

UNREST AND VIOLENCE: 2016

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GENERAL

Prior to 2016, the number of violent acts committed in schools had become a concern.¹ Traditional measures such as having a police presence and security guards at schools, campaigns against drugs, metal detectors and the introduction of more after-school activities had had no impact on the number of violence-related incidents at schools. The highest number of incidents was recorded in the Western Cape, Limpopo and Free State. Each year, approximately 22 per cent of learners are affected by violence nationally.² Since 2008 the Department of Basic Education (DBE) has been implementing measures to make schools safer places, and recently it formulated the following proposals to secure schools:

- reduce the number of learners per teacher;
- produce more effective teachers;
- identify ‘problem children’ at an early stage and remedy their behaviour;
- provide better training and support to teachers in order to control discipline in their classrooms;
- appoint social workers to schools permanently;

1 Jason Felix ‘Geweld Neem Toe in Skole in SA’ (*Netwerk24*, 5 August 2015) <<https://www.netwerk24.com/Nuus/Onderwys/Geweld-neem-toe-by-skole-in-SA-20150805>> accessed 7 October 2017.

2 Taschica Pillay ‘Violence rules in SA schools’ (*TimesLive*, 6 August 2015) <<https://www.timeslive.co.za/news/south-africa/2015-08-06-violence-rules-in-sa-schools/>> accessed 7 October 2017.

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- provide learners with an opportunity to discuss issues of security at their school, and
- involve the community in all aspects of their children's security.³

Although learners are usually the focus of violence, teachers are also becoming victims. Approximately 30 per cent of teachers do not feel safe in the workplace and 12 per cent have already experienced violence there.⁴ Statistics referring to violence in schools usually also refer to violence that learners experience on their way to or from school, which indicates that learners should also be able to access safe routes and transport to and from school.

During 2016, the Western Cape provincial government appropriated R50 million for safeguarding high-risk schools.⁵ The funds were allocated for the appointment of additional personnel, known as 'resource officers'. These officers would have the same powers as police officers, but would be trained to act specifically within a school context. Their general duties would include, for example, access control, unannounced investigations, interventions and post-school mentorships. Their duties could also extend to assisting learners in social matters. These measures are critically important because South Africa has the second highest incidence of violence in schools in the world (Jamaica has highest).⁶ Although the numbers may seem high in comparison to those of other places in the world, it may be that other countries do not keep such statistics.⁷

Not only is physical violence increasing; internet violence and harassment are also becoming more problematic.⁸ Some 24 per cent of South African teenagers (13–18 years) indicated that they have experienced internet harassment, in comparison to the international average of 18 per cent. South Africa had the fourth highest number of announced incidents of internet harassment, following New Zealand (30 per cent), the United States (27 per cent) and Ireland (26 per cent); teenagers in Spain and Czechia had the lowest number of announced incidents (8 per cent).

3 *ibid.*

4 Lauren Anthony 'SA School Violence Escalates' (*IOL*, 8 July 2013) <<https://www.iol.co.za/news/crime-courts/sa-school-violence-escalates-1543786>> accessed 7 October 2017.

5 Tammy Petersen 'R50m Boost for 18 High Risk Schools in the Western Cape' (*News24*, 1 October 2015) <<http://www.news24.com/SouthAfrica/News/R50m-safety-boost-for-18-high-risk-schools-in-Western-Cape-20151001>> accessed 7 October 2017.

6 Nokuthula Ntuli 'SA School Violence Shock' (*IOL*, 6 August 2015) <<https://www.iol.co.za/news/crime-courts/sa-school-violence-shock-1896532>> accessed 7 October 2017.

7 See also Marelise van der Merwe 'Knife's Edge: How Dangerous are South Africa's Schools?' (*Daily Maverick*, 16 July 2015) <<https://www.dailymaverick.co.za/article/2015-07-16-knifes-edge-how-dangerous-are-south-africas-schools/#.WdkuNmiCyU>> accessed 7 October 2017.

8 See in general Paula Gilbert 'One in Five SA Teens Cyber Bullied' (*ITWeb*, 23 September 2015) <http://www.itweb.co.za/index.php?option=com_content&view=article&id=146442> accessed 7 October 2017.

The 2015 ‘#Rhodesmustfall’ initiative led to the ‘#feesmustfall’ campaign and countrywide unrest and protest at universities.⁹ Although the campaign started peacefully at a few campuses, it quickly escalated into violence and the destruction of university and personal property. Students relied on social media to gain support for the campaign.¹⁰ The initial demand that there be no increase in fees was replaced by a demand for free higher education, an end to the outsourcing of workers and a write-off of student debt. The Minister of Higher Education and Training was initially apathetic and the police sometimes acted violently, both responses resulting in fierce public criticism.¹¹ The protests led to a decision not to increase university fees in 2015 and 2016;¹² they included violence such as arson, the disruption of lectures, damage to property, blockading access routes, and assaults on other students and personnel. The 2016 campaign again disrupted lectures, and resulted in violence, arson, assaults – and a harsh police reaction. The demands from the students shifted to the decolonisation of curricula, transformation and, depending on the university or the protesting group, issues such as gender violence and free food came to the fore. The 2016 campaign was criticised as being leaderless, having been hijacked by political parties, and for the instances of police brutality.¹³

This article is a continuation of a journal article that appeared regularly in *Southern African Public Law* after the 1987 discussion of various measures pertaining violence. It initially started as a discussion about all the measures pertaining to the state of emergency in South Africa at the time and then over time developed into a discussion of all the issues that relate to violence and its regulation in the country. Here, in this issue of the *Journal of Law, Society and Development*, the most important measures and

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- 9 See in general Govan Whittles ‘Free Education gets a Push Forward’ (*Eyewitness News*, 2 November 2015) <<http://ewn.co.za/2015/11/02/Zuma-seeks-to-elevate-task-team-investigating-free-education>> accessed 7 October 2017; Barry Bateman ‘#feeshavefallen: Zuma Scraps Fee Hikes for 2016’ (*Eyewitness News*, 23 October 2015) <<http://ewn.co.za/2015/10/23/FeesHaveFallen-Zuma-scraps-fee-hikes-for-2016>> accessed 7 October 2017.
- 10 Tsholofelo Wesi ‘Fees Must Fall Protest in Pretoria “Hijacked”’ (*The Citizen*, 23 October 2015) <<https://citizen.co.za/news/south-africa/833478/fees-must-fall-protest-in-pretoria-hijacked/>> accessed 7 October 2017.
- 11 Msombuka ‘Nzimande Warned of Fees Must Fall Campaign Explosion’ (*The Sowetan*, Johannesburg, 19 October 2015) 17.
- 12 Ludovica Iaccino ‘SA: Jacob Zuma Announces 0 per cent University Fee Increase Following Fees Must Fall Protest’ (*International Business Times*, 23 October 2015) <<http://www.ibtimes.co.uk/south-africa-jacob-zuma-announces-0-university-fee-increase-following-fees-must-fall-protest-1525398>> accessed 7 October 2017.
- 13 Jane Duncan ‘Why Student Protests in South Africa Have Turned Violent’ (*The Conversation*, 29 September 2016) <<http://theconversation.com/why-student-protests-in-south-africa-have-turned-violent-66288>> accessed 7 October 2017; David Everatt ‘What Must Fall: Fees or the South African State?’ (*The Conversation*, 20 October 2017) <<https://theconversation.com/what-must-fall-fees-or-the-south-african-state-67389>> accessed 7 October 2017.

cases pertaining to crime statistics, truth and reconciliation, security services, arms and ammunition, terrorism and corruption that occurred during 2015–2016 are discussed.¹⁴

CRIME STATISTICS

The annual crime statistics were published on 1 September 2016.¹⁵ These statistics covered the period 1 April 2015 to 31 March 2016 and included both national and provincial statistics and those at the station level.

