

**CONTENTS**

FOREWORD	5
1. INTRODUCTION	6
2. CODE OF CONDUCT OF THE SOUTH AFRICAN POLICE SERVICE	9
3. DRIVING OF STATE VEHICLES	10
4. FORMAT AND CONTENT OF A GOOD STATEMENT	12
5. WARNING STATEMENTS	18
6. COMMISSIONERS OF OATH	21
7. COMMON LAW OFFENCES	25
8. ANIMAL IDENTIFICATION ACT NO. 6 OF 2002	32
9. ANIMALS PROTECTION ACT NO. 71 OF 1962	35
10. CHILD JUSTICE ACT NO. 75 OF 2008	42
11. CHILDREN'S ACT NO. 38 OF 2005	53
12. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996	60
13. COUNTERFEIT GOODS ACT NO. 37 OF 1997	65
14. CRIMINAL LAW SECOND AMENDMENT ACT NO. 126 OF 1992	72
15. CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT NO. 32 OF 2007	78

16.	CRIMINAL MATTERS AMENDMENT ACT NO. 18 OF 2015 – ESSENTIAL INFRASTRUCTURE	86
17.	CRIMINAL PROCEDURE ACT NO. 51 OF 1977	94
18.	CUSTOMARY INITIATION ACT 2 OF 2021	138
19.	CYBERCRIMES ACT NO. 19 OF 2020	143
20.	DANGEROUS WEAPONS ACT NO. 15 OF 2013	179
21.	DIPLOMATIC IMMUNITIES AND PRIVILEGES ACT NO. 37 OF 2001	181
22.	DOMESTIC VIOLENCE ACT NO. 116 OF 1998	183
23.	DRUGS AND DRUG TRAFFICKING ACT NO. 140 OF 1992	201
24.	ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT NO. 25 OF 2002	212
25.	EXPLOSIVES ACT NO. 26 OF 1956	214
26.	EXTENSION OF SECURITY OF TENURE ACT NO. 62 OF 1997, PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT NO. 19 OF 1998 AND TRESPASS ACT NO. 6 OF 1959	222
27.	EXTRADITION ACT NO. 67 OF 1962	244
28.	FILMS AND PUBLICATIONS ACT NO. 65 OF 1996	254
29.	FIREARMS CONTROL ACT NO. 60 OF 2000	259
30.	GENERAL LAW AMENDMENT ACT NO. 62 OF 1955: POSSESSION AND RECEIPT OF STOLEN PROPERTY	272
31.	IMMIGRATION ACT NO. 13 OF 2002	274

32.	INTIMIDATION ACT NO. 72 OF 1982	292
33.	INQUEST ACT NO. 58 OF 1959	294
34.	LIQUOR ACT NO. 59 OF 2003	299
35.	MENTAL HEALTH CARE ACT NO. 17 OF 2002	302
36.	MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT NO. 28 OF 2002	307 307
37.	NATIONAL ROAD TRAFFIC ACT NO. 93 OF 1996	319
38.	OLDER PERSONS ACT NO. 13 OF 2006	326
39.	PREVENTION OF COUNTERFEITING OF CURRENCY ACT NO. 16 OF 1965	330 330
40.	PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT NO. 12 OF 2004	338 338
41.	PREVENTION AND COMBATING OF TORTURE OF PERSONS ACT NO. 13 OF 2013	344 344
42.	PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS ACT NO. 7 OF 2014	347 347
43.	PREVENTION OF ORGANISED CRIME ACT NO. 121 OF 1998	355 355
44.	PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT NO. 4 OF 2000	362 362
45.	PROTECTION FROM HARASSMENT ACT NO. 17 OF 2011	365 365

46.	PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RELATED ACTIVITIES ACT NO. 33 OF 2004	369
47.	PROTECTION OF PERSONAL INFORMATION ACT NO. 4 OF 2013	377
48.	REGULATION OF GATHERINGS ACT NO. 205 OF 1993	383
49.	REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION RELATED INFORMATION ACT No. 70 OF 2002	393
50.	RIOTOUS ASSEMBLIES ACT NO. 17 OF 1956	404
51.	SECOND-HAND GOODS ACT NO. 6 OF 2009	407
52.	SOUTH AFRICAN POLICE SERVICE ACT NO. 68 OF 1995	414
53.	SAFETY AT SPORTS AND RECREATIONAL EVENTS ACT NO. 2 OF 2010	427
54.	STOCK THEFT ACT NO. 57 OF 1959	432
55.	TOBACCO PRODUCTS CONTROL ACT NO. 83 OF 1964	439
56.	TOURISM ACT NO. 3 OF 2014	442
56.	BIBLIOGRAPHY	445
57.	ACKNOWLEDGEMENTS	445

## FOREWORD

The Iqabane booklet was first published by the South African Police Service in 2006. Since then, it has become an important source of direction and guidance for police officials to ensure that their conduct comply with the relevant legal requirements. An updated edition was published in 2015 to keep members abreast of legal developments.

The value of the booklet lies in its convenient and practical nature that focuses on critical aspects of legislation that impacts on policing matters. The legislation included in the booklet is by no means the only legislation that places responsibilities on police officials or affects policing. However, it has been carefully selected to address pertinent priorities and focus areas in the South African Police Service that impact on policing.

The aim of the booklet is to guide and assist police officials, irrespective of their working environment and the policing functions that they perform, by providing relevant and valuable guidance relating to legal aspects.

The objects of the South African Police Service, as set out in section 205(3) of the Constitution of the Republic of South Africa, 1996, include, *inter alia*, to prevent and investigate crime, protect and secure the inhabitants of the country and their property and uphold and enforce the law. In order to ensure compliance with their constitutional mandate, it is imperative that police officials have a sound understanding of the law and their powers and responsibilities in terms thereof.

Iqabane aims to empower police officials to execute their powers and perform their functions in a lawful and professional manner. It has become part of the day-to-day equipment of police officials, utilised to prevent and investigate crime and to serve the communities we aim to protect. As its name indicates, Iqabane has indeed become a friend and companion to many.

Important legal developments in recent years have necessitated the latest update of the booklet to ensure that it remains practical, relevant and legally sound. It is our wish that the revised Iqabane will be viewed as evidence of the commitment of the Service to strengthen the role of police officials in the enhancement of the effectiveness of the criminal justice system and, furthermore, that the book will continue to guide police officials in the daily performance of their policing duties.

The booklet was been revised to reflect the legal position as it is in June 2023.

## **1. INTRODUCTION**

### **1.1 DUTIES AND POWERS OF THE SOUTH AFRICAN POLICE SERVICE**

The objectives of the South African Police Service (SAPS), as set out in section 205(3) of the Constitution, are to prevent, combat and investigate crime, to maintain public order, to protect and secure South Africa's inhabitants and their property and to uphold and enforce the law.

Members of the Service derive their powers and duties from the law. The law does not only afford powers and duties to certain persons, but also prohibits certain kinds of conduct, e.g. murder and theft.

### **1.2 MATERIAL SOURCES OF SOUTH AFRICAN LAW**

The material sources of South African law consist of the common law, statutory law and case law. Common law is the inherited, unwritten and uncodified law of South Africa, such as the prohibition to murder another human being, while statutory law is embodied in an Act of Parliament, such as the South African Police Service Act No. 68 of

1995 which, for example, allows members to set up roadblocks and prohibits members from becoming actively involved in politics. Case law concerns the judgments delivered courts which interpret both the common law and statutory law and which may declare certain conduct or Acts invalid.

Parliament is not the only authority to make laws. Laws are also made by provincial legislatures (for example, gambling and liquor legislation) and municipal councils (by adopting municipal by-laws). Laws can also be made by the courts (in interpreting the law) or by Ministers or Directors General who have been empowered by legislation to issue regulations or directives in respect of their line function responsibilities. For example, the National Commissioner is authorised to issue National Instructions to the members of the Service.

Any action taken outside the mandate of the law is unlawful (illegal). This may, depending on the facts, constitute a crime which is punishable by the State, a delict which leads to civil claims, misconduct and/or unethical conduct for which the State (Service) and the individual member himself or herself, can be held liable e.g. when a member commits a crime or is charged with misconduct in terms of the SAPS Disciplinary Regulations.

### **1.3 RESPONSIBILITY OF THE SOUTH AFRICAN POLICE SERVICE IN RESPECT OF CRIMINAL LAW**

The police is mainly responsible for the investigation of crime and enforcing of criminal law, i.e. the different forms of unlawful and blameworthy conduct which are defined by law as crimes and which are punishable by the State. Crimes can either be categorised as statutory law or common law. Civil disputes between private parties are not part of the mandate and responsibilities of the SAPS. The SAPS can, however, be requested or compelled to become involved in certain civil proceedings such as assistance to a complainant in respect of domestic violence proceedings or proceedings instituted in

terms of chapter 5 or 6 of the Prevention of Organised Crime Act No. 121 of 1998.

