial officers in traditional courts in eradicating domestic and GBV in rural areas if they were conferred with powers to implement the provisions of the DVA, including the issuing of IPOs to stop acts of abuse?

(ii) How could the implementation of the DVA by traditional leaders improve access to justice and overcome barriers faced by rural victims who cannot access the Magistrate's Courts to access remedies provided by the DVA?

(iii) What role could be played by traditional leaders as community leaders in conveying the state's commitment to the elimination of domestic and GBV?

1.5 Research methodology

This study adopted an exploratory research design and was entirely desktop-based. It includes a review of existing research and literature, relevant legislation, such as the DVA, Domestic Violence Amendment Act,[48] Black Administration Act,[49] the Traditional Courts Act,[50] and the Traditional and Khoi-San Leadership Act,[51] and case law, electronic sources, and academic articles. Some of the possible solutions that could be explored are informed by the writer's practical experience in the field.

[48] Act 14 of 2021.
[49] Act 38 of 1927.
[50] Act 9 of 2022.
[51] Act 4 of 2019.

1.6 Limitations of the study

The focus of this study is on women victims of domestic and GBV who reside in rural areas and who due to barriers (outlined above) limiting their access to the Magistrate's Court may opt to use traditional courts as their courts of first instance for their domestic and GBV related matters.

The study did not deal with the question of the constitutionality of traditional courts, nor did it deal with the question of whether traditional courts are courts of law or just arbitration tribunals.

1.7 Sequence of chapters

The structure of this thesis is as follows: Chapter one introduced the study, providing the background to the study, the research problem statement, the research question and sub-questions, the methodology, and the limitations of the study. Chapter two examines the DVA including the remedies provided by the Act. Chapter three examines the institution of traditional leadership as an alternative forum to settle domestic and GBV disputes**.** Chapter four, the final chapter, deals with the summation of arguments and provides recommendations on how the potential possessed by traditional leaders could be utilised to enable them to play a role in implementing the DVA as amended.

1.8 Conclusion

Domestic and GBV are social ills facing South Africa's rainbow nation. The fight against such violence requires the same efforts and attention that the South African government gave to the COVID-19 pandemic because these social ills can be likened to a pandemic. Women in rural areas are not spared from these social ills and, like women in urban areas and cities, are also exposed to all forms of abuse. However, rural victims have an additional challenge comprising various barriers limiting their access to justice. Therefore, in light of this pandemic of violence directed at women, no stone must be left unturned in fighting this scourge and utilising the remedies provided for in the DVA.

CHAPTER TWO

DOMESTIC VIOLENCE ACT AS A REMEDY TO DOMESTIC AND GENDER-BASED VIOLENCE IN RURAL AREAS

"Domestic violence speaks many languages, has many colours and lives in many different communities"
Sandra Pupatello[52]

2.1 Introduction

This chapter will examine the DVA and its regulations as a solution to acts of domestic and GBV experienced by rural women. The chapter will also examine how remedies offered by the DVA are accessed by rural dwellers. The challenges and obstacles that prevent rural women from accessing justice, particularly accessing remedies provided by the DVA, will be identified. How these challenges lead rural women to turn to traditional courts as their only effective and available means of seeking restitution for legal matters and injustices will be highlighted.[53]

2.2 Domestic Violence Act 116 of 1998 as a radical remedy

2.2.1 Background of the Act

The DVA is a well-articulated, progressive and useful piece of legislation promulgated in an attempt to provide victims with an accessible legal tool to stop any acts of domestic abuse and related matters.[54] It came into effect in December 1999 and has thus been in operation in South Africa for 26 years. However, the DVA is not the first South African legislation to specifically address acts of domestic abuse and GBV in a family environment, as this Act supersedes the Prevention of Family Violence Act (PFVA).[55] The PFVA, passed towards the end of the apartheid era, was the first act to introduce a legal mechanism to interdict acts of domestic violence by enabling victims

[52] S Pupatello, available at https://www.azquotes.com/quote/681556 accessed on 03 July 2022.
[53] F H S Jili op cit note 17 at 39.
[54] L Artz 'Better safe than sorry: Magistrates' views on the Domestic Violence Act' (2004) (7) *South African Crime Quarterly* 1.
[55] 133 of 1993.

of family violence to approach the court and obtain a "family violence interdict" against their abusers.[56]

Even though the PFVA was a good initiative and the first South African legislation to address domestic violence, it was severely criticised for its serious shortcomings. One shortcoming concerns limiting the application of the Act to heterosexual relationships only.[57] The remedies of the Act were only available to men and women who were married to each other in terms of the law or custom, as well as those who were in a marriage-like relationship who lived together.[58] The PFVA thus excluded parties in a homosexual relationship, amounting to discrimination on grounds of sexual orientation which is prohibited under Section 9(3) of the Constitution of 1996.[59] The Act also narrowly interpreted the term "family" to favour parties in a marriage,[60] thereby failing to consider other domestic relationships, such as those between family members related by affinity, consanguinity, or adoption.

A further downfall of the PFVA was that even though the application for a family violence interdict was granted on an *ex parte* application basis, the Act did not make provision for a return date for justification of the interdict order granted in the respondent's absence.[61] This approach disregarded one of our fundamental legal principles, namely, the *audi alteram partem* principle, which requires the other party in a dispute to be heard.[62] The disregard for this principle emanated from the fact that the magistrate was required to grant a final interdict, with potentially serious repercussions, without allowing the respondent to be heard.[63] The ineffective manner in which the PFVA dealt with domestic violence resulted in the post-apartheid government enacting the existing DVA.

[56] Section 2(1) of PFVA.
[57] A Van der Hoven 'Domestic violence in South Africa' (2001) 14.3 *Acta Criminologica: African Journal of Criminology & Victimology* 20.
[58] Section 2(1) of the PFVA.
[59] Van der Hoven op cit note 57 at 20.
[60] Ibid.
[61] B Clarke 'Cold comfort? A commentary on the Prevention of Family Violence Act' 1996 *SAJHR* 595.
[62] A common law right for both parties to a dispute to be heard.
[63] L Dicker 'The Prevention of Family Violence Act: Innovation or violation? '1994 *De Rebus* 213.

2.2.2 Purpose of the Domestic Violence Act 116 of 1998

The main purpose of the DVA is to afford victims of domestic violence immediate maximum protection from domestic abuse that the law can provide.[64] The Act achieved this through its main objective of providing civil protection in the form of a protection order. A protection order is a practical tool and legal document of the DVA,[65] aimed at providing urgent protection to the victims who are exposed to any form of abuse. A protection order provides customised protection tailored to the complainant's circumstances.[66] It does this by specifying the conditions and prohibitions that prevent the perpetrator from committing acts of domestic violence.

The protection order is first issued as an IPO in terms of Section 5(2) (b) of the DVA. It is issued as a temporary order if the court is satisfied that the complainant needs urgent protection. The IPO is issued with a return date which informs the respondent to appear in court on a future date or return date.[67] On the return date, the respondent will have an opportunity to inform the court why the IPO should not be made final. The final order, issued under Section 6 of the DVA, is granted only after the court has carefully considered all the circumstances, facts and evidence. This evidence must demonstrate on balance of probabilities, that the respondent has committed or is committing act of domestic violence.[68] The IPO and final order are issued together with a suspended warrant of arrest (see Appendix 2).[69] However, the IPO is issued with an interim warrant of arrest which is valid until the return date or pending the issuing of a final protection order in terms of Section 6 of the DVA. The IPO as well as the interim warrant of arrest shall have no force and effect until it has been served on the respondent.[70]

The protection order is not the only remedy provided by the Act. Other additional ancillary orders may be granted by the magistrate who issues the protection order.[71]

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[64] Preamble of the Domestic Violence Act 116 of 1998.
[65] T Vogt '*The Impact of an Interim Protection Order (Domestic Violence Act 116/1998) on Victims of Domestic Violence'* (unpublished Doctoral dissertation, University of Stellenbosch, 2007) 03.
[66] Artz op cit note 54 at 3.
[67] Section 5(2) of the DVA.
[68] S 6(4) of the DVA.
[69] Section 8(1) of the DVA.
[70] Section 5 (6) of the DVA.
[71] Regulation 7 of the Domestic Violence Act 116 of 1998, such as an order to pay rent, mortgage bond or other monetary relief.

2.2.3 Beneficiaries of the remedies provided by the Domestic Violence Act

2.2.3.1 Victims of domestic violence and gender-based violence

Any person who is or has been in a domestic relationship with a respondent or perpetrator of violence, and who is or has been subjected or allegedly subjected to an act of domestic violence, is a victim of domestic violence and may apply for a protection order.[72] The DVA recognises that acts of domestic violence take many forms, such as physical abuse, sexual abuse, emotional abuse, verbal abuse, spiritual abuse, elder abuse, psychological abuse, economic abuse, intimidation, harassment, stalking, and any other controlling or abusive behaviour towards the complainant.[73] The Act also recognises that acts of domestic violence can be committed in a wide range of domestic relationships.[74]

The victims of GBV are not excluded from the protection provided by the DVA when having regard to how the United Nations (UN) [75] defines GBV. The UN Convention describes GBV as acts that result in or are likely to result in physical, sexual, verbal, emotional, and psychological harm or suffering to women, including threats of such

[72] Section 1 of the DVA definition of "complainant".
[73] Section 1 of the DVA definition of "domestic violence".
[74] Section 1 of the DVA "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; or

(*f*) they share or recently shared the same residence;

[75] Convention on the Elimination All Forms of Racial Discrimination, available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-l accessed on 25 July 2022. Article 12 (1) requires State Parties to take appropriate steps to eliminate discrimination against women in the field of health care and for men and women to be treated equally when accessing health care.

acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.[76]

The description of the acts of GBV by the UN Convention coincides with the definition of acts that constitute domestic violence in terms of the DVA. Therefore, any victim of GBV acts who is in a domestic relationship may find solace in remedies provided by the DVA.

2.2.3.2 Victims of harmful cultural practices

The DVA is not specific about cultural practices which amount to domestic violence and GBV. However, any harmful cultural practice which finds its application in any form of domestic violence would qualify as an act of domestic and GBV. This would be the case in instances where family members are subjected to cultural practices that are detrimental to their well-being. In most cases, family members who are victims of these harmful cultural practices are not allowed to voice their opinions because these cultural practices are performed under the guise of culture. Harmful cultural practices are usually facilitated by family members who are in a domestic relationship with the victim. In the name of cultural adherence, they direct how rituals and customary practices are to be performed, to whom they will be performed, and when they are to be performed. While on this point of family members perpetuating abuse, Msweswe[77] argued that in the traditional context, domestic violence is not perpetrated by men only, but mothers-in-law also contribute to women's abuse by encouraging their sons to demand respect and submissiveness from their wives through violence in the name of culture.

2.2.3.3 Anyone acting in the interest of the complainant

The "beauty" of the DVA, as amended, is that it places an obligation on any interested person to report any acts of domestic violence on behalf of the complainant. An interested person is any person who has the knowledge, belief, or reasonable suspicion that domestic violence has been committed against a child, a person with a

[76] Vogt op cit note 65 at 18.

[77] L Mshweshwe 'Understanding domestic violence: masculinity, culture, traditions' (2020) 6.10 *Heliyon* 1-5 at 3.

disability, or an older person.[78] The Act requires that such a person should report acts of domestic violence to, for example, a social worker or member of the SAPS.[79] Even functionaries such as medical practitioners, healthcare workers, educators, and social workers who, in the course of performance of their duties, come across victims of domestic violence have an obligation to report such incidents on behalf of the victim.[80]

2.3 The process of obtaining an interim protection order as an urgent remedy

Two major enforcement components in the DVA are responsible for the successful application of an IPO, namely, the courts and police stations. The courts play a vital role as an application for a protection order can be made at the nearest Magistrate's Court within an area where the complainant and respondent permanently reside, study, carry on business or are employed, and where the cause of action arose.[81] Alternatively, the complainant may apply for a protection order electronically, by submitting the application to an electronic address of the court having jurisdiction.[82] It is worth noting that the DVA is very specific about the designated court where a protection order can be obtained, that court being the Magistrate's Court,[83] and not any specialised court such as a traditional court.

Police stations are the second major enforcement component and are responsible for serving the protection order. The SAPS is thus key to the successful implementation of the DVA,[84] as they are responsible for receiving complaints of domestic violence and serving a protection order issued by the court to the respondent. The DVA places certain specific obligations on members of the SAPS to monitor the implementation of the Act.[85] Even though the DVA outlines specific duties for the SAPS in handling domestic violence disputes, it makes no provisions for members of SAPS to issue protection orders at the police station.

[78] Section 2B of the DVA.
[79] Section 2B of the DVA.
[80] Section 2A of the DVA.
[81] Section 12 of the DVA.
[82] Section 4(1) (bb) of the DVA.
[83] Section 1(d) definition of "court" in the DVA.
[84] Artz op cit note 54 at 27.
[85] Section 18 of the DVA.

