

UPROOTING A CULTURE OF GENDER-BASED VIOLENCE IN SOUTH AFRICA: CRITICAL APPROACHES TO BAIL, POLICING AND AWARENESS

Windell Nortje

LLB LLM LLD

Senior Lecturer, Department of Criminal Justice and Procedure, University of the Western Cape

Shane Hull

LLB LLM

Associate Lecturer, Department of Private Law University of the Western Cape

SUMMARY

Gender-based violence (GBV) is a serious and systemic problem in South Africa. The government has attempted to address the problem by introducing several initiatives including sexual offences courts, and various laws aimed at protecting women and children. However, the recent reform is not sufficient. Only a limited number of bail reforms were introduced. This article proposes several additional bail reforms aimed at protecting women and children against GBV. Also, more proactive measures need to be undertaken to reduce GBV. This includes reform in the South African Police Service (SAPS) and awareness campaigns. These initiatives are important because they target GBV at its roots. First, the article provides a brief overview of the culture of GBV and the efforts of the South African government to curb it. This is followed by an analysis of how bail proceedings can be amended to have a greater impact on GBV prevention. The article then analyses proactive measures geared towards improving the role of the SAPS, and promoting awareness campaigns to combat the scourge of GBV.

1 INTRODUCTION

Siphokazi Boo, a beautiful and promising Black South African woman, lived in Paarl in 2021.¹ She, like millions of other women, wanted to enjoy her life.

¹ Bhengu “‘We Will Die From Heartbreak’: Family of Murdered Western Cape Woman Laments Case Delays” (7 April 2021) *News24* <https://www.news24.com/news24/>

Her story, sadly, does not reflect any joy. Booi, was brutally dismembered, set alight and dumped at a train station, allegedly by her boyfriend, Sithobile Qebe, who was out on bail at the time.² Qebe is currently standing trial for her murder. Gender-based violence (GBV), defined as any act that results in sexual, mental or physical harm or suffering to women, is rife in South Africa.³ GBV has become a culture.⁴ The Interim Steering Committee on GBV has noted: “South Africa holds the shameful distinction of being one of the most unsafe places in the world to be a woman.”⁵ Each day, 115 women are raped.⁶ This amounts to approximately 42 000 rapes a year.⁷ Equally appalling is the murder of women; three women are killed by their intimate partners per day in the country.⁸

The Constitution of the Republic of South Africa, 1996 (the Constitution) guarantees the right to human dignity,⁹ and freedom and security of the person.¹⁰ It is also an objective of local government to provide a safe environment for its citizenry.¹¹ GBV severely violates these rights, especially that of women and children.¹² Mokone asserts, “It is clear that laws, policies, year-long awareness campaigns and every mechanism that has been established to combat and ultimately eradicate gender-based violence are proving to be ineffective and insufficient.”¹³ There is a need for serious GBV

[southafrica/news/we-will-die-from-heartbreak-family-of-murdered-western-cape-woman-laments-case-delays-20230407](https://www.southafrica.news/we-will-die-from-heartbreak-family-of-murdered-western-cape-woman-laments-case-delays-20230407) (accessed 2023-05-20).

² Fisher “Siphokazi Booi’s Murder Case Postponed to April” (16 February 2022) *Eyewitness News* <https://ewn.co.za/2022/02/16/siphokazi-booi-s-murder-case-postponed-to-april> (accessed 2023-05-19).

³ See Meyiwa, Williamson, Ntabanyane and Maseti “A Twenty-Year Review of Policy Landscape for Gender-Based Violence in South Africa” 2017 15(2) *Gender and Behaviour* 8614 8614. See, generally, Brodie *Femicide in South Africa* (2020). This article focuses mainly on women. GBV also affects children and members of the LGBTIQ+ community.

⁴ See, generally, Buqa “Gender-Based Violence in South Africa: A Narrative Reflection” 2022 78(1) *HTS Theological Studies* 1–8; Gqola *Rape: A South African Nightmare* (2016).

⁵ Interim Steering Committee on GBV *National Strategic Plan on Gender-Based Violence & Femicide* (2020) 2. See, generally, Snyman *Snyman’s Criminal Law 7ed* (updated by Hoor) (2020) 307–309.

⁶ Gouws “Rape is Endemic in South Africa. Why the ANC Government Keeps Missing the Mark” (9 August 2022) *The Mail & Guardian* <https://mg.co.za/opinion/2022-08-09-rape-is-endemic-in-south-africa-why-the-anc-government-keeps-missing-the-mark/> (accessed 2022-10-29).

⁷ Gouws <https://mg.co.za/opinion/2022-08-09-rape-is-endemic-in-south-africa-why-the-anc-government-keeps-missing-the-mark/>.

⁸ United Nations Office on Drugs and Crimes “Gender-Related Killings of Women and Girls (Femicide/Feminicide)” https://www.unodc.org/documents/data-and-analysis/briefs/Femicide_brief_Nov2022.pdf (accessed 2023-05-19) 24.

⁹ S 10 of the Constitution.

¹⁰ S 12 of the Constitution.

¹¹ S 152(1)(d) of the Constitution.

¹² See *S v Robertson* [2022] ZAWCHC 104; 2023 (2) SACR 156 (WCC) par 31; *S v Khasibe* [2022] ZAKZPHC 43 par 12.