When faced with a certain scenario, the question arises as to whether or not the facts constitute a crime. It is advised that, in the case of uncertainty, a member first consult the list of common law crimes defined in this booklet. If the particular conduct does not appear in the list of common law offences, the conduct may have been defined as a crime in a specific statute (Act or legislation) which are published in a *Gazette*. These statutes and/or *Gazettes* are available on the Intranet of the SAPS or can be obtained from your local Legal Services that will also be in a position to advise you. Crime definitions are also available on the Crime Administration System (CAS).

Police officials are servants of the State. They must therefore ensure that their conduct is exemplary at any given time and that they uphold and respect the rights of the public, victims and perpetrators. To be a good police official not only requires compliance with the law. It also requires basic human qualities such as good manners, punctuality, discipline, leadership, good interpersonal skills and a positive attitude. As knowledge of one's professional environment needs constant nurturing and development, so do these qualities. The SAPS is a professional institution and its members must therefore, at all times, project a professional image. No police official is above the law. In fact, society demands more from a member as a result of his or her occupation and expects accountability of police officials. It is incumbent on every police official to earn the respect of the community he or she serves. It goes without saying that rudeness, a lack of empathy or discipline, dishonesty, incompetency and an arrogant attitude will not earn you the respect and credibility you seek.

*"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches people by example. If the government becomes the law-breaker, it breeds contempt for law and invites every man to become a law unto himself".*

-Louis Brandeis, US Supreme Court Justice (1856-1941)

## **2. CODE OF CONDUCT OF THE SOUTH AFRICAN POLICE SERVICE**

I commit myself to creating a safe and secure environment for all people of South Africa by –

- participating in endeavours aimed at addressing the causes of crime;
- preventing all acts which may threaten the safety or security of any community; and
- investigating criminal conduct which endangered the safety or security of the community and bringing the perpetrators to justice.

In carrying out this commitment, I shall at all times –

- uphold the Constitutional and the law;
- take into account the needs of the community;
- recognize the needs of the South African Police Service as my employer; and
- cooperate with all interested parties in the community and the government at every level.

In order to achieve a safe and secure environment for all the people of South Africa I undertake to –

- act with integrity in rendering an effective service of a high standard which is accessible to everybody, and continuously strive towards improving this service;

- utilise all available resources responsibly, efficiently and cost-effectively to optimise their use;
- develop my own skills and contribute towards the development of my colleagues to ensure equal opportunities for all;
- contribute to the reconstruction, development of, and reconciliation in our country;
- uphold and protect the fundamental rights of every person;
- act in a manner that is impartial, courteous, honest, respectful, transparent and accountable;
- exercise the powers conferred upon me in a responsible and controlled manner;
- and work towards preventing any form of corruption and bringing the perpetrators to justice.

## NOTE

- All police officials are bound by the provisions of the Code of Conduct of the South African Police Service.
- Police officials who contravene the Code of Conduct are guilty of misconduct in terms of Regulation 5(3)(u) of the South African Police Service Discipline Regulations, 2016.

## 3. DRIVING OF STATE VEHICLES

The abuse of, as well as collisions involving state vehicles, is costing the SAPS a fortune in civil claims, damages and repairs. Abuse of government vehicles, which is increasingly being detected and reported by members of the public, rightly so, also negatively affects the professional image and integrity of the Service.

Members should note that it is a privilege and not a right to drive and use state vehicles. Members who abuse these vehicles, for instance, by using a state vehicle to drive to the shops for private purposes, to transport their pets to the vet or to use the vehicle as a means of transport between their house and work should take note that they are not only guilty of misconduct, but can also be charged with a criminal offence.

In terms of section 66(2) of the National Road Traffic Act No. 93 of 1996, no person shall drive a vehicle without the consent of the owner, operator or person in lawful charge thereof

Members should also note the provisions of National Instruction 4 of 2011 which regulates state vehicles in the Service. According to this National Instruction:

- An employee may under no circumstances drive a state vehicle when he or she is **not in possession of a valid driving licence** and not an authorised driver of state vehicles. The authorisation of an employee to drive a state vehicle automatically terminates with the expiry, suspension or revocation of his or her driving licence.
- A vehicle with an **expired licence disk** or missing number plate may not be used until those items have been replaced;
- The driver of a vehicle must forthwith **report the loss, theft or damage** of a vehicle's **fuel card** to his or her commander and make an entry on the reverse side of the SAPS 132(b) (vehicle register). A fuel card not in use must be locked away.
- **Unauthorised passengers** may not be conveyed in a state vehicle. This excludes members of the immediate household of a driver in respect of whom prior written authorisation has been granted by the driver's commander.
- **Explosives** may under no circumstances be transported in or be put in a vehicle for safe keeping, if such vehicle has not specifically been built for that purpose. This prohibition also applies to the transportation of fuel or other flammable liquids in a vehicle with radio equipment.

- Employees who in special circumstances require a state vehicle for **official purposes** after hours may apply to their commanders on form SAPS 132(G) for the use and garaging of the vehicle. (Please note the Delegation of Powers: Supply Chain Management provides for the levels at which the garaging of vehicles may be approved).
- When a state vehicle is involved in an **accident**, it must be reported to the nearest police station and a senior, experienced member on duty at that station must visit the scene of the accident. If the state vehicle is involved in an accident on a public road, irrespective of whether it has sustained damage or not, a docket must be registered. Employees at the scene must not admit liability to any private person.
- A driver of a state vehicle must at all times **comply with traffic laws** and regulations. Any contravention of these laws or regulations is considered a personal matter for which the State will not accept responsibility.

(The above information does not reflect everything that is contained in the National Instruction. Members should consult the complete National Instruction. Cognisance must also be taken of Treasury Regulation 12 in respect of state protection and the forfeiture of state protection).

## 4. FORMAT AND CONTENT OF A GOOD STATEMENT

The successful prosecution of crime depends, to a large extent, on the quality, completeness, relevance and accuracy of the statement taken by the police. For this reason, it is advisable that members should take cognisance of the following:

### **CORRECT PREAMBLE (SEE ALSO PAR 11 OF NI 13 OF 2017)**

The following particulars of the deponent must be contained in the preamble:

- Full names and surname

- Whether the statement is made under oath or affirmed
- The language in which the statement is given (the original and the language into which it has been translated)
- Home language spoken
- Gender and race
- Identity number, date of birth and age
- Full residential address. If no address is available, a full description of the place of residence, as well as description of landmarks, churches, shops etc., which are close to the place of residence
- Full business address
- Occupation
- Full contact details
- Full details of the deponent's nationality (if available)

## CONTENTS

The statement must contain four elements of the crime:

- Legality
- Act
- Unlawfulness
- Culpability (intention or negligence)

Before writing the statement, do the following:

Obtain the *first account* of the incident.

- Ask the deponent to repeat the information in reverse order.
- Draw an agenda and clarify discrepancies.

This can be done by asking the deponent to-

- **tell** you what happened;
- **explain** discrepancies or unclear terms; and
- **describe** the items that were stolen or weapons used etc.

The following questions should be used to obtain all relevant information on the incident being reported:

What happened?

- Where did the incident occur?
- When did the incident happen?
- Who was involved?
- Why were you there?
- How did the incident happen?

The statement must include information on the following:

- Feelings – how did the deponent feel when the incident occurred?
- Fears – did the deponent fear for his or her life and is he or she still frightened?
- Clothes – if applicable, what was the deponent wearing during the incident?

Did you clarify the following?

- Amount – of time under observation.
- Distance – from the incident and/or suspects.
- Visibility – was it day or night? Was there any street lighting? Was it raining or clear?

Any additional relevant information.

- Obstructions – Was the deponent's view obstructed? What obstructed the view?
- Known – is/are the suspect(s) known or has/have he or she/they been seen before?
- Any – reason to remember the suspect(s)?
- Time – lapse since the last time the suspect(s) has/have been seen?
- Errors – or material discrepancies that need to be clarified.

Full details of the witness(es):

- Full name
- Residential address
- Gender
- Contact numbers
- Workplace
- Work telephone numbers

## **Full description of the suspect(s):**

- Facial appearance
- Gender
- Clothing
- Hair
- Race
- Age
- Tattoos, marks, scars, etc.
- Tall/short
- Any distinctive feature

## **Full description of the exhibits:**

- Brand name
- Serial, registration or similar identification number
- Colour
- Type

After obtaining all of the above information, the member can write a full statement in chronological order and in a manner that will paint a picture of what happened during the particular incident. This will enable the investigating officer to conduct a full investigation, and the public prosecutor to have all the facts, at his or her disposal to successfully prosecute an offender.

**THE DEPONENT MUST SIGN THE COMPLETE STATEMENT. A DEPONENT WHO HAS NO OBJECTION IN TAKING THE PRESCRIBED**

## **OATH CAN END A STATEMENT BEFORE SIGNING THE SAME AS FOLLOWS:**

I know and understand the contents of the above affidavit.

