

## **Collins Khosa judgment: A win for all of South Africa against brutality by security forces**

Daily Maverick by Carmel Rickard

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Collins Khosa, who died after being viciously beaten over the Easter Weekend. (Photo supplied)

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**The ministers of defence and of police must draw up a code of conduct for all the security forces with guidelines for their behaviour and interaction with civilians during this time.**

In a major victory for human rights, the family of Collins Khosa and their neighbours have won a court application for orders against the security forces and their bosses. And they will no doubt be awarded significant damages when that part of the litigation is eventually heard.

But they are not the only winners: everyone in South Africa has won because of this restatement by the courts of the obvious: that the government and the security forces will be held to account for how they behave – even during restrictions aimed at curbing the spread of Covid-19 – and that their behaviour will be measured against the standards of the Constitution and the Bill of Rights.

Collins Khosa, his immediate neighbour and members of their families were viciously beaten by soldiers over the Easter weekend at their home in Alexandra township, Gauteng, for what the security forces said were infringements of lockdown regulations.

Soon after the soldiers left, Khosa died: the injuries sustained from the assaults had been fatal. According to his family and other witnesses whose claims were not challenged by the security forces in their papers before court, the assaults followed the discovery, by the security forces, of a half-drunk beer next to a chair in Khosa's yard and a single beer in his fridge.

But the [decision](#) of Judge Hans Fabricius, handed down in the Gauteng High Court on 15 May 2020 in a case brought by the Khosa family and their neighbours, means there are other winners apart from the named applicants. Constitutionalism and the Bill of Rights have both been given new life by the strongly

worded decision and its reminder to everyone in South Africa of the standards of behaviour required of us all, the government, the security forces and the people.

### **Significant**

In particular, the people of SA, treated so shoddily over many weeks of lockdown, may also count this as a significant victory. The court's strong restatement of the rights of the people puts the state authorities and the security establishment on terms to act within the bounds of the social contract embodied in the Constitution, making clear that anything less is unlawful.

Many reports of the judgment have highlighted that soldiers who were involved in the fatal assault of Khosa over the Easter weekend are to be suspended, on full pay, while a proper investigation takes place. True. But the judgment goes far beyond this particular case and even the particular soldiers and their leaders. It sees Fabricius setting things straight and restating what should be the reality of our lives. SA is a constitutional democracy, he points out, and that means the government has to behave in a way that is respectful of the people and their rights.

### **Distrust**

He writes that people must be able to trust the government to do its part. And that is to "abide by the rule of law and make rational regulations". However, he and counsel in the case agreed that at present "there is a large measure of distrust" between the people and the government. This mistrust was primarily caused by how the security forces and their top officials have been treating people in the context of the lockdown regulations.

While a lockdown was clearly needed, "the public is entitled to be treated with dignity and respect whether rich or poor". Under the Bill of Rights "there is no doubt about that", said the judge. On the other hand, the government can "justifiably expect citizens to cooperate for the common goal, take responsibility to ensure their own safety and that of others". Unless this "community of interest" existed, the whole lockdown exercise would fail, "and a wasteland and social unrest awaits us all".

### **'National psyche'**

He noted that everyone was already becoming aware of the negative effect of the lockdown on the "national psyche" given the inevitable impact of the lockdown on the economy.

In addition, however much the restrictions were needed, the public was entitled to respect for rights that even disaster regulations may not infringe. These included the right to dignity, the right to life and the right not to be tortured or punished in a cruel, inhuman and degrading way.

According to Khosa's family and neighbours who had brought the application, if a proper code of conduct recognising these rights had been developed for how soldiers and police were to operate together and separately during the lockdown, Khosa might still be alive.

### **Indemnity**

Trawling through the applicants' affidavits, the judge highlighted a number of places where the ministers of defence and of police, gave contradictory messages. On the one hand, the security forces were encouraged to take action against the rest of society in language that would have been understood

to permit violence and other unlawful actions. But on the other, official statements appeared to tone down that language.

The judge spoke with concern about additional aspects of the regulations so far given little publicity, namely, what seems to be the provision of indemnity for law enforcement officials whatever they might do. This, he said, “adds to the already lacklustre response... to the increasing spate of lockdown brutality”.

### **Compassion**

What strikes any careful reader of the decision is the judge’s common sense and, even more, his compassion. He notices the inequalities of society, the lack of basic facilities under which people suffer, the children living in informal settlements who have nowhere to play and their parents who have no means of managing their lives during lockdown. He points out the frustrations of the youth, faced with dire prospects of employment and no hope of obtaining a proper education. He also notes the conduct of the security forces, aimed mainly at “the most vulnerable” in SA, and says when the poorest are treated with “contempt and indifference”, courts must intervene.

“There are clear indications of the complete lack of trust between... the government on the one hand and society on the other.” Members of society, “are not objects or subjects of some higher authority” – not the president, the executive or even the “nebulous National Command Council”. No, he said, people “are holders of rights and in particular, those rights stipulated in [the Bill of Rights] of the Constitution”.

