



21 May 2020

## **IMPLICATIONS OF THE KHOSA JUDGEMENT: TORTURE**

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### **1. INTRODUCTION**

On 15 May 2020, in the High Court of SA (Gauteng Division), Judge Fabricius delivered his judgement on the torture and murder of Mr. S Khosa on Friday, 10 April 2020 by members of the South African Defence Force (SANDF) and Johannesburg Metropolitan Police Department (JMPD).<sup>1</sup> The judgement was a scathing criticism of the behaviour of law enforcement members during the National Lockdown, not only in the death of Mr Khosa, but also in many other reported cases. (The judgement is hereafter referred to as the “Khosa Judgement”).

Although the definition of torture is clear as outlined in the Prevention and Combatting of Torture of Persons Act, 2013 (Act No. 13 of 2013) (Torture Act), it does not assign a specific body to investigate such cases, as mandated by various international instruments, notably the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Despite this, the Independent Police Investigative Directorate (IPID), through its mandate, investigates cases of torture. It is quite difficult to prove a case of torture for criminal prosecution in South Africa, as illustrated by data from the IPID on the outcomes of torture cases/investigations. Difficulties include that cases are often based on the testimony of a law enforcement officer against that of an arrestee or complainant; intimidation and corruption are used to influence investigations; and torture is seen as an intervention of detention and interrogation. Torture is also extra-custodial violence (outside of the context of custody or detention), as in the case of Mr. Khosa.<sup>2</sup>

This paper focusses on the legislative framework of torture in South Africa and the prevalence of torture cases as reported to the IPID. Furthermore, the paper focusses on aspects of the Khosa Judgement that emphasised torture and cruel, inhuman treatment. The paper could assist Members of the Portfolio Committee on Police during its engagement with the IPID on Friday, 22 May 2020.

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<sup>1</sup> High Court of South Africa (Gauteng Division, Pretoria) Case 21512/2020

<sup>2</sup> Kelly, T (2019)



## 2. LEGISLATIVE FRAMEWORK

Various international and regional instruments, as well as domestic legislation, bind South Africa in terms of torture prevention and investigations, including:

- Universal Declaration of Human Rights (1948);
- International Covenant on Civil and Political Rights (ICCPR) (1966) – ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’;
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); and
- The African Commission on Human and Peoples Rights, Guidelines against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Robben Island Guidelines).

South African legislation includes -

- South African Constitution – right not to be tortured or treated or punished in a cruel, inhuman or degrading way; and
- Prevention and Combatting of Torture of Persons Act, 2013 (Act No. 13 of 2013).

Although the Constitution refers to torture, the Torture Act criminalises torture. Prior to this Act, torture cases were prosecuted as assault, rape, culpable homicide and/or murder (amongst others). Section 3 of the Torture Act defines torture. Torture differs from other crimes because it can only be committed by or with the help of a public official. The South African Human Rights Commission states that -

“Simply described, torture is when:

- There is an intentional act causing severe pain and suffering to the victim.
- This suffering can be either physical and/or mental.
- A public official or a person acting on behalf of a public official must commit it.
- Torture occurs when it is done for the purpose of:
  - (a) Obtaining information (for example during interrogations and questioning by the police) from the tortured persons or a third party (for example, wife, family, or even business partner);
  - (b) Punishing the victim for what he/she has done or what he/she is suspected to have done or what a third person has done or suspected to have done; and
  - (c) Intimidating or forcing the offender or third person to admit to or do something for any reason based on discrimination of any kind. Discrimination can be on any grounds, for example, sex, gender, sexual orientation, religion, political opinion or affiliation, or ethnicity.”

