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Gender-based violence during COVID-19:

a human rights violation

By Siyabonga Zondi and Sinothile Zondi (Durban interns)

The Universal Declaration of Human Rights (UDHR), the founding document of the United Nations, states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

There is now near-universal consensus that all individuals are entitled to certain basic rights under any circumstance. Human rights are the articulation of the need for justice, tolerance, mutual respect and human dignity in all of our activity. To protect human rights is to ensure that people receive decent humane treatment. To violate the most basic rights on the other hand, is to deny individuals their fundamental moral entitlements. It is, in a sense, to treat them as if they are less than human and undeserving of respect and dignity.

Gender-based violence is a profound human rights violation, which is a common and widespread problem in South Africa, which disproportionately affects women and girls. It is a crisis that is tearing our society apart and affects every community in the country. It increases particularly during any type of emergency, whether it be an economic crisis, a breakout of conflict or a disease.

We have seen a significant increase in the number of gender-based violence cases since the country began the nationwide lockdown in response to the COVID-19 pandemic. Pre-existing social norms and inequalities, economic and social stress caused by the pandemic, coupled with restricted movement and social isolation measures, have led to an exponential increase in

gender-based violence cases.

Inasmuch as gender-based violence does not begin with disasters like COVID-19, the chaos and instability this has caused have left women and girls more vulnerable than ever. The mass effort to save lives has put one vulnerable group at risk. Women and children who live with abusers have no escape. The pandemic makes it hard for this vulnerable group and being able to separate them from people who abuse them and provide them with resources that can help has been a challenge.

Publicising abuse is a way to demand justice for the victims, by pressuring governments to respond and to hold perpetrators accountable. Publicising abuse raises awareness in society and can mobilise support for the victims in making a complaint. The level of detail in the documentation can affect the ability of the supporting agencies to accept and act on a complaint and should be as comprehensive as possible. The effectiveness of human rights as a tool depends on the accuracy and comprehensiveness of the evidence gathered. It can contribute to educating and organising as well as advocating at a political or legal level.

Government leaders have been brought down through documentation of human rights violations; the power of the process, both for the victim and the perpetrator, should not be underestimated. Documentation can also be a way to secure assistance, relief and rehabilitation for victims. Documentation can help to mobilise international attention on an issue and push the government to act as a result. Accurate statistics are difficult to obtain for many reasons including the fact that most incidents of gender-based violence are not reported. It is however evident that our country has particularly high rates of gender-based violence. This is more so when the media brings attention to some of the more heinous acts of violence against women.

One of the most devastating cases which left the whole country in shock was that of 21 year-old Tshegofatsho Pule who was eight months pregnant. She was found hanging from a tree in Roodepoort, Johannesburg with multiple stab wounds to the chest. Another case was in Khayelitsha, which is one of the biggest townships in Cape Town, where 34 year old Sbongiseni Gabadu's decomposing body was found chopped up and stuffed inside a sports bag.

Documentation can be an empowering process if it involves sharing ownership of information with the affected group, and helps them understand the political, economic or other circumstances that allow violations to happen. Often, victims of rights violations who belong to a highly stigmatised or persecuted group do not recognise that a rights violation has happened to them or that certain treatment is wrong. Some do not believe they have any rights at all. In addition to providing a historical record of abuse, community or peer driven documentation brings ordinary people into a broader movement against injustice.

The Constitution states that the fundamental rights of all South Africans will be respected and protected. President Cyril Ramaphosa, in an address to the country, highlighted the fact that gender-based violence should be considered as a second pandemic in the country and taken as seriously as the coronavirus. This has not been the first time that there has been a rapid surge in incidents of gender-based violence during a lockdown situation. The President reiterated the need to treat the fight against gender-based violence as a war and women's rights campaigners have welcomed the greater focus on violence against women. ●

When a delay is a denial!

