



GAUTENG PROVINCE

29 JULY 2020

HIGH LEVEL SESSION ON GENDER BASED VIOLENCE AND FEMICIDE

DELIBERATION ON THE CRITICAL POLICY PILLARS:

To inform the enactment of a legislative instrument on GBV and Femicide in South Africa

INPUT THEME:

Gender Based Violence and Femicide; and the Rule of Law in South Africa: Toward Zero
Tolerance Policy for the Killing of women

Greetings

The Deputy Chair of the National Council of Provinces("NCOP"), Hon SE Lucas

The Honourable members of parliament

...

Ladies and gentlemen

As SAWLA we appreciate the honour of being invited to deliver an input on deliberations on the critical policy pillars as canvassed in the national strategic plan on gender-based violence and femicide in order to inform the enactment of a legislation instrument on GBV and Femicide in our country.

SAWLA GAUTENG PEC MEMBERS

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Before I deliver my input, I would have erred if I fail to recognize all the women of our country as they continue, with a resilient and unyielding spirit to soldier on and craft a better South Africa by refusing to accept anything but, that which is promised and enshrined in the Bill of Rights; and challenging head on, every aspect of society that stands stubbornly to oppose their rights to these promises. You are indeed a beacon of hope for all women in the world and the continent at large.

I further wish to remember all the victims of GBV and all women that succumbed to death due to gender based violence in all forms and femicide.

I wish also to acknowledge our government's efforts to curb GBV and Femicide.

The road to freedom for the women of our country has indeed been long, sadly, with all the interventions, it is not yet Uhuru.

That having been said, I wish to express gratitude to all who have been working tirelessly in order to find solutions for this societal scourge, may God Almighty see you through, so that South Africa may be safe for ALL.

Since the declaration signed by the delegates of the Presidential Summit against GBV and F which was held on 01 and 02 November 2018 in Pretoria, the fight against GBV and F has taken a historic turning point, as government has embarked on an action plan in order to respond comprehensively to eradicate GBV and F.

This multi-sectoral approach, has led to the establishment of the Interim GBV and F Committee, which led to the approval of the Emergency Response Action Plan ("ERAP").

We note from the ERAP report dated 30 April 2020, that the role of ERAP has been building and strengthening state capacity; resource mobilization; programme development and building institutional resilience.

We note further that while the NSP was being crafted, ERAP was being implemented, despite the arrival of COVID 19 on our shore, which commitment is commendable, regard being had to the challenges we are facing as a country as a result of COVID 19.

The NSP having been adopted and published, and the ERAP process having come to a conclusion as civil society we welcome the move to the next phase in the fight for GBV and F.

The ground having been prepared and ready for the GBV and F Council to assume its work, we share the President's hope that this phase ushers in a new accelerated pace to combat GBV and F and that many more milestones will be reached.

We, also, remain unequivocal that South Africa's peace, stability and prosperity rest on our enduring commitment to the constitutionally guaranteed right to equality between men and women¹.

On that note, I now make my input on the NSP on GBV and F, and in particular the pillars adopted in the NSP vision. The focus of this input is where I believe as the legal sector we are best placed in relevance, i.e, The Third Pillar- the Justice, Safety and Protection Pillar.

BACKGROUND

I first set out the background to this Pillar as canvassed in the NSP, which informs my input.

1. The extent of GBV and Femicide in South Africa²

1.1. Femicide

1.1.1. The 2009 national femicide study found that 1024 females were murdered by an intimate partner and further 768 female were killed by a non-partner.

1.1.2. Intimate femicide is therefore the leading cause of female murder representing more than half (56%) of all women killed.

¹ Forward: Emergency Response Action Plan on Gender-Based Violence and Femicide dated 30 April 2020

² Page 24-NSP

1.1.3. The same study found rape femicide was identified in every 1 of 5 women killed (19.8%).

1.1.4. The increase in media reports and increase in female homicide reported by police in the SAP report of September 2019, suggest that femicide is not decreasing³.

1.2. Domestic Violence/ Intimate Partner Violence

1.2.1. Numerous prevalence studies since 1998 from different settings and populations confirm that GBV is highly prevalent and endemic in South Africa with physical violence being the most common form of GBV reported in studies.

1.3. Sexual Violence⁴

1.3.1. Sexual violence reported by police is on the rise, although underreporting to the police is a commonly known fact for sexual offences. According to a 2017 Gauteng study only one in 23 women who reported sexual abuse also reported to police. The true number of sexual offences is therefore significantly higher than what is reported to police, and 37% of men reporting to having raped a woman or girl.

