

# 2022 Measures to Curb Violence, Regulate the Security Services and Terrorism

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## Abstract

Despite extant overarching legislative measures, new legislative measures, and other initiatives, crime and violence are still rife in South Africa. This contribution highlights the increase in crime statistics and elaborates on matters connected therewith, including shortcomings in the services dedicated to crime prevention and the country's protection. Recent developments within the broad domains of security services regarding legislation and case law handed down are discussed. Concerns like domestic and gender-based violence and new approaches to extant threats, like terrorism, are further canvassed in the contribution. Additionally, matters linked to security, unrest, and violence are examined. These issues include correctional services, developments linked to arms and ammunition, and national security and reconciliation.

**Keywords:** unrest; violence; crime statistics; violent protests; truth and reconciliation; security services; arms and ammunition; domestic violence; terrorism

UNISA  university of south africa  
PRESS

Journal of Law Society and Development  
<https://unisapressjournals.co.za/index.php/JLSD>  
Volume 10 | 2023 | #15198 | 24 pages

<https://doi.org/10.25159/2520-9515/15198>  
ISSN 2520-9515 (Online), ISSN 2313-8289 (Print)  
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## Introduction

The crime statistics reported, and existing policing and other resources underscore the intolerable position many communities, families, and individuals continue to find themselves in. Whereas the reporting period saw various incidents of violence, including taxi violence (Masson 2022),<sup>1</sup> security services—the South African Police Service (SAPS), the legislative, and other frameworks within which these services operate—emerged as particularly problematic. In this regard, case law provided guidance concerning searches without warrants, underscoring the basic point of departure that the police have an inherent duty to assist and protect citizens. It also highlighted that where additional resources can be made available pursuing from, for example, Equality Court processes, it should take place as soon as possible.

Within the correctional services domain, incarceration and human rights concerns remain contentious. While South African prisons continue to be overcrowded, solitary confinement was identified as a human rights violation. Concerns about the violation of rights to further education, freedom of expression, and right to dignity were likewise raised in this domain.

Attempts to combat crime and violence included the establishment of a new division in the Western Cape—a Violence Prevention Unit (Tembo 2022) and the deployment of the South African National Defence Force to all nine provinces, from 18 December 2021 to 19 March 2022.

With regard to arms and ammunition, a judgment was handed down in the Constitutional Court concerning firearms and the licencing process. Interesting links with property and ownership concepts emerged in the process as well.

In this article, the most important 2022 measures and court decisions are discussed. The issues addressed pertain to:

- crime statistics;
- violent protests;
- national unity and reconciliation;
- security services (including police services, correctional services, defence, military, and intelligence services);
- arms and ammunition;
- domestic and gender violence; and

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1 See, for example, PG 8554 of 18 February 2022 PN 22; also see National Land Transport Act 5 of 2009: PG 8661 of 22 September 2022 PN 109; PG 8594 of 20 May 2022 PN 57; PG 8595 of 25 May 2022 PN 58; GG 45772 of 18 January 2022 GN.

- terrorism.<sup>7</sup>

## Crime Statistics

Crime statistics for the period April 2021 to March 2022 revealed that murder cases increased by 26.1 per cent from the previous reporting period of April 2020 to March 2021 (SAPS, 2022). Reported sexual offences in the 2021–2022 period increased by 14 per cent, while attempted murder increased by 18.1 per cent. The statistics for all types of assault and robbery with aggravating circumstances increased by between 10 and 13 per cent. Similar increases were noted for rape, sexual assault, attempted sexual assault, and contact sexual offences, with an average increase of 14 per cent. Serious crime related to robbery increased by an average of 14.9 per cent, with bank robbery having the highest increase. It should be noted that bank robbery cases increased from two per cent in the 2020 reporting period to 11 per cent in this reporting era. Property-related crimes, including burglary, theft and stock theft mostly indicated a decrease of two per cent. Illegal possession of firearms decreased by 4.8 per cent.

The highest incidents of contact crime were reported at police stations in Gauteng, followed by stations in the Western Cape, and KwaZulu-Natal. Most murders, however, were reported in KwaZulu-Natal and the Western Cape. Overall, 30 more police officers were killed in the reporting period. The increase in all crime statistics can be attributed to the fact that the previous cycle reported crimes within the COVID-19 lockdown period. Notably, the crime statistics returned more or less to the same numbers reported during the pre-COVID-19 period.

## Violent Protests

Service delivery protests, in which some protesters were killed, continued during 2022 (Aljazeera, 2022; Kali, 2023; Carmichael, 2022). Mothelesi, Marumo, and Sebolaaneng (2022) argue that these protests have an impact on the government's ability to realise its National Development Plan and, ironically, they hamper service delivery. During the reporting period, the United Nations condemned the increase in xenophobic attacks in South Africa (United Nations, 2022).

## National Unity and Reconciliation

The assistance to victims identified in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 in relation to basic education was increased.<sup>2</sup> Draft Regulations relating to Housing Assistance to Victims were published for comment.<sup>3</sup>

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2 GG 45953 of 25 February 2022 GN R1779.

3 GG 47634 of 2 December 2022 GN R2829; GG 47634 of 2 December 2022 GN R2829.

The Regulations deal with the beneficiaries, how and what housing can be claimed as well as set out procedural requirements.