National Adoption Coalition v Head of Department of Social Development for KwaZulu-Natal NO 2020 (4) SA 284 (KZN) ("National Adoption Coalition case")

In the Charles Dickens novel, Great Expectations, young Pip remarks that: ***"In the little world in which children have their existence, whosoever brings them up, there is nothing so finely perceived and so finely felt as injustice."***

Unfortunately many children in South Africa have felt this injustice through abandonment, abuse and neglect and are left with little hope of experiencing love, joy and the stability of a family. Adoption plays a role in alleviating this injustice. On 24 February 2020, the High Court in Durban granted an order declaring that the Head of Department for Social Development, KwaZulu-Natal (HOD) had violated section 28 of the Constitution. The judgment, by Judge Seegobin, has a significant effect on the adoption of children.

Role of the Department of Social Development (DSD) in the Adoption Process

- The DSD plays a significant role in the adoption process in South Africa as articulated in the Children's Act 38 of 2005 ("the Act").
- Section 239(1) (d) of the Act sets out the statutory requirements for an adoption application and states: "An application for adoption order should be accompanied by a letter by the provincial head of social development recommending the adoption of the child ("section 239 letter")."
- The section 239 letter provides oversight in the adoption process to prevent child trafficking and abuse.
- The Act does not specify what considerations the DSD should take into account when recommending adoption, resulting in each province adopting its own process to evaluate adoption applications.
- The DSD in KwaZulu-Natal implemented a process which required each adoption application to be presented before a panel; panellists would scrutinise each adoption application before providing a section 239 letter. The process led to undue delays in adoptions in KwaZulu-Natal. Statistics indicate that a total of 174 adoptions took place in the province over a seven-year period, just 5% of the national average.

NACSA instituted proceedings against the HOD and the DSD to declare this adoption process constitutionally

invalid because it did not promote the best interests of the child.

Court Findings

- The inordinate delays caused in finalising the adoption process by the HOD and DSD violated s 28 of the Constitution, and the paramountcy principle . The court specifically held that the two main causes of the delays in finalising adoptions in this province were 1) the composition of the adoption panel; and 2) the actions of the HOD.
- The panel members were not "suitably qualified and experienced to deal with adoption matters and the complexities that may arise from time to time" , and the panel meetings were "erratic" and uncertain.
- The HOD and DSD did not understand their constitutional obligations in the adoption process - the duty to expedite the process in the best interests of the child .
- The DSD and HOD took irrelevant considerations into account when considering an adoption application.
- The adoption process followed by the HOD and DSD resulted in undue delays and caused serious long-term psychological trauma, both for consenting parents and the child, and were not in the best interests of the child.
- The court ordered a supervisory order in which the HOD and DSD were to process the backlog of adoption applications within 30 days and to strictly adhere to the 30-day turnaround time articulated by the National Department for all future applications.●

Sheriff's costs in Children's Court cases – who should pay?

By Elsabe Steenhuisen

Introduction

The disbursements in cases ProBono.Org refers to legal practitioners ("LPs"), are mostly sponsored by the LPs, such as their travel expenses and photocopies. But what about the sheriff's costs, which can be a substantial amount? We all know that the party who instructs service should pay for it. In terms of the Guidelines of ProBono.Org LPs may, if they choose, recover disbursements from the pro bono referred clients. However, it becomes a totally different ball game when we practise in the Children's Courts when we represent the child or one of the parents who can barely afford a daily living, let alone paying sheriff's costs!

The question then arises whether service by the sheriff is always a requirement to secure the presence of a witness in Children's Court proceedings? What about the respondent (the other parent or care-taker or interested party) whose appearance is necessary during the proceedings - how is the presence of these persons secured? The full answer to these two questions is on our website at (Lloyd to provide the link – Resources/One Child Campaign)

The position regarding the witness:

The Regulations pertaining to the Children's Act

When we look for the answer in the Children's Act, we have to be aware of two sets of regulations:

1. The Regulations relating to Children's Courts and International Child Abduction 2010, also referred to as the Justice Regulations ("JR"), and refer to sections 42-75; 161-166 and 274-280.
2. The General Regulations regarding Children, 2010 ("GR"), and refer to sections 90,103, 142, 160, 179, 190, 212, 227, 253 and 280 of the Children's Act, and other centres and facilities.