Thus far, it has been highlighted that an application for a protection order is an administrative process handled by the courts and the SAPS. There are three main role players as well in these criminal justice institutions responsible for enforcing the DVA and there are three main phases during this process. The first phase is the application phase. The main role player is the clerk of the court, who plays a very active role during this pre-judicial phase when the application for the IPO is processed. The second phase is the consideration phase and the main role player is the magistrate whose important role is to consider the application and decide if the relief claimed is justified. The third phase is the service of the protection order phase, and the role players are the members of the SAPS, a peace officer, clerk of the court, or sheriff.[86] All these key individuals need to play their roles effectively, be accountable, and ensure that the complainant receives the maximum protection for the DVA to work.[87]

2.4 Key role player's functions in the process of the application of the protection order

2.4.1 Role of the clerk of the court in the Magistrate's Court

The clerk of the court who is approached by the complainant who seeks an IPO is obliged to first inform the applicant of all the remedies which are provided by the Act, as well as how to obtain those remedies.[88] The clerk of the court is only exempted from this obligation if the applicant is legally represented.[89] He or she also has a duty to hand in a written notice (Form 3) to the complainant[90] which contains in writing all that has been explained and as proof thereof.[91] As much as reasonably possible, the notice must be in an official language or the complainant's language of choice.[92] If, after all remedies have been explained, the complainant elects to apply for an IPO, there is a prescribed manner for processing that application.[93] This entails completing

[86] Section 13 of the DVA.
[87] M J Phasha *Exploring Domestic Violence: A Case Study of the Victimisation of Women and Children in Mankweng Policing Area, Limpopo Province, South Africa* (unpublished Doctoral dissertation, University of Limpopo, 2021) 41.
[88] Section 4(2) read with Regulation 5 of the DVA.
[89] Regulation 5(1) of the DVA.
[90] Regulation 5(1)(a) of the DVA.
[91] Regulation 5 of the DVA.
[92] Regulation 5(1)(a) of the DVA.
[93] Section 4 of the DVA.

Form 2 under Regulation 4 of the Act.[94] This form must be accompanied by an affidavit made by the complainant, stating the facts on which the application is based, the nature of the order applied for, and the name of the police station where the complainant is likely to report the respondent when the protection order is breached.[95] The complainant has a choice of making an affidavit to be attached to Form 2 at a police station or in court. The clerk of the court has a duty to assist the victim in completing the forms, more so because these forms are often written in English or Afrikaans, which can be a challenge for illiterate victims and those not familiar with the two languages.

2.4.2 Role of the magistrate

Once the application form (Form 2) and affidavit have been completed and signed by the complainant, the clerk of the court shall "forthwith" submit these documents to a magistrate.[96] The magistrate must read the application form brought by the clerk of the court, as well as all supporting documents attached to the application form. If the affidavit does not furnish the court with sufficient information, nothing prevents the magistrate from hearing additional oral evidence from the complainant, before determining if there is a need to issue an IPO.[97]

The consideration and determination process by the magistrate requires the ability and skill to establish whether there is prima facie evidence that the respondent is committing or has committed an act of domestic violence.[98] The DVA addresses the test of urgency, as an application for a protection order must be dealt with as soon as reasonably possible.[99] Therefore, in considering the application for an IPO, the magistrate has to approach such an application as an urgent *ex parte* application.[100] Like any *ex parte* application, when considering the application, the magistrate must be satisfied that the degree of urgency is so great that it justifies dispensing with

[94] Regulation 4(1) of the DVA.
[95] Regulation 4(2)(a) - (c) of the DVA.
[96] Section 4(7) of the DVA.
[97] Section 5(1) of the DVA.
[98] Section 5(2) of the DVA.
[99] Section 5(1) of the DVA.
[100] 'An application brought by a litigant in which no notice (warning) of the application is given to the other party.'

providing the notice to the other party.[101] Therefore, an IPO is issued notwithstanding the respondent not being given notice of the application (because it is an *ex parte* application).

The magistrate has the duty to decide, after considering the complainant's application, whether an IPO is immediately needed to protect the complainant. If the magistrate is satisfied that the complainant needs maximum protection, then an IPO is issued. In circumstances where the court decides to not immediately issue the IPO, it may direct the clerk of the court to issue a notice to show cause to the respondent; the respondent is called upon to come to court and explain why the interim order should not be issued.[102]

2.4.3 Role of the official who serves the protection order

Once the IPO has been issued by the court, it must without delay be served to the respondent.[103] It is imperative that the order be served timeously as it has no force and effect until it has been served to the respondent.

It must be noted that the DVA designated specific officials to serve the protection order, and any documents in terms of the Act.[104] The designated officials are a clerk of the court, a sheriff, or a peace officer. There is also a prescribed manner or method in which each of these officials is to serve the order.[105] If the protection order or any document in terms of the Act is served by the clerk of the court, Regulation 15(1) (a) of the DVA prescribes that he or she must without delay hand or present a certified copy to the respondent in person. However, if the protection order or any document in terms of the Act is served by the sheriff or by a peace officer, the prescribed manner of service is flexible; the respondent may be served personally, or if the respondent is unavailable, the documents may be served to any other person who appears to be at

[101] Rule 55(3)(ii) of the Magistrate Court Rules, Magistrate's Court Act 32 of 1944.
[102] Section 5(4) of the DVA.
[103] Regulation 15(1) of the DVA.
[104] The designated officials are the Clerk of the court who is able to serve the respondents in court, the Sheriffs or Peace officers, Regulation 15(1)(a) of the DVA 116 of 1998 as amended.
[105] Section 13 of the DVA.

least 16 years old and in charge of the respondent's place of residence, business, or employment at the time.[106]

Once the IPO is served, the order remains valid until the final order has been confirmed and this occurs after the court has held an enquiry in the presence of the parties involved.[107] At the hearing, the court may confirm the interim order, amend it or set it aside.[108] The IPO may be confirmed in the absence of the respondent, where the respondent is in default after being served with an IPO timeously and in person.[109]

The unique nature of the protection order is that, after it has been confirmed by the court, it never expires but remains in force until it is set aside by the court.[110] The warrant of arrest which is issued together with the protection order also remains in force as long as the latter is in force. A further unique feature of the DVA [111] is that it allows the applicants, if there is an emergency, to bring an application for an IPO outside of court operating hours or on a day which is not an ordinary court day.[112]

2.5 Evaluation of the implementation of the DVA and its accessibility in rural areas

It is clear from the above discussion that the DVA is a comprehensive piece of legislation aimed at curbing the high incidents of domestic and GBV through the remedies it provides. The main remedy is the protection order which has to be considered and issued immediately by the Magistrate's Court to protect the complainant.[113] Therefore, any victim of domestic and GBV who needs to apply for a protection order would have to approach the nearest Magistrate's Court to access the remedies provided by DVA. Alternatively, the victim has the option of making an electronic application to the court having jurisdiction. In theory, this seems like an easy exercise but research has shown that, in practice, several concerns have been raised regarding the implementation of the DVA which hamper the efficacy of the relief

[106] Rule 9(3)(b) of the Magistrate Court Rules of Act 32 of 1944.
[107] Section 6(2) of the DVA.
[108] Section 6 of the DVA.
[109] Section 6(1) of the DVA.
[110] Section 6(7) of the DVA.
[111] 116 of 1998 as amended.
[112] Section 4(5) of the DVA.
[113] Section 4(2) (b) of the DVA.

available to victims of domestic violence.[114] One of the concerns relates to Section 5(1) of the DVA which requires the magistrates, in certain instances, to have contact with complainants on the day of the application for an IPO, and hear additional oral evidence from the complainant before determining if there is a need to issue an IPO.[115] In courts with heavy caseloads, magistrates are often unable to meet with complainants on the day of the protection order application.[116] As a result, complainants have no opportunity to clarify factual issues, which can lead to important protections, that may be urgently needed, not being included in the IPO.[117]

Section 5(6) of the DVA clearly states that the IPO issued by the magistrate shall have no force and effect until it has been served on the respondent. Therefore, the police, clerk of the court, or sheriff have an obligation to serve the IPO to the respondent as soon as reasonably possible to provide the complainant with the maximum protection. However, according to research, the lack of resources, such as limited state vehicles at police stations, is one of the concerns that hampers the smooth implementation of Section 5(6) of the DVA.[118] The lack of resources can thus result in the IPO not being served timeously. While the SAPS have its challenges, the shortage of court staff to manage court loads has been identified as another implementation gap which causes victims to be subjected to prolonged delays in obtaining the protection order.[119]

In 2009, the Tshwaranang Legal Advocacy Centre to End Violence Against Women (TLAC) and the Heinrich Boll Foundation (HBF)[120] did a case study on some of the practical experiences of people who approach the Magistrate's Court to apply for a protection order. This was done by profiling the experiences of 151 persons applying for a protection order at nine courts in Johannesburg.[121] According to the study, a

[114] https://za.boell.org/en/2021/09/02/criminal-justice-responses-assessing-implementation-domestic-violence-act-gauteng accessed on 01 April 2022.
[115] Section 5(1) of the DVA.
[116] P Parenzee, L Artz & K Moult *Monitoring the Implementation of the DVA: First Research Report 2000-2002* (2001) 22.
[117] Ibid
[118] J Smit & F Nel 'An evaluation of the implementation of the Domestic Violence Act: what is happening in practice? (2002) 15(3) *Acta Criminology* 51.
[119] Ibid.
[120] https://za.boell.org/en/2021/09/02/criminal-justice-responses-assessing-implementation-domestic-violence-act-gauteng accessed on 01 April 2022
[121] Ibid.

major challenge experienced by the applicants was that the application process was time-consuming; some applicants waited for two to three hours before being assisted by the clerk of the court, while others spent a total of six hours in court for the entire process.[122] Some of the applicants were even informed to come to court the following day for the outcome of the application.[123] Undue delays in the process of obtaining a protection order and further challenges, such as the lack of access to courts and police stations, were some of the implementation gaps identified in the study. This case study thus highlights the practical challenges of implementing the DVA in the Magistrate's Court. These implementation challenges of the DVA are not limited to Johannesburg courts; they are also faced by courts in other provinces with high caseloads, lack of resources, staff shortages, and related issues.

A more recent study by Phasha which explored domestic violence by examining the victimisation of women and children in the Mankweng Policing Area, Limpopo Province, found that the South African criminal justice system, such as the SAPS, courts and correctional service officials are still encountering several challenges when dealing with domestic violence.[124] One of the challenges noted in this research is that victims of domestic violence are face with many challenges when trying to report their victimisation to the police.[125] Past and more recent research has thus clearly indicated that the Magistrate's Court which has been entrusted to implement the DVA also has its challenges – it is overburdened with high caseloads and domestic violence cases are not its only key function.[126] In terms of the latter, the Magistrate's Court handles a wide range of matters serving as a civil, criminal, and family court. Even within the Family Court, the magistrate does not focus solely on domestic violence cases, but also on matters related to maintenance, harassment, and Children's Court issues. On this basis, Parenzee, Artz and Moult[127] argued that domestic violence issues are met with a complex legal system that is resource-constrained and plagued by inequalities.

[122] Ibid.
[123] Ibid.
[124] Phasha op cit note 87 at 41.
[125] Ibid.
[126] Artz op cit note 54 at 2.
[127] Parenzee op cit note 116 at 72.

2.5.1 Accessibility of the Domestic Violence Act in rural areas

While there are challenges identified in the implementation of the DVA that deprive victims of exercising their right to obtain a protection order, victims from rural communities face additional barriers when seeking remedies under the DVA from the Magistrate's Court. These additional barriers are due to the geographical location of rural areas in relation to the distribution of Magistrate's Courts. South African rural areas are mostly located in remote, underdeveloped regions, far from adjudication centres. This is mainly due to the segregation policies and laws passed during the apartheid era, such as the Group Areas Act[128] which led to many "non-whites" being forcibly moved to areas far from urban centres and which were underdeveloped and lacked facilities. The impact of these segregation policies continues to be felt with criminal justice resources being sparser in areas inhabited by black people and coloured communities.[129] The situation is further exacerbated by high levels of poverty in rural areas as, in the absence of employment opportunities, many rural households depend on social grants as their primary source of income.[130] Thus, transport costs pose a further barrier to accessing courts and police stations. In addition to geographical and poverty-related barriers, there is the issue of access to public services. In general, rural areas in South Africa are disadvantaged by a lack of access to basic public services, including poorly maintained roads[131] which further hinder rural dwellers – who mostly depend on public transport – from accessing courts and police stations. Infrastructural problems also include a lack of or unreliable electricity supply,[132] which affects internet connectivity making it difficult for rural victims to utilise the digital solutions provided by the DVA.

