IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: (YES) / NO

(2) OF INTEREST TO OTHERS JUDGES: (YES) / NO

(3) REVISED

15/5/2020

CASE NUMBER: 21512/2020

IN THE MATTER BETWEEN:

KHOSA, MPHEPHU	FIRST RESPONDENT
MONTHSHA, NOMSA	SECOND APPLICANT
MUVHANGO, THABISO	THIRD APPLICANT

AND

MINISTER OF DEFENCE AND MILITARY VETERANS	FIRST RESPONDENT
SECRETARY FOR DEFENCE	SECOND RESPONDENT
CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	THIRD RESPONDENT
MINISTER OF POLICE	FOURTH RESPONDENT
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	FIFTH RESPONDENT

ACTING CHIEF OF THE JOHANNESBURG METROPOLITAN POLICE DEPARTMENT	SIXTH RESPONDENT
CHIEF OF THE EKURHULENI METROPOLITAN POLICE DEPARTMENT	SEVENTH RESPONDENT
OFFICE OF THE MILITARY OMBUD	EIGHTH RESPONDENT
INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	NINTH RESPONDENT
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	TENTH RESPONDENT

JUDGMENT

FABRICIUS J

[1] It has long been debated by renowned philosophers of what the terms would be of what they called a 'social contract' between the populace and a legitimate government. Just one example: Kant was of the view that such a contract implied an idea of reason which obliged every legislator to frame its laws in such a way that they could have been produced by the united will of a whole nation and obligate each citizen as if he had consented. Kant concluded that this imaginary act of collective consent 'is the test of the rightfulness of every public law'. Aristotle, Bentham, Mill and Rawls had different views, and these are collected and discussed in 'JUSTICE, WHAT'S THE RIGHT THING TO DO?' by Michael J Sandel published by Farrar, Straus, and Giroux, New York in 2009. What social contract exists now between the South African population and the government is fortunately defined and established by the Constitution of the Republic of South Africa which came into force in 1994. Section 1 of Chapter 1, the Founding Provisions, tell us that the Republic is one founded on values of human dignity, the achievement of equality

and the advancement of human rights and freedoms, amongst others. In particular it also provides for the supremacy of the Constitution and the rule of law. Chapter 2 of this Constitution is the one that in my opinion is always regarded by the public as being one of the most 'advanced' constitutional documents in the world. I do not think that they have in mind all of the other chapters of the Constitution when this praise is uttered. The Bill of Rights is the cornerstone of democracy in this country and it enshrines the rights of all people and affirms its democratic values of human dignity, equality and freedom which must be respected, protected, promoted and fulfilled by the state and all organs of state. See sections 7 and 8 of Chapter 2 of the Constitution.

[2] The urgent application before me is of an unusual nature in as much as on a first reading it only seeks me to restate the law. The law in this context would be the relevant provisions of the said Constitution, the Disaster Management Act 57 of 2002, International Documents relevant in the context of section 39(1)(b) of the Constitution, such as the **Universal Declaration of Human Rights of 1948**, the **International Convent on Civil and Political Rights of 1976** (a treaty which South Africa has ratified and which is thus part of South African law), the **United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984** ('Torture Convention') which was also ratified and domesticated through the Prevention and Combating of Torture of Persons Act 13 of 2013 ('Torture Act'). And further, the domestic law, namely the South African Police Act 68 of 1995, the Defence Act 42 of 2002, the Criminal Procedure Act 51 of 1977 and Military Ombud Act 4 of 2012 as also the Independent Police Investigative Directorate Act 1 of 2011.

[3] The urgent application before me consists of some 1300 pages which were delivered to me on the afternoon of 2 May 2020. The heads of argument of the parties consisting of some 280 pages were delivered to me during the late afternoon of Monday, the 4th of May 2020. The hearing was set down for Tuesday the 5th May 2020 and continued on the 6th May 2020. It is evident that this process is not the usual one as envisaged by the Rules of Court relating to urgency and the particular Practice Manual of this division pertaining to the same topic. I decided however to condone all non-compliance because of the nature of the application and the relief sought, which in my view all had to be considered carefully and properly and urgently in the context of the state of affairs that now exists under the Disaster Management Act 57 of 2002, as well as the state of the South African economy which existed immediately, but also for a fairly long period of time, before the relevant decisions in terms of the Disaster Management Act were taken by the President, which provided for a 'lock-down' in terms of Regulations that were published from time to time as well as amended on occasions. In law context is everything and as will become apparent when I deal with the particular relief that was ultimately sought by the applicants, I have kept the context in mind as it forms an important part of the applicants' case as well as that of certain of the respondents.

[4] During the last year or so international rating agencies classified the South African investment rating as being of "junk" status which of course had its own consequence on the financial markets, on the value of the Rand, and the ability of the government to borrow money on international markets. Added to that was the

fact that there is vast unemployment in South Africa, substantial inequality between various groups of our population, lack of basic facilities such as electricity and water, the supply of electricity, and very little foreign investment which could have alleviated the situation. Coupled to that are the problems that have been grabbled with for years, relating to State Owned Enterprises which by any definition were all insolvent, and unable to function either properly or at all from time to time. All of this obviously had an effect on the mood of the nation, if I could call it that, and especially the youth who were faced with limited employment opportunities and the lack of any hope to obtain a proper education. These are unfortunately the realities and they play a role in this application if it is read properly as a whole.

[5] I must however add that this case is not concerned with the question whether or not any of the Regulations promulgated are unlawful and thus invalid because they are not rationally related to their purpose, ie. to contain the spread of the coronavirus. Rationality is part of the rule of law requirement. It is viewed objectively and it is irrelevant that a decision was made mistakenly or in good faith. See *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)* at par 20.

[6] A seemingly irrational Regulation seems to be that one can purchase only certain items at a super-market, whilst not others. It makes no sense and it affects economic progress that must go hand-in-hand with the concerted effect by all, including the citizenry, to contain the virus. It should not be the choice of either the public health or the state of the economy. It is a necessity to safeguard both. The

virus may well be contained (but not defeated until a vaccine is found) but what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and overall, the maintenance of the rule of law. The answer in my view is: there is no point.

[7] However, I need to say something in the context of the present state of affairs and the application as a whole. The populace must be able to trust the government to abide by the rule of law and to make rational Regulations to promote their stated purpose. These should intrude upon the rights of people (and businesses) either not at all or if they do, or justifiably must, the least restrictive measures, must be sought, applied and communicated to the public. In return the Government can justifiably expect the citizens to co-operate for the common goal, take responsibility to ensure their own safety and that of others. The social contract that I have briefly referred to will then take its rightful constitutional place for the benefit of the nation and the State. If there is no such community of interest, the whole exercise and purpose of a lock-down will fail and a wasteland and social unrest awaits us all. This citizenry must also take responsibility to achieve the stated goal even when they are exercising their rightful freedom of choice.

[8] Returning then from the duty of the population to the duty of the government. I must point out, as I will again hereunder, that the founding values of our Constitution include a democratic government based on the principles of accountability, responsiveness and openness. The public administration, which includes all organs of State, must be accountable and transparency must be

fostered by providing the public with timely, accessible, accountable and accurate information.

See S. 195(1)(g) of the Constitution, and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer South African Social Security Agency and Others* 2014 (9) SA 179 (CC) at par [50].

[9] Thus, if the Government is held to these Constitutional obligations and the citizens trust is restored, and lawful rational Regulations are obeyed, the expected flood of litigation will retreat and the spread of the virus will be contained until the appropriate vaccine is found. The fact of the matter is thus simply the following: Communality of failure.

THE PARTIES BEFORE COURT:

[10] The Minister of Defence and Military Veterans ('Defence Minister') is the Cabinet Minister responsible for the South African National Defence Force ('SANDF') in terms of section 201(1) of the Constitution. The second respondent, the Secretary for Defence is appointed in terms of section 7 of the Defence Act 42 of 2002 ('Defence Act') and is responsible inter alia for advising the Defence Minister on defence policy matters and for monitoring compliance with the policies and directions issued by the chief of the SANDF by the Defence Minister. The third respondent is the Chief of the SANDF appointed in terms of section 13 of the Defence Act, and is responsible amongst others for formulating and issuing military policies and doctrines, training the SANDF, and to act in accordance with

Constitution and the law, including customary international law and international agreements binding on the Republic.

[11] In terms of section 200 of the Constitution, the Defence force must be structured and managed as a disciplined military force. Its primary objective is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force (See sections 200(1) and 200(2) respectively). The fourth respondent is the Minister of Police, who is the Cabinet Member responsible for the Police Services in terms of section 206 of the Constitution. The fifth respondent is the National Commissioner of the South African Police Services ('SAPS Commissioner') who is appointed in terms of section 207 of the Constitution to exercise control over and manage the Police Service.

[12] The sixth respondent is the Chief of the Johannesburg Metropolitan Police Department which is a municipality police service established in terms of section 64A of the South African Police Service Act 68 of 1995, for the city of Johannesburg Metropolitan Municipality.

[13] The seventh respondent is the chief of the Ekurhuleni Metropolitan Police Department which is a municipal police service established in terms of section 64A for the Ekurhuleni Metropolitan Municipality.

[14] The eighth respondent is the office of the Military Ombud which is an office established by the Military Ombud Act 4 of 2012 to investigate complaints by

members of the SANDF regarding their working conditions and complaints by members of the public about the 'official conduct' of the SANDF. No relief was sought against the Ombud including a costs order. The application in the context of this respondent was said to be intended to support the purpose of the office and ensure a proper investigation which will be credible and independent. I will return to the role of the Ombud later in this judgment.

[15] The ninth respondent is an Independent Police Investigative Directorate ('IPID'). IPID is an investigative body established by the Independent Police Investigative Directorate Act 1 of 2011 mandated to investigate police misconduct and offences. No relief was sought against this respondent but applicants sought to ensure that any investigation done would be credible and independent.

[16] The tenth respondent is the Minister of Cooperative Governance and Traditional Affairs, the cabinet member responsible for the Disaster Management Act. No relief is sought against this Minister but she was cited for her potential interest in the matter as the Minister who declared the state of disaster.

THE HEARING:

[17] I am glad to say that the hearing was conducted in the most amiable manner and every counsel conducted himself/herself with the greatest degree of professionalism and dignity. I am proud to say that the South African public as well as the respondents were well served by all the counsel who appeared before me. The arguments were well prepared and to the point. Obviously I as Judge was obliged to put certain problems to counsel that I had with the relief sought, and

these were promptly and properly addressed to such an extent that towards the end of the hearing I was handed a draft order by the applicants which in a number of material respects, asked for lesser relief than that sought in the original Notice of Motion, and accordingly the last hours of argument concerned themselves with the relief sought in that particular order.

[18] The Socio-Economic Rights Institute was admitted as an *amicus curiae* and supplied me with written heads of argument which I undertook to consider for purposes of my judgment. No oral argument was necessary, and was thus not delivered. The Fair and Equable Society sought leave to intervene as an applicant, and after having listened to argument relating to urgency of the application, and the nature of the interest that this applicant either had or did not have, I decided that it had no substantial interest in the application brought by the present applicants, and that the matter was not urgent in any event, because this party had waited about one month before it launched its application obviously in the hope that it could ride on the back of the present applicants. There was no basis for this hope and what was even more disturbing was that the particular members of the public who were said to have suffered at the hands of the SAPS and SANDF, had all allegedly been either assaulted, shot and even murdered by the Johannesburg Metropolitan Police Department during the first ten days or so of April 2020. Despite that, it was common cause that no complaint has as yet been laid by these persons or by the Society. In the light of those facts seen cumulatively, I struck the matter off the roll but made no cost order. This Society has other remedies at its disposal, and obviously the first would be to register a complaint with the relevant authorities, to ensure that the complaints are properly investigated, and then if necessary to

approach the court in its own right for an order that would be appropriate having regard to the facts then at its disposal.

