



GUIDELINES FOR THE IMPLEMENTATION

of the Domestic Violence Act for the Magistrates



the **doj&cd**

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PREFACE

The Lower Court Management Committee (LCMC), a forum comprising of all Regional Court Presidents and Chief Magistrates in South Africa, has the pleasure of presenting these Domestic Violence Guidelines for Magistrates.

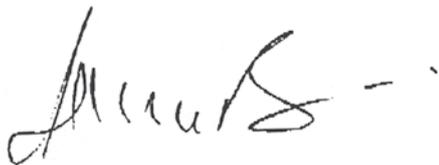
The compilation of these guidelines was undertaken by the Family and Gender Service Delivery Task Team, a sub-committee of the Lower Court Management.

This formidable team comprises of Chief Magistrates Renuka Subban (Verulam) Ntombizodwa Nduna (Kimberley) and Mziwonke Hinxha (Bloemfontein).

The guidelines are not meant to be prescriptive in any way, but rather to be used as a quick reference manual and easy to follow guide for magistrates who have not had the opportunity to attend training courses relating to the relevant legislation.

The material in the Domestic Violence guidelines is the product of:

- The Magistrates working group, who in collaboration with the Gender Directorate formulated the first draft.
- Magistrates who attended a workshop to edit the second draft written by members of Fagett.
- The LCMC would like to acknowledge with thanks, the support provided by the Chief Director, Promotion of Rights of Vulnerable Groups, Court Services, of the Department of Justice and Constitutional Development in funding the workshops and in the printing of this booklet.



Nomathamsanqa Beshe

Chairperson: Lower Court
Management Committee

domestic violence

TABLE OF CONTENTS

PREAMBLE	p1
THE INTERIM PROTECTION ORDER PART A	p2
THE INTERIM PROTECTION ORDER PART B	p2
THE INTERIM PROTECTION ORDER PART C	p5
THE RETURN DATE (FINALISATION OF PROTECTION ORDER)	p5
BREACHES/VIOLATION OF PROTECTION ORDERS	p7
BAIL	p7
ADDITIONAL CONSIDERATIONS	p8
QUALITY CONTROL QUESTIONNAIRE: DOMESTIC VIOLENCE INTERIM ORDERS	p8
RETURN DATE: FINAL ORDER	p9

PREAMBLE

Domestic Violence is the most common and pervasive human rights abuse in South Africa. Every day women are murdered, physically and sexually assaulted, threatened, and humiliated by their partners in their own homes. In spite of legislation and regulations in place to combat domestic violence, courts are often criticised for the lack of sensitivity, proper service delivery and uniformity by magistrates in implementing the legislation.

These guidelines are intended to assist and guide magistrates in implementing the Domestic Violence Act in any way that ensures both legal consistency and legal uniformity. The guidelines do not attempt, in any way, to limit judicial independence or discretion and should be read with the legal obligations on magistrates prescribed by the Act itself.

The guidelines are based on the experiences of magistrates presiding over domestic violence cases and who are therefore cognisant of the day to day realities of magistrates in our courts.

Guiding Principles

In the light of the above social and legal context of domestic violence, magistrates presiding over cases of domestic violence should consider the following:

1. Treat each case seriously, fairly, expeditiously and with sensitivity to the race, class, gender and culture of the parties involved;¹
2. Treat cases with the appropriate urgency that each case demands;
3. Consider the potential lethality of domestic violence;
4. Fully interrogate and consider each case;
5. Seriously consider the “perceived risk” to the applicant.
6. Deal with applications for protection orders promptly.
7. Be aware that applicants may make after-hours applications as provided in the Domestic Violence Act, provision should therefore be made to ensure that magistrates are available to grant after hours applications.
8. Avoid minimising the abuse or the perceived risk that the applicant believes she/he is in.
9. It is important to note that, should an applicant withdraw either the interim or final protection order, the withdrawal **may not** be used against the applicant if she/he applies for a subsequent order.
10. In the light of high levels of semi-literacy, the respondent should have a fair opportunity to file an opposing affidavit or to respond to the matter orally in court.
11. (a) As a norm interview the applicant and where necessary lead viva voce evidence from her/him.
(b) In offices with no resident magistrates, the administrative staff should fax the application through to the magistrate appointed for the district.
(c) The presiding Officer should fully record the proceedings including the rights explained to the parties.
(d) The warrant of arrest should not be signed by the Magistrate until after a proof of service on the respondent is available.
12. Orders concerning access to (or contact with) a minor child made in terms of Section 7 (6) must be ancillary to a protection order as envisaged in Section 7 (1) of the Act.²
13. Deal with domestic violence matters in camera.
14. Where an existing court order is in place, it is important to note that the Domestic Violence Act provides an immediate emergency remedy on the new set of facts before the court. As such, magistrates should provide an immediate remedy, even if it is not in line with

1. After-hours application: most courts have court managers and court administrators who should attend to organising after hours applications. Clerks must be assigned to deal with after hours applications, and a magistrate must be available to deal with these.