1.3.2. An additional feature of sexual abuse in South Africa is the age of victims reporting to police with a study reporting that almost half of sexual offence complaints are children (46%).

1.3.3. Daily reports of sexual violence in the media attest to the normalcy of GBV across settings, mainly perpetrated by those who are supposed to protect the public (i.e the recent Independent Police investigative Directorate ("IPID") report an increase of rape by police officers and 230 increase of sexual abuse cases perpetrated by teachers in the last five years.

1.4. Systemic failure to protect, support and attain justice⁵

1.4.1. The special Rapporteur Report on VAW in South Africa highlighted:

- 1.4.1.1. the uneven geographic availability and distribution of intersectoral responses to GBV;
- 1.4.1.2. uneven quality and range of services provided to women and girls living in informal settlements and rural areas;
- 1.4.1.3. Specific groups of women, such women with disabilities and transwomen face very particular challenges in accessing services;
- 1.4.1.4. Suggestion that the failure of Domestic Violence Act to protect women was because of gender neutral nature, which failure resulted

³ Updated data on femicide have not been provided in the NSP, it is however reported that such are underway from different initiatives.

⁴ Page 26-NSP

⁵ Page 30-31-NSP

in the recurring theme of a lack of access to essential services for safety, protection and recovery. Which services include:

- 1.4.1.4.1. Timely health care;
- 1.4.1.4.2. Police response;
- 1.4.1.4.3. Access to justice (Including Legal Aid Centre and other information on their rights);
- 1.4.1.4.4. Safe accommodation;
- 1.4.1.4.5. Placement in alternative care which includes shelters, as well as foster care and child/youth care centres;
- 1.4.1.4.6. Even where basic support services exist they are:
 - 1.4.1.4.6.1. typically underfunded;
 - 1.4.1.4.6.2. not of sufficient quality and/or;
 - 1.4.1.4.6.3. lack appropriately trained staff to provide support and care for survivors
- 1.4.1.4.7. All leading to secondary victimization.

1.4.2. Further information available to me, which I found to be relevant and alarming at the time of drafting this input is the different types of non-compliance pinpointed by the IPID's oversight, which included⁶:

- 1.4.2.1. failure to inform victims on where and how to access counselling services;
- 1.4.2.2. failure to inform victims on where and how to obtain a protection order;
- 1.4.2.3. failure to keep a copy of the protection order after it had been obtained from court;
- 1.4.2.4. failure to locate victims and establish whether they were safe;
- 1.4.2.5. failure to note reason why no charge or arrest was made;
- 1.4.2.6. failure to note the incidents in the domestic violence register;
- 1.4.2.7. failure to open a docket and refer the matter to the National Prosecuting Authority (NPA) for decision to prosecute;
- 1.4.2.8. failure to search and seize firearms and ammunition;
- 1.4.2.9. failure to take a witness statement;
- 1.4.2.10. failure to inform the victim on where and how to access medical assistance;
- 1.4.2.11. failure to issue a notice against the alleged transgressor to appear in court;
- 1.4.2.12. failure to complete the J88 (medical report) and other relevant information.

1.4.3. The Soul City report found the failure to assist victims is directly linked to the Domestic Act not being fully costed and not placing any obligations on the Department of Social Development for the provision of care and

⁶ IPID input on implementation of Domestic Violence Act: Meeting summary: Police Committee: Parliamentary Monitoring group 18 August 2015: Parliamentary Monitoring Group Website-official reports and/or inputs could not be obtained, the information can easily be verified by relevant authorities.

support services or the Department of Health or National Prosecuting Authority.

1.4.4. This points to lack of accountability and responsibility for effectively addressing GBV. Research on social welfare spending points to the poor and low spending on GBV which shifted the burden towards non-governmental organisations (NGO's) for service delivery. The DPME Diagnostic Review (2016) estimated 60% of social services for women and children are provided by civil society, which they are well placed to respond to, given their location within communities. (I pause to note that this speaks to the spatial planning of the apartheid regime where essential services were placed far from where the majority black people lived), however the women working in the NGO's and providing the services are inadequately and unfairly remunerated.

