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SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS
2024, VOL. 40, NOS. 3–4, 282–297
https://doi.org/10.1080/02587203.2024.2436185

SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS

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CASE REPORT

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Using the protection from Harassment Act to silence victims of rape from naming their perpetrators: *LW v KCA*

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ABSTRACT

Increasingly, victims and survivors of gender-based violence are naming their perpetrators in public. However, there has been a backlash against the public naming of perpetrators. Men who have been named as perpetrators are turning to a variety of legal mechanisms in response to the allegations made against them. One such mechanism is the pursuit of protection orders under the Protection from Harassment Act. In the case of *LW v KCA*, the High Court dealt with the question of whether naming one's perpetrator in public constituted harassment under the Act. The Court held that such conduct is not harassment, creating seminal development in the jurisprudence regarding gender-based violence.

ARTICLE HISTORY
Received 8 November 2023
Accepted 3 October 2024

KEYWORDS
Protection from harassment; public naming of perpetrators of rape; protection orders

1. Introduction

Increasingly, victims and survivors of gender-based violence are naming their perpetrators in public.[1] They do so for a variety of reasons: to protect other women; to enhance their own healing; to speak their truth. The public naming of perpetrators gained traction through movements such as #MeToo, the #RUReferenceList, #EndRapeCulture and #AmINext.[2] These movements highlighted the deficiencies of criminal justice systems and the accompanying impunity. In the accountability gap, these '#movements' created an impetus for women to identify those who had raped and abused them and, in so doing, to offset the silence and consequential impunity.

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[1] *LW v KCA* 2023 ZAGPJHC 1154 para 54; *DS v AP (Centre for Applied Legal Studies and Wise4Afrika (NPC) amici curiae)* 2022 (2) SACR 81 para 45; *M Booysen v J Dolley-Major* (Case No: 5043/2021); and *Mnyandu v Padayachi* [2016] 4 All SA 110 (KZP). I use the terms 'victims' not to denote weakness or vulnerability but as a factual statement of being the subject of harm.

[2] Amanda Gouws' discussion of #EndRapeCulture in the context of the many hashtag campaigns in South Africa at the time: A Gouws '#EndRapeCulture campaign in South Africa: resisting sexual violence through protest and the politics of experience' (2018) 45 *Politikon* 1. See also B Meyersfeld 'Sexual harassment and disciplinary proceedings: Never the twain shall meet' (2020) 10 *Constitutional Court Review* 301, 311–315.

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However, there has been a backlash against the public naming of perpetrators.[3] Men who have been named as perpetrators are turning to a variety of legal mechanisms to quash the allegations made against them. One such mechanism is the pursuit of protection orders under the Protection from Harassment Act 17 of 2011 ('the PHA' or 'the Act'). These orders can be capricious. At times, the orders prohibit the speaker from ever speaking about her rape to anyone at all, even if she omits the name of the complainant.[4] The effect of these cases is to silence speakers, discredit victims and appropriate victimhood for those who are accused of rape.

There is an intuitive problem with this. The PHA was part of a suite of legislation designed to protect women from gender-based violence.[5] Men using this legislation to silence women is a perverse inversion of the purpose of the PHA. At the same time, the PHA provides relief to anyone who has been the victim of harassment, irrespective, inter alia, of their sex. One cannot categorically preclude men accused of rape from using the legislation.

A balance must be struck. On the one hand, the interpretation of harassment must be sufficiently flexible to allow *anyone* who has been a legitimate target of harassment to find relief under the Act. On the other hand, courts must avoid the exploitation and appropriation of the PHA by men to 'exert dominance'[6] over their accusers and to silence victims.[7]

The answer to this impasse lies in a proper analysis of the meaning of 'harassment'. However, there is little guidance in the Act as to when conduct constitutes harassment. It is therefore with relief that the High Court, in the case of *LW v KCA*, undertook an in-depth exploration of the meaning of 'harassment'.[8]

In a crucial judgment, the Court held that identifying one's perpetrator publicly is not in and of itself harassment: 'If any provision of the PHA can bear more than one constitutionally compliant interpretation, that which *better allows victims to speak out, is to be preferred*'.[9] The importance of this sentence cannot be overstated. It creates a fundamental shift in the jurisprudence not only of the PHA, but also in respect of all cases involving public naming of perpetrators.

Given the importance of this holding, I analyse the case, structuring my argument as follows. In Section 2, I provide an overview of the case. In Section 3, I unpack the Court's analysis of 'harassment'. In Section 4, I extract from the Court's reasoning a two-part test to be applied when assessing whether naming one's perpetrator is harassment. In Section 5, I discuss the issues that the Court explicitly rejects as relevant to the determination of harassment in public naming cases. In Section 6, I situate the judgment in the global backlash against the public naming of sexual abusers. I then conclude the note in part 7, summarising the key legal findings and their impact on gender-based violence in South Africa.