2. Andrew v Narodien 2002(1)SACR 336

THE INTERIM PROTECTION ORDER

the existing High Court Order, and order the parties to have the High Court Order amended within a reasonable period of time. It is also important to note that the Return Date provides the respondent the opportunity to contest the interim protection order. It should be understood that the remedies available under the Domestic Violence Act do not replace the High Court judgments and should therefore be an interim measure until the High Court orders can be amended.

PART A:

The Magistrate should establish –

1. Whether the applicant has sought medical attention or other assistance (including whether she/he is in possession of any current or previous medical certificates or documentation).³
2. Where physical or sexual assault has been committed, the extent or nature of the injuries sustained by the applicant.
3. Whether any objects, weapons or instruments have been used in the most recent or previous incidents of domestic violence.
4. Whether the respondent is in possession of a dangerous weapon (a firearm or a dangerous weapon in terms of the Dangerous Weapons Act 71 of 1968).⁴ Where it is established that the respondent is in possession of a dangerous weapon, the Magistrate should refer to sections 2(a) and 9 of the Domestic Violence Act.
5. Where other forms of domestic violence have been committed, the effects of violence on the applicant or any other person affected by the domestic violence.
6. Whether the applicant:
 - (a) has laid a criminal charge;
 - (b) intends laying a criminal charge;
 - (c) is aware that she/he can lay a criminal charge;
 - (d) is aware that she/he can make supplementary statements to the police or the court.
7. Whether the applicant is aware of any other orders against the respondent (including maintenance orders or protection orders).
8. Whether the applicant has any orders against him/her (including maintenance orders, protection orders).⁵ Where it has been established that a previous protection order is in place, it is recommended that where the original application has not been finalized, an attempt should be made to hear the parties together. A notice to show cause of what should be issued and the return dates amended accordingly.
9. The Presiding Officer should enquire whether the applicant needs counseling services.

PART B:

Procedure to follow:

1. The applicant's rights to legal representation should be explained.
2. The magistrate should verify the contents of the affidavit with the complainant carefully against what is applied for in Form 2.
3. If the history of the abuse is not adequately set out in the papers or forms presented to the court, the PO should obtain *viva voce* evidence from the applicant in order to supplement same including:

3. The Magistrate may also make note of any physical injuries visible on the applicant at the hearing and may enquire about such injuries. These observations may be noted in the file.

4. According to the Dangerous Weapons Act, a "dangerous weapon" means any object, other than a firearm, which is likely to cause serious bodily injury if it were used to commit an assault.

5. A number of suggestions have been made surrounding counter-protection orders. The court may decide to (a) join the two matters (on the Return Date) and review both matters together, (b) bring the two matters together on the Return Date (but keep the cases separate), or (c) to treat the two matters completely separately and hear the matters on different dates. It is important however that the court takes cognizance of any previous orders and does not grant a new (counter) protection order that conflicts with the original order granted.

