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**SOUTH AFRICAN LAW COMMISSION**

**ISSUE PAPER 2**

**PROJECT 100**

**FAMILY VIOLENCE**

**Closing date for comments 15 August 1996**

**ISBN: 0-621-17495-5**

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## **INTRODUCTION**

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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## **PREFACE**

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This issue paper (which reflects information gathered up to the end of March 1996) was prepared to elicit responses and, together with those responses, to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

The Commission will assume that respondents agree to the Commission's quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations under the Constitution of the Republic of South Africa, Act 200 of 1993.

Respondents are requested to submit written comments, representations or requests to the Commission by 15 August 1996 at the address appearing on the previous page.

The project leader responsible for this project is Ms Z Seedat and the researcher, who may be contacted for further information, is Mr W F Schröder.

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## CHAPTER 1

### ORIGIN OF THE INVESTIGATION AND INTRODUCTION

#### 1. REPRESENTATIONS

The Commission received a request for the inclusion in its programme of an investigation concerning the Prevention of Family Violence Act 133 of 1993 from Attorneys: Pincus Matz, Marquard and Hugo-Hamman. According to them the Act represents a radical and, in their view, an unjustified departure from the **audi alteram partem** principle. They are of the opinion that this principle is a fundamental principle of our law and one which cannot and should not be abandoned under any circumstances. At the most, particular circumstances may justify a temporary suspension of the principle. It is for this reason that the Supreme Court has traditionally insisted that applicants make out a proper case for urgency and explain to the Court why such order should be granted without any notice to the other side.

They argue that the Act is in need of urgent revision and suggest that magistrates should not grant such orders to applicants unless it is evident that it is justified in the circumstances. Where interdicts are granted **ex parte**, they should be **interim** interdicts as normally provided for. Where conflicts of fact arise, magistrates should be granted a discretion and should be encouraged to act as mediators.

#### 2. INCLUSION OF INVESTIGATION IN THE COMMISSION'S PROGRAMME

At its meeting held in Pretoria on 23 and 24 February 1996 the Commission considered and approved the inclusion of an investigation relating to family violence in its programme. The Commission decided to compile this issue paper in order to facilitate a focussed debate .

It is contemplated that following this issue paper draft legislation will be prepared and published for general knowledge and comment.

**CHAPTER 2****THE PROBLEM****3. THE PREVENTION OF FAMILY VIOLENCE ACT, ACT 133 OF 1993**

This Act came into operation on 1 December 1993 and provides for the following:

- (a) the granting of interdicts with regard to family violence;
- (b) an obligation on certain persons to report cases of ill-treatment of children, and
- (c) the conviction of a husband of the rape of his wife.

Section 2(1) of the Act provides that any party to a marriage or any other party who has a material interest in the matter on behalf of the applicant may apply to a judge or magistrate in chambers for an interdict against the other party to the marriage in which the latter is prohibited from performing any of the following acts:

- (a) assaulting or threatening the applicant or a child living with the parties or with either of them [section 2(1)(a)];
- (b) entering the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated [section 2(1)(b)];
- (c) preventing the applicant or a child who ordinarily lives in the matrimonial home from entering and remaining in the matrimonial home or a specified part of the matrimonial home [section 2(1)(c)]; or
- (d) committing any other act specified in the interdict [section 2(1)(d)].



It is interesting to note that the words "parties to a marriage" are construed as including a man and a woman who are or were married to each other according to any law or custom and also a man and a woman who ordinarily live or lived together as husband and wife, although not married to each other.

In granting the interdict the judge or magistrate must make the following orders:

- (a) authorise the issue of a warrant for the arrest of the respondent [section 2(2)(a)];
- (b) suspending the execution of such warrant subject to such conditions regarding compliance with the interdict as he or she deems fit [section 2(2)(b)]; and
- (c) advise the respondent that he or she may, after 24 hours, notice to the applicant and the court concerned, apply for the amendment or setting aside of the interdict [section 2(2)(c)].