Statistics from the past decade (2006/2007–2015/2016) have indicated a decrease in crime overall; however, crimes of a violent nature, including crimes against persons (also referred to as ‘contact crimes’), have increased. According to recent statistics released by the South African Police Service (SAPS), contact crimes increased by 1 per cent between the 2014/2015 and 2015/2016 financial years.¹⁶

Sexual offences and common robbery are the only contact crimes that showed a significant decrease in the number of reported cases in comparison to the 2014/2015 financial year. In 2014/2015, 53 617 sexual offences were reported and in 2015/2016 a total of 51 895 – amounting to a decrease of 3,2 per cent. These numbers indicate that 94,4 sexual offences were recorded per 100 000 of the South African population. However, the argument is often put forward that these statistics on sexual offences are not accurate as many victims seem reluctant to report cases to the SAPS.¹⁷

Common robbery showed a 1,5 per cent decrease in the number of reported cases, taking into account that in 2014/2015 54 927 instances of this type of case were reported and 54 110 during 2015/2016. In 2015/2016 the robbery rate was 98,4 per 100 000. However, robbery with aggravating circumstances increased by 2,7 per cent in 2015/2016 (132 527) from the reported number of cases in 2014/2015 (129 045). This increase resulted in 240,9 reported robberies with aggravating circumstances per 100 000.

14 In this note the most important policy measures, legislation, reports and decisions for the period 30 October 2015 to 30 October 2016 are discussed. This note was submitted to *SAPL* for publication towards the end of 2016; it was previously entitled ‘Onrus en Geweld’ and was published in Afrikaans. Before the editors of *SAPL* requested that the journal should have one heading, the journal appeared under various headings. The editors of *SAPL* approached the *Journal of Law, Society and Development* to continue with the publication of this annual note.

15 See generally Anon ‘Watch: Briefing on the 2016 Crime Stats’ (*eNCA*, 2 September 2016) <<http://www.enca.com/south-africa/catch-it-live-police-minister-releases-the-2016-crime-stats>> accessed 7 October 2017; Anon ‘SA Murder on the Rise, Police Can’t Keep Up’ (*eNCA*, 2 September 2016) <<http://www.enca.com/south-africa/sa-murder-rate-on-the-rise>> accessed 7 October 2017.

16 South African Police Services (SAPS), ‘Crime Statistics 2015/2016’ (SAPS, 2016) <<https://www.saps.gov.za/services/crimestats.php>> accessed 7 October 2017.

17 Lizette Lancaster et al ‘Assault and Sexual Offences – Overview of the Official Statistics: 2014/15’ (ISS, 2015) <<https://issafrica.s3.amazonaws.com/site/uploads/SA-Crime-Stats-2015-Assault-and-sexual-offences-fact-sheet.pdf>> accessed 7 October 2017.

Assault with the intent to inflict grievous bodily harm decreased from 337,2 per 100 000 in 2014/2015 to 332,5 per 100 000 in 2015/2016. Common assault increased by 2,2 per cent in 2015/2016: in 2014/2015, 161 486 common assault cases were recorded compared to the 164 958 cases reported in the following year. This means that the rate of common assault increased from 298,2 per 100 000 in 2014/2015 to 299,9 in 2015/2016. The Institute for Security Studies (ISS) argues that, similarly to those of sexual offences, the common assault statistics do not reflect the reality in South Africa as most victims do not report these cases to the SAPS.

Carjackings have also increased nationally – up since 2015 by 14,3 per cent – most notably in Gauteng province. Interestingly, whereas carjacking increased, the theft of motor vehicles declined during the reporting period, an overall decline of roughly 4 per cent being registered.

Among contact crimes, murder and attempted murder showed the biggest increases in the number of reported cases: during 2015/2016, 18 673 murders were reported, 4,9 per cent more than in the 2014/2015 financial year. The murder rate per 100 000 is 33,9, up from 32,9 in 2014/2015. Attempted murder showed an increase of 3,4 per cent in that 17 537 cases were reported during 2014/2015 and 18 127 during 2015/2016. The rate of attempted murder increased from 32,4 per 100 000 in 2014/2015 to 33 in 2015/2016. The most prominent murder weapons used were knives (36,3 per cent) and firearms (32,1 per cent), whereas other instruments comprised 11,1 per cent. Disturbingly, the majority of murders were committed indoors, among people known to each other, often in a domestic violence context and invariably linked to alcohol abuse. In this regard, Cape Town – Nyanga specifically – had the highest recorded murder rate in South Africa.¹⁸ Also included in the murder hotspot list were Bethelsdorp (Eastern Cape), Inanda and uMlazi (KwaZulu-Natal) and Gugulethu, Harare, Khayelitsha, Delft, Kraaifontein and Mfuleni (Western Cape).

Not unlike previous years, various criticisms were levelled at the latest statistics. The greatest concern is that crime statistics should not be collected and managed by the SAPS, but ought to be collected by an independent body.¹⁹ Despite SAPS having given an undertaking that crime statistics would be released quarterly, not much has happened since that announcement.²⁰ The idea was apparently to continue the annual statistics announcement, but to supplement it with quarterly releases that would be useful to the various lobby groups and crime researchers that had called for them. The argument was

18 African News Agency 'Crime Stats Show Western Cape is SA's Murder Capital' (*eNCA*, 3 September 2016) <<https://www.enca.com/south-africa/crime-stats-reveal-western-cape-holds-most-murder-hotspots>> accessed 7 October 2017.

19 See Anon 'DA Questions Validity of Crime Stats' (*Eyewitness News*, 25 September 2012) <<http://ewn.co.za/2012/09/25/DA-questions-crime-stats-validity>> accessed 7 October 2017.

20 Barry Bateman 'Govt's Decision to Release Crime Stats More Often Widely Welcomed' (*Eyewitness News*, 10 June 2016) <<http://ewn.co.za/2016/06/10/Govts-decision-on-crime-stats-warmly-received-by-lobby-groups>> accessed 7 October 2017.

that having information released speedily would promote more effective combating of crime and identification of crime trends.

The ISS indicated that, notwithstanding positive developments relating to the reduction of crime, the incidence of murder (an increase of almost 20 per cent during the previous four years), hijackings (a 14 per cent increase), violence and organised crime remained high.²¹ ISS is of the opinion that crime needs to be tackled by a multi-faceted solution (of which policing is but one part) and emphasises the need to intervene to deal with contributing factors such as ‘investing in at-risk youth; keeping children safe and supporting parents; and addressing the role of alcohol, guns and drugs’ and the appointment of an additional 50 000 social workers.