I have no objection in taking the prescribed oath.

I consider the prescribed oath as binding on my conscience.

Should a deponent have an objection against taking the prescribed oath, he or she should instead make an affirmation that he or she truly affirms that the contents of the declaration are true.

## **OATH**

- Was the oath/affirmation administered?
- Did the deponent read his or her statement?
- Did the deponent sign the statement?

## **TRANSLATION**

- Did the translator affix his or her certificate to indicate from which language and into which language he or she translated the statement?
- Did the translator sign his or her certificate?

## **CERTIFICATION**

- Have you affixed the certificate to the statement?
- Have you deleted all relevant fields in the certificate and initialled next to the deletion, where applicable?
- Have you signed as Commissioner of Oath on the certificate?

## GENERAL

- Is the statement in clear, readable and understandable language and handwriting?
- Is the statement complete? Does the statement cover all elements of the alleged crime?

Please note National Instruction 6 of 2014, paragraph 5 and further in respect of instructions that are applicable to interviewing of persons in custody. See also the discussion on the Prevention and Combating of Torture of Persons Act No. 13 of 2013.

Standing Order (General) 327 regulates the administering of the oath and affirmation by members and other employees of the Service on statements and forms.

## 5. WARNING STATEMENTS

It is important to note that, whenever a member takes a warning statement from a suspect, only the official “*Statement regarding interview with suspects*” (SAPS 3M (m)) may be used.

This form contains the comprehensive constitutional warning which must be conveyed by a member to a suspect. It is imperative that the SAPS 3M(m) be used to record the warning statement of a suspect. No other unofficial form may be used for this purpose.

Failure to use the standard official form may result in rendering an accused person’s trial unfair, e.g. failure to advise the person from whom the warning statement is taken that his or her statement could be used against him or her in a subsequent trial.

**[S v Orrie and Another 2005 (1) SACR 63 (CC)].**

Must suspects who are not arrested or detained also be warned of their constitutional rights?

A suspect who is not an arrested, detained or accused person is also entitled to fair pre-trial procedures, even if section 35 of the Constitution does not specifically state so. This means that a suspect is entitled to be cautioned or warned before being questioned by the police, to enable him or her to properly consider and exercise his or her rights before interacting with the police. The official warning statement of the police recognises this principle. Using the SAPS 3M(m) will prevent persons who are being investigated from successfully challenging the statements they have made to the police.

How often must the police warn an arrested person of his or her constitutional rights?

In ***S v Mathebula and Another 1997 (1) SACR 10 (W)*** the question arose as to whether or not an accused person was entitled to be informed of the existence of the section 25 rights (of the 1993 Constitution, now section 35 of the Constitution of the Republic of South Africa, 1996) at every pre-trial stage where police or the State sought his or her cooperation during the investigatory process. The court held that an arrested person is entitled to legal representation at every important pre-trial stage where the police seek to enlist the cooperation of the arrested person. Every pre-trial stage must be preceded by a warning informing the person of his rights under section 25 (read section 35) of the Constitution. In another case the defence contended that the repetition of the warning “would be unduly formalistic” (***S v Marx and Another 1996 (2) SACR 140 (W)***). While in ***S v Shaba en ‘n Ander 1998 (2) SA 48 (T); 1998 (1) SACR 16 (T)***, it was found that the Mathebula judgement was incorrect insofar as it held that the failure to fully explain an accused’s rights to him at every important step of the investigation has the consequence that

any evidence obtained is done so unconstitutionally and is therefore inadmissible.

It is proposed that, police officials should endeavour to warn a suspect/arrested person at every stage of an investigation where they seek the person's cooperation, e.g. at the arrest, during an interview, identification parade, etc. This will limit the risk of any successful challenges to police practice and will ensure that the arrested person/suspect is able to exercise sound judgement.

Warning statement or confession?

In ***Maliga v S* (543/13 [2014] SASCA 161)** the appellant (A) and one Eunice (husband and wife) were involved in a domestic argument during which Eunice was fatally wounded by a gunshot. A was charged with murder. The police confronted A, who told them that he had shot Eunice. The police subsequently arrested A. A day or two after the arrest, the police asked A if they could take down a warning statement from him. Upon asking A if he wished to exercise his right to legal representation, A replied that he wished to be represented by a "lawyer from the law clinic". This request was ignored by the police who proceeded to take down a confession from A whilst he was unrepresented. The evidence of the police that A had shot his wife during an argument was elicited by them without warning A of his constitutional rights as envisaged by section 35 of the Constitution.

The Supreme Court of Appeal accordingly held that this evidence was inadmissible. The court further held that the confession, made to non-commissioned police officials, was not confirmed or reduced to writing in the presence of a magistrate or justice of the peace (as required by section 217(1)(a) of the Criminal Procedure Act No. 51 of 1977) and was inadmissible on that ground alone. The court remarked as follows: "*it must however be said that it is difficult to understand how anyone could mistake what is clearly a confession for a warning statement. The prosecutor failed in his duty*". The court

subsequently set aside the conviction and sentence of A because the trial was conducted in an unfair manner.

## **6. COMMISSIONERS OF OATH**

In terms of section 6 of the Justices of the Peace and Commissioners of Oaths Act No. 16 of 1963, the Minister of Justice and Constitutional Development may designate the holders of any office as *ex officio* commissioners of oath.

In *Gazette* 903 dated 10 July 1998 all members of the Service, including reservists who are on duty, are *ex officio* commissioners of oath. Administrative clerks and typists appointed in terms of the Public Service Act, Proclamation No. 103 of 1994 on a minimum notch of salary level 2, are also designated as *ex officio* commissioners of oath and may administer an oath or affirmation or authenticate documents as true copies of the original document. Student constables only become commissioners of oath after they have completed the first semester of their basic training programme. Before any employee performs this function, his or her commander must ensure that the employee is informed of the content of National Instruction 10 of 2020 and understands the content thereof.

Members who retire or resign from the SAPS forfeit all their powers as police officials, including the powers conferred upon them as commissioners of oaths. Former members have to apply to the Minister of Justice and Constitutional Development to be appointed as commissioner of oaths or justice of the peace which appointment will be limited to a specific area.

### **ADMINISTERING AN OATH OR AFFIRMATION**

*Gazette* 7119 dated 11 July 1980 regulates the form of an oath or affirmation in an affidavit. Before a commissioner of oaths administers an oath or affirmation to a person, he or she shall ask the deponent-

- whether he or she knows and understand the contents of the declaration;
- whether he or she has any objection to taking the prescribed oath; and
- whether he or she considers the prescribed oath to be binding on his or her conscience.

If the deponent acknowledges that he or she knows and understands the contents of this declaration, indicates to the commissioner of oaths that he or she has no objection in taking the prescribed oath and that he or she considers the prescribed oath to be binding on his or her conscience, the commissioner of oaths can administer the oath by asking the deponent to utter the words *“I swear that the contents of this declaration are true, so help me God”*.

If the deponent acknowledges that he or she knows and understands the contents of the declaration, but has an objection to taking the prescribed oath or does not consider the oath to be binding on his or her conscience, the commissioner of oaths can administer an affirmation by causing the deponent to utter the following words: *“I truly affirm that the contents of this declaration are true”*.

The deponent must now sign the declaration in the presence of the commissioner of oaths. If the deponent cannot write, he or she must affix his or her mark or a fingerprint to the declaration and two witnesses must co-sign under the mark or fingerprint.

The commissioner of oaths and the deponent must also initial or affix a mark or a fingerprint on every page of the declaration, except the one where the oath or affirmation is administered.

### **CERTIFICATE BY COMMISSIONER OF OATHS**

The commissioner of oaths must certify as follows:

*“I certify that the deponent has acknowledged that he or she knows and understands the content of this statement. The deponent has no objection in taking the prescribed oath. This statement was sworn to before me and the deponent’s signature/ mark/ fingerprint was placed thereon in my presence at ..... (place), on ..... (date) at ..... (time)”.*

Where the deponent has any objection to the prescribed oath, the affirmation can be as follows:

*“I certify that the deponent acknowledges that he or she knows and understands the contents of this statement. This statement was affirmed before me and deponent’s signature/ mark/ fingerprint was placed thereon in my presence at ..... (place), on ..... (date) at ..... (time)”.*

The signature, full names, capacity and address of the commissioner of oaths must be placed at the end of the affidavit.

## **NOTE**

A commissioner of oaths is not allowed to charge any fee for administering any oath or affirmation. A commissioner of oaths may not administer an oath or affirmation relating to a matter in which he or she has an interest. (Interest must be a real interest and not a remote or indirect one). See paragraph 8(4)-(9) of National Instruction 10 of 2020 for a more detailed discussion of when a member should be excluded from administering the oath in respect of a statement.