[3] *DS v AP* (note 1 above) para 45.
[4] *DS v AP* (note 1 above).
[5] Domestic Violence Act 116 of 1998 ('DVA') and Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('Sexual Offences Act').
[6] *Booysen* (note 1 above) para 29.
[7] *LW v KCA* (note 1 above) para 61. See also *Mnyandu* (note 1 above) 44.
[8] *LW v KCA* (note 1 above).
[9] Ibid para 54, emphasis added.

2. Overview of the case

2.1 Facts

LW and KCA, both in the performing arts industry, had been in a long-term relationship. LW claimed that the relationship was abusive and, that on two occasions, KCA had raped her.[10] The first took place at a performing arts festival and the second in her home.[11] LW also stated that KCA had raped another woman, AS, and sexually assaulted a friend.[12] KCA denied the allegations.

LW never reported or discussed the rapes until she met AS.[13] Together, LW and AS reported the rapes to three institutions. The first was an arts foundation that had provided both LW and KCA with research grants in Switzerland.[14] The second complaint was to the Gender Equity Office at the University of the Witwatersrand ('Wits') (at the time, KCA was a student at Wits).[15] The third complaint was to the National Arts Festival ('NAF'), in which LW, AS and KCA were to participate.[16]

The nub of the various complaints was that LW and AS felt unsafe. As regards the complaint to the NAF, LW and AS were concerned that they were going to have to perform in the same arts festival as their rapist.[17] Their key request was that they, and potentially other victims of KCA, be provided with support and safety. They also requested that KCA should not be the recipient of a prestigious arts award, in light of the allegations against him.[18] For various reasons, none of these organisations were able or willing to provide LW and AS with support.

Later, LW and AS threatened to 'go public'.[19] This threat was never implemented.

KCA approached the Magistrate's Court for a protection order under the PHA against LW, prohibiting her from communicating with third parties on social media and in the press about the allegations.[20] Strangely, he did not bring a claim against AS.[21]

> KCA was successful.[22] The magistrate prohibited LW from 'mentally or psychologically harassing KCA, engaging in verbal, electronic, or other communication "aimed at" the respondent and publishing or posting the rape allegations about the complainant on any platform, including any social media platform'.[23]

[10] Ibid para 11. KCA 'physically threatened and intimidated her, emotionally manipulated her and psychologically abused her. He "eventually wore [her] down to a frightened, appeasing and submissive person [she] could hardly recognise as being [herself]"'. Ibid para 14–17.
[11] Idem. It later transpired two other women had been raped by the Respondent. Ibid paras 21–22.
[12] Ibid para 3.
[13] Ibid para 53.
[14] Ibid para 102.
[15] Ibid para 105.
[16] Ibid para 107.
[17] Ibid para 107.
[18] Ibid para 3.
[19] Idem.
[20] Ibid para 6.
[21] Ibid para 129(e).
[22] Ibid para 29.
[23] Ibid para 30.

2.2 Judgment

The question before the Court was whether LW's complaints to the three institutions ('the communications') constituted harassment for the purposes of the PHA. The Court held that the Magistrate erred and overturned the protection order. This was so for two reasons. The first related to a procedural issue. KCA had failed to present information to the Magistrate during the *ex parte* application, violating a litigant's obligation in *ex parte* proceedings to present all information to the court, even if prejudicial to their own case. On this point alone, the Court found that the protection order could not stand.[24]

However, the Court went on to examine whether LW's conduct actually constituted harassment, alive, no doubt, to the urgent need for direction in this regard. The Court held that LW's conduct did not constitute harassment. Applying the reasoning discussed below, the Court overturned the protection order.

3. The court's analysis of the meaning of harassment

I focus on three aspects of the Court's analysis of harassment. The first is the Court's discussion of the text of the PHA and the definition of harassment. The second is whether LW's communications met the criteria of the 'conduct' element of harassment. The third is the Court's holding that, even if LW's communications were 'conduct' as defined by the Act, they were reasonable and therefore could not constitute harassment.

Before discussing these aspects, the Court identified the factors that should guide its interpretation of 'harassment'.[25] The first is the duty on courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights.[26] The second is that where there are two constitutionally compliant interpretations, the interpretation of legislation that best promotes the spirit, purport and objects of the Bill of Rights must be preferred. The third is the obligation on courts to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. The last is the 'simultaneous consideration of "text, context and purpose"'.[27]

In the discussion below, it will be evident how the Court used these factors to conclude that identifying one's rapist does not in itself constitute harassment. This will give great comfort to women needing to speak publicly about their experiences – not only about what happened to them but also about who did it.

