

Background

The Act was enacted following concerns that the criminal justice system was ill equipped to deal with the increase in reported cases of violence against women and children. It came after the 2005 Amendments to the Penal Code, which mainly enhanced sentences or introduced mandatory minimum sentences for sexual offences, appeared not to have had any impact on dealing with the scourge.

It was passed after it had become clear that the successful prosecution of the offences was being hampered by challenges experienced during investigations and in some cases, when the matters were in court. The treatment of victims when they reported cases to the police and at court, affected their testimony or their willingness to testify.

The Anti Gender Based Violence Act which was enacted in 2010 is complimented by the **Anti Gender Based Violence Act (Court) Rules** of 2016. The preamble to the Act reads as follows:

“An Act to provide for the protection of victims of gender-based violence; constitute the Anti Gender Based Violence Committee; establish the Anti Gender Based Violence Fund; and provide for matters connected with, or incidental to, the foregoing.”

Though the Act provides for the creation of **shelters for victims** of gender based violence, the establishment of the **Anti-Gender-Based Violence Committee** and the **Anti-Gender-Based Violence Fund**, this paper will only consider provisions dealing with investigations and court proceedings. The relevant provisions are considered side by side with **The Anti-Gender Based Violence (Court) Rules**.

LODGING A COMPLAINT AT THE POLICE STATION

This is provided for in Part 2 of the Act. In addition to a victim being able to personally file a complaint, **a complaint can be lodged by a next of friend** on behalf of a child or person with a mental disability.¹ The “next of friend” can either be a person or institution with information of the gender-based violence and whose intervention is considered to be in the interest of the victim.²

The Act also places an obligation on a police officer, labour inspector, social worker, counselor, medical practitioner, legal practitioner, nurse, religious leader, traditional leader, teacher, employer or any other person or institution with

¹ Sections 5 (1) and (2) of the Gender Based Violence Act

² Section 6(3) the Anti-Gender Based Violence Act

information concerning the commission of an act of gender based violence, to **inform victims of their right to lodge a complaint**. They must also be informed of other rights and services provided for under the Act.³

A person with information of gender based violence has the option of **lodging the complaint** at a police station in the area where the offender resides, where the victim resides or is temporarily residing, where the gender-based violence occurred or is occurring or is likely to occur or at a police station that is convenient.⁴ The police officer who receives the complaint is **obliged to act promptly** and offer **protection to the victim** that the circumstances of a case may require.⁵ Where **the complainant or witness is a child**, they must be interviewed in the presence of their parent(s) or guardian(s). However, where the parent(s) or guardian(s) is a suspect or offender, the interview shall be in the presence of a next of friend.⁶

In addition to interviewing witnesses and taking statements, a police officer to whom a report is made, must **assist the victim**

³ Section 5 of the Anti-Gender Based Violence Act

⁴ Section 6(4) the Anti-Gender Based Violence Act

⁵ Section 7 of the Anti-Gender Based Violence Act

⁶ Sections 8(2) of the Anti-Gender Based Violence Act

obtain medical treatment and where necessary, find a place of safety. The police officer should also give protection to a victim who decides to retrieve personal belongings.⁷ Further, a victim who is assisted to obtain medical treatment under the Act, is entitled to **free medical treatment at a public health facility.**⁸ He/she is also entitled to a free medical report. The Act also provides that **family mediation or intervention** shall not be a bar to the investigation or prosecution of a complaint.⁹

A person suspected of committing an offence or who is about to commit an offence under the Act, can be arrested without a warrant. Further, a police officer can **arrest, without a warrant,** a person he/she suspects “**will escape or cause an unreasonable delay, trouble or expense**” to be brought to book for any offence that may be committed under the Act, if not arrested immediately. An arrest without a warrant can also be effected on a person **interfering with witnesses, tampering with or destroying evidence,** obstructing a police officer in the execution of duty or who has contravened or is contravening an order issued under the Act.¹⁰

⁷ Sections 8(c),(d),(e) and (f) of the Anti-Gender Based Violence Act

⁸ Sections 8(4) of the Anti-Gender Based Violence Act

⁹ Sections 8(5) of the Anti-Gender Based Violence Act

¹⁰ Sections 9 of the Anti-Gender Based Violence Act

COURT PROCEEDINGS: PROTECTION AND OCCUPATION ORDERS

Provisions relating to protection orders, occupation orders and court proceedings are in **Parts III and VII of the Act**. Applications for the orders, at the first instance, are to be made in the **Subordinate Courts**.¹¹ Further, **Rule 4(1) of the Anti Gender Based Violence (Court) Rules**, provides that applications under the Act will be made using the **forms in the schedule** to the Rules. All applications must be signed by the applicant or the applicant's representative and sworn before the Commissioner for Oaths.¹²

Protection Orders

A person can apply for a protection order to **prevent the respondent from** carrying out a threat of or committing acts of gender-based violence¹³ and the application is launched using **Form II in the schedule** to the Rules. In cases where a victim is unable to personally apply for the order either because of tender age or mental disability, a parent or guardian of the child, a social worker, a police officer, a probation officer, a medical officer, a representative of a non-governmental organisation or other

¹¹ Section 3 of the Anti-Gender Based Violence Act defines the court as being the Subordinate Court

¹² Rule 4(4) of the Anti-Gender Based Violence (Court) Rules

¹³ Section 10(1) of the Anti-Gender Based Violence Act

institution with information of the gender-based violence can **make the application on their behalf.**¹⁴

In such cases, the applicant must obtain the **consent of the victim** unless the victim is a child, has a mental disability, is unconscious or is a person whom the court is satisfied is unable to give the required consent. Where consent cannot be obtained, the **applicant must obtain the leave** of the court¹⁵ before lodging the application. The application for leave is made using **Form III** in the schedule to the Rules.

