# *S v P* – The Abuse of Protection Orders to "Gag" Victims of Rape

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## Abstract

In recent years there has been the emergence of global and local anti-gender-based violence movements such as #MeToo and, in South Africa, #menaretrash, which has precipitated an increase in the disclosure of the names of the alleged perpetrators of sexual violence by the survivors. The increase in the disclosure of these names has been met with the intensification of legal processes by alleged perpetrators to counter and silence survivors.

This case note will focus on the recent appeal case of *S v P* 2022 2 SACR 81 (WCC) in the High Court of South Africa, Western Cape Division, in Cape Town. In this case the court had to consider whether the *court a quo* was correct in issuing a final protection order (in terms of the *Protection from Harassment Act* 17 of 2011) against the appellant (S) where the *court a quo* found that her act of harassment was a third party's public disclosure of the respondent (P) as her rapist.

It will be argued that the Western Cape High Court was correct in finding that the court *a quo* should not have issued a final protection order against S. It will be further argued that the reasons to overturn this decision included the *court a quo's* failure to appreciate the gendered purpose of the *Protection from Harassment Act* and that P misused and abused the Act in order to silence S. It will then be argued that one of the reasons why survivors choose to disclose alleged perpetrators' names on social platforms is a societal contextual reason, which includes the high rates of gender-based violence in South Africa alongside the high rates of attrition in gender-based violence cases in the criminal justice system.

Finally, I will consider the cases of *Mdlekeza v Gallie* 2021 (WCHC) (unreported) case number 15490/2020 of 20 April 2021 and *Booysen v Major* (WCHC) (unreported) case number 5043/2021 of 30 August 2012 and argue that these cases are further examples of this abuse of process employed to silence survivors. With the courts seeing an increase in these applications to silence victims, it is argued that the courts must adopt a feminist-contextualised approach in order to avoid gagging survivors of gender-based violence and being complicit in the increasing weaponisation of court processes by alleged perpetrators.

## Keywords

Rape; gag-order; protection order; harassment; gender-based violence

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> Al Monroe: It's every man's worst nightmare, getting accused of something like that.
> Cassandra: Can you guess what every woman's worst nightmare is?[1]

## 1 Introduction

The public disclosure of the names of men who allegedly commit sexual violence against the victims or survivors of these offences has been commonplace in the time proceeding the #MeToo movement. The hashtag movement emerged from the movement, "me too", an anti-gender-based violence movement created by Tarana Burke in 2007. The phrase again found new prominence in 2017 in a global campaign against gender-based violence, following a call by actress Aylssa Milano for victims to post "me too" if they had experienced gender-based violence at the hands of Hollywood producer Harvey Weinstein.[2] Following the numerous disclosures around sexual violence committed by Weinstein, similar movements emerged in the United States, such as the "Shitty Media Men list", which was a crowdsourced list documenting men accused of various acts of sexual violence in the media industry. The disclosure of perpetrators' names also found prominence in tertiary institutions worldwide, such as the "List of Men to Avoid", which was linked to survivors of sexual violence at Middlebury College in Vermont.[3] South African universities similarly saw movements related to multiple disclosures of perpetrators' names, such as the "#RUReferenceList".[4]

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1 Fennell *A Promising Young Woman*. Adv B Meyersfeld quoted these lines from the film during her address on behalf of the appellant in the Western Cape High Court.

2 Swemmer "Sexual Harassment". I use the word victim/survivor interchangeably in this article. I do this as some individuals who have been sexually violated view themselves as survivors yet some still feel they are victims of the violence they experienced. By using the words interchangeably, I show that there is no single hegemonic experience of sexual violence.

3 Bauer-Wolf 2018 https://www.insidehighered.com/news/2018/01/30/metoo-movement-inspires-similar-campaigns-among-colleges.

4 Staff Reporter 2018 https://mg.co.za/article/2018-07-06-00-rureferencelist-the-fear-of-repercussions-still-lingers/. It is important to note the institutional (patriarchal) backlash that these lists and movements can have against survivors. For example, the Supreme Court of Appeal (SCA) recently heard the appeal of Yolanda Dyanti. Yolanda Dyanti was disciplined by the University in relation to her involvement in the #RUReferenceList and pro-survivor protests related thereto at the University. Dyanti argued that Rhodes University's disciplinary action taken against her was procedurally unfair. The SCA hearing is available at SERI 2022 https://www.youtube.com/watch?v=ycee6xQWuMQ.

During the same period as #MeToo, South Africa experienced its own hashtag movement and subsequent disclosure of alleged perpetrators in the form of "#menaretrash". The movement was a response by South Africans to the brutal murder of Karabo Mokoena by her ex-boyfriend.[5]

With the global prevalence of these forms of movements which see the public disclosure of the names of men accused of gender-based violence, there has subsequently been an increase in the rate of legal procedures (defamation claims, interdicts and protection orders) by accused individuals against survivors.[6]

I begin my analysis of this issue of the (mis)use of the legal system as a weapon against survivor disclosure by focussing on the case of *S v P*.[7] This case involved the Western Cape Division in Cape Town determining whether the *court a quo* was correct in finding that the public disclosures made by various third parties on various social media platforms around S's (Appellant's) alleged rape by P (Respondent) constituted grounds for him to secure a protection order against her under the *Protection from Harassment Act*.[8]

To adequately deal with this (mis)use of the legal system as in cases like S's, I will then propose that a feminist lens be applied so that courts can contextualise these cases of abuse of court processes correctly. I will set out what a feminist lens may be seen to require and argue that the Western Cape High Court successfully adopted such a lens to come to its final judgment to overturn the *court a quo's* judgment.

