

DO ORDERS OF LAW ENFORCEMENT OFFICIALS SUPERSEDE THE PROVISIONS OF THE CONSTITUTION AND JUSTIFY A COMMAND OF ‘SKOP, SKIET EN DONDER’?

Khosa & Others v Minister of Defence & Military Defence & Military Veterans & Others (21512/2020) [2020] ZAGPPHC 147

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by Dashia Govinden*



Abstract

In Khosa and others v Minister of Defence, the High Court was tasked with assessing whether the use of force by Police and Military personnel was lawful and justifiable in enforcing the COVID-19 Lockdown Regulations. The Court declared that when executing Regulations developed to address the COVID-19 pandemic, law enforcement officers are bound by the Constitution, the law, and international law. Mr Collins Khosa was accused by members of the Police and South African National Defence Force (SANDF) of having violated the Lockdown Regulations. Consequently, Mr Khosa was assaulted in his home by military personnel assigned to enforce the COVID-19 Lockdown Regulations. Hours after the assault Mr Khosa succumbed to his injuries and died. The Court found that the use of force against Mr Khosa was unlawful and violated his fundamental constitutional rights. The court emphasised the significance of protecting constitutional rights, especially during times of a national state of disaster, and emphasised that the Police and Military forces must act within the bounds of the Constitution and respect the rights of all individuals. Additionally, the

* Final year LLB student.

Court highlighted numerous inflammatory public comments made by the Minister of Defence that impacted the enforcement of the Regulations by law enforcement. The Court specified the measures that the Minister of Defence and Police had to implement to effectively investigate the assault on Mr Khosa and prevent further instances of abuse at the hands of Police and Military personnel enforcing the COVID-19 Lockdown Regulations.

1 Introduction

The founding provisions of the Constitution envisage the values of human dignity, the advancement of human rights, and the achievement of equality.¹ The Bill of Rights contained in Chapter 2 of the Constitution is the cornerstone of democracy, as it reinforces the values of human dignity, equality and freedom which must be fulfilled, promoted, protected, and respected by the state and all organs of state.² South Africa's democratic society is founded on the supremacy of the Constitution and the rule of law, an essential precept which ensures that the exercise of public power is within the ambit of the law and the Constitution while guarding the rights in the Bill of Rights.³ The emergence of the COVID-19 pandemic presented a unique challenge for the rule of law, as it entailed the introduction of restrictive measures by the government to combat the pandemic. It granted the government extensive powers which, given the relatively few checks on the powers, resulted in abuses of human rights and, threatened the constitutionalism of South Africa.⁴ In *Khosa and others v Minister of Defence (Khosa)*,⁵ the court confirmed that all law enforcement officials are bound by national and international law obligations prohibiting torture and the violation of human dignity, even during a state of disaster. Further, the court reasserted the non-derogable rights contained in sections 10 and 11 of the Constitution. This case note will provide an overview of the facts and judgement of the *Khosa* case while discussing the extent of the unconstitutional powers that were granted to law enforcement officials, while considering the aptness of the judgement of the court in condemning the infringement on human rights by law enforcement officials during a state of disaster.

1 Constitution of the Republic of South Africa, 1996.

2 The Constitution (n1) sec 7.

3 I Currie & J De Waal *The Bill of Rights Handbook* (2013) at 13.

4 CM Fombad 'Editorial introduction to special focus: Assessing the implications of COVID-19 pandemic regulations for human rights and the rule of law in Eastern and Southern Africa' (2020) *African Human Rights Journal* at 327.

5 *Khosa & others v Minister of Defence & Military Veterans* 2020 7 BCLR 816 (GP).