The South African Institute of Race Relations (IRR), in its 2016 publication, *Winning the war on crime in Africa: A New approach to community policing*, discusses – against the background of the historical and current crime statistics in the country – the South African law-enforcement context by focusing on what it refers to as ‘cader deployment’, the privatisation of law enforcement, township mob justice (vigilantism) and neighbourhood watches.²²

TRUTH AND RECONCILIATION COMMISSION

The Regulations on Exhumation, Reburial or Symbolic Burial of Deceased Victims²³ were amended in 2016.²⁴ The regulations inserted definitions for a ‘cleansing ceremony’, a ‘handing-over ceremony’ and a ‘recipient’. A ‘cleansing ceremony’ is defined as

a ceremony during which the relatives of a deceased victim observe customary rituals to secure a safe passage for the deceased and to cleanse the relatives of the deceased victim from impurity or to remove bad luck from them.

A ‘hand-over ceremony’ is defined as

the ceremony during which the Department hand[s] over the remains of a deceased victim, which have been found during an exhumation procedure contemplated in Regulation 3(2)(a), to the relatives of a deceased victim

and a ‘recipient’ is regarded as the person designated

21 Institute for Security Studies (ISS), ‘SA Crime Stats: Hope Amid Alarming Trends’ (ISS, 2 September 2016) <<https://issafrica.org/about-us/press-releases/sa-crime-stats-hope-amid-alarming-trends>> accessed 7 October 2017.

22 South African Institute of Race Relations (IRR) ‘Winning the War on Crime in Africa: A New Approach to Community Policing’ (IRR, September 2016) <http://irr.org.za/reports-and-publications/occasional-reports/files/sairr_english_wwacinsa_print_050916.pdf> accessed 7 October 2017.

23 GN R356 (GG) 33164 (7 May 2010).

24 GN R1305 (GG) 40362 (21 October 2016).

for purposes of Regulations 4, 4A, 4B, 5 and 5B of the regulations after consultation with the relatives of the missing person or deceased victim.²⁵

The regulations now allow a relative of a deceased victim to request in writing and with proof of identity:

- a one-off contribution of R17 000 towards the expenses of reburial of the victim or R8 500 towards the expenses of a symbolic reburial;
- an allowance for travel and subsistence to attend a cleansing ceremony (restricted to five recipients) and a hand-over ceremony (restricted to nine recipients), and
- to purchase an animal to be slaughtered during the cleansing ceremony (maximum amount R1 500).²⁶
- (The Annexure to the Regulations contains the necessary application form.)

The fund administrator must take into account the distance to be travelled and the health and age of the recipients as well as the logistical arrangements of the ceremony when they consider the travel recipients' arrangements.²⁷

The department must provide a coffin, funeral items and accessories not exceeding the amount of R12 000 for the purposes of the hand-over ceremony. If the family provides a coffin or an institution donates a coffin, the department is not obliged to provide a coffin, although it may be obliged to provide a coffin in terms of other legislation.²⁸ The amended regulations also adjusted the amounts to be awarded in terms of Regulation 5.²⁹ Regulation 5D is inserted to provide a general provision that all amounts should increase automatically by 5 per cent annually.

On 11 March 2016 the Department of Justice and Constitutional Development invited parties to comment on the proposed amendment to the regulations regarding Assistance to Victims in respect of Higher Education and Training.³⁰ The proposed amendments inserted Regulation 8A to provide for additional forms of assistance such as a monthly allowance for meals, a one-off allowance for equipment, devices, instruments and tools, and a one-off amount to settle a debt to a tertiary institution.³¹ The head of the relevant department of the tertiary institution must certify that the equipment and other items are necessary for the study and sufficient proof of the debt must be provided. The allowance would be paid for four years only and if the recipient received an allowance for skills

25 *ibid* reg 2.

26 *ibid* regs 3(1)(b), 3(2)(c)–(f), 4A and 5B, read with reg 5E, 11(1)(c).

27 *ibid* reg 8A.

28 *ibid* reg 5C.

29 *ibid* reg 6.

30 GN R852 (GG) 38157 (3 November 2014); GN R1305 (GG) 40362 (21 October 2016).

31 *ibid* reg 8A(1)–(2).

development, then the number of years would be reduced accordingly.³² The amounts to assist victims in respect of higher education and training were also increased.³³

SECURITY SERVICES

Police Services

In 2015 three concerns relative to the police were highlighted:

- police officers experience high levels of stress, which impairs their health;
- the increasing violence committed by the SAPS, and
- the discreditation of the Commissioner of Police, Riah Phiyega, which led to her suspension.

These factors had a negative impact on the public's perception of the SAPS and led to a lack of trust in the SAPS and to the public taking the law into their own hands.³⁴

As mentioned above, the number of police officers suffering from health problems such as depression and anxiety disorders is increasing.³⁵ Linked to this is the fact that the SAPS heads the list of the top ten scandals of the years 2015/2016 in connection with corruption and bribery (see also the discussion under the heading Corruption). Not only are members vulnerable to being killed while rendering service, but many members are also prone to depression and other mental illness, all of which exacerbates the conditions for suicide.³⁶ While the latest figures reflect the 2013 position and are therefore not up to date, the data are disconcerting. In 2013, 115 officers committed suicide, compared to 29 officers murdered on duty. This equates to 7,39 per 100 000 officers; in comparison, 0,9 per 100 000 South Africans die by suicide. Although depression and mental health matters are prominent, other difficulties, such as financial and physical, also contribute to these data. One suggestion to deal with that could possibly prevent suicides in this context is to implement a national suicide-prevention strategy that would incorporate various vulnerable groups, including the SAPS.³⁷ In 2015 the number of medical claims

32 *ibid* reg 8A(3)–(5), read with reg 16(2)(b) and amendments to Form 1.

33 Schedule to GN R3 (GG) 39742 (26 February 2016).

34 Gadeeja Abbas 'Erosion of Public Trust in the Cops' (*Cape Argus*, 8 October 2015) <<https://www.iol.co.za/news/crime-courts/erosion-of-public-trust-in-the-cops-1927145>> accessed 7 October 2017.

35 See Anon 'Depression, Attempted Suicide among Police Worrying' (*SANews*, 21 June 2012) <<http://www.sanews.gov.za/features/depression-attempted-suicide-among-police-worrying>> accessed 7 October 2017.

36 See generally Gráinne Perkins 'Shedding Light on the Hidden Epidemic of Police Suicide in South Africa' (*The Conversation*, 3 February 2016) <<http://theconversation.com/shedding-light-on-the-hidden-epidemic-of-police-suicide-in-South-Africa-53318>> accessed 7 October 2017.

37 See also Sloane Hunter 'SA Police Force have a Suicide Problem' (*2 Oceans Vibe News*, 3 February 2016) <<http://www.2oceansvibe.com/2016/02/03/sa-police-have-a-suicide-problem>> accessed 7

submitted to POLMED indicated that 10 636 police officers suffered from depression and 2 763 from post-traumatic stress anxiety disorders. The number of suicides among police officers is still high – in 2015, 84 attempted suicides were recorded.³⁸ This emphasises an increasing need for counsellors within the SAPS.

Apart from suicide, being killed in the line of duty is also a very real possibility for active SAPS members. In this regard, 22 police were killed in KwaZulu-Natal in the period April 2015–January 2016.³⁹ In this war against crime, police are often at a disadvantage as criminals are heavily armed and have little or no regard for human life. Of the 22 police killed in KwaZulu-Natal, nine were off duty, whereas 13 died in the process of conducting arrests or attempting to stop a crime in progress.