To show how such a lens can be used in deciding these cases, I will discuss the facts of the case and consider some of the court's problematic findings. I will argue in support of the appeal court and broadly argue that P's application was an abuse or (mis)use of court procedures with the sole aim of silencing the victim of alleged sexual violence. I base this argument on a consideration of the historical purpose of the *Harassment Act*. I then focus on the argument presented by counsel for S and various *amici* in the case, around the prevalence of gender-based violence in South Africa, the attrition of sexual violence cases through the criminal justice system, and the culture of silence.

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5 Samanga date unknown https://www.okayafrica.com/real-story-behind-menaretrash-south-africas-viral-hashtag/.

6 Weisbrot 2020 *Cuny Law Review* 332.

7 *S v P* 2022 2 SACR 81 (WCC) (hereafter *S v P*).

8 *Protection from Harassment Act* 17 of 2011 (hereafter *Harassment Act*).

Finally, I will briefly consider two other cases, *Booysen v Major*[9] and *Mdlekeza v Gallie*,[10] as examples of this abuse of process and argue that courts must adopt a feminist-contextualised approach when considering these cases to avoid gagging survivors of violence and being complicit in the increasing weaponisation of court processes by alleged perpetrators.

## 2 Case history

S and P were engaged in an intimate relationship from around 2012 until 2015.[11] Both individuals worked in what is known as the "street wear fashion industry" in Cape Town, with S owning a modelling agency and P previously owning a fashion label called "YONGN LAYZEE".[12]

S stated that she had experienced mental and emotional abuse during her relationship with P.[13] S finally chose to end her relationship with P around 2015, when she alleged that he had raped her. After the incident S was dissuaded from reporting the crime to the police by a social worker she was seeing for psycho-social assistance. The social worker advised S that she should focus on keeping herself safe from the abusive relationship rather than laying a charge against P.

On 15 December 2016 S applied to the court for a domestic violence protection order against P,[14] yet in March 2017 S withdrew the application due to an agreement entered into by herself and P not to contact each other electronically, by phone, or in person.[15] As stated by the Appeal Court, the withdrawing of the application was based on a settlement agreement reached between S and P. The Appeal Court, however, emphasises that the agreement did not include preventing S from making allegations against P that he had raped her, and it did not deal with a previous incident of "the appellant's social media discussions of the rape".[16]

In 2016 S was part of a private WhatsApp group called "Call you out CT" or "CYO" ("CYO group"). The group's primary aim was to "call out" alleged perpetrators or disclose gender-based violence that occurred in the fashion

9 *Booysen v Major* (WCHC) (unreported) case number 5043/2021 of 30 August 2012.
10 *Mdlekeza v Gallie* 2021 (WCHC) (unreported) case number 15490/2020 of 20 April 2021.
11 *S v P* para 5.
12 *S v P* 2022 2 SACR 81 (WCC) (Appellant Heads of Argument) (herefter *S v P Heads*) para 5.
13 *S v P Heads* para 7.
14 *S v P* para 6.
15 *Domestic Violence Act* 116 of 1998 (hereafter *DVA*).
16 *S v P* para 8.

industry in Cape Town.[17] According to S she had joined the group "to create a community with other victims of rape and as a form of healing for herself."[18] Later, around 2017, S made a post in the private CYO group sharing that she had been violated and stating the person's name (P).[19]

In 2018 P's name became publicly linked to the alleged rape of S when in one instance a third party revealed his name in Twitter posts.[20] S explained that she did not know about the publication, did not consent to it, and understood that this publication of her personal story of gender-based violence publicly by a third party violated the rules of the CYO group.[21] The Appeal Court noted that S felt that the publication of the details of her rape without her permission was "devastating to her and she felt that the publication without her consent was similar to the experience of rape."[22]

The messages about P were posted on Twitter at the time in South Africa when Uyinene Mrwetyana had been raped and savagely beaten to death in a Post Office in Claremont, and there was a massive public outcry around the scourge of gender-based violence in the country.[23]

Judgment in favour of P was handed down on 26 November 2020. This was three years after the alleged incident of disclosure had taken place.[24] The final protection order stated that "the respondent is prohibited by this court from – (a) engaging in the harassment of the complainant" and the complainant's "current and future business (sic)", and "colleagues and friends". The court went further to add in the order that S was prohibited from continuing to emotionally abuse P. Finally, the court directed that S "shall not disclose to anyone in any manner that the applicant allegedly raped her."[25]

17 *P v S* (Magistrates' Court for the District of the Cape) (unreported) case number H1029/2019 of 26 November 2020 (hereafter *P v S*) 3.
18 *S v P Heads* para 10.
19 *P v S* 4.
20 *P v S* 4.
21 *S v P* para 11.
22 *S v P* para 12.
23 *S v P Heads* para 16 and *S v P* 12.
24 *S v P* 2022 2 SACR 81 (WCC) (Application to Appeal )(hereafter *S v P Application to Appeal*).
25 *P v S.*

# 3 The appeal case

## *3.1 The historical purpose of the Harassment Act as a gendered act*

In 2021 S appealed the decision of the *court a quo*, basing one of the grounds of her appeal on the argument that the court must be cognisant of the historical and current purpose of the *Harassment Act* when adjudicating applications which request the court to act counter to such purpose and whose primary aim is to unfairly silence victims of gender-based violence.[26]

To show the purpose of the *Harassment Act* as one whose aim is the protection of vulnerable individuals (predominantly women) from gender-based violence, it is worthwhile considering where the Act emerged from and its purpose at the time of its conception and inception.

The *Harassment Act* has its origin in the South African Law Reform Commission (SALRC) Report Project 130, *Stalking*, published in 2006 (the Stalking Report).[27] The use of the term "harassment" rather than "stalking" in the Act was based on the argument by the SALRC that the term "harassment" is predominantly used in foreign and international law and thus "harassment" should be employed as an umbrella term that includes stalking.[28] The authors of the Stalking Report further recommended that terms such as "harassment" and "stalking", as already set out in the *Domestic Violence Act* 116 of 1998 (the *DVA*), should bear the same definition in the new harassment legislation, to create synergy between the pieces of legislation dealing with various forms of gender-based violence.