[19] As I have mentioned in my introductory paragraphs, an important factor arose during argument and that is also contained in all the affidavits when read together, is that I and counsel were at idem that at present there is a large measure of distrust between the South African populace and the government. This distrust relates primarily to the functions of the respondents and how they treat the persons throughout South Africa in the context of the Regulations made under the Disaster Management Act. The fear of the population relates at present not only to the fear of contracting the virus, but also to the fear of what will happen after the national lock-down is called off. It is plainly clear (counsel in court admitted that a Judge is allowed to read newspapers to keep himself or herself informed of current events) that the present lock-down measures will result in massive unemployment with all its consequences relating to the inability to provide each particular family with sustenance and an income. It is clear that thousands of small businesses have been adversely affected and many of them will probably never be re-established. Unemployment will become worse and many families, in fact most likely millions, will think about the future with a great deal of insecurity and despair. Added to that is that both the Commissioner of South African Revenue Services and the Minister of Finance have told the public about the billions of Rand that are lost every month, unrecoverable in my view, as a result of the lock-down Regulations, and the fact that thousands of businesses have ground to a halt. This has of course a snowball effect in as much as the State is deprived of revenue that it would receive by way of various forms of taxes. It is no exaggeration to say that the national psyche has thus

been negatively affected by the lock-down Regulations. How this will ever be rectified nobody knows, and the public is not told. It was therefore my view, and counsel accepted it as well, that the application should be seen in the light of the context that I have briefly referred to. I must emphasise that all counsel were in agreement that a lock-down was necessary, and I must add that I am of the same view less there be any doubt about that. The public is however entitled to be treated with dignity and respect whether rich or poor. Section 7 of the Bill of Rights makes this abundantly clear and there is no doubt about that. They are also entitled to human dignity and this right needs to be respected and protected as again made abundantly clear by section 10 of the Bill of Rights. Similarly the public is entitled to the right to life by way of section 11, and everyone has the right to freedom and security of the person according to the provisions of section 12 which includes the right to be free from all forms of violence from either public or private sources, not to be tortured in any way, and not to be treated or punished in a cruel, inhuman or degrading way. Section 12(2) provides that everyone has the right to bodily and psychological integrity which includes the right to security in and control over their body. Section 21 deals to the right to a basic education and section 31 entitles all members of the community to enjoy their culture, practice their religion, use their language and to form, join and maintain religious and linguistic associations in other organs of civil society. Section 35 deals with the rights of an arrested, detained and accused person. An important section in the present context is section 36, which deals with limitation of rights and states that the rights in the Bill of Rights may only be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account a number of factors, the most

important of which for present purposes is the question whether or not the State has introduced less restrictive means to achieve the purpose of any particular Regulation made in terms of the management of the Disaster Act (Section 36(1)(e)). Some of these rights, including the right to equality, human dignity, life, freedom of security of the person and arrested and detained and accused persons, may not be derogated from even in a state of emergency.

[20] All of these rights may be enforced by anyone acting in their own interest or acting on behalf of another who cannot act in their own name, or acting as a member of, or in the interest of group or class of persons or acting in the public interest by approaching a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may then grant appropriate relief including a declaration of rights. Declaratory orders are discretionary and flexible and all relevant circumstances must be considered. It is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values.
See: *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paragraph 107.

[21] The court is given certain powers in constitutional matters and when deciding such, section 172 provides that a court must declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency and make any order that is just and equitable. I will deal with this section again hereunder.

RELIEF SOUGHT:

[22] As I have said, the relief sought by the applicants was informally amended by the handing up of a draft order during the course of the proceedings on the second day of the hearing. It is my view that the relief sought needs to be considered in terms of the relevant legislation, the Constitution and various other documents and directives that pertain to the functions of the various respondents. I will later in this judgment refer to some of those. The relief sought must also be seen in the context of the situation that South Africa finds itself in at the moment as I have said. There was no argument pertaining to the urgency of this application and in any event, I would have held that it is extremely urgent.

[23] The relief sought was ultimately the following:

> *'In terms of sections 38 and 172(1)(b), read with section 21(1)(c) of the Superior Courts Act, 10 of 2013, it is declared that, during and notwithstanding the declaration of the State of Disaster and the Lockdown under the Disaster Management Act 57 of 2002.*
>
> *2.1 all persons present within the territory of the Republic of South Africa are entitled to (among others) the following rights, which are non-derogable even during states of emergency:*
>
> *2.1.1 the right to human dignity (section 10 of the Constitution);*
>
> *2.1.2 the right to life (section 11 of the Constitution);*
>
> *2.1.3 the right not to be tortured in any way (section 12(1)(d) of the Constitution);*
>
> *2.1.4 the right not to be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e) of the Constitution);*
>
> *2.2 under section 199(5) of the Constitution, the South African security services, which include the South African National Defence Force ("**SANDF**"), the South African Police Service ("**SAPS**"), and any Metropolitan Police Department ("**MPD**"), must act, and must instruct their members to act, in accordance with the Constitution and the law, including*

customary international law and international agreements binding on the Republic;

2.3 *as organs of state, the first to seventh respondents, the SANDF, the SAPS and any MPD are obliged, under section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights, including those enumerated above;*

2.4 *members of the SANDF, the SAPS and any MPD remain bound by section 13(3)(b) of the South African Police Service Act 68 of 1995 (read with section 20(1)(a) of the Defence Act 42 of 2002), to use only the minimum force that is reasonable to perform an official duty;*

2.5 *members of the SANDF, the SAPS and any MPD, as well as their commanders or superiors, including each of the first to seventh respondents, are bound by the provisions of the Prevention and Combating of Torture of Persons Act 13 of 2013, and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.*

3. *The first to fourth respondents, within their respective areas of authority, shall:*

3.1 *within five days, pending the outcome of disciplinary proceedings, place on precautionary suspension, on full pay, all members of the SANDF who were present at or adjacent to 3885 Moeketsi Street, Far East Bank, Alexandra, Johannesburg on 10 April 2020;*

3.2 *within two days, command all members of the SANDF, SAPS and any MPD to adhere to the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment, and to apply only the minimum force that is reasonable to enforce the law;*

3.3 *within five days, warn all members of the SANDF, the SAPS and any MPD, as well as their entire chains of command, that any failure to report, repress and prevent acts of torture or cruel, inhuman or degrading treatment or punishment shall expose them each individually to criminal, civil and/or disciplinary sanctions;*

3.4 *within seven days, lodge affidavits with this Court confirming that the above has been done.*

3.5 *It is recorded that the sixth respondent shall immediately commence a process to place the members of JMPD who were present at or adjacent to 3885 Moeketsi Street, Far East Bank, Alexandra, Johannesburg on 10 April 2020 on suspension, pending an investigation into charges of misconduct.*

4. *The first and fourth respondents shall, within five days:*

4.1 *develop and publish a code of conduct and operational procedures, regulating the conduct of members of the*

SANDF, SAPS and MPDs in giving effect to the declaration of the State of Disaster.

4.2 *widely publish the following, in newspapers of national and provincial circulation; electronic platforms available to the government such as WhatsApp, Facebook and Twitter, and national and provincial radio stations:*

4.2.1 *guidelines about the circumstances when the use of force may be used in strict compliance with section 49 of the Criminal Procedure Act 51 of 1977;*

4.2.2 *guidelines about the enforcement of the Lockdown Regulations and any other Regulations issued during the State of Disaster;*

4.2.3 *guidelines about enforcing social distancing and the restriction of movement and other activities, at each of the different Stages of Alert during the State of Disaster;*

4.2.4 *guidelines about when a person may be arrested and alternative means of securing their attendance at trial.*

4.2.5 *information regarding where members of the public may lodge complaints against members of the SANDF, the SAPS and other any enforcement agency/officer.*

4.3 *lodge affidavits with this Court confirming that the above has been done.*

5. *The first to sixth respondents shall, within five days:*

5.1 *establish a freely accessible mechanism for civilians to report allegations of torture or cruel, inhuman or degrading treatment or punishment, committed by members of the SANDF, the SAPS or any MPD for the duration of State of Disaster.*

5.2 *widely publicise such mechanism throughout South Africa via television, radio and digital media in all eleven official languages.*

6. *The first and fourth respondents shall:*

6.1 *ensure that the internal investigations into the incidents listed below are completed and reports are furnished to this Court, on or before 8 May 2020:*

6.1.1 *the treatment of Mr Collins Khosa;*

6.1.2 *the treatment of any other person whose rights may have been infringed during the State of Disaster at the hands of members of the SANDF, the SAPS and/or any MPD.*

6.2 *immediately lodge each such report with this Court.*

6.3 *furnish such reports to the applicants' legal representatives.*

7. *The eighth and ninth respondents are ordered to file their report of their investigations to this Court by 8 May 2020.*

8. *The first to fifth respondents shall, jointly and severally, bear the costs of this application, including the costs of two counsel.'*

[24] In the introduction to applicants' heads of argument the following appears and I quote:

1. *This case concerns torture and brutality committed against civilians by members of the South African security forces, in the course of a nationwide joint operation to enforce unprecedented restrictions on civilian movement and activity, imposed by Government to combat the spread of the COVID-19 Coronavirus pandemic.*

2. *These restrictions (collectively called "**the Lockdown**") have been in place since 26 March 2020 and will remain in place, to varying degrees, indefinitely.*

3. *The Lockdown is being enforced by members of the South African Police Service ("**SAPS**") and Municipal Police Departments ("**MPDs**"). They are being assisted by 76,000 members of the South African National Defence Force ("**SANDF**"), in a joint operation (called "**Operation Notlela**", meaning "lock") which commenced on 26 March 2020 and is due to conclude on 26 June 2020, but may be extended.*

4. *There is evidence that several civilians have been brutalised and tortured – some to death – by members of the SANDF, the SAPS and MPDs ("**security forces**") enforcing the Lockdown. These are instances of "**Lockdown brutality**".*

5. *This application is brought by the family of one man – Mr Collins Khosa – who was brutalised, tortured and murdered by members of the security forces, at his home, on 10 April 2020. Two of the applicants were themselves also brutalised and tortured on the same occasion.*

6. *This case is not about the justification for the Lockdown or its extent. It is about combating Lockdown brutality.*

7. *Specifically, it is about whether the officials in command of the security forces – the first to seventh respondents (the "**commanding officers**") – have done what the Constitution requires them to do in order to combat Lockdown brutality.*

8. *The commanding officers say they have. The applicants say they have not, and ask this Court to order them to do what the Constitution commands.*

9. *Various relief is sought against the first to seventh respondents. They all oppose this application, on grounds that broadly overlap. For convenience, the first to seventh respondents shall be referred to as "**the respondents**".*

10. *No relief is sought against the eighth to tenth respondents; they are cited only for the interest they may have in the matter. They do not oppose the application, but the eighth and ninth respondents have filed explanatory affidavits.*

[25] The above mentioned rights have been curtailed substantially and have negatively affected just about every business, every private household and every person whilst it is a trite law that when rights are restricted or derogated from it should happen within the confines of section 36(1)(e) which provides, for a less restrictive means enquiry to achieve the stated purpose. The Disaster Management Act also creates offences and penalties, and it is apparent from newspaper reports that almost 20 000 persons on day 42 of the 'lock-down' have been made criminals. The consequences thereof have perhaps not been sensibly considered, in as much as a criminal conviction impedes or even prohibits further employment opportunities. Perhaps an administrative fine that could be paid Solidarity Fund would have been a better option. However these remarks are *obiter* and do not form part of the applicants' cause of action and therefore I will say nothing further. I do think however that a Courts' comments especially during extraordinary times can and should reflect the general views of the public. I similarly again emphasise that the applicants' seek no declaration that any particular Statute or Regulation should be struck down as being invalid on grounds of irrationality.

THE LOCK-DOWN:

[26] On 31 December 2019 a novel pneumonia of unknown cause was detected in Wuhan, China. This virus known as COVID-19 (coronavirus) is a highly communicable and infectious disease and was so declared to be by the **Public Health Emergency of International Concern** on 30 January 2020 by the World Health Organisation.

[27] On 15 March 2020 the President of the Republic of South Africa, MC Ramaphosa, declared a state of national disaster and announced measures to combat the spread of this virus.

[28] On 25 March 2020 the Minister of Cooperative Government and Traditional Affairs (the tenth respondent), acting in terms of s3 of the Disaster Management Act 57 of 2002, issued Regulations implementing measures where movement would be severally restricted through a 'lock-down' ('lock-down regulations'). This was as a result of justified concerns about the growing spread of COVID-19 infections in South Africa since the first notification of a positive case. As I've said this lock-down was supported by all counsel and by myself, and we therefore need not concern ourselves with the decision to do so any further, except in respect of one aspect which I will return to.

[29] The President then announced that the SANDF would be deployed to assist SAPS to enforce the lock-down Regulations. On 25 March 2020 the President issued President's Minute 78 of 2020 which read as follows: ' By virtue by the powers vested in me in terms of s201(2)(a) of the Constitution of the Republic of South Africa, 1996, read with s18(1) of the Defence Act (Act 42 of 2002), I hereby authorise the employment of 2820 (15 battalions), support elements and equipment of the SANDF enrolled in terms of ss52 and 53 of the said Defence Act, for service assistance of other State Departments and borderline control. The period of deployment will be from 26 March 2020 until 26 June 2020'. The President signed this minute and it was co-signed by the appropriate minister of the Cabinet.

