MISSED OPPORTUNITIES

Confiscation of weapons in domestic violence cases

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Part of a series in the *SA Crime Quarterly* on the implementation of the Domestic Violence Act, this article focuses on the use of weapons in incidents of domestic violence as reflected in applications for protection orders at three Western Cape jurisdictions. Weapons are often used in domestic violence. If the police and magistrates use the powers available to them to seize weapons, it will go a long way to protecting women and the broader public.

Domestic violence in South Africa is marked by high levels of physical violence accompanied, in many cases, by weapon use. In this article research conducted by the Consortium on Violence Against Women[1] is used to illustrate the extent of the problem and consider available remedies in terms of existing legislation and regulations. If courts rigorously apply these legislative tools, they will go a long way in protecting women from the potentially lethal consequences that result from being trapped in an abusive relationship.

Use of physical violence and weapons

Proforma applications for a domestic violence protection order under the Domestic Violence Act (116 of 1998) require applicants to complete an affidavit setting out the details of all incidents of abuse experienced at the hands of the respondent, along with whether firearms or other dangerous weapons were used, and what injuries were sustained. In addition, applicants are required to specify the types of abuse from which they are seeking protection, and may request that any of a number of other conditions be attached to the court order. These include an order for seizure by a member of the South African Police Service (SAPS) of a specified firearm or dangerous weapon, which is in the possession of the respondent.

The Consortium on Violence Against Women analysed 616 of these applications for domestic violence protection orders filed at Cape Town, George and Mitchell's Plain magistrates' courts during 2001.[2] The extent to which physical violence pervades abusive domestic relationships is reflected in this sample, which constitutes 10% of applications made during the research period, with well over 65% of supporting affidavits mentioning physical violence. An alarmingly high 77% of applications filed in George reflected incidents of physical assault (Table 1).

The use of a weapon in perpetrating the assault was noted in more than 40% of the files mentioning physical violence, with George magisterial district once again presenting the highest frequency at 48% (Table 2).

Table 1: Frequency of physical violence mentioned in affidavit, by magisterial district

	Cape Town	Mitchell's Plain	George
Total number of files examined	170	279	167
Number of files mentioning physical violence	117	184	129
Frequency of physical violence in sample	**68.9%**	**65.9%**	**77.2%**

Source: Parenzee, Artz and Moult

Table 2: Frequency of weapons mentioned in affidavit, by magisterial district

	Cape Town	Mitchell's Plain	George
Number of affidavits mentioning physical violence	117	184	129
Number of affidavits mentioning use of weapons	44	70	62
Frequency of use of weapons	**37.6%**	**38.0%**	**48.0%**

Source: Adapted from Parenzee, Artz and Moult

This means that over a quarter of all applications for domestic violence protection orders, including those in which physical violence was not noted (and 37% of all applications in George) mentioned the use of a weapon.

This is clearly one arena in which respondents who can be shown to have a propensity towards violence can be dealt with by the criminal justice system. Criminal justice officials are in a position to take precautionary measures to protect not only the respondent, but also potentially the broader public. The next section considers the legal obligations placed on criminal justice officials to act in these circumstances.

What the DVA requires of officials

The Domestic Violence Act (DVA) places an obligation on magistrates to order the seizure of weapons under certain circumstances. Mirroring the request that may be made by applicants in this respect, section 7(2)(a) of the DVA allows magistrates to order, as a specific condition of a domestic violence protection order, that a SAPS member should seize any firearm or dangerous weapon in the possession or under the control of the respondent, when "reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant".

This provision cross-refers to s9 of the Act, which is far more specific in placing a responsibility on the court to order such a seizure. Thus s9(1) provides that the court *must* order seizure of a firearm or dangerous weapon, if the magistrate is satisfied that the following factors apply:

a) the respondent has threatened to kill or injure himself; or
b) has threatened to kill another person with whom he is in a domestic relationship (it is noteworthy in this respect that the person threatened need not necessarily be the applicant for a protection order, and that the threat need not necessarily have been made with reference to the weapon under consideration); or
c) that continued possession of the weapon is not in the respondent's best interest or in the interests of any person with whom they are in a domestic relationship, because of the respondent's:
   i) state of mind or mental condition;
   ii) inclination to violence;
   iii) use or dependence on drugs or alcohol.