- (a) how long the domestic violence has been taking place (months, years);
 - (b) what the applicant perceives are “triggers” to the respondent’s violence (i.e. alcohol);
 - (c) how often domestic violence takes place (everyday? on weekends?);
 - (d) what the most prevalent forms of abuse are that the applicant is subjected to by the respondent;
 - (e) any previous attempts by the applicant to seek help (from the police, medical practitioners, family, social workers, community street committees, community courts and so on);
 - (f) whether the respondent is currently presenting or has a history of mental illness; and
 - (g) whether there is any indication or history of addictions or habitual drug or alcohol abuse by the respondent.
4. Consider the social context of applicant and the respondent in granting the interim protection order. In order to adequately adjudicate the matter, the Magistrate may want to consider the following in relation to applicant or respondent:
- (a) employment or employability;
 - (b) domicile or property ownership;
 - (c) cultural background; and
 - (d) religion
5. When considering whether a case for urgency has been made out or not, the Magistrate should establish whether the applicant will suffer undue hardship if the interim order is not granted; in this regard, he/she should be guided by:
- (a) a consideration of the applicant’s perceived risk of further harm by the respondent; and
 - (b) the implications of not providing the applicant with an immediate remedy.
6. Court should not refuse an interim protection order unless urgency is not shown. Where a case for “urgency” is not made, a notice to show cause in terms of section 5(4) of the Act should be issued. Urgency may include, but is not limited to instances where:
- (a) the respondent is in possession of a firearm and has threatened to use the firearm against the applicant, or her dependants or other family members;
 - (b) the respondent has used a weapon against the applicant in previous incidents of domestic violence (not restricted to dangerous weapons such as firearms or knives);
 - (c) the applicant was critically injured by the respondent on a previous occasion, or on the occasion in question;
 - (d) the applicant and her children have been ‘kicked out’ of the family home by the respondent or anyone affiliated with the respondent;
 - (e) the applicant has sufficient evidence (i.e. witness statements) that the respondent has threatened to harm her/him;
 - (f) the applicant experiences economic or social deprivation as a result of the abuse (i.e. has no shelter or has been restricted from seeking assistance from family members); or
 - (g) the applicant fears for her safety or that of her children, dependents or other family members.
7. The Presiding Officer should as a norm, cause the applicant to make his/her application for withdrawal under oath *viva voce*. Written affidavits should be submitted under exceptional circumstances.
8. The court should only allow the withdrawal of an interim protection order when it is convinced that

THE INTERIM PROTECTION ORDER

the applicant is at no further risk of violence or abuse and that the applicant's withdrawal of the order is not under duress. A request by the applicant should not be sufficient cause to withdraw the application.⁶

It is important to note that should an applicant withdraw either the interim or final protection order, the withdrawal **may not** be used against the applicant if he/she applies for a subsequent order.

9. When making provision for the removal of the Respondent, Magistrates must consider **inter alia**:

- (a) the safety, health and well-being of the applicant, child/children or any other person affected by the domestic violence;
- (b) the applicant's perceived risk of further harm or violence;
- (c) the personal and material interest of the applicant; and
- (d) the best interest of the child/children.

10. If a child applies to the court for a protection order, the court must consider the application, and if it deems fit, grant an interim protection order. The court must then, if it finds the child to be a child in need of care, refer the child to the Children's Court in terms of section 11(1)(c) of the Child Care Act.

As far as possible or as a norm, a minor applicant should be assisted by a parent or guardian unless the order sought is against the said parent or guardian; or the said minor prefers not to be assisted and the Presiding Officer is satisfied that the decision is an informed one.

11. When an application is brought on behalf of the applicant, the presiding officer should bear in mind that:

- the applicant must have a material interest in the well-being of the complainant;
- such application must be brought with the written consent of the complainant unless the exceptions in Section 4(3) (a) to (d) are applicable.

12. When adult applicants request, as part of the protection order, an order for the placement of children (i.e. structured or specific visits), the Magistrate should inform the applicant that the arrangement is a temporary one. When making provision for the placement of children magistrates must consider **inter alia**:

- (a) the safety, health and well-being of the applicant, child/children or any other person affected by the Domestic Violence;
- (b) the applicant's perceived risk of further harm or violence;
- (c) the personal and material interests of the applicant; and
- (d) the best interest of the child/children.

13. The magistrate should bear in mind that he/she can deal with such an application only if the child is adversely affected emotionally or physically by lack of an order and this must be alleged on the papers.

14. When considering emergency monetary relief in terms of Section 7(4) it should be distinguished from Section 7(3) read with Section 7(1)(c).

- the emergency monetary relief should be preceded by a financial enquiry on the applicant's needs and the respondent's ability to satisfy such need.

An order for the emergency monetary relief should state:

- (a) the amount payable;
- (b) the date on which the date falls due;
- (c) duration of the order; and
- (d) the pay point.

The magistrate should explain the nature and the importance of the monetary relief and inform the applicant to lay a maintenance complaint.

