

Firearms Control Briefing

Class action aims for police accountability in firearms management

Introduction

In February 2023 GFSA gave official notice that class action proceedings were to be instituted against the South African Police Services (SAPS) on behalf of affected families for deaths and injuries resulting from failed police-controlled firearms management systems. In the context of GFSA's class action, this Briefing looks more closely at police accountability, and the role and effectiveness of various institutions to hold the police accountable. First though, it summarises the class action against SAPS.

CSPS: Civilian Secretariat for Police Service
IPID: Independent Police Investigative Directorate
DVA: Domestic Violence Act, 1998
NPA: National Prosecuting Authority
PCOP: Portfolio Committee on Police
SAPS: South African Police Service

'Prinsloo guns' class action

The class action being instituted by GFSA on behalf of affected families aims to hold SAPS accountable for crimes committed by senior police member, Colonel Christiaan Prinsloo, who confessed to selling 2,000+ guns held in police stores to gang leaders on the Cape Flats. Prinsloo was assisted in his criminal enterprise by his colleague Colonel Naidoo. As of 2016, SAPS' own, publicly available records reveal that 'Prinsloo's guns' have been used in, at least, 1,066 murders; 187 children (under 18 years of age) were shot by criminals using a 'Prinsloo gun', of which 67 died.

When the police's Project Impi – see sidebar – uncovered Prinsloo's criminality in 2016, SAPS' Legal Division warned that, unless the stolen firearms still in the hands of criminals were retrieved and systems put in place to prevent further corruption, the risk of litigation was 'enormous'. In September 2016 SAPS recorded that at least a thousand 'Prinsloo guns' remained in circulation and continued to maim and kill people across the country. It was at this same time that SAPS disbanded Project Impi and there is no publicly accessible information related to the SAPS' progress (if any) in recovering the firearms sold into criminal hands by Prinsloo and his accomplices.

Project Impi

A SAPS investigation code-named Project Impi was registered in December 2013 after the police began recovering an excessive number of guns on the Cape Flats that had been professionally 'cleaned' of identifying marks, proof that a sophisticated gun smuggling syndicate was at work.

Following intensive investigations, senior SAPS member Colonel Christiaan Prinsloo, a commander of the Gauteng Firearm, Liquor and Second Hand Goods Control was arrested in 2015. Prinsloo confessed to his role in smuggling guns that were confiscated by or surrendered to the police for destruction to gang leaders on the Cape Flats and entered into a plea bargain with the state, providing detailed information on the syndicate in return for a lesser sentence. Colonel David Charles Naidoo, who was employed by SAPS in the capacity of an operational officer in the Confiscated Firearms Store at Silverton under the Head Office: Confiscated Firearms Store, assisted Prinsloo in his criminal enterprise.

In terms of the *Institution of Legal Proceedings Against Certain Organs of State Act, 2002*, on 20 February 2023 GFSA sent notices to the Minister of Police, National Police Commissioner and Provincial Police Commissioners giving notice of the class action, specifically that an application for the certification of class action proceedings will be lodged with the Western Cape High Court after the 60-day notice period had lapsed.

The class to be represented in the action includes the parents and guardians of children who were injured, dependents of victims killed, and those who survived a shooting with a ‘Prinsloo gun’. Several families have already given witness statements and work continues to identify further claimants. A global firm of attorneys has taken the case *pro-bono*, and has secured prominent senior and junior legal counsel to represent the litigants in the Western Cape High Court.

The certification process is the first step in GFSA’s attempt to secure redress for the class members in order to compensate them for the damages that they have suffered due to failure by the state to manage firearms held under its control. GFSA believes that this litigation will not just assist the victims of this failure, but will also serve as an important lesson to the SAPS as to the importance of having functional firearm management systems in place.

In this regard, GFSA is also considering pursuing a structural interdict against the SAPS. If successfully pursued, this would oblige SAPS to address the failures in its weapons and ammunition management system which allowed Prinsloo and others to leak guns from police stores – undetected and for years – by stipulating protocols for recording, storing and handling firearms.

“These guns continue to circulate in our communities, and they pose the biggest threat to our right to life.”

Lynn Phillips, Secretary of the Cape Flats Safety Forum

Police accountability

Democratic policing rests on accountability.¹ This is because police services like SAPS have ‘extraordinary powers’ to infringe on fundamental rights, including the right to freedom (through arrest and detention), safety and security (through the use of force), and life (through the use of lethal force beyond the strict remit of self-defence).²

Police accountability encompasses two aspects:³

- **Answerability**, which refers to the obligation of SAPS to explain and justify actions as being reasonable and within its mandate.
- **Enforceability**, which provides for sanction when actions contravene this mandate.