### **Naïve**

“I may be naïve,” he writes, “but I cannot understand why the security forces cannot realise that they are also citizens of this country.” Like everyone else, they and their families were protected by the Bill of Rights. “No doubt they also have families that suffer” under lockdown and its impact on the economy. No parent among the security forces “would like to see their families treated” in the way that others had been “so visibly ill-treated” since the lockdown began.

He was also alarmed by the argument on behalf of the security authorities that the court had no business adjudicating such a case. Those entrusted with protecting the people from crime and violence not only failed to take steps against those responsible for ill treatment of ordinary people “but have the audacity to tell a court that it has no function in the matter and ought not even to hear it,” he said. Contrary to the claim of the authorities, suspending those who might have been involved in the fatal assault at the Khosa home would not be a “drastic measure”, and it would “instil public confidence”.

### **Investigation**

One of the most worrying aspects of the case, as highlighted by Fabricius, is this: at the time the case was argued, no medical examination of the survivors had been made by any state agency, nor had there been any interview of victims or witnesses. Fabricius said this alone showed that the existing investigative bodies were not committed to complying with the international Torture Convention, despite SA being a signatory. Or else they did not have the competence to do so.

Both the Military Ombud and the Independent Police Investigative Directorate were too inadequately funded and staffed to manage their investigative task and the judge said he agreed that there was “no existing mechanism capable [of] conducting prompt, impartial and effective investigations of lockdown

brutality". The court therefore had the "duty and the power" to order the ministers of defence and of police to establish such a mechanism as a matter of urgency.

### **Military language**

Directives to the soldiers involved in Alexandra where the Khosa family lived was worded in a way that "explicitly targeted" the local people as "threats or obstacles" to the military objective of combating Covid-19, with the implication that such threats had to be "neutralised".

It was clear from the directive, "saturated with military language" that clearer instructions and guidelines were needed about how soldiers were to interact with civilians in a constitutional democracy, and the court ordered that such guidelines were to be immediately drawn up and published. This is a major development arising from this case and perhaps also the most tangible result for ordinary people, namely that the ministers of defence and of police must draw up a code of conduct for all the security forces with guidelines for their behaviour and interaction with civilians during this time. And the code must be published widely.

The code of conduct and guidelines must be made public via extensive use of media, with the court having an oversight function to ensure this has been done. Publishing of the guidelines, along with information about how to report any breaches of the code and the guidelines, will mean that everyone will know the standards of behaviour that the security forces are obliged to meet. If the security forces continue with unlawful actions, the public will be empowered to report and ask for action.

### **Reset**

These guidelines, and the mechanism for ensuring that the public can easily report breaches of their key rights, has been a key element missing so far from the lockdown process and the strategy to curb Covid-19. The judgment should be welcomed for its critically important intervention in the strategy used by the government to contain Covid-19. Just as significant, it contains an important critique of the comments and behaviour of the ministers of defence and of police, all of which had been passed over with no word from President Cyril Ramaphosa until his most recent public address. Even then, he made only the most vague references to mistakes that should be acknowledged.

Before this judgment, the approach of the government meant SA had been little better off in relation to the security forces than we would have been under the previous authoritarian, apartheid rulers – without our democratic constitution and the protection of its Bill of Rights. Now we have been empowered once again to use these rights when confronted by security force brutality.

### **It's like a reset**

In the days after the Fabricius judgment was released, traumatised residents of two seaside towns, one in the Western Cape and the other in KwaZulu-Natal, spoke of how municipal and traffic police had told them they "had no rights" under lockdown regulations. The judgment stresses that this is untrue.

In addition, municipal and traffic police in Gauteng were included in the list of respondents in the Fabricius judgment and are thus subject to the orders issued. Clearly, municipal and traffic police in the rest of the country cannot escape the strictures of this judgment. Members and leaders of municipal and traffic police are also subject to the court's declaration that the rights of the public must be

respected. They are likewise hit by the judge's order on adherence to a code of conduct during the period of lockdown.

The respondents in the case were as follows: minister of defence and military veterans, secretary for defence, chief of the SA National Defence Force, minister of police, national commissioner of the SA Police Service, Acting Chief of the Johannesburg Metropolitan Police Department, Chief of the Ekurhuleni Metropolitan Police Department, Office of the Military Ombud, Independent Police Investigative Directorate, minister of cooperative governance and traditional affairs. **DM**

Click [here](#) for a summary of the court's order.

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[https://www.dailymaverick.co.za/article/2020-05-18-collins-khosa-judgment-a-win-for-all-of-south-africa-against-brutality-by-security-forces/amp/?\\_twitter\\_impression=true](https://www.dailymaverick.co.za/article/2020-05-18-collins-khosa-judgment-a-win-for-all-of-south-africa-against-brutality-by-security-forces/amp/?_twitter_impression=true)