2 Facts

On 15 March 2020, as a result of the COVID-19 pandemic, the President of the Republic of South Africa declared a national state of disaster, regulated through the Disaster Management Act 57 of 2002 (Disaster Management Act).⁶ On 25 March 2020, the Minister of Cooperative Government and Traditional Affairs introduced regulations in terms of the Disaster Management Act to combat the spread of the virus.⁷ The implementation of this legislation placed numerous restrictions on the lives of all South Africans, including the restriction of movement of people and the prohibition of alcohol sales including the restriction of public consumption of alcohol.⁸ In terms of the Disaster Management Act, the President announced the deployment of the South African National Defence Force (SANDF) in order to assist the South African Police Service (SAPS) in enforcing Lockdown Regulations.⁹ On 10 April 2020, two members of the SANDF questioned the occupants of a house in Alexandra, Johannesburg about a half-full cup of alcohol that was found on the premises. The SANDF members accused the occupants of violating Lockdown Regulations and raided the house while confiscating items of alcohol and damaging property. One of the occupants, Mr Collins Khosa, objected to the SANDF's actions and was met with numerous acts of violence. The brutal assault against Mr Khosa was witnessed by various residents, who attempted to record the incident on their cellphones, which were later confiscated by members of the SANDF.¹⁰ The SANDF members called for reinforcements and continued to assault Mr Khosa – beer was poured over his head, he was choked with his hands behind his back, he was slammed against a wall and steel gate, he was kicked, slapped, punched, and hit with the butt of a machine gun. The assault led to Mr Khosa's subsequent death.¹¹ Before the assault on Mr Khosa, there were multiple inflammatory public remarks made by the Minister of Police, ordering law enforcement officials to 'push South Africans back into their homes' and advocating for the use of violence in the enforcement of Lockdown Regulations.¹² Following his death, Mr Khosa's spouse informed the Minister of Defence about the sequence of events that led to his death and she urged the SANDF and the JMPD to furnish them with comprehensive details of the identities

6 President Cyril Ramaphosa: Measures to combat Coronavirus COVID-19 epidemic 15 March 2020 <https://www.gov.za/speeches/statement-president-cyril-ramaphosa-measures-combat-covid-19-epidemic-15-mar-2020-0000> (accessed 21 October 2023).

7 *Khosa* (n 4) para 3.

8 Disaster Management Act 57 of 2002 (Disaster Management Act) secs 27(2)(f) & (i).

9 *Khosa* (n 4) para 29.

10 *Khosa* (n 4) para 60.

11 *Khosa* (n 4) para 34.

12 *Khosa* (n 4) para 39.

of all Police and Military personnel who were present and who engaged in the assault against Mr Khosa.¹³ Additionally, she also demanded the President, Minister of Defence and the Chief of the JMPD to publicly condemn the behaviour of the law enforcement officials.¹⁴ After receiving an inadequate response, she approached the court directly to properly address the matter and curb further occurrences.¹⁵

3 Judgment

The High Court affirmed that this case is not concerned with the justification for the Lockdown Regulations, but rather about contesting Lockdown brutality by members of the SAPS and SANDF. The High Court argued that such conduct by members of law enforcement was unconstitutional and violated the Bill of Rights as well as the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UN Torture Convention).¹⁶ It was held that despite the declaration of a State of Disaster under the Disaster Management Act, all persons within the territory of the Republic of South Africa are entitled to rights enshrined in section 37(5) of the Constitution. Such rights include the right to human dignity in section 10 of the Constitution, the right to life in section 11 of the Constitution, the right not to be tortured in any way in section 12(1)(d) of the Constitution, and the right not to be treated or punished in a cruel, inhuman, or degrading way in section 12(1)(e) of the Constitution.¹⁷ The Court asserted that section 4(4) of the Prevention and Combating of Torture of Persons Act 13 of 2013 (Torture Act) stipulates that no circumstance, including a declaration of a National State of Disaster, warrants any form of torture.¹⁸ The court noted that the Lockdown Regulations did not confer powers unto law enforcement to damage property or the use of unjustified excessive force.¹⁹ Fabricius J held that leaders are to communicate responsibly, watch their tone and convey clear orders to their members about the use of force.²⁰ The Court criticised the comments made by the Minister of Defence which essentially instructed law enforcement officials to exercise powers of punishment which they did not have.²¹ Fabricius J reiterated that as organs of state, the SANDF, SAPS and MPD including the Defence

13 Khosa (n 4) para 50.

14 Khosa (n 4) para 50.

15 Khosa (n 4) para 51.

16 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 art 2.