¹³ Mokone “The Constitutional Role of the Judiciary in Cases of Sexual GBV: An Analysis of *Tshabalala v S*; *Ntuli v S* 2020 (5) SA 1 (CC)” 2021 42 *Obiter* 406 419. See also, generally, Von Meullen and Van der Waldt “A Model for Gender-based Violence Awareness: The Case of Student Representative Councils in Selected South African Universities” 2022 30(1) *Administratio Publica* 34–55.

reform, which is the focus of this article.¹⁴ The combatting of GBV crimes has only recently gathered much-needed legislative steam. Widespread protests against GBV broke out in 2019 owing to the murder of a university student, Uyinene Mrwetyana, inside a South African post office.¹⁵ As a result, in 2022, three statutes were eventually signed into law by President Cyril Ramaphosa; these included the Criminal Law (Sexual Offences and Related Matters) Amendment Act,¹⁶ the Criminal and Related Matters Amendment Act¹⁷ and the Domestic Violence Amendment Act.¹⁸

One of the biggest changes included in these laws was that all accused charged with domestic violence crimes must now appear before a court for their bail applications, effectively removing the possibility for prosecutorial and police bail in such cases.¹⁹ While this reform is applauded, various aspects of bail included in the Criminal Procedure Act²⁰ (CPA) remain insufficient to address GBV, and are analysed in this article.²¹ For example, it is argued that the current bail conditions imposed on GBV accused must be more specific to protect women and children. The article also considers proactive measures to combat the culture of GBV by analysing the role of the South African Police Service (SAPS) in ensuring that GBV offences are properly reported.²² Also, there currently exists significant distrust in the SAPS and this article looks at measures to professionalise the response of the SAPS to GBV.²³ The article also examines the lack of clear awareness measures geared towards combating GBV in South Africa, and proposes new alternatives. This article makes an important contribution to the body of

¹⁴ Indeed, serious GBV reform has been driven by the United Nations (UN) since 2010. See UN General Assembly (UNGA) *Resolution Adopted by the General Assembly on 21 December 2010: Strengthening Crime Prevention and Criminal Justice Responses to Violence Against Women* A/RES/65/228. Goal 5.2 of the UN Sustainable Development Goals aims to “[e]liminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation” (UN Department of Economic and Social Affairs: Sustainable Development “Goals: 5 Achieve Gender Equality and Empower All Women and Girls” (no date) https://sdgs.un.org/goals/goal5#targets_and_indicators (accessed 2023-10-28) Target 5.2).

¹⁵ See Staff Reporter “Murder Confession Arrives with a Thud – But Uyinene Mrwetyana Is Still Officially Missing” *Daily Maverick* (3 September 2019) <https://www.dailymaverick.co.za/article/2019-09-03-murder-confession-arrives-with-a-thud-but-uyinene-mrwetyana-is-still-officially-missing/> (accessed 2023-10-25).

¹⁶ 13 of 2021.

¹⁷ 12 of 2021.

¹⁸ 14 of 2021.

¹⁹ See s 3(b) of the Criminal and Related Matters Amendment Act 12 of 2021, which substitutes s 59A(1) of Act 51 of 1977.

²⁰ 51 of 1977.

²¹ Bail is regulated in Chapter 9 of the CPA. See, generally, Van der Merwe “Bail and Other Forms of Release” in Joubert, Kemp, Swanepoel, Terblanche, Van Der Merwe, Ally and Mokoena *Criminal Procedure Handbook* 13ed (2020) 206–240.

²² To examine the proactive measures put in place by SAPS, see SAPS *Annual Performance Plan 2023/2024* https://www.saps.gov.za/about/stratframework/strategic_plan/2023_2024/annual_performance_plan_2023_2024.pdf (accessed 2023-10-27). See also Nortje “Professionalising the Fight Against Police Corruption in South Africa: Towards a Proactive Anti-Corruption Regime” 2023 48 *Journal of Juridical Science* 72–95.

²³ See, generally, Fry “Trust of the Police in South Africa: A Research Note” 2013 8 *International Journal of Criminal Justice Sciences* 36–46.

literature on GBV and criminal procedure by focusing specifically on how the strengthening of bail, policing and awareness measures can lead to uprooting the culture of GBV.

First, the article provides a brief overview of GBV and the efforts of the South African government to curb it. This is followed by an analysis of how bail proceedings can be amended to have a greater impact on GBV prevention. The article then analyses matters related to the reporting of serious GBV matters at police stations. Finally, proactive measures to combat GBV, including awareness campaigns, are discussed.

2 A CULTURE OF GBV

In 2020, Tshegofatso Pule, pregnant at the time, was found hanging from a tree with a gunshot wound in her chest.²⁴ Her estranged boyfriend, Ntuthuko Shoba, had arranged a contract killer to murder her.²⁵

GBV is rampant in South Africa, and yet, it is not a new phenomenon. It was endemic during colonialism and apartheid but not categorised as such.²⁶ While apartheid reinforced the use of violence and inculcated the idea of manhood as “macho”, most males became incapable of raising *lobola* and unable to be the breadwinners for their families.²⁷ As a result, many young men, especially after the rise of democracy, sought to reassert their masculinity in opposition to a system that disempowered them.²⁸ Many men also feel a sense of entitlement over their female partners once they have paid *lobola*.²⁹ This has created a culture of GBV and helps explain the massive upsurge in violence in South Africa.³⁰ Indeed, GBV is more prevalent in societies where there is a culture of violence, and where male superiority is treated as a norm.³¹ A belief in male superiority can manifest in men feeling entitled to sex, which results in an abuse of power.³² Women’s and children’s rights are generally neglected in a toxic patriarchal system.³³

²⁴ *S v Shoba* [2022] ZAGPJHC 174 par 1.

²⁵ *S v Shoba supra* par 1.

²⁶ See, generally, Kaganas and Murray “Law and Women’s Rights in South Africa: An Overview” in Murray (ed) *Gender and the New South African Legal Order* (1994) 20–28.

²⁷ Green *Gender Violence in Africa: African Women’s Responses* (1999) 70–71. See also Graaf and Heineken “Masculinities and Gender-Based Violence in South Africa: A Study of a Masculinities-Focused Intervention Programme” 2017 34 *Development Southern Africa* 627.

²⁸ Green *Gender Violence in Africa* 71.

