

South African Police Service



Suid-Afrikaanse Polisie

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- B. All Provincial Commissioners
- C. All Divisional Commissioners
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- F. All Section Heads
HEAD OFFICE
- G. All Commanders
SAPS COLLEGES AND TRAINING CENTRES
- H. All Deputy National Commissioners
- I. The Secretary
CIVILIAN SECRETARIAT FOR THE SOUTH AFRICAN POLICE SERVICE

USE OF FORCE AND TORTURE: GUIDELINES ON THE IMPLEMENTATION AND ENFORCEMENT OF REGULATIONS AND DIRECTIVES ISSUED IN TERMS OF SECTION 27 OF THE DISASTER MANAGEMENT ACT, 2002 (ACT NO. 57 OF 2002): CONTAINMENT AND MANAGEMENT OF COVID-19

- A-G1. The Minister of Cooperative Governance and Traditional Affairs (COGTA), designated under section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002), declared a national state of disaster (published in Government Gazette No. 43096 on 15 March 2020), and promulgated regulations in terms of section 27(2) of the Disaster Management Act, 2002, on 29 April 2020 ("the Regulations").
2. In terms of the Regulations members of the South African Police Service (SAPS) have been designated as enforcement officers, together with members of the SANDF and peace officers. Enforcement officers are expected to enforce

compliance with the Regulations. Enforcement officers are not empowered to authorise deviations or exceptions of the obligations created in terms of the Regulations and Directions issued by a Minister within his or her sphere of responsibility.

3. The Regulations are aimed at containing and managing the COVID-19 virus and police action must support this aim. According to a speech delivered by His Excellency, the President of the Republic of South Africa, on 26 March 2020 at the Tshwane Police Academy, members of the SAPS are expected to be supportive, provide a service, help, give advice, guide and lead the community, in order to ensure that lives are saved. This is indeed the main objective of the Regulations.
4. Section 205(3) of the Constitution of the Republic of South Africa, 1996, provides that *"the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."*
5. Complaints of torture, excessive use of force, inhumane treatment and punishment of the community by enforcement officers (including members of the SAPS) during the State of Disaster have come to the attention of the National Commissioner. Conduct of this nature by members of the SAPS is unacceptable and will be dealt with in terms of the criminal law and the disciplinary process of the SAPS.
6. The following principles are therefore reiterated:
 - 6.1 **Briefing of members**
 - 6.1.1 The relief commander must during each parade instruct the members under his or her command in the nature of their functions and duties, cautioning them regularly and strongly against any act of unnecessary violence on any person, as well as cautioning them against the use of objectionable language, but inculcating in them the value of loyalty, sobriety and an even temper. He or she must continuously communicate the instructions set out in this circular.

6.1.2 When members go off duty, they must be encouraged to convey challenges experienced during the shift. The relief commander must note these concerns and, if he or she does not have a solution, engage his or her seniors in order to resolve the challenges.

6.2 **Arrest and use of force**

6.2.1 As a general rule, the object of an arrest is to secure the attendance of a person at his or her trial. A member may under no circumstances arrest a person in order to punish, scare or harass such person or to teach him or her a lesson.

6.2.2 A member may only arrest a person if he or she has the authority (power) to arrest that person. Legislation (the Criminal Procedure Act, 1977 (Act No. 51 of 1977) ("the Act"), in particular) authorises a member to effect the arrest of a person in certain limited circumstances. Every member must acquaint himself or herself with the legislation that empowers a member to arrest a person and must, in particular, make sure that he or she understands the circumstances outlined in the legislation that must be present before a person may be arrested.

6.2.3 Members must ensure that a particular offence exists in law before arresting a person for the commission of an offence. Where certain conduct has not been criminalized (such as the wearing of masks or social distancing) members must sensitize "transgressors" that their conduct is endangering their health and that of others. Members must continuously monitor if certain conduct constitutes an offence as the Regulations often changes.