1.4.5. A review of the implementation of the Act in 2012 by Tshwaranang found that a substantial percentage of police officers had limited knowledge of the provisions of the Act, more specifically relating to their responsibilities, this suggesting that the police may view domestic violence as a private matter rather than a crime. The study found that women withdraw their cases as a result :

1.4.5.1. Inefficient courts;

1.4.5.2. Unfriendly court process;

1.4.5.3. Long waiting periods due to shortage of staff to process their applications for protection orders

1.4.6. The attrition of rate of rape cases from the national rape study in 2012, in which only 542 of a total of 3953 rape cases finalized with verdict and 340 out of the same number with guilty verdict attest to lack of effectiveness of the justice system and this is an impediment to victims of GBV seeking help and further increases their risk of more violence and even femicide.

1.4.7. According to the Shukumisa (2016): Thuthuzela Care Centres Compliance Audit and Gap Analysis, particular groups of women who are extremely vulnerable to violence as a result of intersecting vulnerabilities, require specialized response care and support, but civil society report on the implementation of the Sexual Offences Legislation forum a clear lack of understanding of the special needs of marginalized groups.

1.4.8. The value of shelters is demonstrated in the 2018 study that found that in addition to providing women with emergency accommodation, shelters met women's basic needs, provided physical and psychological safety, meeting much needed care and support for women and children. The study found that 75% of those who left the shelters were living free of their abusers. However the study also found that challenges with accessing funding often placed rural shelters at a disadvantage, thus limiting their

ability to render comprehensive services and that the needs of women's children accompanying them to shelters were not catered for.

1.4.9. Victim unfriendliness remains a problem at many Thuthuzela Care Centres ("TCC's") and contributes to secondary victimization. This is largely due to:

- 1.4.9.1. continued insensitive emergency (EMS) and SAPS staff;
- 1.4.9.2. inadequate counseling rooms to ensure privacy and only half having separate entrances for perpetrators;
- 1.4.9.3. Many TCC's not child friendly despite children representing 60% of the cases

1.5. Legislative and Policy Framework to respond to GBV in South Africa

1.5.1. The Constitution of the Republic of South Africa sets the framework for an effective legislative response to GBV compliance thereto a number of policies and legislation are in place in order to respond thereto:

1.5.1.1. The National Crime Prevention Strategy (NCPS) 1996 establishes crimes of violence against women and children as a national priority;

1.5.1.2. Section 51 of the Criminal Law Amendment Act 105 of 1997 prescribes minimum sentences for certain offenses, including:

- 1.5.1.2.1. Murder;
- 1.5.1.2.2. Rape;
- 1.5.1.2.3. Indecent Assault;
- 1.5.1.2.4. Sodomy;
- 1.5.1.2.5. Kidnapping;
- 1.5.1.2.6. Child Stealing;
- 1.5.1.2.7. Assault when a dangerous wound is inflicted;
- 1.5.1.2.8. Arson;
- 1.5.1.2.9. Malicious injury to property;
- 1.5.1.2.10. Breaking and entering premises with an intention to commit an offense.

1.5.1.3. The Criminal Procedure Second Amendment Act 85 of 1997 regulates bail regime by shifting the onus in bail applications to the accused on serious offences, eg, murder and rape.

1.5.1.4. Domestic Violence Act 116 of 1998, its objective, among others is to afford the victims of domestic violence protection from domestic abuse..

1.5.1.5. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, aimed at bridging the gap between common law and statutory law in relation to sexual offence crimes, in order to provide adequate protection to the victims of sexual offences.

- 1.5.1.6. The Criminal Law (Sexual Offences and Related matters) Amendment Act 6 of 2012, which has provided for:
 - 1.5.1.6.1. the national policy framework on management of sexual offence matters in order to create a coordinated response to sexual violence, in particular coordinated planning, resource allocations and execution of services.
- 1.5.1.7. The Criminal Law (sexual offences and related matters) Amendment Act 6 of 2012, which provides for effective prosecution and conviction of offenders.
- 1.5.1.8. The National Development Plan, the Integrated Social Crime Prevention Strategy 2100
- 1.5.1.9. White Paper on Safety and Security 2016
- 1.5.1.10. The department of Social Development: National Policy Guidelines For Victim Empowerment [in conjunction with United Nations Office on Drugs and Crime ("UNODC") and European Union ("EU")], is to be considered as well.

The current legislative framework is sound and can be used to further the aims of this project. What you will require are a few material amendments, for instance, the justice system is consistently frustrated when, after investigating and completing a case docket, the victim then turns up and withdraws charges. This is frustrating the justice system and provides no incentive to police to take these cases seriously nor does it provide any incentive to abused women to report cruel and criminal conduct. The victims are often manipulated by the perpetrators to withdraw charges. A simple amendment can remedy this. However, this must be thought through, there has to be adequate support for victims who often suffer economic blackmail.