Given the above, a victim of domestic violence in a rural area who manages to overcome geographical barriers and travel to court to access justice will further have to face the realities experienced by other Magistrate's Court users outlined earlier. These include the reality of the time-consuming application process and the possibility

[128] 41 of 1950.
[129] J Waldman '*Wheels of Justice & Cycles of Abuse: What Barriers do Victims of Domestic Violence in South Africa Face when Seeking the Protection of the Courts?*' (unpublished LLM thesis, University of Cape Town, 2021) 21
[130] A Nicolaides & N E Dludla op cit note 41 at 5.
[131] Ibid 2.
[132] Ibid 9.

of having to travel to court twice for the same application process.[133] The same victim will then have to travel once more for the enquiry and confirmation of the order. This may be exceedingly difficult for a victim with little or no money. The reality is that women in rural areas have a hard time obtaining a protection order[134] and it is highly likely that such victims would be discouraged and abandon the entire process.[135] Yet the Supreme Court of Appeal pointed out in *Tsobo v Tsobo*[136] that the primary objective of the DVA is to provide victims of domestic violence with an effective, uncomplicated, and swift legal remedy, which also provides a simplified procedure for protection order applications.

While there are socio-economic, infrastructural, and procedural barriers that impose challenges to the implementation of the DVA in rural areas, there are the traditional courts which serve rural communities. They possess the potential to overcome the barriers that undermine the implementation of the DVA in rural areas. Traditional courts are located in almost every area of jurisdiction of traditional leaders,[137] giving them the advantage of being physically accessible to rural communities – a key feature that distinguishes traditional courts from the Magistrate's Court. They are well placed to such an extent that, they create, enhance and facilitate access to court for all people regardless of gender or socio-economic diversity.[138] Their accessibility makes traditional courts the first port of call for justice for millions of citizens in rural areas.[139] Additionally, the nature and procedures followed by traditional courts in resolving

[133] The general practical experience of victims who approach the Magistrate's Court were well highlighted in the case study conducted by the Tshwaranang Legal Advocacy Centre to End Violence. Available at https://za.boell.org/en/2021/09/02/criminal-justice-responses-assessing-implementation-domestic-violence-act-gauteng accessed on 01 April 2022.

[134] S Sibisi'Critically Evaluating the Machinery of the Domestic Violence Act 116/1998 for Combating Domestic Violence in South Africa' (unpublished LLM dissertation, University of KwaZulu-Natal, 2017) 124.

[135] Ibid

[136] Tsobo v Tsobo (281/2021) [2023] ZASCA 109 (15 July 2022).

[137] South African Law Commission (SALC) Report Project 90 Customary Law *'Report on traditional courts and judicial function of traditional leaders'* (2003) 05.

[138]I Madondo 'Accessibiliy,independence and impartiality of the Traditional Court System' (2023) *Journal of law,Society and Development* 2.

[139] A Osman 'South Africa's effort to fix traditional courts hit a snag' available at https://theconversation.com/south-africas-efforts-to-fix-traditional-courts-hit-a-snag-162356 accessed on 06 April 2022.

dispute is informal, simple, flexible, and affordable. [140] The traditional court system is characterised by open justice which is known as the bedrock of democracies.[141] The accessibility of traditional court system is further enhanced by the language in these court. According to Section 7(9) of the TCA, the language to be used in these courts, is the language that is widely spoken in the area and that also makes these courts to be more accessible to the litigants. All these benefits of the traditional court system make them the suitable avenue to deal with domestic and GBV matters, as victims approach the court to seek urgent protection.

2.6 Conclusion

This chapter has highlighted that the DVA is an impressive piece of legislation aimed at protecting victims from abuse. Despite this, its implementation in rural areas, in particular, remains a challenge. This chapter has shown that there are many barriers which prevent rural women from accessing Magistrate's Courts which dispense the remedies provided by the DVA. Yet, there are traditional courts in rural areas which are not only physically accessible to the rural community but also have significant potential to implement the DVA.

[140] C P Soyapi, 'Regulating traditional justice in South Africa: a comparative analysis of selected aspects of the Traditional Courts Bill' (2014) 17.4 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1441.

[141] I Madondo op cit note 138 at 3.

CHAPTER THREE

TRADITIONAL COURTS AS A VEHICLE TO FACILITATE ACCESS TO JUSTICE IN RURAL AREAS

"Access to justice is a fundamental democratic right, a pillar of a free and equal society…."
Judge Mjabuliseni Isaac Madondo[142]

3.1 Introduction

Customary law is, without doubt, the oldest system of law in most African countries.[143] South Africa is one of the African countries that still applies customary law in traditional courts. This is mainly because it has a hybrid legal system which consists of different types of laws including customary law.

Even though customary law is the oldest legal system, it remains the most preferred, especially among rural communities, due to its conciliatory and restorative approach.[144] Traditional courts are geared towards achieving conciliation between the parties when resolving disputes. Reconciliation and restoration are not the only features that make the traditional justice system attractive and preferred; it is also more accessible to the poor, disadvantaged, marginalised, illiterate, and rural populations.[145] Traditional leaders who preside in these courts are still the authentic voice of the communities in rural areas.[146] Hence the institution of traditional leadership still has a loud voice and a pivotal role in dispensing traditional justice.

This chapter assesses the institution of traditional leadership, with a special focus on the traditional courts that dispense justice in rural areas and the traditional leaders who preside over these courts. The main aim of this assessment is to determine

[142] I M Madondo *The Role of Traditional Courts in the Justice System* (2017) 4.
[143] C B Soyapi op cit note 140 at 1441.
[144] Madondo op cit note 142 at 3.
[145] Ibid 8.
[146] 'Department of Traditional Affairs' available at https://nationalgovernment.co.za/units/view/47/department-of-traditional-affairs-dta accessed on 13 July 2022.

whether traditional courts and leaders have the necessary tools to play a role in issuing IPOs to protect victims in urgent need of relief from acts of domestic abuse and GBV. This chapter will also explore and question whether the institutions responsible for dispensing justice in rural areas are capable of implementing the provisions of the DVA. Additionally, this chapter will highlight how traditional courts function, who the key role players are, the structure or composition of these courts, and their essential tools for enhancing access to justice. Most importantly, this chapter will explore the legal framework that governs the traditional justice system as dispensed by traditional courts.

3.2 Legal framework that shaped South Africa's traditional justice system

The traditional justice system dispensed by traditional courts in South Africa dates back to living customary law, which consisted of unwritten normative values and customs that existed long before colonisation.[147] Colonisation in South Africa changed the nature of the traditional justice system by introducing official customary law, which was a new system of law based on the Western justice system, influenced by Roman-Dutch and English law.[148] This new system differed from the traditional justice system, which was rooted, as noted above, in unwritten normative values and customs. The new system differed as the colonial government began a process of reducing the unwritten version of customary law into written texts, so that courts would have a single authoritative code of rules.[149] However, the written version of customary law was different as there was application of repugnancy clause which removed African values that were repugnant to western civilisation.[150] It was argued by Ndima,[151] that the application of repugnancy clause left African law distorted beyond recognition, because the colonial government attempted to understand the rules of African law in isolation from their social context. In addition, the western system further disregarded the views of the adherents to customary legal system.[152] Consequently, this resulted in dichotomy between 'official' customary law, which was based on assumption that,

[147] Soyapi op cit note 140 at 1441.
[148] Ibid.
[149] T W Bennett Customary Law in South Africa (2004) 5.
[150] DD Ndima 'The African law of the 21st century in South Africa' (2003) 36.3 *Comparative and International law journal of Southern Africa* 326.
[151] Ibid.
[152] I Madondo op cit 138 at 1.

Western system was a dominant system which was supreme and 'living' customary law, which was inferior and subservient.[153] The subservient status of the living customary law did not change even when the Apartheid government ushered in 1948.[154] However, the dismantling of the apartheid regime in 1994 and advent of the Constitution necessitated a change in the legal system, which eventually saw customary law acquiring equal status with common law, and no longer subservient.[155] The Constitution recognised customary law as independent and original source of law.[156]

3.2.1 Constitution of the Republic of South Africa

The critical role of the institution of traditional leadership is recognised by sections 211 and 212 of the Constitution. Section 211 recognises the continued existence of the institution, status, and role of traditional leadership according to customary law, while Section 212 requires national legislation to define the role of traditional leadership as an institution at the local level on matters affecting local communities. The TLGFA, TKLA, TCA were among the acts that were enacted to give effect to Section 211 of the Constitution.

Section 166 of the Constitution recognises South Africa's courts as the Constitutional Court, the Supreme Court of Appeal, the High Court, the Magistrate's Court, as well as courts established in terms of Acts of Parliament. Traditional courts are not listed under Section 166, but they are recognised under Section 166(c) which recognises courts established by an Act of Parliament. Traditional courts were first recognised by the BAA and are now recognised by the TCA which repealed the BAA.

3.2.2 Black Administration Act 38 of 1927 (BAA)

The BAA marked the beginning of the legal framework for the traditional justice system, followed by various pieces of legislation that further shaped the traditional justice system in South Africa. This Act became the main pillar of legal dualism and principal tool in facilitating and regulation and control of black people in both colonial

[153] Ndima op cit note 150 at 326.
[154] T W Bennet 'Legal pluralism and the family in South Africa: Lessons from customary law reform' (2011) 25 *Emory International law Rev.* 1031.
[155] Madondo op cit note 142 at 5.
[156] ibid

and apartheid era.[157] The BAA was first introduced as the Native Administration Act,[158] later renamed the Bantu Administration Act,[159] and subsequently renamed the BAA. This BAA codified customary law that related to the traditional justice system. The significant part of this Act is that it recognised the Native Commissioner's Court as a court of law, presided over by a Native Commissioner.[160] It also recognised the role and functions of traditional leaders as judicial officers by bestowing them with jurisdiction to hear criminal and civil claims arising from customary law and traditional practices among traditional black communities.[161] Even though the Act brought a system of control over how traditional courts operated, the colonisers allowed these courts to retain procedures that were informal, flexible, and simple and which were used before colonisation.[162]

The dawn of constitutional democracy on 27 April 1994, marked the end of the apartheid era in South Africa. The Constitution of the Republic of South Africa brought about various changes to the country's legislation that had existed under apartheid. The BAA was not immune to the changes which were brought about by the Constitution. The Act was also subjected to change, as it was seen as a reminder of the South African past, and was not in line with certain constitutional values and human rights.[163] The provisions of the BAA were scrutinised and severely criticised and all sections of this Act were finally repealed by the TCA.

3.2.3 Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA)

The Traditional and Khoi-San Leadership Act (TLKA) repealed the Traditional leadership Act 41 of 2003 (TLGFA). The TLGFA was enacted nine years after the advent of a democratic government as there was still uncertainty about the role of traditional leaders in the democratic era.[164] The TLGA placed a specific obligation on

[157] Madondo op cit note 142 at 3.
[158] 38 of 1927.
[159] 38 of 1927.
[160] Section 10(3) of the Black Administration Act 38 of 1927 which was later repealed by Section 2 of the Special Courts for Black Abolition Act 34 of 1986.
[161] Section 12 and Section 20 Black Administration Act 38 of 1927.
[162] Soyapi op cit note 140 at 1442.
[163] C Rautenbach 'Traditional courts as alternative dispute resolution (ADR) mechanisms in South Africa' 2014 *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition* 300.
[164] B Tshehla 'Traditional justice in practice - a Limpopo case study' (2005) 115 *Institute for Security Studies Monographs* 16.

the government to protect and promote the institution of traditional leadership.[165] It also recognised certain traditional structures and traditional leadership roles[166] and identified the communities which are subject to traditional leadership.[167] This Act did not only recognise the roles of leadership positions within the traditional institution, it also outlined the role of the House of Traditional Leaders in South Africa,[168] which is the body composed of traditional leaders who are delegates from the provincial houses of traditional leaders.[169] The mandate of the House of Traditional Leaders is to promote the role of traditional leadership within the constitutional dispensation.[170]

When the TLGFA was implemented, many gaps were identified which resulted in the amendment of the Act in 2009.[171] However, even the 2009 amendment did not fill all the gaps. One of the highlighted gaps of the 2003 and 2009 versions of TLGFA was the failure to recognise the institution of Khoi-San leadership and communities. The TLGFA was eventually repealed and replaced by the Traditional and Khoi-San Leadership Act (TKLA).[172]

Even though the TKLA replaced the TLGFA, most of the provisions of the latter were retained by the TKLA. Like the TLGFA, the TKLA also recognises traditional communities, traditional leadership positions, the establishment of traditional councils, and the House of Traditional Leaders. The main difference is that the TKLA integrated and recognised Khoi-San communities[173] and traditional leadership positions,[174] and also integrated the Khoi-San into the existing houses of traditional leaders.[175]

Even though TKLA was aimed at addressing the failings of the TLGFA, but unfortunately this Act (TKLA) was declared unconstitutional in the case of *Mogale and*

[165] Ibid at 19.
[166] Section 8 of the TLGFA.
[167] Section 2(1) – (3) of the TLGA.
[168] Section 16 of the TLGFA.
[169] Ibid.
[170] Ibid.
[171] The Traditional Leadership and Governance Framework Act 41 of 2003 was amended by the Traditional Leadership and Governance Framework Amendment Act 41 of 2009.
[172] 3 of 2019.
[173] Section 3 of the TKLA.
[174] Section 7 the TKLA.
[175] Section 26 of the TKLA.