### **MISUSE OF POLICE AND GOVERNMENT STAMPS AND STATIONARY**

Police officials must be careful when they are requested to authenticate documents or to stamp documents with an official stamp. Make sure that the original document is presented to you when you are requested to certify that a document is a true copy of the original.

Forged police and other official government stamps, as well as official letterheads are often used to deceive innocent persons or to obtain information/services to which the requester (private person) is not entitled. Members must accordingly ensure that stamps and stationery are safeguarded and that police stamps are not affixed to private documents without a justifiable reason. On a daily basis members of the public are confronted with persons who collect funds with forms on which a public stamp is affixed to give it credibility, although there is no reason or requirement for such stamp.

Members should note **Standing Order (General) 327** that provides for the administering of the oath and affirmation by members and other employees of the Service on statements and forms. Cognisance must also be taken of **National Instruction 10 of 2020** which provides for the **authentication** of documents which are submitted to the SAPS. According to the last mentioned Instruction:

Copies or reproductions of all documents which are submitted to the commissioner of oaths for authentication, whether by the public or for official purpose, must be authenticated by applying a stamp on the document in the format set out in Annexure B. The following wording must be used:

*"I certify that this document is a true reproduction (copy) of the original document which was handed to me for authentication. I further certify that, from my observations, an amendment or a change was not made to the original document.*

.....  
(Signature)

Persal Number ..... Rank.....

Full names and surname in print .....

**SECTION 234 OF THE CRIMINAL PROCEDURE ACT NO. 51 OF 1977:**

*“Proof of official documents -*

- (1) *It shall, at criminal proceedings, be sufficient to prove an original official document which is in the custody or under the control of any State official by virtue of his office, if a copy thereof or an extract therefrom, certified as a true copy or extract by the head of the department concerned or by any State official authorised thereto by such head, is produced in evidence at such proceedings.*
- (2) (a) *An original official document referred to in subsection (1), other than the record of judicial proceedings, may be produced at criminal proceedings only upon the order of the attorney-general.*  
 (b) *It shall not be necessary for the head of the department concerned to appear in person to produce an original document under paragraph (a), but such document may be produced by any person authorised thereto by such head.*
- (3) ***Any official who, under subsection (1), certifies any copy or extract as true knowing that such copy or extract is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years”.***

## 7. COMMON LAW OFFENCES

Common law offences still applicable within the South African legal system are defined below.

### ABDUCTION

Abduction consists in unlawfully taking a minor out of the control of his or her custodian with the intention of enabling someone to marry or have sexual intercourse with that minor.

Note: a minor is a child under the age of 18 years, thus “minor” has the same meaning as “child”. According to section 17 of the Children’s Act No. 38 of 2005, a child becomes a major (adult) upon reaching the age of 18 years.

**ARSON**

Arson is the unlawful and intentional setting fire to an immovable property belonging to another.

**ASSAULT**

Assault consists of unlawfully and intentionally-

- (i) applying force to the person of another;
- (ii) inspiring a belief in another person that force is immediately to be applied to him or her.

**ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM**

This is another form of assault, committed with the intention to cause serious bodily injury.

**BIGAMY**

Bigamy consists of unlawfully and intentionally entering into what purports to be a lawful marriage ceremony with one person while lawfully married to another.

**CONTEMPT OF COURT**

Contempt of court consists of unlawfully and intentionally –

- (i) violating the dignity, repute or authority of a judicial body or a judicial officer in his or her judicial capacity; or
- (ii) publishing information or comment concerning a pending judicial proceeding which constitutes a real risk of improperly influencing the outcome of the proceeding or to prejudice the administration of justice in that proceeding.

**CRIMEN INJURIA**

Crimen injuria consists of unlawfully and intentionally impairing the dignity or privacy of another person.

**CULPABLE HOMICIDE**

Culpable homicide is the unlawful and negligent killing of another human being.

**DEFAMATION**

Defamation consists of the unlawful and intentional publication of matter that impairs another person's reputation.

**DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE**

The crime of defeating or obstructing the course of justice consists of unlawfully and intentionally engaging in conduct which defeats or obstructs the course or administration of justice.

**EXPOSING AN INFANT**

This crime consists of the unlawful and intentional exposure and abandonment of an infant in such a place or in such circumstances that its death from exposure is likely to result.

**EXTORTION**

Extortion consists of taking from another some patrimonial or non-patrimonial advantage by intentionally and unlawfully subjecting that person to pressure which induces him or her to submit to the taking.

**FORGERY AND UTTERING**

Forgery consists of unlawfully and intentionally making a false document to the actual or potential prejudice of another. Uttering consists of unlawfully and intentionally passing off a false (forged) document to the actual or potential prejudice of another.

**FRAUD**

Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.

**HIGH TREASON**

A person commits high treason if, owing allegiance to the Republic of South Africa, he or she unlawfully engages in conduct within or outside the Republic with the intention of-

- (i) overthrowing the government of the Republic;
- (ii) coercing the government by violence into any action or inaction;
- (iii) violating, threatening or endangering the existence, independence or security of the Republic;
- (iv) changing the constitutional structure of the Republic.

**HOUSEBREAKING WITH INTENT TO COMMIT A CRIME**

Housebreaking with intent to commit a crime consists of unlawfully and intentionally breaking into and entering a building or structure with the intention of committing some crime in it.

**KIDNAPPING**

The crime consists of unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child.

## **MALICIOUS INJURY TO PROPERTY**

Malicious injury to property consists of unlawfully and intentionally damaging the property of another.

## **MURDER**

Murder is the unlawful and intentional killing of another human being.

## **PERJURY**

Perjury consists in the unlawfully and intentionally making of a false statement in the course of a judicial proceeding by a person who has taken the oath or made an affirmation before, or who has been admonished by somebody competent to administer or accept the oath, affirmation or admonition.

## **POISONING OR ADMINISTERING POISON OR OTHER NOXIOUS SUBSTANCE**

This crime consists of unlawfully and intentionally administering poison or other noxious (harmful) substance to another.

## **PUBLIC INDECENCY**

This crime consists of unlawfully, intentionally and publicly engaging in conduct which tends to deprave the morals of others, or which outrages the public's sense of decency.

## **PUBLIC VIOLENCE**

It consists of the unlawful and intentional commission, together with a number of people, of (an) act/s which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others.

## RECEIVING STOLEN PROPERTY

The crime of receiving stolen property consists of unlawfully receiving possession of stolen property knowing it to have been stolen.

## ROBBERY

Robbery consists of the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another.

## SEDITION

Sedition consists of unlawfully and intentionally-

- (i) taking part in a concourse of people violently, or by threats of violence, challenging, defying or resisting the authority of the State; or
- (ii) causing such a concourse.

## THEFT

Theft consists of the unlawful appropriation of moveable corporeal property belonging to another with intent to deprive the owner permanently of the property.

## VIOLATING A GRAVE

This crime consists of unlawfully and intentionally damaging a human grave.

### Note the following:

- **Rape** is now a statutory offence, applicable to all forms of sexual penetration without consent, and irrespective of whether the victim is male or female;

- **Indecent assault** is now a statutory offence, known as **sexual assault**;
- **Incest, bestiality and violation of a corpse** (of a sexual nature) are now statutory offences;
- **Bribery** is a statutory offence.

**The crime of public violence must be distinguished from the crime of sedition.** In public violence the interests which are protected are “public peace and tranquillity” or “the rights of others”. Sedition is aimed at protecting the “authority of the state of the Republic of South Africa.” The elements of public violence are:

- An act;
- By a number of persons;
- Which assumes serious dimensions;
- Which is unlawful; and
- Intentional, specifically to (forcibly) disturb public peace and tranquillity or to infringe the rights of others.

According to Section 17 of the Riotous Assemblies Act, No. 17 of 1956 “A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed”.

Note that the Riotous Assemblies Act, No. 17 of 1956 is currently under review and that section 18(2)(b) of the Act was declared to be unconstitutional in the matter of **Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another** [2020] ZACC 25.

## 8. ANIMAL IDENTIFICATION ACT NO. 6 OF 2002

The above Act consolidates the law relating to the identification of animals. Animals in respect of which this Act applies are:

- Cattle;
- Sheep;
- Goats; and
- Pigs.