Provision is made for a speedy, inexpensive procedure to obtain an interdict without legal representation. The application is made by way of affidavit. The affidavit should state the facts upon which the application is based and the nature of the order applied for. Supporting affidavits may also accompany the application which must be handed to the clerk of the court. On receiving the necessary documentation, the clerk of the court must immediately submit it to a judge or magistrate in chambers.

The interdict and the orders will be of force and effect only after service on the respondent. After service has been effected, the registrar must deliver or send a certified copy of the interdict and the original warrant of arrest to the applicant. If the applicant requires the execution of the warrant he or she must present an affidavit to a peace officer in which it is stated that the respondent has breached one or more of the conditions of suspension of the warrant. After the respondent has been arrested, he or she may be released only if his or her release is ordered by a judge or a magistrate. He or she must, however, be brought before a judge or magistrate as soon as possible but not later than 24 hours after his or her arrest. A summary inquiry into the alleged breach of the conditions of the order suspending the warrant is then held by a judge or

magistrate. If the respondent has contravened the interdict he or she can be sentenced to a fine (no maximum is specified) or up to 12 months' imprisonment or both.

Section 4 of the Act further provides for an obligation to report the ill-treatment of children. It provides that any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to a reasonable suspicion that such child has been ill-treated or suffers from any injury the probable cause of which was deliberate must immediately report such circumstances to a police official, a commissioner of child welfare or a social worker referred to in section 1 of the Child Care Act, 1983.

In the light of the comments received and the criticism that has been voiced in various legal periodicals the question arises as to whether the application and workability of the Act should be revised.

## CHAPTER 3

### EVALUATION OF THE ACT

Although the aim of the Act is laudable, the manner in which it provides for interdicts appears to be seriously flawed. Concern has been expressed at the apparent disregard for the **audi alteram partem** rule. There seems to be a general feeling that this problem could be solved if a rule nisi - an interim order with a return date - were granted.

The magistrates of the Cape Peninsula met to discuss the application of the Act and to identify problem areas. The following problem areas, which correspond with those raised in the comments received by the Commission, were identified:

(a) Applicability of Act

Section 2(1) of the Act reads as follows:

2(1). A judge or magistrate in chambers may, on application in the prescribed manner by a party to a marriage (hereinafter called the applicant) or by any other person who has a material interest in the matter on behalf of the applicant, grant an interdict against the other party to the marriage.....

It seems that the applicability of the Act should be broadened to enable parents to obtain interdicts against their children and vice versa. The question arises whether there is a need to provide some form of relief for family members who are not "parties to a marriage" as defined in section 1(2) of the Act. The Act also appears to be unconstitutional in that, by omission, it denies relief to a party in a homosexual relationship.

The further question arises whether the Act should not be amended to include family members that fall beyond the immediate family scope, for example an

aunt, uncle, niece or nephew. There seems to be the argument that such an amendment would negate the spirit of the Act which is to prevent violence between parties living together as a family.

(b) Jurisdiction

There appears to be some confusion as to precisely how jurisdiction is conferred on any particular court in terms of the Act as regards the initial application for an interdict. Under the normal rules of civil jurisdiction the applicant must apply to the court having jurisdiction over the respondent. Jurisdiction of the Magistrate's Court is governed by the Magistrate's Court Act, 32 of 1944, and the Magistrate's Court has jurisdiction only in respect of the persons as described in section 28 of the Magistrate's Court Act. It seems that under these circumstances section 28(1)(d) is applicable since the whole cause of action arose in that court's jurisdiction. However, should this present problems in practice then jurisdiction should be spelt out explicitly in the legislation.

It seems that problems are being experienced in cases where an applicant leaves the jurisdiction where he or she obtained the interdict and is then advised that he or she must obtain a new interdict in the new area as the existing interdict does not apply. If this is the case then the legislation needs to be explicit in this regard.

(c) Legal representation

It would appear that the various magistrates' offices have different attitudes to legal representation at the various stages of the interdict. It depends to a large extent on whether or not oral evidence is allowed by the various magistrates. There is a feeling that the Act should be more specific about legal representation and allow it at all stages of the process.