²⁹ Zinyemba and Hlongwana “Men’s Conceptualization of Gender-Based Violence Directed to Women in Alexandra Township, Johannesburg, South Africa” 2022 22 *BMC Public Health* 1 2. See also Hewitt-Stubbs, Zimmer-Gembeck, Mastro and Boislard “A Longitudinal Study of Sexual Entitlement and Self-Efficacy Among Young Women and Men: Gender Differences and Associations With Age and Sexual Experience” 2016 6 *Behavioral Sciences* 1–14.

³⁰ Green *Gender Violence in Africa* 71.

³¹ Sultana “Patriarchy and Women’s Subordination: A Theoretical Analysis” 2010 *Arts Faculty Journal* 1 3.

³² Jewkes “Intimate Partner Violence: Causes and Prevention” 2002 359 *The Lancet* 1423 1423.

³³ See, generally, Becker “Patriarchy and Inequality: Towards a Substantive Feminism” 1999 1 *University of Chicago Law Forum* 21–88.

One of the main causes of GBV is the power inequality rooted in patriarchy.³⁴ Feminism is adopted as a theoretical framework in this article, as feminists agree that patriarchy is the reason for the subjugation of women, as well as of men who do not conform to heteronormative standards.³⁵ In *Masiya*, the Constitutional Court held that “sexual violence and rape not only offends the privacy and dignity of women, but also reflects the unequal power relations between men and women in society.”³⁶

Rape is one of the most severe forms of GBV.³⁷ The Constitutional Court has also noted: “Rape is a scourge that affects women of all races, classes and sexual orientations, but we know that in South Africa rape has a pernicious effect on black women specifically.”³⁸ Rape is an abuse of power expressed in a sexual way and characterised by the power of the offender and disempowerment for the complainant.³⁹ The Constitutional Court held that a reluctance to understand that rape is not just about sex, but about the abuse of power “would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture.”⁴⁰ Burchell explains that “the rapist does not rape because he is sexually frustrated or deprived, any more than the alcoholic drinks because he is thirsty.”⁴¹ The Constitutional Court warned that there is an urgent need to dismantle the “rape culture” in South Africa.⁴² It is submitted that “rape culture” forms parts of the bigger “GBV culture” experienced in South Africa.⁴³

GBV is also a human rights violation that has severe consequences on the family unit, and on the mental and physical health of women and children.⁴⁴ Almost a third of all women who have been in a relationship have experienced physical or sexual violence by their intimate partner.⁴⁵ In 2020, the World Health Organization estimated that 12.1 in every 100 000 women

³⁴ Sultana 2010 *Arts Faculty Journal* 1. See also *F v Minister of Safety and Security (Institute for Security Studies & Others as Amici Curiae)* 2012 JOL 28228 (CC) par 56.

³⁵ See, generally, Bennett “‘Circles and Circles’: Notes on African Feminist Debates Around Gender and Violence in the c21” 2010 14 *Feminist Africa* 21–47; Allen “Rethinking Power” 1998 *Hypatia* 21–40.

³⁶ *Masiya v Director of Public Prosecutions Pretoria* 2007 (5) SA 30 (CC) par 28.

³⁷ See, generally, UN Women “FAQs: Types of Violence Against Women and Girls” (no date) <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence> (accessed 2023-10-28).

³⁸ *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC) par 68 n38.

³⁹ *Tshabalala v S; Ntuli v S supra* par 73.

⁴⁰ *Tshabalala v S; Ntuli v S supra* par 63.

⁴¹ Burchell *Principles of Criminal Law* 5ed (2016) 611.

⁴² See *Tshabalala v S; Ntuli v S supra* par 75.

⁴³ See, generally, UN Women “16 Ways You Can Stand Against Rape Culture” (18 November 2019) <https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture> (accessed 2023-10-28).

⁴⁴ See *S v Baloyi* 86 2000 (1) BCLR 86 (CC) par 11. See also Bencomo, Battistini and McGovern “Gender-Based Violence Is a Human Rights Violation: Are Donors Responding Adequately? What a Decade of Donor Interventions in Colombia, Kenya, and Uganda Reveals” 2022 24 *Health and Human Rights Journal* 29–45.

⁴⁵ Enaifoghe, Dlelana, Durokifa and Dlamini “The Prevalence of Gender-Based Violence against Women in South Africa: A Call for Action” 2021 10(1) *African Journal of Gender, Society and Development* 121 126.

in SA are victims of femicide each year.⁴⁶ This is five times higher than the global average of 2.6 in every 100 000 women, clearly highlighting the historic and systemic nature of GBV in South Africa.⁴⁷ Also, only one in nine GBV cases is reported, mainly owing to a lack of trust in the SAPS.⁴⁸ Moreover, women fear retaliation by their abuser, as in the case of Qebe, who allegedly killed Booi because she was planning to testify against him in a previous assault case.⁴⁹ The culture of GBV in South Africa has resulted in many women being stuck between deciding to report GBV or accepting it out of fear for their lives.

3 THE GOVERNMENT'S RESPONSE TO GBV

In 2019, the Executive implemented the National Strategic Plan on GBV and Femicide 2020–2030.⁵⁰ The Strategic Plan notes: “The unacceptably high levels of gender-based violence and femicide in South Africa are a blight on our national conscience, and a betrayal of our constitutional order for which so many fought, and for which so many gave their lives.”⁵¹ It provides substantial policy on the prevention of GBV and also calls on researchers to continue exploring how we can strengthen the fight against GBV, as “there remains a poor information base, to inform a more effective response to GBV.”⁵² It is believed that this article will contribute to the information base and provide important recommendations that will strengthen the response to GBV in South Africa.