[30] Then also on 25 March 2020 the President wrote to the Chairperson on the Joint Standing Committee on Defence Parliament of the Republic of South Africa as follows:

> *' EMPLOYMENT OF MEMBERS OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE FOR SERVICE IN CO-OPERATION WITH THE SOUTH AFRICAN POLICE SERVICE TO MAINTAIN LAW AND ORDER, SUPPORT TO OTHER STATE DEPARTMENTS AND BORDERLINE CONTROL.*
>
> *On 23 March 2020 I announced that the National Coronavirus Command Council has decided to enforce a national-wide lock-down for 21 days with effect midnight Thursday 26 March 2020. The decision by the National Coronavirus Command Council was taken as a measure to save South Africans from infection and to save the lives of thousands of people.*
>
> *To ensure that the measures outlined in my announcement are implemented, I have in terms of s201(2)(a) of the Constitution of the Republic of South Africa,1996 and s18(1) of the Defence Act 2002 (Act 42 of 2002) authorised the employment of 2820 members of the South African National Defence Force (SANDF) for service in co-operation with the South African Police Service in order to maintain law and order, support other State Departments and to control our borderline to combat the spread of Covid-19.*
>
> *Members of the SANDF will be employed in all 9 provinces. The employment is authorised in accordance with section 201(2)(a) of the Constitution of the Republic South Africa,1996 and s18(1) of the Defence Act 2002.*
>
> *The employment will be over a period from 26 March 2020 to 26 June 2020.*
>
> *The expenditure expected to be incurred for this employment is R641 200 290*
>
> *I will communicate this report to members of the National Assembly and the National Council of Provinces and which to request that you bring the contents thereof to the attention of the Joint Standing Committee on Defence.'*

[31] This communication was signed by the President.

[32] A similar such letter was again written by the President on 21 April 2020 where he stated that the outbreak of the Covid-19 continued to increase with reported cases across the Republic of South Africa. As a result he decided in terms of the same sections referred to in the previous letter to employ an additional 73180

members of the SANDF consisting of the regular force, reserve force and auxiliary force. He also gave the expected expenditure which was round R 4,590,393,940.00.

[33] Regulations were then issued from time to time in terms of s27(2) of the Disaster Management Act by the tenth respondent designated under section 3 of the Disaster Management Act after consultation with relevant cabinet members.

[34] The second applicant authorised to make the founding affidavit on behalf of the other applicants described the torture and murder of Mr. Khosa as follows:

> ***'The Torture and Murder of Mr Collins Khosa***
>
> *45. During the lock-down on Good Friday, 10 April 2020, at about 17h00, I was at home with Mr Khosa, Mr Muvhango and his wife, Mrs Yvonny Muvhango when two uniformed female members of the SANDF entered our home carrying sjamboks (whips).*
>
> *46. Before entering the house, the said members met with Mr Muvhango just outside the house but inside the yard. The two members of the SANDF asked him about an unattended camping chair and half-full cup of alcohol in the yard. Before he could answer, they ordered him inside the house and announced that they would confiscate any alcohol in the house.*
>
> *47. When the two SANDF members came inside, I had just finished dishing up dinner for Mr Khosa who was by then busy eating. Mr Muvhango's pregnant wife was also inside the house with her two children.*
>
> *48. The two SANDF members accused Mr Khosa and Mr Muvhango of violating the Lockdown Regulations. They inquired about the camping chair and half-full cup of alcohol in the yard. Mr Khosa informed them that even if he had been drinking, that would not be an offence as it was inside his yard The SANDF members did not take kindly to Mr Khosa's response and they were agitated by his response.*
>
> *49. It is at that point that the SANDF proceeded to raid the house. They confiscated one beer from Mr Muvhango's fridge and then one beer from Mr Khosa's fridge. They ordered Mr Khosa and Mr Muvhango to follow them outside to the street as they wanted to "prove a point" to them.*
>
> *50. On their way out, a member of the SANDF damaged Mr Khosa's car which was parked inside the yard, by smashing the metal gate against. Mr. Khosa protested this act of vandalism. This further agitated the members of the SANDF.*
>
> *51. Ms Ivonny Muvhango and I followed them outside. I asked the SANDF members why they took the alcohol outside the yard creating an impression*

that Mr Khosa and Mr Muvhango violated the regulations by drinking outside the yard. This question was also repeated by Mr. Muvhango and Mr Khosa. We did not receive any response.

52. *Mr Khosa and Mr Muvhango were made to stand outside the yard with the two beers on the ground, while members of the SANDF waited for back-up. Shortly, a number of vehicles arrived form both the SANDF and the JMPD, with armed personnel.*

53. *At this stage, about three further SANDF members approached the scene and were "briefed" about the incident by the two SANDF members who had entered our home. Without making any enquiries of Mr Khosa or anybody else, these three SANDF members manhandled and assaulted Mr Khosa in the following manner:*

    53.1 *they poured beer on top of this head and on his body;*

    53.2 *one member of the SANDF held his hands behind his back, while the other choked him;*

    53.3 *they slammed him against the cement wall;*

    53.4 *they hit him with the butt of a machine gun;*

    53.5 *they kicked, slapped and punched him on his face, stomach and ribs, and*

    53.6 *they slammed him against the steel gate.*

54. *During the entire incident, I kept shouting that they must stop hurting Mr Khosa as they were going to kill him. My plea was ignored.*

55. *During this time, Mr Muvhango was also manhandled by a member of the SANDF and beer was also poured all over his body.*

56. *While Mr Khosa was being brutalised, two female SANDF members approached me and Mrs Muvhango. Mr Muvhango shouted that these SANDF members should not touch his wife as she is pregnant.*

57. *As they approached me, I ran inside the house and closed the door, the SANDF members came after me and kicked the door open. They ordered me to come outside, and one member started whipping me with a sjambok over my body and my face. I was in a state of shock as I was being whipped. I could not defend myself from the SANDF nor could I run away.*

58. *The confirmatory affidavits of Mrs Muvhango are attached to this affidavit as **"D"**.*

59. *The incident was witnessed by some members of the Alexandra community. In addition, part of the above incident was caught on cellphone video which was circulated on the news and social media. Regrettably, some of the witnesses whom we consulted with, informed me that, while they recorded the incident on their cell phones, their phones were taken by the SANDF and the video recordings were deleted. These potential eyewitnesses were also*

threatened with violence by the SANDF and they have been afraid to assist us in the investigation of the matter.

60. *Mr Tebogo Mothabela is one of our neighbours who witnessed the assault on Mr Khosa, he attempted recording the incident with his phone however he was instructed by the SANDF to stop recording. Thereafter, members of the SANDF approached him and took his phone and deleted the recordings. Mr, Mothabela's confirmatory affidavit is attached as annexure **"E"**.*

61. *Similarly, one of the community members, Ms Glenda Phaladi recorded the assault on Mr. Khosa on her cellphone, however, her phone was also confiscated by members of SANDF and they deleted the recording. Ms Phaladi's confirmatory affidavit is attached as annexure **"F"**. In addition, Mr Noel Bongela lives in the same yard as us, he had spent his day with Mr Khosa before his death and also witnessed the assault on Mr Khosa later that day, Mr Bongela's confirmatory affidavit is attached as annexure **"G"**.*

62. *After the SANDF and JMPD members left, I took Mr Khosa inside our house. He later started vomiting, losing his speech and consciousness, and progressively, he lost his ability to walk. I rested him on the bed. I sat on the side of the bed trying to comfort him. However, about three hours after the SANDF members had left. While holding my hand, I noticed that he was not moving. I quickly called Mr Muvhango and his wife who then called Emergency Services. Upon their arrival, the Emergency Services declared Mr Khosa dead on arrival.*

63. *Medical advice received suggested blunt force trauma to Mr Khosa's head and torso, which could have severally damaged his internal organs, including his brain. Consistent with this advice, the death notice described cause of death as a blunt force head injury. I attach a copy of the death notice as annexure **"H"**.*

64. *The manner in which Mr Khosa was killed has left me, his children, his mother (the first applicant), his sister, and his brother-in -law (the third applicant) in a state of absolute shock and trauma. We are emotionally obliterated and have lost complete faith in the security forces, and the SANDF in particular.'*

[35] It was then said in the Founding Affidavit that if Commanding Officers had responded promptly and effectively to the incidents of lock-down brutality described in the preceding paragraphs, by developing a proper Code of Conduct , placing off duty the implicated members of the security forces, or by reminding the security forces of their legal obligations, the deponent's life-partner might still be alive and his children might not orphaned.

[36] The next heading of the Founding Affidavit was 'Commanding Officers Response'. It was stated by the deponent that the Minister of Police and the Minister of Defence have executive authority over the security forces and they failed to take effective steps to stop illegal action of these forces. The statements which I will refer to hereunder appear to defend and downplay, if not encourage the use of force. Even after the death of Mr Khosa, the Minister of Defence stated that the public should not 'provoke' the soldiers.

[37] On the Wednesday preceding the start of the nation-wide lock-down (25 March 2020) the defence minister while addressing the media on the role of the SANDF during the lock-down stated that there will be no 'skop, skiet and donder of civilians by the SANDF unless necessary to do so. 'It will only be skop, skiet and donder when circumstances determine that. For now we are a constitutional democracy.' (The relevant link referring to this statement is given as a footnote in the Founding Affidavit) 'Skop, skiet and donder' when literally translated into English, as it should not be, means 'kick, shoot and assault or injure'. It is in line with the colloquial saying in Afrikaans which really means that I will assault, injure or harm you.

[38] The deponent then stated that these type of statements do not unconditionally condemn police and military brutality or promote the spirit and purport of the Bill of Rights and the Constitution in general. They seem to imply that South Africa is a Constitutional democracy 'for now' – that is conditional upon members of the public not 'provoking' security forces. In effect what the Minister of Defence stated was that there would be circumstances where force is 'deserved'.

This was again to provide soldiers with powers of punishment which they did not have. These powers are to be reserved for courts only.

[39] On 7 April 2020, during a national address by the Police Minister, held at Secunda, he encouraged the police officers enforcing the lock-down to 'push South Africans back to their homes if they refuse'. (Similarly, the link giving access to this statement is contained in a footnote to the Founding Affidavit as are all the other statements of Ministers that I will refer to.) In this statement the Police Minister made the following remarks:

> *' I hear them (people) crying that cops and soldiers are brutal not listening to us is brutality.'*
>
> *'It is our duty, if you do not want to protect yourself and the rest of us, we must start by protecting you…so we need to push a little bit.'*

[40] One does ask in this context, and this was also debated in court, how and under which circumstances the police would 'push' alleged transgressors back into their humble shacks or huts in the many informal squatter camps that are so unfortunately present all over South Africa.

[41] In similar vein the now suspended executive member of the Matjhabeng Local Municipality endorsed lock-down brutality on 8 April 2020 during a rallying call to local members of the SADF in the Free State 'do not hesitated to skop and donder' citizens and foreign nationals when enforcing lock-down.

[42] On 12 April 2020 the Minister warned that police officers will confiscate liquor that is being sold illegally and will 'destroy the infrastructure where liquor is

being sold'. This of course will be an unlawful act and not justified by any law or regulation.

[43] The deponent quite correctly states that the lock-down Regulations do not authorise law enforcement officials to cause damage to property owned or occupied by civilians. This would clearly be an act of undermining them. What is even worse in this particular context is that Regulation 11E provides that 'no person is entitled to compensation for any loss or damage arising out of any act or omission by an enforcement officer under these Regulations'. This seems to offer a wholesale indemnity for law enforcement officials and adds to the already lacklustre response by the commanding officers to the increasing spade of the lock-down brutality.

[44] On 16 April 2020, after Mr Khosa's death, as described, the Minister of Defence addressed the media. She mentioned that the matter was under investigation. However, as reported by News24.com she had the following message to the civilian population which the deponent refers to as 'this chilling message': ' Mapisa-Nqakula said that people should not venture out of their homes to check what soldiers and law enforcement were doing 'or even provoke them' 'we are not taking this steps because we are a mean government or we are being insensitive. We have taken these decisions because it has become necessary for us to do so. Young people 'you have nothing to lose but your life if you go out you do so at your own peril' she said, adding that they out will only lead to further infections'. It was stated in this context that the Defence Minister clearly blames civilians for 'provoking' the soldiers. She was either unable or unwilling to make unequivocal statements condemning violence.