6. The same principle applies when the applicant makes a request to have the protection order varied or set aside.

PART C:

1. The magistrate should: Explain to the applicant the temporary nature of the interim protection order,
2. Inform the applicant of her/his legal options, including securing maintenance, custody, evictions and divorce.⁷
3. Inform the applicant that she/he can make supplementary statements to the police or the courts, should she/he have any additional information or evidence pertaining to her/his case.
4. Inform the applicant of what she/he can do if the respondent breaches the conditions of the interim protection order *viz-laying* a criminal charge.
5. Explain to the applicant the fact that the interim protection order will not be in effect until it has been served properly on the respondent.
6. Explain the applicant's right to call witnesses and his/her right to have them subpoenaed on his/her behalf.
7. Explain to the applicant why the court has added or removed particular conditions applied for in the application for the interim protection order and the extent to which the court can intervene.
8. Explain to the applicant the reasons for not granting the interim protection order. These reasons must be noted in the file, but this does not mean furnishing written reasons for the decision (in terms of Rule 51 of the Magistrates Court Act).
9. Explain to the applicant that he/she must return to the court on the return date at the time and place of a hearing. Further he/she should be informed that if he/she fails to attend and or remain in attendance, in the case where disputes arise, the matter might be struck off the roll and warrant of the arrest of the respondent cancelled.
10. Explain that the respondent can anticipate the action.

11. Ensure when signing the order that the respondent's right to anticipate the action is indicated on the order.
12. When the order is served on the respondent, a form is directed to respondent advising him/her of his/her right to Legal Aid/legal representation should be attached for service.
13. Right to withdraw and/or amend the application and procedure thereof should be explained to the applicant.

THE RETURN DATE (FINALISATION OF PROTECTION ORDER)

1. Both parties should be reapprised of their right to legal representation on the return date and of the availability of legal aid.
2. Where neither party is present on the return date, the decision whether to grant the final protection order should only be based on:
 - (a) whether the interim order and notice to appear was brought to the attention of the respondent or whether he had knowledge of same;
 - (b) whether there is evidence, from the papers, of domestic violence; and
 - (c) where the order was confirmed in the absence of both parties, both the record and the order to be served should:
 - be indicative of this; and
 - should explain the parties' rights to apply for setting aside or the variation of the order.
3. It is recommended that when the:
 - 3.1 applicant is not present on the return date, the Presiding Officer should, depending on whether on the papers there is evidence of domestic

7. As a magistrate you may explain the legal options available under Domestic Violence Act or any other relevant Act to the applicant, without necessarily 'advising' the applicant on which options he/she should take..

domestic violence

violence, grant the final order unless the respondent disputes material allegations; and

3.2 where the respondent denies material allegations, in exercising his/her judicial discretion whether to postpone the matter or SOR, the Presiding Officer should be guided **inter alia** by the seriousness of the offence.

4. D/V matters should not be postponed unless absolutely necessary, e.g. in cases of further evidence being required where a dispute of facts arises, requests for a Social Worker's report, etc.
5. The court should always confirm with the applicant whether she is continuing with her application.

The presiding officer should confirm the receipt of the interim order by the respondent. Where the service is confirmed and/or where if denied, the respondent waives his right to proper service, the presiding officer should:

- confirm the contents of the complainant's affidavit with the respondent;
- where there is no dispute of material allegations, in order to avoid protracted litigation, the court should adjudicate the matter on the papers;
- where however there is a dispute of material allegations, oral evidence should be led.

6. Instead of requiring the applicant to file an affidavit withdrawing the application, the Presiding Officer should take the applicant's evidence under oath.
7. If a postponement is necessary for the above or any other reason, the interim protection order remains in force and should be extended until the next date of hearing and the parties should be informed of same.
8. When considering setting the interim order aside, the court must take into consideration the social context of domestic violence.⁸
9. In cases where the removal of the respondent is ordered, but does not specify a time period, the court

should advise the applicant and respondent that they may apply to the court to have this set aside in the future.⁹

10. The court must further explain:

- (a) consequences for the respondent in case of breach;
- (b) appeal rights where there was dispute;
- (c) right to apply for variation or setting aside of the order; and
- (d) where an order for the removal of one of the parties from the shared residence/premises or an order barring access to the shared residence/premises is confirmed, the court should:
 - (d)(i) Clearly explain to the respondent the effect of the order, viz permanency that can only be set aside by way of variation procedure or on appeal or review.
 - (d)(ii) Where the parties are married, the effect of creating a permanent separation which one normally obtains through a divorce.
 - (d)(iii) The fact that the court cannot address the propriety rights enjoyed by the parties, e.g. sharing of the common estate whether both parties were married or staying together and to this end,
 - (d)(iv) Should advise the respondent of the alternative forum for adjudication on propriety issues.