In 2019, the then-Chief Justice Mogoeng Mogoeng also identified the judiciary as a key role player in combating GBV.⁵³ He noted that South Africa will have to implement strategic plans to deal with the root causes of GBV and that stricter laws should be created.⁵⁴ In *S v Chapman*, the Supreme

⁴⁶ Nkanjeni “Women’s Month: 5 Gender-Based Violence Cases That Have Made Headlines in 2022” (8 August 2022) *Times Live* <https://www.timeslive.co.za/news/south-africa/2022-08-08-womens-month-5-gender-based-violence-cases-that-have-made-headlines-in-2022/> (accessed 2023-05-20).

⁴⁷ Nkanjeni <https://www.timeslive.co.za/news/south-africa/2022-08-08-womens-month-5-gender-based-violence-cases-that-have-made-headlines-in-2022/>.

⁴⁸ Thebus “GBV Cases in the Western Cape of Major Concern, With More Than 400 Recorded in a Year” (13 May 2022) *IOL* <https://www.iol.co.za/capeargus/news/gbv-cases-in-the-western-cape-of-major-concern-with-more-than-400-recorded-in-a-year-734714c0-9a87-4fcf-9d4d-1599188b130c> (accessed 20-05-2023).

⁴⁹ Thebus <https://www.iol.co.za/capeargus/news/gbv-cases-in-the-western-cape-of-major-concern-with-more-than-400-recorded-in-a-year-734714c0-9a87-4fcf-9d4d-1599188b130c>.

⁵⁰ Interim Steering Committee on GBV *National Strategic Plan*. See also South African Government “Overview of National Strategic Plan on Gender-Based Violence and Femicide Roll-Out Year 1: May 2020–30 April 2021” (9 August 2021) https://www.gov.za/sites/default/files/gcis_document/202108/nsp-gbv-year-1-rollout-report-2020-2021-final-version-web.pdf (accessed 2023-11-11).

⁵¹ Interim Steering Committee on GBV *National Strategic Plan 2*.

⁵² Interim Steering Committee on GBV *National Strategic Plan 3*.

⁵³ Mpanza “We Need to Deal With the Root Causes of GBV – Mogoeng Mogoeng” (3 October 2019) *Jacaranda FM* <https://www.jacarandafm.com/news/news/we-need-deal-root-causes-gbv-mogoeng-mogoeng/> (accessed 2023-05-21).

⁵⁴ Mpanza <https://www.jacarandafm.com/news/news/we-need-deal-root-causes-gbv-mogoeng-mogoeng/>.

Court of Appeal (SCA) held that rape is a particularly serious crime since it violates the victim's privacy, dignity and person, in a humiliating, demeaning and cruel way.⁵⁵ It further held that women have a right to be able to move about freely and enjoy the peace and quiet of their homes without fear and insecurity.⁵⁶ Various sexual courts have been established to deal specifically with GBV cases in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,⁵⁷ which introduced the regulation of such courts. In 2013, the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO) published a report on the drastic need to establish sexual offences courts.⁵⁸ At the time of writing, 116 MATTSO courts, as they are currently called, had been established throughout the country.⁵⁹ The National GBV Strategic Plan has called for the establishment of 11 additional sexual offences courts equipped with victim support services.⁶⁰ The Department of Justice and Constitutional Development is currently in the process of converting the MATTSO courts into designated section 55A sexual offences courts.⁶¹ These developments are promising and enable the judiciary to appoint presiding officers with experience in GBV matters; this is in addition to the National Prosecuting Authority who already has a dedicated unit that focuses on GBV crimes.⁶² However, at the same time, it is argued that more can be done to ensure that the use of intermediaries and closed-circuit television facilities are widely available in sexual offences cases and, in particular, in the rural areas of the country.⁶³ Child witnesses and even some adults can testify in a separate room via an intermediary, upon application to the court.⁶⁴ More should be done to roll out these facilities to all areas of the country.

The legislature made significant progress by adopting three GBV laws in 2019. The Criminal Law (Sexual Offences and Related Matters) Amendment Act expanded the definition of incest, introduced the new offence of sexual intimidation, and made substantial amendments to the National Register for Sex Offenders, among other interventions.⁶⁵ The Domestic Violence Amendment Act expands on the definition of domestic abuse by including controlling behaviour, coercive behaviour, sexual harassment, related

⁵⁵ *S v Chapman* 1997 (3) SA 341 (SCA) par 3.

⁵⁶ *S v Chapman supra* par 4.

⁵⁷ S 55A(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁵⁸ MATTSO *Report on the Re-Establishment of Sexual Offences Courts* (August 2013).

⁵⁹ Department of Justice and Constitutional Development "Criminal Law. List of MATTSO Courts" (2022) <https://www.justice.gov.za/vg/sxo-SOC-list.html> (accessed 2023-05-21).

⁶⁰ Interim Steering Committee on GBV *National Strategic Plan* 49.

⁶¹ Parliamentary Monitoring Group "Question NW924 to the Minister of Justice and Correctional Services" (25 April 2022) <https://pmg.org.za/committee-question/18554/> (accessed 2023-05-21).

⁶² See National Prosecuting Authority "Sexual Offences and Community Affairs: Defending Women and Children" (18 March 2022) <https://www.npa.gov.za/sexual-offences-and-community-affairs> (accessed 2023-05-21).

⁶³ See, generally, Lamprecht *The Use of Closed-Circuit Television in South African Criminal Courts* (master's thesis, University of Pretoria) 2019.

⁶⁴ See s 158(2) and 170A of the CPA.

⁶⁵ See generally, Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 13 of 2021.

person abuse, elder abuse and spiritual abuse.⁶⁶ The Act also introduces the establishment of an integrated electronic repository for domestic violence protection orders.⁶⁷ While the Criminal and Related Matters Amendment Act made important amendments to the law relating to bail, it is argued that more can be done. Bail and its importance to the fight against GBV cannot be overemphasised.