[45] It should be added at this stage that it is not explained in these papers how millions of poor people who are confined to the most humblest of 'homes' are supposed to be justifiably confined to the little space that shelter them from the elements. Many of such people are children and it is also nowhere explained how they would have to endure months of lock-down conditions without any movement or, what is so necessary for young children, playing with other children the same age. I do not intend to say in this context that the relevant persons are entitled to roam around in the streets but if they are in their own little courtyard, I fail to see how that would be a transgression of the relevant Regulations. Certainly, they would not invite assaults and brutality.

[46] The deponent continued to refer to a subsequent radio interview on Radio 702 on 22 April 2020 when the Minister of Defence seemed to lay the blame squarely at the feet of the civilians stating that they should 'not provoke' the military forces. The minister did not condemn the lock-down brutality. This was after applicants' had launched proceedings before the Constitutional Court on terms similar to the present (direct access to this court was denied). Applicants state that they are advised that under the Constitution the Parliament should practice oversight over the SANDF and SAPS. The reality was that parliamentary processes are not designed to prevent ongoing violence at the hands of the security forces especially during a state of disaster. While the matter may be reported to the oversight bodies, these will take time, and will unlikely be designed to address the problem that is currently being faced.

[47] It was further stated that the attitude of the SANDF to the parliamentary process has been alarming. On 22 April 2020 the Defence Minister, the Chief of Staff of SANDF and Chief of Joint Operations appeared before Parliament's Joint Standing Committee on defence. When the SANDF was questioned on the alleged cause of brutality and torture, Lieutenant General Yam is reported to have said to the parliamentarians: 'You are not our clients, we are not the Police Force. We take our instructions from the Commander in Chief'. Again it seems to have been forgotten that we live in a constitutional democracy and where parliament, according to the provisions of Chapter 4 of the Constitution consisting of the National Assembly and National Council of Provinces, is the legislative authority.

[48] The deponents to the Founding Affidavit then further state that to their knowledge, no steps have been taken against the SANDF for the statements and the contempt they have shown to parliament. The attitude of the Chief of Staff of the SANDF points to the concern of the applicants about the general view of the SANDF to the law, and the fact that the power must be regulated. It was said that the SANDF should not be left unaccountable and its use of force should be regulated. This was the point of the application.

[49] I have already referred to s200 of the Constitution which refers to the defence force and its primary objects to defend and protect the republic, its territorial integrity and its people in accordance with the Constitution (my underlining).

PRECLUDE TO THE APPLICATION:

[50] On 14 April 2020 the applicants' attorney sent a letter to the Minister of Defence. In that letter it was demanded that the SANDF and the JMPD provide them with full details of the particular incident including the names of the members who were present and also involved in the assault. It was demanded that the President, the Minister of Defence and the Chief of the JMPD publicly condemn the conduct of their members. A report on what steps had been taken by the SANDF and JMPD in disciplining their members was demanded as well as a confirmation that such members be immediately removed from the public and placed on suspension pending the finalisation of the investigation. In respect of Mr Khosa's minor children, an undertaking of financial support, emotional shock, psychological assistance and any medical expenses that they had to incur during this period was sought. Further, the Parliamentary report on the employment of the SANDF was requested in terms of section 201 of the Constitution. The Code of Conduct in operational procedures governing the SANDF being the joint operation in terms of section 19(3)(c)(i) of the Defence Act was required.

[51] It was said in the Founding Affidavit that on 16 April 2020 the State Attorney sent a terse report on behalf of President and the Defence Minister, a copy of which was also annexed. The Defence Minister effectively fobbed them off boldly denying any wrong doing, failing to give any meaningful answers, and failing to deliver any of the documents requested. On 19 April 2020 the State Attorney provided the Parliamentary Report requested. The response from the State Attorney was silent on the other demands made, including the Code of Conduct for the SANDF. As a result, on 20 April 2020 the applicants' instituted an urgent application for direct

access to the Constitutional Court seeking the same relief and on essentially the same facts of this application. On 24 April 2020 the Constitutional Court refused direct access. It simply ruled that there was no case made out for approaching the court directly.

[52] There is no doubt that the applicants have standing in this application, and this was not debated in court any further.

[53] I have referred to the Constitutional and legal framework applicable to these proceedings and I will return to the relevant sections when I deal with the relief sought.

THE PREVENTION AND COMBATTING OF TORTURE OF PERSONS ACT 13 OF 2013:

[54] This Act ratified and domesticated the **United Nations Convention against Torture and Other Cruel, Inhuman or Degrading treatment or punishment**, 1994 (the Torture Convention) Torture is defined in article 1. Article 2(1) obliges the State to take effective legislative, administrative, judicial and other measures to prevent acts of torture. Article 10 states that rules and instructions in this regard are required. Importantly article 12 requires South Africa to 'ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed. Article 13 requires South Africa to 'ensure that any individual who alleges that he has been subjected to torture...has a right to complain to, and to have his case promptly and impartially examined by its competent authorities'.

[55] Certain sections of the Torture Act are particularly relevant in the present context. Section 4(4) states that no exceptional circumstances including any state of emergency, may be invoked as a justification for torture. Section 10 gives the State 'a duty to promote awareness against the prohibition against torture aimed at the prevention and combatting thereof...' This would include the training of public officials on the prohibition, prevention and combating of torture and by ensuring that 'all public officials who may be involved in the custody, interrogation, treatment of a person subjected to any form of arrested, detained or imprisonment are educated and informed of the prohibition against torture'. It is clear from section 12(1)(c),(d) and (e) of the Constitution, interpreted in the light of international law, especially the Torture Convention and the Torture Act that State brutality is juridically regarded as especially egregious form of harm. State brutality, when it takes the form torture, cruel or inhuman treatment or punishment is legally distinctive for two definitional reasons, as it was explained in the Founding Affidavit:

1. It is committed by 'public official', when people clothed with public authority, in whom the public are entitled and expected to repose their trust.

   See *F v Minister of Safety and Security* 2012 (1) SA 536 CC at par 78"

   'Once we accept that our Constitution assures the public that it is safe to repose the trust in the police, we must also accept that constitutional aspiration is undermined when the trust is breached.

2. It is committed for 'purposes' ulterior to legitimate law enforcement, such as to 'punish' people, who have not been afforded a fair trial before a competent and independent tribunal or indeed any trial at all.

[56] It follows that these constitutionally exceptional crimes need to be prevented and remedied in a radical different, more stringent and more urgent manner than 'ordinary crimes'.

DOMESTIC LAWS AND THE LIMITS ON THE USE OF FORCE:

[57] The constitutional guarantee of freedom from State brutality is also given effect to by the provisions of the mentioned Defence Act, the SAPS Act and the Criminal Procedure Act.

[58] The SAPS Act is the principal legislation that governs the SAPS and MPD'S and places limits on the existence of their powers and functions.

1. Section 13(1) provides that they must exercise their powers and functions, 'subject to the Constitution' and with due regard to the fundamental rights of every person.

2. Section 13(3)(a) requires them to perform their duties 'in a manner that is reasonable in the circumstances'.

3. Section 13(3)(b) provides that where members authorised by law to use force, he or she 'may only use the minimum force which is reasonable in the circumstances'

[59] The Criminal Procedure Act is even more detailed:

1. S49(2) provides that Police officials may use force only-

   1.1 to effect an arrest of a 'suspect' (a person reasonable suspected of having committed an offence;

   1.2 even then, when a suspected cannot be arrested without the use of force' and

   1.3 to the extent force used that it is reasonably necessary and proportional in the circumstances to overcome resistance or to prevent the suspect from fleeing.

[60] It further provides that 'deadly force' (likely to cause serious bodily harm or death) may be used only if the suspect-

1. Poses a threat of serious violence to the arrestor and any other person, or
2. Is reasonable suspected of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of affecting arrest.

[61] Other than in that specific instance (to arrest a person and to secure their attendance at trial); the SAPS Act does not give police officers a general license to use force in the execution of their duties.

[62] Where police training confines itself to when a firearm is to be used or not It is wholly and totally insufficient in the context of what I have just dealt with.

[63] SANDF members are also not exempt from these limitations on the use of force. On the contrary, the Defence Act provides that when the SANDF is 'employed in co-operation with the [SAPS] in terms of section 201(2)(a) of the Constitution in the prevention and combating of crime and maintenance and preservation of law and order within the Republic' several conditions will apply, including:

1. Section 20(1) subjects SANDF members equally to the strict limitations on the use of force as set out in the SAPS Act and the Criminal Procedure Act;

2. Section 19(3)(c)(i) requires that their functions 'must be performed in accordance with...code of conduct and operational procedures approved by the [Defence] Minister';

3. Section 20(11) provides that they 'must receive appropriate training prior to such employment'. It was contented that it is obvious that why such a Code of Conduct and prior training is required: soldiers are trained to use force and not refrain from it. When deployed within the Republic to engage with allied civilians rather than enemy combat, SANDF members must be re-educated or re-orientated in a non-military fashion, which includes adhering to the statutory limits of the use of force. I may just add that when the poor, the weak, the hunger and desperate are addressed by this security forces, this obligation requires more restraint and is of even more of a moral imperative. What we are dealing with in South Africa at this moment is the conduct of security forces aimed at mainly the

most vulnerable because of the socio-economic situations that exist throughout South Africa for which the poor are certainly not to blame. When I refer to 'poor', I also refer to the consequent result, namely mental anguish, physical weakness, lack of proper housing or sanitary facilities, and also lack of even the most basic food or medical supplies. If such persons are treated with contempt and indifference any court of law would do its utmost within its discretionary powers (where such exist) to apply the law to its fullest extent to prevent such.

[64] In summary therefore the position is as follows:

1. In general members of the SAPS and the SANDF may not use force. However, where force is necessary to use, it may only be minimum force.

2. If it is the intention to secure the arrest of a person, force may only be used where it is reasonably necessary and proportional. Where deadly force may be used this can only occur where there is a threat to life.

3. Other than in those strict circumstances, there is no general license for the SANDF or the SAPS to use force.

[65] I will hereunder deal with the allegations by the respondents as to training and instructions that are given to the security forces in this regard. But in my view,

on their own version, this is solely inadequate and we have seen the result in the streets.

[66] In terms of the draft order that was handed to me during the proceedings and which was debated in court, as well as in the affidavits, the applicants seek a declaratory order notwithstanding the declaration of the State of Disaster and the lock-down under the Disaster Management Act as set out in prayers 2.1 to 2.4. I noted that paragraphs 2.1 to 2.4 essentially consists of 're-affirmation' of the law that is applicable in South Africa in the present context, and in particular the law that applies to the security forces either under lock-down conditions or in general. It was therefore contended by the respondents that such a declaration was incompetent and in any event wholly unnecessary, inasmuch as all members of the security forces had received proper training, had received instructions, both in oral and written form. It was furthermore contended that it is not the function of the court to merely restate the law in any given circumstances.

[67] Declaratory relief is competent in one of four instances. Firstly, as 'appropriate relief' in terms of section 38 of the Constitution. Secondly, where law or conduct is declared unconstitutional under section 172(1)(a) of the Constitution. Thirdly, as just and equitable in terms of section 172(1)(b) of the Constitution. Fourthly, as discretionary relief in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013.

[68] Each of these constitute an independent basis for a declaratory relief. The respondents argued that there was no basis for relief granted in terms of section

21(1)(c) of the Superior Courts Act, a contention with which the applicants counsel obviously disagreed. But, even if he was wrong, it would not follow that declaratory relief would be incompetent. It would be competent in terms of sections 38 and 172 of the Constitution.

SECTION 38 OF THE CONSTITUTION:

[69] This provides: 'any one listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights' This section therefore contains two substantive requirements: first an applicant must allege that a right has been infringed or is threatened with infringement, and secondly a court is entitled to grant 'appropriate relief' which may include a declaration of rights. The applicants satisfy both requirements in my view. In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paragraph 69, the Constitutional Court explained the meaning of 'appropriate relief' as follows:

> *'given the historical context in which Interim Constitution was adopted and the extensive violation of fundamental rights which preceded it, I have no doubt that this court has a particular duty to ensure that within the bounds of the Constitution, effective relief can be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot be properly upheld or enhanced. Particularly in a country so few have the means to enforce their rights through the Courts, it is essential that on those occasions where the legal process does establish that an infringement of an entrenched right had occurred, that it be effectively vindicated. The Courts have a particular responsibility in this regard and are obliged to 'forge new tools and shape innovative remedies, if needs be, to achieve this goal'.*

[70] As I have said this comment was made by the Constitutional Court in 1997. It applies some 23 years later and in my view it applies particularly to the case before me given the facts and the state in which the society lives at present. We live

in a democratic society under the rule of law. The Bill of Rights is a modern and effective tool and it must be used without fear or favour where appropriate within the bounds of the Constitution. The present facts cry out for a declaratory order in my opinion.