17 Khosa (n 4) para 146.

18 Khosa (n 4) para 55.

19 Khosa (n 4) para 74.

20 Khosa (n 4) para 93.

21 Khosa (n 4) para 38.

Minister and the Police Minister, under section 7(2) of the Constitution, are obligated to respect, promote, protect, and fulfil the rights in the Bill of Rights.²² The court reached the following conclusion and ordered that all SANDF and SAPS members who were present at Mr Khosa's residence are to be placed on precautionary suspension.²³ The relevant authorities were obligated in terms of the judgment, to develop a Code of Conduct regulating the conduct of SANDF and SAPS members during the State of Disaster, which had to be widely published. The court concluded that the Minister of Defence and Police had to initiate investigations into the treatment of Mr Khosa, and any other person whose rights had been infringed, prescribing strict timelines for the completion of such investigations.²⁴

4 Commentary

4.1 Powers and functions of the State

The right to human dignity, equality and freedom are repeatedly emphasised in the Bill of Rights as it places an obligation on the state to protect and fulfil such rights.²⁵ The founding values of the Constitution, contained in section 1(c), establish a democratic government under the supremacy of the Constitution and the rule of law, to guarantee accountability, transparency, and responsiveness in the functions of all courts and organs of state.²⁶ The Constitution is the supreme law of the land and according to Section 172(1) of the Constitution, courts must declare all conduct, laws and regulations that contradict the provisions of the Constitution invalid.²⁷ The preamble to the Constitution states that government must be 'based on the will of the people' thus implying that the relationship between the government and the people must not merely be established on the unilateral exercise of power by the government.²⁸ The public must be able to place their trust in the government to act within the confines of the Constitution and the rule of law while promoting the rights of all individuals within the Republic and working towards the constitutional aim of achieving equality.²⁹ It is the judiciary's responsibility to impartially apply the Constitution without fear, favour or prejudice.³⁰ The Constitution must grant the government

22 Khosa (n 4) para 146.

23 Khosa (n 4) para 146.

24 Khosa (n 4) para 146.

25 The Constitution (n 1) sec 7(1).

26 I Currie & J De Waal (n 3) at 348.

27 Khosa (n 4) para 77.

28 I Currie & J De Waal (n 3) at 14.

29 Khosa (n 4) para 7.

30 The Constitution (n 1) sec 165(2).

sufficient power to govern the country effectively, but it must also control the state's power to ensure that it does not violate the law or the rights of citizens.³¹ Constitutionalism entails the clear definition and limitation of the state's power in order to protect the interests of society by firstly, constraining the scope of actions that various organs of state can execute and secondly, by prescribing measures that they must adhere to within their competence and in the exercise of their functions.³² The granting of an urgent application is indicative of the court's responsiveness in protecting the constitutionality of the Republic as per their constitutional obligation in section 165(2) of the Constitution. Thus, the court in *Khosa* upheld their duty to promote the rights in the Bill of Rights, as it reiterated and affirmed the concept of democracy and the rights of all South Africans while reasserting that the Constitution is the highest law in the land and all people, organisations and organs of state are subject to it.³³

4.2 Applicable legislation

The COVID-19 pandemic has provided novel challenges for the state and the people of the Republic. The Regulations issued in terms of the Disaster Management Act are aimed at regulating civilian behaviour to reduce the spread of the pandemic.³⁴ However, this increased the powers vested in government and law enforcement officials, allowing them to fulfil their subjective interests, and ultimately resulted in infringement of the rights of people.³⁵ Ensuring fundamental human rights and constitutionalism under a state of disaster can be problematic and challenging.³⁶ Even under a declaration of a national state of disaster, any limitation of rights is subject to the limitation clause, as per section 36 of the Constitution. Constitutional rights may only be limited by a law of general application provided that it is reasonable and justifiable in an open and democratic society based on the values enshrined in the Bill of Rights.³⁷ However, the Disaster Management Act affirms that all persons within the territory of the Republic of South Africa are entitled to their Constitutional rights even during a state of disaster as discussed above.³⁸ International human rights standards should be adhered to during states of