The Children's Act

Section 53 of the Children's Act ("Who may approach court")

Section 53 and JR 7(2) provide who may bring a case to the Children's Court. What is the position if one of these persons mentioned in JR 7(2), or the persons named in section 53, want to call a witness? JR Form 4 has the answer. It sets out the procedure to secure

witnesses at court (one has to submit particulars of the witness/es to the clerk of the court within fourteen days before the date of the hearing). Form 4 states that the costs of the service of the subpoena on any witness will be borne by the person who requests the witness subpoena unless, in exceptional cases, the court directs that the state bears such costs. Neither the Act nor the Regulations define "exceptional cases", but one should certainly be able to argue that indigency, or acting pro bono for a child who has no known parent or carer, or has an indigent carer, should be sufficient reason to invoke this mechanism. Form 4 does not refer to sections 58 and 59 of the Children's Act, neither to Form 6 of the JR, nor to JR 9, which all deal with witnesses.

Witnesses in the Children's Court

Section 58 of the Children's Act provides for the right to adduce evidence. This means that any party to the proceedings may call a witness. Section 59(1) of the Children's Act stipulates the procedure to secure the presence of a witness. The clerk must, in the prescribed manner, summons a person to appear as a witness at either the request of the presiding officer (section 59(1)(a)), the child or a person whose rights may be affected by an order in those proceedings (section 59(1)(b)), or the legal representative appearing for either the child or party/ies involved in the case (section 59(1)(c)).

Sheriff's costs in Children's Court cases – who should pay? (contd)

A request to the Clerk for the issuing of a subpoena by any of the above-mentioned persons, other than the Presiding Officer, must:

a) be made at least at fifteen (15) court days before the date of the hearing;

b) be in writing on **Annexure O**; *and*

c) filed in the specific Court file.

Annexure O is available from the clerk of the Children's Court.

JR 9(1) permits the **clerk** to subpoena at least ten (10) days before the date of the hearing, any person to appear as a witness in a matter in terms of Form 6. JR 9(2) permits a **person** referred to in section 59(1)(b) or (c), to request the clerk within 15 days before the hearing, to issue a subpoena to the witness the person intends to call. JR 9(3) provides for personal service by either the sheriff, or a clerk, or a person authorised by the presiding officer. It provides also for service by registered post or any other manner as directed by the presiding officer. As JR 9(3) does not refer to service by the SAPS, one can argue that section 59(2) of the Children's Act makes provision for this option. Other options, as pointed out above, but only on authorisation by the court, may be service by a social worker; any other person, such as a family member or a friend; Facebook; e-mail, or facsimile. It is obvious that the court's authorisation should be in writing.

Form 6 provides for service of a copy of the subpoena personally on the witness; or to a person apparently not younger than 16 years and apparently residing or employed at the residence/place of employment/business of the witness if the witness could not be conveniently found; or by affixing/placing it to/in the outer/principal door/security gate/post box of the residence/place of employment/business of the witness as the witness kept the residence/place of employment/business closed.

Conclusion

There are various options available for the legal practitioner to secure the presence of a witness at court. Many of the options would be far more cost effective and affordable than service by the sheriff or the SAPS (see Section 15(1)(b) of the Magistrates' Courts Act). The LP should only first obtain authorisation from the presiding officer by substantiating the reasons for the application to court. I want to leave you with the suggestion of one of our colleagues, Lesley Blake – should the sheriffs, being also officers of the court, not be required to also do pro bono work as part of their social responsibility towards the public? After all, it is members of the public who pay their fees.●

Write for us

We would like to invite legal practitioners to contribute to our bi-monthly newsletters by writing an article of up to 400 words (one page) on a topical issue of law. Please indicate your interest to the editor at **margaret@probono.org.za**

The deadline for articles for the next issue will be **1 November 2020.**

Calling all legal practitioners!

ProBono.Org is conducting a needs analysis among its partners to better understand how it can provide support and assistance in relation to HIV/AIDS and TB. To do this, we invite you to complete a short survey.

This survey should not take more than 5 minutes of your time and you should be able to answer it without prior preparation. Based on the results of the survey, ProBono.Org will endeavour to offer more targeted, tailored and effective support. We appreciate your time and willingness to share your needs with us.

Please click the link below to take you to the survey: https://www.surveymonkey.com/r/5BZ525P