### DUTIES OF OWNERS OF ANIMALS

Section 7 of the Act provides that each owner of an animal must –

- “(a) apply for registration of an identification mark in terms of section 5(1);*
  - (b) mark his or her animals in the prescribed manner;*
  - (c) where an identification mark on an animal is invisible or indistinct, mark the animal clearly with his or her identification mark, within 14 days after he or she is directed to do so by the registrar, an authorised person, an officer or a police official; and*
  - (d) notify the registrar in writing of any changes of his or her address.*
- (2) No person may —*
- (a) within 14 days of the date on which he or she becomes the owner of an animal with an identification mark, sell, barter, give away or in any other manner dispose of that animal to another person, unless he or she furnishes a document of identification to the person who acquires that animal; or*

- (b) *after 14 days of the date on which he or she becomes the owner of an animal, sell, barter, give away or in any other manner dispose of that animal unless-*
- (i) *such animal has been marked in the prescribed manner with the identification mark of the owner disposing of that animal; and*
  - (ii) *he or she furnishes the person acquiring that animal with a document of identification.*
- (3) *A person acquiring an animal from a person disposing of an animal as contemplated in subsection (2) must retain the document of identification obtained from that person for a period of one year”.*

## OFFENCES

The offences of the Act are created by section 16 that provides as follows:

*“Any person who –*

- (1) (a) *is a marking operator and who fails to keep a register in terms of section 11 (1) (c);*
- (b) *has in his or her possession an animal marked not in accordance with or in a manner allowed by this Act;*
- (c) *alters, mutilates or cancels an identification mark on an animal;*
- (d) *sells to any person an animal on which an identification mark has been altered, mutilated or cancelled;*
- (e) *sells to any person an animal of which an ear has been cut off;*
- (f) *hinders or obstructs an officer or an authorised person or a police official in the execution of his or her duties or the exercise of his or her powers under this Act:*

- (g) *fails or refuses to produce, when required in terms of this Act by the registrar or a police official to do so, any livestock or other thing in his or her possession or under his or her control;*
- (h) *alters a certificate issued in terms of section 5 (2) (c);*
- (i) *fails to comply with or contravenes any provision of section 7;*
- (j) *in any application made in terms of this Act, makes or causes to be made a statement which is false;*
- (k) *falsely holds himself or herself out to be the registrar or an authorised person; or*
- (l) *marks animals for financial gain without being registered as a marking operator, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months, or to both such fine and such imprisonment”.*

## WHAT IS AN IDENTIFICATION MARK?

Section 15 (1)(a) of the Act provides that no person may mark an animal with a mark that is not an identification mark.

Section 1 of the Act defines an identification mark as follows:

*“**identification mark** means any registered mark registered in terms of section 5 (2) and placed on any animal for any purpose, and includes any representation of a mark intended to be placed on any animals, as the circumstances may require, but does not include any—*

- (a) *mark made or placed on the horn or hoof;*
- (b) *mark made with paint on any animal;*
- (c) *clasp, rivet or tag attached to the ear, or any mark made on such clasp, rivet or tag; or*
- (d) *notch or hole”.*

## 9. ANIMALS PROTECTION ACT NO. 71 OF 1962

The above Act consolidates and amends the laws relating to the prevention of cruelty to animals.

### DEFINITION OF ANIMAL FOR PURPOSES OF THIS ACT

“**animal**” means any equine, bovine, sheep, goat, pig, fowl, ostrich, dog, cat or other domestic animal or bird, or any wild animal, wild bird or reptile which is in captivity or under the control of any person;

### OFFENCES

The offences are created in section 2 that provides as follows:

“(1) Any person who –

- (a) *overloads, overdrives, overrides, ill-treats, neglects, infuriates, tortures or maims or cruelly beats, kicks, goads or terrifies any animal; or*
- (b) *confines, chains, tethers or secures any animal unnecessarily or under such conditions or in such a manner or position as to cause that animal unnecessary suffering or in any place which affords inadequate space, ventilation, light, protection or shelter from heat, cold or weather; or*
- (c) *unnecessarily starves or under-feeds or denies water or food to any animal; or*
- (d) *lays or exposes any poison or any poisoned fluid or edible matter or infectious agents except for the destruction of vermin or marauding domestic animals or without taking reasonable precautions to prevent injury or disease being caused to animals; or*

- (e) *being the owner of any animal, deliberately or negligently keeps such animal in a dirty or parasitic condition or allows it to become infested with external parasites or fails to render or procure veterinary or other medical treatment or attention which he is able to render or procure for any such animal in need of such treatment or attention, whether through disease, injury, delivery of young or any other cause, or fails to destroy or cause to be destroyed any such animal which is so seriously injured or diseased or in such a physical condition that to prolong its life would be cruel and would cause such animal unnecessary suffering; or*
- (f) *uses on or attaches to any animal any equipment, appliance or vehicle which causes or will cause injury to such animal or which is loaded, used or attached in such a manner as will cause such animal to be injured or to become diseased or to suffer unnecessarily; or*
- (g) *save for the purpose of training hounds maintained by a duly established and registered vermin club in the destruction of vermin, liberates any animal in such manner or place as to expose it to immediate attack or danger of attack by other animals or by wild animals, or baits or provokes any animal or incites any animal to attack another animal; or*
- (h) *liberates any bird in such manner as to expose it to immediate attack or danger of attack by animals, wild animals or wild birds; or*
- (i) *drives or uses any animal which is so diseased or so injured or in such a physical condition that it is unfit to be driven or to do any work; or*
- (j) *lays any trap or other device for the purpose of capturing or destroying any animal, wild animal or wild bird the destruction of which is not proved to be necessary for the protection of property or for the prevention of the spread of disease; or*

- (k) *having laid any such trap or other device fails either himself or through some competent person to inspect and clear such trap or device at least once each day; or*
- (l) *except under the authority of a permit issued by the magistrate of the district concerned, sells any trap or other device intended for the capture of any animal, including any wild animal (not being a rodent) or wild bird, to any person who is not a bona fide farmer; or conveys, carries, confines, secures, restrains or tethers any animal*
  - (i) *under such conditions or in such a manner or position or for such a period of time or over such a distance as to cause that animal unnecessary suffering; or*
  - (ii) *in conditions affording inadequate shelter, light or ventilation or in which such animal is excessively exposed to heat, cold, weather, sun, rain, dust, exhaust gases or noxious fumes; or*
  - (iii) *without making adequate provision for suitable food, potable water and rest for such animal in circumstances where it is necessary; or*
- (n) *without reasonable cause administers to any animal any poisonous or injurious drug or substance; or*
- (o) *.....*
- (p) *being the owner of any animal, deliberately or without reasonable cause or excuse, abandons it, whether permanently or not, in circumstances likely to cause that animal unnecessary suffering; or*
- (q) *causes, procures or assists in the commission or omission of any of the aforesaid acts or, being the owner of any animal, permits the commission or omission of any such act; or*
- (r) *by wantonly or unreasonably or negligently doing or omitting to do any act or causing or procuring the*

(s) *commission or omission of any act, causes any unnecessary suffering to any animal; or kills any animal in contravention of a prohibition in terms of a notice published in the Gazette under subsection (3) of this section, shall, subject to the provisions of this Act and any other law, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding twelve months or to such imprisonment without the option of a fine.*

(2) *For the purposes of subsection (1) the owner of any animal shall be deemed to have permitted or procured the commission or omission of any act in relation to that animal if by the exercise of reasonable care and supervision in respect of that animal he could have prevented the commission or omission of such act.*

(3) *The Minister may by notice in the Gazette prohibit the killing of an animal specified in the notice with the intention of using the skin or meat or any other part of such animal for commercial purposes”.*

## POISONING OF ANIMALS

The free availability of poisons such as aldicarb or temik (also known as “two-step”) creates the risk of poisoning. Section 2 (1)(n) of the above Act can be utilised to charge persons who administer poison to animals. With regard to the selling of poisons such as aldicarb, members should note the provisions of the **Fertilizers, Farm Feeds, Agriculture Remedies and Stock Remedies Act No. 38 of 1947**. According to section 7 of the Act, no person may sell any agricultural remedy (chemical or biological poison) unless the poison is **registered under this Act under the name or mark which it is so sold, packed in such manner and mass or volume as may be prescribed** and the **container** in which it is sold, comply with the prescribed requirements and is sealed and labelled or marked in such

manner as may be prescribed, **or if it is not sold in a container, it is accompanied by an invoice.** Section 18 of the 1947 Act provides for offences and penalties. Section 18(1)(c) criminalises conduct that contravenes or fails to comply with the provisions of section 7.

## ANIMAL FIGHTS

Section 2A of the Animal Protection Act No. 71 of 1962 prohibits this type of conduct. According to this section any person who-

- “(1) (a) *possesses, keeps, imports, buys, sells, trains, breeds or has under his control an animal for the purpose of fighting any other animal;*
- (b) *baits or provokes or incites any animal to attack another animal or to proceed with the fighting of another animal;*
- (c) *for financial gain or as a form of amusement promotes animal fights;*
- (d) *allows any of the acts referred to in paragraphs (a) to (c) to take place on any premises or place in his possession or under his charge or control;*
- (e) *owns, uses or controls any premises or place for the purpose or partly for the purpose of presenting animal fights on any such premises or place or who acts or assists in the management of any such premises or place, or who receives any consideration for the admission of any person to any such premises or place; or*
- (f) *is present as a spectator at any premises or place where any of the acts referred to in paragraphs (a) to (c) is taking place or where preparations are being made for such acts, shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years.*
- (2) *In any prosecution in terms of subsection (1) it shall be presumed, unless the contrary is proved, that an animal which is found at any premises or place is the property or under the control of the owner of that premises or place, or is the property or under the*

*control of the person who uses or is in control of the premises or place.*

- (3) *Notwithstanding anything to the contrary contained in any law, a magistrate's court shall have jurisdiction to impose any penalty provided for in this section".*

## **POWERS OF POLICE TO DESTROY DISEASED OR SEVERELY INJURED ANIMALS**

Section 5(1) of the Animal Protection Act No. 71 of 1962 provides that, whenever a police officer is of the opinion that any animal is so diseased or severely injured or in such a physical condition that it ought to be destroyed, the police officer must, if the owner is absent or refuses to consent to the destruction of the animal, at once summon a veterinarian or, if not available, two adult persons to examine the animal and if they certify that it would be cruel to keep the animal alive, the police officer may, without consent of the owner, destroy or cause the animal to be destroyed with due consideration of all precautions so as to inflict as little suffering as practicable.