3.1 The definition of harassment

3.1.1 The text of the PHA

First the Court looked at the text of the PHA. Section 1 of the PHA defines harassment as follows:

[24] Ibid para 86.
[25] Ibid para 49.
[26] Section 39(2) of the Constitution of the Republic of South Africa, 1996.
[27] *LW v KCA* (note 1 above) para 49(d).

> '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-
>
> 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;
> 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
> 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 them where 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.

'Harm' is defined as any mental, psychological, physical or economic harm.[28] A related person is defined as a member of the complainant's family or household, or any person in a close relationship with the complainant.[29]

The Court noted correctly that the definition of harassment must be read in conjunction with s 9(5) of the PHA, which reads as follows:[30]

> (5) For the purpose of deciding whether the conduct of a respondent is unreasonable as referred to in paragraph (a) of the definition of 'harassment', the court must, in addition to any other factor, take into account 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.

Therefore, even if the proscribed conduct occurs, only if it is unreasonable will it constitute harassment.

Thus, the essential elements of the definition of harassment may be summarised as follows: (i) harm, which includes physical conduct and acts that create the reasonable fear of harm; (ii) intent in the form of knowledge – that a reasonable person would realise that the conduct would be harmful. It is not necessary to show that the respondent set out to hurt the complainant; (iii)

[28] Section 1 of the Act.
[29] Idem.
[30] *LW v KCA* (note 1 above) para 90.

conduct, which broadly includes: following the complainant (importing the traditional notion of stalking); contacting the complainant, for example, by phone; and contacting the complainant by sending them written communications or objects; (iv) reasonableness in that the conduct must be unreasonable; and (v) as an alternative, conduct that amounts to sexual harassment.

3.1.2 The definition the court adopted

Based on these provisions, the determination of whether conduct is harassment will depend on the discretion of the judicial officer. The Act, however, provides little direction as to what factors should be inform a judge's discretion. In order to address this vacuum, the *LW* court turned to the dictionary definition of harassment. The dictionary definitions evoke a sense of repetitive or constant conduct: '1. Trouble by repeated attacks. Now freq. subject to constant molesting or persecution. 2. Lay waste, devastate. 3. Tire out, exhaust. 4. Overwhelm with […] misfortunes, etc.'[31]

This aligns with the general sense of harassment being repetitive conduct, although, the text of the Act clearly does not require a repetitive course of conduct.[32] The High Court grappled with this in the case of *Mnyandu v Padayachi*.[33] The Court in that case held that the conduct envisaged by the PHA may manifest in two ways. The first is that the conduct may have a repetitive element that 'makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim'.[34] Alternatively, the conduct must be 'of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked'.[35] The kernel of both forms of conduct is a sense of torment, fear and distress.

Based on the dictionary definition and the position adopted in *Mnyandu*, the Court in *LW* developed the concept of conduct that is 'predatory or persecutory in nature'.[36]

3.1.3 Is the court's definition of harassment too narrow?

I pause here to consider whether this standard may have unintended negative consequences. Is the standard too high such that victims of gender-based violence may not be able to get protection orders because the alleged harassment does not reach the threshold of predation or persecution?

To some extent, this risk is attenuated by the second prong of the reasonableness test, i.e., whether a reasonable complainant would experience the conduct as predatory or persecutory. But as with all objective standards, the determination of whether conduct is 'predatory or persecutory' will differ depending on the judge's frame of reference. If the judge understands the impact of harassment (either because of

[31] Ibid para 95.
[32] This is how harassment is defined in s 1 of the DVA, which uses the language of 'a pattern of conduct' and 'repeatedly' engaging in proscribed conduct.
[33] *Mnyandu* (note 1 above) para 30.
[34] Idem.
[35] Ibid para 68.
[36] *LW v KCA* (note 1 above) para 96. The Court was influenced by the seriousness of such orders and the consequences of a breach thereof.

personal experience or because they understand the systemic nature of gender-based violence), it is likely that a broader range of conduct will fall within the definition of predation or persecution. If the adjudicator lacks this frame of reference, a narrower category of conduct will meet the predatory/persecutory threshold.

Given the conservative nature of many South African judges, it is likely that courts will adopt a narrow interpretation. The language in many gender-based violence cases belies a regressive and patriarchal approach to women. Take for example the case of *DS v AP*.[37] The Western Cape High Court overturned a magistrate's decision that the appellant (the respondent in the lower court) had harassed her rapist when she spoke about her rape on a private WhatsApp chat group (after the discussions had been leaked publicly without her knowledge). The magistrate ordered that the appellant not '*disclose to anyone in any manner*' that the respondent raped her. In addition to the all-encompassing prohibition on the appellant from ever talking about the rape with anyone ever, the magistrate's judgment contained statements and conclusions that were both untrue and discriminatory. The magistrate had held that:

> The evidence of the respondent was that she 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 of her former 'lovers' and yet failed to lay one charge of rape against any one of them.[38]

The appellant had not been sexually abused in her youth. She did not 'not deny' this because it was *never put to her in court*. She was *not* in relationships with the men who abused her in the past. The magistrate clearly had a view of the appellant that had nothing to do with the information before him. The disquieting fabrication of childhood sexual assault and the false characterisation of her previous rapists as 'lovers'; the random reference to the appellant's therapy and the use of the word 'strange' in describing her 'failure' to lay a charge of rape 'against *any one* of them'; and the insertion of quote marks around the word 'rape', all these statements cast the appellant as unhinged, duplicitous and unbelievable.