1.6. Global and Regional Obligations and Commitment

- 1.6.1. Input to be made in follow up session on a comparative study of applicable legislation enacted by signatory countries to the obligations and commitments in expression thereto; and the effectiveness thereof.

I now turn to make input on the five year outcomes adopted in the NSP on the third Pillar on Justice, Safety and Protection.

2. Five Year Outcomes

2.1. This pillar's aim is to⁷:

- 2.1.1. address the systemic challenges that have resulted in inadequate response to the management of GBV F cases, particularly domestic violence, sexual offences, child homicide, human trafficking, and other related matters;
- 2.1.2. facilitate access to justice, safety and protection in response to the needs of victims of GBV using domestic legislation and policies and where applicable international and regional protocols;
- 2.1.3. addressing the infrastructure and resourcing challenges that have obstructed the optimal delivery of justice to different survivors.

2.2. I note that the pillars are centered around bringing about specific changes over the next ten years, which are broken down into the five year outcomes.

2.3. I have endeavored to align my input to resources that are already available or can be made available

2.4. I have done so because, government largely has capacity, but is largely underutilized or with the right intervention and/or coordination between different stakeholders and/or better management of resources, we can immediately have positive results.

3. Pillar Three ("3") Justice, Safety and Protection- divided into 3 sub topics, summarized and re-organised in the following manner:

3.1.1. Access to criminal justice that is:

- 3.1.1.1. Responsive ;
- 3.1.1.2. Quick
- 3.1.1.3. GBVF sensitive (Alarmed by the pandemic of GBVF)
- 3.1.1.4. Efficient (All the components to deal with it are in place) and;
- 3.1.1.5. Effective (achieves the required results in each case)
 - Access to justice is directly linked to the police ability to respond to the every call for help.
 - To be GBV sensitive means:
 - Alarmed by the pandemic. Understanding the trauma coupled with the call and have the necessary Counselling skills and medical intervention required in order to deal with GBV;
 - Offer help in a manner that upholds the right to privacy and affirms the dignity of the victim.

⁷ Para 4.3, Page 48 NSP

- The police their training is not meant to equip them to be sensitive, unless they are social workers by training.
- In order to bring sensitivity to policing, it is imperative that each police station be equipped with a social worker/s on a 24hr watch.
- This can be achieved through aligning the Thuthuzela Centres with all our police stations, and the best way to achieve that is to have the centres at the police stations or in close proximity thereto.
- The centres must be fully equipped themselves and operating at their optimal levels at all times.
- The Centres must be equipped with administration staff, medical intervention on call of both a nurse and doctor, adequate accommodation, i.e accomodation with basic amenities: clean bed with fresh linen, tv set, radio, books and magazines, cater for children (toys etc, telephone, bathroom with clean towels, toiletries, food items (to see people through the night), the standard that one would find in an entry level lodge.
- The Centres must have capacity to divert women who cannot return to their places of dwelling to shelters.
- Police to must provide security for the Centres, where they are based outside the police stations, including the shelters, where necessary.
- If the police are to be efficient and effective, guidelines must aligned accordingly and be implemented and monitored by an independent oversight body, who receives data daily from the police stations involved. The monitoring body must have authority to compel compliance, including approaching court for that purpose (this body could be the GBV & F Council). Government tends to respect the Court, by complying with Court Orders, but that is not always a deterrent. If accountability with regard to adverse Court findings is to induce delivery, this will strengthen consequence management at SAPS.
- For the judiciary to be effective the roll out of Sexual Offences Courts must be fast tracked, these must be aligned to every magisterial district. The current number is not adequate. We have about 500 magisterial districts, without counting the sub-districts, but only 93 Sexual Offences Courts. These Courts must have infrastructure that is friendly to the victims of all ages, which will include, dedicated entrances to victim, etc-as tabled in the 2013 report on re-instatement of the Sexual Offences Courts.
- Applicable legislation must immediately be amended in order to extend the protection provided to victims of Domestic

Violence in terms of section 11 of the Domestic Violence Act (that is prohibition of publication of information on GBV cases that reveals identities of victims), as most women do not come forward because they are not willing to trade their right to privacy for justice. Both these rights can be protected simultaneously in order for the victim to lead a normal life beyond the ordeal. This will impede a serious barrier to justice.

- I note the contention that the Domestic Violence Act has failed, I do not agree with it. My view is that it is the people who have the obligation to implement it that have failed as evident above and of not is the lipid report on implementation.