[71] *In Hoffman v South African Airways* 2001 (1) SA 1 CC the court held that appropriate relief in terms of section 38 must be construed purposely and in the light of section 172(1)(b) which empowers a court in constitutional matters to make any order that is just and equitable. As such, the court held that, 'appropriate relief must be fair and just in the circumstances of the particular case.' Appropriateness imports 'the elements of justice and fairness'.

[72] The court held at paragraph 42 as follows: ' the determination of the appropriate relief, therefore, calls for a balancing of the various interest that might be effected by the remedy. The balancing process must at least be guided by the objective, first, to address the role occasioned by the infringement of the Constitutional right; second, to deter future infringements; third, to make an order that can be complied with; fourth, fairness of all those that might be effected by the relief, invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case'.

[73] I have already referred in some detail to the number of infringements of certain constitutional rights that have unfortunately become so apparent. The deterrence aspect is of great importance in this case and under the present circumstances. As I have said, there are clear indications of the complete lack of

trust between the relevant parties and by that I don't only mean the present litigants before me but the Government as an institution on the one hand and society on the other hand, which, I need to repeat, are not objects, or subjects of some higher authority be it the President or the executive or the nebulous National Command Council. They are holders of rights and in particular those rights are stipulated in Chapter 2 of the Constitution. And as I have said, these need to be respected by Government and the Security Forces under all circumstances.

[74] It is my view that a declaratory order is justifiable on the facts, and the considerations that the *Hoffman* decision refers to. Whilst it is of course so that paragraphs 2.1 to 2.1.4 refer to constitutional rights, there are also rights under the domestic statutes that I referred to. Paragraph 2.2 makes the other orders effective. The respondents have said in their answering affidavits that they do training and give appropriate instructions, and therefore there could be no justifiable opposition to this part of the relief. Similarly, as far as these security forces are concerned, it is important that the instructions that they are given, and examples have been annexed to their answering affidavits, must not only be confined to the use or non-use of firearms. I have set out their obligations in some detail and it is important to note and for the public to appreciate, that security forces are only entitled to use the minimum force that is reasonable to perform an official duty. I may be naïve, but I need to say that I cannot understand why the security forces cannot realise that they are also citizens of this country. They are also the holders of the rights in the Bill of Rights. No doubt they also have families that suffer under the present state of affairs and I am convinced that no father or mother in the security services would like to

see their families be treated in the manner that others have been so visibly ill-treated.

[75] It was also submitted that appropriate relief must be future looking. One of its objects is to 'deter future violations'. This imposes an obligation on the court, faced with evidence which proves violations of rights, not to gloss over the violation on the basis that declaratory relief is not necessary. Declaratory relief services a unique and distinct purpose of acknowledging the violation, setting out the obligations and deterring future violations. I agree that this is the correct approach and it is one that I will adopt.

[76] It was contended that to qualify for appropriate relief as per section 38 of the Constitution the applicants merely need to establish that their rights have been infringed or are threatened with infringement. On the facts of this case, it is plain that these rights have been infringed, or are threatened with infringement. Especially the right to life has been infringed and their right to dignity has been grossly infringed. Also, the right not to be subjected to torture or cruel unusual punishment has been established on the facts. The right to dignity is a foundational value in the Chapter of Rights which must be respected by all organs of state. In my view, it is the essence of the Bill of Rights and a court should not tolerate an infringement especially not by those that are created to protect the human dignity of citizens and all persons in this country. It is an ironic thought having regard to the history of this country, that the very institutions that have been created to safeguard and protect the population from crime and violence, are the very persons who now fail to impose the

appropriate internal remedies against the transgressors, but have the audacity to tell a court that it has no function in the matter and ought not even to hear it

SECTION 172 OF THE CONSTITUTION:

[77] Section 172(1) of the Constitution provides that when a court is dealing with an constitutional matter within its powers it must declare that any law or conduct that is inconsistent with the Constitution as invalid to the extent of its inconsistent and make any order that is just and equitable.

[78] In *Bengwenyama Minerals Pty Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) the Constitutional Court stressed the rule of law underpinnings behind section 172. The rule of law is entrenched in section 1(c) of the Constitution which provides that it is a foundational value of our Constitution and our society. The rule of law concern behind a declaration of invalidity of law or conduct, was dealt with as follows in the said judgment at paragraph 85:

> *'I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never to relinquished but the circumstances of each case must be examined in order to determine whether the factual certainty requires some amelioration of legality, if so, to which extent.'*

[79] I agree with the applicants' contention that it is crucial to note that according to section 172(1)(b) a court may make any order that is just and equitable. This is not dependant on the finding of invalidity. In *Corruption Watch NPC and Others v The President of the Republic of South Africa* 2018 (10) BCLR 1179 (CC) this was explained in paragraph 68 as follows:

> *' The operative word " any" is as wide as it sounds. Wide this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in this section- justice and equitable'*

[80] This actually echoes what was said by the Constitutional Court *in Economic Freedom Fighters v The Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) paragraphs 210 to 211:

> *'A court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, s172(1)(b) empowers courts to make any order that is just and equitable...*
>
> *The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the Notice of Motion or some order pleading.'*

It will become apparent that this is exactly what I intend to do.

[81] It is therefore clear that both under section 38 and 172 of the Constitution I am intitled to grant an order that is appropriate or just and equitable. Where rights are threatened or violated it can in my view not be seriously and honestly be argued that a declaration is not appropriate and if I understood Mr Maenetjie SC on behalf of the first three Respondents correctly, he did not seriously contend otherwise. I do appreciate his proper approach in this context.

SECTION 21(1)(c) OF THE SUPERIOR COURTS ACT:

[82] In the context of section 21(1)(c) of the Superior Courts Act the respondents seem to be of the view that this section has displaced the remedial power of this court which is contained in sections 38 and 172 of the Constitution. This is obviously not so. Section 21 is additional and not exclusive, so it was submitted. In any event I was told that the debate about section 21 of the Act should not detain me unduly. The applicants have not relied thereon, but explicitly on the sections in the Constitution. Therefore the only question is whether or not the applicants have made out the case that they have pleaded. However, if I were to apply the criteria of section 21(1)(c) of the Superior Courts Act all necessary prerequisites have been fulfilled. In terms of section 21(1)(c), I have the power: '... in its discretion, and at the

instance of any interest person, to enquire into and determine any existing, future or contingent right or obligation, not extending that such person cannot claim any relief consequential upon their determination.

[83] In *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* 2019 (3) SA 1 (CC) the two stage approach was endorsed. First the court must be satisfied that the applicant has interest in a future, existing or contingent right or obligation, and secondly a court may then exercise its discretion either to refuse or grant the order sought. The existence of a live dispute is not a prerequisite. It was accepted by the respondents that the applicants do have an interest in the an existing, future of contingent right or obligation. What was disputed was the second element namely, whether or not the discretion of the court ought to be exercised in favour of granting the declaratory order sought.

[84] The submission was that there are a number of reasons why this declaratory order should be granted:

1. <u>to vindicate the rule of law:</u>

   I have referred to the relevant sections of the Constitution in this context.

2. <u>the conduct of the security forces threatens or has in fact violated the rights in the Bill of Rights:</u>

   I have described how the deceased and the two applicants and two witnesses have been subjected to assault, torture and invasion of their bodily integrity in breach of the Constitution. Having regard to that

description (no other version was tendered by the respondents) there can be no doubt that fundamental rights to dignity as per section 10 of the Constitution, life (section 11), and the freedom and security of a person (section 12), were infringed. It is correct that none of the averments have been answered. Instead the Minister of Defence claims that any answer to these will cause prejudice to the pending investigation. Similarly, the Minister of Police claims that the matter is receiving an investigation. No answer is given to the nature of the prejudice and, the claim of prejudice is hollow, so it was contented. I do agree with this submission for the reason that will become apparent. These submission are legally untenable. In *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 CC at paragraph 42, the rule in *Hollington v Hewthorn Co Ltd* [1943] 2 ALL ER 35 was applied, namely that the findings of one tribunal cannot be used as a fact in a subsequent tribunal.

PRAYER 3.1: SUSPENSION PENDING DISCIPLINARY MEASURES

[85] The respondents claim that any accused members of the security forces can only be placed off duty and disarmed after they have been found guilty in a thorough investigation which is underway. This of course is not so. Precautionary suspensions have been ordered by Courts before, where there has been a prima facie case of abuse of public authority.

See: *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) at paragraph 61-64.

[86] This is often necessary to prevent a culture of impunity which is a State's duty to prevent.

See: *National Commissioner of the SA Police Service v South African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) at paragraph 2.

[87] This is not a drastic measure at all, but it would instil public confidence.

PRAYERS 3.2 AND 3.3: COMMANDS AND WARNINGS:

[88] Section 199(5) of the Constitution states: 'The security services must act, and must teach and require their members, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic'. This is plainly not a once-off but a continuous duty. The defence respondent accepted that these prayers accurately '[restate] legal obligations' but claim that these had already been fulfilled and thus the orders sought 'are not necessary'. On behalf of the applicants it was submitted that these orders are clearly necessary for the following reasons:

1. The commands and warnings (allegedly already given) were not heeded on 10 April 2020 at the applicants' home. They were ignored or defiled, not just by one deviant soldier acting alone, but a group acting in concert. We know what the consequences were. This alone warrants an order that the defence respondents repeat those demands and warnings more clearly and decisively and regularly, even if they have already been given;

On the defence respondent's evidence alone their alleged commands and warnings did not translate well on an operational level. A document was annexed to the founding affidavit titled 'Joint-operations Divisional Operational Directive' to 'Charlie Company of 21 South African infantry battalion of 30 March 2020'. Charlie Company was deployed in Alexandra where Mr Khosa was murdered.

2. The directive does not describe an operation to support SAPS in policing civilians, but is almost in the form of a military combat engagement against hostile forces. It defines the aim of the operation 'combat Coronavirus' against which they will engage in 'battle' until it is 'defeated and neutralised' (this does seem to remind one of instructions given to special forces sent into certain mountains to 'neutralise' the enemy). The directive warns Charlie Company that the coronavirus 'moral is high as population of Alexandra don't care about measures in place'. It thus explicitly targeted the residents of Alexandra as threats or obstacles to the military objective.

3. The directive goes further and states that among the Alexandra population 'there is a few that is resistant towards SANDF because of the fact that they support illicit activities within Alexandra'. Charlie Company is then being instructed that they must expect and overcome resistance from some residents in Alexandra.

4. The directive then instructs the Company 'to channel non-compliant [community] members and to allow harsh measures of the law to take course.

Commanders core function may be applied to find, fix and neutralise the non-compliers'. It was submitted that it is clear, by standing up for himself and insisting on being treated as a normal human, being Mr Khosa had become one of the 'non-compliers' that Charlie Company had to 'neutralise'.

5. The contents of this directive, saturated with military language and orientated towards military combat makes it clear that there is a need for clearer and louder commands and warnings from the defence, about how SANDF members must deal with civilians.

6. The Defence Minister has spoken with a 'forked tongue' as it was put, and issued mixed messages about the use of force during the operation Notlela. I have already referred to the quote 'skop, skiet en donder' 'when circumstances demand that'. In an affidavit she never explained what those 'circumstances' would be, and more importantly what the SANDF members would understand those 'circumstances' to be.

[89] The Defence Minister seeks praise for having expressed 'regret' at the death of Mr Khosa and for having 'condemned unlawful conduct on the part of the SANDF'. But she then says that she 'equally condemned conduct that disobeys the lockdown Regulations'. This seems to suggest that, as it was put, some sort of moral or legal equivalence between civilians disobeying, and soldiers violating constitutional, international and statutory provisions on the excessive use of force. I agree that there is no such legal or moral equivalence.

[90] Applicants counsel furthermore submitted that it was not the Minister's place to 'condemn' civilians for allegedly disobeying Regulations. Other ministers are responsible for telling civilians what to do and what not to do (instead of asking them), her job is to tell the SANDF what is acceptable and what is not. The fact that the defence minister sees it as her business to instruct civilians on how to behave is consistent with the attitude displayed by the SANDF members at the applicants home who saw it as there business to 'teach [Mr Khosa and Mr Muvhango] a lesson'. In this context I again refer to the introduction of this judgment.