Pensioners protested in front of the Constitutional Court, claiming that although they were identified as victims by the TRC, they had not received any compensation in terms of the Act. They pointed out that “only 22,000 of the more than 100,000 applicants have, to date, been verified as victims of apartheid eligible for reparations. They said that of the 22,000 verified victims, about 17,400 were paid. They received R30,000 per victim as a once-off payment instead of the R126,000 over six months, as the TRC had previously recommended.” They also demand that the process be altered to enable more victims to claim compensation (Matanduro, 2022). At the end of 2022, the fund amounted to approximately R2 billion (Steyn, 2022).

The National Prosecuting Authority indicated that it is conducting 129 investigations into gross violations of human rights that occurred during apartheid (Githahu, 2022).

## Security Services

### Police Services and General Safety

The Western Cape Provincial Police Ombudsman instituted an investigation into allegations of police inefficiency.<sup>4</sup>

The Constitutional Court handed down a judgment on *The Residents of Industry House and Others v Minister of Police and Others*.<sup>5</sup> This is a very lengthy and important judgment relating to the unconstitutionality finding of section 13(7)(c) of the South African Police Service Act<sup>6</sup> (SAPS Act). Overall, three judgments were handed down: the first judgment was the majority judgment handed down by Mhlantla J (with six justices concurring); the second judgment was handed down by Justice Jafta (with four judges concurring); and the third judgment was handed down by Victor AJ. At issue was the portion of section 13(7)(c) that authorised searches without a warrant. In the period 2017–2018, the applicants, residents of various inner-city buildings in Johannesburg, were subjected to a series of raids and searches of homes and possessions by the SAPS. The Johannesburg Metropolitan Police Department and/or immigration officials often accompanied SAPS. During these searches, which often happened in the early morning hours, residents were ordered to vacate the building while the searches took place. In addition, they were ordered to produce identity documents.<sup>7</sup> The application lodged by the applicants was successful in the High Court. It aimed to declare section 13(7)(c) of the Act unconstitutional because it authorised searches of persons, homes, and properties without a warrant. These searches also included the

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4 PG 8581 of 8 April 2022 PN 43.

5 2022 (1) BCLR 46 (CC); 2023 (1) SACR 14 (CC); 2023 (3) SA 329 (CC).

6 68 of 1995.

7 See for background paras 3–18.

seizure of possessions. The High Court agreed that, while paragraphs (a) and (b) of the section passed constitutional muster as they were valuable tools to be employed in securing peace and order, the wording of paragraph (c) was problematic as it related to private space, namely that of a home.

At the Constitutional Court (CC), the applicants made three submissions.<sup>8</sup> Firstly, that section 13(7)(c) was unconstitutional in its entirety as paragraphs (a) and (b) provided the framework for the warrantless searches set out in paragraph (c); and, if paragraph (c) was unconstitutional, so too should the foregoing paragraphs. Secondly, the High Court erred in not granting a final interdict (as it found that interim relief was sufficient to prevent further unconstitutional searches); and thirdly, the residents were entitled to constitutional damages. The majority judgment handed down by Justice Mhlantla found that the broad spectrum of the right to privacy, set out in section 14 of the Bill of Rights, was not canvassed sufficiently in the High Court. Given that paragraph (c) was so broad that it effectively also authorised searches of persons, vehicles, and property as well—not only homes—it would also include searches that were not conducted in light of the considerations of public order, public safety, or in urgent and pressing circumstances.<sup>9</sup> While the section was aligned to a legitimate governmental purpose, there were less restrictive ways in which the objectives could be achieved.<sup>10</sup> To that end, the majority found that the unconstitutional part of section 13(7)(c) should be severed<sup>11</sup> and that a read-in be granted providing for searches within certain areas, as provided for in sections 21 and 22 of the Criminal Procedure Act:<sup>12</sup>

What is unconstitutional is only that portion of the section that permits warrantless searches without appropriate safeguards.<sup>13</sup>

A declaration of invalidity of a portion of section 13(7)(c) of the SAPS Act was issued. The Court dismissed the appeals relating to the challenge of paragraphs (a) and (b), as well as the claim for constitutional damages and the final interdict.<sup>14</sup>

The second judgment agreed with the majority on all issues, but it was written separately to underscore specifically the point that a claim for constitutional damages was not justified in this matter.<sup>15</sup> That was the case because the violation of a constitutional right affected the public and not specific individuals or portions of the public. In this light, constitutional damages to be paid to these residents in particular would not constitute appropriate relief. While the third judgment agreed with the findings of the unconstitutionality of paragraph (c), it also found paragraphs (a) and (b) of the relevant

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8 Paragraph 34 and further.

9 Paragraph 57.

10 Paragraph 59.

11 Paragraph 59.

12 51 of 1977.

13 Paragraph 63.

14 Paragraphs 73–76 and 123–124.

15 Paragraphs 127–161.

section unconstitutional.<sup>16</sup> That finding was made because the three paragraphs were all interlinked, they were overbroad and disproportionate to their purpose.

In the final order, the declaration of invalidity issued by the High Court concerning section 13(7)(c) of the SAPS Act was confirmed and the following phrase was to be read in: "... and within the cordoned-off area, search any person, premise or vehicle, or any object of whatever nature in terms of sections 21 and 22 of the Criminal Procedure Act 51 of 1977."