There are various accountability structures assigned to oversee SAPS and its members, as described below.

¹ Muntingh, Lukas; Andrew Faull; Jean Redpath; and Kristen Petersen. 2021. Democratic policing: A conceptual framework. Law Democracy & Development. Vol 25, pp. 121-147.

² Ibid.

³ Vetten, Lisa. 2014. Gendering state accountability in South Africa: Police accountability and the Domestic Violence Act. APCOF Policy Paper 11, November. Cape Town: African Policing Civilian Oversight Forum.

Internal discipline

SAPS, like all government departments, has internal structures to enforce its disciplinary code.⁴ Based on the outcome of disciplinary proceedings, perpetrators can be referred to law enforcement agencies for further investigation and prosecution.⁵ However, research done by Africa Criminal Justice Reform (ACJR) highlights how woefully inadequate SAPS' internal disciplinary structure is in holding police members accountable.⁶ In a comparison with the Department of Correctional Services (DCS), the ACJR study (which looked at data from 2007/08 to 2017/18) found that:

- SAPS institutes disciplinary measures at a rate 3.5 times less than the DCS.
- The number of SAPS officials subject to disciplinary action has steadily decreased over time, while the number of actions against DCS officials has increased.
- SAPS officials that face disciplinary action stand a 62% chance of having the case withdrawn or being found not guilty, while DCS officials have a 7% chance.

Independent Police Investigative Directorate (IPID)

IPID is an “independent investigative oversight body”⁷ mandated to investigate criminal offences committed by the police; the outcomes of these investigations are then forwarded to SAPS or the National Prosecuting Authority (NPA) for disciplinary action or prosecution.

The ACJR study found that more cases are reported to IPID, and are thus serious cases, than all the cases handled by SAPS' internal disciplinary processes – a trend that has continued to date: In 2021/22 SAPS heard 1,169 disciplinary cases, while IPID received 5,295 cases against both SAPS and metro police services.⁸ According to the ACJR, this creates the impression that IPID is “responsible for discipline in SAPS, whereas this responsibility rests squarely on the shoulders of SAPS management.”⁹

ViewFinder, a South African accountability journalism project, has found a number of problems with IPID's effectiveness.¹⁰ Not only is the quality of investigations questionable, when IPID cases do lead to criminal or disciplinary recommendations against accused officers, hardly any are disciplined: In an analysis of the watchdog's case data, ViewFinder found that SAPS converts fewer than one in four IPID recommendations into disciplinary convictions. Moreover, the ACJR study found that when cases are referred by IPID to the NPA for criminal prosecution, they appear to get stuck there, “for reasons that are not clear, the NPA seems to be less than eager to prosecute police officials.”¹¹

Civilian Secretariat for Police Service (CSPS)

The *Civilian Secretariat for Police Service Act*, 2011 legislates the responsibilities of the CSPS. These are largely “supervisory, cooperative and commendatory.”¹² Thus, although South Africa's Constitution provides for civilian oversight of policing, a key structure tasked with this responsibility

⁴ African Criminal Justice Reform. 2019. Failing to discipline in SAPS: Fostering a culture of impunity. Factsheet 9. Dullah Omar Institute, University of the Western Cape.

⁵ South African Police Services 2021-2022 Annual Report.

⁶ African Criminal Justice Reform. 2019. Failing to discipline in SAPS.

⁷ Independent Police Investigative Directorate. n.d. Vision and Mission. (Online). Available at www.ipid.gov.za (accessed 16 April 2023).

⁸ South Africa Police Services 2021-2022 Annual Report; Independent Police Investigative Directorate 2021-2022 Annual Report.

⁹ African Criminal Justice Reform. 2019. Failing to discipline in SAPS, p. 4.

¹⁰ Knoetze, Daneel. 2021. How SAPS protects the killers within its ranks. ViewFinder, 11 May. (Online). Available at <http://viewfinder.org.za/how-saps-protects-the-killers-within-its-ranks/> (accessed 15 April 2023).

¹¹ African Criminal Justice Reform. 2019. Failing to discipline in SAPS, p. 4.

¹² Vetten. 2014. Gendering state accountability in South Africa, p. 4.



is, in reality, nothing more than an “advisory body”, which “cannot enforce compliance with its recommendations.”¹³

Parliamentary Portfolio Committee on Police (PCOP)

Under South Africa’s Constitution, parliament has the power to conduct oversight of all organs of state, with the Portfolio Committee on Police (PCOP) being primarily responsible for overseeing the work of SAPS. Over the years the PCOP has had some success in holding the police to account. For instance, it worked closely with civil society organisations to strengthen policing of domestic violence between 2007 and 2013, which resulted in:¹⁴

- The establishment of a strengthened IPID in 2011 to replace its predecessor, the Independent Complaints Directorate, described as a “toothless bulldog”, which had no power to enforce recommendations arising from its investigations.¹⁵
- Police management putting a range of measures in place to comply with prescribed duties under the *Domestic Violence Act* (DVA) – see sidebar.