The portrayal of rape complainants in this way stems from an intractable diminution of and discrimination against women in our legal system. The cautionary principle in the law of evidence is a case in point. Until as recently as 1998, the testimony of women who accuse men of rape fell within this category. Judges were required to treat the testimony of rape victims with caution because of the general 'tendency' of women to lie and to fabricate such allegations.[39] This rule has been abolished but the ingrained prejudice against rape victims remains.[40]

[37] *DS v AP* (note 1 above).

[38] Ibid para 23, emphasis added.

[39] *S v Snyman* 1968 (2) SA 582 (A) 585 C–H.

[40] M Machisa, R Jina, G Labuschagne, L Vetten, L Loots & R Jewkes 'Factors Associated With Rape Case Attrition in the South African Criminal Justice System: A National Cross-Sectional Study' (2022) XX *The British Journal of Criminology* 1; D Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (2015) 156–157; PJ Schwikkard 'Getting somewhere slowly: The revision of a few evidence rules' in L Artz & D Smythe (eds) *Should We Consent? Rape Law Reform in South Africa* (2008) 72, 74; and R Bashonga & Z Khuzwayo '"This thing of the victim has to prove that the perp intended to assault is kak!": Social media responses to sexual violence on South African University campuses' (2017) 31 *Agenda* 35, 36.

This institutional prejudice was starkly evident in the 2006 case of *S v Zuma*, in which the former president had been accused of rape.[41] Van der Merwe J allowed the accused to lead evidence regarding the complainant's sexual history, including that she had been raped before and was the victim of at least two incidents of child abuse.[42] The judge insisted that the evidence 'was not led to show that the complainant was of loose morals' but rather to show 'that the complainant was inclined to falsely accuse men of having raped or attempted to rape her'. The extent of this evidence, together with questionable statements regarding the complainant's history of mental illness, created a picture of the complainant as unreliable, dishonest and delusional.[43] The judge cultivated this portrayal with disquieting statements that the complainant was 'a woman who is not scared to tell men of her sexual needs'[44] and that it was 'not strange to her to be naked with a man whom she had met only a week before'.[45]

The evocation of rape myths and gendered tropes about female duplicity does not bode well for an expansive interpretation of the predatory/persecutory threshold under the PHA. In all likelihood, courts' interpretation of harassment will veer in various directions depending on the extent to which judicial officers are knowledgeable about gender-based violence, its impact on victims and how that translates into law. One can only hope that the developing jurisprudence in gender-based violence cases will guide the application of the PHA in a direction that aligns with its original purpose.

4. The Court's two-part analysis

The Court developed what can be described as a two-part test (although it did not identify its approach in this way). First, it is necessary to determine whether the conduct meets the requirements of the definition of harassment in s 1 of the Act (step one). If so, the second step is to determine whether the conduct was unreasonable. If the conduct is unreasonable, it is harassment. If not, the conduct is not harassment and no protection order may be granted (step two).

4.1 Step one: Was LW's conduct harassment?

The Court held that the communications met the definitional elements of harassment in the Act.[46] There was direct engagement in conduct, which LW knew or ought to have known would cause harm to KCA. The conduct was a form of communication and thus fell within the proscribed conduct identified in paragraph (a) or (b) of the definition.

[41] *S v Zuma* 2006 ZAGPJHC 45.
[42] Ibid 50–51.
[43] For commentary on this case, see: S Hassim 'Democracy's shadows: Sexual rights and gender politics in the rape trial of Jacob Zuma' (2009) 68 *African Studies* 57; J Moloi 'The case of *S v Zuma*' (2006) 18 *SA Crime Quarterly* 23; S Nadar 'Towards a feminist missiological agenda: A case study of the Jacob Zuma rape trial' (2009) 31 *Missionalia* 85; L Vetten 'Losing the plot in Zuma rape trial's stories' (2014) *Mail & Guardian*, 14 August.
[44] *S v Zuma* (note 41 above) 165–166.
[45] Ibid 167.
[46] *LW v KCA* (note 1 above) para 122.