**According to section 5(2), the police officer must advise the owner of the destruction if the owner's name and address are known. If destruction took place on a public road, the police officer must remove the carcass or cause it to be removed.**

**ANIMAL MATTERS AMENDMENT ACT NO. 42 OF 1993**

Section 1 of this Act provides as follows:

- “(1) Any person as a result of whose negligence an animal causes injury to another person, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.*
- (2) Whenever a person is convicted of an offence in terms of subsection (1), the court convicting him may in addition to any punishment imposed upon him in respect of that offence -*
- (a) make any order relating to the removal, custody, disposal or destruction of the animal concerned and the recovery of any costs incurred in connection therewith;*
  - (b) declare the person convicted to be unfit, for a specified period, to own a certain kind of animal or an animal of a specific breed or to have it under his control or in his custody.*
- (3) Subsection (2) shall mutatis mutandis apply if any person -*
- (a) as a result of whose negligence an animal causes the death of another person is found guilty of an offence with regard to such negligence;*
  - (b) as a result of whose deliberate action an animal causes the death of or injury to another person is found guilty of an offence with regard to such action.*
- (4) The Minister of Justice may from time to time, with the concurrence of the Minister of State Expenditure (Finance), appropriate funds to a society for costs incurred relating to the removal, custody, disposal or destruction of an animal.*
- (5) (a) A person who has in terms of subsection (2) (b) been declared unfit, for a specified period, to own a certain kind of animal or an animal of a specific breed or to have it under his control or in his custody, shall, if at the time of the declaration he owns or has under his control or in his custody such an animal and such animal is not destroyed in terms of subsection (2) (a), within 14 days from the date on which such declaration was made, make*

*alternative arrangements for the caring of the animal for the period for which he is declared unfit to own such an animal or to have it under his control or in his custody.*

- (b) *Subject to the provisions of paragraph (a), any person who owns or has under his control or in his custody an animal in contravention of a declaration made in terms of subsection 2 (b), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.*
- (6) *Notwithstanding anything to the contrary contained in any law, a magistrate's court shall have jurisdiction to impose any penalty which is provided for in this section”.*

Members should take note of the contents of the **circular 3/34/1 dated 5 January 2023**: “*Responsibilities of the South African Police Service in respect of the enforcement of the Animals Protection Act, 1962 (Act No. 71 of 1962)*”, signed by the National Commissioner.

## 10. CHILD JUSTICE ACT NO. 75 OF 2008

The Child Justice Act No. 75 of 2008 came into operation on 1 April 2010. The Act creates a **separate criminal justice system for children in conflict with the law**. The Act emphasises the involvement of a probation officer to assess the child as soon as possible to determine the circumstances of the child and to make recommendations on how to proceed with the matter. In this regard, **the act provides that a matter may be diverted from the formal criminal justice system**. This way, the child is held accountable for his or her conduct, while he or she undergoes programmes to address the wrongfulness of his or her actions. The purpose is to

ensure that the child takes responsibility for his or her conduct and also to prevent similar conduct in future. If a matter involving a child is diverted, the child will not have a criminal record, but his or her particulars will be included in the Diversion Register which is kept by the Department of Social Development. Furthermore, the principle of **restorative justice** is embodied in the Act to ensure that the child appreciates the consequences of his or her action.

“child” means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older, but under the age of 21 years whose matter is dealt with in terms of section 4 (2).

The minimum age of criminal capacity used to be 10 years. This has however been raised to 12 years by the Child Justice Amendment Act No. 28 of 2019 which came into operation in 19 August 2022. This means that, **if a child younger than 12 years is involved in criminal activities, the child cannot be held criminally liable (in other words, the child cannot be arrested, charged or prosecuted)**, but must be assessed by a probation officer. According to section 7 of the Act, a child who commits an offence while under the age of 12 years does not have criminal capacity and cannot be prosecuted for an offence. A child who is 12 years or older but under the age 14 years and who commits an offence is presumed to lack criminal capacity, unless the state proves that the child has criminal capacity.

The Act furthermore provides that **children and adults may not be detained together in police cells, nor may persons of the opposite gender be detained together. A child may only be arrested as a last resort** and only if there is compelling reasons to justify the arrest. A child detained in a police cell may not be detained for longer than 48 hours and must be assessed by a probation officer before his or her first appearance in court (which is called a preliminary inquiry).

**National Instruction 2 of 2010** explains how a member must deal with a child in conflict with the law, as well as the powers and duties of members in terms of the Act. Members must make use of the SAPS 583 and SAPS 583 (a) to (j) forms as prescribed in the National Instruction.

Some of the relevant sections of the Act are:

***“17. Methods of securing attendance of child at preliminary inquiry***

- (1) *The methods of securing the attendance of a child at a preliminary inquiry are –*
- (a) *a written notice, as provided for in section 18;*
  - (b) *a summons, as provided for in section 19; or*
  - (c) *arrest, as provided for in section 20.*
- (2) *Where circumstances permit, a police official should obtain guidance from the Director of Public Prosecutions or a prosecutor on whether or not the child is required to attend a preliminary inquiry and, if so, the manner in which the child’s attendance should be secured.*

***18. Written notice to appear in preliminary inquiry (The form SAPS 583(b) must be utilised for this purpose)***

- (1) *A police official may, in respect of a child who is alleged to have committed an offence referred to in Schedule 1, hand to the child a written notice provided for in section 56 of the Criminal Procedure Act, but as amended by this section in respect of children, requiring the child to appear at a preliminary inquiry.*
- (2) *The provision of section 56(1)(c) of the Criminal Procedure Act relating to an admission of guilt and payment of a fine do not*

*apply to a written notice in terms of this Act. (This means that a child MAY NOT under any circumstances be released on a J534.)*

- (3) (a) *A written notice must specify the date, time place of the preliminary inquiry and be handed to the child in the presence of his or her parent, appropriate person or guardian, in which case both the child and parent, appropriate person or guardian must acknowledge receipt by way of a signature or mark.*
- (b) *In exceptional circumstances, where it is not possible to hand a written notice to the child in the presence of his or her parent, an appropriate person or guardian, the written notice must be handed to the child and a copy must, as soon as circumstances permit, be handed to the parent, appropriate person or guardian, and both the child and parent, appropriate person or guardian must acknowledge receipt by way of signature or mark.*
- (4) *A police official must, in the prescribed manner –*
- (a) *when handing a written notice to the child, parent, appropriate person or guardian -*
- (i) *inform them of the nature of the allegation against the child;*
- (ii) *inform them of the child's rights;*
- (iii) *explain to them the immediate procedures to be followed in terms of this Act;*
- (iv) *warn the child to appear at the preliminary inquiry on the date,*  
*and at the time and place specified in the written notice and to remain in attendance; and*
- (v) *warn the parent, appropriate person or guardian to bring or cause the child to be brought to the preliminary inquiry on the date and at the time and place specified in the written notice and to remain in attendance; and*

- (b) *immediately but not later than 24 hours after handing the written notice to the child, notify the probation officer concerned.*

**19. Summons**

- (1) *A summons issued in respect of a child in terms of section 54 of the Criminal Procedure Act who is to appear at a preliminary inquiry, must specify the date, time and place of the preliminary inquiry.*
- (2) (a) *A summons must be served on a child in the presence of his or her parent, an appropriate person or a guardian, in which case both the child and parent, appropriate adult or guardian must acknowledge service by way of a signature or mark.*
  - (b) *in exceptional circumstances, where is not possible to serve a summons on a child in the presence of his or her parent, and appropriate person or guardian, the summons must, as soon as circumstances permit, be served on the parent, appropriate adult or guardian, and both the child and parent, appropriate person or guardian must acknowledge service by way of a signature or mark.*
- (3) *A police official must, in the prescribed manner -*
  - (a) *when serving a summons on the child, parent, appropriate person or guardian –*
    - (i) *inform them of the nature of the allegation against the child;*
    - (ii) *inform them of the child's rights;*
    - (iii) *explain to them the immediate procedures to be followed in terms of this Act;*