Further, in cases where the court considers that it is in the **best interest of the applicant**, a protection order can be issued *ex-parte*.¹⁶ In determining the best interests of the applicant, the court will consider whether there is a risk of harm to the applicant, a relation or friend of the applicant if the order is not made immediately.

The court may also **grant the order ex-parte** in cases where it is concludes that the applicant may be deterred or prevented from

¹⁴ Sections 10(4) of the Anti-Gender Based Violence Act

¹⁵ Sections 10(5)(b) of the Anti-Gender Based Violence Act

¹⁶ Section 12(1) of the Anti-Gender Based Violence Act

pursuing the application if it is not granted immediately¹⁷ or in cases where there is reason to believe that the respondent is deliberately evading service of notice of the proceedings and the applicant or a person in a domestic relationship with him/her will be prejudiced by the delay in effecting service. **The interim protection order** is for an initial period of three months and it can be extended for a further three months in cases where the court thinks it fit.¹⁸

The Act also allows the court to issue a protection order **on its own motion** or following an application by a victim in the course of a “criminal proceedings” relating to gender-based violence.¹⁹ It appears that this may be in the course of a criminal trial or an application for bail.

In cases where the applicant is unrepresented, in addition to providing information on the procedure for lodging the application, the Clerk of Court is required to inform him/her of other remedies that are available under the Act.²⁰

¹⁷ Section 12(2) of the Anti-Gender Based Violence Act

¹⁸Section 12(2) of the Anti-Gender Based Violence Act

¹⁹ Section 10(8) Of the Anti-Gender Based Violence Act

²⁰ Sections 10(2) of the Anti-Gender Based Violence Act

The application for an order **can be filed in a court situated** where the victim or respondent resides, carries on business or is employed.²¹ It can also be filed at a court which is situated where the act of gender-based violence occurred, is occurring or is likely to occur.

The Act provides that proceedings shall be **in chambers** and may be **held in camera**.²² Further, **Section 38 of the Act** provides that proceedings other than criminal proceedings **cannot be published without the leave of court**. In cases where leave is granted, the publication shall protect the **identity of the complainant and witnesses** in the proceedings.

The proceedings will be in the presence of the parties, their legal representatives and any other person permitted by the court. However, where the court is of the opinion that the presence of the respondent is likely to have a **“serious adverse effect” on the victim or a witness**, the court may take such steps as it considers necessary to **separate the respondent from the victim** or the

²¹ Section 10(6) of the Anti- Gender Based Violence Act

²² Section 37 of the Anti-Gender Based Violence Act

witness.²³ These may include mounting a movable screen in the chambers where the hearing is taking place or using a video link.²⁴

For the purpose of determining the application for an order, the court may allow oral or affidavit evidence. It may also give **directions on issues** on which it requires evidence, the nature of the evidence required or issues on which the parties should file submissions.²⁵ This may include medical evidence or the examination of witness. In cases **where an expert is involved**, the party calling the expert must serve a report or a written statement of the intended evidence 7 days before the hearing.²⁶ The Clerk of Court will in turn serve the report or statement on the other parties.

In addition, the court may request for a **report on any of the parties** to the proceedings to be prepared and submitted by a social worker, probation officer or other person it appoints.²⁷ Such a report may be on the circumstances of the gender-based violence, an assessment of the effect of the violence and any

²³ Sections 11(2) of the Anti-Gender Based Violence Act

²⁴ Rule 22 of the Anti-Gender Based Violence (Court) Rules

²⁵ Rule 23 of the Anti-Gender Based Violence (Court) Rules

²⁶ Rule 24 of the Anti-Gender Based Violence (Court) Rules

²⁷ Sections 10(6) of the Anti-Gender Based Violence Act

other information considered expedient by the social worker, probation officer or other person appointed by the court.