4 THE IMPORTANCE OF BAIL REFORM

The Constitution provides that every accused has the right to be released from detention if this is in the interests of justice.⁶⁸ Bail does not exist to punish the accused, since the release of an accused is founded on their constitutional right of presumption of innocence.⁶⁹ The SCA noted in *S v Viljoen* that a bail application is not a criminal proceeding, nor should it be categorised as a dress rehearsal for the upcoming trial.⁷⁰ The release of an accused, however, becomes problematic when accused are granted bail and subsequently commit GBV offences. This has occurred in many GBV cases, including the featured case of *Qebe*, but also in the landmark Constitutional Court judgment of *Carmichele v Minister of Safety and Security*,⁷¹ in which the accused had been released on a warning for attempted rape.⁷² Shortly after his release, the accused brutally assaulted Carmichele, even after she and other concerned parties notified police and the prosecutor that the accused was stalking her.⁷³

The Constitutional Court held that prosecutors have a duty to inform the presiding officer of any information relevant to the granting of bail.⁷⁴ The court also explained that South Africa has an unreserved duty under international law to prohibit all forms of GBV.⁷⁵ It referred to the Convention on the Elimination of All Forms of Discrimination Against Women, and held that GBV impairs the enjoyment by women of fundamental rights and freedoms.⁷⁶ South Africa also ratified the Maputo Protocol, which guarantees that every woman shall have the right to dignity inherent in a human being

⁶⁶ See s 2 of the Domestic Violence Amendment Act 14 of 2021, which substitutes s 1 of Act 116 of 1998.

⁶⁷ See s12 of the Domestic Violence Amendment Act 14 of 2021, which inserts s 6A in Act 116 of 1998.

⁶⁸ S 35(1)(f) of the Constitution.

⁶⁹ S 35(3)(h) of the Constitution; *S v Acheson* 1991 (2) SA 805 (Nm); *S v Stanfield* 1997 (1) SACR 221 (C) 233g–i. See also Van der Merwe in Joubert *et al Criminal Procedure Handbook* 211; Du Toit *Commentary on the Criminal Procedure Act* (2016) 9–34.

⁷⁰ *S v Viljoen* (2002) 4 All SA 10 (SCA) par 25. See also Theophilopoulos (ed) *Criminal Procedure in South Africa* (2019) 214.

⁷¹ See *Carmichele v Minister of Safety and Security* (Centre for Applied Legal Studies as *Amicus Curiae*) 2002 (1) SACR 79 (CC).

⁷² *Carmichele v Minister of Safety and Security* *supra* par 13.

⁷³ *Carmichele v Minister of Safety and Security* *supra* par 5–24.

⁷⁴ *Carmichele v Minister of Safety and Security* *supra* par 72.

⁷⁵ *Carmichele v Minister of Safety and Security* *supra* par 62.

⁷⁶ See *Carmichele v Minister of Safety and Security* *supra* par 62. See also art 1, 2, 3, 6, 11, 12 and 16 of UNGA *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) 1249 UNTS 13 Adopted: 18/12/1979; EIF: 03/09/1981.

and to the recognition and protection of her human and legal rights.⁷⁷ The court also held: “Constitutional obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.”⁷⁸ This is a stark reminder of the duty placed on the State to safeguard the rights of women and children. It is believed that the State is not fulfilling its duties and obligations in this regard, especially if one considers what happened in the *Qebe* case, and to thousands of other women in South Africa.

The presiding officer hearing a GBV bail application is also under pressure to make a decision that will serve the interests of justice, as well as the interests of the complainant and the accused.⁷⁹ The decision of the court, however, is complex as it has to strike a balance between the rights of the accused and the rights of the victims.⁸⁰ Presiding officers are guided by numerous bail factors included in the CPA.⁸¹ Section 60(4) of the CPA provides that the granting of bail will not be in the interests of justice when certain grounds are established by the State. These include the likelihood that the accused, if released on bail, will (a) endanger the safety of the public or will commit a Schedule 1 offence,⁸² (b) evade his trial,⁸³ (c) intimidate witnesses or destroy evidence,⁸⁴ (d) jeopardise the effectiveness of the criminal justice system,⁸⁵ and (e) undermine the public order and peace.⁸⁶ These factors were clearly evident in *Carmichele* and *Qebe*, but the State failed in its duty to protect the victims. It is submitted that there exists a problem in the analysis, application and interpretation of bail grounds in serious GBV matters.

The legislature in 2021 attempted to address this concern by instructing a court during bail proceedings, in certain offences, also to hear the views of the individual against whom the offence was committed, and whether they would feel safe if the accused were released on bail.⁸⁷ It is not clear how consistently this amendment is being applied in our courts, but this

⁷⁷ African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) Adopted:01/07/ 2003; EIF: 25/11/ 2005. See also Mujuzi “The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations” 2008 12(2) *Law, Democracy & Development* 41 58.

⁷⁸ *Carmichele v Minister of Safety and Security supra* par 57. See also May “Submissions by the Women's Legal Centre to the United Nations Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression” (June 2021) <https://www.ohchr.org/sites/default/files/2021-11/Women-s-Legal-Centre.pdf> (accessed 2023-10-25).

⁷⁹ See *Majali v S* (unreported, GSJ case no 41210/2010, 19 July 2011) par 17. See also Du Toit *Commentary on the Criminal Procedure Act* 9–4.

⁸⁰ See *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999(2) SACR 51 (CC) par 50.

⁸¹ See s 60 of the CPA.

⁸² S 60(4)(a) of the CPA. See also *S v Mpulampula* 2007 (2) SACR 133 (E) 136i–j.

⁸³ S 60(4)(b) of the CPA. See also *S v Yanta* 2000 (1) SACR 237 (Tk) 247d–e.

⁸⁴ S 60(4)(c) of the CPA. See also *S v Louw* 2000 (2) SACR 714 (T).

⁸⁵ S 60(4)(d) of the CPA. See also Du Toit *Commentary on the Criminal Procedure Act* 9–32.

⁸⁶ S 60(4)(e) of the CPA. See also *S v Miselo* 2002 (1) SACR 649 (C) 653a–b.