Despite some (at least earlier) successes in holding SAPS to account, that SAPS’ transgressions in complying with mandated domestic violence policing duties are repeated year after year, with no improvement or accountability¹⁶ point to parliament’s own toothless-ness.

The PCOP’s failure to hold the police accountable for not performing DVA prescribed duties, let alone other responsibilities, including in relation to the management of firearms, is part of a larger failure by parliament to live up to its

POLICING DOMESTIC VIOLENCE*†

South Africa’s *Domestic Violence Act*, 1998 (DVA) is noteworthy in that prescribed duties in the policing of domestic violence are backed by an accountability structure intended to identify and penalise non-compliance.

Two notions of accountability inform the DVA:

The first, which focuses on the conduct of officials, requires two sorts of duties: A largely discretionary provision of various policing services to victims of domestic violence; and the mandatory keeping of records. Non-compliance with either set of responsibilities is classified a form of misconduct in terms of the *South African Police Service Act*, 1995 (as amended).

To ensure that these policing duties are undertaken, the DVA provides, secondly, for an institutional accountability structure. This includes an expectation that commanding officers scrutinise domestic violence records and take corrective action when they are not satisfactorily maintained, or when the necessary services have not been provided. In addition, all cases of non-compliance must be referred to the CSPS, which in turn must report to parliament every six months.

* Vetten, Lisa. 2014. Gendering state accountability in South Africa: Police accountability and the Domestic Violence Act. APCOF Policy Paper 11, November. Cape Town: African Policing Civilian Oversight Forum.

† Spies, Amanda. 2019. Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa’s Domestic Violence Legislation. *Journal of African Law*, Vol. 63, No. 1, pp. 53-77.

¹³ Ibid, p. 4.

¹⁴ Ibid.

¹⁵ Ibid, p. 7.

¹⁶ Ibid; Spies, Amanda. 2019. Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa’s Domestic Violence Legislation. *Journal of African Law*, Vol. 63, No. 1, pp. 53-77; Civilian Secretariat for Police Service. 2022. Briefing on the implementation of the Domestic Violence Act, 1998. Presentation to the Select Committee on Security and Justice, 25 May.



constitutional mandate. This has been attributed to an absence of standards of accountability and the fact that portfolio committees are not independent.¹⁷

Civil claims

While IPID is tasked with investigating criminal police behaviour, its ‘crisis of legitimacy’¹⁸ is confirmed by comparing IPID complaints with civil claims: The 5,295 cases received by IPID in 2021/22 is 2.5 times less than the 13,262 civil claims lodged that year.¹⁹ In the absence of effective accountability mechanisms and growing impunity within SAPS, civil claims against the police are an increasingly important mechanism to hold the police accountable for unlawful behaviour, including brutality, unlawful arrests and detention as well as failures to undertake policing duties, even when these are mandated as under the DVA.

Unfortunately, SAPS’ public reporting on civil claims – both incurred and finalised through payment (following a court-ruling or out-of-court settlement) or withdrawal – changed in 2016/17, making it difficult to compare civil claims before and after this time. However, the trend of increasing civil claims has continued: For instance the number of claims lodged increased by 63% between 2013/14 (when 8,161 civil claims were lodged) and 2021/22.²⁰ The 13,262 new civil claims registered in 2021/22 were valued at R67,6 billion, though a study assessing claims vs payments over an eight year period found that just 4% of all amounts claimed resulted in payment by the SAPS, with the vast majority of claims finalised by being withdrawn, abandoned or reduced.²¹ The gap between claims lodged and paid out has been attributed to the ‘business’ of suing the police, and that many people arrested by the police immediately assume unlawful police conduct, a sentiment fuelled by a general lack of legitimacy of and confidence in the police.²²

In the absence of other sanctions, civil claims can incentivise compliance with legislative duties by state actors like SAPS.²³ However, for as long as state institutions keep ‘picking up the tab’ for crimes committed by employees, civil claims will perpetuate the culture of impunity. In this regard, SAPS’ most recent annual report, which notes that an action plan approved by the National Commissioner on 9 March 2022 and comprising “20 deliverables to effectively down manage the incidences of civil claims and civil litigation” offers some recognition of the importance of holding SAPS members accountable: “The plan focuses on actions aimed at mind set changes on ‘attitudes and behaviours’ of SAPS employees, in order to prevent unlawful actions and on holding SAPS employees directly accountable and liable for compensation for any act or omission, either through negligence or intention, which infringes on the rights of others.”²⁴

The antithesis of accountability is impunity²⁵

¹⁷ Corder, Hugh. 2022. South Africa’s parliament fails to hold the executive to account: history shows what can happen, *The Conversation*, 24 October; Doyle, Monique; Rault-Smith, Jennifer; and Alli, Rashaad. 2022. “Where was parliament?”. Cape Town: Parliamentary Monitoring Group.