The SALRC argued at the time of the Stalking Report that there was insufficient protection in the common law for victims of harassment. Thus they recommended a process similar to that of the *DVA*, which would include the option of a complainant applying for an interdict to prohibit further harassing actions by the respondent.[29]

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26 *S v P Heads* para 34. Other arguments presented by S in support of her appeal included the erroneous interpretation of "harassment", a lack of a causal link between S's conduct and the resultant "alleged harm", the evaluation of the evidence, drawing a negative inference from a reluctance to report the rape, the duty of courts to protect victims of sexual abuse, the prevalence of gender-based violence in South Africa, and the abuse of process.

27 SALRC *Stalking Report*.

28 PMG 2010 https://pmg.org.za/committee-meeting/12394/ 2-3; SALRC *Stalking Report* xiii.

29 SALRC *Stalking Report* xiii.

The limitation of the common law in instances of acts associated with harassment identified by the SALRC is correct if one considers that acts commonly associated with harassment such as stalking, malicious phone calls and threats of violence do not "neatly" fit into common law crimes.[30] For example, in the instance of common law assault the following is required to be met to constitute an offence (1) conduct which results in another person's bodily integrity being impaired (or inspiring the belief that it may be impaired); (2) unlawfulness; and (3) intention.[31] If we consider a form of harassment such as a victim receiving a barrage of texts or phone calls, it is difficult to shape this act to "fit" the common law offence. The actions do not necessarily impair "bodily integrity" but they do impair psychological and emotional integrity.

Many common law crimes such as assault and historically common law rape have the same problem of placing the harm of the offence solely on the physical damage to the individual's body. The Constitutional Court discussed this in *Tshabala v S,* where it considered whether the doctrine of common purpose could apply to the previous offence of common law rape.[32] The court considered the Applicants' argument that common law rape was concerned with instrumentality. This is where the offence "can only be committed by a male using his own genitalia" to commit the crime and not "by an individual who is merely present at the event and by his conduct … either promotes, encourages or facilitated the successful commission of the offence."[33] In terms of the common law definition of rape, the focus of the harm is the vagina of the woman and does not extend beyond her genitalia as a site of harm and trauma. On this idea of instrumentality the court in *Tshabala v S* states that:

> [t]he instrumentality argument has no place in our modern society founded upon the Bill of Rights. It is obsolete and must be discarded because its foundation is embedded in a system of patriarchy where women are treated as mere chattels. It ignores the fact that rape can be committed by more than

30 It is debateable whether these acts currently, in 2022, are considered as crimes as many still do not fit the rigidity of common law crimes discussed above. The SALRC's analyses on whether acts of domestic violence should be considered as crimes in the country are progressive, however, at least in terms of intimate partner violence in the home. See SALRC *Domestic Violence Issue Paper*.

31 Snyman *Criminal Law Workbook* 447.

32 *Tshabalala v S* 2020 3 BCLR 307 (CC) (hereafter *Tshabalala)*

33 *Tshabalala* para 2.

> one person for as long as the others have the intention of exercising power and dominance over the woman, just by their presence.[34]

It is not contentious to assert that many of the common law crimes should be revisited and adapted to reflect the values and rights of the Bill of Rights, which may in fact render the focus of harm solely on the body obsolete and lead to the incorporation of violations of individuals' psychological and emotional integrity and well-being as offences.

The *Harassment Act* was always intended to be gendered in nature. This is because the Stalking Report, as the primary foundation for the Act, aimed to counter the "culture of violence" in the country as well as the prevalence of gender-based violence against women and children.[35] In relation to violence in the home the SALRC referred to the *DVA* as the legislative vehicle that was aimed at attempting to eradicate private violence. They, then expressed the hope that the *Harassment Act* could replicate this and target public violence and aim to similarly assist victims.[36] The SALRC stated further that the report's focus was on addressing and assisting victims of gender-based violence where various cultures in South African can be construed as permitting discrimination against women in the form of harassment, sexual and physical violence.[37] The gendered nature of the harm was highlighted by the SALRC when they reported that, at the time of the report, "[i]nternational studies on the prevalence of stalking and local studies on stalking within a domestic context have shown that stalking victims are disproportionately female."[38] This, with the authors citing that in Canada 80% of the victims of “stalking” are women, and in the United Kingdom 75% are women.[39]

This approach was subsequently carried through to the Memorandum to the Protection from Harassment Bill, which states that one of the purposes of the Bill would be to "contribute to the fight against violence against women and children".[40] The *Harassment Act* was finally assented to in 2 December 2011 and although its purpose has consistently been to curb gender-based

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34 *Tshabalala* para 54. As the court correctly reflects, the current definition of rape in terms of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 does not adopt an instrumental approach.

35 SALRC *Stalking Report* 2-3.

36 SALRC *Stalking Report* xiii.

37 SALRC *Stalking Report* xiii.

38 SALRC *Stalking Report* xiii.

39 SALRC *Stalking Report* xiii.

40 *Protection from Harassment Bill* [B1-2010].

violence, unfortunately women are the predominant victims of harassment.[41]

South Africa currently has a web of gendered legislation that aims to protect women and children from various forms of gender-based violence both in the home and outside thereof, which includes the *DVA*, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007) (hereafter *SORMA*), the *Harassment Act*, the *Children's Act* 38 of 2005 and the *Cybercrimes Act* 19 of 2020.[42] Yet even with the deliberate attention to the context in which these laws exist and their purpose, attempts to misuse and abuse these laws to retain patriarchal control continue to occur.

This use or misuse of the law to maintain control is not new and can be seen in relation to "counter-applications" in terms of domestic violence law. In relation to *DVA* applications it has been noted by Artz that in 5%-30% of the cases magistrates deal with in regard to domestic violence, the women's application will be "countered" by the man with his assertion that she has in fact violated him.