[91] The Defence Minister then attaches news reports which she says accurately quote her comments in the press on Mr Khosa's death. Not one of these reports 'is condemning anything'. She only said that the government 'hang [their] head in shame', 'regret what happened' and 'were saddened by it', and 'will not at any point defend what happened'. The deponents to the affidavit say that while these comments are all merited and appreciated, they do not amount to condemnation of anyone or anything.

[92] In the same context of commenting on Mr Khosa's death the Defence Minister said that the people should not 'provoke' the security forces. This seems to imply that Mr Khosa had provoked the security forces and thus bore some blame for his death.

[93] In her affidavit the Defence Minister never explains what she meant by this term 'provoke'. She can hardly deny that it could be interpreted by the SANDF members to mean that 'provocation' is among the 'circumstances' in which she has

said that 'skop, skiet en donder' would be warranted. It was contended that the Defence Minister's own mixed messages have contributed to the need for louder and clearer commands and warnings about the use of force, as is sought in prayers 3.2 and 3.3.

[94] The police respondents as I have said, contend that the granting of these prayers would be merely to restating the obvious, and would thus serve no purpose. It was said that SAPS members know of their obligation to respect fundamental rights and the obligation to report any transgression by their fellow employees. It was contended that the Commissioner was not in any position to claim with certainty of 'what was known' of all SAPS members. The fact that the mentioned brutality had taken place suggested there were members who do not 'know' their obligations. In fact the Commissioner himself admitted that 'there are always rogue elements'.

[95] I agree with applicants' counsel that it is even more concerning that the Police respondents have adduced no factual material at all to support the sweeping statements. They have adduced no speeches, minutes, standing orders, directives or any other official materials to tell me whether, when, by whom and to whom the commands and warnings have been issued. This material should surely have been at the fingertips.

[96] I agree that the Police respondents have thus put up nothing more than a bald denial and that there is a need to issue these commands and warnings.

[97] The police respondents have also not denied that the Police Minister said on 12 April 2020 that the SAPS will 'destroy the infrastructure where liquor is sold' instead they say the following: 'the Police will not literally destroy the infrastructure where liquor is sold as it seems to be suggested by the applicants, but will ensure the selling of liquor, contrary to the regulation does not take place there again'. The enforcement of the Regulations may thus entail confiscation of liquor found to be sold contrary to the Regulations. The Police can, and will never bulldozer or flatten the buildings in which liquor is sold, just by way of example'. The commissioner thus effectively says that the Police Minister was speaking figuratively or joking. If the Police Minister was speaking literally, then this was a command to use unlawful force. If he was not speaking literally he was being extremely irresponsible and would have no way of knowing or ensuring that SAPS members would not take these comments literally or seriously. In either scenario the need for proper commands and warnings to be taken literally or seriously is both manifest and urgent. I agree with that contention. Accordingly, applicants' counsel submitted that these prayers if granted would cost the respondents nothing at all and yet they have the potential to save lives. The fact that they may deflate some of the egos is of no concern to me. The respondent's resistance to prayers 3.2 and 3.3. is thus difficult to understand in the present context of the crises which has affected every person and household.

[98] I am therefore in agreement with applicants that paragraphs 3.2 and 3.3 of the draft order are not only appropriate under the circumstances, but also just and equitable seen in the context of the case and the situation in the country. It is noted

that the Police Minister did not make an affidavit explaining his comments or his views on the relief sought.

PRAYER 3.4:

[99] I can see no reason why this cannot be done and it is a reasonable order under the circumstances. I was told in Court that I would receive a report by 4 June 2020.

PRAYER 3.5 AND THE ROLE OF THE 6TH AND 9TH RESPODENT:

[100] Mr. Mokhari S.C assured me that an investigation would take place and that I would receive a report. No relief was sought against the 9th respondent but its role becomes relevant.

[101] During the course of the argument I was handed a supplementary affidavit on behalf of IPID, the ninth respondent. This affidavit was to the effect, with reference to the affidavit that was initially filed, that an 'error in law' had been made which would be rectified in as much as there had been no investigation done for the reason that no member or members of the Police Force had been involved in the assault of Mr Khosa and the other applicants. I was given an undertaking that a further report would be filed and I received this on Friday afternoon on 8 May 2020.

[102] As to the duties of the Police in the present context see *S v Govender* [2004] ALL SA 259 (SCA). In paragraph [28] the following was said:

'There was in law a duty, in the circumstances of this case, on those policemen who were present and who witnessed (as indeed they must have) but did not participate in this attack on the Deceased to put a stop to it'

[103] In the affidavit handed to me in court, I was referred to regulation 4(1) of the Independent Police Investigative Directed Regulations of 2012 which provides that 'the investigation of the death of a person as a result of police action or omission or both must be done in accordance with this regulation.' The deponent to that affidavit was the accounting officer of IPID who therefore gave me an undertaking that he would designate the investigation in line with regulation 4(2)(b) and that the investigators would attempt to reconstruct the scene within 24 hours from the date this affidavit was filed in order to have at least a preliminary report available for me by 8 May 2020. A report was filed as I have said, and an undertaking was given to investigate the role of the police in Mr. Khosa's death. The deponent added that it was practically impossible to trace and interview these JMPD officers within the two days in which the report had to be filed. However, specific instructions were given that this investigation be prioritised and treated as urgent. The lead investigator advised that they required a period of 2 weeks to conduct this investigation. A report was therefore tendered within 14 days as from 8 May 2020, and I await this.

PRAYER 4: CODE OF CONDUCT AND OPERATIONAL PROCEDURES

[104] This prayer is concerned with the necessity of the first to fourth respondents to publish within 5 days a code of conduct and operational procedures regulating the conduct of members of the SANDF, SAPS and MPD'S in giving effect to the declaration of the State of Disaster. The rest of the prayers are concerned with how this code of conduct and other guidelines be brought to the attention of the public so

that an efficient system exists which can be practically utilised by those negatively affected. In the Founding affidavit the applicants allege that the Minister of Defence had not complied with the provisions of section 19(3)(c) of the Defence Act. Neither the Minister of Defence nor the Minister of Police deny this. In the case of the Minister of Defence it is claimed that this section does not apply. In the case of the Minister of Police it was argued that the SAPS already have a code of conduct and their own internal guidelines. It is common cause that section 19 has not been complied with and the only question that I need to decide is whether a matter of law it applies, and if it does, to grant the appropriate relief. This context the applicants argument proceeded along the following lines: the SANDF 'in co-operation with the Police Service' is regulated directly by the Constitution. Section 201(2)(a) provides that the President as the head of the Executive may authorise the deployment of the SANDF 'in co-operation with the Police Service'. Section 19 of the Defence Act is a constitutionally mandated provision. It mirrors the provisions of section 201(2)(a) which provides for the employment of the Defence Force in co-operation with the Police Service. In accordance with the subsidiarity principle, the section is a statutory enactment of the constitutional provision in section 201(2)(a) and sets out the precondition for its operation. Further is a statute in place which regulates the same subject matter as the Constitution. The correct starting point is the statute, rather that the Constitution. In the context of statutes, which give effect to fundamental rights, this is known as the subsidiarity principle. This part of the case does not directly engage the Bill of Rights but the rationale for application of the principle is the same. In *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at paragraph 53 Cameron J said the following:

> *' these considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying*

on or attacking the Constitutionality of legislation enacted to give effect to that right. This is the form of constitutional subsidiarity parliament invokes here. Once legislation to fulfil the constitutional right exist, the constitution's embodiment of that right is no longer the prime mechanism enforcement. The legislation is primary. The right in the Constitution plays only a subsidiarity or supporting role.'

[105] Of course it is clear that this decision was decided in a different context but the mentioned reasoning is directly applicable herein. The constitution makes provision for deployment of the SANDF with the SAPS. But the precise mechanism of how that is meant to operate is left to parliament. Parliament therefore included section 19 of the Defence Act to give effect to the broad powers in section 201(2)(a). Hence the compulsory point of departure to test the conduct of the Minister against the provisions of the statute rather than constitution directly.

THE TEXT OF SECTION 19:

[106] Section 19 of the Defence Act is directly applicable. Its heading clearly stipulates 'employment in co-operation with the SAPS'. The text of section 19(1) is clear, it provides that the defence force 'may be employed in the co-operation with the Police Service in section 201(2)(a) in the prevention and combating of crime and maintenance and preservation of law and order within the Republic.' This section does not replace section 18 or section 20 of the Defence Act. It simply specifies the preconditions for employment of the SANDF in co-operation with the SAPS. Section 18 is the general provision which always applies whenever the SANDF is deployed internally. Section 19 is more specific it is applicable whenever the SANDF is deployed in co-operation with the SAPS. On the facts both sections are applicable.

[107] When the SANDF so deployed in co-operation with the SAPS:

1. Section 19(2) provides that 'the Minister must give notice of such deployment by notice in the Gazette within 24 hours of the commencement of such deployment.'
2. Section 19(3)(c) places compulsory obligations on the Minister of Defence which do not appear in either section 18 or section 20. First, the Minister must approve a code of conduct and operational procedures to be used in such deployment, as per section 19(3)(c)(i). Secondly, section 19(3)(c)(ii) provides for guidelines for co-operation between the Defence Force and the South African Police Service and co-ordination and command over and control over members between the Defence Force and the South African police Service. Therefore, the argument that there was no obligation to comply with these provisions conflicts with the plain text. The irony is that during March 2020 the Defence legal services wrote a memo describing the mission of the Defence Force during the state of the national disaster as follows in paragraph 3 of the document that was part of the affidavits:

'Mission

3. Defence Legal Services Division (DLSD) must therefore provide the necessary legal support during the state of national disaster pertaining to the COVI-19 infectious disease over the period 26 March 2020 – 26 June 2020 in relation to the employment of the SANDF in terms of section 210(2)(a) of the Constitution of the Republic of South Africa, 1996 and section 19 of the Defence Act, Act 42 of 2002:

a.co-operation with the SAPS in the maintains of law and order.

b. assistance to other state departments.

c. borderline control.

d. protection of people and property.

e. disaster relief.'

[108] Whilst I am obviously not bound by the Legal Departments interpretation of the statute I am of the view that it is correct and was obviously ignored by the Defence Force.

THE PURPOSE OF SECTION 19:

[109] In addition to the text, a provision must be construed to achieve a purpose See for instance *Commissioner for the South African Revenue Services v Bosch and Another* 2015 (2) SA 174 (SCA) at paragraph 9 where the following appears:

> *' the words of a section provide the starting point and are considered in the light of their text, the apparent purpose of the provision and any background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but as soon as more than one possible meaning is available, the determination of provisions proper meaning will depend as much as context, purpose and background.'*

[110] I am of the view that this dictum is directly applicable when section 19 is considered.

[111] It serves a different purpose to sections 18 and 20. It is the only section in the Act which requires a Code of Conduct, Operational Procedures and guidelines of co-operation between the Defence Force and South African Police Services. If this section is not applicable or did not appear in the Act specially tailored operational procedures, guidelines and a specifically tailored code of conduct will not be provided. Sections 18 or 20 do not make provisions for specifically tailored requirements of a joint operation.

[112] It is important to note that sections 18 and 19 bind the executive. Section 18 applies generally when the SANDF is employed generally as I have said. Section 19 places cumulative obligations on the SANDF when it is employed internally with the SAPS. So rather than displacing section 18, section 19 reinforces it and provides clarification for internal employment in co-operation with the SAPS. I agree with this reasoning and it is in line with the context, purpose and background of the legislation that applies at present and is under discussion in this application.

[113] It was argued that the distinct purpose of section 19 would be completely undermined if ignored in favour of section 18 and section 20. This would be so for the following reasons:

1. Section 18 deals with the general employment of the Defence Force. But crucially, its purpose is to impose obligations on the President, the Minister of Defence, Parliament and Secretary of Defence;

2. Section 19 is also targeted at the obligations of the President and the Minister of Defence. But because the section applies in the unique circumstances contemplated in Section 201(2)(a) it also contains obligations of the Minister of Police. Like section 18, section 19 is primarily targeted at imposing obligations on the executive in the general deployment of the Defence Force and in the scenario specific employment of Defence Force together with the South African Police Services;

3. Section 20 differs from both section 18 and 19. Its purpose is not to regulate the exercise of power by the President or the Minister when deploying the Defence Force. Rather, it regulates the conduct of members of the Defence Force. Its heading makes it clear 'Powers and Duties of members when being deployed'. Unlike sections 18 and 19 , section 20 imposes no obligations on the executive. Its role is to make it explicit that certain sections of the South African Police Services Act apply also to members of the SANDF when together in a joint operation. This in fact has never been a contentions point, and the issue herein has always been whether section 19 of the Defence Act has been complied with.