Others v Speaker of the National Assembly and Others.[176] The Constitutional court declared in this case that the Parliament failed to comply with its constitutional obligation to facilitate public involvement before passing the TKLA.[177] The order declaring the Act invalid is suspended for a period of 24 months in order to enable Parliament to re-enact the statute in a manner that is consistent with the Constitution.[178]

3.2.4 Traditional Courts Act 9 of 2022 (TCA)

The institution of traditional leadership under the democratic dispensation in South Africa is still a work in progress. It is based on the sequence of legislation starting with the legislation passed during the colonial, apartheid, and democratic eras.[179] The latest development concerning the institution of traditional leadership is the signing into law of the Traditional Courts Bill (TCB),[180] which was signed after 14 years of controversial amendments. Prior to the enactment of the TCA, there were three versions of the TCB that were placed before the Parliament. Each version raised concerns about the impact of the experience of women in customary law dispute forums. Gender representation of women in the traditional courts was one of the key set of concerns pertaining the adoption of the TCB, a problem stemming from a history that had not been kind to the manner in which women and authority were handled.[181] One of the best examples from history, is that women were excluded as members of the court who can participate in the hearing and deliberations of the case, and they were also excluded as litigants.[182] Women were not only excluded or not permitted to attend court sessions, but they were required to sit outside of court and relay information through male representatives if they were aggrieved, and that placed women at a serious disadvantage.[183] The first disadvantage being the fact that, if the woman did not have a male relative or adult male to appear in court on her behalf, then that woman would have been at a disadvantage position.[184] Even in instances

[176] Mogale and Others v Speaker of the National Assembly and Others [2023] 14.
[177] Ibid.
[178] Ibid.
[179] Soyapi op cit note 140 at 1442.
[180] Traditional Courts Bill [B1-2017].
[181] Soyapi op cit note 140 at 1441.
[182] I Madondo op cit at 12.
[183] Ibid; Section 11(3)(b) of the BAA.
[184] SM Weeks, 'The Traditional Courts Bill: controversy around process, substance and implications' 2011 *South African Crime Quarterly* 35 8.

where the woman was having conflicts with the male relative or adult male, even under those circumstances, the woman would have been placed in a disadvantage position.[185] Widows were even worse as they were not allowed at a court space during the mourning phase.[186] TCB was not addressing these problems, hence it was severely criticised for not protecting women's rights.

The Bill was signed by the President of South Africa on 16 September 2023, and it became the Traditional Courts Act (TCA). The significance of the version of the bill that was signed into law, is that it did not only finally addressed the issue of gender representation in traditional courts. Therefore, the practice of excluding women from court proceedings was reversed by the TCA.[187] Section 5 of the TCA requires the composition of traditional courts to comprise both women and men and also requires the court to promote the representation and participation of women; therefore, putting the practice of male-dominated traditional courts to an end.

The other significant feature of the version of the bill signed into law, is that it finally repealed the BAA which was not only a reminder of the South African past but was designed for black people only, hence not in line with constitutional values and human rights.[188] The TCA created a single statute that regulates the resolution of disputes in traditional courts in accordance with the Constitution.[189] It affirms the role of traditional courts as courts of law which function by following customary law to promote access to justice, prevent conflict, maintain harmony, and resolve disputes.[190] The TCA recognises customary law as a legal system that lives side-by-side with the common law and legislation.[191] It also provides a uniform framework for the structure and functioning of traditional courts in line with constitutional imperatives and values.[192]

[185] Ibid.
[186] Ibid.
[187] P Holomisa 'Balancing law and tradition: The TCB and its relation to African systems of justice administration' (2011) 35 South *African Crime Quarterly* 19.
[188] Rautenbach op cit note 163 at 300.
[189] Preamble of the TCA.
[190] Act 108 of 1996.
[191] Preamble of TCA.
[192] Ibid.

3.3 Composition of traditional courts

Like the Magistrate's Court, the composition of the traditional courts is made up of the judicial, administrative, and law enforcement components.

(a) Judicial component (Presiding officers)

The judicial component consists of the Traditional Council. The Traditional Council is constituted of senior traditional leaders, *izinduna,* and heads of leading forums who are representatives of the people.[193] The TCA requires that the Council consists of both women and men, ensuring fair representation and participation of the former.[194] In court, the Traditional Council is responsible for performing judicial functions. It hears the complainant's evidence, the defendant's evidence, and the witness's evidence (if applicable). The procedure that is followed during a court's hearing is inquisitorial, as the judiciary is actively involved in the proceedings, performing an examining role.[195] The Council then resolves the dispute in accordance with cultural customs and practices.[196] The decision that is reached in resolving disputes is a collective one, deliberated by the entire Traditional Council.

(b) Administrative component

The administrative functions of the traditional courts are performed by *'onobhala be nkosi',* that is, clerks of the traditional courts in terms of the TCA.[197] The main duty of the clerk is to ensure the effective functioning of the court. The institution of proceedings in respect of any dispute in the traditional courts is an administrative process. Therefore, the clerk plays a pivotal role from the time the case is registered until it is finalised. The duties of the clerk of the traditional court include, among others, issuing a summons,[198] recording reported cases,[199] keeping a register of court

[193] Madondo op cit note 142 at 4.
[194] Section 5(1)(a) & 5(3) of the TCA.
[195] Jili op cit note 17 at 44.
[196] Ibid.
[197] Section 5 (4)(a) of the TCA.
[198] Section 5(4)(b) of the TCA.
[199] Ibid.

sessions,[200] and recording court proceedings[201] as well as decisions made by the court.[202]

(c) Law enforcement component

The rural enforcement component consists of tribal constables, who also serve as messengers of the court.[203] The functions of tribal constables are to serve processes of the court, such as court-calling documents and conveying the court's verbal summons. They, therefore, have a similar role to that of the sheriff in the Magistrate's Court. When the court is in session, tribal constables perform a role similar to that of court orderlies in the Magistrate's Court, which is to maintain order during court sessions.

The TLGFA recognised the roles of traditional leaders and traditional communities but did not recognise tribal constables and their role in the traditional courts, nor did it make any provisions for their appointment.[204] The TKLA, which replaced the TLGFA, also fails to recognise the role of tribal constables. However, this does not mean their services are not required, as they play a critical role in the functioning of the traditional courts. [205]

In contrast, the TCA recognises the role of the Justice of the Peace, who performs some functions similar to those performed by tribal constables. The Justice of the Peace has a duty to serve a summons.[206] If there is non-compliance which is not due to the fault of the party who was to receive the summons, the Justice of the Peace has the power to negotiate with that party.[207] However, if non-compliance is due to the fault of the party against whom the summons was issued, then the Justice of the Peace has the power to request the traditional court to refer the matter to the Magistrate's Court.[208]

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[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Madondo op cit note 142 at 20.
[204] Ibid 21.
[205] Ibid.
[206] Section 4(4)(a) of the TCA.
[207] Section 4(4)(b)(i) of the TCA.
[208] Section 4(4)b) (ii) of the TCA.

It is, therefore, clear from the court's composition that traditional courts have a system in place to administer justice. One advantage of this composition is that the court is made up of community members who are familiar with the environment and dynamics of their community, making traditional courts more accessible to the community.

3.3.1 Hierarchy of the traditional court system

The traditional court system has its own hierarchy which reflects different levels of traditional leadership and which is recognised in terms of customary law.[209] The highest court in terms of levels of traditional leadership is the King's or Queen's Court where it is available.[210] The second highest court is the Principal Traditional Leader's Court.[211] This is followed by the Senior Traditional Leader's Court and the lowest court, namely, the Headman's or Headwoman's Court.[212] The latter serves as the court of first instance for traditional court users.

The version of the TCA that currently governs the traditional courts does not include an opt-out clause. Therefore, once a dispute is launched in the traditional court and the other party voluntarily participates, the dispute has to remain in the jurisdiction of the traditional court system until all levels of the system are exhausted.[213] Therefore, parties who voluntarily consent to the jurisdiction of the traditional court cannot simply opt-out of the traditional justice jurisdiction in favour of another forum as it suits them. They are obligated to first follow the traditional court's appeal procedure, which entails moving from the court of first instance (the Headman's or Headwoman's Court) to the more senior courts as outlined above, until reaching the highest court which could be the Kings or Queen's Court (if available) before a matter is referred to the Magistrate's Court.[214] The hierarchy of the traditional court system, as well as the composition of the traditional court and its jurisdictions, bears a striking resemblance to the formal justice system dispensed by the Magistrate's Court.

[209]Section 6(3) of the TCA.
[210] Section 6(3) (d) of the TCA.
[211] Ibid Section 6(3) (c) of the TCA.
[212] Ibid.
[213] Section 12(1) of the TCA.
[214] Section 6(3) read with Section 12(1) of the TCA.

3.3.2 Procedure in the traditional courts

The procedures observed in the traditional courts vary from place to place and in terms of different cultural and political contexts.[215] Despite different cultures and places, what remains common is the customary law procedure that is followed; it is a procedure which is casual and informal.[216] Thus, the procedure that is followed when resolving a dispute in the traditional court enhances access to justice because it is simple, flexible, and expeditious.[217] The flexibility of procedures allows for improvisation and makes room for the creative resolution of conflict.[218]

The proceedings in these courts are open to community members who understand traditional law procedures.[219] Members of the gallery of traditional courts are also allowed to actively participate during court sessions.[220] Proceedings are easily understood by the users of traditional courts, who are also familiar with the language used in court, which is their mother tongue. The TCA requires that the language that is most widely spoken in the area be the language used in court for people to easily follow the process.[221] The language used in courts also plays a pivotal role in increasing access to justice because it enables the litigants to present their cases freely in a language understood by the presiding officers.[222] The use of the local language of the disputants in traditional courts also eliminates the risk of distortion through interpretation.[223] The informal procedures of traditional courts have the advantage of leaving less room for technicalities and focusing on the substance of the matter.[224]

[215] T W Bennett *op* cit166.
[216] Ibid.
[217] South African Law Commission op cit note 137 at 5.
[218] B W Martins 'Access to justice: The role of community-based paralegals in community restorative justice in rural Kwazulu-Natal' (unpublished LLM thesis, University of KwaZulu-Natal, 2014) 35.
[219] Ibid.
[220] 'Policy Framework on the Traditional Justice System Under the Constitution' available at https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtspfrmw.pdf accessed on 15 December 2022.
[221] Section 7(9) of the TCA.
[222] Martins op cit note 218 at 35.
[223] Ibid.
[224] Rautenbach op cit note 163 at 323.

3.3.3 Jurisdiction of traditional courts

The TCA bestows traditional leaders with jurisdiction to resolve certain disputes arising from civil claims, criminal disputes, and disputes arising from customary law practices.[225] It is also worth noting that a traditional leader's jurisdiction is only limited to the application of customary law when resolving disputes. Even though the Constitution recognises customary law as a law which is on equal footing with common law and statutory legislation, traditional courts can only apply customary law when resolving disputes.

Schedule 2 of the TCA lists matters that the traditional court is competent to deal with, as well as their monetary jurisdiction. However, the Schedule does not list any offences connected with domestic and GBV in terms of the DVA. The main reason for the exclusion of domestic violence matters from the Schedule is that the South African Law Commission (SALRC) recommended that offences relating to domestic violence be excluded from the jurisdiction of the traditional courts because those were serious offences.[226] Therefore, in terms of the TCA, there are no specific provisions that extend the jurisdiction of traditional courts to deal with domestic and GBV in terms of the DVA. However, the TCA possess the potential to be modified to accommodate the implementation of the DVA by traditional leaders in their traditional courts.

It is clear from the above discussion that, the structure of traditional courts is similar to the structure of the Magistrate's Courts and how traditional courts administer justice is similar to how the Magistrate's Court functions and administers justice. Even though traditional courts have all the structures in place to administer justice, the question is whether these courts are a suitable forum to handle domestic and GBV directed at women.

3.4 Suitability of traditional leaders to handle domestic and gender-based violence matters

The question of whether traditional courts and the entire traditional justice system are the correct forum to hear domestic violence matters has been a point of contention

[225] Section 4(2)(a) read with Schedule 2 of the TCA.
[226] South African Law Reform Commission (Project 90) Op cit note 137 at para 3.2.

among many scholars. While some scholars have raised reservations about the competency of traditional leaders to handle domestic and GBV directed at women,[227] other scholars [228] hold the view that traditional leaders and traditional courts still have a valuable role to play in the administration of justice. They possess many strengths to enhance access to justice for those rural women who are confronted with acts of domestic and GBV.