6.2.4 The requirements for effecting a lawful arrest are dealt with in National Instruction 11 of 2019.

6.2.5 Section 39(1) of the Act provides that an arrest shall be effected with or without a warrant and unless the person to be arrested submits to custody, by actually touching his or her body or, if the circumstances so require, by forcibly confining his or her body.

- 6.2.6 Although section 39(1) of the Act authorises a member to “forcibly confine” the body of a person in the process of arresting the person, this is only permissible if the person does not submit to custody and circumstances so require. Later in court, a member may be required to explain the circumstances that were present, which required him or her to “forcibly confine” the body of the person that he or she was arresting. Such circumstances may include the person attempting to evade the arrest by running away, verbally threatening, portraying threatening conduct, etc.
- 6.2.7 Section 39(1) of the Act therefore empowers a member to use force to effect an arrest in certain limited circumstances only. The purpose of using force must be “to confine” the body of the person to be arrested and may only be used if that person does not submit himself or herself to custody and circumstances require that force be used. A member who uses force for any other purpose (such as to punish or teach the suspect a lesson), may himself or herself be guilty of an offence, such as assault, assault GBH, attempted murder, etc.
- 6.2.8 It is obvious that section 39(1) of the Criminal Procedure Act envisages that no force will normally be required or be necessary to effect an arrest. However, in those limited circumstances in which force is necessary “to confine” the body of the person to be arrested, the purpose of using force may only be to confine the body of the person to be arrested. The use of force for any other purpose is accordingly not permissible (unlawful). Once the suspect’s body has been confined, the use of force must immediately stop.
- 6.2.9 Section 39(1) authorises the use of force in order to confine the body of a person to be arrested. Section 39(1) of the Criminal Procedure Act does not authorise the use of a firearm. Section 49 of the Criminal Procedure Act applies to the use of a firearm (see National Instruction 1 of 2016 in this regard). **In exercising their powers, functions and duties, members are not allowed to indiscriminately use force to achieve even a legally permissible objective, but must ensure that the harm which may result from the use of the force, will be proportional in all the circumstances.**

6.2.10 It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in paragraph 6.2.11 (below). The member must, upon arrival at the police station, complete the Arrest Statement (SAPS 3M(i)), amongst other things explaining why arrest was necessary. Factors that the member should consider to exercise his or her discretion in a proper manner are whether –

- (a) there is a likelihood that the arrested person, if released, will endanger the safety of the public or any particular person or commit another Schedule 1 offence;
- (b) there is a likelihood that the arrested person, if released, will attempt to evade his or her trial;
- (c) there is a likelihood that the arrested person, if released, will attempt to influence or intimidate witnesses or conceal or destroy evidence;
- (d) there is a likelihood that the arrested person, if released, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system; or
- (e) in exceptional circumstances, there is a likelihood that the release will disturb public order or undermine the public peace and security.

6.2.11 A member, even though authorised by law, should normally refrain from arresting a person if –

- (a) the attendance of the person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977 (If a member is satisfied that the attendance of the person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977, the member must open a docket and refer it to the public prosecutor for the public prosecutor to have a summons issued. The summons may then be

served on the person. Pocket Book and Occurrence Book entries must be made in all these instances.); or

- (b) the member believes on reasonable grounds that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Government Gazette* (currently, R 5000,00), in which event such member may hand to the accused a written notice [J 534] as a method of securing his or her attendance in the magistrate's court in accordance with section 56 of the Criminal Procedure Act, 1977. If the person must be taken to the police station to be issued with a J 534, such person must be taken immediately to the police station. Pocket Book and Occurrence Book entries must be made in all these instances.

6.2.12 There are circumstances where the law permits a member to arrest a person although the purpose with the arrest is not solely to take the person to court. These circumstances are outlined in paragraph 7 of National Instruction 11 of 2019 (Arrest, treatment and transportation of an arrested person), and constitute exceptions to the general rule that the object of an arrest must be to secure the attendance of an accused at his or her trial. These exceptions must be applied with caution and members must take special note of the requirements that must be complied with before an arrest in those circumstances will be regarded as lawful.