[114] It is also noteworthy under the South African Police Services Act of 1995 as per section 40 thereof, which deals with disciplinary proceedings, the section does not apply to members of the SANDF even during the period of a joint-deployment. The same applies to the provisions dealing with discipline for members of the SANDF. They have no application to members of the SAPS. That is the distinctive role played by section 19 which cannot be erased simply by reference to section 18 of the Defence Act.

[115] The Defence Minister has annexed a number of letters signed by the President dated 25 March 2020 and 21 April 2020. Both letters expressly refer to section 201(2)(a) of the Constitution which authorises the deployment of the SANDF 'in co-operation' with the South African Police Services. That being so, section 19 of the Defence Act must apply as it expressly gives effect to section 201(2)(a) of the Constitution.

[116] The submission therefore was that the Defence Minister had to form her obligation under section 19(3)(c)(i) of the Defence Act to approve the code of conduct and operational procedures for the SANDF's service in co-operation with the SAPS during the lock-down, before that joint-operation commenced on 26 March 2020. I have carefully considered this argument and I agree with the reasoning. In my view therefore section 19 applies and I am justified to grant prayer 4.1.

[117] The Police Minister was obviously of a different view and the opposing affidavit states that the ordinary code of conduct of the SAPS is sufficient. A copy of this code is not assessed because it is not annexed. It would indeed by helpful to measure it against the Code of Conduct for Law Enforcement Officials adopted by the **United Nations General Assembly Resolution 34/169** of 17 December 1997. It was in any event contended that the reason for saying so is wrong. The Police respondents say 'the police are required to enforce Regulations in the same manner as they are required to enforce any other law. The enforcement of the Regulations is therefore no different from the enforcement of any other law.' But this is contradicted by the lengthy evidence about how extraordinary circumstances of the lock-down are. Moreover, the ordinary SAPS code of conduct, whatever it says, is surely not tailored for joint-operations with the SANDF. It would not pre-suppose to guide SAPS members on how to interact with SANDF members of different ranks, how to guide them or how to restrain them during policing exercises, searches, arrests and so forth. In the context of a joint-operation especially in the extraordinary

circumstances of the lockdown, there is a clear and pressing need for a proper code of conduct and operational procedures specifically developed for this joint-operation.

[118] As far as guidelines for the enforcement of the lock-down is concerned, useful reference must be had to provisions of section 199(5) of the Constitution which states: ' the security services must act on, and must teach and require their members to act in accordance with the Constitution and the law, including customary international law and international binding agreements binding on the Republic.'

[119] In my view in this specific context that it would be useful to keep in mind the founding provisions of the Constitution which I have referred to and especially section 1(c) of the Constitution read with section 7(1) thereof and (2) thereof. All of these provisions provide for the preservation of democracy, human dignity and freedom and the obligation of this State and all its organs to respect, protect, promote and fulfil the rights in the Bill of Rights. It is clear from all the provisions that I have referred to, both in the Defence Act, Police Act as well as in the Constitution, that the duty of the security forces is in the present context to aid and assist population of South Africa and of course to provide for law and order subject to its duties to act lawfully. The security apparatus in all its forms, is not the government of South Africa. We are a constitutional democratic Republic and it is essential that this be repeatedly brought to the attention of the security forces. At the same time it must be remembered that parliament oversees the executive and it must do its duty in that context as well. It must further be remembered in the present context that according to the provisions of section 83 of the Constitution the President, as head

of State, and head of the National Executive must uphold, defend and respect the Constitution as the supreme law of the Republic and must promote the unity of the nation. Neither the President, nor the National Executive nor the Parliament nor the court can or should allow that a new Berlin Wall wrinkles it way through South Africa with all the well-known results of divisions of communities and families. Lack of trust in the statutory institutions whose duty it is to protect the populace must be restored and enhance democracy and the freedoms contained in the Bill of Rights.

[120] The defence respondent's claimed that no further guidelines were required in respect of the SANDF members. Applicants' argument was to the contrary and referred to a number of guidelines which were either in a form an operational directive or purported to be guidelines for deployed troops. These only referred to provisions of section 49 of the Criminal Procedure Act in the context when or when not a firearm may be used. Such reference is grossly misleading in as much as section 49 of the Criminal Procedure Act applies to the use of <u>any force</u> not only by discharging a firearm. It applies to the use of fists, boots, batons, blades, sjamboks or anything else. The directive suggests that any force that does not involve the discharging of a firearm is not subject to the restrictions of section 49. This of course is wrong and we have seen the results in the context of what happened to Mr Khosa and the applicants.

[121] An annexure dated 1 April 2020 is entitled 'Guidelines for Deployed Troops'. It states 'golden rule – minimum force is always applicable'. Minimum force is the degree of force objectively viewed, that is necessary to achieve the aim. It does not tell the SANDF members that the only 'aim' for which force is allowed to be used

under section 49(2) of the Criminal Procedure Act to affect an arrest of a 'suspect' (a person reasonable suspected of having committed an offence) and only when the suspect cannot be arrested without the use of force. No force may ever be used for any other aim such as to 'teach' [someone] for instance a lesson.

[122] I have also noted that none of the documents annexed give any guidance specific to the practical context of civilian policing which is different wholly different than conflict situations for which SANDF members are trained.

[123] The Police respondent's in turn admit that they have issued SAPS and MPD members with no guidelines beyond a verbatim copy and paste of section 49 of the Criminal Procedure Act without more. They claim that the section requires no guidelines in as much as the provisions are very clear and unambiguous. Neither the applicants' counsel nor I am convinced by this argument. Section 49 of the Criminal Procedure Act is only a few lines long. It states principles. It does not describe how to use a particular weapon or instrument with minimum force. It does certainly not explain how to deal with the extra ordinary circumstances of the lock-down, where every person, including the children and elderly, is a 'potential suspect'. No proper guidelines have as yet been issued in my view to inform even SANDF members, let alone civilians how security forces may enforce the lock-down, including when and to which extent they may use force.

[124] Useful reference can be had to examples contained in the document titled **'United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials'** and the **United Nations guidelines are Less-Lethal**

Weapons Enforcement 2020. This is a detailed 50 page document setting out practically how different instruments and methods may be used to minimise force. It was suggested by applicants;' counsel and I agree therewith, that it would cost the respondents very little to adopt or adapt either of these United Nations documents as guidelines for the lock-down. It could save lives.

[125] I have already mentioned that a code of conduct and operational procedures would not be wholly ineffective if they were not widely published along the lines understood in paragraph 4.2 on the Draft Order.

[126] As I have already mentioned I have not forgotten that citizens of South Africa must also impose a duty on themselves and comply with the Regulations and guidelines not only for their own personal benefit, but for the benefit of society as a whole having regard to how the virus spreads. The guidelines as suggested by prayers 4.2.3 should therefore also contain details about enforcing social distancing and the restriction of movement and other activities at each stage of the different stages of alert during the state of disaster. Such guidelines ought then to be applied sensibly by the security forces so as not to make all transgressor a criminal. There should also be a guideline of when a person may be arrested and alternative means of securing their attendance at trial. There is no general reason in my opinion to arrest each and every transgressor, no matter how trivial the transgression. The offence police cells and prisons are overcrowded, and no doubt that is one of the reasons why the President has recently announced that thousands of prison inmates will be released on parole. Once a security officer is satisfied that a 'transgressor' has supplied his correct name, a warning to appear in court would

suffice. It is beyond my powers to make any order that an administrative fine would be sufficient rather than making each and every transgressor a criminal with all the adverse consequences that I have already referred to. That is a matter for Parliament.

[127] The public have a complaint mechanism at its disposal and should be fully informed of the availability thereof, and therefore I'm of the view that prayer 4.2.5 is wholly justified and appropriate The same applies to prayer 5 which deals with the obligations of the first to sixth respondents. The basis for this relief is that contained in paragraph 5 is the Constitution itself, interpreted in accordance with the international law. Sections 12(1)(d) and (e) of the Constitution guarantee 'everyone the right not to be tortured in any way, not to be punished in a cruel, inhuman or degrading why.' This 'every one' includes the late Mr Khosa, his partner Ms Monthsha and his brother in-law Mr Muvhango. It however also includes all civilians who will be exposed for the remainder of the state of disaster to intense policing by armed members of the SAPS, MPD's, as well as some 76 000 armed members of the SANDF.

[128] Under section 7(2) of the Constitution the Defence Minister and the Police Minister, as organs of state also have a duty to respect, protect, promote and fulfil these rights.

[129] In *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at paragraph 184 and further the point was made that these duties must be discharged in accordance with the standards set by the international law.

[130] In addition section 199(5) of the Constitution states that 'the security services must act, and teach and require their members to act in accordance with the Constitution and the law including customary international law and international agreement binding on the Republic.

STANDARDS SET BY INTERNATIONAL LAW:

[131] Articles 12 and 13 of the **Torture Convention** are particularly clear in the present context. The first mentioned article requires each state party to ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is a reasonable ground to belief that an act of torture has been committed in any territory under its jurisdiction. Article 13 in turn states that each state party shall ensure that any individual who alleges that he has been subjected to torture in any territory under its jurisdiction has a right to complain, and to have his case promptly and impartially examined, by its competent authorities. Steps shall be taken to ensure that the complainant and the witnesses are protected against all ill-treatment and intimidation as a consequence of the complaint or evidence given. These provisions are due echoed in the Robben Island Guidelines, adopted in 2002 by the African Commission on Human Rights and People Rights to guide states to give effect to article 5 of the **African Charter of Human and People's Rights 1981** Section F deals with complaints and investigation procedures and its much in line with the article 12 and 13 of the **Torture Convention**. There are a number of other international documents to the same effect and one aspect repeatedly stands out, namely that any such investigation must be prompt and impartial.

INADEQUACY OF EXISTING INVESTIGATIVE MECHANISMS

[132] The torture act has no provisions dealing with the lodging and investigation of complaints of torture. In its 2017 report to UNCAT (which was 8 years late) the South African Government explained that:

1. The only body tasked with investigating torture complaints against members of the SAPS and MPD is the Independent Police Investigative Directorate (IPID), the ninth respondent and

2. The only body tasked with investigating torture complaints against members of the SANDF is the Office of the Military Ombud.

[133] It appears that UNCAT asked South Africa certain questions in a document titled 'List of issues in relation to the second periodic period report of South Africa' dated 14 April 2019, paragraph 5. The Government failed to provide this information and UNCAT issued a report titled 'Concluding observations on South Africa's report' delivered less than a year ago and I will refer to only a number of the observations made. In the present context it was stated that about the use of the Act in practice, since it does not provide for investigations of acts of torture and since no public officials have been prosecuted under the Act to date ....

> *'7 The state party should: ...*
> *b. in order to operationalise the Act consider introducing procedural provisions to ensure that documentation, effective and independent investigation and prosecution of acts of torture and cruel, inhuman and degrading treatment or punishment.*
> ...
> *22. The committee is seriously concerned that numerous instances of violence in places of deprivation of liberty, including the excessive use of force, torture, sexual violence and other forms of ill-treatment. Its also concerned of the high number of death in custody resulting, notably, from actions of police and prison officials and from the absence of medical*

treatment, and the low number of investigations into and prosecutions relating to such death…

23. The state party should:
a. ensure that all deaths in custody and all cases of violence and other forms of ill-treatment in state or contract-managed prisons are investigated promptly, thoroughly and impartially by an independent mechanism with no institutional or hierarchical connection between the investigators and the alleged perpetrators; those responsible are brought to justice and, is found guilty duly punished, and that the victims and their depends obtain adequate redress.'

[134] The Committee then also dealt with statistics relating to police brutality and the excessive use of force. It is not necessary for present purposes to repeat all of the findings except what was stated under paragraph 32(a):' the Committee is concerned at numerous reports of acts of torture committed by police officials, including the report by the Independent Police Investigative Directorate of 217 cases of torture and 3661 cases of assault recorded in the period 2017/2018 as well as reports of 112 rapes committed by police officers, including 35 committed while the officers were on duty, and

'b. that such acts have resulted in a significant increase in the number of deaths in police custody, including 394 deaths of a result of police action and 302 deaths in police custody for 2016/2017 period while less than half is investigated.'

