**NATIONAL ASSEMBLY**

**QUESTION FOR WRITTEN REPLY**

**PARLIAMENTARY QUESTION NO: 148**

**DATE OF QUESTION: 11 FEBRUARY 2021**

**DATE OF SUBMISSION: 25 FEBRUARY 2021**

**Ms B S Masango (DA) to ask the Minister of Justice and Correctional Services:**

1. In view of the Republic’s gender-based violence (GBV) that is peaking and children that are being used as bargaining tools by perpetrators of violence against women once the victim opens a case, what (a) protection does a protection order that is filed against an alleged perpetrator of GBV provide for children in such a case and (b) rights does the victim have to retain custody of the child until the said court dates;
2. what is his department doing to assist victims, especially female victims, to avoid alleged perpetrators of GBV from taking their children away as revenge for opening a case against them?

**NW151E**

**REPLY:**

1. (a) The Domestic Violence Act, 1998 (Act No. 116 of 1998) was enacted to address

and combat domestic violence. An applicant can apply to court for a protection order against the perpetrator’s abuse, in terms of the Domestic Violence Act.

The court may, if it is satisfied that it is in the best interest of any child:

* by means of an order, refuse the respondent (alleged perpetrator) contact with such child
* order contact with such child on conditions as it may consider appropriate
* prohibit the respondent (alleged perpetrator) from entering the residence shared by the complainant and the respondent (alleged perpetrator), provided it is in the best interest of the applicant.
* The applicant can apply for an order for temporary placement of children in care facilities.
* Further, the domestic violence court may not refuse to issue a protection order or impose any condition or make any order which is competent to impose or make merely on the grounds that other legal remedies are available to the complainant.

In providing the necessary relief, the court considers the facts presented before

it. The court, in making any order where it affects placement of children or removal of the respondent (alleged perpetrator), depending on the facts and application before it, will consider the best interests of the child, including safety, health, the well-being, perceived risk of further harm or violence, personal and material interests of both the applicant and the children and the best interests of the child.

The best interests of the child, in addition to that of the applicant, is emphasised to demonstrate that in all matters of gender-based violence where children are affected, the court will probe the details of a case in order to have all facts before it, so as to make an appropriate order. In this regard, the court may, where circumstances permit, in terms of the Mediation in Certain Divorce Matters Act, 1987, refer such matters to the Office of the Family Advocate for the court to obtain the Family Advocate’s report containing the recommendations on the best interests of children affected by the domestic violence.

The Family Advocate will conduct an investigation into the welfare of the children and make such recommendation that will first identify the risks and factors that have a direct and an indirect impact on the wellbeing of the children, and then recommend the necessary safety nets to mitigate such risk pending the finalization of the domestic violence case. These recommendations may include supervised contact between the children and the alleged perpetrator, in appropriate circumstances.

The Domestic Violence Act also provides for the court to consider an application brought before it by a child under this Act and if it deems fit, grant the interim protection order. In addition, if the court finds that the applicant child is in need of care, that child will be referred to the children’s court for further intervention.

The provision above demonstrates that minor children have to be protected and can deviate from the norm of a minor having to be accompanied by a parent or guardian, as an order can still be sought against either. The court will respond to any emergency application before it and grant the temporary relief sought, after considering all facts before it and the rights of children affected.

Where the perpetrator contravenes the interim order or removes the children against the court order, that will amount to contempt of court. Legal consequences ensue and the warrant of arrest by the domestic violence court is immediately given effect to. It must be noted that these are immediate orders which are interim pending the return date for further hearing, including that of the alleged perpetrator, for either the confirmation thereof or any order appropriate.

The Sexual Offences and Community Affairs (SOCA) Unit of the national prosecuting Authority provides regular training on the Domestic Violence Act to prosecutors and other partners in the criminal justice system to ensure that the intention of the Domestic Violence Act is fully realized.

(b) Where the victim of domestic violence is a primary care giver of the children (the

victim resides with the children) they will still retain the primary care of the children pending the finalization of the matter. The right that the victim has is that they can request assistance from the Office of the Family Advocate with regards to the drafting of a Parenting Plan. In the Parenting Plan they can set out arrangements as regards the children’s residence as well as the contact regime (how they will continue having contact with the alleged perpetrator) pending the finalization of the case. The victim can also request the Office of the Family Advocate to assist with assessments of the children, interactional analysis as well as observation of the children to ensure that they retain the custody of the children.

1. Children cannot be uprooted from their stable environment without any lawful reason. In the case where a child is unlawfully removed from their stable environment, that is they are removed without a court order or any form of agreement between their parents, the primary caregiver, in this case, the victim of domestic violence has a right to launch an application at the Children’s Court to have the children returned to their primary residence.

During such proceedings, the court will as a way of preserving the best interests of children, make an order to the effect that an investigation be conducted by the Office of the Family Advocate so as to provide the court with the recommendations on the best interests of the children given the prevailing circumstances.