3.4.1 Traditional institutions' strengths and weaknesses to play a role in the domestic and gender-based violence space

The institution of traditional leadership has various enabling tools that boost its capacity to play a role in the domestic and GBV. In the context of the administration of justice by traditional leaders and traditional courts, the practical capacity of traditional courts to enhance access to justice is one of their most highlighted tools.

Access to justice is a fundamental democratic right which is guaranteed to everyone whether they form part of a rural or urban community.[229] It is a pillar of a free and equal society.[230] The reality facing South Africa is that, even though the Constitution guarantees the right of access to justice, not everyone has easy access to it. Access to justice in rural areas remains elusive even in a democratic South Africa.[231] Community members from rural, remote areas still have to travel long distances to access justice services which are mostly situated in towns and cities. While this is a challenge facing South Africa's justice system, an untapped solution exists in the traditional justice system administered by the traditional courts, with traditional leaders who preside over them.[232] This untapped solution lies in the physical accessibility of traditional courts to a rural community. Traditional courts exist in almost every area of jurisdiction of traditional leaders.[233] They are situated within close proximity to the community, to the extent that victims may walk to adjudicating centres. Even the

[227] J Williams and J Klusener 'The Traditional Courts Bill: A woman's perspective' (2013) 276 *SAJHR*; N Gasa, 'The Traditional Courts Bill: A silent coup? (2011) 28 *SA Crime Quarterly*; S Mnisi Weeks, 'Regulating vernacular dispute resolution forums: Controversy concerning the process, substance and implications of South Africa's Traditional Courts Bill' (2012) 12(1) *Oxford University Commonwealth Law Journal* 153.
[228] Soyapi op cit note 140 at 1144.
[229] Section 34 of Act 108 of 1996.
[230] Madondo op cit note 142 at 4.
[231] Martins op cit note 218 at 1-5.
[232] Rautenbach op cit note 163 at 300.
[233] SALRC op cit note 137 at 5.

izinduna and *amakhosi* who preside in these courts are members of the community and can be reached at any time. They can also easily relate to matters affecting the community that they serve. It is not only easy to access traditional courts, but justice dispensed by these courts is fast and cheap.

The strength of the traditional justice system to provide access to justice services creates a space for this institution to better meet the needs of rural women who are victims of domestic and GBV and who elect to resort to traditional courts for urgent judicial protection. It creates a space because victims who elect to resort to traditional courts as their court of first instance do not have to travel long distances to access court services; neither do they have to pay transport costs to access state institutions to report domestic abuse incidents. Furthermore, research has shown that women who suffer domestic violence do not want to wait long periods for assistance because violence has an emotional impact on the entire family.[234] Therefore, traditional courts and traditional leaders have great potential to play a significant role in filling gaps caused by factors limiting access to basic services such as the Magistrate's Courts,[235] and providing speedy relief to victims of abuse.

However, the practical capacity of traditional courts to provide better access to justice is of no value to victims of domestic and GBV if traditional leaders who preside in these courts lack the authority to provide urgent judicial protection in terms of the DVA. The ability of traditional leaders to issue an IPO in terms of the DVA could be the key link that enables victims, who cannot access the Magistrate's Courts, to obtain the remedies provided by the DVA. On this basis, it is argued that traditional leaders should also be equipped with the authority to issue protection orders in terms of the DVA. Should this occur, they would be able to provide immediate and maximum protection to victims of domestic and GBV (as envisioned by the DVA), who have chosen to resort to traditional courts as their court of first instance in these matters. It was further held by the High Court in the case of *G.D V H. B*[236] that society is constantly changing, and the law must adapt accordingly to ensure relevance and that the widest possible protections are afforded to those in a wide range of domestic relationship.

[234] Martins op cit note 218 at 9-314.
[235] Ibid.
[236] G.D.VH. B (HCAA26/2023) [2024] ZALMPPHC 51 paragraph 42.

In addition to the geographical proximity of traditional courts, a further strength of the institution of traditional leadership in enhancing access to justice is its procedural flexibility, in that traditional courts are convened at a time and place which is convenient and accessible to members of the community in question.[237] Furthermore, unlike the formal justice system, the sitting of the traditional court is not confined to a court building or a specific courthouse and is also not confined to specific hours. The flexibility of the traditional justice system allows the court to convene at any other place, such as the chief's homestead, which may best suit what is envisaged by Section 4(5) of the DVA which deals with after-hours applications for an IPO if there is an emergency. The Section does not only make provision for after-court hours applications but also includes weekends and public holiday applications for an IPO in case of emergency. Traditional leaders have the capacity to implement Section 4(5) provisions, as they are members of the community, and hence can be reached after hours at their homestead, during weekends, and public holidays.

The flexibility of the traditional justice system has the potential to complement the weaknesses of the Magistrate's Court, which rural dwellers often find difficult to access after-hours and on weekends. This difficulty arises because Magistrate's Courts are either not physically accessible due to geographical location, the lack of financial means to reach them, or poor network coverage to process an electronic application. The flexibility of the traditional justice system creates opportunities for rural victims of abuse to access the remedies provided by the DVA, especially when they face challenges accessing the Magistrate's Court.

If the doors of traditional courts could be opened to settle domestic violence and GBV matters there is the possibility that they would reduce the number of domestic violence applications received by the overburdened Magistrate's Courts. This would mainly be due to traditional courts being more effective in disposing of cases than the Magistrate's Court which receives several applications a day. There are no backlogs of cases or high volumes of applications for proceedings in traditional courts, unlike in

[237] Section 7(1) of the TCA.

the Magistrate's Court. This would allow traditional leaders to dispose of cases more speedily.

Whilst there is a potential for traditional leaders and traditional courts to bring the remedies of the DVA closer to rural women and curb the spread of domestic and GBV in rural areas, there are hurdles that have to be crossed by the institution of traditional leadership to play such an important role. The main hurdle is that the DVA is very specific about the court that may implement its provisions. The specific court is the Magistrate's Court which is established in terms of the Magistrates' Courts Act (MCA).[238] Traditional courts, however, are not established in terms of the MCA, but in terms of the TCA. Furthermore, even the DVA does not make any provision for its implementation by traditional courts established in terms of the TCA. Thus, the MCA, the TCA and the DVA itself make no provision for traditional courts and leaders to implement the DVA.

It is, therefore, argued that the first aspect of the law that would have to be developed to enable traditional leaders to issue protection orders would have to start with the reconsideration and review of the definition of 'court' by the DVA. The definition of court in terms of the Act would have to be extended to include courts established in terms of the TCA as courts legible to implement the provisions of the DVA. The inclusion of traditional courts in the definition of courts under the DVA would be the first step that would create room for traditional leaders who are the presiding officers in the traditional courts to issue an IPO. Furthermore, since the focus of this study was to explore the jurisdiction of traditional leaders to issue IPOs in terms of Section 5 of the DVA, both Sections 4 and 5 of the Act will have to be reconsidered to accommodate the role of traditional leaders and courts. Section 4 of the DVA prescribes the manner of applying for an IPO, while Section 5 deals with the consideration and issuing of an IPO. Both sections of the Act will have to be adjusted to the extent that they reflect the role of traditional leaders and the clerk of the traditional courts in the implementation of the Act. The pertinent issue for determination would be: in light of the hierarchy of traditional courts and different ranks, which traditional leader would be bestowed with this authority to issue an IPO?

[238] 32 of 1944.

Alternatively, the jurisdiction of traditional leaders to issue protection orders can be extended in terms of the TCA. The "new" TCA is the Act that currently governs the traditional courts, and determines its jurisdiction by listing matters that this court is competent to deal with under Schedule 2.[239] The potential lies in Section 8 of the TCA which deals with all orders that traditional courts may make after deliberation on any dispute before it. Section 8(1)(d) of the TCA, allows traditional courts to make an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct. This section is not specific as to what specific conduct the court may prohibit, as long as it is a conduct complained of by the aggrieved party. Therefore, Section 8(1)(d) of the TCA provides a framework that the legislature can refine to make it possible for traditional courts to implement the DVA. The proposed solution is that Section 8(1)(d) of the TCA should be adjusted to prohibit specific acts which are acts of domestic violence and GBV. Additionally, it should specify the instrument used to prohibit such conduct, namely, the IPO issued under the DVA. This adjustment of Section 8 of the TCA will not alter the customary law applied by traditional courts in solving disputes but will enable traditional leaders to apply the DVA within their courts.

Whilst the institution of traditional leadership has its advantages which enhance its suitability to handle domestic and GBV matters, there are challenges highlighted in the literature which indicate that traditional courts should not have jurisdiction to hear such matters. The argument has been raised that, even if traditional courts were to be given jurisdiction to hear domestic violence matters in terms of the DVA, they would not have the authority to deal with the accused who has violated the provisions of the DVA.[240] The basis of this argument lies in the fact that the DVA provides for sentences with an option of direct imprisonment in cases where a person is convicted for the breach of a protection order.[241] Traditional courts do not have jurisdiction to impose sentences with direct imprisonment because they do not have facilities to detain the offender. With regard to this concern, it could be argued that a traditional leader's jurisdiction would be limited to the provisions of Section 5, which only deal with issuing an IPO as

[239] Section 4(2)(a) read with Schedule 2 of the TCA.
[240] Williams and Klusener op cit note 227 at 276.
[241] Ibid.

emergency relief. Therefore, once the traditional leader has issued an IPO, the matter would then be immediately transferred to the Magistrate's Court. The Magistrate's Court will then conduct the hearing or enquiry and determine whether a final order should be issued in terms of Section 6 of the DVA. Therefore, if the respondent violates the conditions of the IPO, he/she would be committing a criminal offence which would require them to appear in the Magistrate's Court. This approach would eliminate the need for traditional courts to deal with the violation of the protection order, which may involve sentencing the offender. Thus, traditional leaders would complement the role of magistrates, rather than replace their duties or interfere with the jurisdiction of the Magistrate's Court.

Nomboniso Gasa[242] also raised the concern that, even if traditional courts were to be bestowed with jurisdiction to hear domestic violence matters, the reality is that traditional courts are not sympathetic to the victims of such domestic violence, given the patriarchal framework of these courts.[243] They are male-dominated and apply patriarchal principles.[244] Sindiso Mnisi Weeks[245] shared the same sentiments arguing that women have tended to be unjustly dealt with by patriarchal customary courts and that these courts have not shown much sympathy to women who are a vulnerable group in our society. It is also worth noting that the issue of the patriarchal character of the traditional courts, as well as its biasness against women has been recognised as one of the weakness of the traditional justice system as far back as two decades ago. This is well displayed in the discussion papers and reports by the South African Law Commission (SALC).

In 1999 a discussion paper was issued by the SALC [246] on judicial functions of traditional leaders and traditional courts. In those discussion, It was argued by the Rural Women's Movement, that, traditional leaders should not have judicial powers,

[242] N Gasa, 'The Traditional Courts Bill: A silent coup? (2011) SA *Crime Quarterly* 28.
[243] Ibid.
[244] William & Klusener op cit note 227 at 289.
[245] S Mnisi Weeks, 'Regulating vernacular dispute resolution forums: Controversy concerning the process, substance and implications of South Africa's Traditional Courts Bill' (2012) 12(1) *Oxford University Commonwealth Law Journal* 153.

[246] South African Law Commission (Project 90) *Discussion Paper 82 on Harmonising of the common law and indigenous law: Traditional Court and Judicial function of Traditional Leaders* (1999).

but should operates like arbitration forums.[247] The argument by the Rural Women's Movement was based on the accusations that these courts were misusing their judicial powers as they were not following the general rules that are generally followed in the magistrate's court when resolving disputes.[248] The Rural Women's Movement further accused traditional courts of favouritism and bias against women hence argued that traditional courts should not be given judicial powers to function like magistrate's court but should operate as arbitration centres .[249]

In 2003, the SALC[250] finalised its work and presented a report on traditional leader's judicial function of traditional leaders and traditional courts. One of the recommendations was that traditional courts should not determine matters relating to dissolution of marriage, whether customary or civil, custody or guardianship on minors and maintenance.[251] Prior to this recommendations being made by the commission, there were debates and discussions on whether traditional courts should have jurisdiction to hear matters relating to marriage, maintenance, custody, and guardianship of minor children.[252] During those debates, it was strongly argued by rural women interviewed and field workers active in the rural development that, due to patriarchal nature of African society, the apparent bias of customary law and practice in favour of males, these matters should be excluded from the civil jurisdiction of traditional courts.[253] It was further argued that, traditional courts tend to be bias against women, hence should not have jurisdiction over matters relating to the dissolution of marriage, custody or guardianship on minors, maintenance and land issues.[254] The debates and discussions raised during the investigations into customary courts and judicial powers of traditional leaders clearly puts on view that ,the issue of patriarchy and biasness of traditional leaders against women is a remnant of the past.