¹⁸ Dereymaeker, Gwen. 2015. Making sense of the numbers: Civil claims against the SAPS. *SA Crime Quarterly*, No. 54, December, pp. 29-41, p. 39.

¹⁹ Independent Police Investigative Directorate 2021-2022 Annual Report; South Africa Police Services 2021-2022 Annual Report.

²⁰ South African Police Service Annual Reports.

²¹ Dereymaeker. 2015. Making sense of the numbers.

²² Ibid.

²³ Spies. 2019. Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence.

²⁴ South African Police Service 2021-2022 Annual Report, p. 109.

²⁵ Muntingh et al. 2021. Democratic policing: A conceptual framework, p. 137.



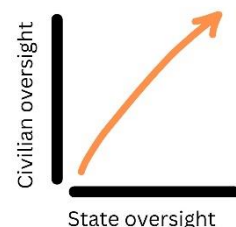
Conclusion

Although various accountability structures are responsible for ensuring that SAPS and its officials carry out policing duties in accordance with the law, they are, for the most part, ineffective. While these institutions have varying power over SAPS having to explain its actions and punishing criminality, even when this power is legislated, they have failed to hold SAPS accountable, which perpetuates criminality: “The fact that police officials enjoy de facto financial, disciplinary and prosecutorial impunity for their behaviour has an impact on their future conduct, as it is unlikely that they will be required to answer for their misdeeds.”²⁶

SAPS’ lack of accountability, and associated lack of public trust, has a range of implications with regards to firearms management. The first is that it spurs gun buying for personal protection. For instance, gun dealers have reported a spike in gun sales following the July 2021 unrest, which was sparked by the imprisonment of former president Jacob Zuma²⁷ and for which the police have been widely criticised for failing to act. More gun buying means more guns in people’s homes and communities and an increased risk of gun violence, both by legally held firearms, but also because legal guns are the biggest source of illegal firearms in South Africa.²⁸

The second is that future moves by the state to control legal firearms will be resisted. For instance the history of firearm amnesties in South Africa shows how effective they have been at removing unlicensed and unwanted firearms from communities, with over 170,000 firearms surrendered in the five amnesties held since 1994.²⁹ With moves to amend the *Firearms Control Act, 2000* to tighten controls over legal firearms, it is essential that SAPS (and government as a whole) take urgent measures to improve accountability mechanisms and build public trust to encourage compliance, which could well require citizens having to surrender firearms and ammunition that are made illegal through amendments.

Noting that accountability is created through the interactions of different institutions, Vetten outlines the potential of diagonal accountability, where citizens, in addition to state institutions, play an increased oversight role, thereby doing away with the monopolisation of state oversight of the state.³⁰



GFSA has repeatedly called for increased civilian involvement and oversight in firearms management; this includes that guns handed in for destruction are destroyed in front of the person (as happened during the 1994 amnesty), and that civilian oversight is mandated in firearm destructions.

Until SAPS and its employees are truly held accountable, which includes facing criminal prosecution and personal cost orders for failing to perform duties, the culture of impunity throughout the organisation will continue to thrive. In this regard, GFSA has urged that amending the *Firearms Control Act* classify SAPS failures to perform firearm-related duties as offences which carry the risk of a fine and/or imprisonment.

²⁶ Dereymaeker. 2015. Making sense of the numbers, p. 39.

²⁷ Between 9 and 18 July 2021 two of South Africa’s provinces (KwaZulu-Natal and Gauteng) experienced widespread violence following the imprisonment of former president Jacob Zuma; over 300 people lost their lives.

²⁸ GFSA. 2022. Firearms Control Briefing 2: Gun control, self-defence and public safety, 15 June. (Online). Available at <https://gfsa.org.za/2022/06/15/briefing-2-of-2022-gun-control-self-defence-and-public-safety/> (accessed 4 April 2023).

²⁹ The number of firearms surrendered during amnesties has been sourced from SAPS annual reports and parliamentary replies.

³⁰ Vetten. 2014. Gendering state accountability in South Africa, p. 7.