[135] In paragraph 33 of the Report they recommended that the state party (South Africa) ensure that all law enforcement officials co-operate and notify the Independent Police Investigative Directorate regarding all allegations of torture by law enforcement officials, recommend disciplinary actions to the Police service, and ensure that the Directorate refers all criminal cases to the National Prosecuting Authority;

'b. ensure that all allegations of torture, access use of force and ill-treatment by law enforcement officials are investigated promptly, effectively and

impartially by mechanisms that are structurally and operationally independent and with no institutional or hierarchical connection between investigators and alleged perpetrators.

c. ensure that all persons under investigation for having committed acts of torture or ill-treatment are suspended immediately from their duties and remain so throughout the investigation, while ensuring that the principle of presumption of innocence is observed...'

[136] It is abundantly clear that the view of UNCAT is that South African's existing investigative bodies have not been performing and do currently not have the capacity to perform the 'prompt and impartial' investigation required by the Torture Convention.

[137] The present case seems to bear this out. The assaults on the applicants and the death of Mr Khosa occurred on 10 April 2020. There was no proper investigation in progress. The affidavit of the ninth respondent which undertook to launch such an investigation within a period of 2 weeks from 8 May 2020 and provide me with an appropriate report. Not one from any State agency medically examined the applicants nor interviewed the surviving victims or any witnesses until after the Court hearing. This alone shows that the existing investigative bodies are either not competent or not committed to comply with article 12 of **the Torture Convention.**

INADEQUACY OF IPID:

[138] In a number of respects IPID itself is of the view that for reasons of inadequacy of funding and the provision of trained personnel it is not always in a position to investigate complaints promptly and efficiently. I have referred to the affidavit that was handed to me in court and the one I received on 8 May 2020, and

only wish to add that it is of serious concern that IPID at present does not even have a permanent executive director for the duration of the lock-down who would act independently as was required by the court in *McBride v Minister of Police and Another* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCOR 1389 (CC) in that decision the court declared certain provisions of the IPID Act unconstitutional as they undermine IPID's independence from the executive. The court ordered parliament to cure the defects in the legislation within 24 months. Some 44 months later parliament has still not amended the IPID Act and no explanation for this delay has been tendered to my knowledge. Defects in IPID can be gleaned from its own Annual Performance Plan for 2019/2020. It has simply been provided with insufficient financial and other resources.

INADEQUACY OF THE OFFICE OF MILITARY OMBUD, THE EIGHTH RESPONDENT:

[139] Although no relief was sought against this respondent, an explanatory affidavit was filed, the latest on 11 May 2020. There are a number of problems relating to this respondent. First, the Ombud is not empowered to investigate SAPS members and MPD members. This alone renders it incompetent to perform the functions under the Torture Convention. It is also not institutionally impartial as the Ombud is required to have at least 10 years military experience. There is not procedural safeguard against the premature removal of the Ombud by the President. Its budget is effectively determined by the Defence Minister it is accountable to the Defence Minister rather than Parliament and its 'method and conduct of investigation 'are prescribed by ministerial Regulations. In practice therefore it cannot investigate promptly, effectively and independently which is also

apparent from its own annual activity report for 2018/2019. Against a target of finalising 75% of complaints within the year, the Ombud's office finalised only 47%.

[140] It is clear that this office lacks sufficient human resource capacity and funding to deal with the existing caseload. It was therefore contented by applicants' counsel that, and in my view justifiably so, that after 1 May 2020 there will be 74000 armed soldiers (almost the entire SANDF) policing civilian streets in the country This is reportedly the larges deployment of the defence force in our post-apartheid history. The Ombud simply does not have the capacity, and I think one can justifiably say that it was not even designed to have this capacity, to deal promptly with the hundreds of civilian complaints that this unprecedented deployment may generate. As a result this office is institutionally and practically incapable of conducting the 'prompt and impartial' investigation required by the **Torture Convention** and thus by section 12(1)(d) and (e) of the Constitution.

[141] I agree with applicants' counsel that there is no existing mechanism capable of conducting prompt, impartial and effective investigations of lock-down brutality and that I have the duty and the power to order the Defence Minister and the Police Minister to establish one urgently. This must be independent and be seen to be independent. The Ombud's report of 11 May 2020 mentions that as yet no formal complaint has been lodged in respect of Mr. Khosa's death. The Ombud is also investigating about 24 other cases at present. A repeated feature is that complainants do not have the necessary complaint forms or are unable to complete them and provide them to the particular office.

THE DRAFT ORDER:

[142] The draft order is designed to ensure that South Africa complies with its Constitutional and international obligations. As far as my powers as court are concerned in the context of the principle of separation of powers it was submitted that I would not overstep the line if the relevant prayers in the draft order were granted. The relief is far more modest than the respondents make it out to be. It is also noted that the separation principle must not be seen along dogmatic lines. In appropriate cases there a certain overlapping between the three separate institutions namely the judiciary, legislative authority and executive authority. See *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) paragraph 170.

Similarly, in *Democratic Alliance v South African Broadcasting Corporation Limited and Others* 2015 1 SA 551 (WCC) at paragraph 99 it was held by Schippers J and in my view correctly so that:

> *'the rule of separation of powers cannot be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to a litigant who successfully raises a constitutional complaint.'*

[143] Courts have in any event granted similar relief before and in this context see: *Democratic Alliance v South African Broadcasting Corporation Soc Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others* [2017] 1 ALL SA 530 (WCC); *President of the Republic of South Africa v Office of the Public Protector and Others* [2018] 1 ALL SA 800 (GP) and *Mwelase and Others v Director-General for the Department of Rural Development and Another* 2019 (6) SA 597 (CC).

[144] Applicants' counsels were therefore not asking me to supplant or undermine existing institutions. Rather, I was asked to order the respondents to enhance the existing institutions and to give them what they are currently lack but constitutionally require- the necessary competence, independence and capacity to receive and investigate complaints of torture, and brutality promptly, impartially and effectively. This relief is competent, justified, appropriate and above all just and equitable as required by the Constitution. Lock-down brutality requires a remedy. The order sought provides that remedy.

[145] I agree with applicants' counsel that it was appropriate to refer to the decision by the Constitutional Court in *Mahomed and Another v The Republic of South Africa and Others* 2001 (3) SA 893 (CC) paragraph 69 where Chaskalson P referred to the United States decision in *Olmstead et al v United States* and quoted the words of Justice Brandeis as follows:

> *" In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."*

[146] In the result, following order is granted:

1. This application is heard as one of urgency in terms of Rule 6(12), the ordinary requirements of the Rules in respect of notice, service and time periods being dispensed with, and the applicants' departure therefrom being condoned

2. In terms of sections 38 and 172(1)(b), read with section 21(1)(c) of the Superior Courts Act, 10 of 2013, it is declared that, during and notwithstanding

the declaration of the State of Disaster and the Lockdown under the Disaster Management Act 57 of 2002:

2.1. all persons present within the territory of the Republic of South Africa are entitled to (among others) the following rights, which are non-derogable even during states of emergency:

2.1.1. the right to human dignity (section 10 of the Constitution);

2.1.2. the right to life (section 11 of the Constitution);

2.1.3. the right not to be tortured in any way (section 12(1)(d) of the Constitution);

2.1.4. the right not to be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e) of the Constitution);

2.2. under section 199(5) of the Constitution, the South African security services, which include the South African National Defence Force ("**SANDF**"), the South African Police Service ("**SAPS**"), and any Metropolitan Police Department ("**MPD**"), must act, and must instruct their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic;

2.3. as organs of state, the first to seventh respondents, the SANDF, the SAPS and any MPD are obliged, under section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights, including those enumerated above;

2.4. members of the SANDF, the SAPS and any MPD remain bound by section 13(3)(b) of the South African Police Service Act 68 of 1995 (read

with section 20(1)(a) of the Defence Act 42 of 2002), to use only the minimum force that is reasonable to perform an official duty;

2.5. members of the SANDF, the SAPS and any MPD, as well as their commanders or superiors, including each of the first to seventh respondents, are bound by the provisions of the Prevention and Combating of Torture of Persons Act 13 of 2013, and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

3. The first to fourth respondents, within their respective areas of authority, shall:

3.1. within five days, pending the outcome of disciplinary proceedings, place on precautionary suspension, on full pay, all members of the SANDF who were present at or adjacent to 3885 Moeketsi Street, Far East Bank, Alexandra, Johannesburg on 10 April 2020;

3.2. within two days, command all members of the SANDF, SAPS and any MPD to adhere to the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment, and to apply only the minimum force that is reasonable to enforce the law;

3.3. within five days, warn all members of the SANDF, the SAPS and any MPD, as well as their entire chains of command, that any failure to report, repress and prevent acts of torture or cruel, inhuman or degrading treatment or punishment shall expose them each individually to criminal, civil and/or disciplinary sanctions;

3.4. within seven days, lodge affidavits with this Court confirming that the above has been done.

3.5. It is recorded that the sixth respondent shall immediately commence a process to place the members of JMPD who were present at or adjacent to 3885 Moeketsi Street, Far East Bank, Alexandra, Johannesburg on 10 April 2020 on suspension, pending an investigation into charges of misconduct.

4. The first and fourth respondents shall, within five days:

4.1. develop and publish a code of conduct and operational procedures, regulating the conduct of members of the SANDF, SAPS and MPDs in giving effect to the declaration of the State of Disaster.

4.2. widely publish the following, in newspapers of national and provincial circulation; electronic platforms available to the government such as WhatsApp, Facebook and Twitter, and national and provincial radio stations:

4.2.1. guidelines about the circumstances when the use of force may be used in strict compliance with section 49 of the Criminal Procedure Act 51 of 1977;

4.2.2. guidelines about the enforcement of the Lockdown Regulations and any other Regulations issued during the State of Disaster;

4.2.3. guidelines about enforcing social distancing and the restriction of movement and other activities, at each of the different Stages of Alert during the State of Disaster;

4.2.4. guidelines about when a person may be arrested and alternative means of securing their attendance at trial;

4.2.5. information regarding where members of the public may lodge complaints against members of the SANDF, the SAPS and other any enforcement agency/officer.

4.3. lodge affidavits with this Court confirming that the above has been done

5. The first to sixth respondents shall, within five days:

5.1. establish a freely accessible mechanism for civilians to report allegations of torture or cruel, inhuman or degrading treatment or punishment, committed by members of the SANDF, the SAPS or any MPD for the duration of State of Disaster.

5.2. widely publicise such mechanism throughout South Africa via television, radio and digital media in all eleven official languages.

6. The first and fourth respondents shall:

6.1. ensure that the internal investigations into the incidents listed below are completed and reports are furnished to this Court, on or before 4 June 2020:

6.1.1. the treatment of Mr Collins Khosa;

6.1.2. the treatment of any other person whose rights may have been infringed during the State of Disaster at the hands of members of the SANDF, the SAPS and/or any MPD.

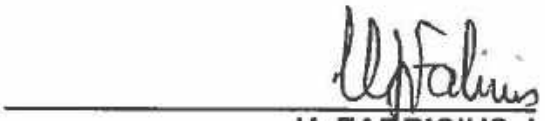
6.2. immediately lodge each such report with this Court.

6.3. furnish such reports to the applicants' legal representatives.

7. The ninth respondent is ordered to file its report of their investigations to this Court by 22 May 2020.

8. The first to fifth respondents shall, jointly and severally, bear the costs of this application, including the costs of two counsel.

[147] As far as costs are concerned there is no reason why the applicants who were substantially successful should, not be awarded the costs of this application. I have a discretion in this regard. Their challenge is constitutionally justified and bona fide.



H. FABRICIUS J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 5 & 6 MAY 2020
DATE OF JUDGMENT: 15 MAY 2020

APPEARANCES:

FOR THE APPLICANTS:

ADV NGCUKAITOBI SC

ADV WINKS

INSTRUCTED BY: IAN LEVITT ATTORNEYS

FOR THE 1ST TO 3RD RESPONDENT:

ADV MAENETJE SC

ADV MOJAPELO

INSTRUCTED BY: STATE ATTORNEY

FOR THE 4TH AND 5TH RESPONDENT:

ADV BOFILATOS SC

INSTRUCTED BY: STATE ATTORNEY

FOR 6TH RESPONDENT:

ADV MAKHARI SC

ADV MAISELA

INSTRUCTED BY: STATE ATTORNEY

FOR 7TH RESPONDENT:
T MAJANG
INSTRUCTED BY: MOJAPELO INCORPORATED

FOR THE 8TH RESPONDENT:

ADV CHABEDI

INSTRUCTED BY: STATE ATTORNEY

FOR THE 9TH RESPONDENT:

ADV RAMAIMELA

INSTRCUTED BY: STATE ATTORNEY

FOR THE SERI:

ADV WILSON

ADV DE VOS

FOR FES:

ADV HASSIM SC

ADV MTSWENI
ADV SEKWAKWENG
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