Interestingly, the figures released by the Independent Complaints Directorate (ICD) indicate that more people are killed by police in KwaZulu-Natal than in any other province. Killings in this province account for 35 per cent of all killings by police in South Africa. The numbers have increased drastically since 2008, with the number of killings for the period 2013/2014 totalling 117. The so-called ‘Cato Manor Death Squad’ unit was one of the units implicated in a 2014 investigation, which indicated that members of the SAPS are more likely to kill than a police officer in the United States.⁴⁰ In comparison, during the first 24 months of 2015, police officers in the United States killed 59 people, in comparison to 54 people in a period of 24 years in the United Kingdom and Wales; in March 2015 police officers in the United States killed 97 people. During the year being surveyed, South African police officers killed 930 people. These numbers do not include persons killed by municipal police, which would bring the number to approximately 1 240 per year.⁴¹ In November 2016 a ‘Proposed National Policing Standard for Municipal Police Services on the Use of Force in Effecting Arrest’ was published for comment.⁴² This will hopefully resolve some of the issues at a municipal level.

Various civil claims have been instituted against the SAPS: the costs of civil proceedings and claims against the SAPS amounted to R26 billion, which had a negative effect on the SAPS budget. More than one-third of the budget is allocated to civil and

October 2017; Anon (n 35).

38 Mia Lindeque ‘Sadag: Cops too Scared to Seek Trauma Counselling’ (*Eyewitness News*, 1 October 2015) <<http://ewn.co.za/2015/10/01/Sadag-Police-too-scared-to-seek-trauma-counselling>> accessed 7 October 2017.

39 Kyle Cowan ‘In the Line of Duty – Shocking Police Death Statistics’ (*Zululand Observer*, 4 February 2016) <<http://zululandobserver.co.za/101027/in-the-line-of-duty-shocking-police-death-statistics>> accessed 7 October 2017.

40 Staff ‘SAPS Twice as Likely to Kill as US Police’ (*Mail & Guardian*, Johannesburg, 15 June 2015) 13; Aaron Morrison ‘Police Brutality on Rise in SA: Officers Accused of Killing, Raping Citizens’ (*International Business Times*, 10 January 2015) <<http://www.ibtimes.com/police-brutality-rise-south-africa-officers-accused-killing-raping-citizens-2122712>> accessed 7 October 2017.

41 Staff (n 40).

42 General Notice 1455 (GG) 40456 (30 November 2016).

criminal litigation. There were 244 cases where people died while under police arrest (an increase of 4 per cent from 2014) and 124 rape cases were opened against police officers; 145 cases of torture were also reported.

In August 2015 the Commissioner of Police was investigated to determine whether she was fit to hold office. This followed the findings of the Farlam Commission on the Marikana incident of 2012. The commissioner has been under investigation since September 2014 and was on previous occasions found guilty of fraud, perjury, misconduct and contravention of police and labour legislation.⁴³ The president amended the Marikana Board of Inquiry's terms of reference in January 2016⁴⁴ to investigate whether

the National Commissioner, in taking the decision to implement 'the tactical option', ought reasonably to have foreseen the tragic and catastrophic consequences which ensued.⁴⁵

The General Regulations of the SAPS were also amended by the substitution of Regulation 8 (to clarify the ranking of officers): Regulation 8(1) read with the Schedule gives the National Commissioner the authority to determine a rank not mentioned in the list (Regulation 8(2), amending Schedule C of the original regulations dealing with distinctive badges). The amended regulations came into force on 1 June 2016.⁴⁶

The Minister of Police issued Disciplinary Regulations for the SAPS on 1 November 2016.⁴⁷ The purpose of the regulations is to 'support corrective labour relations in the service' and to promote mutual respect between the employers and employees.⁴⁸ GN R1361 also contains principles that underlie the regulations,⁴⁹ sets out different types of misconduct – including violence and acts of terrorism⁵⁰ – and makes provision for the appointment of disciplinary officers.⁵¹ The regulations also provide for an expeditious process⁵² and set out the various punitive and corrective measures that the disciplinary committee could award.⁵³ The procedures before, at and after the hearing are also regulated.⁵⁴

43 General Notice 981 (GG) 39279 (9 October 2015).

44 Proclamation 4 (GG) 39638 (29 January 2016).

45 General Notice 981 (n 43) para 2.2 of the Terms of Reference.

46 GN R563 (GG) 40008 (24 May 2016).

47 GN R1361 (GG) 40389 (1 November 2016).

48 *ibid* at reg 2.

49 *ibid* at reg 4.

50 *ibid* at reg 5.

51 *ibid* at reg 6.

52 *ibid* at reg 9.

53 *ibid* at regs 7–8, 10–12.

54 *ibid* at regs 11–17; reg 18 makes provision for transitional arrangements.

Correctional Services

Conditions in South African prisons remain challenging. Over the past year, there seems to have been an increase in incidents of assault on inmates, allegedly perpetrated by correctional officers.⁵⁵ In a 2015 report issued by Justice Cameron, the conditions in Pollsmoor Prison were highlighted as being especially problematic: bed space intended for 4 336 people accommodated 8 005 inmates.⁵⁶ The infrastructure in Pollsmoor was found to be outdated and insufficient, and overcrowding was found to be a massive problem. In the course of 2016 the Parliamentary Select Committee on Security and Justice visited the prison to ascertain whether conditions had improved since Justice Cameron's report was made public the previous year. Although the committee observed a marked improvement in the cleanliness in the prison, numerous obstacles remained, with the shortage of staff being prominent.⁵⁷

Nationally, while the prison population had been reduced from 187 000 in 2004 to 158 518 in September 2015, the shortfall in bed space remained 39 384 as there was space for 119 134 inmates only.⁵⁸ Overcrowding, as reflected in both national and international reports, therefore remained problematic.

In March 2016 the United Nations published a damning report on South African prisons.⁵⁹ This report was necessary in the light of South Africa's commitment to the provisions of the International Covenant on Civil and Political Rights, which was ratified in December 1998. The list of concerns included overcrowding, dilapidated infrastructure, unsanitary conditions, inadequate food, a lack of provision for inmates to exercise, poor ventilation and limited access for inmates to health services. In some

55 Ilze-Marie le Roux 'Inmates "Too Scared" to Report Attacks by Prison Officials' (*Eyewitness News*, 18 November 2016) <<http://ewn.co.za/2016/11/18/inmates-too-scared-to-report-attacks-by-prison-officials>> accessed 7 October 2017.

56 Kevin Brandt 'DA Slams Presentation on Pollsmoor Living Conditions' (*Eyewitness News*, 24 August 2016) <<http://ewn.co.za/2016/08/24/DA-slams-presentation-on-Pollsmoor-living-conditions>> accessed 7 October 2017; Ruth Hopkins 'Filth, Disease, Sex and Violence for Pollsmoor's Female Inmates' (*Mail & Guardian*, 4 March 2016) <<https://mg.co.za/article/2016-03-03-filth-disease-sex-and-violence-for-pollsmoors-female-inmates>> accessed 7 October 2017.

57 Monique Mortlock 'Overcrowding Still an Issue at Pollsmoor Prison' (*Eyewitness News*, 28 October 2016) <<http://ewn.co.za/2016/10/28/overcrowding-still-an-issue-at-pollsmoor-prison>> accessed 7 October 2017.

