



ARE FINAL PROTECTION ORDERS POWERFUL ENOUGH TO BE LISTED AS ONE OF THE PUNISHMENTS UNDER s276 OF THE CPA?

by NKULULEKO XABA, pupil awaiting admission to the Free State Bar

INTRODUCTION

This article considers protection orders granted during bail proceedings for domestic violence offences. By analysing the punitive nature and the possible consequences of such protection orders, and how they may interfere with the rights of the accused, I argue that protection orders should be included as one of the penalties in s276 of the Criminal Procedure Act 51 of 1977.

THE CURRENT POSITION OF PROTECTION ORDERS IN CRIMINAL CASES

According to Section 60(12)(b) of the CPA: "If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), in respect of an offence that was allegedly committed by the accused against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act 116 of 1998 with the accused, and a protection order as contemplated in that Act has not been issued against the accused, the court must, after holding an enquiry, issue a protection order referred to in section 6 of that Act against the accused, where after the provisions of that Act shall apply".

In criminal matters, protection orders are not regarded or recognised as punishments or sentences for committing criminal offences but as safety mechanisms designed to provide relief to the complainant before the finalisation of the trial.

THE PENAL CHARACTERISTICS AND LONG-

TERM IMPLICATIONS OF A PROTECTION ORDER

Protection orders are interdictory orders that protect victims of domestic violence. However, the legal fraternity may not have realised yet that a protection order on its own may qualify as a legal penalty. This is based on an analysis of the different qualities of a protection order, that are similar to those found in legal punishments listed in s276 of the CPA such as imprisonment, fines and correctional supervision. The proposition is also based on how a protection order may limit the constitutional rights of the accused.

THEORIES OF PUNISHMENT AND THE IMPACT AND CHARACTERISTICS OF PROTECTION ORDERS

According to *Criminal Law 6th edition* by Professor CR Snyman, there are three theories of punishment: the absolute theory, the relative theory and the combination theory.

Under the absolute theory, the concept of retribution dominates, focusing on punishing an unlawful act to restore the scales of justice in a society violated by the criminal offence. The offender must suffer some kind of prejudice – as a penalty, in order to promote justice. A protection order is retributive in nature for the following reasons:

i. The interference with freedom of movement

According to s7(c) of the Domestic Violence Act 116 of 1998

(DVA), if a respondent (here, also the accused person in a domestic violence matter) resides with the complainant, the court may issue a protection order with a condition that the respondent be prohibited from entering the residence he shared with the complainant. This condition may equate to an eviction, and although an eviction is not recognised as a punishment in terms of s276, the manner in which an eviction interferes with the rights of the accused is retributive.

According to s21(1) and (3) of the Constitution, “Everyone has the right to freedom of movement and “Every citizen has the right to enter, to remain in and to reside anywhere in, the republic”. A protection order with a condition in terms of s7(c) limits the constitutional right to freedom of movement.

ii. Financial prejudice

According to section 7(4) as an additional condition in a protection order, the court may order the respondent to pay “emergency monetary relief”, after having regard to the financial needs and resources of the complainant and the respondent, and such an order has the effect of a civil judgment of a magistrate’s court. The consequences of s7(4) equate to a fine in terms of s276(1)(f) of the CPA.

iii. Declaration of unfitness to possess a firearm and the deprivation of personal property

According to s9 of the DVA, a protection order is adequate reason for the accused to be declared unfit to possess a firearm by the court or the registrar in terms of the Firearms Control Act 60 of 2000. This entails that should an accused be employed to work with a firearm for example a member of the South African Police Service, South African National Defense Force or a private security firm, the accused could face unemployment due to incapacity.

Should an accused be in ownership of a registered firearm, an application can be made in terms of s (9) of the DVA for his/her weapons to be seized, depriving the accused of valuable property. This may interfere with the accused’s property rights in terms of s25 of the Constitution.

iv. Compromise of the right to bail

During bail proceedings of any matter, the court is obligated by s11B to enquire if the accused has previous convictions, pending matters and protection orders against him. If the accused has a final protection order against him, unrelated to the matter for which he is being currently prosecuted, his chances of getting bail may be significantly diminished. This is because the court in those proceedings may make an inference that the accused is prone to violent behaviour and conclude that there exists a likelihood in terms of s60(4) that the accused, if he or she were released on bail, will endanger the safety of another person or commit a Schedule 1 offence.

v. A deterrent and preventative order

According to Prof Snyman’s Criminal Law, final penalties for criminal offenders may serve to be deterrent or preventative rather than retributive. A protection order may be construed as a deterrent or preventative remedy. This is because when an accused is served with a protection order, the accused is not allowed to contact, assault and harass the complainant.

The accused is warned that a warrant of arrest will be issued but “held over”/suspended for execution in the event that the accused fails to comply. This after-effect is classically referred to as the “sword of Damocles” and is another practical example of how a protection order can also serve the exact same purpose as a legal punishment.

vi. Similarity with s297 of the CPA

A protection order has the striking resemblance of a recognised sentence under s297(1)(c) of the CPA which states that “where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion discharge the person concerned with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction”.

Except for the fact that a previous conviction will be recorded in an instance that an accused is reprimanded, the repercussions of that specific sentence are identical to the ones in a protection order. This is because the protection order basically “cautions” and “reprimands” an accused not to commit any listed acts of domestic violence and threatens the accused with consequences should he elect to do so.

In the matter of *State vs Rabie*¹ the concept of deterrence is explained in the following terms, “the idea is that man being a rational creature, would refrain from the commission of crimes if he should know that the unpleasant consequences of punishment will follow the commission of certain acts”. This principle applies to the consequences of both a protection order and a sentence in terms of s297 of the CPA.

CONCLUSION AND RECOMMENDATIONS

Upon analysing the holistic impact of a final protection order on constitutional rights and how it relates to the recognised theories of punishment in criminal procedure, it is recommended for final protection orders to be included as a separate punishment in terms of s276 of the CPA for minor offences. In certain minor offences such as assault by threat and *crimen injuria*, where the accused is a first-time offender, it is double jeopardy to prosecute an accused with a protection order against them. 

Notes

- 1 *State vs Rabie* 1975 (4) SA 855 (A).