It was less clear, however, whether LW's conduct was 'aimed' at KCA.[47] The purpose of the communications was to identify KCA as their rapist and *also*:

> to conscientise the institutions themselves about the problem of the gender-based violence, to encourage them to introduce policies and protocols to deal with the problem, and to give consideration to how they could make their environments safer for women and the victims of such violence.[48]

The communications thus were not directed at KCA. This doubt notwithstanding, the Court proceeded on the basis that the communications were aimed at KCA as required in the definition of harassment.[49]

There is a lingering question, which was not addressed by the Court, regarding the fact that the communications were made to professional organisations. While it is galling that survivors of gender-based violence should be silenced *at all*, it is particularly alarming that a court would grant a protection order where the communications were made to professional bodies for the purpose of seeking safety within one's profession. One of the inequities of the protection order was that LW's communications were through organisational channels for the purpose of securing some type of safety. While these channels were not courts, they nonetheless mirrored some form of grievance process.

This is particularly important for women working outside of a formal workplace. The International Labour Organisation Convention on the Elimination of Violence and Harassment in the World of Work speaks of sexual harassment in the 'world of work' and not of the workplace.[50] The scope of the Convention extends to 'harassment in the world of work occurring in the course of, linked with or arising out of work' irrespective of the contractual status of the worker.[51] What happened to LW occurred in the world in which she worked. In communicating with the three organisations, she was attempting to obtain the type of protection to which she would be entitled if she worked in a company. In a way, punishing LW for the communications is akin to granting a protection order against an employee who brings a grievance mechanism in formal company process.

Having concluded that the communications constituted harassment, the Court turned to the second question: Were the communications unreasonable?

4.2 Step two: Was LW's conduct unreasonable?

To achieve a balanced application of the PHA, judicial officers' discretion must be 'infused by a deep awareness of the epidemic scale of gender-based violence that

[47] The Court did not ask whether the communications could be said to be directed at a related person. This is because s 1 of the PHA defines a related person as 'any member of the family or household of a complainant, or any other person in a close relationship to the complainant'. The three organisations clearly did not fall within this category.

[48] *LW v KCA* (note 1 above) para 128.

[49] Idem.

[50] Convention Concerning the Elimination of Violence and Harassment in the World of Work (adopted 21 June 2019, entered into force 25 Jun 2021). Adoption: Geneva, 108th ILC session (21 June 2019).

[51] Ibid art 3.

besets our society and the aim of the legislation to prevent it'.[52] Thus, apart from looking at the text of the Act, the *LW* Court considered (i) the context of the impugned conduct; and (ii) the purpose of the Act. I discuss each in turn.

4.2.1 Context

The Court held that the word 'harassment' could not be interpreted in a vacuum.[53] It was necessary to situate the Act in the context of the 'staggeringly high' incidence of gender-based violence in South Africa.[54] This echoes the *Mnyandu* judgment's imprimatur that, to achieve a balanced application of the PHA, judicial officers' discretion must be 'infused by a deep awareness of the epidemic scale of gender-based violence that besets our society and the aim of the legislation to prevent it'.[55]

In this regard, the Court looked at the interplay between the silencing of victims of gender-based violence, and the failure of the legal system. It acknowledged that context is not only about numbers. It is also about the silencing of victims of rape.

From the moment that the rape happens, victims report feeling silenced. There are many reasons for this. They include stigma, fear of further violence, the failure of the police and the national prosecuting authority to investigate and prosecute complaints of gender-based violence, the experience of victim-blaming and shaming, the speaker's own sense of shame or responsibility for what occurred (albeit of course misplaced), and the refusal of the perpetrator to apologise or acknowledge that he committed an act of gender-based violence.

The enforced silencing is asphyxiating and isolating, making healing impossible to achieve. As Pumla Gqola demonstrates, silence is part of the 'the female fear factory', a system that normalises and legitimises rape.[56] The Constitutional Court in *Levenstein v Estate of the Late Sidney Lewis Frankel* spoke about the social norms that silence victims of sexual assault.[57] In that case, Sidney Frankel sexually assaulted the eight applicants when they were children. It took the applicants decades before they could institute criminal and civil proceedings against Frankel. By this time their matters had prescribed in terms of s 18 of the Criminal Procedure Act 51 of 1977. In declaring s 18 unconstitutional, the Constitutional Court held 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.[58]

The *LW* Court similarly highlighted the need for 'women-victims to challenge the culture of silencing by speaking out about gender-based violence *and identifying their abusers*'.[59] This has a 'beneficial effect of women-victims exercising