58 Anon 'Violent and Unsanitary – Inside SA's Overcrowded Jails' (*Rising Up*, 12 April 2016) <<http://risingup.co.za/violent-and-unsanitary-inside-sas-overcrowded-jails/>> accessed 7 October 2017.

59 Jeff Wicks 'UN Rights Body Releases Damning Report on SA Prisons' (*News24*, 11 April 2016) <<http://www.news24.com/SouthAfrica/News/un-rights-body-releases-damning-report-on-sa-prisons-20160411>> accessed 7 October 2017; see also the submission to the UN Commission of the Civil Society Prison Reform Initiative, Just Detention International, Lawyers for Human Rights and NICRO 'Thematic Report on Criminal Justice and Human Rights in South Africa' (OHCHR, March 2016) <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23064_E.pdf> accessed 7 October 2017.

cases the conditions resulted in as many as 90 prisoners sharing a single shower and toilet. Solitary confinement and segregation were commented on in particular.

Where maximum security prisons are concerned, extra harsh conditions prevail in that prisoners are locked up 23 hours a day for a minimum period of six months. In this regard, recommendations were made that these kinds of confinement should be used in exceptional circumstances only and strictly for short periods of time. Apparently, understaffing had played a large role in the prevailing segregation and confinement arrangements as it was simply easier and more effective to manage the prisons in that manner.

Rehabilitation is another burning issue, because various studies have indicated that approximately 85–94 per cent of prisoners in South Africa become re-offenders after their release from prison. One recommendation was to install surveillance cameras in all prison cells.⁶⁰ In response to a media query relating to the UN report, the DCS issued a press release indicating that in the process of ‘the broader transformation programme of prison to correctional centres’ various matters had been receiving priority attention, and concrete achievements had been attained.⁶¹

Despite the very negative local and international image of South African prisons, the Annual Report for the 2015/2016 financial year of the DCS highlighted the fact that some progress had been made. In this regard, the department managed to put 75 595 (74,30 per cent) sentenced offenders successfully through various correctional programmes during the review period.⁶² Significant achievements were also reported regarding parolees and probationers who had violated their conditions: of the 51 937 parolees, 98,78 per cent had complied with their conditions and 98,65 per cent of the probationers had remained violation-free. A further development entailed formalising a strategy for placing remand detainees under an Electronic Monitoring System (EMS) to be implemented in the 2016/2017 financial year. This strategy would allow the DCS to submit applications for EMS directly to courts. The initiative was introduced in July 2014 and involves an all-encompassing tracking system on a 24-7-365 basis.

Furthermore, programmes of rehabilitation and social re-integration were strengthened.⁶³ The staff shortages mentioned above were also dealt with: high-ranking posts, including vacancies for the National Commissioner, Chief Financial Officer and Chief Deputy Commissioner: Strategic Management, were filled. However, new

60 Also compare Anon ‘Popcru “Not Surprised” by UN Report on SA Prisons’ (*eNCA*, 13 April 2016) <<https://www.enca.com/south-africa/popcru-not-surprised-un-report-sa-prisons>> accessed 7 October 2017.

61 Department of Correctional Services ‘Response to Media Enquiry’ <<http://images.timeslive.co.za/pdf/STDigital/PrisonOverCrowdingResponse.pdf>> accessed 7 October 2017.

62 Department of Correctional Services ‘Annual Report 2015/2016 Financial Year’ (DCS, 2016) <<http://www.dcs.gov.za/docs/2016%20doc/DCS%20Annual%20Report%202015-16.pdf>> accessed 7 October 2017 9.

63 *ibid* 10.

appointments also needed to be reflected against resignations and terminations of employment. With regard to the latter, 97 per cent of corrupt staff members charged with offences were successfully prosecuted and found guilty.⁶⁴

In *S v Motlounge*⁶⁵ the Court dealt with four matters:

- an appropriate sentence to be imposed for murder;
- the order directing a parole board how to deal with the unexpired portion of a sentence in respect of a previous conviction;
- the implied repeal by the Firearms Control Act 60 of 2000⁶⁶ of the sentencing portion of unlawful possession of firearms of the Criminal Law Amendment Act 105 of 1997, as well as
- the costs order to be made in criminal proceedings.⁶⁷

The State appealed against the sentence imposed on Mr Oupa Motlounge, the respondent (Motlounge), after the Court *a quo* had convicted him of murder and for the unlawful possession of a semi-automatic firearm and ammunition. Motlounge was sentenced to 14 years' imprisonment for the murder, six years of which was suspended for a period of five years. In respect of the unlawful possession of a firearm and ammunition, taken together with the other sentence, a sentence of six years' imprisonment was imposed, half of which was suspended for a period of five years.⁶⁸ These sentences were ordered to run concurrently and Motlounge was therefore sentenced to an effective period of eight years' imprisonment. In addition, the Court *a quo* ordered that the eight-year sentence for the murder charge was to run concurrently with the existing sentence Motlounge was serving. In addition, any parole that might have been implemented or any other reduction in relation to the period to be served in relation to that conviction was also to apply to that conviction.⁶⁹ At the time of the murder Motlounge was on parole in respect of convictions for armed robbery and unlawful possession of a firearm and ammunition, for which he had been sentenced to ten years' imprisonment after sentences had been ordered to run concurrently. He was also declared unfit to possess a firearm and, when released on parole, one of the conditions prohibited him from being outside his home except for work.⁷⁰

64 *ibid.*

65 (182/15) [2016] ZASCA 96 (2 June 2016).

66 See 'Arms and Ammunition' below.

67 *Motlounge* (n 65) para 1.

68 *ibid* para 2.

69 *ibid.*

70 *ibid* para 4.

The convictions arose from an argument and a physical altercation that had ensued between Motloun and the deceased at a tavern after the deceased had made romantic advances towards a companion of Motloun's and the latter had responded violently. It was not in dispute that the deceased was the aggressor in both the verbal and the physical altercation, in response to which Motloun had gone home and returned to the scene with a firearm. When the deceased had appeared to be attempting to run Motloun over in the street outside the tavern with his motor vehicle, Motloun had fired a shot, causing the deceased to fall out of the vehicle. Motloun fired several further shots into the deceased as the latter lay on the ground, wounding him fatally.⁷¹

An appellate court may interfere with a sentence imposed by a lower court only when there is a material misdirection by the sentencing court.⁷² This dictum was established in *S v Malgas*,⁷³ where Marais JA held that an appellate court may interfere when the disparity between the sentence imposed by the trial court and that imposed by the appellate court, if it had been the trial court, can be described as 'shocking, startling or disturbingly inappropriate'.⁷⁴ When considering the following aggravating circumstances, it was found that the sentence of the Court *a quo* was in fact startlingly inappropriate: Motloun had gone to fetch a firearm when the fight was over; a considerable period of time had elapsed between the earlier altercation and the incident. Motloun was still on parole and he had breached his parole conditions by going to the tavern.⁷⁵ Interference on appeal was therefore deemed to be warranted.⁷⁶ The appeal against the sentence on the murder conviction was accordingly upheld, the conviction was set aside, and a sentence of 15 years was imposed.⁷⁷

The Court found that the Court *a quo*'s direction to the parole board that any parole provision for imprisonment for the previous conviction should coincide with the parole for the current offence had been an interference with the parole board's powers.⁷⁸ With regard to the costs order made by the Court *a quo* in terms of section 316B(3) of the Criminal Procedure Act 51 of 1977, the Court found that such an order requires both parties to argue the issue, which had not happened in this case. Furthermore, no costs had been incurred where the respondent had been represented by the Legal Aid Board. The costs order was accordingly set aside.⁷⁹

71 *ibid* para 2.

