



## ***“Good fences make good neighbours”***

### ***An explanatory analysis of the rights of unit owners in handling domestic violence within a sectional title scheme.***

Robert Frost in 1914, coined the phrase “good fences make good neighbours”.<sup>1</sup> The ever-emerging impact of modernisation and the need for peace and security has caused an acceleration in the need for residency within a sectional title scheme. As a result, the fences Robert Frost referred to in ‘mending walls’ has been removed, as people live in close proximity to each other and are often exposed to violent relational disputes that impact their peace and security.

This article provides an exposition of the rights of unit owners within a sectional title scheme that are exposed to the ever-growing act of domestic violence.

There is no provision in the Prescribed Conduct Rules (PCRs) in the Sectional Title Schemes Management Regulations, 2016 (“the STSMA Regulations”) which provides specific guidelines to deal with domestic violence. One would have to look at the so-called “nuisance laws” or rules in relation thereto.

There are a number of benefits to living in a sectional title scheme however, people live in close proximity to each other and are often exposed to factors that cause a disturbance which infringes on their use and enjoyment of their property.

One such factor may be ongoing domestic disputes or violence which could potentially be dealt with using, as above, nuisance laws or rules relating thereto within the sectional title scheme. A private nuisance “denotes an infringement of a neighbour’s entitlement of use and enjoyment so that it affects the quality of life”.<sup>2</sup> Nuisance includes any abnormal behaviour that causes harm or damage to a neighbour.<sup>3</sup>

From a civil law perspective, there is very little neighbours can do if they suspect that a neighbour is suffering from domestic violence.

However, in terms of PCR7(1) of the STSMA Regulations an owner or occupier of a section must not create noise likely to interfere with the peaceful enjoyment of another person in the scheme. The trustees of the body corporate may enforce the PCRs by imposing a fine or penalty if there is an empowering provision within the scheme’s rules to do so. Alternatively, the affected unit owner or occupier may approach the Community Schemes Ombud Service (CSOS) in

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<sup>1</sup> Frost, R 1914, *Mending Walls*, David Nut, North Boston.

<sup>2</sup> See Samuels, A ‘Note on the use of public nuisance doctrine in 21<sup>st</sup> century South Africa’ available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2225-71602015000100012#:~:text=A%20private%20nuisance%20%22denotes%20an%20infringement%20of%20a,the%20law%20of%20property%20in%20South%20Africa%20134%29](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602015000100012#:~:text=A%20private%20nuisance%20%22denotes%20an%20infringement%20of%20a,the%20law%20of%20property%20in%20South%20Africa%20134%29), last accessed on 21 February 2023.

<sup>3</sup> Prof Paddock, G “Quick Guide: Nuisance in community Schemes” | 26/04/2022 <https://paddocksblog.com/2022/04/26/quick-guide-nuisance-in-community-schemes/> This article is published under the Creative Commons Attribution licence.



terms of s 39(2)(a) of the Community Schemes Ombud Service Act<sup>4</sup> (the “CSOS Act”). Section 39(2)(a) of the CSOS Act, allows an adjudicator to intervene and control nuisance behaviour by ordering a person to act, or refrain from acting in a specified way.

It is submitted that failure to comply with the CSOS adjudication order could result in contempt of court proceedings (if it has been registered as an order of court in terms of s 56 of the CSOS Act) which may carry a criminal penalty.<sup>5</sup>

From a criminal law perspective, there are more processes which a neighbour or the Body Corporate could follow.

Section 384 of the Criminal Procedure Act<sup>6</sup>, provides for an effective lesser known remedy that is much more cost-effective than civil procedure routes. In terms of section 384 of the Criminal Procedure Act, whenever a complaint on oath (i.e. in the form of an affidavit) is made to a Magistrate stating that any person is conducting himself in a violent manner or is threatening to cause another person, or the property of that person, damage, a complainant may approach the court for an order to keep the peace, failing which the perpetrator may be ordered to be committed to jail for a period not exceeding six months.<sup>7</sup>

The alternative way to proceed in reporting domestic violence would be to utilise the Domestic Violence Act<sup>8</sup> (“the Domestic Violence Act”) or the Protection from Harassment Act<sup>9</sup> (“the Harassment Act”).

The purpose of the Domestic Violence Act is to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide.<sup>10</sup> Organs of state such as the South African Police Service (“SAPS”) have a responsibility to give effect to the Domestic Violence Act and attend to the complaints by victims or persons (i.e. unit owners in a community scheme) indirectly affected by domestic violence. Failure to act on a complaint may result in the SAPS incurring civil liability alternatively criminal liability on the basis of a dereliction of duty.

One of the advantages of the Domestic Violence Act is that it provides for protection orders. Similarly, the Harassment Act allows a complainant to obtain a protection order against harassment.<sup>11</sup> In terms of the Domestic Violence Act, a protection order may be granted against a perpetrator (in which there is or has been a domestic relationship with the complainant) on the evidence of, among other evidence, physical, sexual or financial abuse.<sup>12</sup> However, in terms of the Harassment Act, the complainant may apply for a protection order without knowing who the alleged perpetrator is and without any form of violence taking place.<sup>13</sup> Lastly, a protection order in terms of the Domestic Violence Act never expires until it is set aside,<sup>14</sup> whereas a protection order in terms of the Harassment Act expires after a period of five years,<sup>15</sup> by operation of law.

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<sup>4</sup> Act 9 of 2011.

<sup>5</sup> In terms of section 56 of the CSOS Act, an adjudicator’s order can be registered in a court with the appropriate jurisdiction, resulting in a person being able to enforce the adjudication order as a court order. It is therefore submitted that the applicant could bring contempt of court proceedings against the respondent (against whom the adjudication order was awarded) who disregards the court order.