Though the parties to an application are allowed to amend documents filed in court²⁸ and there is provision for parties to make interlocutory application²⁹, the court is required to consider or hear any application presented before it within 14 days of it being filed.³⁰

Section 14 of the Act sets out a wide array of conduct that a protection order may prohibit, they range from inflicting actual violence to harassing, communicating with or enlisting others to commit act of gender based violence. An order may require the respondent to bind him/herself to be of good behaviour, seek counseling or other rehabilitative service, forbid him/her from contacting or interacting with the applicant or a child or other person in the care of the applicant.³¹

It may also order the respondent to surrender any firearm or weapon in their possession to the police. The respondent may be directed to make temporary periodic payments for maintenance. The

²⁸ Rule 25 of the Anti-Gender Based Violence (Court) Rules

²⁹ Rule 26 of the Anti-Gender Based Violence (Court) Rules

³⁰ Sections 11(3) of the Anti-Gender Based Violence Act

³¹ Sections 15(1) of the Anti-Gender Based Violence Act

court can also grant **temporal sole custody of a child** to the applicant or order the relocation of the applicant to a shelter or other place of safety at the respondent's cost. Further, the parties may be restrained from taking, converting, damaging, or otherwise dealing in property in which the other party may have an interest or a reasonable expectation of use. A court shall not refuse to issue a protection order or impose any other condition solely on the ground that other legal remedies are available to the applicant.³²

The duration of the protection order is for **not more than 12 months** in the first instance.³³ The order can be extended, modified or rescinded by the court on application by the applicant in the original proceedings.³⁴

Occupation Order

Section 20 of the Act provides for the passing of an occupation Order. The order can be issued in cases where a court issuing a protection order, considers it expedient to **require a respondent to vacate the matrimonial home** or other home he/she shares with the applicant and to continue to pay rent, mortgage payments and

³² Sections 15(2) of the Anti-Gender Based Violence Act

³³ Section 17 of the Anti-Gender Based Violence Act

³⁴ Section 16 of the Anti-Gender Based Violence Act

maintenance to the applicant. The court **may issue the order after considering** a social enquiry report, prepared by a social worker, probation officer or other person appointed by it and is satisfied that if it is not issued, the health, education and development of the family will be affected.

Where an occupation order is issued, a landlord shall not evict an applicant solely on the basis that the applicant is not a party to a lease agreement for the property.³⁵

Mediation

Section 36 of the Act provides that where a court is trying a criminal matter concerning gender-based violence **“which is not aggravated”** and the complainant expresses the desire to have the matter settled out of court, or the court is of the opinion that the matter can be amicably settled, it may, with the consent of the complainant, refer it for settlement by any alternative dispute resolution method. **For the purposes of working out a settlement, the court may** require the complainant and the offender to attend counseling. It may also require the offender to receive psychiatric help or appoint a probation officer to observe and report on the subsequent conduct of the offender to the court.

³⁵ Section 20(4) of the Anti-Gender Based Violence Act

Offences under the Act

The Act does not create “new” gender based violence offences. The only offences under it are those associated with the lodging of complaints, making of applications in court or ignoring court orders. These are:

1. Making a false statement in an affidavit presented under the Act³⁶
2. Contravention of any order issued under the Act or giving false information to a police officer or a judicial officer performing any function under the Act³⁷
3. obstructing an inspector appointed under the act from exercising his functions³⁸
4. Publication of proceedings without the leave of court or revealing the identity of a witness.³⁹

Appeals and Review

Rule 28 sub-rule 3 of the Anti-Gender Based Violence (Court) Rules provides that the court should render its judgment **within 28 days** of the conclusion of the hearing of the application. The judgment shall be in writing and made available to the parties within seven

³⁶ Section 11(5) of the Anti-Gender Based Violence Act

³⁷ Section 23(1) of the Anti-Gender Based Violence Act

³⁸ Section 26(5) of the Anti-Gender Based Violence Act

³⁹ Section 38(1) of the Anti-Gender Based Violence Act

days of the decision being rendered.⁴⁰ The court has the power to correct any clerical mistake or accidental slip or omission.⁴¹

A party aggrieved with the courts judgment, can within 30 days of the decision appeal to the High Court⁴² or apply to the court to review its judgment.⁴³ The application for review must be launched not later 7 days after the passing of the judgment,⁴⁴ but special leave is required at the expiry of 14 days.⁴⁵

In addition to the court having the power to review its decision on the application of a party, it can do so on its own motion.⁴⁶

The court has the power to review “upon such grounds as it considers sufficient” and in exercise of the power, may reopen or rehear the matter and take fresh evidence. However, the court shall not rehear or take fresh evidence “unless there is reason to believe that there has been a miscarriage of justice”.⁴⁷ Further, the court will not review its own judgment without giving the parties an opportunity to be heard.⁴⁸

⁴⁰ Rule 28(1) of the Anti-Gender Based Violence (Court) Rules

⁴¹ Rule 28(1) of the Anti-Gender Based Violence (Court) Rules

⁴² Section 21 of the Ant- Gender Based Violence Act and Rule 33 of the Anti-Gender Based Violence (Court) Rules

⁴³ Rule 29(1) of the Anti-Gender Based Violence (Court) Rules

⁴⁴ Rule 30(1) of the Anti-Gender Based Violence (Court) Rules

⁴⁵ Rule 30(2) of the Anti-Gender Based Violence (Court) Rules

⁴⁶ Rule 29(1) of the Anti-Gender Based Violence (Court) Rules

⁴⁷ Rule 29(3) of the Anti-Gender Based Violence (Court) Rules

⁴⁸ Rule 30 of the Anti-Gender Based Violence (Court) Rules