*Maremane Communal Property Association v Minister of Police Station Commander: South Africa Police*<sup>17</sup> related to the various applicants' efforts and lengths they had to go to, to get appropriate relief. The matter had a long history, starting in 2019 when certain community members blockaded and/or obstructed the road giving access to the relevant properties. The applicants launched an urgent application in court interdicting the respondents from blockading and/or obstructing road access and interfering with the operation of Afrimang (Pty) Ltd, the mine in question. Orders to that effect were handed down in August 2019 and confirmed in November 2019.<sup>18</sup> Notwithstanding these orders, the respondents in October 2021 resumed demonstrations and again blockaded the road. An order identical to the 2019 orders was again handed down on 11 October 2021. The order further directed that it be served in a particular manner, by the Sheriff—by reading out the order and affixing it—and that the members of the SAPS assist the Sheriff in serving and executing the order. The SAPS refused to assist, stating that the Sheriff and not the respondents was responsible for serving and executing the order.<sup>19</sup> It was further averred that the applicant had to first obtain a final order before the police could act. This led the Court to explain, before dealing with the specific matters raised, why—increasingly—civil society was taking over the functions of law-enforcement agencies and security agencies as society had seemingly lost confidence in the formal law enforcement agencies' ability to perform their duties.<sup>20</sup> A rule *nisi* was subsequently confirmed on 11 March 2022. Yet, the respondents again failed and/or refused to execute the order and failed/refused to clear the road so that mining activities could continue as per the Court order.<sup>21</sup> Applicants thereafter approached the cluster police station at Postmasburg to ensure that the Court order was executed. The response was that the applicants should enable the community to benefit from the land, on the one hand, and on the other, even if "hundreds" of complaints were registered, the "SAPS will simply not act."<sup>22</sup> A further urgent application was lodged, opposed by the respondents, inter alia because the primary duty was that of the Sheriff and not of the

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16 Paragraphs 162–222.

17 Case (2086/21) [2022] ZANCHC 37, 15 July 2022.

18 Paragraph 7.

19 Paragraph 12.

20 See the whole of para 14.

21 Paragraph 15.

22 Paragraph 17.

SAPS. The Court thereafter directed the second respondent to execute the relevant orders.

The respondents thereafter lodged an application for leave to appeal, challenging the above order, on the following grounds: (a) the duty to serve and execute court orders rested on the Sheriff and not on the respondents; (b) since the court orders were clear, they did not require any tools of interpretation to be brought to aid; and (c) the costs order against the respondents was not just and equitable. As a point of departure, the Court underlined that the respondents had missed the essence of leave to appeal application: the issue was not whether the respondents had the primary responsibility of executing orders of the Court.<sup>23</sup> That responsibility rested with the Sheriff. Instead, the central issue, in this case, was whether, once a court order had been served by the Sheriff, members of the community could approach the SAPS for assistance in enforcing the terms of the order without first enlisting the Sheriff's services once again, trying to enforce the Court order.<sup>24</sup> The respondents averred that the applicant ought to have enlisted the services of the Sheriff to execute the order and only if the Sheriff encountered a problem, or was hindered in any way from executing the order, then the Sheriff would be entitled to request assistance from the SAPS.<sup>25</sup> The Court per Ramaepadi AJ distinguished between mere service of a judgment or an order where criminal and/or disorderly conduct was not involved on the one hand and execution of a court order or judgment that sought to prevent criminal and/or other disorderly conduct, on the other.<sup>26</sup> Notably, the specific order was aimed at preventing or stopping further criminal behaviour. Crime prevention and maintenance of public order were some of the core functions of the SAPS.<sup>27</sup> Whenever acts of criminality were committed, society was entitled to look up to the SAPS for assistance and the police had a corresponding duty to assist.<sup>28</sup> As stated in paragraph 37:

In fact, it is unheard of that members of the police can refuse to act when conduct of a criminal nature is brought to their attention simply because the Court Order says 'SAPS shall assist the Sheriff in serving and executing the orders'. To do so would be to excessively peer at the language of the document without paying sufficient attention to the context and purpose of the document – the Court Order. That is precisely what the Court tried to warn the respondents about when it called upon the respondents to consider the purpose of the Court Order. Clearly, that too, the respondents did not seem to appreciate. Hence their persistence in challenging the Order on the ground, inter alia, that the Court erred by adopting a 'purposive interpretation' of the Court Order when the court order was clear in its terms.

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23 Paragraph 29.

24 Paragraph 30.

25 Paragraph 31.

26 Paragraph 33.

27 Paragraph 34.

28 Paragraph 35.

The applicant incurred costs in obtaining various Court orders to prevent the continuation of criminal activity and thereafter had to incur further costs to approach the Court to compel the respondents (police) to perform their constitutional obligation—when their assistance was needed most.<sup>29</sup> The Court concluded that the respondents failed the test for leave to appeal and the application was thus dismissed.

Community rights, interlinked with land rights, mining concessions, and legal constructs like a communal property association are complex and multi-dimensional. It is even likely that the police or some other members of the community could have had empathy with the criminal activity of blockading the road and interfering with mining activities. This was clear from the statement that the community must be allowed to enjoy the land. Where land and other rights are indeed threatened and/or encroached on, the correct and relevant legal channels would have to be followed: self-help cannot be condoned. On the contrary: where court orders had been secured, legal processes need to follow suit and orders need to be executed accordingly. It is inconceivable that the SAPS would refuse to assist while criminal behaviour prevailed.

