

## Constitutional implications of COVID-19: Arrests and the use of force to enforce lockdown

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*This new contribution seeks to provide a weekly analysis of constitutional issues arising from COVID-19 and the responses to it. In this instalment, I consider the role of the courts.*

My first three articles considered the broad constitutional implications of COVID-19 for governance and constitutional rights, the role of Parliament, and access to justice and the courts. This week, I focus on arrest and the use of force by the police and the military in enforcing the lockdown, following the judgment in *Khosa v Minister of Defence and Military Veterans* [2020] ZAGPPHC 147. The case was prompted by the death of Mr Collins Khosa, who was allegedly killed by members of the security forces at his home on 10 April 2020. However, the applicants framed the case as being about 'lockdown brutality' generally, and sought relief that extended beyond the case of Mr Khosa.

The Constitutional Court had dismissed an application for direct access in *Khosa*. Three weeks later, the Pretoria High Court upheld the application on an urgent basis. In a sweeping judgment, Fabricius J granted almost all the relief sought by the applicants. The matter has laid bare the abuse of arrest powers and the use of force by the police and the military to enforce the lockdown and ordered the imposition of vital accountability mechanisms, reasserting Bill of Rights guarantees.

The first premise of the *Khosa* judgment is that the lockdown was necessary. This was accepted by Fabricius J and all the parties (para 19). However, the applicants contended that there had been widespread instances of Lockdown brutality at the hands of police and soldiers enforcing the lockdown.

Much of the judgment and order restated the existing law on arrest, use of force and Bill of Rights guarantees. The court explicitly considered this necessary given the conduct of the police and military. In addition to the reports of lockdown brutality, the court highlighted a series of inflammatory public statements by senior police and military officials and

politicians that tended to justify the use of force and blame civilians for 'provoking' the security services (paras 36–46). The court also noted that the Chief of Staff of the SANDF had resisted attempts by the parliamentary standing committee on defence to hold the SANDF accountable (para 47). Moreover, the court observed that the SANDF operational directives used militaristic language – words such as 'combat Coronavirus', 'battle', 'defeated' and 'neutralised' – and warned the SANDF that the residents of Alexandra 'don't care about the measures in place' (para 88).

In addition to restating the law, the court granted the relief sought by the applicants (as amended at the hearing), including:

- a declarator that, notwithstanding 'states of emergency', all people in the country are entitled to certain 'non-derogable' rights in the Bill of Rights (an inappropriately framed declarator, since South Africa has declared a state of *disaster*, not emergency, and derogability is irrelevant, as I explained in my first piece);
- directing the South African Police Service (SAPS), the South African National Defence Force (SANDF) and any municipal police department to act, and instruct their members to act lawfully;
- directing the police and military respondents to suspend all their members who had been present when Mr Khosa was killed and investigate the incident;
- directing the respondents to develop and publish a code of conduct and operational procedures for the lockdown; and
- directing the respondents to establish a mechanism for citizens to report complaints of police or military conduct. (para 146)

The court's order provides firm guidance on the limits of lawful use of force and requires the military and police to take steps to prevent any further abuses and hold perpetrators accountable. The *Khosa* judgment focuses on the current crisis, in which the military are deployed to perform non-military functions. The court makes crucial interventions that will set standards and provide an accountability mechanism during the lockdown, for both military and police. In what follows, however, I discuss issues that the judgment highlights relating to arrest and the use of force that have long-term implications, once the SANDF has returned to barracks and policing is restored to the police.

### The abuse of arrest powers

The judgment touches only briefly on arrest, given that the facts in *Khosa* related more to the use of force. However, the question whether the use of force in effecting an arrest is lawful only arises if the decision to arrest was itself lawful. There have been reports of widespread arrests for breach of the lockdown regulations. The original Lockdown Regulations and the 'Level Four' Lockdown Regulations provide that any person who contravenes the regulations relating to movement, gatherings and the cessation of business operations is 'guilty of an offence and, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment'. This is a minor offence. The Level Four Lockdown regulations also provide specifically that, where a gathering takes place, an enforcement officer must order the persons to disperse and, 'if the persons fail to disperse, take appropriate action, which may,

subject to the Criminal Procedure Act (CPA), include arrest and detention.' Arrest for gathering is therefore only potentially lawful if an instruction to disperse is refused, and even then, only if it is 'appropriate' and complies with the CPA.