This creates a situation where the victims of violence experience the appropriation of their victimhood by the violators, who use the law as a weapon against them. Some women then find that they are required to try to defend themselves before the court and at home. Fortunately, Artz notes that some magistrates have become aware of this misuse of the law. She quotes one magistrate as stating,

> [y]ou see more and more of these things. One party gets an order then the other party gets another order to retaliate. It's not that uncommon, but the courts are quickly wising up to it. It is very difficult to track if you don't have good record-keeping systems at the court and the second applicant is very hesitant to say that the reason he is applying for a protection order is because his wife got one against him. My tolerance for these cases is limited. It wastes the court's time and it undermines the real purpose for the DVA. These people need to learn to play these games outside of my court.[43]

In the instance of the case of *S v P* it can be argued that P chose to misuse the *Harassment Act* application process. This was instead of opting for

41 Nana 2008 *JAL* 245-267; Leskinen, Cortina and Kabat 2011 *Law & Hum Behav* 25-39.

42 *Children's Act* 38 of 2005.

43 Artz 2004 *SACQ* 7 (emphasis added). For a further discussion on the problematic nature of counter-protection orders and the need to enact laws prohibiting such, see CALS 2020 https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20submission%20Domestic%20Violence%20Amendment%20Bill%202020.pdf 13-14.

established routes in law which provide similar remedies, such as a defamation claim coupled with a prohibitory interdict. Although this is speculation it is likely, based on the comparative speediness of harassment applications versus the long wait for a trial date. He may also may have based this decision on an important element of the *Harassment Act,* which is the balance of proof that needs to be established to obtain an interim order, a *prima facie* one, as well as the nature of the interim order being *ex parte* and thus easier to attain as it is in principle unopposed.[44]

Importantly, Artz's statement (above) is just as true for harassment applications. The misuse of the process in order to obtain swifter means of silencing an alleged victim is not only a burden on the already overburdened legal system, and especially the system dealing with relief around gender-based violence, but it also undermines the purpose of the Act. The Act thus becomes a weapon used to attack those it is made to protect. Presiding officers must be aware of these intentions to misuse these gendered laws and be cognisant of the overarching context in which these applications are made.

### *3.2 The prevalence of gender-based violence in South Africa and the culture of silence*

It is often stated by those that try to prevent individuals from disclosing the names of alleged perpetrators that they should instead have pursued a criminal sanction, and thus there is the insinuation that survivors who do not choose this route are in fact untruthful in their accusations. This was apparent in the *court a quo*'s judgment, where a negative inference was drawn from S's reluctance to report her past experiences of sexual violence.[45]

On this the *court a quo* stated that:

> [t]he evidence of the Respondent [S] was on (sic) therapy for many years. She did not deny the fact of childhood or teenage sexual abuse. It is also "strange" that she was "raped" by three former "lovers" and yet failed to lay one charge of rape against anyone of them. This court by no means wants to silence the respondent or deprive her of her Constitutional rights but in my humble view she cannot continue to tell others that the applicant [P] "raped" her. This is a very serious allegation.[46]

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44 *Harassment Act* s 3(2).

45 *S v P Heads of Argument* 21.

46 *P v S* para 25. The court's disbelief of S's account is emphasised by its use of quotation marks around words such as "strange" and "raped".

The discriminatory view that women are likely to lie about experiencing sexual violence is in no way new in our society and in our criminal justice system. Pithey notes this as a common stereotype where it is thought that "women are prone to lying about sexual offences and make false claims to protect their reputations or out of malice against the accused."[47] This stereotype was severely criticised by the Supreme Court of Appeal in *S v Jackson* around 24 years ago, where the court stated that:

> the notion that women are habitually inclined to lie about being raped is of ancient origin. In our country, as in others, judges have attempted to justify the cautionary rule by relying on "collective wisdom and experience"… This justification lacks any factual or reality-based foundation, and can be exposed as a myth simply by asking: whose wisdom? Whose experience? What proof is there of the assumptions underlying the rule?' The fact is that such empirical research as has been done refutes the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses.[48]

Unfortunately, and as can be seen from the extract from the judgment of the *court a quo* in *P v S*,[49] in some instances our courts continue to subscribe to this stereotype and the consequences of this, as will be shown below, extend beyond the individual's case. They filter into societal perceptions around the fairness of our justice system with regard to rape cases.

There is a high rate of attrition of rape cases that occur throughout the different parts of the criminal justice system (i.e., reporting, investigating, prosecuting, judging). This is emphasised in the South African Medical Research Council's attrition report of 2017, which found that of 3 952 cases of rape reported to police, only 65% were referred for prosecution. Of this original amount of 3 952 reported cases, 34,4% went to trial and in relation to the original reported case, only 8,6% of cases resulted in a guilty verdict.[50]

In terms of this study only a very small percentage of cases, only 8,6% of the reported cases, result in a successful conviction in South Africa.[51] This paints a very clear picture that it is not likely that a woman who reports a rape case will see justice, which may be why women are engaging in new methods of attaining a sense of justice for themselves.