*Social Justice Coalition v Minister of Police*<sup>30</sup> dealt with adequate and equitable police resources in the Western Cape specifically. The background to the judgment was a December 2018 finding of the Equality Court that the allocation of police human resources and the system used by the SAPS to determine the allocation of these resources in the Western Cape unfairly discriminated against Black and poor persons based on the grounds of race and poverty. Despite stating that a hearing would be scheduled to set out the relief to remedy the unfair discrimination, such a hearing never took place although applicants made numerous attempts to convene such a hearing. The result was an application for leave to appeal against the Equality Court’s constructive refusal to grant a remedy, alternatively, to seek direct access to the CC to decide the outstanding matters. The majority judgment, handed down by Unterhalter AJ, (with Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring) highlighted the plight of the Black and poor communities in the Western Cape, enforcing the general statements made in the minority judgment handed down by Kollapen J. However, at the heart of the matter was the absence of a court order or the absence of a remedy. For leave to appeal to be adjudicated on, there had to be an existing order: “An appeal lies from the order of the court below.”<sup>31</sup> Since the Equality Court did not decide on the remedy, there was nothing from which to appeal to the CC. The Court questioned whether it then had the authority to make a declaratory order.<sup>32</sup> Clothed as a declaratory order, the CC would decide for another court in a case pending before that court, on the basis that that other court had refused relief to the applicants, when in fact it had made no such order.<sup>33</sup> In this regard, the majority focussed on the

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29 Paragraph 43.

30 [2022] ZACC 27; 2022 (10) BCLR 1267 (CC).

31 Paragraph 127.

32 Paragraph 129.

33 Paragraph 130.



lack of jurisdiction of the CC in the matter, explaining that leave to appeal could not be granted as there was no extant order. While section 34 of the Bill of Rights was critical in providing for a right to access courts, the CC underlined that, that right was also inherently concerned with process. Accordingly, the CC was not the competent court to enforce the duties of the Equality Court by giving the applicants access when no application had been made to the Equality Court to do so. While the Equality Court had indeed been approached numerous times to set down the applicants' case for hearing, no application has ever been made by the applicants to enforce their constitutional rights of access. The CC concluded as follows:

I appreciate that the applicants have, with much persistence, requested the presiding judge in the Equality Court to convene his Court. His failure to do so is to be deprecated. What is required is an application, brought urgently if there are grounds, to the Equality Court, setting out the infringement of the applicants' rights and requiring the Presiding Judge to convene his Court.<sup>34</sup>

The above is an obvious manifestation of “justice delayed is justice denied”—an unacceptable position given that the power to convene the court is in the hands of the presiding judge. Given the crime statistics in the Western Cape, in informal settlements and the Cape Flats area specifically, and the lack of police stations and centres, the position is intolerable.

The Minister of Police voiced his concerns about “rogue” units, highlighting that the functions of municipal police service are mainly traffic-oriented and the enforcement of municipal by-laws (Anon 2022d). Their aim is thus not to conduct criminal investigations or gather intelligence. The Safety and Security Investigations Unit was not part of municipal police services and is instead, conducting activities it is not authorised to do, including gathering evidence, contacting foreign investigative units like the FBI, and engaging Interpol. Essentially, this unit is tampering with official police investigations, acting outside the Constitution, and bypassing legal structures.

### **Correctional Services**

The Judicial Inspectorate for Correctional Services reiterates its view that solitary confinement is a human rights violation (Cameron 2022; Singh 2022; Broughton 2022). Minister Cele reported that South African prisons are 33 per cent overpopulated with more than 500,000 South Africans and 18,000 foreigners incarcerated (Nkanjeni 2022).

In *Minister of Justice and Correctional Services and Others v Pretorius and Others*,<sup>35</sup> the Gauteng High Court confirmed the findings of the court *a quo* that the prohibition by the National Commissioner of the use of personal laptops without a modem infringed the rights of the prisoners in question. The Court found that the prohibition infringed on prisoners' rights to further education and freedom of expression as entrenched in

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34 Paragraph 150.

35 2022 (1) SACR 564 (GJ).

sections 16(1)(d) and 29(1)(b) of the Constitution. Furthermore, under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, it constituted unfair discrimination.<sup>36</sup> The issue to be decided was whether the policy as applied to the respondents amounted to unfair discrimination.

In this matter, the respondents argued that the prohibition of access to their laptops in their prison cells constituted an infringement on their right to further education and the right to study, as well as the right to human dignity. The approval of the Department Correctional Services: Policy Procedures—Directorate Formal Education by the Acting Commissioner on 8 February 2007 imposed this limitation on access to personal computers.<sup>37</sup> In line with this limitation, prisoners could only use personal computers between 7:00 and 14:00 and only in a computer room. The respondents contended that because of daily routines like clinic check-ups, attending to visitors, ablutions, eating breakfast, and delays in the opening of the computer room, they could not access the computers for at least 20 hours a day.<sup>38</sup> However, the appellants contended that allowing the respondents unlimited access to their personal computers could pose a security risk as they could gain internet access. This could lead to criminal activities being committed.<sup>39</sup> The Court found that there was no evidence to this effect and seeing that two of the respondents have had unfettered access to their personal computers in the past 11 years, without incident, the chances of security breaches were slim to non-existent.<sup>40</sup> The Court found that “... the court a *quo* was correct in its finding that no justification existed for the limitation on the basic rights of the respondents to study and to further education. Such limitation therefore constituted unfair discrimination against the respondents.”<sup>41</sup> The application was accordingly dismissed.