6.2.13 Members may not use private equipment or equipment not issued by the SAPS such a "sjambok", etc.

6.2.14 The detention of a person is a serious and humiliating infringement upon his or her freedom of movement and must be limited to the minimum period of time that may be necessitated by the *interests of justice*. Based on the information provided and subject to the conditions set out in National Instruction 3 of 2016 (Bail and the release of Persons), the arresting member, community service centre commander or the senior member in charge must consider the release a person (in consultation with the investigating officer) –

- (a) on written warning (section 72 of the Act) [SAPS 496];
- (b) on written notice (section 56 of the Act) [J 534];
- (c) on bail (sections 59 and 59A of the Act) [J398 or J399];
- (d) after a charge has been withdrawn through an arrangement with the Public Prosecutor; or
- (e) if he or she was detained as a suspect, but is released from detention before the expiry of the 48-hour period because no charge is brought against him or her (section 50(1)(c) of *the Act*) [SAPS 328].

6.3 Torture

6.3.1 The right not to be tortured is entrenched as a fundamental right in Chapter 2 of the Constitution. The Prevention and Combating of Torture of Persons Act, 2013 (Act No.13 of 2013) criminalises torture and other offences associated with the torture of persons.

6.3.2 “**torture**”, as defined in section 3 of the Prevention and Combating of Torture of Persons Act, 2013, means:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person —

(a) *for such purposes as to —*

- (i) *obtain information or a confession from him or her or any other person;*
 - (ii) *punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit;*
or
 - (iii) *intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or*
- (b) *for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a*

public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.

6.3.3 Section 4 of the Prevention and Combating of Torture of Persons Act, 2013 provides that it is an offence for any person to —

- (a) commit torture;
- (b) attempt to commit torture;
- (c) incite, instigate, command or procure any person to commit torture; or
- (d) participate in torture, or conspire with a public official to aid or procure the commission of torture.

6.3.4 Section 4 of the Prevention and Combating of Torture of Persons Act, 2013, provides that, despite any other law to the contrary, including customary international law, the fact that a member or employee who is accused of *torture* —

- (a) is or was a head of state or government, a member of a government or parliament, an elected representative or a government official; or
- (b) was under a legal obligation to obey a manifestly unlawful order of a government or superior,

is neither a defence to a charge of committing an offence referred to in section 4 of the Prevention and Combating of Torture of Persons Act, 2013, nor a ground for any possible reduction of sentence, once that person has been convicted of an offence set out in section 4 of the Prevention and Combating of Torture of Persons Act, 2013.

6.3.5 No member may torture any person, permit or instruct anyone else to do so, or tolerate the torture of another by anyone. The same applies to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. No exception, such as a state of disaster, a state of war or a threat of war, state of emergency, internal political instability or any other public emergency will serve as justification for torture - there can simply be no justification for torture, ever.

- 6.3.6 A member or an employee who has reason to believe that a person is being tortured, or that an attempt is being made to do so, must immediately take all reasonable steps to put an end thereto.
- 6.3.7 If a suspect or person in custody raises a complaint regarding torture, the complaint must immediately be reported to the station commander or, where appropriate, the provincial commissioner or divisional commissioner, who must report this to the relevant provincial office of the Independent Police Investigative Directorate: Provided that this does not exclude a person in custody to submit a complaint regarding torture directly to the Independent Police Investigative Directorate. An entry of all steps taken must be made in the Occurrence Book (SAPS 10) at the station where the matter was reported.
- 6.3.8 If an investigation reveals that a member or an employee committed, attempted to commit or acted as an accomplice in the commission of *torture*, it constitutes serious misconduct and –
- (a) disciplinary proceedings must immediately be instituted against such a member or employee; and
 - (b) a case must be registered on CAS (the relevant offences are set out in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013).