The DVA makes further provision that any firearm seized under such an order should be dealt with under s11 of the Arms and Ammunition Act (now repealed and replaced by s102 of the Firearms Control Act), in terms of which a person may be declared unfit to possess a firearm. The DVA specifically requires the court to have the clerk of the court refer a copy of the record of evidence concerned to the national commissioner of police for this purpose. There was no evidence in the files examined of this having been done.

Firearms Control Act

The Firearms Control Act (60 of 2000) came into full effect on 1 July 2004 and provides, as did its predecessor, the 1969 Arms and Ammunition Act, that the national commissioner of police ("the Registrar") may declare certain persons unfit to possess a firearm. Topping the list of those against whom such an order may be made are respondents against whom a final protection order has been issued in terms of the Domestic Violence Act.

This represents an important recognition of the lethality of violent domestic relationships, in which research suggests that over 40% of fatalities occur as a result of gunshots.[3] If narrowly interpreted it will, however, deny protection to applicants with interim protection orders that have not yet been finalised under the DVA.

It is therefore important to note that application may be made to the Registrar to have a person declared unfit on other grounds, including that continued possession is not in the interests of the person possessing the firearm or any other person because of:

- threats made to kill or injure themselves or another person by means of a firearm or other dangerous weapon;
- their mental condition, inclination to violence, or dependence on drugs or alcohol.

In this respect it mirrors s9 of the DVA and means that an application under s102 of the FCA can, and indeed should, be made at the time that an interim protection order is issued. When a final protection order is issued applicants should be informed, regardless of whether seizure of a weapon has been ordered under the DVA, of the remedy available to them under the Firearms Control Act. When the court has ordered a weapon to be seized at any stage of the proceedings, this order must be conveyed to the Registrar for administrative action.

For the Registrar to determine that someone is unfit to possess a firearm, application must be made under oath setting out adequate reasons. Although at the time that an interim protection order is made, it is possible that the person against whom a s102 order is subsequently sought will not have had the opportunity to respond to the DVA application, the s102 hearing clearly constitutes an independent determination in which the respondent is provided with a reasonable opportunity to give reasons as to why a declaration should not be made. As such it cannot be seen as infringing on the respondent's due process rights.

This does not mean that the courts are off the hook. Section 103 of the FCA requires the court to apply its mind to the question of whether a person should be declared unfit to possess a firearm, by creating a presumption of unfitness in respect of convictions for certain offences.

A number of these offences typically occur in domestic violence cases, and point to the importance of police laying ancillary charges when assisting a victim of domestic violence. These include:

- unlawful or negligent handling of a firearm;
- handling of a firearm while under the influence of drugs or alcohol;
- a crime or offence in the commission of which a firearm was used;
- any offence involving violence, sexual abuse or dishonesty for which the accused was sentenced to imprisonment without the option of a fine;
- any offence involving physical or sexual abuse occurring within a domestic relationship;
- any offence involving the abuse of alcohol or drugs; and
- any offence under the DVA where the accused is sentenced to imprisonment without option of a fine.

It is clear from the wording of this section that the court must apply its mind to these cases and must, whether it finds the person convicted to be unfit or not, forward that determination to the Registrar. Subsection (4) requires that unless the court determines that a person is fit to possess a firearm, the court must make an immediate order for the search and seizure of all authorising documentation (licences, competency certificates, etc), firearms and ammunition in that person's possession.

Under s103(2) this duty becomes discretionary, with the court required to enquire and determine whether a person is unfit to possess a firearm upon conviction for a number of scheduled offences. While there is not the same presumption as that arising under s103(1), this section clearly places a positive duty on the court to make such an enquiry and come to a determination. Relevant Schedule 2 offences include:

- malicious damage to property;
- entering a premises with the intent to commit an offence;
- offences under the DVA for which the accused was not sentenced to imprisonment without the option of a fine; and
- offences involving violence, sexual abuse or dishonesty in respect of which the accused was not sentenced to imprisonment without the option of a fine.

It is not necessary that a firearm be used in the commission of any of these offences. As such these provisions have the potential to provide an important means of protection to those subject to domestic abuse. This requires, however, that appropriate charges are initially laid and that the accused/respondent's possession of a weapon be brought to the attention of the court. It also requires that police, prosecutors and magistrates take the threat of firearms seriously.