[52] Mnyandu (note 1 above) para 69.
[53] Ibid para 1. This approach was evident from the opening paragraph of the judgment. The Court cited the explanatory memorandum accompanying the Bill when it was presented to parliament, which promised that [t]he Bill will also contribute to the fight against violence against women and children'.
[54] Ibid para 50.
[55] Ibid para 61.
[56] PD Gqola *Rape: A South African Nightmare* (2015) 79.
[57] *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 (8) BCLR 921 (CC).
[58] Ibid para 56.
[59] *LW v KCA* (note 1 above) paras 54 & 100, emphasis added.

their freedom of expression, both in terms of healing and in terms of identifying and prosecuting abusers'.[60]

The failure of the criminal justice system has contributed to this muting of survivors. Prosecutors decline to prosecute almost half the rape cases referred to them by the police.[61] The result is that only 8 per cent of rapes in South Africa result in a conviction.[62] This stands in stark contrast to the rate of rape in South Africa. In a society where a quarter, to a third, of women are or will be a victim of gender-based violence, silence is pernicious.[63] The *Levenstein* Court confirmed that it is 'rational to be reluctant to report and to avoid reporting' sexual assault due to 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'.[64]

Finally, the *LW* Court considered the public interest component of the communications. Section 9(5) of the Act provides that conduct will *not* be unreasonable if it was undertaken (a) 'for the purpose of detecting or preventing an offence' or (b) 'to reveal a threat to public safety or the environment'.

LW's communications 'were not sent simply for the sake of targeting or harming the respondent' and rather 'sought to address concerns about the both the appellant's safety and that of other women'.[65] They reflected 'a strong desire to bring about societal and institutional change'.[66] LW 'engaged in the communication not only for her own ends, but also to prevent the commission of an offence and to reveal a threat to public safety'.[67]

Therefore, in light of the communications' healing nature, their societal and institutional relevance, and their revealing a threat to public safety, the Court concluded that the communications were not unreasonable.[68] Because of the context of mass rape in South Africa, the structural impunity, the culture of silencing, and the isolation in which victims suffer, naming a perpetrator cannot be harassment. As the Court poignantly stated, 'where society and institutions are perceived as responding with lethargy, quiet diplomacy is not to be expected'.[69]

This analysis led the Court to its groundbreaking conclusion that if 'any provision of the PHA can bear more than one constitutionally compliant interpretation, that which *better allows victims to speak out, is to be preferred*'.[70]

As noted above, this approach can be applied beyond the interpretation of harassment under the PHA. It must inform the adjudication of *all* legal claims that have the potential to silence women who identify their perpetrators publicly. The

[60] Idem.

[61] MT Machisa, G Labuschagne, L Vetten, L Loots, S Swemmer, B Meyersfeld & R Jewkes *Rape Justice in South Africa: A Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012* (2017) Gender and Health Research Unit, South African Medical Research Council.

[62] Idem. See also M Machisa et al (note 40 above) 4.

[63] 'A staggering one-in-three women, experience physical, sexual abuse' (2019) *UN News*, 24 November; 'Guide: Rape statistics in South Africa' (2016) *Africa Check*, 22 June.

[64] *Levenstein* (note 58 above) para 57.

[65] *LW v KCA* (note 1 above) para 129(d).

[66] Idem.

[67] Ibid para 129(f).

[68] Ibid para 129(d).

[69] Ibid para 129(c).

[70] Ibid para 54, emphasis added.

prioritisation of women's rights to heal, to create safety for themselves and for other women, to challenge impunity – these contextual factors demand that, where women name their perpetrators publicly, courts must choose an interpretation of the law that allows women to speak freely.

The Court then turned to the purpose of the Act.

4.2.2 Purpose of the Act

The Court is clear. Magistrates are enjoined to consider the purpose of the Act when determining whether conduct constitutes harassment. The holding that courts must consider the purpose of the Act helps to mitigate the misappropriation of victimhood by men in a way that is inconsistent with the intention behind such legislation. Courts should be weary of allowing perpetrators to use the Act as another tool to silence and further victimise women who try to navigate the horror of rape in South Africa. This was never the intention of the Act and goes against the spirit, purport and ambit of such legislation.[71]

The preamble of the Act indicates that the purpose of the Act is:

a. To give effect to the rights to equality, privacy, dignity, freedom and security of the person; and
b. Protecting the right to be free from all forms of violence whether from public or private sources.

The PHA was introduced to expand the Domestic Violence Act (DVA),[72] extending protection orders to people who are not in domestic relationships.[73] Both Acts are part of a suite of legislation designed to address inter-personal violence.[74] While the Acts do not speak specifically to complainants being women, they clearly are designed to address the fact that the majority, by far, of people who are the victims of inter-personal violence are women and children.[75] The explanatory memorandum accompanying the PHA Bill promised that the Bill would 'also contribute to the fight against violence against women and children'.[76] The PHA also has its history in the stalking of women by men.[77] This is the 'mischief' that the PHA was designed to address.