7. **Service complaints**

- 7.1 Complainants may submit a complaint of alleged criminal conduct committed by law enforcement officers directly by visiting their local police station's Community Service Centre (CSC), or any other police station, submit an affidavit and request that a criminal case be registered for investigation.
- 7.2 Complainants may also submit a complaint regarding the conduct or service being rendered by law enforcement officers directly by visiting their local police station's Community Service Centre (CSC), Station Commander, District / Cluster Commander's office or Provincial Complaints Coordinators: Inspectorate.

- 7.3 The public will be encouraged to bring complaints of torture, excessive use of force, inhumane treatment and punishment of the community by enforcement officers to the attention of the SAPS at the above stated offices, the Provincial Complaints Coordinators of the Inspectorate or to the National Service Complaints Centre.
- 7.4 The service complaints against members of the SAPS will be investigated. Complaints in respect of enforcement officers of other agencies will be channeled to the relevant agencies for investigation.
8. The following National Instructions and circulars are attached to this circular for ease of reference and members must again acquaint themselves with the content thereof:
- 8.1 Circular 1/1/4/1 dated 2019-11-19 (Instructions relating to arrest and detention of suspects);
- 8.2 National Instruction 11 of 2019 (Arrest, treatment and transportation of an arrested person);
- 8.3 National Instruction 12 of 2019 (Arrest and treatment of illegal foreigners)
- 8.4 National Instruction 1 of 2016 (The use of force in effecting an arrest); and
- 8.5 National Instruction 6 of 2014 (The Prevention and combating of torture of persons).
- 8.6 National Instruction 6 of 2017 (Service complaints against the SAPS);
- 8.7 Interim Standard Operating Procedure for National Instruction 6 of 2017 (Service complaints against the SAPS)
9. Various National Crime Combatting Forum (NCCF) Instructions were also issued:
- 9.1 NCCF Instruction 3 of 2020 (Guidelines on the implementation and enforcement of regulations and directives issued in terms of section 27 of the Disaster Management Act, 2002 (Act No. 57 of 2002): Containment and management of Covid-19);
- 9.2 NCCF Instruction 5 of 2020 (Supplementary instruction 5 to NCCF Instruction 3 of 2020: Guidelines on the implementation and enforcement of regulations and

- directives issued in terms of section 27 of the Disaster Management Act, 2002 (Act No. 57 of 2002): Containment and management of Covid-19);
- 9.3 NCCF Instruction 6 of 2020 (Supplementary instruction 6 to NCCF Instruction 3 of 2020: Guidelines on the implementation and enforcement of regulations and directives issued in terms of section 27 of the Disaster Management Act, 2002 (Act No. 57 of 2002): Containment and management of Covid-19);
- 9.4 NCCF Instruction 10 of 2020 (Supplementary instruction 10 to NCCF Instruction 3 of 2020: Guidelines on the implementation and enforcement of regulations and directives issued in terms of section 27 of the Disaster Management Act, 2002 (Act No. 57 of 2002): Containment and management of Covid-19); and
- 9.5 NCCF Instruction 11 of 2020 (Guidelines on the implementation and enforcement of regulations and directives issued in terms of section 27 of the Disaster Management Act, 2002 (Act No. 57 of 2002): Implementation and enforcement of the Alert Level 4 Regulations).
10. A failure to comply with these instructions must be regarded as serious misconduct and members and commanders who refuse to comply with these instructions must be held personally liable for any compensation that the Service is ordered to pay as a result thereof. Losses suffered by the SAPS as a result of a failure to comply with these instructions by an employee will in terms of National Instruction 25 of 2019 (Management of Civil Claims in the South African Police Service) be recovered from that employee.
11. The content of this circular must immediately be brought to the attention of all members.

USE OF FORCE AND TORTURE: GUIDELINES ON THE IMPLEMENTATION AND ENFORCEMENT OF REGULATIONS AND DIRECTIVES ISSUED IN TERMS OF SECTION 27 OF THE DISASTER MANAGEMENT ACT, 2002 (ACT NO. 57 OF 2002): CONTAINMENT AND MANAGEMENT OF COVID-19

12. This circular applies *mutatis mutandis* to all municipal police services.

H – I 1. For your information.



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Date: 2020 -05- 13