Research has clearly illustrated that in ss11 and 12 hearings these roleplayers have tended not to adequately apply the relevant provisions and, where they have, to focus on cases where a firearm was used, rather than the potential for violence of someone who owns a firearm.[4]

What the DVA regulations require of SAPS

Specific obligations are placed on the SAPS in terms of the National Instructions regarding domestic violence, which were promulgated under the DVA. The emphasis of these guidelines is on executing a court order to seize a weapon or firearm which is in the possession or under the control of the respondent, with a view, again, to dealing with the matter in terms of s11 of the Arms and Ammunition Act.

However, these instructions go beyond the provisions contained in the DVA, by providing (in s6(7)) for a SAPS member to enter and search a premises at any time, without a warrant, as specified under s41(1) of the Arms and Ammunition Act, and to seize a firearm when that member has reason to believe that:

- a person has threatened or expressed the intention to kill or injure himself or herself or any other person (note that here a domestic relationship is not required) by means of a firearm;
- or is in possession of a firearm and continued possession is not in his or her interest or in the interest of any other person as a result of his or her mental condition, inclination to violence (regardless of whether a firearm was used in the violent act or not), or his or her dependence on intoxicating liquor or a drug which has a narcotic effect.

These provisions mirror those contained in s11 of the Arms and Ammunition Act, the DVA and now the FCA.

Interviews show that some police officers are using their powers under the Arms and Ammunition Act to confiscate firearms, even when there was no court order in place. As one police officer said:

> *I have confiscated weapons. Sometimes when there is a court order, but other times when we perceived it to be a threat because of the types of abuse the complainant has been subjected to. Rather safe than sorry.* (P3X)

It would, however, seem that this is the exception rather than the rule. In the words of another police officer:

You do have to confiscate weapons, but not that often. Yes there are complaints that the husband has threatened to shoot her, or kill her, but he never does. It's never serious. (P10bSF)

This approach is clearly at odds with the positive duty placed on police members through legislation and recognised by the Supreme Court of Appeal in the case of *Minister of Safety and Security v Van Duivenboden.*[5] In that case the failure of police members to hold a s11 hearing on at least two occasions when Mr Brooks (a man described by the SCA as being both "fond of firearms" and "fond of alcohol, which he habitually consumed in excess") had clearly shown a propensity for violence, was recognised as providing the basis for a delictual action by Mr Van Duivenboden against the police when he was subsequently shot by Mr Brooks (who, at the same time, shot and killed his own wife and daughter).

That is, the failure by police members to declare Brooks unfit to possess a firearm, when it could reasonably have been expected of them to do so, had in all likelihood given rise to the damages suffered by Van Duivenboden. It is quite feasible that this reasoning could be extended to magistrates who have – and refrain from using – similar powers.

The purpose of a seizure is to provide the basis for an administrative hearing. The National Instructions require that a SAPS member who has seized a firearm must ascertain whether that firearm is licensed and, if it is not, include the offence in the docket. In practice, no evidence has been found that this is occurring in domestic violence cases.

Despite the commotion engendered by the passage of the FCA, it seems that provisions for search and seizure have been somewhat narrowed in s110, which parallels Chapter 2 of the Criminal Procedure Act (51 of 1977) in requiring that a search be done only upon a warrant unless the person concerned consents or the police member has reasonable grounds for believing that a search warrant would have been issued and that a delay in obtaining a warrant would defeat the object of the search. This may require an amendment to the National Instructions, as there seems to be no analogy to s41 in the new Act.

Dangerous weapons

Both the DVA and FCA make reference to the use of "dangerous weapons". The DVA defines it with reference to the definition given in s1 of the Dangerous Weapons Act (71 of 1968), in terms of which a dangerous weapon is any object, other than a firearm, which is likely to cause serious bodily injury if used to commit an assault. Any person who is in possession of such a weapon is guilty of an offence unless they can prove that they did not at any time have the intention of using the weapon or object for an unlawful purpose.

This is a very broad definition and particularly problematic when applied to domestic violence. As one police officer pointed out, in domestic violence cases "…just about anything can be a weapon". Docket analysis reflected the following types of 'weapons' as having been used in reported incidents of domestic violence: firearms, knives, sharp objects, bottles, iron pipes, hose pipes, spade, axe, belt, sticks, brooms, metal pot, chairs, sjamboks, irons, wooden plank, brick, cricket bat, knobkierries, chains, golf clubs, hammer, ashtray, shoe, and a coffee table. In this context, a 'dangerous weapon' includes many common household objects – the seizure of which is clearly problematic, if not impossible.