<sup>6</sup> Act 56 of 1955.

<sup>7</sup> Section 384 of the Criminal Procedure Act No. 56 of 1955 was not repealed by the new Criminal Procedure Act, No. 51 of 1977.

<sup>8</sup> Act 116 of 1998.

<sup>9</sup> Act 17 of 2011.

<sup>10</sup> The Preamble, *Domestic Violence Act*, 1998.

<sup>11</sup> Section 2 of the Harassment Act.

<sup>12</sup> In terms of s 6(4) of the Domestic Violence Act the court must issue a protection order on the balance of probabilities that the respondent has committed an act of domestic violence. The list of acts which constitutes domestic violence can be found in s 1(viii) of the Domestic Violence Act.

<sup>13</sup> In terms of s 5 of the Harassment Act, the Court can issue a directive for SAPS to investigate the identity of the respondent.

<sup>14</sup> Section 6(7) of the Domestic Violence Act.

<sup>15</sup> Section 9(8) of the Harassment Act.



It is important to note that sometimes in practice it appears that clerks of certain magistrates' courts do not allow a complainant to apply for a protection order in terms of the Harassment Act, if they deem there to be a previous relationship between the parties or where the complainant and respondent used to share a living space. However, this position is incorrect and is in contravention of the Harassment Act. In terms of the Harassment Act, provided that the complainant is not in possession of, or in the process of, applying for a protection order against harassment or stalking as provided for in the Domestic Violence Act, the court may not refuse to issue a protection order in terms of the Harassment Act simply because there may be other legal remedies which are available to the complainant.<sup>16</sup>

Generally, the complainant in a domestic violence matter, applying for a protection order, would need to be the victim of domestic violence.<sup>17</sup> This is because the Domestic Violence Act defines "complainant" as meaning "any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant."<sup>18</sup>

Further, the Domestic Violence Act defines "domestic violence" as:

*"physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent, where the parties do not share the same residence, or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant".<sup>19</sup>*

A third party, such as a neighbour, can therefore only go so far as reporting suspected domestic violence to the police, but could not apply for a protection order themselves unless, in the case where the complainant is a major their written consent is obtained,<sup>20</sup> or if the complainant is a minor,<sup>21</sup> mentally challenged, unconscious or a person who the court is satisfied cannot give consent.<sup>22</sup>

A protection order in the context of domestic violence is governed by, and applied for, in terms of the Domestic Violence Act. The terms of the protection order itself (and therefore what the Court can include in the protection order) are governed by s 7 of the Domestic Violence Act and include, but are not limited to the prohibition of the person committing the act of domestic violence (the "respondent" in the court proceedings) from committing any further act of domestic violence or getting someone else's help to commit such an act.<sup>23</sup> The respondent may be ordered not to enter the residence (whether shared or not) of the complainant, a specific part of the shared residence or the complainant's place of employment.<sup>24</sup> This list is, however, not exhaustive and the court may order other prohibitions.

The protection order has far-reaching consequences and would ensure that the complainant is protected. For example, the court could order that the address of the complainant is not disclosed,<sup>25</sup> or that if the complainant needs to visit the residence of the respondent to uplift personal property, they are accompanied by a peace officer.<sup>26</sup>

<sup>16</sup> Section 10(5)(a) of the Harassment Act.

<sup>17</sup> A copy of the application form can be found here, [https://www.saps.gov.za/services/downloads/protection\\_order\\_application.pdf](https://www.saps.gov.za/services/downloads/protection_order_application.pdf)

<sup>18</sup> Section 1(iii) of the Domestic Violence Act.

<sup>19</sup> Section 1(viii) of the Domestic Violence Act.

<sup>20</sup> Section 4(3) of the Domestic Violence Act.

<sup>21</sup> Section 4(3)(a) and 4(4) of the Domestic Violence Act.

<sup>22</sup> Section 4(3)(a) – (d) of the Domestic Violence Act.

<sup>23</sup> Section 7(1)(a) and (b) of the Domestic Violence Act.

<sup>24</sup> Section 7(1)(c) and (f) of the Domestic Violence Act.

<sup>25</sup> Section 7(5)(b) of the Domestic Violence Act.

<sup>26</sup> Section 7(2)(b) of the Domestic Violence Act.



A complainant may apply to any court within the area in which the complainant or respondent lives or works, or carries on business or where the cause of action arose.<sup>27</sup>

With regard to the safety of children, a protection order can also include (if the court deems it to be in the best interests of a child), that the respondent may not have any contact with the child, or that any contact between the respondent and the child is on certain conditions.<sup>28</sup>

While this article does not purport to be a complete summary of this topic, it is important to note that a court must, when it issues a protection order, authorise the issue of a warrant of arrest against the respondent and suspend the execution thereof until such time as the respondent breaches any of the prohibitions or conditions contained in the protection order.<sup>29</sup> This should, at least in theory, provide expedient protection by the police to the complainant in the case of any future non-compliance with the protection order.

Should you be, or suspect that a neighbour in your community scheme could be the victim of domestic violence, please reach out to one of the following institutions without delay:

**SAPS – 10111**

**SAPS Family Violence, Child Protection and Sexual Offences Unit. Head office Pretoria – 012 393 2363**

**Women Abuse Helpline – 0800 150 150**

**Childline – 0800 055 555**

**Legal Aid – 0800 110 110**

**Legal Aid (Please call me) – 079 835 7179**

**Legal Practice Council (to assist you in getting in touch with a criminal or family lawyer to receive advice) – 010 001 8500**

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**20 FEBRUARY 2023**

<sup>27</sup> Section 12(1)(a)-(c) of the Domestic Violence Act.

<sup>28</sup> Section 7(6) of the Domestic Violence Act.

<sup>29</sup> Section 8 of the Domestic Violence Act.