Not only is there not a likelihood that a reported rape case will result in a successful prosecution, but there is also the barrier to actually reporting the crime in the first instance. Women in South Africa are generally already

47 Pithey "The Personal is the Political" 101.
48 *S v Jackson* 1998 4 BCLR 424 (SCA) paras 12-14.
49 *P v S* para 25.
50 Machisa *et al* 2017 http://dx.doi.org/10.13140/RG.2.2.16983.37289 13.
51 Machisa *et al* 2017 http://dx.doi.org/10.13140/RG.2.2.16983.37289 13.

reluctant to report rape cases to the police. For example, in a study in Gauteng in 2011 it was found that 1 in 25 women reported their rape to the police.[52] Smythe explains the issues around individuals' perceptions of the police as barriers to reporting. She explains that rape survivors' experiences reflect deeply problematic attitudes and practices by police, which leads to a questionable investigation and secondary victimisation of these women.[53] Smythe provides examples of problems with police conduct, such as police refusing to allow women to lay charges, formulating charges as sexual assault rather than rape (when the survivor reported being raped), not allowing the survivor to report the offence in private, not making arrests and not providing information to the individual.[54]

This is supported by and expanded upon in interviews conducted by Jones in 2021 of three rape survivors who chose not to report the offence to police.[55] One individual explained that she had been raped by her intimate partner one evening while she was drunk. When asked why she chose not to report the rape, she stated:

> I've been asked why I haven't reported it and I have many reasons; I have no physical evidence or witnesses, the police will probably be less inclined to believe me because I was dating him at the time, it happened so long ago and he's a white male so it's likely that he would be believed over me.[56]

Reasons other than the perceived inadequacies of the police were also highlighted in Jones' interview, including a lack of education around reporting mechanisms and a fear of retaliation by the alleged perpetrator.[57]

It can be seen in relation to the above that the intersection of various factors such as high attrition rates, perceptions around the police service and its attitudes as well as personal factors affect the individual woman's choice of whether or not to report a rape. Taking these factors together, it is not surprising that South Africa sees a reluctance by many women to report these violations.

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52 Machisa *et al* 2011 https://www.saferspaces.org.za/uploads/files/GenderLinks-13452_begin_war_at_home.pdf.

53 Smythe *Rape Unresolved* 11.

54 Smythe *Rape Unresolved* 1.

55 Jones 2021 https://www.news24.com/life/Wellness/Mind/i-will-never-report-my-rape-3-women-tell-us-why-they-wont-go-to-the-police-20210216.

56 Jones 2021 https://www.news24.com/life/Wellness/Mind/i-will-never-report-my-rape-3-women-tell-us-why-they-wont-go-to-the-police-20210216.

57 Jones 2021 https://www.news24.com/life/Wellness/Mind/i-will-never-report-my-rape-3-women-tell-us-why-they-wont-go-to-the-police-20210216.

The Appeal Court agreed with the argument that when women feel they cannot report sexual violence to the police and that all these forms of features around surviving sexual trauma, such as disclosure, "make it rational to be reluctant to report and to avoid reporting".[58] Furthermore, the Appeal Court states that:

> [e]ven if a survivor is fully aware that she was abused, she naturally weighs up the possibility of reprisals from the perpetrator together with the possible lack of support from the police and statistically small eventuality that reporting will actually, eventually, result in a conviction in a criminal court.[59]

Considering these factors, it is also then not surprising that survivors would choose to seek justice elsewhere, which includes the use of closed-groups such as in the instance of S and the "CYO group", or public platforms such as Instagram where, for example, actress and model Amanda Du Pont recently accused hip-hop artist Jub-Jub of raping her.[60]

## 4 A feminist approach towards "gag-orders"

The misuse of court applications and procedures (and the threat thereof) to prevent individuals from public disclosure or further public disclosure of alleged sexual violence has become common in South Africa, and in recent years the High Court of South Africa, Western Cape Division in Cape Town has delivered two other judgments around the interdict applications aiming to silence disclosure. These were the cases of *Booysen v Major* and *Mdlekeza v Gallie,* both dealing with alleged perpetrators' applications to interdict the survivors. The court handed down two very different and contradictory orders in these two matters.[61]

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58 *S v P* para 57.

59 *S v P* para 57.

60 Dayile 2021 https://www.news24.com/drum/celebs/news/more-women-accusing-jub-jub-after-amanda-du-ponts-statement-i-was-raped-for-two-years-by-him-20211203. In December 2021 Jub Jub's mother applied urgently to the High Court to have the rape claims made by Du Pont removed from online platforms and requested a public apology by Du Pont. Justice Mia dismissed the application due to a lack of urgency. Furthermore, arguing for Du Pont, Adv Ngcukaitobi argued that "What she [Jacqueline 'Mamma Jackie' Mpambani] asked for is a gagging order and it should not be granted because it is direct infringement. What makes it more inappropriate is that it is supressing the ability of rape victims to speak their truth. Its saying to them, 'Never repeat the fact you were raped'." Pheto 2021 https://www.timeslive.co.za/news/south-africa/2021-12-28-tantamount-to-a-gagging-order-judge-dismisses-mama-jackies-urgent-case/%20accessed%20on%2022%20September%202022/.

61 *Booysen v Major* (WCHC) (unreported) case number 5043/2021 of 30 August 2012; *Mdlekeza v Gallie* (WCHC) (unreported) case number 15490/2020 of 20 April 2021.

Before exploring the judgments, a brief canvassing of what a feminist-lens would entail must be addressed. Viewing matters through this type of lens in judicial decision making must include an examination and reflection on the ways gender bias and stereotyping permeate structures or systems (such as the judiciary) and our everyday social interactions. The lens requires this examination and reflection to consider these factors from the position of a marginalised gendered individual, such as a woman, a person who is part of the LGBTIAQ+ community or a child.

The effects of bias and setereotyping in judicial decision making have been noted by scholars such as Miller, who found that judges are no less influenced by gender ideology then laypersons.[62] Furthermore, Miller notes that "judges' decision-making was substantially influenced by gender-ideoology" and that "[j]udges support for traditional gender roles for men and women predicated gender disparaties in both a child custody case and an employment discrimination case."[63]

In the South African context, I have previously highlighted the continued reliance of some presiding officers on gender stereotyping related to rape myths. This included magistrates focussing on the previous sexual history of female survivors of rape, and employing the cautionary approach when considering the credibility of a female survivor.[64] The continued existence of both previous sexual history evidence and the cautionary approach are largely not permitted in law due to their discriminatory foundation and have subsequently been explicitly prohibited in legislation such as the *Criminal Procedure Act* 51 of 1977 and *SORMA*.[65]

I suggest that in order to begin to curb these biases around gender and stereotyping in judicial decision making, the use of a feminist lens requires presiding officers to engage with and reflect on both the personal and the political (or societal) context of reports and disclosures by survivors of sexual violence.

