

REPUBLIC OF SOUTH AFRICA

PROTECTION FROM HARASSMENT BILL

WORKING DOCUMENT

14 JUNE 2011

B list

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 32922 of 1 February 2010)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 1 — 2010]

BILL

To provide for the issuing of protection orders against harassment; to amend the Criminal Procedure Act, 1955, so as to provide for an increase of the amount which may be fixed by a magistrate in respect of a recognisance as security to keep the peace and to provide a mechanism to subpoena witnesses to attend proceedings in terms of that Act; to effect consequential amendments to the Criminal Procedure Act, 1977; to amend the Domestic Violence Act, 1998, so as to provide a mechanism to subpoena witnesses to attend proceedings in terms of that Act; to effect consequential amendments to the Firearms Control Act, 2000; and to provide for matters connected therewith.

PREAMBLE

SINCE the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;

AND IN ORDER to—

- (a) afford victims of [harassing behaviour] harassment an effective remedy against such behaviour; and
- (b) to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act.

PARLIAMENT of the Republic of South Africa therefore enacts as follows:—

Definitions and application of Act

1. (1) In this Act, unless the context indicates otherwise—

["arm" means any firearm or any handgun or airgun or ammunition as defined in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000);]

"child" means a person under the age of 18 years;

"clerk of the court" means a clerk of the court appointed in terms of section 13 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and includes an assistant clerk of the court so appointed;

"complainant" means any person who alleges that he or she is being subjected to harassment;

"court" means any magistrate's court for a district referred to in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);

["dangerous weapon" means any object, other than a firearm, which is likely to cause serious bodily injury if it were used to commit an assault;]

"electronic communications identity number" means a technical identification label which represents the origin or destination of electronic communications traffic, as a rule clearly identified by a logical or virtual identity number or address assigned

to a customer of an electronic communications service provider (such as a telephone number, cellular phone number, e-mail address with or without a corresponding IP address, web address with or without a corresponding IP address or other subscriber number);

“electronic communications service provider” means an entity or a person who is licensed or exempted from being licensed in terms of Chapter 3 of the Electronic Communications Act, 2005 (Act No. 36 of 2005), to provide an electronic communications service;

"harm" means any mental, psychological, physical or economic harm;

"harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know—

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—

[(a)](i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

[(b)](ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

[(c)](iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving [it] them where [it] they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person;

"member of the South African Police Service" means any member as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995);

"Minister" means the Cabinet member responsible for the administration of justice;

"peace officer" means a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

"prescribed" means prescribed in terms of a regulation made under section [16]19;

"related person" means any member of the family or household of a complainant, or any other person in a close relationship to the complainant;

"respondent" means —

(a) any person against whom proceedings are instituted in terms of this Act; and

(b) for the purposes of section 4, 5 and 6, any person who is reasonably suspected of engaging in or who has engaged in harassment of the complainant or a related person;

"sexual harassment" means any—

(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;

(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) implied or expressed promise of reward for complying with a sexually-oriented request; or

(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request;

"sheriff" means a person appointed as a sheriff in terms of the Sheriffs Act, 1986 (Act No. 90 of 1986); **[and]**

"this Act" includes the regulations[.]; and

"weapon" means—

(a) any firearm or any handgun or airgun or ammunition as defined in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000); and

(b) any object, other than that which is referred to in paragraph (a), which is likely to cause serious bodily injury if it were used to commit an assault.

(2) This Act does not prevent a person who may apply for relief against harassment or stalking in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), from applying for relief in terms of this Act.

(3) For the purpose of deciding whether the conduct of a respondent is unreasonable for the purposes of/as provided for/ as referred to in paragraph (a) of the definition of "harassment", the court must, in addition to any other factor, take into account/consider whether the conduct, in the circumstances in question, was engaged in—

(a) for the purpose of detecting or preventing an offence;

(b) to reveal a threat to public safety or the environment;

(c) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or

(d) to comply with a legal duty.

Application for protection order

2. (1) A complainant may in the prescribed manner apply to the court for a protection order against harassment.

(2) If the complainant or a person referred to in subsection (3) is not represented by a legal representative, the clerk of the court must inform the complainant or person, in the prescribed manner, of—

- (a) the relief available in terms of this Act; and
- (b) the right to also lodge a criminal complaint against the respondent of *crimen injuria*, assault, trespass, extortion or any other offence which has a bearing on the *persona* or property of the complainant or related person.

(3) (a) Notwithstanding the provisions of any other law, the application for a protection order may, subject to paragraph (b), be brought on behalf of the complainant by another person who has a material interest in the well-being of the complainant or related person.

(b) An application referred to in paragraph (a) must be brought with the written consent of the complainant, except in circumstances where the complainant is a person who, in the opinion of the court, is unable to do so.

(4) Notwithstanding the provisions of any other law, any child, or person on behalf of a child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.