3.1.2. Strengthen capacity within the justice system in order to:

3.1.2.1. Address impunity

3.1.2.2. Effectively respond to femicide

3.1.2.3. Facilitate justice for survivors of GBV

- In order to address impunity and effective response to femicide:
 - This can be achieved by deterrence through sentencing & consistency thereof by our Courts, there must be a monthly publication on all GBV & F matters, that records all GBV & F matters, this must be made available to the public as well.
 - Although sentencing is in the domain of presiding officers in whose discretion it is to determine an appropriate sentence, which is arrived at after having applied their minds to all circumstances surrounding the commission of the crime, I think the issue of inconsistency in sentencing in GBV and F matters, needs to be addressed, __ in the case of Femicide I propose amendment of the CPA in order to position Femicide at the same level as that of repeat offenders for murder and also exclude the option of parole. Let the law makers consider this and in doing so, tread carefully and avoid constitutional challenges.
- An effective response to GBV will be an effective deterrent to Femicide, which should include:
 - Empowering presiding officers by amending crime schedules, in particular, schedule 5 and 6 to include GBV assault and GBV assault GBH respectively, it then shifts the onus provisioned in section 60(11) of the Criminal Procedure Act in bail proceedings to the accused to satisfy the court that it is in the interest of

justice and/or that there are exceptional circumstances that justify the release on bail.

- Exclude the option of a fine in all GBV Assault matters and effect amendment on applicable legislation precluding withdrawal of charges and precluding refusal to prosecute GBV & Femicide matters, similar to section 18 of the Domestic Violence Act.
- If we can prevent femicide, let's focus on that, rather than to react to femicide cases. Let's rather react to GBV cases. That coupled with strengthening our existing legislation on the sentencing regime for femicide as proposed will deter would be offenders.
- Further consideration on effective response to GBV will be:
 - Establishing a GBV unit within legal aid dedicated to dealing with women issues that will provide the following assistance to GBV victims and women in general:
 - Assistance women who are not physically abused, but abused in many other respects that want to exit the toxic relationships, by legally empowering them to do so;
 - Provide legal assistance to women who are GBV victims who need that urgent legal intervention to be able obtain necessary court orders, including urgent maintenance orders;
 - Provide support during court proceedings where necessary.
 - Amendment of the Magistrates Court Act and/or Magistrates Court Rules to cater for urgent relief for GBV and Femicide matters, in order to deal with issues of accommodation and maintenance.
- Facilitation of justice must also include support of a social worker in court, including, during the proceedings and legal support for the victim from Legal Aid that will ensure the victims' legal rights are protected. At the conclusion of each case the social worker and legal support must conclude a report advising on support needed post the ordeal in order to ensure appropriate transition to normal life.

3.1.3. Amend legislation relating to GBV in order to:

3.1.3.1. Build on legislative reforms **initiated under ERAP**

- Over and above aforementioned proposed amendments, I propose that human trafficking receive focused attention by adoption of a dedicated approach to it and that it be looked at in conjunction with sex work, as the two components are interlinked to some extent.
- The porous borders also make it necessary for our country to have a dedicated strategy on these which may also be under the GBV & F Council.
- Once that approach is adopted, it will be clear that the only aspect that needs decriminalization is the criminalization of the selling of sex, and that a new component of criminalizing the buying of sex must be introduced, in that its vulnerable women who resort to selling sex, what is unacceptable is men taking advantage of vulnerable women and enticing them to make their bodies a commodity.
- Human trafficking, because of its complexities, should rather receive dedicated focus as GBV & Femicide.

CONCLUSION

- What we propose can be implemented by simple and easy to implement amendments to current legislation (new legislation regarding GBV is unnecessary, will take too long and will come under constitutional challenges); within existing government departments and structures and will not require a substantial increase in existing budgets.
- Criminologists caution against over confidence in legislating ourselves out of problems, without looking at underlying causes of the particular crime.
- Regard being had to the fact that GBV in most cases is nothing either than assault and Femicide is nothing either than murder. We believe our current legislation with a few amendments is adequate to deal with the scourge and there is therefore no need for new legislation on femicide to be enacted.
- Finally, when government makes the slogan “Zero tolerance against GBV and Femicide” that must equate to “Zero tolerance against law enforcement that fails society” because

that is immediately within government's domain to manage;
And this project will be a waste of time and resources if we
are not going to deal with the elephant in the room:

- coordinated implementation
- monitoring of compliance
- accountability
- consequence management.

ADV FEZEKA MAGANO