[247] Ibid 10.
[248] ibid
[249] ibid
[250] South African Law Commission (Project 90) *Customary law: Report on Traditional Court and function of Traditional leaders* (2003).
[251] Ibid xii 4.1
[252] Ibid 10.
[253] Ibid.
[254] Ibid 11.

However, it is also worth noting that, two decades has passed since the SALC had these discussions and recommendations. There has been a lot of changes during the past two decades. The major change being the fact that, the BAA which was governing the traditional courts at the time SALC compiled the reports has been repealed by the TCA. The TCA came into operation on the 27th of September 2023, and it introduced lots of changes which address and alleviate some of the concerns raised during SALC discussion paper in 1999 and 2003 which relates to dissolution of marriage, maintenance, custody and guardianship of minor children. The TCA addressed the concerns by excluding and limiting the jurisdiction of the traditional courts in certain matters. Schedule 2 of the TCA lists matters which traditional court are competent to deal with in terms of the TCA, as well as the extent in which traditional courts can deal with those matters. For instance, Schedule 2 of the TCA limits the jurisdiction of the traditional courts in matters relating to customary law marriages, custody and guardianship of minor children, as traditional courts only have jurisdiction to give advice in these matters and not make any pronouncements. The TCA also totally excluded maintenance matters from the jurisdiction of traditional court, therefore the concern about traditional court not having capacity to deal with maintenance matters has been addressed by the TCA.

Furthermore, the concerns about the patriarchal character of traditional courts which are dominated by men, as well as their biasness against women and tendency to favour male litigants has been addressed by the TCA. Section 5(1) of the TCA makes it compulsory for the composition of traditional courts to consist of women and men, in order to address the complaints relating to the patriarchal structure of traditional court. Therefore, under the new Act, there is no room for men dominated court. In addition, in terms of the TCA, women are not only just required to be part of the composition of the court and then be silent members, but the Act requires that, beyond gender composition, women must also actively participate in the proceedings as members of the traditional court, and also actively participate even when they approach the court as litigants.[255] The inclusive court environment envisaged by the TCA creates a space for women to have equal participation in the court proceedings as men without being

[255] Section 5(2) of the TCA.

discriminated. [256] Therefore, if women are allowed to fully participate in resolution of dispute without being discriminated, that would promote inclusive decision making, which would then reduce any risk of biased-making decision against women.

The issue of patriarchy and unequal treatment of women are however not the only criticism levelled against traditional leaders and traditional courts.The application of customary law in domestic violence cases has been identified as another reason why traditional courts are not an appropriate forum to deal with domestic violence disputes.[257] It is common cause that traditional leaders apply customary law when resolving disputes in the traditional courts.[258] Customary law is applied in all matters that are brought for resolution, even matters that arise from domestic relationships. Yet research has shown that customary law lacks specific rules for addressing domestic violence.[259] There are no specific uniform rules or directives in customary law to guide traditional leaders on how to deal with domestic violence matters. William and Klusener[260] also argue that the lack of customary law rules addressing domestic violence is further demonstrated by customary law precepts that allow the moderate chastisement of women.

The lack of customary rules dealing with domestic violence does not mean that no attempts have been made by traditional leaders to address domestic disputes. There are cultural practices aimed at addressing domestic and GBV disputes, such as the culture of '*ukutheleka'*.[261] *Ukutheleka* is one of the cultural practices applied within some traditional communities to discourage acts of domestic violence in a domestic relationship. Furthermore, it is worth noting that even if customary law lacks specific rules dealing with domestic violence it, like any other law in South Africa, is subject to

[256] Section 7(3)(a)(i) of the TCA.
[257] William & Klusener op cit note 227 at 286.
[258] Section 1(c) of the TCA.
[259] E Curren & E Bonthuys 'Customary law and domestic violence in rural South African communities: notes and comments" (2005) 21 *South African Journal on Human rights* 607.
[260] William & Klusener op cit note 227 at 286.
[261] The "theleka" custom serves as a way of stopping family violence. It is practiced when the husband has ill-treated his wife, especially by seriously assaulting her. The father or guardian of the wife may request a beast as damages from his son-in-law if the latter has assaulted his wife. The beast paid may be in excess of the *lobolo* originally specified. See N M Ngema 'The enforcement of the payment of lobolo and its impact on children's rights in South Africa' (2013) 16 *Potchefstroom Electronic Law Journal* 405.

the Constitution, which provides for the right to be free from all forms of violence.[262] Therefore, customary law precepts must align with the Constitution and not conflict with women's constitutional rights. Customary law is by its nature flexible and capable of developing to consider changing social values.[263]

It is clear from the above discussion that even though the institution of traditional leadership has the potential to handle domestic violence matters, the institution cannot escape criticism. However, despite the challenges and defects of traditional institutions, their advantages in terms of enhancing access to justice weigh heavily in favour of the use of traditional courts and leaders in implementing the DVA. If the traditional court's jurisdiction is extended to apply the provisions of the DVA, traditional leaders will be in a better position to fight the scourge of domestic and GBV. However, the question then is: even if the legislature were to adjust the DVA or, alternatively, adjust the TCA to enable traditional leaders and traditional courts to issue protection orders, will it be practical for this institution in its current state to do so, or is this just wishful thinking?

3.5 Critical analysis of the practical application of the DVA by traditional leaders

An application for a protection order in the Magistrate's Court has three phases which have been discussed in Chapter two, namely:

(a) The application phase (Section 4);[264]

(b) The consideration phase by the presiding officer (Section 5);[265] and

(c) The issuing of the protection order (Section 5(2)(a) and (b)).[266]

All these phases are interconnected; thus, there is no way for traditional leaders to implement Section 5 of the DVA[267] without the other phases being implemented by specific role players.

[262] Section 12(c) of the Constitution of the Republic of South Africa
[263] William & Klusener op cit note 227 at 280.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.

3.5.1 Application phase

The application for a protection order is an administrative process which is administered by the clerk of the court until the application is submitted to the magistrate for consideration and possible issuing of a protection order.[268] In practice, when courts receive numerous applications for protection orders, the clerk of the court often ends up sifting through and screening these applications to determine which applicants qualify for urgent relief before forwarding them to the magistrate. However, the discretion to determine who qualifies for a protection order lies with the magistrate, not the clerk of the court. Therefore, the first step for traditional courts in implementing Section 4 of the DVA,[269] is to establish strong administrative support.

Fortunately, Section 5(4)(a) of the TCA makes it compulsory for every traditional court to have a clerk of the traditional court.[270] They provide administrative support to traditional leaders when performing their judicial duties. The DVA, on the other hand, prescribes how the clerk of the court must process the application for a protection order, which includes completing the prescribed forms.[271] In the context of traditional courts, the clerk of the court will be responsible for the duties assigned by the DVA, similar to those performed by the clerk of the court in the Magistrate's Court. Clerks of traditional courts are equipped with skills to interview complainants, identify the complaint, record information appropriately, and file it in the prescribed manner.[272] These skills will most likely enable the clerk of the traditional court to receive complaints of domestic violence and accurately record the information in the application form (Form 2). Once the application form is completed, the clerk will promptly submit it, along with the affidavit, to the traditional leaders for consideration.[273]

[268] Ibid Section 4(7).
[269] 116 of 1998.
[270] Section 5(4)(a) of the Traditional Courts Act makes provisions for the clerk of the traditional court to be appointed in accordance with the laws governing the public service which prescribe the duties of the clerks of traditional courts.
[271] Section 4(2) of the DVA.
[272] Section 5(1)(b)(i) -(ix) of the TCA.
[273] Section 4(7) of the DVA.

3.5.2 Consideration phase

In the Magistrate's Court, once the Magistrate receives an urgent application, they must as soon as reasonably possible consider it in terms of Section 4(7) of the DVA. In traditional courts, traditional leaders will have to play the role of considering the application upon receiving it from the clerk of the court. The practical question is: will traditional leaders be able to perform this task as presiding officers in the traditional court?

Traditional leaders in their capacity as judicial officers are exposed to a wide range of disputes which they resolve by experience, common sense, and the application of customary law. The process involves hearing evidence, identifying customary rules applicable to the dispute, assessing evidence by weighing its merits and demerits, deciding cases based on the application of customary law to the facts, and pronouncing judgment. Hence, it could be safely argued that the skills they apply when resolving disputes are the very same skills applied by magistrates in resolving disputes when they decide cases. The magistrate is required to identify issues from the facts given, identify the law, apply it to the facts by evaluating evidence, and thereafter make a ruling and order.

Therefore, it is proposed that if traditional leaders could be given the task of assessing urgent applications for IPOs, they would be able to perform the task with diligence should they be given training on the application of the DVA. This proposal is based on the fact that traditional leaders possess judicial skills to resolve disputes, and these skills are likely to enable them to consider the application for a protection order. The consideration of the application requires that the decider of facts has the ability to identify if there is prima facie evidence of an act or acts of domestic violence in the application for a protection order. The decider of facts must also consider whether undue hardship may be suffered by the complainant if a protection order is not issued immediately.[274] If the information at the disposal of the decider of facts is insufficient or lacks certain important information to reach a decision, he or she is at liberty to call for additional evidence as deemed fit, which includes oral evidence.[275] Traditional

[274] Section 5(2)(b) of the DVA.
[275] Section 5 (1) of the DVA.

leaders are more likely to make use of the option of oral evidence since documentary evidence is not regularly used as evidence in the traditional court. However, beyond deciding whether a protection order should be issued, traditional leaders will also be required to endorse the order, which must be properly formulated and in a court order document (Form 12).[276] The only challenge with application forms, court orders and other forms issued under the amended DVA is that, even though there are eleven official languages in South Africa, but the DVA forms are only written in English and Afrikaans. Therefore, the victim who is not conversant with English and Afrikaans language will have to enlist the help of the interpreters or be assisted by the clerk of the court to fill in the application forms. Fortunately, section 7(10) of the TCA makes provisions for an interpreter to be provided for any party who does not understand the language used in the traditional court. However, for DVA to be more accessible to the community, the department of justice need to consider having the Act, its regulations and all forms under the Act issued in other languages to enhance access to justice.

Whenever a court issues a protection order, the court must make an order authorising the issue of a warrant of arrest and suspending the execution subject to compliance with any prohibition.[277] The warrant of arrest, which is contained in Form 8, would also have to be endorsed and signed by the traditional leader.[278]

The competency to formulate an order requires more than just experience and the ability to apply common sense, but also a certain level of proficiency in law and legal drafting will be required. This is mainly because a protection order is a legal document, which is legally binding and prohibits certain abusive behaviour. Therefore, the order should be clear, straightforward and unambiguous. This would be challenging for judicial traditional leaders who are proficient in customary law only. In particular, it would be challenging for those traditional leaders who are illiterate (but possess wisdom gained through experience and a deep understanding of customary law). To eliminate this challenge, the writer proposes that traditional leaders' experience and wisdom should be further enhanced through intensive training. Since the need for this

[276] Regulation 11(1) of the DVA as amended.
[277] Section 8 of the DVA.
[278] Regulation 9 of the DVA.

training will be in the quest to enhance service delivery,[279] the appropriate body to facilitate such training will be the South African Judicial Education Institute (SAJEI).[280] The training should be aimed at making traditional leaders conversant with the provisions of the DVA, especially sections 4 and 5 of the Act. The knowledge of the DVA will enable traditional leaders to not only consider the applications for protection orders but also to draft orders that are unambiguous.

In 2016-2017, the SAJEI undertook an initiative to train traditional leaders from the province of KwaZulu-Natal in judicial skills and dispute resolution.[281] The training was productive, and it is argued that the Institute could train traditional leaders in the context of the DVA. The only difference is that the SAJEI would need to provide specifically tailored training on the provisions of the DVA that would fully equip traditional leaders with the necessary skills to handle domestic violence cases in court. To address the challenge faced by illiterate traditional leaders, it is suggested that these leaders be allowed to make verbal orders which would be documented by clerks of the traditional court. The idea of a verbal order by a traditional leader who cannot read and write is not aimed at undermining the manner in which traditional leaders execute their duties. It is also not aimed to be used as a measure to determine the literacy of traditional leaders using western standard. However, a verbal order under these circumstances is aimed at complementing those traditional leaders who possess wisdom and knowledge gained through experience, but who cannot read and write. Therefore, the Clerk of the traditional court's duty will be to reduce into writing the decision that has been carefully assessed and considered by that particular traditional leader. Furthermore, when having regard of the nature of a protection order, that it is a restraining order which sets out conducts or acts that the respondent is prohibited from performing, then it has to be in writing. It has to be in writing because there are consequences for failure to comply with the order, hence the respondent has to have a point of reference of what he/she is prohibited to do.

[279] Preamble of the South African Judicial Education Institute Act 14 of 2008.