(5) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court has a reasonable belief that the complainant or a related person is suffering or may suffer harm if the application is not dealt with immediately.

(6) Supporting affidavits by persons who have knowledge of the

matter concerned may accompany the application.

(7) The application and affidavits must be lodged with the clerk of the court who must immediately submit the application and affidavits to the court.

Consideration of application and issuing of interim protection order

3. (1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 2(7) and may, for that purpose, consider any additional evidence it deems fit, including oral evidence or evidence by affidavit, which must form part of the record of proceedings.

(2) If the court is satisfied that there is *prima facie* evidence that—

- (a) the respondent is engaging or has engaged in harassment;
- (b) harm is being or may be suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and
- (c) the protection to be accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent,

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings referred to in subsection (1), issue an interim protection order against the respondent, in the prescribed manner.

(3) (a) Upon the issuing of an interim protection order the court must direct that the interim protection order be served on the respondent in the prescribed manner by the clerk of the court, sheriff or peace officer identified by the court.

(b) A copy of the application referred to in section 2(1) and the record of any evidence noted in terms of subsection (1) must be served on the

respondent together with the interim protection order in the prescribed manner.

(c) An interim protection order must call on the respondent to show cause on the return date specified in the order why the interim protection order should not be made final.

(4) If the court does not issue an interim protection order in terms of subsection (2), the court must direct that the certified copies of the application concerned and any supporting affidavits be served on the respondent in the prescribed manner by the clerk of the court, a sheriff or a peace officer identified by the court, together with a prescribed notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued.

(5) The return dates referred to in subsections (3)(c) and (4) may not be less than 10 days after service has been effected on the respondent, but a return date referred to in subsection (3)(c) may be anticipated by the respondent on not less than 24 hours' written notice to the complainant and the court.

(6) An interim protection order [~~has no~~] is of force and effect [until it has been served on] from the time it is issued by the court and the existence thereof has been brought to the attention of the respondent.

(7) Upon service or upon receipt of a return of service of an interim protection order on a respondent, the clerk of the court must immediately cause—

(a) a certified copy of the interim protection order; and

(b) the original warrant of arrest referred to in section [8]11(1)(a),

to be served on the complainant in the prescribed manner.

Electronic communications service provider to furnish particulars to court

4. (1) If an application for a protection order is made in terms of section 2 and the court is satisfied in terms of section 3(2) that a protection order must be issued as a result of the harassment of the complainant or a related person by means of electronic communications or electronic mail over an electronic communications system of an electronic communications service provider and the identity or address of the respondent is not known, the court may—

(a) adjourn the proceedings to any time and date on the terms and conditions which the court deems appropriate; and

(b) issue a direction in the prescribed form directing an electronic communications service provider to furnish the court in the prescribed manner by means of an affidavit in the prescribed form with—

(i) the electronic communications identity number from where the harassing electronic communications or electronic mail originated;

(ii) the name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned;

(iii) any information which indicates that electronic communications or electronic mail were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant; and

(iv) any other information that is available to an electronic communications service provider which may be of assistance to the court to identify the respondent or the electronic communications service provider which provides a service to the respondent.

(2) If the court issues a direction in terms of subsection (1) the court must direct that the direction be served on the electronic communications service provider in the prescribed manner.

(3) (a) The information referred to in subsection (1)(b)(i), (ii) and (iii) must be provided to the court within five ordinary court days from the time that the direction is served on an electronic communications service provider.

(b) An electronic communications service provider on which a direction is served, may in the prescribed manner by means of an affidavit in the prescribed form apply to the court for—

(i) an extension of the period of five ordinary court days referred to in paragraph (a) for a further period of five ordinary court days on the grounds that the information cannot be provided timeously; or

(ii) the cancellation of the direction on the grounds that—

(aa) it does not provide an electronic communications service to either the respondent or complainant or related person; or

(bb) the requested information is not available in the records of the electronic communications service provider.

(4) After receipt of an application in terms of subsection (3)(b), the court —

(a) must consider the application;

(b) may, in the prescribed manner, request such additional evidence by way of affidavit from the electronic communications service provider as it deems fit;

(c) must give a decision in respect thereof; and

(d) must inform the electronic communications service provider in the prescribed form and in the prescribed manner of the outcome of the application.

(5) (a) The court may, on receipt of an affidavit from an electronic communications service provider which contains the information referred to in subsection (1)(b)(i) and (ii), consider the issuing of an interim protection order in terms of section 3(2) against the respondent on the date to which the proceedings have been adjourned.

(b) Any information furnished to the court in terms of subsection (1)(b)(iii) forms part of the evidence that a court may consider in terms of section 3(1).

(6) An electronic communications service provider must, at least 48 hours before providing the information referred to in subsection (1)(b) to the court, by means of an electronic communication, inform the respondent of the—

- (a) information that is to be provided to the court;
- (b) reference number of the direction; and
- (c) name and address of the court.