31 The Constitution (n 1) sec 41(1)

32 I Currie & J De Waal (n 3) at 8.

33 The Constitution (n 1) sec 2.

34 Disaster Management Act 57 of 2002: Amendment of Regulations issued in terms of section 27(2).

35 L Wessels 'Derogation of human rights: International law standards: a comparative study' LLD thesis, Rand Afrikaans Universiteit, 2001 at 13.

36 CM Fombad 'Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa' (2020) 20 *African Human Rights Journal* at 398.

37 *Moise v Greater Germiston Transitional Local Council* 2001 8 BCLR 765 (CC).

38 *Khosa* (n 4) para 19.

disaster.³⁹ In this regard, the Torture Act ratified and domesticated the provisions of the United Nations Torture Convention. Furthermore, the South African security services⁴⁰ must act in accordance with and instruct their members to act within the ambit of the Constitution, law and international agreements which are binding on the republic.⁴¹ As organs of state the SANDF, SAPS and MPD are obligated to respect, promote, and fulfil the rights in the Bill of Rights as per section 7(2) of the Constitution.⁴² The inherent responsibility of the defence force is regulated by section 200 of the Constitution which describes their main objective as defending and protecting the Republic and the people in accordance with the Constitution and values of international law regulating the use of force.⁴³ The exemplary declarations made by the court in *Khosa* reinforced the rights of all people within the Republic and directly condemned any conduct in contradiction of the Constitution.⁴⁴ Furthermore, the court pinpointed the specific rights of Mr Khosa that have been infringed and threatened by unconstitutional actions of law enforcement officials.⁴⁵ The Torture Act places an obligation on the state to take functional administrative, legislative, judicial, and other distinct courses of action to prohibit and prevent acts of torture.⁴⁶ The Torture Act has no express provision regulating the reporting or investigation of complaints against torture. The Independent Police Investigative Directorate (IPID) is the only body responsible for investigating complaints of torture against members of the SAPS and MPD.⁴⁷ The Office of the Military Ombud is the only organisation tasked with investigating complaints of torture against members of the SANDF.⁴⁸ Section 4(4) of the Torture Act declares that 'no exceptional circumstances whatsoever, including but not limited to, a state of war, threat of war, internal political instability, national security or any state of emergency may be invoked as a justification for torture.' Consequently, section 10 of the Torture Act places a duty on the state to promote awareness and combatting of all forms of torture, such includes the training of law enforcement officials to combat torture.⁴⁹ In *F v Minister of Safety and Security*, the court held that it is the state's duty to protect the public against crime.⁵⁰ Additionally, it held that the constitutionalism of the Republic is threatened when there is distrust between the public and the

39 Wessels (n 6) at 16.

40 The SANDF, SAPS and Metropolitan Police Departments (MPD).

41 The Constitution (n 1) sec 199(5).

42 *Khosa* (n 4) para 23.

43 *Khosa* (n 4) para 11.

44 *Khosa* (n 4) para 146.

45 *Khosa* (n 4) para 75.

46 *Khosa* (n 4) para 54.

47 *Khosa* (n 4) para 132.

48 *Khosa* (n 4) para 132.

49 *Khosa* (n 4) para 55.

50 *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 2.

police.⁵¹ According to section 13 of the South African Police Service Act (SAPS Act), all law enforcement officials must operate within the ambit of the Constitution heeding the fundamental rights of all persons. Section 13(3)(b) provides that members 'may only use minimum force which is reasonable'.⁵² The SAPS Act strictly states that no police officer, under this act, has a general licence to use force, and may only use minimum force in their line of duty.⁵³ The court in *Khosa* explicitly concluded that the conduct of law enforcement officials subjected Mr Khosa to grievous acts of torture which grossly threatened and infringed his rights to life and dignity.