11. Where there was retrieval of a firearm, the presiding officer should direct the clerk of the court to forward a certified copy of the proceedings to the National Commissioner of the South African Police Service to enable the latter, to act in terms of Section 11 of the Arms and Ammunition Act 1969 as amended by the Firearms Control Act 60 of 2000.

8. The same principles apply to the setting aside or variation of a final order.

9. This may also apply to orders that provide for access to children and financial relief.

BREACHES/VIOLATION OF PROTECTION ORDERS

1. Where a breach of a protection order has been committed, the following issues should be taken into consideration.
 - (a) the general principles of criminal law (i.e. grounds of justification, knowledge of unlawfulness and intention);
 - (b) the pervasive or repeated nature of domestic violence; and¹⁰
 - (c) the social context of the applicant and the accused.
2. When sentencing a person convicted for breaching a protection order, Magistrates must:
 - (a) Consider the seriousness of domestic violence, including the potential lethality of some domestic violence cases.
 - (b) Consider further risk/harm to the applicant.
 - (c) Work towards more individualised and creative sentences (i.e. incarceration or supervision on weekends, where the violence tends to escalate on the weekends).
 - (d) Make every effort to use pre-sentence reports.
 - (e) Consider a referral to a rehabilitation centre as a condition of a suspended custodial sentence. In this instance a social worker's report is a pre-requisite.

BAIL

1. Magistrates should be pro-active and ensure that the following have been taken into consideration during a bail hearing:
 - (a) that the complainant has been informed of the hearing and of the decision to grant or not grant bail, including the conditions of bail;
 - (b) that the accused is fully informed of the allegations made by the complainant; and
 - (c) any witnesses or witness statements to support the allegations.
2. Relations should be strengthened with correctional service to closely monitor domestic violence cases (pending investigations).¹¹
3. Periodic supervision or monitoring can be used as a condition of bail.
4. The court must inform the accused that the protection order is still in effect during the course of investigation into the matter of the accused's breach. Any other contraventions of the protection order will constitute an additional charge of breaching the order.
5. The court must inform the complainant that the protection order is still in effect and that she/he must report any additional contraventions of the protection order.

10. *S v Baloyi* 2000(1) SACR 81 (cc)

11. In terms of section 62(f) of the Criminal Procedure Act which states that:

Court may add further conditions of bail. Any court before which a change is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail –

(f) which provides that the accused shall be placed under the supervision of a probation officer or correctional official.

QUESTIONNAIRE

ADDITIONAL CONSIDERATIONS

1. Magistrates should assist in ensuring that clerks and volunteers are adequately educated on the contents (obligations and expectations) of these guidelines.
2. The duties of the court clerks should be detailed at transformation meetings, justice/community meetings or court management meetings.
3. Magistrates should be aware of – and apply the appropriate level of flexibility – when handling matters with literate and semi-literate parties.

QUALITY CONTROL QUESTIONNAIRE: DOMESTIC VIOLENCE INTERIM ORDERS

1. Are proceedings *in camera*?

2. Is right to legal representation explained?

3. What is the norm on granting interim orders? See Section 5(1). It is on the affidavit only or interview of the applicants as well or both?

4. Are the contents of the affidavit confirmed with the applicant?

5. Is the applicant advised of criminal effect of domestic violence, where practical, and advised to lay a criminal charge as well?

6. Is the applicant advised that an interim order and warrant of arrest will be released on return of service?

7. If not, explain how the court deals with application in case of non appearance of applicant on the return date.

RETURN DATE: FINAL ORDER

1. Are proceedings *in camera*?

2. Is proof of service on file?

domestic violence

QUESTIONNAIRE

3. On appearance by parties, was right to legal representation explained?

4. Confirmation with Respondent on receipt of interim order.

5. Explanation of right to Respondents in case of short service or non service.

6. Has Complainant confirmed contents of affidavit?

7. Was Respondent's right to XX. Was Section 6(3) – (no direct XX) considered?

8. Was Complainant given opportunity to call witness(es)?

9. Was Respondent's rights on closure of applicant's case explained?

10. Was Respondent given opportunity to call witness(es)?

11. Were both parties given an opportunity to address the Court?

12. Was the Effect of final order and non-compliance explained?

13. Was the principle of an Offence created by Section 17(d) (false statement by complainant), explained to complainant?

14. In the event that the evidence supports a seizure of arms and dangerous weapons, was order in terms of Section 9(1) Act 116 of 1998 as amended by the Firearms Control Act 60 of 2000 considered?

15. Were Appeal and Review proceedings explained?



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