(7) (a) The Director-General: Justice and Constitutional Development must, in consultation with the Director-General: Communications and the electronic communications service providers, compile and maintain a list of electronic communications service providers that can provide the courts with the information referred to in subsection (1)(b) and must contain the following particulars of each such electronic communications service provider:

- (i) The name and address (physical and postal address);
- (ii) the e-mail address;
- (iii) a telephone and facsimile number; and
- (iv) the names of persons who are responsible for providing the information referred to in subsection (1) (b).

(b) An electronic communications service provider must, in the prescribed manner and without undue delay, bring any change of any of the particulars referred to in paragraph (a) to the attention of the Director-General: Justice and Constitutional Development.

(c) The Director-General: Justice and Constitutional Development must, in the prescribed manner and without undue delay, make the list referred to in paragraph (a) and any subsequent amendments thereto available to all courts.

(8) The Minister may, after consultation with the electronic communications service providers, by notice in the Gazette, prescribe reasonable tariffs of compensation payable to electronic communications service providers for providing the information referred to in subsection (1)(b).

Court may order investigation to ascertain name and address of respondent

5. (1) If an application for a protection order is made in terms of section 2 and the court is satisfied in terms of section 3(2) that a protection order must be issued as a result of the harassment of the complainant or a related person and the identity or address of the respondent is not known, the court may—

(a) adjourn the proceedings to any time and date on the terms and conditions which the court deems appropriate; and

(b) issue a direction in the prescribed form directing the station commander of the relevant police station to investigate the matter with a view to determining the name and address of the respondent or obtaining any other information which may be required in order to identify or trace the respondent.

(2) If the court issues a direction in terms of subsection (1) the court must direct that the direction be served on the station commander of the relevant police station in the prescribed manner by the clerk of the court or sheriff identified by the court.

(3) (a) The information referred to in subsection (1)(b) must be provided to the court by means of an affidavit in the prescribed form within the time period indicated by the court.

(b) A station commander on which a direction is served, may, in the prescribed manner by means of an affidavit in the prescribed form, apply to the court for—

- (i) an extension of the period referred to in paragraph (a) on the grounds that the information cannot be provided timeously; or
- (ii) the cancellation of the direction on the grounds that, after a reasonable investigation of the matter, the South African Police Service is not in a position to determine the name and address of the respondent or obtain any other information which is required in order to identify or trace the respondent.

(4) After receipt of an application in terms of subsection (3)(b), the court—

- (a) must consider the application;
- (b) may, in the prescribed manner, request such additional evidence by way of affidavit from the station commander as it deems fit;
- (c) must give a decision in respect thereof; and
- (d) must inform the station commander, in the prescribed form and in the prescribed manner of the outcome of the application.

(5) The court may, on receipt of an affidavit in terms of subsection (3)(a) which contains the information provided for in subsection (1)(b), consider the issuing of an interim protection order in terms of section 3(2) against the respondent on the date to which the proceedings have been adjourned.

Powers of members of South African Police Service to ascertain name and address of respondent

6. (1) A member of the South African Police Service –

(a) may–

(i) if the complainant states under oath or affirmation that he or she intends applying for a protection order; and

(ii) if it appears from the information stated under oath or affirmation that there are reasonable grounds for believing that a respondent whose name and address are unknown to the complainant or a related person is engaging or has engaged in harassment of the complainant; or

(b) must, in terms of a direction issued in terms of section 5(1)(b), in the manner set out in the national instructions issued in terms of section 20(2), investigate the matter with a view to determining the name and address of the respondent.

(2) A member of the South African Police Service may, in the manner set out in the national instructions issued in terms of section 20(2), request the respondent to furnish such member with his or her full name and address and any other information which the member may require in order to identify or trace the respondent.

(3) Information obtained by a member of the South African Police Service pursuant to an investigation in terms of subsection (1) must –

- (a) be kept by the member in the manner set out in the national instructions issued in terms of section 20(2); and
- (b) be provided to the court by means of an affidavit in the prescribed form when an application for a protection order is made by the complainant in terms of section 2.

Attendance of witnesses

[4]7. (1) The court may, in the prescribed manner and at any stage of proceedings under this Act, cause to be subpoenaed any person as a witness at those proceedings or to produce any book, document or object, if the evidence of that person or book, document or object appears to the court essential to the just decision of the case.

(2) A [witness] person who is subpoenaed as provided for in subsection (1), must attend the proceedings and remain in attendance at the proceedings, and a person who is in attendance at any proceedings under this Act, though not subpoenaed as a witness, and who is warned by the court to remain in attendance at the proceedings, must remain in attendance at the proceedings, unless he or she is excused by the court.

(3) Any person who is subpoenaed in terms of subsection (1) or warned in terms of subsection (2) to attend proceedings [as provided for in **subsection (1)**], and who fails to—

- (a) attend or to remain in attendance;