In *Modack v Regional Commissioner, Western Cape, of the Department of Correctional Services*<sup>42</sup> the applicant, a high-profile detainee, was alleged to have been involved in approximately 200 criminal offences—inter alia, murder, attempted murder and other offences relating to firearms—sought a mandatory interdict against the respondents. The applicant was arrested on 29 April 2021 and detained at Drakenstein Correctional Centre in the district of Paarl, Western Cape. In January 2022, he was moved by the respondents from Drakenstein to Helderstroom Correctional Centre. According to the applicant, it would have been more convenient for him to be detained at Pollsmoor Maximum Security Prison since it is close to his home. In his application, he stated that it was impossible for him to properly consult with his attorneys as he prepared for his trial. The attorneys were based in his home area, a two-hour drive from the prison.<sup>43</sup> He

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36 4 of 2000.

37 Paragraph 11.

38 Paragraph 7–8.

39 Paragraph 10.

40 Paragraph 12.

41 Paragraph 25.

42 (4222/2021) [2022] ZAWCHC 139 (21 July 2022).

43 Paragraph 2.

further contended that there are not enough wardens at Helderfontein to supervise prisoners' bathing, forcing him to shower only every second day. He also contended that the food provided at the prison was not tasty or nourishing and that his family was not allowed to bring him food, medication, or supplements.<sup>44</sup> The respondents opposed the application and contended that it did not meet the requirements for a final interdict. They based their argument on the following: "(a) that an incorrect procedure had been adopted, in that the application is for a mandatory interdict as opposed to a review; (b) a lack of urgency, and (c) the failure to exhaust internal remedies."<sup>45</sup>

The respondents further contended that the place of detention may change depending on the situation and the main consideration should be the maintenance of security and good order in the remand detention facility. The respondents further alleged that the applicant was found in possession of cellphones on two different occasions while detained at Drakenstein and that the security in Helderstroom is better.

The Court found that the onus was on the applicant to show that the respondents' decision to transfer him was unlawful. Further, the applicant did not seek a review or set aside the conduct of his transfer but wanted the Court to override the respondents' decision and substitute the same with its order. According to Lekhuleni J: "This in my view, would be far-reaching and legally incompetent."<sup>46</sup> The Court also indicated that the order the applicant sought was administrative and that the Promotion of Administrative Justice Act<sup>47</sup> should have been used. On the respondent's argument that internal remedies were not exhausted, the Court concluded that indeed the applicant failed to exhaust internal remedies. The applicant failed to utilise the complaint procedure as stipulated in the Correctional Services Act.<sup>48</sup>

On lack of urgency, the Court found that although the applicant launched this application on an urgent basis for a hearing on 18 March 2022, he failed to indicate urgency in his founding affidavit. No reasons were provided for not bringing this application earlier considering his transfer was on 12 January 2022. The applicant sought a final mandatory interdict and the requirements for a final interdict are as follows: "A clear right on the part of the applicant; an injury actually committed or reasonably apprehended; and the absence of any other satisfactory remedy available to the applicant."<sup>49</sup>

The Court emphasised that the rights in the Constitution were not absolute and could be limited in terms of section 36. Limiting the provision of medication, food, and supplements by family members could be justified. The respondents contended that

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44 Paragraph 3.

45 Paragraph 4.

46 Paragraph 12.

47 3 of 2000 (PAJA).

48 11 of 1998 s 21.

49 Paragraph 28.

detainees could get medication and supplements if needed as prescribed by the resident doctor. Accordingly, the application was dismissed.

## Defence and Military

The Defence Amendment Act<sup>50</sup> commenced on 30 December 2021.<sup>51</sup> The amendments include, amongst others, that the Chief of Staff is included as a member of the Military Command of the Defence Force,<sup>52</sup> to regulate the delegation and assignment of powers to the Secretary for Defence,<sup>53</sup> to ensure that the Defence Force can be deployed outside South Africa,<sup>54</sup> to issue identification cards to the Military Police,<sup>55</sup> and to ensure security vetting of contractors, vendors, and service providers.<sup>56</sup> A person no longer needs the permission of his or her employer to remain a member of the Defence Reserve Force.<sup>57</sup> The Minister may further prohibit access to certain military properties or areas.<sup>58</sup> The use of uniforms, distinctive marks, decorations, medals, and insignia is better regulated.<sup>59</sup> The Defence Act now also prescribes when the service of a member of the Regular Force may be terminated.<sup>60</sup> The Minister may also issue standards for health and fitness, amongst others.<sup>61</sup> In terms of the Military Pensions Act<sup>62</sup> increases in pensions were announced.<sup>63</sup>

Members of the South African National Defence Force (SANDF) were deployed from 18 December 2021 to 19 March 2022 as part of Operation Prosper. This operation aimed to “prevent and combat crime and maintain and preserve law and order across nine provinces” of South Africa. In carrying out this operation, SANDF members had to act in terms of the Code of Conduct that was published in the *Government Gazette*. In addition, the Parliamentary Defence Committee raised concerns that the Air Force’s funding does not allow it to service its aircraft. This could impact South Africa’s obligation to serve in peace missions (Anon, 2022b).

In 2022, the organisation, Open Secrets and Lawyers for Human Rights, requested numerous documents related to procurement during the apartheid era. The High Court initially granted such an order to the South African History Archive Trust (SAHA), a

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50 6 of 2020.