- (iv) *warn the child to appear at the preliminary inquiry on the date, and at the time and place specified in the summons and to remain in attendance; and*
- (v) *warn the parent, appropriate adult or guardian to bring or cause the child to be brought to the preliminary inquiry on the date and at the time and place specified in the summons and to remain in attendance; and*
- (b) *immediately but not later than 24 hours after the service of the summons notify the probation officer concerned.*

## **20. Arrest**

- (1) *A child may not be arrested for an offence referred to in Schedule 1, unless there are compelling reasons justifying the arrest, which may include the following circumstances:*
  - (a) *where the police official has reason to believe that the child does not have a fixed residential address;*
  - (b) *where the police official has reason to believe that the child will continue to commit offences, unless he or she is arrested;*
  - (c) *where the police official has reason to believe that the child poses a danger to any person;*
  - (d) *where the offence is in the process of being committed; or*
  - (e) *where the offence is committed in circumstances as set out in national instructions referred to in section 97(5)(a)(ii).*
- (2) *A warrant of arrest issued under section 43 of the Criminal Procedure Act in respect of a child must direct that the child be brought to appear at a preliminary inquiry.*
- (3) *The police official arresting a child must, in the prescribed manner-*
  - (a) *inform the child of the nature of the allegation against him or her;*

- (b) *inform the child of his or her rights;*
  - (c) *explain to the child the immediate procedures to be followed in terms of this Act; and*
  - (d) *notify the child's parent, and appropriate person or guardian of the arrest: Provided that if a police official is unable to notify the child's parents an appropriate adult or guardian of the arrest, the police official must submit a written report to the presiding officer at the preliminary inquiry.*
- (4) (a) *A police official, where possible the police official who arrested the child, must immediately, but no later than 24 hours after the arrest, inform the probation officer in whose area of jurisdiction the child was arrested of the arrest in the prescribed manner.*
- (b) *If a police official is unable to inform a probation officer of the arrest, the police official must submit a written report to the inquiry magistrate at the preliminary inquiry, furnishing reasons for non-compliance, as prescribed.*
- (5) *Any child who has been arrested and who remains in custody must, whether or not an assessment of the child has been done, be taken by a police official to the magistrate's court having jurisdiction, in order to deal with the matter in terms of section 5(2) to (4), as soon as possible but not later than 48 hours after arrest, in which case the provisions of section 50(1)(d) of the Criminal Procedure Act dealing with-*
- (i) *ordinary court hours;*
  - (ii) *physical illness or other physical condition; and*
  - (iii) *arrest outside of the area of jurisdiction of the court;*

*apply in respect of the expiry of the period of 48 hours.*

**21. Approach to be followed when considering release or detention of child after arrest**

- (1) *When considering the release or detention of a child who has been arrested, preference must be given to releasing the child, as set out in the subsection (2) and (3).*
- (2) *Prior to the child's first appearance at a preliminary inquiry –*
  - (a) *a police official must, in respect of an offence referred to in Schedule 1, where appropriate, release a child on written notice into the care of a parent, an appropriate person or guardian in terms of section 18, read with section 22; or*
  - (b) *a prosecutor may, in respect of an offence referred to in Schedule 1 or 2, authorise the release of a child on bail in terms of section 25, read with section 59A of the Criminal Procedure Act, in which case the reference to Schedule 7 in section 59A of that Act is to be regarded as a reference to Schedule 2 of this Act.*
- (3) *A presiding officer may, at a child's first appearance at a preliminary inquiry or thereafter the child justice court -*
  - (a) *in respect of any offence, release a child into the care of a parent, an appropriate person or guardian in terms of section 24(2)(a);*
  - (b) *in respect of an offence referred to in Schedule 1 or 2, release a child on his or her own recognisance in terms of section 24(2)(b); or*
  - (c) *if a child is not released from detention in terms of paragraph (a) or (b), release the child on bail in terms of section 25.*

**22. Release of child on written notice into care of parent, appropriate person or guardian before first appearance at preliminary inquiry**

- (1) *A police official must release a child on written notice in terms of section 18 into the care of a parent, an appropriate person or*

*guardian if the child is in detention in police custody in respect of an offence referred to in Schedule 1, as soon as possible and before the child appears at the preliminary inquiry, unless -*

- (a) a child's parents or an appropriate person or guardian cannot be located or is not available and all reasonable efforts have been made to locate the parent or appropriate person or guardian; or*
- (b) there is a substantial risk that the child may be a danger to any other person or to himself or herself.*

- (2) Where a child has not been released in terms of subsection (1), the investigating police official must provide the inquiry magistrate with a written report in the prescribed manner, giving reason why the child could not be released, with particular reference to the factor referred to in subsection (1)(a) or (b).*

### **23. Duty of police officials when releasing child into care of parent, appropriate person or guardian**

*A police official who releases a child from detention in terms of section 22 and places the child in the care of a parent or an appropriate person or guardian, must, at the time of the release of the child, hand to the child and to the person into whose care the child is released, a written notice in accordance with section 18.*

### **25. Release of child on bail**

- (1) Chapter 9 of the Criminal Procedure Act applies to an application for the release of a child on bail, except for section 59 and section 59A, to the extent set out in section 21(2)(b).*
- (2) An application for the release of a child, referred to in section 21(3)(c), on bail, must be considered in the following three stages:*

- (a) *whether the interests of justice permit the release of the child on bail; and*
- (b) *if so, a separate inquiry must be held in to the ability of the child and his or her parent, an appropriate person or guardian to pay the amount of money being considered or any other appropriate amount; and*
- (c) *if after an inquiry referred to in paragraph (b), it is found that the child and his or her parent, and appropriate person or guardian are -*
  - (i) *unable to pay any amount of money, the presiding officer must set appropriate conditions that do not include an amount of money for the releases of the child on bail; or*
  - (ii) *able to pay an amount of money, the presiding officer must set conditions for the release of the child on bail and an amount which is appropriate in the circumstances.*

## **28. Protection of children detained in police custody**

- (1) *A child who is in detention in police custody must be-*
- (a) *detained separately from adults, and boys must be held separately from girls;*
  - (b) *detained in conditions which take into account their particular vulnerability and will reduce the risk of harm to that child, including the risk of harm caused by other children;*
  - (c) *permitted visits by parents, appropriate persons, guardians, legal representatives, registered social workers, probation officers, assistant probation officers, health workers, religious counsellors and any other person who, in terms of any law, is entitled to visit; and*
  - (d) *cared for in a manner consistent with the special needs of children, including the provision of-*

- (i) *immediate and appropriate health care in the event of any illness, injury or severe psychological trauma; and*
  - (ii) *(ii) adequate food, water, blankets and bedding.*
- (2) (a) *If any complaint is received from a child or any other person during an arrest or while the child is in detention in police custody relating to any injury sustained or severe psychological trauma suffered by the child or if a police official observes that a child has been injured or is severely traumatised, that complaint or observation must, in the prescribed manner, be recorded and reported to the station commissioner, who must ensure that the child receives immediate and appropriate medical treatment if he or she is satisfied that any of the following circumstances exist:*
- (i) *There is evidence of physical injury or severe psychological trauma;*
  - (ii) *the child appears to be in pain as a result of an injury;*
  - (iii) *there is an allegation that a sexual offence as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), has been committed against the child; or*
  - (iv) *there are other circumstances which warrant medical treatment.*
- (b) *In the event of a report being made as referred to in paragraph (a), that report must, in the prescribed manner, as soon as is reasonably possible, be submitted to the Provincial Commissioner of Police concerned and a copy of the report must be submitted simultaneously to the National Commissioner of Police, indicating -*
- (i) *the nature of the injury sustained or severe psychological trauma suffered by the child;*
  - (ii) *an explanation of the circumstances surrounding the injury or trauma; and*

- (iii) *a recommendation as to whether any further action is required.*
- (c) *A copy of the medical report, if applicable, must accompany the report by the station commissioner referred to in paragraph (b), and a further copy must be filed in the docket.*
- (3) *The station commissioner of each police station must keep a register in which prescribed details regarding the detention of all children in police cells or lockups must be recorded in a manner that entries regarding the detention of children are clearly distinguishable from those of adults.*
- (4) *The register may be examined by any person, as may be prescribed”.*

**NOTE: the form SAPS 583(f) and the SAPS 583 register must be utilised for this purpose).**

## 11. CHILDREN'S ACT NO. 38 OF 2005

The Children's Act No. 38 of 2005, (hereinafter referred to as “the Children's Act”) came into operation on 1 April 2010. The Children's Act replaced the Child Care Act No. 74 of 1983. One of the objectives of the Children's Act is to **promote the protection, development and well-being of children**. It is important to note that the Children's Act deals with children **in need of care and protection**, while the Child Justice Act deals with children in **conflict with the law**.

According to the Children's Act, a child is defined as a person under the age of 18 years.