This is not to say that the Act may only be used by women who are abused by men. However, where the Act is used by an *abuser* against the person he is accused of abusing, to misappropriate victimhood and regain some of the lost ground as a result of the public discourse on rape, this should direct courts to refuse the order.

[71] In *Omar v Government of the Republic of SA*, in speaking about the DVA, the Constitutional Court held that 'the Act serves a very important social and legal purpose', namely, to address violence against women. *Omar v Government of the Republic of SA* SA 2006 (2) SA 289 (CC) para 18.
[72] The latter is limited to domestic relationships.
[73] *LW v KCA* (note 1 above) para 56.
[74] The DVA and the Sexual Offences Act.
[75] The preamble to the DVA evokes the obligations of states towards ending violence against women and children.
[76] Ibid para 1.
[77] *LW v KCA* (note 1 above) para 57; *Mnyandu* (note 1 above) para 49.

To conclude, the Court's analysis of 'harassment' reveals the following principles: (i) conduct that is reasonable is not harassment; (ii) when interpreting the Act, courts must prefer an interpretation of 'harassment' that favours women's rights to speak about their experiences of gender-based violence and the identity of those who harmed them; and (iii) when named perpetrators use the Act to silence their accusers, courts must consider the purpose of the Act to ensure that there is no misappropriation thereof.

The Court did not only provide guidance as to the considerations relevant to the determination of harassment. It also identified factors that are *irrelevant*.

5. Factors that should *not* be considered when interpreting the PHA

5.1 Truthfulness of the communication

If an allegation is false, does that in itself constitute harassment? The short answer is no.

In *Mnyandu*, the Court held that the truth or otherwise of a victim's statement is not determinative of harassment.[78] In that case, the applicant (against whom a protection order had been granted in the Magistrates' Court) had sent an email the contents of which were proved to be untrue.[79] However, the fact that the email was not true, did not mean that her conduct was 'necessarily oppressive or unreasonable'.[80] This is because the *purpose* of the email was to provide a reason to refuse the respondent's invitation for a further meeting.[81]

The Court in *LW* agreed with this position, holding that:

> There is nothing in the definition of harassment in section 1 of the PHA or in section 9(5) to suggest that the communication of incorrect facts or untruths automatically gives rise to harassment.[82]

However, the Court did hold that 'whilst not decisive, [truthfulness] would be relevant to the question of unreasonableness'.[83] An assessment of the reasonableness of a communication must consider 'the extent to which it is based on the communicator's sincerely – and reasonably – held belief'.[84]

This does raise a problem. If a court must take truthfulness into account when determining reasonableness, how is this to be done? In previous cases, protection order applications have turned into quasi-criminal trials, where women are cross-examined about whether they were really raped. This should be discouraged.

The simple question really is whether the respondent's impugned conduct reached the standard of predation or persecution.[85] For example, if person 'A' announced that person 'B' raped her, the veracity of that statement does not turn the conduct into

[78] *Mnyandu* (note 1 above) para 69.
[79] Idem.
[80] Idem.
[81] Idem.
[82] *LW v KCA* (note 1 above) para 97.
[83] Idem.
[84] Ibid para 129(a).
[85] Ibid para 96.

harassment. If, however, 'A' then threatens to take revenge in a way that instils a level of fear, then that is harassment. Veracity should be left to the realm of criminal and defamation law and ought not to be a factor in PHA applications.

The position can be summarised as this: (i) if a statement is untrue, that does not necessarily make it harassment; (ii) truthfulness may nonetheless be relevant to the question of reasonableness; and, (iii) an assessment of reasonableness must ask whether the communicator sincerely and reasonably believed the allegation.

5.2 Delay

The Court addressed the question of the delay between the rape and LW's communications. Was the delay between the rape and LW's communications unreasonable, thus making the conduct harassment? The Court dismissed this, recalling that the 'delay in communicating the allegations is consistent with the well-known phenomenon that victims may take a long time to come to terms with the fact that they have been raped'.[86] This echoes the finding by the Constitutional Court in *Levenstein* that courts may not draw any inference from the length of any delay in reporting cases of sexual assault.[87]

6. Situating the judgment globally: #MeToo and beyond

The importance of the judgment in *LW v KCA* extends beyond the borders of South African law. Women around the world have been identifying their abusers publicly and, as with South Africa, foreign jurisdictions are having to deal with the legal response to these public statements, and the backlash against them.[88] In France, journalist Sandra Muller – creator of the #BalanceTonPorc ('expose your pig') movement – was sued by Eric Brion, the man she accused of sexual harassment.[89] In Australia, the #LetHerSpeak movement is campaigning to abolish the 'gag-laws' that silence sexual assault victims in various states in Australia.[90] In India, former Indian minister MJ Akbar lay criminal charges of defamation against Priya Ramani, one of 20 women who had accused him of predatory conduct.[91] In Johnny Depp's defamation case against his former wife, Amber Heard, a US court ordered Heard to pay Depp $15 million for publicly accusing him of assault.[92]

[86] Ibid para 129(b): 'The delay in the communications is therefore not a pointer to unreasonableness'.