51 With the exclusion of ss. 8 and 16 - GG 45859 of 4 February 2022 Proc 51.

52 Section 4A(j).

53 Section 8(e).

54 Section 18(1).

55 Section 30(1).

56 Sections 36(d) and 44(3).

57 Section 54(1B).

58 Section 83A.

59 Sections 53(8), 74, 76, 78, and 104.

60 Amendment of sections 59 and 60. Section 103 is amended to shorten the period of absence without leave to ten calendar days to allow a board of inquiry to act on the absence.

61 Section 82.

62 84 of 1967.

62 GG 45779 of 21 January 2022 GN R1685.

trust which was later dissolved.<sup>64</sup> The department then requested that the court order be rescinded, while the SAHA requested that it be replaced by Open Secrets. The case was ongoing at the end of 2022 (Anon 2022a).

*Lieutenant Colonel KB O'Brien v The Minister of Defence and Military Veterans and Others*<sup>65</sup> concerned judgments and orders of a military judge. While on appointment as a military judge for a set period of time, the appellant expressed his concerns and raised the issue of the constitutionality of the appointment of military judges in a number of his judgments. The concern was essentially twofold: the criteria for the appointment of judges seemingly changed over time (e.g., in one year it could be the number of court hours carried out by the relevant individual, while in the next year, different criteria was employed) and the fact that these appointments were only temporary, for a set period only.<sup>66</sup> It seemed as if these considerations could have an impact on the capacity of judges to be objective and neutral, hence the constitutionality concern. Worded differently: as military judges were appointed for relatively short periods and no continuity would be achieved, and because these appointees would not know whether and on what basis they might be appointed in the same capacity again, it might impact on how they approached and adjudicated matters.<sup>67</sup> Despite being warned not to make these kinds of statements as part of his judgments, the appellant continued to do so. Three matters dealt with by the appellant became relevant due to long delays in finalising them. One of the reasons proffered by the appellant in one of the judgments handed down was that the delay was due to the Minister's failure to appoint military judges, resulting in a finding against the Minister. Three judgments handed down were consequently reviewed, inter alia as there was no attempt by the appellant to justify orders handed down by him, making findings without evidence being led to that effect and finding against parties not joined and granting orders that were not sought by parties. On review, the constitutional challenges failed, leading to the appeal.

On appeal, the SCA per Ponnar JA and Chetty AJA (with Nicholls, Gorven and Mabindla-Boqwana JJA concurring) highlighted that, in truth, the reference to “factual basis” was “a rendition in the appellant’s judgment of his personal views.”<sup>68</sup> Accordingly,

It may be said that the appellant breached several canons of good judicial behaviour ... His preoccupation with issues that had become all-consuming made it difficult for him to objectively and dispassionately decide matters that came before him from a position of relative detachment.<sup>69</sup>

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63 *South African History Archive Trust v South African Reserve Bank* [2020] 3 All SA 380 (SCA); 2020 (6) SA 127 (SCA); 2020 (12) BCLR 1427 (SCA).

64 [2022] ZASCA 178; [2023] 1 ALL SA 341 (SCA) (13 December 2022).

65 See for more detail paras 7–10.

66 See para 16 specifically.

67 Paragraph 42.

68 Paragraph 43.

And further:

... owing to his erroneous views and his preoccupation with issues that affected him personally, which he impermissibly injected into his judgment, one would have to say that the appellant wholly misconceived the nature of his equity and his duties in connection therewith. Accordingly, he never truly applied his mind to the issues before him and wrongly decided on a range of issues that were not properly before him. Those were issues justiciable on review.<sup>70</sup>

The appeal against the dismissal of the cross-application, dealing with the constitutionality challenge, also failed. The SCA was satisfied that the Minister could assign officers to the function of a military judge and could do so for a fixed period, of whatever duration, per legislation. If that was the case, then it was difficult to see why the Minister could not review such an appointment and extend it for a further appointment or decide against such an extension.<sup>71</sup> It is an interesting judgment. Military judges have important roles to play and like all other presiding officials, are held to the highest order. Stating that judges might not be neutral because of the basis they are appointed, goes directly against the grain of impartiality and objectivity.

### National Security and Intelligence

The Independent Police Investigative Directorate (IPID) Amendment Bill, 2022 was published for comment.<sup>72</sup> The Amendment Bill aims to give effect to the *McBride* judgment that declared various provisions of the IPID Act 1 of 2011 unconstitutional.<sup>73</sup> It further strengthens the independence and impartiality of the IPID,<sup>74</sup> ensures that the Minister cannot interfere with the appointment and dismissal of the Executive Director as well as ensures an open and transparent process for his or her appointment.<sup>75</sup> Other amendments include measures to ensure that the Directorate will be able to execute its mandate effectively and efficiently.<sup>76</sup> Section 3(2) of the Act is to be amended to include that the Directorate should exercise its functions in line with the Constitution.

### Arms and Ammunition

Before the CC judgment in *Minister of Police and Others v Fidelity Security Services (Pty) Ltd*,<sup>77</sup> the interpretation of section 3, read with section 149 of the Firearms Control

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69 Paragraph 45.

70 Paragraph 57.

71 GG 47373 of 28 October 2022 GN 2681.

72 *McBride v Minister of Police* [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP); *McBride v Minister of Police* 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC).

73 Section 4(3) inserted.

74 Substitution of ss 6 and 7 and the amendment of other sections in the Act.

75 Preamble.

76 [2022] ZACC 16; 2022 (2) SACR 519 (CC).