[280] The SAJEI is a national education and training body established in terms South African Judicial Education Institute Act 14 of 2008. One of the main objectives of body is to provide appropriate judicial education and training to aspiring and newly appointed judicial officers, as well as continued training for experienced judicial officers.

[281] '2016 & 2017 KZN traditional leaders training schedule' available at https://www.judiciary.org.za/images/traditional_leaders_training_2016-2017/SAJEI-12-May-2016_2016-17-KZN-Traditional-Leaders-Training-Schedule-Ammended.pdf accessed on 08 February 2023.

Fortunately, the recent amendments of the DVA and its regulations has also introduced a new proforma annexure to be used for an IPO (Form 12).[282] Form 12 lists all the types of domestic abuse recognised by the DVA[283] and has boxes to be ticked next to each of the types. Therefore, the Form does not require the presiding officer to carefully write down the prohibited types of abuse; all that needs to be done is to tick the box with the applicable type of abuse which is prohibited. This amendment will work to the advantage of a traditional leader who is illiterate, as they will not be required to write but can instead make a verbal order. The clerk of the traditional court will then tick the appropriate boxes in accordance with the traditional leader's order. The traditional leader dealing with that particular application will then have to sign the order. The order should have a return date as an application for an IPO is an *ex parte* application.

To safeguard against any miscarriage of justice from the orders issued by traditional leaders, a system of checks and balances should be put in place. One such system is that once an IPO has been granted by the traditional court and duly served to the respondent, the order must immediately be transferred to the Magistrate's Court, which will also deal with the confirmation of the interim order. Therefore, under these circumstances, an IPO granted by the traditional leader should have a return date which directs the respondent to appear in the Magistrate's Court. Additionally, the applicant should be warned to appear in the Magistrate's Court on the specified return date.

It further submitted by the writer that the system of transferring the domestic violence matter to the Magistrate's Court after an interim order has been issued, will not only serve as a check and balance tool but will be a solution even in instances where the order is breached before the return date. One of the realities that would be faced by traditional leaders who issue an IPO is that such orders are at risk of being violated before confirmation, and the question is: how would traditional leaders deal with the breach of such an order? Under normal circumstances in the Magistrate's Court, when

[282] APPENDIX- Form 12.
[283] 116 of 1998 as amended.

an interim order is breached, the interim warrant of arrest is executed by members of the SAPS. The perpetrator will be charged and kept in custody pending his/her appearance in the Magistrate's Court. However, in the traditional justice system context, traditional leaders do not have the authority to make an order that the accused be detained in custody, nor do traditional courts have detention facilities or holding cells to keep those who are to be detained in custody.

3.5.3 Service of the interim protection order

The DVA is very specific about who should serve the protection order. It specifies that the protection order must be served immediately by a police officer, sheriff or clerk of the court.[284] The Act also prescribes how each of these officials should serve the protection order (as discussed in Chapter two).[285] The Act's specificity about who should serve the order and how it should be served is crucial in determining the validity of the order. Therefore, the service phase is a critical one. Fortunately, traditional courts also have a rural enforcement system in place, which is also responsible for serving court documents. The service of processes in the traditional justice system is handled by tribal constables.[286]

The first challenge with the tribal constables who serve calling documents in the traditional courts is that they do not fall within the definition of either the sheriff or the police officer. Even the Traditional and Khoi-San Leadership Act (TKLA) does not recognise tribal constables and their role in traditional communities. If the functions of tribal constables cannot be clearly defined, this presents a challenge, as the prescribed manner in which they should serve the protection order cannot be established. It is also not prescribed how a tribal constable should deal with a respondent who refuses to receive court documents. This poses a significant issue for the service of a protection order, which sometimes requires personal service and necessitates that the server of the document note in the return of service how the order was served. Consequently, the service of a protection order by a tribal constable will have no legal effect in the absence of clear guidelines regarding their duties as servers of documents in the traditional court.

[284] Section 13(1), Regulation 15 of the DVA.
[285] Ibid.
[286] Madondo op cit note 142 at 20.

While the problem of tribal constables serving court documents remains, the TCA introduced Justices of the Peace as servers of traditional court documents.[287] However, the introduction of the role of the Justice of the Peace does not solve the problem either, because the Act does not prescribe how he or she should serve court documents. It is, therefore, clear that there is no prescribed manner in which tribal constables and Justices of the Peace should serve court documents. If the protection order were to be served by either a tribal constable or by a Justice of the Peace, the service of that order would be null and void. Proper service of documents is crucial in determining the validity of the order, as its effectiveness depends on correct service. The issue of serving the IPO is significant, as the final protection order cannot be confirmed if the interim order is not served properly.

Whilst there are noticeable challenges to how the protection order would be served in the traditional courts, it is worth noting the advantages of the tribal constables. They possess the potential to serve the order timeously as they are members of the community. They also possess the potential to overcome some of the challenges faced by the Magistrate's Court when it comes to the service of the protection orders. One such challenge is that protection orders are sometimes not served timeously by members of the SAPS because of a lack of state vehicles. In cases where a sheriff has been instructed to serve a protection order, delays may be caused by non-payment of the sheriff.

As emphasised, the service of a protection order is critical, as it determines its validity. If not served properly by a designated official, the order is null and void and the complainant remains in danger. To prevent any unjust outcomes, it is recommended that even within the context of the traditional justice system, the SAPS should continue with its duty of serving protection orders. This recommendation is based on two grounds: first, the DVA assigns specific duties to police in its implementation; and second, there are national instructions issued by the Commissioner of Police, which prescribe how SAPS members should implement the DVA. These national instructions impose obligations on the police as to how they must respond to domestic violence

[287] Ibid.

complaints, and comply with requirements of the DVA, including the effective service of protection orders.

Therefore, it is argued that even in instances where the DVA is implemented by traditional courts, the duties and obligations of the police in terms of the SAPS national instructions remain, as the instructions do not specify that these duties and obligations are only applicable if the protection order is issued by a Magistrate's Court. Thus, the proposed extension of a traditional leader's jurisdiction would automatically activate the SAPS's obligation to monitor the implementation of the DVA by traditional courts. This obligation would require the station commissioner of a nearby police station to be in constant communication with traditional leaders who have the authority to implement the DVA.

3.6 Conclusion

This chapter explored the institution of traditional leadership in a judicial context. It explored whether traditional leaders, as judicial officers in the traditional court, would be able to implement sections 4 and 5 of the DVA 116 of 1998 as amended. This chapter has shown that while there is an untapped potential possessed by traditional leaders and traditional courts to improve access to justice for victims of domestic and GBV in rural areas, there are challenges that would be experienced when implementing the Act. However, the need to provide maximum protection to victims of violence in rural areas necessitates that these challenges be addressed and that the institution of traditional leadership is incorporated into the judicial system *vis a vis* in the implementation of the DVA.

CHAPTER FOUR

CONCLUSION

"No problem is so deep that it cannot be overcome, given the will of all parties, through discussion and negotiation rather than force and violence."

Nelson Mandela[288]

4.1 Introduction

The main purpose of this dissertation was to explore the role of traditional leaders in combating domestic and GBV faced by rural women. The role of traditional leaders was viewed in the context of the provisions of the DVA. Specifically, the angle that was explored was how best can traditional leaders serve rural communities, especially women, if they are given authority to issue IPOs in terms of Section 5 of the DVA in their traditional courts. This role was examined in light of the widespread social ill of domestic and GBV directed at women, which is prevalent throughout the country and particularly in rural areas. When women in these areas knock on the doors of the traditional courts seeking urgent relief, they return empty-handed because traditional courts do not have the authority to issue IPOs. This is mainly because the DVA is very specific in that only the Magistrate's Courts can enforce the provisions of the Act. However, a major challenge with these designated courts is that they are not always physically accessible to all communities. Some victims of domestic violence from remote rural areas must travel long distances and incur significant costs to reach criminal justice centres where they can access the remedies provided by the Act. The plight of rural dwellers is further exacerbated by several social services barriers (for example, the lack of infrastructure such as the lack of proper roads and bridges) that make it even more difficult for rural victims to access the remedies provided by the DVA from the Magistrate's Courts. These difficulties faced by rural dwellers in

[288] Nelson Mandela. (nd). AZQoutes.com. https://www.azquotes.com/quote/797823 accessed on 20 October 2024.

accessing these courts leave many rural women with no choice but to resort to the traditional justice system to resolve their domestic and GBV incidents, whilst others voluntarily choose this route.

In light of the barriers limiting rural complainants from accessing justice when they seek remedies under the DVA from Magistrate's Courts, there is the untapped potential of the traditional justice system in the form of traditional courts and traditional leaders. This potential of the traditional courts emanates from their ability to provide the most basic human right, namely, access to justice. The potential of traditional courts and traditional leaders to bridge the gap and serve those victims who approach them to resolve domestic and GBV disputes was explored in this dissertation. One of the best features of the traditional justice system is the physical accessibility of traditional courts to the community. They are not only within close proximity to the community but even traditional leaders who serve in these courts are community members themselves. Chapter three examined the untapped potential of the institution of traditional leadership in settling domestic violence disputes. This potential was examined in light of the nature of domestic and GBV affecting rural women as highlighted in Chapter one. While Chapter three showcased the traditional courts' significant potential to bridge the gaps limiting access to justice, it also critically examined whether traditional courts are equipped to implement the DVA if such jurisdiction was extended to traditional leaders. This critical analysis identified several obstacles in the traditional justice system that could hinder the smooth implementation of the Act by traditional leaders. The first obstacle is that the DVA excludes traditional courts from its implementation. The second relates to the prescribed manner in which court documents are served in traditional courts by rural enforcement officers. The third obstacle concerns the competency of traditional leaders to endorse protection orders.

4.2 Recommendations

In light of the arguments presented in this dissertation, the following key recommendations are submitted as possible solutions to address obstacles that could hinder the smooth implementation of the DVA by traditional leaders:

(a) It is recommended that the DVA should be reviewed to amend the definition of the term “court” in the Act to include traditional courts as courts of first instance for victims seeking protection orders. However, given the shortcomings of the institution of traditional leadership, it is recommended that the jurisdiction of the traditional leaders should be limited to enforcing only Section 5 of the Act, which pertains to issuing IPOs. As a safeguard and monitoring tool, magistrates should still retain the authority to confirm these interim orders in terms of Section 6 of the DVA. Therefore, the traditional leader should transfer the matter to the Magistrate’s court immediately after granting the IPO and give the applicant date to appear in the Magistrate’s court, the IPO that is to be served to the respondent must also reflect when the respondent has to appear in the Magistrate’s court for hearing and final outcome in terms of Section 6 of the DVA.

(b) To further enhance access to justice, it is recommended that the Magistrate’s Commission assign designated magistrates who understand the language commonly used in the area, as well as the social context of the area, to preside in traditional courts periodically for the purpose of hearing specific matters in terms of Section 6 of the DVA. The magistrate holding Section 6 of DVA enquiries will only preside in the traditional court for the purpose of the application of the provisions of the DVA only, and not interfere with the customary law which is ordinarily applied by traditional courts, and also not interfere with the duties of the traditional leaders as presiding officers. But, they would only seat in the traditional court to enhance justice by holding hearings that they would ordinary hold in the magistrate’s court to confirm, or amend or set aside those IPOs that had been issued by the traditional leaders. This could be the case for specific matters such as cases for example that involves parties who are elderly, or those parties living with disability. In that way, both complainants and respondents will not have to travel to the Magistrate’s Court for confirmation of the interim order but would instead access justice from their traditional courts. After the hearings, magistrates and traditional leaders may have peer-learning sessions, on a one-on-one basis to share skills on the application of DVA. Magistrates would also have the opportunity to evaluate the IPOs issued by traditional leaders and offer guidance where needed.

(c) Alternatively, it is recommended that Section 8(1)(d) of the TCA should be amended to allow traditional leaders to issue traditional court protection orders. Specifically, this section should be amended to include an order (issued by traditional courts) that deters any acts of domestic and GBV. Therefore, it is also recommended that Schedule 2 of the TCA should be amended to extend the jurisdiction of traditional courts to deal with acts of domestic and GBV cases in terms of the DVA.

(d) With regard to the concerns about the competency of traditional leaders to apply statutory law with its formalities such as properly formulating an interim order, it is recommended that traditional leaders should receive thorough judicial training from SAJEI. The Institute is well-positioned to thoroughly train traditional leaders on how to legally respond to complaints of domestic and GBV and to share the skills required to implement the DVA. Traditional leaders are experts in their field, that is, in their application of customary law in resolving the dispute. Therefore, they possess good judicial skills to identify the area of law applicable to the facts in dispute, assess evidence, evaluate evidence and make pronouncements. They apply customary law in wide variety of matters including domestic violence matters. However, there is no customary law remedy to stop acts of violence like the protection order. Therefore, SAJEI's training will be aimed at enhancing traditional leader's knowledge of the DVA, enable them to gain the tools to interpret legislative framework and remain effective in addressing contemporary challenges, so as to be in a position to fight the scourge of domestic and GBV by issuing protection orders in their traditional courts.