The need to consider both the personal and the political come from the statement of the American feminist Carol Hanisch that the "personal is the political", which was set out in her 1970s essay of the same name.[66] The phrase implies that the personal experience of women is rooted in women's

62 Miller 2018 *Social Psychology and Personality Studies* 227-234.
63 Miller 2018 *Social Psychology and Personality Studies* 232.
64 Swemmer 2020 *SACQ* 45-56.
65 Swemmer 2020 *SACQ* 48-51.
66 Kelly 2023 https://www.britannica.com/topic/the-personal-is-political.

political and social position. The position of women politically has historically been one of marginalisation, discrimination and inequality.

I argue that using a feminist lens in a way that establishes both the personal and the political requires the presiding officer to explore what the individual survivor experienced at the time of her sexual violation as well as her attempts to secure assistance. These factors form part of the personal experience of the survivor. The presiding officer should consider both the formal routes that the survivor attempted to navigate, such as reporting a sexual violation to the police, as well as the informal routes. These may include discussing the incident with a social worker, reaching out for assistance from a church leader, or speaking to family and friends.[67]

Following the exploration of the factors pertaining to the sexual violation and disclosure the presiding officer must also engage in the political or the societal environment of sexual violations. This engagement must include being aware of the high rates of sexual violation committed in South Africa each day, the attrition rate around sexual violation prosecution and conviction in South Africa, as well as the various societal barriers to justice. These societal barriers include the culture of silence, dissuasion from moving forward with a criminal case by family or friends, and the survivor being financially dependent on the perpetrator.[68]

Finally, when presiding officers have explored both the personal and the political factors associated with the sexual violation and the subsequent disclosure, they can embark on a more informed decision-making process which can express a weighing up of the various factors before a decision is made about the survivor's act of disclosure.

In turning to the cases below, I highlight how the court both succeeded and failed in applying different features of the feminist lens. I furthermore reflect on ways the court could have adopted the feminist lens which may have changed the outcome of the specific cases.

### *4.1 Mdlekeza v Gallie*[69]

The *Gallie* case concerned the publication by the University of Cape Town (UCT) in June of 2020 of an article about the Applicant, Mdlekeza. Mdlekeza

67 In *S v P* the court acknowledged that P had been dissuaded from pursuing criminal sanction by a social worker she engaged with. *S v P* para 7.

68 Suran 2015 *Women Lawyers Journal* 48-61.

69 *Mdlekeza v Gallie* (WCHC) (unreported) case number 15490/2020 of 20 April 2021 (hereafter *Mdlekeza*).

published with the intention of promoting his profile and showcasing his views about student development while also aiming to boost his consulting business.[70]

Also in June, and following the publication of the article online by UCT, the Respondent, Gallie, published tweets containing the following, in which she tagged UCT:

> (iii) *Tsi, I got sexually assaulted by this guy in 2012. He locked me in his house in Plattekloof and tried to force himself on me. Thankfully I fought my out and ran to the neighbours and got them to call my mom and the police got fetch me. He refused to open when they arrived. Sies.* [Sic]
>
> (ii) *Lol, he offered me a lift home because we were going in the same direction and I had met him through mutual friends. He drove past my stop and straight to his house. Soze ndimlibale.*
>
> (iii) *We2. Come what may from this. I really couldn't care less. I really have been quiet about this for way too long.*[71]

In early August and again at the end of August, Mdlekeza sent correspondence to Gallie requesting that she remove the posts and issue an apology to him.[72] With a lack of positive response by Gallie, Mdlekeza issued his application proceedings against Gallie where he required, among other things, that she remove the post, "pin" an apology on her Twitter account and pay R200 000.00 in damages.[73]

As part of her defence, which was based on her alleged sexual violation by Mdlekeza, Gallie issued a counterclaim for R250 000.00 for pain and suffering in the form of severe shock, grief and suffering related to the alleged offence.[74] Unfortunately, due to continuing issues arising from the *Prescription Act* 68 of 1969 around prescription in cases based on rape in the absence of "intellectual disability, disorder or incapacity", Gallie's counterclaim was deemed to have prescribed.[75]

In deciding whether Gallie had defamed Mdlekeza the court entered into a discussion as to why disclosing that an individual is the perpetrator of a sexual offence can be considered as defamation when there is no evidence of a criminal complaint being pursued against the alleged perpetrator at the time of the incident. It emerged from Gallie's testimony, however, that she

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70 *Mdlekeza* para 1.
71 *Mdlekeza* para 2.
72 *Mdlekeza* para 4.
73 *Mdlekeza* para 4.
74 *Mdlekeza* para 5.
75 *Mdlekeza* para 10; *Prescription Act* 68 of 1969 (hereafter *Prescription Act*) s 12(4).

had pursued a criminal charge against Mdlkeza in 2020. Problematically the Court in this case considered the fact that Gallie had not approached the police and that no other steps had been taken in 6 years as proof that she was not being truthful in accusing Mdlekeza of sexual violence. The court specifically states:

> To be accused of sexual assault and to be identified as a sexual predator in such manner and circumstances can only be defamatory, especially since at the time of publishing this tweet the respondent had not pursued any criminal charges or any other steps against the applicant for a period of six years.[76]

This must be compared with the Appeal Court in *S v P,* which explicitly states that:

> The absence of a conviction does not mean that a person who committed an offence like theft, cannot be called a thief or, as in this case, a rapist, where facts outside a criminal trial show the existence of such a fact. The lack of a conviction does not render such a fact, if it indeed happened, untrue or non-existent. Especially in cases like rape where it is a notorious fact, which has been judicially recognised, that most victims do not report rape to the police. It does not render the true facts, that a victim was raped, untrue or non-existent. The reasons why rape victims do not lay charges are well-known and our courts have taken cognisance of it.[77]

These two contrasting approaches taken by the court in interrogating evidence exemplify how the use of a feminist lens (adopted in *S v P*) and an understanding of gender-based violence contextually in South Africa can result in a very different outcome to adopting a non-feminist lens (adopted in *Gallie*). When courts look at cases involving the attempted silencing or punishment of survivors of gender-based violence, the approach must be grounded in an understanding of the various barriers to justice that survivors face in the country and then also the evidence of the particular survivor. To ignore the context is to take an approach which negates the Constitutional values of human dignity, equality and freedom.