Act<sup>78</sup> was to the effect that those who failed to renew their firearm licences in time, could not bring new licence applications in respect of those particular firearms. To that end, on the basis that possession became unlawful, owners usually handed in their firearms, thus forfeiting their possessions. In the High Court, it was found that a gun owner could not bring a new application to possess the firearm, following the approach above. The SCA reversed that decision, leading to the appeal in the CC. The respondent in the matter, Fidelity, is one of the largest security service providers in the country, with many offices nationwide. In compliance with section 7, an official was appointed to deal with licence renewal issues. When the official was replaced by a new staff member, it was discovered that the licences of 700 firearms had not been renewed under section 24 of the Act and the licences had thus terminated under section 28 of the Act. Fidelity then belatedly approached the Registrar (Commissioner) to renew the expired licences under section 24 of the Act. While such an application had to be made at least 90 days before the expiry of licences, late applications could be considered if sufficient reasons for lateness were provided. Late applications meant possessing such firearms was unlawful, and they must be surrendered to the nearest police station.<sup>79</sup> Fidelity unsuccessfully applied to the High Court for extensive relief. Its application included challenging the constitutionality of sections 24 and 28 and seeking an interdict restraining the police from seizing the firearms. Because a firearm can only be destroyed as set out in the Act and, given that it remains the property of the owner thereof until destruction, the SCA ultimately upheld the appeal and found that Fidelity was entitled to reapply for new licences to possess firearms.<sup>80</sup> In the CC, the State parties highlighted that the matter raised constitutional issues, including concerning the government's constitutional duties in regulating the use and possession of firearms. Further, as the Act required that, once a licence had expired and guns had to be surrendered to the police, possession thereafter could not be lawful. Fidelity, on the other hand, suggested nuanced differences between "possession" and "ownership" and that the Act related to "possession".<sup>81</sup> Accordingly, the lapsing of the licence of possession did not terminate the ownership. Instead, the firearm remained the property of the owner until it was destroyed. The handing over of the firearm therefore terminated the possession but did not terminate the ownership. The difference between ownership and possession was dealt with in detail.<sup>82</sup> Notably, the licence authorises one to possess a firearm, not to own it. The statutory framework relating to fresh licence applications was dealt with thereafter:

Although the firearm might be seized by or surrendered to the police, such person would... retain ownership. One must assume that the lawmaker preserved ownership for a purpose. Yet, in the period from seizure or surrender or destruction, the person's ownership would appear pointless, since there would be no means by which the owner

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77 60 of 2000.

78 Paragraphs 1–3.

79 At para 11.

80 See para 19 and further.

81 Paragraphs 38–41.

could recover lawful possession before destruction. By giving section 20 its plain and ordinary meaning, the supposed gap disappears. To interpret section 20 as being applicable to an owner in Fidelity's position gives rise to a result which is neither businesslike nor sensible, and such interpretation is to be avoided if reasonably possible.<sup>83</sup>

The above interpretation would also be more aligned with constitutional values, in particular property rights guaranteed in section 25.<sup>84</sup> Leave to appeal and the appeal itself were dismissed.

The judgment has far-reaching implications, not the least regarding clarity between ownership and possession where firearms are concerned, but also for the process of licencing. To that end, directives were issued in July 2022 to all provincial police commissioners that firearm owners be allowed to apply for a licence for a weapon at any time, without forfeiting the weapon. Furthermore, there should not be any prosecution of such owners and an owner, for a period set out in the circular, retained possession while a new licence was being issued.

## Domestic and Gender Violence

The government introduced a National Council on Gender-Based Violence and Femicide Bill [B31-2022].<sup>85</sup> Section 2 of the Act sets out the purpose of the Act, including the establishment of a National Council to provide strategic leadership and joint approaches on how to eliminate or limit gender-based violence and femicide.<sup>86</sup> Forums are to be created in the national, provincial, and local spheres.<sup>87</sup> The aims also refer to the Bill of Rights and “affirm a national commitment to building a society that is free from all forms of gender-based violence and femicide.” The National Council will be assisted by a chief executive officer,<sup>88</sup> a secretariat,<sup>89</sup> a board,<sup>90</sup> and its committees.<sup>91</sup> The Bill further introduces reporting mechanisms to monitor, evaluate and take corrective action in response to gender-based violence and femicide.<sup>92</sup> Provincial and local working groups will be subject to norms and standards issued by the board.<sup>93</sup> The Bill creates collaborative structures to address gender-based violence and ensures that these structures are funded. However, the question is whether the response to gender-based violence and femicide requires another bureaucratic structure

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82 Paragraph 55.

83 Paragraph 56.

84 GG 46991 of 30 September 2022 GN 2558.

85 Clauses 3–5.

86 Clause 2.

87 Clause 15–16.

88 Clause 17.

89 Clauses 6–13.

90 Clause 14.

91 Clause 5.

92 Clause 22.



or whether immediate action by an inter-ministerial task team that includes ministers responsible for policing, basic education, cooperative governance and traditional affairs, higher education, human settlements, justice, women, youth and disability and social development could not have led to more immediate action.