[87] *Levenstein* (note 58 above).

[88] M Stubbs-Richardson, S Gilbreath, M Paul & A Reid 'It's a global #MeToo: A cross-national comparison of social change associated with the movement' (2024) 24 *Feminist Media Studies*; C Whynot 'Retaliatory defamation suits: The legal silencing of the #MeToo movement' (2020) 94 *Tulane Law Review* 1.

[89] AFP 'French woman overturns conviction for accusing man of sexual harassment' (2021) *The Guardian*, 31 March.

[90] <https://www.letusspeak.com.au>.

[91] See: India: PTI, 'Delhi HC admits MJ Akbar's appeal against acquittal of Priya Ramani in defamation case' (2022) *Times of India*, 13 January; Canada: A Hurry 'Defamation as a sword: The weaponization of civil liability against sexual assault survivors in the post-#MeToo era' (2022) 34 *Canadian Journal of Women and the Law* 82; Sweden: L Wegerstad & U Andersson 'The only path to justice: The criminal legal system and defamation judgments related to #MeToo in Sweden' (2024) 32 *Feminist Legal Studies* 231; United States: K Abhishek 'Sexual harassment & law of defamation: The first refuge of the powerful' (2023) 6 *International Journal of Law Management & Humanities* 439.

[92] C Nelson '"A public orgy of misogyny": Gender, power, media, and legal spectacle in *Depp v Heard*' (2024) *Feminist Media Studies*.

At the core of this backlash is the traditional suspicion of women's narratives in the public sphere in general. Theorists such as Nancy Frazer, Tanya Serisier and Lucie White have shown how historically, the public sphere was reserved for public issues; discourse about personal matters had to remain private.[93] Therefore, when women start speaking publicly about the harm they experience in private, there is an intuitive rejection of this speech. Add to this the fact that, in almost all societies, women's narratives are viewed as suspicious, it is unsurprising that many jurisdictions are struggling to situate the naming of perpetrators within their legal systems.[94]

The *LW v KCA* case, therefore, is important not only for the interpretation of harassment in the PHA. It is an example of how laws in general can be interpreted to protect 'survivor narratives'.[95] These shift our focus from individual cases to collective harm, which in turn creates a context of 'believability'.[96] For without the shift from the individual to the collective, the hundreds of perpetrators who have been exposed and held to account since #MeToo began, would still be sexual predators, committing sexual assault with impunity.

7. Conclusion

Every person who has been the victim of gender-based violence and who speaks publicly about who hurt her, is affected by the gagging orders imposed by Magistrates' Courts under the PHA. The chilling effect of protection orders will spread throughout the country, silencing millions of women who have been raped. This is the antithesis of the fight against gender-based violence.

In *LW v KCA*, the High Court provides a roadmap for courts dealing with applications for protection orders under the PHA against women who publicly name their perpetrators. The Court underscored the importance of taking a balanced and reasoned approach to an anomalous situation where men use the PHA to silence those who accuse them of rape. It is not enough simply to ask whether the impugned conduct constitutes harassment. It is also necessary to ask whether the conduct was *unreasonable*. To this end, courts must consider the context of gender-based violence in South Africa and the purpose of the Act to address it.

Most importantly, the Court has made it clear that the most constitutionally compliant interpretation of the PHA is that which allows victims to speak.

LW v KCA places us back on the road towards a proper utilisation of the PHA, which, hopefully, will ensure that courts do not misapply this legislation. Above all, it is clear that the identification of a person as a perpetrator of rape is not unreasonable and thus does not constitute harassment for the purposes of the PHA.

[93]N Fraser 'Rethinking the public sphere: A contribution to the critique of actually existing democracy' (1990) 25/26 *Social Text* 856; T Serisier 'Reading survivor narratives: Literary criticism as feminist solidarity' in H Hewett & M Holland (eds) *#MeToo and Literary Studies: Reading, Writing, and Teaching about Sexual Violence and Rape Culture* (2021); and L White 'Subordination, rhetorical survival skills, and Sunday shoes: Notes on the hearing of Mrs. G.' (1990) 38 *Buffalo Law Review* 1.

[94]M Salter 'Justice and revenge in online counter-publics: Emerging responses to sexual violence in the age of social media' (2013) 9 *Crime, Media, Culture* 225, 227.

[95]T Serisier (note 94 above).

[96]T Serisier '#BelieveWomen, revisited: Refusing the politics of doubt' (2024) *Feminist Theory*.

Disclosure statement

No conflict of interest has been declared by the author.

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