Constitutional democracy entails that the exercise of public power must comply with the Constitution and the rule of law, meaning that officials of the government, such as Ministers, can only exercise powers and perform functions which they are empowered to exercise by legislation.⁵⁴ As per section 92(2) of the Constitution the Minister is accountable to Parliament for the exercise of powers conferred unto them.⁵⁵ Section 199(5) of the Constitution obligates security services to act and teach their members within the ambit of the Constitution. Under section 7(2) of the Constitution the Defence Minister and the Police Minister, as organs of state are obligated to respect, protect, and fulfil the rights of civilians in accordance with international laws.⁵⁶ The Minister of Defence has a duty to convey clear commands to law enforcement officials when dealing with civilians, however, the Defence Minister acted outside her scope of powers as her use of 'mixed messages' such as 'skop, skiet en donder' tacitly 'imbued' law enforcement officials with unconstitutional powers of punishment which they were not empowered to exercise. Her failure to condemn the violent acts of security services seemed to serve as justification for the unconstitutional acts of law enforcement officials.⁵⁷ The court's judgment in *Khosa* appositely criticised the comments made by the Minister of Defence encouraging gratuitous acts of violence and the use of excessive force by law enforcement, while also commenting on her failure to act within the scope of her power and to uphold her constitutional obligations.

51 *F v Minister of Safety and Security*.

52 The South African Police Service Act 68 of 1995.

53 *Khosa* (n 4) para 61.

54 *Fair-Trade Independent Tobacco Association v President of the RSA* 2020 (246) ZAGPPHC.

55 P De Vos & W Freedman *South African Constitutional Law in Context* (2014) at 315.

56 *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC).

57 *Khosa* (n 4) para 89.

5 Conclusion

The court was cognisant of its duty of preserving constitutionality and the human rights of all people within the Republic. The court scrutinised the actions of organs of state and law enforcement officials, and its findings were based on pertinent and well-founded national and international laws that govern the Republic. The need to act swiftly during states of disaster gives the government justification for the exercise of broad powers, which can be destructively used to abuse fundamental rights and censor opponents of the government.⁵⁸ In spite of the beneficial developments in law and international conventions, human rights are still grossly violated, especially in states of disaster.⁵⁹ Despite a national state of disaster the public is entitled to be treated with dignity, respect and rights, such as the right to life which cannot be limited, even during a state of disaster. The court in *Khosa* concluded that organs of state, such as law enforcement officials and the Minister of Defence, are obligated to respect and protect the rights of all citizens enshrined in section 7(2) of the Constitution while acting within their scope of power.⁶⁰ The judgement served as a warning to law enforcement officials to recognise the limits of their authority while enforcing Lockdown Regulations. The Court further reaffirmed that state brutality in any expression of torture, inhuman or cruel treatment is a clear violation of the Constitution as well as other international human rights law conventions.⁶¹ The judgment passed by the High Court is to be applauded as a significant turning point in the manner in which Lockdown Regulations were and are enforced. The judgment emphasises the priority enjoyed by the fundamental rights of every person and enhances the crucial promotion and protection of human rights. It warns government and law enforcement officials to act within the ambit of the Constitution regardless of circumstance. Although this will not prevent all instances of abuse against human rights during a state of disaster, it could significantly limit the occurrences of human rights violations at the hands of law enforcement officials. The court addressed the need to introduce mechanisms to rapidly deal with abuses of emergency powers and violations of human rights and to hold perpetrators accountable to prevent further violations which ultimately challenge democracy, the rule of law and the achievement of equality within the Republic.

58 Fombad (n 7) at 385.

59 Wessels (n 6) at 19.

60 *Khosa* (n 4) para 78.

61 *Khosa* (n 4) para 54.