72 *ibid* para 5.

73 *S v Malgas* 2001 (1) SACR 469 (SCA).

74 *ibid* para 12.

75 *Motloun* (n 65) para 12.

76 *ibid* para 13.

77 *ibid* para 25.

78 *ibid* para 14.

79 *ibid* para 24.

In *Mapodile v Minister of Correctional Services*,⁸⁰ the applicant, a gay prisoner,⁸¹ had approached the Court to force the DCS to host him in a single cell or at least in a cell with inmates of the same sexual orientation⁸² because his cell mates were regarding him as a woman and treating him accordingly. His complaints to the authorities had fallen on deaf ears.⁸³ The matter was not opposed and the judge made the order.⁸⁴ The applicant's advocate indicated that:⁸⁵

Gays and lesbians had been part our society for many years. They are not associated with a particular race as perceived by some members of our society. African people, particularly Basotho, guided by their forefathers, had been using the word 'tarasi' for many years to describe gay or lesbian. There had not been any controversy around the issue of homosexuality in the community of Basotho. They always discouraged homophobia and had accorded respect to gays and lesbians.

The Court indicated⁸⁶ that as a result of colonialism and Christianity gays and lesbians had been denied their freedom to express themselves and their integrity had been infringed.

They were subjected to emotional torture to say the least and were forced to subordinate themselves to the societal norms and values and cultural practices which only recognised heterosexuality and widely accepted definition of 'man', 'woman' and 'spouse' as explained in the bible.⁸⁷

The Court referred to the right to human dignity⁸⁸ and the regulations of the DCS that explicitly state that prisoners should be held 'under conditions of human dignity'.⁸⁹ The regulations distinguish between male and female prisoners, prisoners of different ages and prisoners who have health or mental defects, but they do not refer to gay prisoners.⁹⁰ The Court found no reason why gay prisoners should not be awarded the

80 *Mapodile v Minister of Correctional Services* 2016 (2) SACR 413 (GJ).

81 *ibid* para 1.

82 *ibid* para 2.

83 *ibid* paras 6–8.

84 *ibid* para 3.

85 *ibid* paras 12–13.

86 With reference to *Fourie & Another v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at 439C and *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1998 (12) BCLR 1517 (CC) at 1521G.

87 *Motloung* (n 65) para 14.

88 Section 10 of the Constitution of the Republic of South Africa, 1996.

89 *Motloung* (n 65) para 24; see also ch II of GN R914 (GG) 26626 (30 July 2004).

90 *ibid* paras 26–29.

same protection⁹¹ and expressed the view that correctional facilities should not regard this as a favour to gay prisoners but as their right to dignity, privacy and equality.⁹²

DEFENCE

The Defence Laws Repeals and Amendment Act 17 of 2015 repeals several defence laws⁹³ as well as section 7 of the Castle Management Act 207 of 1993 that was deemed to be unconstitutional.⁹⁴ The Defence Special Tribunal Act 81 of 1998, the Demobilisation Act 99 of 1996 and the Termination of Integration of Intake Act 44 of 2001 are among the Acts that were repealed.

The Minister of Defence published regulations to deal with individual grievances:⁹⁵

A grievance includes, but is not limited to, a written expression of dissatisfaction by a member or employee regarding an official act or omission relating to their promotion, placement, course nomination, assessment or service benefits.⁹⁶

It excludes matters relating to disciplinary hearings or matters of professional misconduct. Moreover, a member or employee must resolve a matter through the relevant chain of command.⁹⁷

Of note is the fact that members of the Defence Force were deployed to assist the SAPS during the local government elections in 2016.⁹⁸

The Annual Performance Plan of the Department of Defence (DoD) indicates that the adoption and approval by Cabinet of the *2015 African Defence Review* enables its implementation in a planned manner, among other things by providing a platform to deal with constraints relating to defence research capability, infrastructure and facilities, and information management.⁹⁹ The two main mandates of the DoD are, first, the defence of South Africa and its sovereignty and territorial integrity and, secondly, to support South Africa's role in peace-keeping operations (regarding both peace support and post-conflict reconstruction) within any contexts that may be determined from time to time by the Southern African Development Community (SADC), the African Union (AU) or the UN.

91 *ibid* para 32.

92 *ibid* paras 31–32.

93 Schedule 1 of the Defence Laws Repeals and Amendment Act 17 of 2015.

94 Schedule 2 of the Defence Laws Repeals and Amendment Act 17 of 2015.

95 GN R1263 (GG) 40347 (14 October 2016).

96 *ibid* reg 1.

97 *ibid* reg 3.

98 GN 888 (GG) 40185 (3 August 2016).

99 <<http://www.dcs.gov.za/docs/2016%20doc/Annual%20Performace%20Plan%202016-2017.pdf>> accessed 12 December 2016.

With regard to pensions for military veterans, the Department of Social Development recently indicated that in the financial year 2016/2017, 162 eligible veterans received social assistance by means of the war veterans' grant. This was expected to decrease to 104 in the financial year 2017/2018, and to 62 in the financial year 2018/2019.¹⁰⁰ The monetary value of the war veterans grant as at 1 April 2016 was R1 520 per month.¹⁰¹

ARMS AND AMMUNITION

In 2017 the National Commissioner of Police published a notice of intent to destroy firearms, ammunition and firearm parts that were either surrendered or forfeited to the state.¹⁰²

The Arms Procurement Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Package (SDPP) published its report in June 2016.¹⁰³ The report set out the findings of the commission in Chapter 5; they are, among other things, that the South African National Defence Force (SANDF) required the necessary personnel and equipment to carry out its constitutional mandate¹⁰⁴ and that there was a need for new equipment.¹⁰⁵ Similarly, the commission indicated (with reference to historical data) that the South African Navy (SAN) and the South Africa Air Force (SAAF) required new ships and aircraft respectively, and equipment.¹⁰⁶ The commission also inquired whether the arms and equipment that were acquired in terms of the SDPP were being utilised to their full capacity.¹⁰⁷ It was further found that the 'SDPP projects had created or retained the number of jobs that were projected'.¹⁰⁸ The commission also investigated allegations that the award of certain contracts had been predetermined,¹⁰⁹ but came to the conclusion that the averments to

100 Department of Social Development 'Strategic Plan 2015–2020 and Annual Performance Plans 2016/17' (DSD, 12 April 2016) <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160412dsd.pdf>> accessed 8 October 2017.

101 GN R525 (GG) 39986 (12 May 2016).

102 GN 721 (GG) 40073 (15 June 2017).

103 GN 742 (GG) 40088 (25 June 2016).

104 *ibid* para 20.

105 *ibid* paras 25–29.

106 *ibid* paras 31–72, 73–159.

107 *ibid* paras 160–279.

108 *ibid* para 340.