Further emerging from the *Gallie* judgment is the troubling reliance on (1) Gallie having got the year of her rape incorrect in her tweet (she conceded the incident happened in 2014 rather than 2012) and (2) that her statement before the court differed from that made in her tweet.[78]

The court used Gallie's giving the year of her rape incorrectly in her tweet as one of the reasons to discount her version of events and thus her credibility as a witness. The court continued to scrutinise the contents of her

76 *Mdlekeza* para 19.
77 *S v P* para 51.
78 *Mdlekeza* paras 22-31.

tweets to come to the conclusion that "[t]he version presented by the respondent in her tweets differs from her oral evidence and does not accurately reflect what transpired."[79] Her credibility was further brought into question when she revealed that it was not Mdlekeza who had offered her a lift but that suggestion of Mdlekeza's providing a lift came from Gallie's friend and herself.[80]

Without adopting a feminist lens in this instance and referring to feminist jurisprudence, the Court failed to evaluate the evidence before it in a way that showed an understanding of gender-based violence and the context of this violence in South Africa.

It has been acknowledged in previous jurisprudence that survivors often do not recall all the facts relating to the violent incident.

This is an ordinary response by individuals to sexual violence and in fact a way in which the mind protects itself from further trauma relating to the event.[81] In the case of *Venter v State* the Supreme Court of Appeal quoted Hopper and Lisack as follows:

> It is not reasonable to expect a trauma survivor – whether a rape victim, a police officer or a soldier – to recall traumatic events the way they would recall their wedding day. They will remember some aspects of the experience in exquisitely painful detail. Indeed, they may spend decades trying to forget. They will remember other aspects not at all, or only in jumbled and confused fragments. Such is the nature of terrifying experiences, and it is a nature that we cannot ignore.[82]

In *Venter v State* the Accused had relied on the Complainant contradicting herself around the dates of her rape. On this, the court stated that the "confusion regarding the dates could have genuinely been caused by the traumatic experience … and was not necessarily an indication of untruthfulness."[83]

The Court in *Gallie* failed to consider trauma as a reason why an individual would forget the date of her rape and rather reasoned that this was due to her being untruthful.[84]

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79 *Mdlekeza* para 26.
80 *Mdlekeza* para 26.
81 Hohl and Conway 2017 *Criminology and Criminal Justice*.
82 *Venter v S* (779/2018) [2021] ZASCA 21 (18 March 2021) (hereafter *Venter*) para 34.
83 *Venter* para 35.
84 *Mdlekeza* para 28.

Although the Court could not benefit from the explanation in *S v P* of why women choose not to report their sexual violations or delay reporting, the Court in *Gallie* failed to consider Constitutional Court jurisprudence which describes the basis for why survivors do not come forward. In *Levenstein* the Constitutional Court states that:

> The systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator, as the applicants allege Mr Frankel to have been, is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones – let alone state officials.[85]

What is important to state is that in adopting a feminist lens in these cases there is not an automatic siding with the survivor or alleged survivor of sexual violence. Instead, the lens promotes a different way of evaluating the motive the survivor has for having decided to disclose a violation publicly. The lens also assists courts when faced with evidence about why an individual may not remember all the facts relating to a violent incident and in some instances may give contradictory evidence. In understanding the context of gender-based violence in the country and the barriers to justice, the court can also reflect on what type of motive the alleged perpetrator has for proceeding with applications such as protection orders or defamation claims. Where the motive is to silence or punish the survivor, then the legal process pursued by the alleged perpetrator needs to be categorised as a misuse and abuse of the court process.

In the case of *Gallie,* I argue that when the Court failed to apply a feminist lens the Court failed to consider relevant factors around context, the effects of trauma and the barriers to criminal justice experienced by survivors of sexual violations. The failure to consider these factors placed the Court in a position where it could not substantively reflect upon Gallie's evidence as the Court was not adequately informed. The lack of a feminist lens in cases of this type can act in a way which protects the alleged perpetrator and silences victims of sexual violence.

### *4.2 Booysen v Major*[86]

85 *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 8 BCLR 921 (CC) paras 56-57.

86 *Booysen v Major (*WCHC) (unreported) case number 5043/2021 of 30 August 2012 (hereafter *Booysen*).