⁸⁷ See s 4(b) of the Criminal and Related Matters Amendment Act, amending s 60 of the CPA.

amendment is not sufficient as it stands. It is argued that the victim might not always be willing to testify against the accused, owing to the victim being financially dependent on the accused or afraid of what might happen to them when the accused is released.⁸⁸ It is proposed that the Act should also instruct the court to call to the stand additional witnesses who have been affected by the conduct of the accused. This should be made mandatory in GBV cases in order to give a voice to those who cannot speak owing to trauma caused by the accused.

Not all GBV offences are regarded in the same way by a bail court. Where an accused is charged with a Schedule 6 offence, such as premeditated murder or gang rape, the accused is required to provide exceptional circumstances to justify bail.⁸⁹ Such exceptional circumstances are not defined but may include that the accused is terminally ill or has proved that the State's case against him is weak.⁹⁰ This is the only time where there is a burden placed on the accused to adduce evidence if they want to obtain bail.⁹¹ The authors submit that this reverse onus should be applicable to all serious GBV matters where the accused: has already confessed to the offence; was caught red-handed by the police; or has prior GBV convictions. This should be applicable to any GBV murder, GBV rape and GBV assault with intent to cause grievous bodily harm, and not only to the most serious GBV offences currently included under Schedule 6.

Bail conditions also play a crucial role in ensuring the safety and security of women and children.⁹² In *S v Mathonsi*, the court prohibited the accused from contacting certain witnesses via WhatsApp, Twitter, Facebook, email, SMS and any other forms of communication.⁹³ In *M v S*, a father was convicted and sentenced of the attempted rape of his eight-year-old daughter.⁹⁴ The court provided a scathing report on the criminal justice system and concluded that the daughter was not protected from her father during court proceedings, which indicated a clear lack of proper bail conditions.⁹⁵ The enforcement of bail conditions is problematic in GBV cases where the offender is often closely related to the victim. It is therefore up to the court to inform the accused of the severe consequences if they were to violate these conditions. It is submitted that our courts must impose harsh consequences on GBV accused who forfeit their bail conditions. The National Strategic Plan on GBV recommends that the CPA should allow "for bail conditions to be tightened in cases of those charged with rape".⁹⁶ In

⁸⁸ See, for e.g., Conner "Financial Freedom: Women, Money, and Domestic Abuse" 2014 20 *William and Mary Journal of Women and the Law* 339–397.

⁸⁹ See s 60(11)(a) of the CPA. See also *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat supra* par 77, where the Constitutional Court declared s 60(11)(a) of the CPA constitutional. See also *Matwa v S* [2022] ZAWCHC 72 par 19.

⁹⁰ Van der Merwe in *Joubert et al Criminal Procedure Handbook* 236. See also *Mafe v S* [2022] ZAWCHC 108 par 16.

⁹¹ Theophilopoulos *Criminal Procedure in South Africa* 214.

⁹² See s 62 of the CPA. See also Du Toit *Commentary on the Criminal Procedure Act* 9–88F.

⁹³ *S v Mathonsi* 2016 (1) SACR 417 (GP) par 29.

⁹⁴ See *M v S* 2020 (1) SACR 241 (WCC).

⁹⁵ *M v S supra* par 76.

⁹⁶ Interim Steering Committee on GBV *National Strategic Plan* 34.

addition, it is argued that the bail conditions issued to all GBV accused charged with serious GBV crimes should be subject to automatic review by a High Court. Such a process could be informal and take the form of an experienced judge reviewing the bail conditions. If the judge is not convinced that the conditions are appropriate, then the matter should be sent back to the bail court.

It is argued that the Department of Justice and Constitutional Development should develop professional programmes aimed at providing refresher courses to magistrates regarding the interpretation of bail proceedings in GBV cases. This could be presented by a retired presiding officer with experience in GBV matters. It is clear from the above discussion that more can be done to strengthen our bail regime in accordance with the fight against a culture of GBV.

5 THE CRITICAL ROLE OF SAPS

The State has a duty to protect women against all forms of GBV that impair their fundamental rights and freedoms.⁹⁷ It has to take reasonable and measurable steps to prevent the violation of those rights.⁹⁸ The courts, together with the SAPS, are under a duty to send a clear message to perpetrators of GBV that they are determined to protect the equality, dignity and freedom of all women.⁹⁹ In *K v Minister of Safety and Security*, the complainant was brutally gang raped by three on-duty and uniformed police officers.¹⁰⁰ The complainant, who asked for a lift in the early morning hours from the officers, would never have imagined that the organ responsible for shielding her from harm would violate her in such an unimaginable way. This case, decided in 2005, has left a visible scar on the image of the SAPS, especially in its fight against GBV. The SAPS is the primary body responsible for the protection of women against sexual violence and is not supposed to contribute to the problem.¹⁰¹ The Constitution provides for the establishment of a single police force.¹⁰² The SAPS is constitutionally responsible to prevent, combat and investigate crime, to protect and secure its citizens, to maintain public order and to enforce the law.¹⁰³

In *AK v Minister of Police*, the applicant was attacked, robbed and repeatedly raped by unknown assailants.¹⁰⁴ The Constitutional Court held that if the police had conducted a thorough search and investigation for the applicant where they initially found her car, she would not have been

⁹⁷ *S v Chapman supra* par 4.

⁹⁸ Maphosa "Tackling the 'Shadow Pandemic': The Development of a Positive Duty on Adults to Report Domestic Violence" 2002 55(1) *De Jure Law Journal* 87 94.

⁹⁹ Maphosa 2002 *De Jure Law Journal* 87 98. See also *Carmichele v Minister of Safety and Security supra* par 17.

¹⁰⁰ *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC) par 1.

¹⁰¹ *Carmichele v Minister of Safety and Security supra* par 30; *K v Minister of Safety and Security supra* par 18.