Seizable weapons

Given the plethora of potentially dangerous weapons reflected in the applications for domestic violence protection orders, the researchers decided to focus on four weapon types that were considered to be potentially susceptible to confiscation: knives, sjamboks, knobkierries and firearms. They tracked those cases in which these weapons had been used through the application process. When the affidavit stated that the complainant had been stabbed, but did not specify the object used, it was assumed, as the most likely scenario, that a knife had been used.

Knives were the weapons most often used in all three magisterial districts, with Mitchell's Plain (19 incidents) and George (18 incidents) both

exhibiting usage that was significantly higher than Cape Town (8 incidents). Although firearms were relatively seldom used, it is important to note that guns were most often used to threaten the complainant, with Mitchell's Plain having the most incidents of threats using a firearm (21 incidents) in comparison to Cape Town (8 incidents) and George (6 incidents), followed closely by knives (34 incidents across the three jurisdictions). Eight affidavits mentioned that the respondent carried a knife or firearm on their person or slept with that weapon.

For the court to order the seizure of a weapon on the basis of information supplied in the affidavit, evidence should be supplied that the respondent is in possession or in control of the weapon concerned. In the data therefore the distinction was drawn between instances where the complainant had written that "he said he would stab me", where it was not stipulated that the respondent actually possessed or had access to a particular weapon, and instances where it was stated that "he chased me round the house with his knife and tried to stab me". The number of requests made by applicants for the confiscation of these weapons, and the number of applications ultimately granted by the magistrate were tracked. The results, as they pertain to firearms and knives, are indicated in Table 3 below.

Applications for removal of a weapon

It is clear from this data that applicants for domestic violence protection orders, while mentioning the use of weapons in their supporting affidavits, and even averring ownership or possession of these weapons, are not requesting that the court order their seizure:

- In Mitchell's Plain the total number of requests made by applicants for seizure of weapons represents 18% of the number of instances when there was confirmed possession, and a mere 8.5% of the total number of affidavits mentioning seizable weapons.
- In George the total number of requests made by applicants for seizure of weapons represented 10% of the number of instances of confirmed possession, and only 6.5% of the total number of affidavits mentioning seizable weapons.
- In Cape Town the picture looks better, with 88% of applicants averring possession or control of a weapon by the respondent requesting that it be seized, amounting to 47% of affidavits mentioning weapons that we would consider capable of being seized.

When broken down further, only two complainants of the eight in Mitchell's Plain who confirmed a firearm as being in the possession of the respondent, actually requested that this be

Table 3: Number of cases per type of weapon at each stage of the domestic violence application process

Mitchell's Plain	**Mention in affidavit**	**Proof of access/ control and threat**	**Request for seizure by applicant**	**Order granted by magistrate**
Guns	14	8	2	4
Guns and knives	9	4	0	0
Knives	12	9	1	1
Cape Town				
Guns	14	11	9	8
Guns and knives	0	0	0	1
Knives	11	5	3	1
George				
Guns	6	4	1	0
Guns and knives	3	3	0	0
Knives	17	11	0	0

Source: Adapted from Parenzee, Artz & Moult, Figures 24, 25, 26.

removed. In a further two cases magistrates also ordered the removal of firearms, so that in half of the cases mentioning firearms, an order was made that they be seized.

When guns were confirmed as being in possession of, or in the control of, the respondent in Cape Town, nine out of 11 complainants requested that these be removed, representing 82% of these cases. The magistrate failed to order the seizure of the weapon on one occasion when this was specifically requested, crossing out the request on the application form, and giving no reason for doing so.

Although firearms were mentioned in six affidavits filed in George, and confirmed as being in the possession of the respondent in four cases, only one request was made for seizure and no order was made in respect of this request. It is in fact notable that in George not one order was made for the seizure of a weapon.

When knives were confirmed as belonging to, or in control of, the respondent in nine Mitchell's Plain applications, only one complainant requested that this be removed, a request that was granted. In the four cases where both guns and knives were confirmed, there were no requests for removal of either, and no orders were made. Although mention was made in one affidavit that the respondent owned a knobkierrie, the complainant did not request its seizure and no order was made.