109 *ibid* para 463.

that effect were not supported by evidence¹¹⁰ and they were accordingly rejected.¹¹¹ The commission found:¹¹²

[t]he evidence tendered before the Commission indicates that the various officials of the DOD, Armscor, the DTI and the National Treasury who were involved in the acquisition process, acted with a high level of professionalism, dedication and integrity. Despite the fact that numerous allegations of criminal conduct on their part were made, no evidence was found or presented before the Commission to substantiate the allegations.

The commission stated further that its findings were consistent with the findings of the Joint Investigating Team, the Auditor-General and the Armscor internal audits.¹¹³ The commission indicated that it would be virtually impossible to find evidence to sustain criminal prosecution 18 years after the SDPP and that such an investigation would serve no purpose. Various bodies had instituted criminal investigations over a period of ten years and ‘no prima facie evidence of criminal conduct [could be found] against anybody’.¹¹⁴ Similar investigations had been conducted in the ‘United Kingdom, France, Germany, Sweden and Switzerland and all were closed several years ago without any criminal prosecution being instituted against anybody’.¹¹⁵ The commission also decided not to make any recommendations with regard to procurement policies and procedures as they ‘have been overhauled and new policies put in place which now guide procurement of all military equipment’.¹¹⁶ Although the findings of the commission did not indicate any criminal activity or fraud, the commission’s work was still criticised because it had not considered all the evidence.¹¹⁷

In *S v Motloun*¹¹⁸ the Court found, on the matter of whether or not the Firearms Control Act 60 of 2000 implicitly amends the Criminal Law Amendment Act 105 of 1997, that the Court *a quo* had erred in its finding. The Court *a quo* had found that the Firearms Control Act had repealed section 51 of the Criminal Law Amendment Act.¹¹⁹

110 *ibid* para 464.

111 *ibid* paras 469, 484, 494, 505, 514, 550–551, 575, 631, 634.

112 *ibid* para 635.

113 *ibid* para 654.

114 *ibid* para 664.

115 *ibid*; see also paras 665–686.

116 *ibid* para 767. See also the official website of The Arms Procurement Commission ‘The Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Packages (SDPP)’ <<http://www.armscomm.org.za/>> accessed 8 October 2017.

117 See in this regard Marianne Tamm ‘Seriti Commission Findings on Arms Deal: But What About Those Two Shipping Containers Full of Documents?’ (*Daily Maverick*, 22 April 2016) <<http://bit.ly/2gykOPA>> accessed 8 October 2017; Editor ‘Editorial: Arms Deal Gets a Coat of Whitewash’ (*Mail & Guardian*, 22 April 2016) <<http://bit.ly/2gLxIC>> accessed 8 October 2017.

118 *Motloun* (n 65); see section 3.2 above.

119 *Motloun* (n 65) para 23.

TERRORISM

In *Okah v S*¹²⁰ the Supreme Court of Appeal had to interpret, among other things, section 15 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 that deals with the jurisdiction of offences.¹²¹ The appellant is a Nigerian citizen who has permanent residency status in South Africa. He appealed against his conviction and sentencing in the Gauteng High Court. He was tried for planning and executing two bombings in Nigeria that had led to the killing of 12 people and the injuring of 64 others. He was further charged with contravening 13 counts in relation to the Act, 12 of which related to the bombings in Nigeria and one to threats of destabilising terrorist activities against ‘South African entities that were commercially active in Nigeria’.¹²² At the time that the threats were made, he was already in custody.

The SCA discussed sovereignty but indicated that in relation to criminal law

[t]here is now recognition that the basic principle referred to above is losing ground ... there is a trend indicating that, where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements or their harmful effect occurred,¹²³

and ‘with the increase in international terrorist activity, states have largely co-operated in order to combat that scourge’.¹²⁴ The Court stated that the definition of ‘terrorist activities’ is wide enough to include activities committed in and outside South Africa.¹²⁵ According to the Court, the main question remained ‘to what extent extra-territorial jurisdiction is conferred by the Act in relation to offences created thereby’.¹²⁶ The Court found that the reference to ‘specified offence’ in section 15(1) is wide enough to cover any offence, whether relating to South Africa or not and whether the offence is committed in or outside the country.¹²⁷ With regard to counts 2, 4, 6, 8, 10 and 12, the Court found that the South African courts had extra-territorial jurisdiction because the appellant had ‘conspired, planned and instructed people in relation to the execution of the bombing in Abuja while in South Africa’.¹²⁸ The Court found further that the rules of extra-territorial jurisdiction did not apply to counts 1, 3, 5 and 7 and the appeal

120 (19/2014) [2016] ZASCA 155 (3 October 2016).

121 *ibid* para 35.

122 *ibid* paras 1–2.

123 *ibid* para 29.

124 *ibid* para 31.

125 *ibid* para 33.

126 *ibid* para 34.

127 *ibid* count 9 para 46; count 11 para 47.

128 *ibid* para 48.

therefore succeeded in this regard.¹²⁹ The conviction on count 13 was overturned due to a lack of evidence.¹³⁰

The Court also reconsidered the sentence,¹³¹ taking the severity and the circumstances of the bombing into account: ‘The effective sentence is 20 years’ imprisonment.’¹³² The importance of this decision is that the courts would not hesitate to apply extra-territorial jurisdiction in the case of terrorist activities. A court would, however, still reconsider the circumstances and the evidence in the same manner as if the incident had happened in South Africa, ensuring a fair hearing to the accused or the appellant (in this case).

The UN Security Council identified various entities and persons as those who may be connected with terrorist activities. Several notices have been published in terms of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.¹³³

CORRUPTION

An anti-corruption protest march to the Union Buildings in Pretoria took place on 30 September 2015.¹³⁴ The protest was instigated by the Congress of South African Trade Unions (Cosatu) and, although the ANC government was against this decision, the organisers stated that the march was non-political and was against corruption in general. The march was also supported by the National Union of Metalworkers of South Africa (Numsa) and the National Development and Labour Council (Nedlac). This anti-corruption march also displayed slogans demanding better service delivery and greater transformation.

In the period under review, much emphasis was placed on the *State of Capture Report*, the last report submitted by the outgoing Public Protector, Advocate Thuli Madonsela, and matters linked to it. Much was linked to the Gupta family and their ties with the then president, Zuma, and the government. The report was issued under section 182(1)(b) of the South African Constitution, section 3(1) of the Executive Members Ethics Act 82 of 1998 and section 8(1) of the Public Protector Act 23 of 1994.

129 *ibid* paras 35–42.

130 *ibid* para 49.

131 *ibid* paras 50–54.

132 *ibid* para 55.

133 Proclamation 60 (GG) 40390 (1 November 2016); Proc 47 (GG) 40181 (2 August 2016); Procs 26–30 (GG) 39974 (5 May 2016); Proc 13 (GG) 39863 (29 March 2016); Procs 7–8 (GG) 39737 (26 February 2016); Proc 45 (GG) 39492 (10 December 2015); Procs 42–43 (GG) 39332 (28 October 2015); Proc 41 (GG) 39307 (21 October 2015); Procs 37–38 (GG) 39124 (21 August 2015); Procs 22–23 (GG) 38795 (15 May 2015).

134 Greg Nicolson ‘Anti-corruption March is Gaining Ground’ (*Daily Maverick*, 16 September 2015) <<https://www.dailymaverick.co.za/article/2015-09-16-anti-corruption-march-is-gaining-ground/>> accessed 8 October 2017.