¹⁰² S 199 of the Constitution.

¹⁰³ S 205(2) of the Constitution.

¹⁰⁴ *AK v Minister of Police* 2023 (2) SA 321 (CC) par 1.

repeatedly raped and would not have suffered secondary trauma.¹⁰⁵ The court stated that the conduct of the police was wrongful and held that the applicant could claim damages from the Minister of Police.¹⁰⁶ The court further held that “[g]ender-based violence sustains women’s subordination in society and imperils the constitutional values of human dignity, freedom, substantive equality, and the establishment of a non-sexist society.”¹⁰⁷ The court also emphasised the obligation on the police to take effective steps to eradicate all forms of GBV.¹⁰⁸

The SAPS and other stakeholders like the NPA and the Department of Health have implemented several policies over the last few decades to address GBV.¹⁰⁹ This has resulted in the establishment of several units dedicated to helping GBV victims. One such unit is the Thuthuzela Care Centre, which was established in 2006 and deals specifically with rape victims.¹¹⁰ When reporting the offence, the complainant is taken from the police station to a Thuthuzela Care Centre (TCC) located at hospitals throughout the country.¹¹¹ This is done to provide a victim-friendly environment for the rape victim. However, the Foundation for Professional Development reported that victim friendliness is still a major concern at TCCs.¹¹² The report indicated that secondary victimisation occurs owing to insensitive police officers and inadequate counselling rooms and privacy at TCCs.¹¹³

The report also noted, “Participants mentioned that the police do not provide feedback to the victims on the progress of their cases, which makes the situation for the victim even more complicated.”¹¹⁴ In an attempt to address the problem, Minister of Police, Bheki Cele, announced the rolling out of GBV desks at police stations in 2022.¹¹⁵ There are currently GBV

¹⁰⁵ *AK v Minister of Police supra* par 18.

¹⁰⁶ *AK v Minister of Police supra* par 124.

¹⁰⁷ *AK v Minister of Police supra* par 117.

¹⁰⁸ *Ibid.*

¹⁰⁹ See generally Interim Steering Committee on GBV *National Strategic Plan*.

¹¹⁰ In addition, the Khuseleka Centres also provide assistance to GBV victims which include “trauma counselling and psychological support, healthcare, police services, legal assistance and shelter for victims of abuse.” See South African Government “Plan to have GBV One-Stop Centres in All Hotspots” (28 October 2020) <https://www.sanews.gov.za/south-africa/plan-have-gbv-one-stop-centres-all-hotspots> (accessed 2023-05-22).

¹¹¹ National Prosecuting Authority “Thuthuzela Care Centres” https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_augu_st_2009.pdf (accessed 2023-05-22).

¹¹² Foundation for Professional Development *Thuthuzela Care Centre Compliance Audit and Gap Analysis 2016* (November 2016) <http://shukumisa.org.za/wp-content/uploads/2018/02/PA00MQJ6-1.pdf> (accessed 2023-05-22) 15.

¹¹³ Foundation for Professional Development <http://shukumisa.org.za/wp-content/uploads/2018/02/PA00MQJ6-1.pdf> (accessed 22-05-2023) 15.

¹¹⁴ Foundation for Professional Development <http://shukumisa.org.za/wp-content/uploads/2018/02/PA00MQJ6-1.pdf> (accessed 22-05-2023) 82.

¹¹⁵ Mabaso “Bheki Cele Wants Dedicated Desk to Investigate Gender-Based Violence Cases” (25 March 2022) *Eyewitness News* <https://ewn.co.za/2022/03/25/bheki-cele-wants-dedicated-desk-to-investigate-gender-based-violence-cases> (accessed 2023-05-22).

desks at all police stations across the country.¹¹⁶ They are manned by over 80 000 police members trained in GBV-related courses.¹¹⁷ The desks were established to provide coordination between the experiences of the victim and the status of the perpetrator in the criminal justice system.¹¹⁸ An audit is currently underway to assess the functionality of the desks.¹¹⁹ The authors commend the SAPS and other stakeholders for their commitment in professionalising the fight against GBV, but more needs to be done. It is argued that an integrated online GBV database, tracking the victim and the offender's status, should be rolled out to streamline the process and to provide the victim with immediate updates about the case.

6 UPROOTING THE CULTURE OF GENDER-BASED VIOLENCE THROUGH INCREASED AWARENESS

The GBV culture in South Africa should be continually exposed and not normalised.¹²⁰ GBV offences are often not reported owing to a desire for privacy and shame over the matter.¹²¹ The marriage relationship is regarded as a sacred and private communion no matter what, as a male participant in a research study in Johannesburg once explained: "Issues involving two people in a marriage like in an African culture there is a saying that *indaba zabantu ababili azingenwa* [issues involving two people in romantic relationship cannot be interfered with]."¹²² Another participant said, "Sometimes men do violence against women without realising that they're violating the rights of a woman."¹²³ These views indicate how normalised GBV has become, and that it has become a culture in South Africa.¹²⁴ It is therefore of paramount importance to make people aware that GBV is unlawful and abhorrent. It is argued that GBV awareness campaigns are popular in South Africa but are not having the desired effect as crimes against women and children remain unacceptably high.

SAPS reported that all provinces currently conduct a "365 days campaign" that runs annually and consists of community-based engagements such as *Izimbizo*, radio and television talks, door-to-door engagements, school-based agreements, crime dialogues and the distribution of information tablets at shopping centres.¹²⁵ Government created a policy framework to

¹¹⁶ Ministry of Police "Police Ministry Assures SAPS Commitment to Bringing GBV Perpetrators to Book" (27 May 2022) SAPS <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=40052> (accessed 2023-05-22).

¹¹⁷ Ministry of Police <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=40052>.