The *Major* case was handed down approximately four months after *Gallie,* with both cases being heard in the Western Cape High Court. The case concerned whether to confirm a *rule nisi* for an urgent interdict preventing the respondent (June Dolly Major) from "directly or indirectly posting any information whatsoever regarding the applicant (Melvin Booysen) on any and all social media platforms, among others."[87] Major alleged that Booysen had raped her as early as 2002 and went public with her allegations in 2016 and again in 2021. In 2021, as the court notes, the public disclosure gained "considerable traction".[88]

Major is a cleric and Booysen is a priest in the Anglican church. According to Major, Booysen raped her in 2002 in Makhanda when she and Booysen were there to find a school for her child.[89] She was subsequently persuaded not to report the incident to the police by a bishop of the church; this was in order to "protect the church".[90] After being ordained she once again wanted to report Booysen to the police, yet a bishop at Table View prevented her by calling for her obedience in terms of the "oath of canonical obedience".[91] In 2016 Major went on a hunger strike and once again disclosed to the church officials that Booysen had raped her. After this, the relationship between Major and the church became strained and after the church reneged on an agreement to assist her in relocating to Australia she resigned and was forced to live in a shelter.[92]

On 7 April 2017 Major made the following posts on her social media account:

> Justice for Rev. June Dolley Major and for All Victims/Survivors of abuse ([Sic]. The Anglican Church of Southern Africa have for many years covered up the abuse of women and boys at the hands of its clergy.
>
> Today, I take a stand for myself and for all other victims. I take a stand for that young lady, who is an Anglican herself, who is a beauty therapist. A young life ruined because a clergy person took advantage of her while she was giving him a massage. He knows who he is, so do I.
>
> Today, I speak out for all Rev. Melvin Booysen's victims. There are many women out there whom he took advantage of, not just me, but they are too afraid to speak out…[93]

87 *Booysen* para 1.
88 *Booysen* para 2.
89 *Booysen* para 7.
90 *Booysen* para 7.
91 *Booysen* para 7.
92 *Booysen* para 7.
93 *Booysen* para 8.

Although the Court's decision around whether to confirm the *rule nisi* and grant the urgent interdict largely centred on the fact that the posts made by Major were first done in 2017 with subsequent posts in 2019, and thus the urgency was negated by the passing of the years, the Court made important feminist obiters around these forms of (mis)use of the legal system.[94]

Importantly the Court reflected on the suggestion by the Booysen's counsel that Major "should in her posts state that she alleges that the applicant raped her instead of saying that he raped her."[95] The Court's response was that "[i]t is an astounding proposition that the alleged rapist should have editorial rights over the alleged victim's narrative."[96]

The Court went on to discuss the above by using a feminist lens which focussed on both the personal and the societal contexts which influence the individual's ability to access justice. The Court did this by looking at the many pathways that Major had attempted to use to try get assistance and attain justice. The Court reflected on her many attempts to access justice, for example, by laying charges against Booysen at the South African Police Service, by requesting the church to intervene, by engaging in hunger strikes and by becoming a "champion for rape survivors".[97]

The Court then went on to reflect upon the societal context in which Major and other women find themselves currently in in the country. This reflection was prompted by the *amicus curiae*, Women's Legal Centre, in their submission to the Court.[98] Some of these factors included that "[o]ne in three women in South Africa is raped" and "[c]urrent statistics indicate that almost 90% of cases which are reported to police are not prosecuted."[99] After reflecting on the current situation, which erects almost insurmountable barriers against survivors attaining justice, the Court goes on to emphasise the importance of disclosure via platforms such as social media. The Court states that:

> [t]hrough her online speak out, the respondent has gone from victim to survivor and now uses the platform to educate and support others. The growth in her support base is an indication of the effect of the South African rape culture and the destruction it wreaks in the lives of women, as well as the need for safe spaces to talk without being judged.[100]

94 *Booysen* paras 8-15.
95 *Booysen* para 18.
96 *Booysen* para 18.
97 *Booysen* para 18.
98 *Booysen* para 18.
99 *Booysen* para 18.
100 *Booysen* para 19.

The approach taken by the Court in the above reflects the type of feminist lens that should be adopted when considering cases that involve women disclosing the names of alleged sexual perpetrators. This approach, as stated earlier, does not require that the Court automatically favour the survivor's account, but rather encourages an approach which encapsulates an inquiry into both the personal and the societal contexts which may have triggered the disclosure. By inquiring into and being sufficiently knowledgeable of the contextual background of a disclosure, the Court can properly reflect on whether or not the alleged perpetrator is endeavouring to (mis)use or weaponise the legal system to silence the alleged survivor.

## 5 Conclusion

In this article I have suggested the use of a feminist lens when interrogating cases against survivors for their disclosure of their alleged perpetrator's names. In order to explain why such an approach would be pertinent I began by contextualising the problem in analysing the case of *S v P*.

I argue that the approach taken by the Appeal Court in *S v P* encapsulates this feminist lens through its process of contextualising the personal barriers survivors face when trying to access justice as well as considering the societal problems which prevent this access. I have also reflected on the issue relating to the (mis)use or weaponisation of laws by alleged perpetrator's, such as the *Harassment Act* in *S v P*, and the need for courts to reflect on the purpose of laws such as the *Harassment Act* as serving the needs of survivors, not alleged perpetrators.

I then turned to consider two other cases dealt with in the same division of the High Court, namely *Mdlekeza v Gallie* and *Booysen v Major* as examples of this abuse of process. In the instance of *Mdlekeza v Gallie* I argue that the Court did not adopt a feminist lens when it failed to consider both the personal and the societal contexts faced by Gallie. If a feminist lens had been used, I argued, a different outcome to the matter may have emerged. Finally, I considered the case of *Booysen v Major* and argued that the court in this case successfully adopted a feminist lens which enabled the court to explore and consider both the personal and the societal contexts which affected Major. This understanding of the context around Major assisted the court in correctly considering her need to have her narrative heard and a sense of justice attained in the absence or the failure of having the criminal justice system assist her sufficiently.

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| | |
|---|---|
| CALS | Centre for Applied Legal Studies |
| DVA | Domestic Violence Act 116 of 1998 |
| JAL | Journal of African Law |
| Law & Hum Behav | Law and Human Behavior |
| PMG | Parliamentary Monitoring Group |
| SALRC | South African Law Reform Commission |
| SACQ | South African Crime Quarterly |
| SCA | Supreme Court of Appeal |
| SERI | Socio-Economic Rights Institute of South Africa |

| | |
|---|---|
| SORMA | Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007) |
| UCT | University of Cape Town |