## Terrorism

The Protection of Constitutional Democracy against Terrorist and Related Activities Bill [B15B-2022] was introduced in Parliament. The purposes of the amendments include alignment with international instruments that were adopted after the commencement of the Act,<sup>94</sup> to introduce offences such as the training of terrorists or the joining or establishing of terrorist organisations, restriction on travel, the publication or distribution of publications related to terrorism, as well as the investigation and prosecution of these offences.<sup>95</sup> The Bill further introduces measures “requiring the disclosure of a decryption key and the effect of a direction to disclose a decryption key;”<sup>96</sup> to provide for the removal of, or making inaccessible, publications with unlawful terrorism related content.”<sup>97</sup> The Bill further introduces definitions in section 1 such as “explosives or other lethal device,” “substances,” and several definitions relating to electronic communication and data. The definition of “terrorist activity” is amended to include acts that relate to weapons of mass destruction, that is “calculated to overthrow the government or the Republic or any other government,” “causes the destruction of or substantial damage or interferences to an information infrastructure,” and various offences in relation to the Cybercrimes Act.<sup>98</sup> It will also include an activity that “further the objectives of an entity engaged in terrorist activity.” The Bill is criticised in that the definition of “terrorism” is too wide in that it virtually includes any form of criticism against the government and could be misused to silence opposition parties. The extension of policing measures will be unconstitutional. It is also argued that the Bill limits freedom of expression, will criminalise humanitarian assistance, and will hamper public participation. (See in this regard Van Zyl 2022; Githahu 2022b; Anon 2022c.)

This Act has to be read with the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act<sup>99</sup> that came into effect in December 2022. This Act amends the Trust Property Control Act<sup>100</sup> (TPC Act) and the Non-Profit

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94 Including e.g. the Protocol to the Organisation of African Unity Convention on the Prevention and Combating of Terrorism, 2004, the International Convention for the Suppression of Acts of Nuclear Terrorism, 2005, Amendment to the Convention on the Physical Protection of Nuclear Material, 2005, the Protocol to the Convention on the Physical Protection of Nuclear Material, 2005, the Convention on the Suppression of Unlawful Acts relating to International Civil Aviation, 2010.

94 Amending ss 3–12 and inserting s 4A.

95 See also ss 1.

96 Preamble and insertion of s 24A.

97 19 of 2020.

98 22 of 2022.

99 57 of 1988.

Organisations Act<sup>101</sup> (NPO Act), among others (Lamola and Kharsany 2023). The amendments further include the insertion of the definitions of “accountable institution” and “beneficial owner” into the TPC Act, an indication of who would be disqualified from being a trustee,<sup>102</sup> and that trustees who are appointed from outside South Africa, will have to be approved by the Master.<sup>103</sup> A beneficial owner includes a natural person who owns trust property, who exercises effective control over the administration of the trust, the founders of the trust (which may include legal persons), trustees, and beneficiaries (including legal persons).<sup>104</sup> The Financial Intelligence Centre Act,<sup>105</sup> the Financial Sector Regulation Act<sup>106</sup> and the Companies Act<sup>107</sup> are also amended in relation to beneficial owners, among others. The General Laws Act came partially into operation on 31 December 2023.<sup>108</sup> The Act further specifies information that must be kept about the beneficial owners and the Master must keep “a register in relation to beneficial ownership of trusts as well as allow access to this information.”<sup>109</sup> The Act also creates new offences.<sup>110</sup> The NPO Act is amended, to require the registration of NPOs if they act outside South Africa’s borders or provide “humanitarian, charitable, religious, educational or cultural services outside South Africa,”<sup>111</sup> to allow them to enter into agreements with state organs,<sup>112</sup> to submit information on the “office-bearers, control structure, governance, management and the operations of registered NPOs.”<sup>113</sup> The Act also indicates who is disqualified to be an office-bearer and provides for the removal of office-bearers.<sup>114</sup> The government stated that these amendments were necessary to ensure that South Africa was not greylisted (Phakathi 2022). Concerns remain that the relevant Department of Social Development cannot implement the Act, that smaller NPOs’ administrative burden will increase, and that the Act may be abused to hamper the activities of certain NPOs (Metelerkamp 2022; Bird 2022).

In addition, the United Nations identified a new list of terrorist-related persons and entities, and South Africa recognised them as such.<sup>115</sup>

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100 71 of 1997.

101 Section 6.

102 Section 10(2).

103 Section 1.

104 38 of 2001.

105 9 of 2017.

106 71 of 2008.

107 GG 47805 of 31 December 2022 Proc 109.

108 Section 11A.

109 Section 19.

110 Section 12(1).

111 Section 5.

112 Section 18(1) (bA) and ss 18(1A) and (1B).

113 Section 25A

114 GG 47728 of 12 December 2022 Proc 98.

## Conclusion

Despite the increase in crime statistics, after there was some decrease amidst the COVID-19 lockdown, and the prevalence of gender-based violence, femicide, unrest and violence in South Africa, all is not lost. The report period has underlined that South African courts are necessary cogs in the machinery by interrogating legislative provisions to ensure that practice and conduct are indeed aligned with the Constitution. Apart from judgements handed down, various other activities, like the establishment of specialist units, also become relevant.

However, for the national endeavour of safeguarding the country and its people, a concerted effort is needed from all role players. It is in this context that the delay of the Equality Court to pronounce on security resources in the Western Cape specifically, is problematic.

Whereas breaches in processes can be remedied, and overarching legislation dealing with combating threats (like terrorism) can be promulgated, livelihood concerns are not that simple to address effectively. Service protests, often violent with corresponding damages to property and invariably resulting in death, continue to bring urgent, critical, and basic concerns to the fore. As long as basic needs and demands are not attended to, South Africa will remain prone to violence and unrest.

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