¹¹⁸ Minister of Police "For Oral Reply: Question 327" (31 August 2022) *Parliamentary Monitoring Group* <https://static.pmg.org.za/RNO327-2022-08-31.pdf> (accessed 2023-05-22).

¹¹⁹ Minister of Police <https://static.pmg.org.za/RNO327-2022-08-31.pdf>.

¹²⁰ See *Tshabalala v S; Ntuli v S supra* par 75.

¹²¹ Mutinta "Gender-Based Violence Among Female Students and Implications for Health Intervention Programmes in Public Universities in Eastern Cape, South Africa" 2022 8 *Cogent Social Sciences* 3.

¹²² Zinyemba and Hlongwana 2022 *BMC Public Health* 7.

¹²³ Zinyemba and Hlongwana 2022 *BMC Public Health* 8.

¹²⁴ See Mutinta 2022 *Cogent Social Sciences* 3.

¹²⁵ Minister of Police <https://static.pmg.org.za/RNO327-2022-08-31.pdf>.

address GBV in the Post-School Education and Training System (PSET).¹²⁶ The Department of Higher Education and Training also convened a GBV colloquium for all PSET institutions and stakeholders to identify national, regional and institutional initiatives to create awareness and prevent GBV in institutions.¹²⁷ The policies that have been put in place focus on the accessibility and availability of student accommodation, which is an ongoing challenge for PSET institutions.¹²⁸ Where student housing is located, the policy facilitates and limits incidents of all forms of violence, including GBV. This is a commendable step by government, even though the implementation of the policy is directed only to the higher-education sector. GBV awareness should also start in our homes and communities. Citizens should be encouraged to donate to charities that deal with GBV prevention. Religious leaders could contribute to the call for GBV prevention by running programmes at churches and mosques. It is submitted that the Department of Social Work could work on a programme to assist parents to incorporate chores within households to teach their children that men and women are equal.

GBV awareness is also part of the school curriculum from Grades 4 to 12.¹²⁹ In terms of school awareness, we suggest that schools arrange regular visits to police stations to inform senior scholars visually of the scourge of GBV. Scholars need to be taken out of their comfort zone at schools to experience what anti-GBV is in practice. Awareness in the mass media is important and impactful, but currently the use of outdoor visual awareness is lacking. The use of billboards is a relatively inexpensive way of illustrating to thousands of people on a daily basis what GBV is.¹³⁰ Billboards are a way to “serve notice” to the masses that the government and community is serious about GBV reform.¹³¹ Soccer, rugby and cricket players should be encouraged to take the knee against GBV and a designated minute before each game could be attributed to GBV awareness. Businesses could provide slogans that relate to eliminating GBV in South Africa and link it to citizens being proudly South African. SAPS should introduce a panic button system for victims of GBV to notify SAPS when a victim requires help. An incentive scheme, such as a monetary reward or a voucher, could be implemented to encourage people to report GBV offences. It is also important to involve men in GBV prevention programmes.¹³² This could include reformed GBV offenders and male police

¹²⁶ Department of Higher Education and Training *Policy Framework to Address Gender-Based Violence in the Post-School Education and Training System* (March 2020) [https://www.dhet.gov.za/Social%20Inclusion/Gazette%20Z95_1221889%20Policy%20Framework%20to%20Address%20GBV%20in%20the%20PSET%20System%202020%20\(1\).pdf](https://www.dhet.gov.za/Social%20Inclusion/Gazette%20Z95_1221889%20Policy%20Framework%20to%20Address%20GBV%20in%20the%20PSET%20System%202020%20(1).pdf).

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ See South African Government “Western Cape Education Takes a Stand on Gender-Based Violence” (9 December 2020) <https://www.gov.za/speeches/stand-against-gender-based-violence-9-dec-2020-0000> (accessed 2023-05-22).

¹³⁰ See DeCicco “Crime Watch: Implementation of Statewide Crime Prevention Programs” 1977 5(3) *Criminal Justice Quarterly* 56 61.

¹³¹ See DeCicco 1977 *Criminal Justice Quarterly* 61.

¹³² Mashamaite and Mukhathi “Stop Gender-Based Violence and Femicide” 2020 *Police* 1 4.

officers. As a country, we have talked enough about GBV prevention; the time has come to be more proactive in our awareness campaigns.

7 CONCLUSION

This article has called for a reform of the current GBV regime. However, the road to GBV eradication is complex because we are painstakingly and slowly breaking down a violent system first inherited from apartheid and then normalised after 1994. It is submitted that a holistic effort from community forums, the SAPS, the NPA, the judiciary and others is required to combat GBV. Judges should be encouraged to practise judicial activism in GBV cases. For example, in the highly publicised *Shoba* case,¹³³ the judge did not even once refer to the scourge of GBV. Courts are also encouraged to pass consistent sentences in GBV matters.¹³⁴ It is recommended that the Department of Correctional Services should review their GBV rehabilitation programmes to ensure that it is creating an anti-GBV culture. It is submitted that all GBV offenders must be subjected to such a rehabilitation programme, which must include the participation of willing survivors of GBV offences. The granting of bail should be considered carefully especially where the court is of the view that the life of a complainant is under threat. Protection orders must be prioritised by our courts. SAPS members who fail to comply with their obligations in terms of assisting GBV complainants should be held accountable and liable to a reduction of their salary.

There is a dire need to be more proactive in our fight against GBV. The enacting of the National Council on Gender-Based Violence and Femicide Bill (B31–2022) must therefore be prioritised. This Council, once established, will provide strategic leadership on the elimination of gender-based violence and femicide and provide an inter-sectoral and multi-sectoral approach towards the implementation of the National Strategic Plan.¹³⁵ All these efforts will be nullified if we fail to uproot the culture of GBV.

¹³³ *Supra*.

¹³⁴ *Maila v S* [2023] ZASCA 3 par 59.

¹³⁵ S 2 of the National Council on Gender-Based Violence and Femicide Bill (B31-2022).