This followed the receipt of three complaints in connection with alleged improper and unethical conduct relating to the appointment of cabinet ministers and directors and the awarding of state contracts and other benefits to the Gupta-linked companies. The report was finally released following a High Court order.¹³⁵ A massive document encompassing 355 pages, it was first believed to be an interim report; however, when it became clear that the report was intended to be final, the president interdicted its publication on the basis that it was unlawful.¹³⁶ In this regard, the claim was made that the conduct of the Public Protector in finalising the report had been unlawful because the president had not had sufficient time and opportunity to deal with the report meaningfully and to comment on its findings.¹³⁷

In essence, the report deals with the alleged corrupt relationship between the president and certain cabinet ministers, on the one hand, and a wealthy Indian family, on the other.¹³⁸ Apparently, various deals had been struck behind the scenes concerning the appointment of particular ministers and the reshuffling of staff and/or portfolios – seemingly all to the benefit particular individuals, friends and family members. Both Deputy Finance Minister Jonas and Vytjie Mentor provided damning evidence against the president and the Gupta family.¹³⁹ The family’s power over the president regarding appointments¹⁴⁰ also included firing certain ministers or forcing the resignation of individuals who were considered stumbling blocks – for example, Minister Nene – in insisting on upholding the rules.¹⁴¹

Essentially, the report called for the appointment, within 30 days, by the president of a commission of inquiry headed by a judge solely selected by the Chief Justice, who should provide the name to the president. The commission had to be resourced sufficiently and the judge had to have the power to appoint his or her own staff to investigate the matter fully. The commission had the same powers as the Public Protector and was required to complete its task and present its findings to the president within 180 days. Also relevant here, depending on the final outcome, was the assurance that the Executive Ethics Code was to be amended and, where it appears crimes have been committed, such instances have to be brought to the attention of the Prosecuting Authority. Overall,

135 See Anon ‘[Must Read] The Full State Capture Report’ (*Eyewitness News*, 2 November 2016) <<http://www.ewn.co.za/2016/11/02/must-read-the-full-state-capture-report>> accessed 8 October 2017.

136 Also see Zelda Venter ‘Zuma: State Capture Report Unlawful’ (*IOL*, 31 October 2016) <<https://www.iol.co.za/news/politics/zuma-state-capture-report-unlawful-2085117>> accessed 8 October 2017.

137 Also compare Ernest Mabuza ‘Maimane to Lay Charges against Zuma Over “State Capture”’ (*The Times*, 14 November 2016) <<http://www.timeslive.co.za/politics/2016/11/14/maimane-to-lay-charges-against-Zuma-over-state-capture>> accessed 3 December 2016.

138 See Lily Kuo ‘Can’t Look’ *Quartz Africa Weekly Brief* (3 November 2016) 2.

139 Anon (n 136) 89.

140 For example, Anon ‘State of Capture Report’ (*Mining Weekly*, 2 November 2016) <<http://www.miningweekly.com/article/state-of-capture-2016-11-02>> accessed 8 October 2017 at 105.

141 Anon (n 136) 89–90.

the Public Protector is responsible for monitoring the implementation of any remedial action, whereas the Secretary of Parliament and the Director-General in the Presidency are to provide implementation reports periodically to the Public Protector.¹⁴²

During the period under review, Eskom's chief executive officer, Brian Molefe, resigned.¹⁴³ As a major state-owned enterprise, Eskom requires public confidence in its operations, functioning and leadership. His conduct, also implicated in the *State of Capture Report* alluded to above, stands to be investigated by a pending judicial commission of inquiry and by other relevant law-enforcement authorities. Eskom, and its connections with the Gupta family, also featured prominently in the report. Molefe had received 58 phone calls from the eldest of the Gupta brothers between August 2015 and March 2016, immediately prior to the Guptas' purchasing SA Optimum coal mine for R2,5 billion. Benefitting greatly in this process was Tegeta Exploration and Resources, a Gupta-owned enterprise that had earned approximately R600 million from supplying coal to Eskom.¹⁴⁴

Underlying the legal battles against the previous Finance Minister, Pravin Gordhan, were the ongoing attempts by the Treasury to thwart deals and transactions that would benefit the Gupta family and their networks.¹⁴⁵

A more recent report published in October 2016 listed the ten top corruption scandals in South Africa during the 2015/2016 period.¹⁴⁶ These scandals included local government, which is considered to be the most corrupt institution in South Africa: two-thirds of municipalities and more than 40 per cent of municipal entities are involved in a variety of alarming deals involving supply-chain management. A staggering number of 189 employees, 21 councillors and 198 suppliers benefitted from such deals.

Linked to this is the second most important scandal: tenderpreneurship fraud, where government employees partner with persons who are politically connected to win tenders from government. In some instances, despite the tenderer having been successful, no services were rendered or no products were delivered. In Limpopo province irregular expenditure almost doubled from R2 million to R3,5 million between 2012/2013 and

142 Also see Anon (n 136) 355.

143 Corruption Watch 'Corruption Watch Welcomes Molefe's Resignation' (*Corruption Watch*, 11 November 2016) <<http://www.corruptionwatch.org.za/corruption-watch-welcomes-molefes-resignation/>> accessed 8 October 2017.

144 Anon (n 136) 20.

145 *ibid* at 131–2; deals involving various incidents where Treasury blocked transactions or thwarted the Gupta family's plans; see also Lynsey Chutel and Lily Kuo 'What the "State Capture" Report Tells us About Zuma, the Guptas, and Corruption in South Africa' (*Quartz Africa*, 3 November 2016) <<http://qz.com/825789/state-capture-jacob-zuma-the-guptas-and-corruption-in-south-africa/>> accessed 8 October 2017.

146 Nedu 'Here are the Top 10 Corruption Scandals in South Africa' (*Buzz South Africa*, 31 October 2016) <<https://buzzsouthafrica.com/here-are-the-top-10-corruption-scandals-in-south-africa/>> accessed 8 October 2017.

2013/2014, whereas in KwaZulu-Natal irregular expenditure amounted to about R4,32 billion during the latter period.

Fourth in line is the SAPS. Included in corruption are a number of police officials who were arrested for bribery and corruption, the arrest of the Western Cape Police Commissioner, Lamoer, on corruption charges and the R500 million lease of the police's new headquarters in Pretoria. Also on this list are the Metro Police and their conduct, including brutality and soliciting and accepting bribes from motorists. Furthermore, matters linked to the pre-payment of electricity meters in Tshwane were listed. For example, an amount was paid to install more than 800 000 meters and manage the project for a period of eight years; however, when the contract was terminated, a total of only 12 930 meters had been installed.

The Public Protector also exposed the Prasa scandal, where R620 million was wasted on unsuitable trains despite Prasa having been forewarned that the specifications would not suit the railways and track conditions in South Africa.

Also on the list was the issue of the falsification of qualifications, including fraudulent curricula vitae, especially among government staff applying for and being appointed to high-ranking and high-earning positions. Parliament was also implicated, in that millions were spent on various awards and award ceremonies, illicit travel and accommodation, and on irregularly awarded contracts to beneficiaries. In addition, there was the massive amount of R246 million that had been spent on the then president's home at Nkandla.

The president referred several procurement and tender matters relating to the DCS to the Special Investigating Unit and the Special Tribunal in terms of the Special Investigating Units and Special Tribunals Act 74 of 1998.¹⁴⁷

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