## 3. REPORTED CASES OF TORTURE IN SOUTH AFRICA (IPID)

In terms of section 28(1)(f) of the Independent Police Investigation Directorate (IPID) Act, 2011 (Act No. 01 of 2011), the Directorate must investigate any complaint of torture or assault against a police officer in the execution of his or her duties. In 2018/19, 270 cases of torture were reported to the IPID, which is an increase of 24% when compared to the previous financial year (217 cases). During the same period, 3 835 assault cases were reported, which is a 5% increase compared to the previous financial year (3 661 cases). In 2018/19, reported incidents of torture increased with 138% in the Eastern Cape (increase from 08 cases to 19 cases), 150% in the Northern Cape (increase from two cases to five



cases) and 1 100% (increase from one case to 12 cases) in the Western Cape. KwaZulu-Natal had the most cases in 2018/19 (150 cases from a total of 270 cases).

At the end of 2018/19, the IPID had 129 cases of torture decision ready (ready for court), but had 556 cases outstanding. Only 81 cases were completed in 2018/19. During this period, 23 cases were referred to the NPA with criminal recommendations, 06 cases were referred to the SAPS for disciplinary conviction, and no cases were referred to the MPS. Of the 06 cases referred to the SAPS only one led to a disciplinary conviction. Of the 23 cases referred to the NPA, none was successful. At the end of the 2018/19 financial year, there were a further two cases of torture on the court roll.

At the end of 2018/19, the IPID closed 2 015 cases, of which 41 were cases of torture.<sup>3</sup> The manner of disposal for these cases were:

- 19 cases were declined;
- 1 case was dismissed;
- 1 case was referred;
- 16 cases were undetected; and
- 4 cases were unsubstantiated.

According to the IPID, no cases of COVID-19 related torture were reported between 26 March and 10 May 2020.<sup>4</sup>

#### **4. KHOSA JUDGEMENT**

##### **4.1. Torture and murder of Mr Khosa**

As part of the court hearing, a founding affidavit described the torture and murder of Mr. Khosa, as follows:

- On 10 April, two female members of the SANDF entered the home carrying sjamboks.
- Before entering, the members asked about the half-full cup of alcohol on the yard and ordered Mr Khosa into the house.
- The SANDF members accused him of violating the lockdown regulations. Mr Khosa said that it was not an offence to drink in his yard, to which “the SANDF members did not take kindly”.
- The SANDF confiscated some alcohol from the house and ordered him to go outside
- The SANDF members called for backup and several vehicles from the SANDF and JMPD arrived.
- Members of the SANDF and the JMPD assaulted Mr Khosa in the following manner:
  - Poured beer on top of his head and body;
  - His bands were held behind his back while being choked;
  - Slammed against a cement wall;
  - Hit with the bitt of a machine gun;
  - Kicked, slapped and punched him in the face, stomach and ribs; and
  - Slammed against the steel gate.

Emergency services declared Mr Khosa dead on arrival due to blunt force trauma.

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<sup>3</sup> Page 70 of the 2018/19 Annual Report of IPID

<sup>4</sup> Presentation to a Joint meeting between the PC on Police and SC on Security and Justice dated 12 May 2020.



#### 4.2. Focus on torture and cruel, inhuman or degrading treatment

The Khosa Judgement laid significant emphasis on torture and cruel, inhuman treatment. The judgement stated that the *Prevention and combatting of torture of persons Act, 2013* ratified and domesticated the *United National Convention against Torture and Other Cruel Inhuman or Degrading treatment or punishment* of 1994 (the Torture Convention). The Convention was signed in November 1998 and the SAPS released a prevention of torture policy. National Instructions on the management of people in custody were also revised to be in line with the policy.<sup>5</sup>

The Torture Convention obliges the State to take effective legislative, administrative, judicial and other measures to prevent acts of torture. The mechanism for prevention has been established under the South African Human Rights Commission, which play a coordinating role together with other bodies such as IPID and the Judicial Inspectorate for Correctional Services (JICS).<sup>6</sup>

The judgement further states that article 10 of the Convention requires that rules and instructions in this regard are required and that prompt investigations must be launched when torture is reported.<sup>7</sup> Section 4(4) of the Torture Act states that “no exceptional circumstances including any state of emergency may be invoked as a justification of torture.”