In Cape Town five affidavits referred to the respondent's control or ownership of knives, but only two requested seizure, with one request granted. Despite the fact that there were seven cases in which the applicant had been stabbed, only one of these applicants applied for and was granted an order for seizure of the knife.

Court orders for removal of a weapon
In Mitchell's Plain the total number of orders by magistrates for seizure of weapons represents 27% of the number of instances of confirmed possession or control, and 13% of the total number of affidavits mentioning seizable weapons. In one case, when mention was made of the respondent owning a "sword, knife and bullets", only the sword was ordered to be confiscated.

In Cape Town the total number of orders by magistrates for seizure of weapons represented 65% of the instances of confirmed control/possession, and 34% of the total number of affidavits mentioning seizable weapons.

In George only two applications were made out of 20 affidavits in which control/possession was established, and 32 cases in which the use of a seizable weapon was mentioned in the affidavit. None were granted. One applicant requested the removal of keys to a safe containing firearms which were in the possession of the respondent, but this was not ordered by the magistrate.

Confiscation by the police
The fact that applicants are not required to specify the type of weapon used against them in the application form may result in a further barrier to enforceability, as police are not provided with the relevant detail to make confiscation possible. This may lead to further vulnerability for complainants. As one police officer explained:

> *The other day there was also an interdict … informing us that we must go take a gun … That is difficult. Maybe he has a safe with a lot of guns, so which one must we take? So I let the guy come and say listen, this is the interdict … and I want your gun. So he says he doesn't have a gun.* (P11aK)

The best way around this conundrum is for the respondent to be declared unfit to possess a firearm, which one assumes is what the magistrate in this instance was in effect trying to achieve. In the case of other weapons, further assistance by clerks and volunteers would help to ensure that complainants make applications for seizure that will be effective in restricting the respondent's access to a dangerous weapon. An explanation of what constitutes a dangerous weapon in the application form would also provide clarity for applicants and further detail for police officers.

When an order for seizure is made there is no indication in the court file as to whether it has been

carried out and to what effect, which makes follow up difficult. There is also no indication that any case in this sample was referred for a s11 hearing under the Arms and Ammunition Act.

Conclusion

In many domestic violence cases, magistrates are not ordering the removal of weapons, despite their use being mentioned in the affidavit and despite there being evidence to suggest that the weapon is owned by, in the possession of, or under the control of the respondent.

Although it is unclear why so few applicants request the removal of weapons, it is likely that the lack of clarity in the application form is a factor, along with cultural and conceptual problems around the definition of a dangerous weapon. It is nonetheless of considerable concern that magistrates, reading these affidavits, are not using their powers under the DVA to order the confiscation of weapons.

It is similarly of concern that police officers who are receiving reports of weapon use in cases of domestic violence are not charging this as a separate offence nor initiating hearings to have the respondent declared unfit.

The SCA's reasoning in *Van Duivenboden*, recognising that but for the failure to remove Mr Brooks' lawful means of access to a weapon, Van Duivenboden would not have been shot, applies in its entirety to the life of Mrs Brooks, another victim of intimate femicide in a country where one in five intimate femicides is perpetrated with a licensed firearm.[6] With the Firearms Control Act, criminal justice personnel have an explicit mandate to remove firearms from the arsenal of weapons available to perpetrators of domestic violence.

Acknowledgement

The docket analysis and interview data contained in this study was drawn from aspects of a more comprehensive study into the implementation of the Domestic Violence Act. See P Parenzee, L Artz and K Moult, *Monitoring the Implementation of the Domestic Violence Act: First Research Report,* Institute of Criminology, University of Cape Town, 2001.

Endnotes

1 The Consortium consisted of the Gender, Law and Development Project at the University of Cape Town, the Gender Project at the University of the Western Cape, Rape Crisis (Cape Town) and a public health consultant.

2 P Parenzee, L Artz and K Moult, *Monitoring the Implementation of the Domestic Violence Act: First Research Report,* Institute of Criminology, University of Cape Town, 2001.

3 Personal correspondence with Kelley Moult.

4 D Mistry and A Minnaar, Declared unfit to own a firearm: Are the courts playing a role? in *SA Crime Quarterly No 6,* 2003, p 27.

5 SCA Case No 209/2001.

6 S Mathews et al, *Every six hours a woman is killed by her intimate partner: A National Study of Female Homicide in South Africa*, South Africa Medical Research Council Policy Brief No 5, June 2004.