Unfortunately, arrest is often used as a default response to any law-breaking. This is unlawful. The courts have previously considered a situation where widespread arrests were being used for a purpose *other than* bringing people to court for prosecution. In *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security* 2009 (6) SA 513 (WCC), the practice of police arresting sex workers in Cape Town, without any intention to prosecute but to harass, punish or intimidate them, was held to be unlawful. Even where there is intention to prosecute, arrest is only lawful where it is necessary to secure the attendance of the accused at trial. In the later decision of *Coetzee v National Commissioner of Police* 2011 (2) SA 227 (GNP), the High Court held that if the person's attendance at trial can be secured through summons, it does not matter 'how severe the alleged criminal offence may be'. In *Coetzee*, the High Court went so far as to order the members of the SAPS responsible for the arrest to pay costs *de bonis propriis* on a punitive scale.

In *Khosa*, Fabricius J touched briefly on this issue, stating *obiter* that '[t]here is no general reason in my opinion to arrest each and every transgressor' of the Lockdown Regulations (para 126). In my view, the position is stronger than that. Many such arrests would be unlawful, if the purpose of the arrest is *not* to prosecute but to send some kind of general deterrent message to comply with Lockdown Regulations. This may be a legitimate purpose, but it can be achieved by giving alleged offenders notice to appear in court, a possibility Fabricius J mentions (para 126).

Arrest in the context of COVID-19 runs the risk of subverting the very purpose of the Lockdown Regulations, by exposing enforcement officers and arrested civilians to a greater risk of contracting the virus. It would be appropriate for the code of conduct and operational procedures required under *Khosa* to set out these principles, to limit the circumstances in which arrests are carried out.

### Use of force and militarisation of the police

Unfortunately, the militarisation of the police has been a worrying trend long before lockdown. The Constitution refers to 'security *services*' and a 'police *service*' (s 199) – a deliberate shift from the police 'force' of the past. However, the SAPS has reintroduced military ranks ('general' etc), having earlier introduced non-military terms.

The naming of ranks, like the 'military language' of which Fabricius J complained, is a symptom of a broader set of policing concerns that were central to the Marikana Commission of Inquiry. (I was one of several lawyers acting for victims of police shootings at Marikana, alongside the *Khosa* applicants' senior counsel, Ngcukaitobi SC.) The Marikana Commission made findings and recommendations on many of the exact problems that emerged in *Khosa*. For instance, it expressed concern at the 'remilitarisation' of the SAPS (para 1086) and recommended that: a panel be set up to review public order policing, including weapons and equipment used by police (p 547 ff); the executive, including the Minister of Police, 'should only give policy guidance and not make operational

decisions' (p 551 para 1); 'the staffing and resourcing of Independent Police Investigative Directorate (IPID) be reviewed to ensure that it is able to carry out its functions effectively' (p 554 para 4).

So we have been here before, and outside of a state of natural disaster. The Marikana Commission of Inquiry drew attention to precisely the concerns now arising as 'lockdown brutality'. Like the lockdown, Marikana exposed what are endemic problems with every-day policing. One of the answers to these problems lies in the proper functioning of IPID. Fabricius J alluded to IPID's insufficient capacity and the fact that it still has an *acting* director, Mr P Setshedi, which undermines its independence and ability to function. IPID, along with the SAPS, Hawks and NPA, was systematically weakened during the Zuma presidency in the context of state capture. *Khosa* reveals that IPID is still ailing and, for now, requires a new dedicated complaints mechanism to deal with lockdown brutality complaints against police and military actors. After lockdown, IPID's role will again be central. During *Khosa*, IPID's answering affidavit was filed late with the explanation that the acting head's term had not been renewed, and he could not sign until the Minister renewed it. A permanent appointment and the filling of vacant posts are crucial to capacitate IPID and provide an institutional check on police abuses.

Returning to the immediate situation of the lockdown and *Khosa*, it has been reported that the Minister of Police intends to appeal the judgment. The matter may yet reach the Constitutional Court.

However, in the meantime the SAPS has released guidelines on the use of force by security services, in a circular dated 19 May 2020. The guidelines, importantly, confirm the core principle that I emphasise above – that 'the object of an arrest is to secure the attendance of a person at his or her trial' and that 'a member may in no circumstances arrest a person in order to punish, scare or harass such person or to teach him or her a lesson'. The guidelines further set out principles on the use of force, the prohibition of torture and provide information on where to make complaints about police misconduct.

This is an important development, but setting standards alone is insufficient to prevent violations and hold security services accountable. A thorough investigation and action on those implicated in the death of Mr Khosa and ensuring an effective complaints mechanism are the crucial next steps.

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