On the other hand, the Act was promulgated to provide speedy and inexpensive relief to a party. The moment legal representation is allowed it is more or less incumbent on the other party to obtain such representation which causes costs to escalate. Supporters of this latter idea feel that legal representation should be expressly excluded, except as regards review and appeal procedures.

(d) Hearing of oral evidence

The Act appears not to allow for oral evidence. No uniform approach is applied by the different courts. The poor quality of the original affidavit made by an applicant at the time of applying for an interdict frequently necessitates oral evidence, particularly when an order is made for the eviction of the respondent from the matrimonial home.

On the other hand, it is argued that the hearing of oral evidence would again negate the spirit of the Act since it would only increase the workload of already overworked magistrates.

(e) Service of interdicts

The general feeling of magistrates is that warrants should be issued only where there has been personal service on the respondent and that the Act should be amended to make this clear.

However, there is also a feeling that personal service would defeat the main objective of the Act, namely to prevent violence.

The general feeling seems to be that provision should be made for service by the South African Police Service, which service is, at present, regarded as invalid.

(f) Duration of interdicts

The Act makes no provision for the automatic cancellation of interdicts after a certain period of time. The opinion was expressed that some sort of limit should be set on the duration of interdicts. Although this proposal is not without merit, it will, if implemented, cause a variety of administrative problems, for example giving notice to the applicant will be essential and in many cases the applicant will no longer be traceable on account of a change of address.

The question also arises whether the warrant for arrest would also lapse? A respondent who is arrested on a warrant issued in terms of an interdict that has lapsed would be in a position to sue for unlawful arrest.

(g) South African Police Service

Two problems were raised in relation to the SAPS'S role in the interdict process. First, it would appear that the police are refusing to accept criminal charges, particularly of assault, until an interdict has been granted. Second, persons are being released with a warning after arrest by the police despite the fact that the Act makes it clear that no person may be released unless a judge or magistrate orders his or her release [section 3(2)9(a)]. In addition, according to information at the Commission's disposal, the Police tend to regard family violence as a civil matter and are reluctant to intervene.

(h) Review and appeal

The Act currently makes no provision for appeal or review, nor for bail pending review. It is felt that the legislature should spell this out in the Act.

In a publication "Violence against Women in South Africa" the Human Rights Watch evaluated the Act under consideration and drew attention to the same shortcomings.

The Act was similarly reviewed at a **Convention on Domestic Violence: heal the family** held at UNISA on 22 September 1994, and the Convention came to the conclusion that changes to certain provisions of the Act are needed.

(I) Other concerns

- \* The Act does not adequately define the grounds upon which an interdict should be granted. A comprehensive definition of family violence is suggested which should include physical, mental and sexual abuse.
- \* The Act offers no protection to a victim who is stalked by an aggressor. The aggressor follows the victim, monitors his or her daily movements and generally harrasses him or her.
- \* Regulations under the Act should make clear provisions for the procedure to be followed after hours since a 24-hour service is not available to applicants.
- \* The Act does not address the issue of rehabilitation and counselling for perpetrators of violence.
- \* The exclusion of the respondent from the matrimonial home - should this be allowed and under what circumstances?
- \* The Act does not allow for the applicant to apply for the amendment or setting aside of the interdict .

## CHAPTER 4

## THE WAY AHEAD

It is suggested that the issues and options outlined above ought to be debated thoroughly before any particular direction is taken. Based on the outcome of such discussions legislation in respect of family violence will be proposed. The comments of all parties who feel that they have an interest in this topic or who may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate whether there are any other issues and/or options that they feel should be explored. **All the relevant role players, organisations and institutions that are likely to be affected by possible legislation should participate in this debate.**

To facilitate a focused debate, respondents are requested to formulate concise submissions with the following questions in mind:

- \* Is there a need for the revision of the Prevention of Family Violence Act, 1993?
- \* in what way should the Act be amended?
- \* will amendment of the Act be able to address all issues concerning family violence and, if not, what other measures should be provided for?
- \* is there a need to address violence against women more specifically and, if so, what should the point of departure be?

The Minister of Justice has recently indicated that the matter is regarded as one of some urgency. Interested parties are accordingly requested to consider this paper and to respond before 15 August 1996.