The Judge further stated that “from section 12(1)(c), (d) and (e) of the Constitution, interpreted in the light of international law, especially the Torture Convention and the torture Act, that **State brutality is juridically regarded as an especially egregious form of harm**”. In conclusion to the section on torture, the Judge stated, “**It follows that these constitutionally exceptional crimes need to be prevented and remedied in a radical different and more stringent and more urgent manner than ‘ordinary crimes’.**”<sup>8</sup>

#### 4.3. Inadequacy of existing investigative mechanisms

Judge Fabricius noted, “It is of serious concern that IPID at present does not even have a permanent Executive Director for the duration of the lockdown who could act independently as was required by the court in *McBride v Minister of Police and others (2016)*.” The Constitutional Court found that certain provisions of the IPID Act are unconstitutional because it undermines the IPID’s independence from the Executive. Judge Fabricius further states “the court ordered parliament to cure the defects in the legislation within 24 months. Some 44 months later parliament has still not amended the IPID Act and no explanation for this delay has been tendered to my knowledge”.<sup>9</sup> However, the IPID Amendment Bill, 2018 (B25-2018) was passed by the NCOP on 26 November 2019 and sent to the President for assent.

In conclusion, Judge Fabricius stated “it (IPID) has simply been provided with insufficient financial and other resources.”

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<sup>5</sup> Tait, S and Bruce, D (2020)

<sup>6</sup> Tait, S and Bruce, D (2020)

<sup>7</sup> Para 54 of the Khosa Judgement

<sup>8</sup> Para 56 of the Khosa Judgement

<sup>9</sup> Para 138 of the Khosa Judgement



#### 4.4. Order granted in terms of torture and cruel, inhuman or degrading treatment

Specifically related to torture, the judgement ordered that the Minister of Defence and Military Veterans, Secretary for Defence, Chief of the SANDF, the Minister of Police, National Commissioner of the SAPS and the Acting Chief of the JMPD, must:

- Within two days, command all members of the SANDP, SAPS and any MPD to adhere to the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment, and to only apply the minimum force that is reasonable to enforce the law.
- Within five days, warn all members of the SANDF, the SAPS and any MPD, as well as their entire chains of command, that any failure to report, repress and prevent acts of torture or cruel, inhuman or degrading treatment or punishment shall expose them each individually to criminal, civil and/or disciplinary sanction
- Within five days, must establish a freely accessible mechanism for civilians to report allegations of torture or cruel, inhuman or degrading treatment or punishment, committed by members of the SANDF, the SAPS or any MPD for the duration of State of Disaster. This mechanism must be widely publicised throughout South Africa via television, radio and digital media in all eleven official languages.

##### 4.4.1. Response by the SAPS

On 19 May 2020, the SAPS issued a communication in response to the Khosa Judgement titled “*Use of Force and Torture: Guidelines on the Implementation and Enforcement of Regulations and Directives issued in terms of Section 27 of the Disaster Management Act, 2002 (Act no 57 of 2002): Containment and Management of COVID-19.*”

The communication states that no member may torture (or attempt to torture) any person, permit or instruct anyone else to do so, or tolerate the torture of another person by anyone. Further thereto, the communication states –

*“No exception, such as a state of disaster, a state of war or a threat of war, state of emergency, internal political instability or any other public emergency will serve as justification for torture – there can simply be no justification for torture, ever.”*

A member (or an employee) must immediately take all reasonable steps to put an end thereto. The Complaint must be reported to the station commander (or where appropriate to the Provincial or Cluster Commander) who must report it to IPID.

Importantly, the communication states that a failure to comply with the instructions must be regarded as serious misconduct and that anyone who “refuse to comply must be **held personally liable** for any compensation that the SAPS is ordered to pay as a result thereof.”<sup>10</sup> The money will be recovered from an employee as per National Instruction 25 of 2019 (Management of Civil Claims in the South African Police Service).

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<sup>10</sup> Para 10 of SAPS Communication on the use of force and torture



The Portfolio Committee on Police should take note of the entire Khosa Judgement and interrogate the responses from SAPS thoroughly to establish whether it satisfies the Court order.

## 5. REFERENCES

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