(e) In addition to training traditional leaders, it is recommended that clerks of the traditional courts also receive training from the SAJEI, as they would be responsible for documenting the verbal orders made by traditional leaders.

(f) It is recommended that the members of the SAPS should retain their duty to serve protection orders, even if those orders are issued by traditional courts. This recommendation is based on Section 18 of the Domestic Violence National

Instruction 7 of 1999 as amended, which places an obligation on the SAPS to monitor the implementation of the DVA. The service of the IPO is very critical as it determines the validity of the order, that why the DVA is also specific who is to serve such order, how such order should be served and consequences that would follow if the respondent fail to comply after being served by either the peace officer, sheriff and clerk of court. Even though tribal constables serve documents in the traditional court, but their duties are not prescribed by either the TCA or TKLA. Therefore, at this stage tribal constables are not suitable candidate to serve documents like IPO, but they can work in collaboration with members of SAPS during the service of IPO, by either assisting the police with directions to respondent's address or respondent's whereabouts as tribal constables are familiar with the areas that they serve.

(g) If a police station is too far from traditional courts with the authority to issue a protection order (like in those remote areas), it is recommended that establishing a satellite police station at or near the traditional court be considered. One or two members of the SAPS could be assigned to run that satellite police station. The duties of these officers would not only be limited to monitoring the implementation of the DVA by traditional courts but they would also perform crime prevention duties, and render all community services such as receiving complaints and certifying documents. Having satellite police stations would, therefore, improve access to justice for the entire community and not just for victims of domestic and GBV.

(h) Finally, traditional leaders' jurisdiction to implement the DVA should not end in court only. In light of this, it is recommended that traditional leaders as community leaders should be actively involved community outreach programmes that educate people about the social ill of domestic and GBV. These initiatives would provide a platform for traditional leaders to work with community members in promoting women's rights. This platform would also provide an opportunity for traditional leaders to educate the community about harmful cultural practices that should not be accepted as the norm.

Rural courts are often supported by community-based advice offices facilitated by community-based paralegals. These paralegals understand the social context of the community they are serving and they also understand the law. Traditional leaders can also work together with paralegals in creating awareness about the social ill of domestic and GBV in rural areas.

4.3 Conclusion

The main purpose of this dissertation was to explore the role of *izinduna* and *amakhosi* in eradicating domestic and GBV in rural areas of South Africa. This role was explored through the lens of the DVA 116 of 1998 as amended, focusing on whether traditional leaders could issue IPOs to victims who either prefer to resort to traditional courts as their courts of first instance or who cannot access Magistrate's Courts due to several barriers. This dissertation demonstrates that traditional leaders have great potential to address the widespread social ill of domestic and GBV. However, for them to do so, certain legal training, and infrastructural changes would need to be made.

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Appendices

Appendix 1 - Interim Protection Order (Form 12)

J507

REPUBLIC OF SOUTH AFRICA

FORM 12

INTERIM PROTECTION ORDER

[Regulation 11(1)]
SECTION 5(2) OF THE DOMESTIC VIOLENCE ACT, 1998 (Act No. 116 of 1998)

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF .....

HELD AT ..... **APPLICATION NO** .....

In the matter between:

APPLICANT: .....
(*ID. No. /Date of Birth: .....)

AND

RESPONDENT: .....
(*ID. No. /Date of Birth: .....)

(Delete whichever is not applicable)*

1. PARTICULARS OF RESPONDENT	
Home Address:	(Tel.No.)
Work Address:	(Tel.No.)
Occupation:	

2. PARTICULARS OF APPLICATION

The complainant/person acting on behalf of the complainant has applied for a protection order against the **respondent** as per the application and record of oral evidence (if any) attached, which application has been considered by the Court.

Department of Justice and Constitutional Development 1

3.	ORDER BY COURT AND PARTICULARS OF ORDER	
3.1	**The Court orders that:**	
	3.1.1	**An Interim Protection Order is granted; and the respondent is ordered-**
	3.1.1.1	not to commit or attempt to commit the following acts of domestic violence towards the complainant: ☐ Physical Abuse; ☐ Sexual Abuse; ☐ Emotional, Verbal or Psychological Abuse; ☐ Economic Abuse; ☐ Intimidation; ☐ Harassment; ☐ Sexual Harassment; ☐ Related Person Abuse; ☐ Spiritual Abuse ☐ Damage to Property; ☐ Elder Abuse; ☐ Coercive Behaviour; ☐ Controlling Behaviour; ☐ Exposure of a child to domestic violence; ☐ Intimidating Behaviour; ☐ Threatening Behaviour; ☐ Abusive Behaviour; ☐ Degrading Behaviour; ☐ Offensive Behaviour; or ☐ Humiliating Behaviour.
	3.1.1.2	☐ not to enlist the help of another person to commit the acts of domestic violence specified in paragraph 3.1.1.1.
	3.1.1.3	☐ not to enter the shared residence at: ....
	3.1.1.4	☐ not to enter, without the complainant's consent, the following parts of the shared residence at: ....
	3.1.1.5	☐ not to enter, without the complainant's consent, the complainant's residence at: ....
	3.1.1.6	☐ not to enter, without the complainant's consent, the complainant's place of employment at: ....
	3.1.1.7	☐ not to enter, without the complainant's consent, the complainant's place of study at: ....
	3.1.1.8	☐ not to prevent the complainant or any child who ordinarily lives or lived in the shared residence at: .... from entering or remaining in the shared residence, or any part thereof.

	3.1.1.9	☐ not to commit any of the following acts, to wit: (i) ..... (ii) ..... (iii) ..... (iv) ..... (v) .....
	3.1.1.10	☐ to pay interim maintenance in the sum of R ..... per month/week until the return date. The matter is also referred to the Maintenance Court for a maintenance investigation.
	3.1.1.11	☐ to make rent or mortgage payments in the sum of R ..... per month/annum.
	3.1.1.12	☐ to pay the following to the complainant as emergency monetary relief: (i) ..... (ii) ..... (iii) .....
	3.1.1.13	☐ return the following property to the complainant: (i) ..... (ii) ..... (iii) .....
	3.1.1.14	☐ surrender the following weapon(s) in the possession of the respondent: (i) ..... (ii) ..... (iii) .....

(Tick box and complete where necessary)

4.	ADDITIONAL ORDERS	
4.1	**It is further ordered that-**	
	4.1.1	☐ A peace officer, namely ..... accompanies the complainant to the following residence: .... in order to assist with arrangements regarding the collection of personal property, i.e. (i) ..... (ii) ..... (iii) ..... (iv) ..... (v) .....

	4.1.2	☐ A member of the South African Police Service at ..... station seizes the following weapon(s) in the possession of the Respondent, i.e. (i) ..... (ii) .....
	4.1.3	☐ The complainant's home, study or work details not be disclosed to the Respondent.
	4.1.4	☐ The Respondent is ordered not to have any contact with the following child(ren) .... until an enquiry has been concluded in terms of the Children's Act. The matter is referred to the Children's Court for an enquiry.
	4.1.5	☐ The respondent is allowed contact with the following child(ren) .... on the following basis, until an enquiry has been concluded in terms of the Children's Act: (i) ..... (ii) ..... (iii) ..... The matter is referred to the Children's Court for an enquiry.
	4.1.6	☐ The respondent: (i) ..... (ii) ..... (iii) .....
4.2	A warrant of arrest is authorised for the arrest of the respondent, the execution of which is suspended subject to the respondent's compliance with the provisions of the protection order as stated above.	
4.3	In terms of sections 5(3)*(a)* and 13(1)*(a)* of the Act, ☐ the clerk of the court ..... (name and surname) ☐ member of the South African Police Service of .....(station) ☐ peace officer ☐ sheriff is hereby directed to serve this order, together with certified copies of the application for a protection order, supporting documents, supporting affidavit and record of evidence on the respondent by hand or electronically.	
4.4	A copy of this order and the copy of warrant of arrest must be forwarded to the .... Police Station, once this interim order has been served on the Respondent.	
4.5	A copy of this order and the original warrant of arrest must be served immediately to the complainant, once this interim order has been served on the respondent.	

4.6	Any other order/condition/recommendation/remark: (i) ..... (ii) ..... (iii) ..... (iv) ..... (v) .....

(Tick box and complete where necessary)

5.	DATE OF CONFIRMATION OF ORDER
5.1	**The respondent** is hereby informed of their right to appear in the Magistrate's Court at ..... on the ..... day of ..... 20 ..... at 08:30 in order to give reasons why the interim protection order should not be confirmed and made final; and of their right to have the matter heard on an earlier date after at least 24 hours' written notice to the complainant and the aforesaid court.
5.2	**The respondent** is further informed that if they do not appear in court on the above-mentioned date and time, and the court is satisfied that this notice was properly served on them, and is satisfied that they committed or are committing an act of domestic violence, this order will be confirmed and made final.

MAGISTRATE **DATE**

Appendix 2 - Warrant of Arrest (Form 33)

J590

REPUBLIC OF SOUTH AFRICA

FORM 33

WARRANT OF ARREST

[Regulation 25]
SECTION 8(1)*(a)* OF THE DOMESTIC VIOLENCE ACT, 1998 (Act No. 116 of 1998)

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF .....

HELD AT ..... **APPLICATION NO** .....

In the matter between:

APPLICANT: .....

(*ID No./Date of Birth: .....)

AND

RESPONDENT: .....

(*ID No./Date of Birth: .....)

TO ALL MEMBERS OF THE SOUTH AFRICAN POLICE SERVICE:

Whereas the attached protection order was granted against the respondent by the Magistrate's Court of ..... on the ..... day of ..... 20..... ;

Therefore this warrant of arrest is hereby authorised and issued in terms of section 8(1)*(a)* the Domestic Violence Act, 1998 (Act No. 116 of 1998); and

Whereas in terms of 8(1)*(b)* of the Domestic Violence Act, 1998, the execution of this warrant is suspended until the respondent has breached a prohibition, condition, obligation or any other order in the protection order, and the respondent was served with the protection order; and

Whereas the complainant is required to submit an affidavit stating nature and circumstance of the breach,

Therefore on receipt of the affidavit by the complainant you are hereby authorised and ordered to immediately arrest the respondent in terms of section 8(4)*(b)* Domestic Violence Act, 1998, for allegedly committing the offence referred to in section 17(1)*(a)* Domestic Violence Act, 1998.

GIVEN UNDER MY HAND AT ..... THIS ..... DAY OF ..... 20.....

MAGISTRATE **DATE**

*(*Delete whichever is not applicable)*

Department of Justice and Constitutional Development

1

4.6	Any other order/condition/recommendation/remark: (i) ..... (ii) ..... (iii) ..... (iv) ..... (v) .....

(Tick box and complete where necessary)

5.	**DATE OF CONFIRMATION OF ORDER**
5.1	**The respondent** is hereby informed of their right to appear in the Magistrate's Court at ..... on the ..... day of ..... 20 ..... at 08:30 in order to give reasons why the interim protection order should not be confirmed and made final; and of their right to have the matter heard on an earlier date after at least 24 hours' written notice to the complainant and the aforesaid court.
5.2	**The respondent** is further informed that if they do not appear in court on the above-mentioned date and time, and the court is satisfied that this notice was properly served on them, and is satisfied that they committed or are committing an act of domestic violence, this order will be confirmed and made final.

MAGISTRATE

DATE

Appendix 3 - Ethical clearance

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mrs Ntombizakithi Nto'Mpela Bhengu (9606705)
School Of Law
Pietermaritzburg

Dear Mrs Ntombizakithi Nto'Mpela Bhengu,

Original application number: 00028217
Project title: The role of 'Izinduna' and 'Amakhosi' in eradicating domestic violence and gender-based violence.

Exemption from Ethics Review

In response to your application received on 2 October 2024, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
pp Academic Leader Research
School Of Law

Appendix 4 - Proof of editing letter

Athol Leach (Proofreading and Editing)

31 Park Rd
Fisherhaven
Hermanus 7200

Email: [redacted] Cell: [redacted]

25 October 2024

To Whom It May Concern

This letter serves to confirm that I have edited the following mini-dissertation (LL.M. in Advance Criminal Justice) by Ntombizakithi Ntom'pela Bhengu (9606705) titled:

"THE ROLE OF 'IZINDUNA' AND 'AMAKHOSI' IN ERADICATING DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE"

The dissertation was edited in terms of grammar, spelling, punctuation and overall style. In doing so, use was made of MS Word's "Track changes" facility thus providing the student with the opportunity to reject or accept the changes made.

Please note that while I have checked the in-text references and those appearing in the list of references for consistency in terms of format (the latter as much as feasibly possible), I have not checked the veracity of the sources themselves.

The tracked document is on file.

Sincerely
[redacted]
Athol Leach
(MIS, Natal)