The Children's Act No. 38 of 2005 imposes certain obligations on a member to ensure the care and protection of children.

**National Instruction 3 of 2010** provides clear direction to a member on how to render the necessary assistance and protection to children.

Members must make use of the **SAPS 581 forms** when dealing with a child in need of care and protection.

The Children's Act **provides for removal of a child with or without a court order and placement of the child in temporary safe care.**

The term "temporary safe care" refers to places previously referred to as "**places of safety**" and is defined in the Children's Act and in paragraph 2 of the **National Instruction**. A prison or police cell does not qualify as a place of "*temporary safe care*".

**Section 151** of the Children's Act provides for the removal of a child by court order by a person authorised by the court, or such person accompanied by a police member. A presiding officer may issue a court order for the removal of a child to temporary safe care if it is established that the child is in need of care and protection.

**Section 152** of the Children's Act provides for the removal and placement of a child in temporary safe care without a court order. According to this section a child may be removed and placed in temporary safe care without a court order if there are reasonable grounds to believe that the child –

- (a) is in need of care and protection; and
- (b) needs immediate emergency protection.

The term "**immediate emergency protection**" referred to above is not defined in the Children's Act. However, paragraph 5(2) of **National Instruction 3 of 2010** provides when a member must consider a child to be in need of immediate emergency protection. Paragraph 11 of National Instruction 3 of 2010 provides step by-step instructions and guidelines to be followed regarding the removal of a child without a court order.

**Section 153** provides that a member may, if he or she is satisfied that it will be in the best interests of the child if the alleged offender is removed from the home or place where the child resides, **issue a written notice** (SAPS 581) to the alleged offender requiring the alleged offender **to leave the home or place where the child resides** and to refrain from entering such home or place or having contact with the child until a court hearing in the Children's Court.

The Children's Act also provides for a **Child Protection Register** to be maintained by the Department of Social Development together with the Department of Justice and Constitutional Development. The Register consists of a Part A and a Part B. The purpose of Part A of the Register is to have a record of abuse or deliberate neglect inflicted on specific children.

The purpose of Part B of the Register is to have a record of persons who are unsuitable to work with children and to use the information in the Register to protect children in general against abuse from these persons.

Members must take note of the wording of the following provisions of the Act.

**“7: Best interests of child standard**

- (1) *Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely –*
- (a) *the nature of the personal relationship between -*
    - (i) *the child and the parents, or any specific parent; and*
    - (ii) *the child and any other care-giver or person relevant in those circumstances;*
  - (b) *the attitude of the parents, or any specific parent, towards*
    - (i) *the child; and*

- (ii) *the exercise of parental responsibilities and rights in respect of the child;*
- (c) *the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;*
- (d) *the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –*
  - (i) *both or either of the parents; or*
  - (ii) *any brother or sister or other child, or any other caregiver or person, with whom the child has been living;*
- (e) *the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;*
- (f) *the need for the child –*
  - (i) *to remain in the care of his or her parent, family and extended family; and*
  - (ii) *to maintain a connection with his or her family, extended family, culture or tradition;*
- (g) *the child's –*
  - (i) *age, maturity and stage of development;*
  - (ii) *gender;*
  - (iii) *background; and*
  - (iv) *any other relevant characteristics of the child;*
- (h) *the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
  - (i) *any disability that a child may have;*
  - (j) *any chronic illness from which a child may suffer;*
- (k) *the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;*

- (l) *the need to protect the child from any physical or psychological harm that may be caused by –*
  - (i) *subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour;*  
*or*
  - (ii) *exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;*
- (m) *any family violence involving the child or family member of the child; and*
- (n) *which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.*

(2) *In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.*

### **9: Best interests of child paramount**

*In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.*

#### **150: Child in need of care and protection**

- (1) *A child is in need of care and protection if such a child -*
  - (a) *has been abandoned or orphaned and does not have the ability to support himself or herself and such inability is readily apparent;*
  - (b) *displays behaviour which cannot be controlled by the parent or caregiver;*
  - (c) *lives or works on the streets or begs for a living;*
  - (d) *is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;*

- (e) *has been exploited or lives in circumstances that expose the child to exploitation;*
  - (f) *lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;*
  - (g) *may be at risk if returned to the custody of the parent, guardian or caregiver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;*
  - (h) *is in a state of physical or mental neglect; or*
  - (i) *is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.*
- (2) *A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker –*
- (a) *a child who is a victim of child labour; and*
  - (b) *a child in a child-headed household.*
- (3) *If after investigation a social worker finds that a child referred to in subsection (2) is not a child in need of care and protection as contemplated in subsection (1), the social worker must where necessary take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.*

**153(1) and (2) Written notice to alleged offender**

- (1) *A police official to whom a report contemplated in section 110(1) or (2) or a request contemplated in 110(7) has been made, may, if he or she is satisfied that it will be in the best interests of the*

*child if the alleged offender is removed from the home or place where the child resides, issue a written notice which –*

- (a) *specifies the names, surname, residential address, occupation and status of the alleged offender;*
- (b) *calls upon the alleged offender to leave the home or place where the child resides and refrain from entering such home or place or having contact with the child until the court hearing specified in paragraph (c);*
- (c) *calls upon the alleged offender to appear at a children's court at a place and on a date and at a time specified in the written notice to advance reasons why he or she should not be permanently prohibited from entering the home or place where the child resides: Provided that the date so specified shall be the first court day after the day upon which the notice is issued; and*
- (d) *contains a certificate under the hand of the police official that he or she has handed the original of such written notice to the alleged offender and that he or she has explained to the alleged offender the importance thereof.*

*(2) The police official must forthwith forward a duplicate original of the written notice to the clerk of the children's court".*

Note the provisions of section 35 of the Act:

**"35. Refusal of access or refusal to exercise parental responsibilities and rights -**

- (1) Any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22 (4), refuses another person who has access to that child or who holds parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights or who prevents that person from exercising such access or such responsibilities and rights is guilty of an offence and liable on

conviction to a fine or to imprisonment for a period not exceeding one year.

- (2) (a) A person having care or custody of a child whereby another person has access to that child or holds parental responsibilities and rights in respect of that child in terms of an order of any court or a parental responsibilities and rights agreement as contemplated in subsection (1) must upon any change in his or her residential address forthwith in writing notify such other person.

- (b) A person who fails to comply with paragraph (a) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year”.

## 12. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

In 1994, South Africa became a constitutional democratic and therefore the Constitution, instead of Parliament, became the supreme law of the land. Because the Constitution is the highest law, all laws enacted by Parliament must be in line with the principles and values of the Constitution. Laws that are in conflict with the principles of the Constitution are unconstitutional and therefore invalid.

### THE BILL OF RIGHTS

Chapter 2 of the Constitution (Bill of Rights) deals with the fundamental rights of individuals and requires that the state should respect, protect, promote and fulfil these rights.

This means that the police, as agents of the state, when exercising their powers, must have due regard to the fundamental rights of every person as enshrined by the Constitution.

The police must exercise their powers within the scope of the objectives of the

Service as set out in section 205(3) of the Constitution, namely to -

- prevent, combat and investigate crime;
- maintain public order;
- protect and secure the inhabitants of the Republic and their property; and
- uphold and enforce the law.

## **HIERARCHY OF RIGHTS IN THE BILL OF RIGHTS?**

Although various rights, such as the right to life, privacy, equality, etc., are contained in the Bill of Rights, one needs to note that the Constitution itself does not create a hierarchy of rights in the Bill of Rights. No right is more important than any other right. All of these rights are of equal importance and must therefore be respected by police officials at all times.

## **LIMITATION CLAUSE - SECTION 36**

Although the Constitution is the supreme law, the rights in the Bill of Rights are not absolute and can be limited. When executing their powers, the police sometimes have to lawfully infringe on the constitutional rights of an individual, e.g. when the police search and seize property, thereby infringing, *inter alia*, the rights to privacy and to property.

Section 36 (limitation clause) provides guidelines as to how, when and to what extent the fundamental rights of an individual can be infringed.

## **RIGHTS OF ARRESTED, DETAINED AND ACCUSED PERSONS**

**What are the rights of arrested, detained and accused persons?**

Police officials must be cautious when arresting and/or detaining suspects not to infringe the rights of those arrested and/or detained. This, however does not mean that one must refrain from acting against these persons, it merely means that one's action must be professional and in accordance with the law. Section 35(1) and (2) of the Constitution set out the rights of arrested and detained persons.

Since both arrest and detention are characterised by a deprivation of liberty, the rights in section 35(2) (detained persons) are also applicable during the arrest of a person.

### **The rights contained in the Bill of Rights may be limited only -**

- In terms of law of general application, i.e. by a law/legislation that is applicable to everyone, (the Criminal Procedure Act No. 51 of 1977).
- The limitation should also be reasonable and justifiable in an open and democratic society. The limitation must always be reasonable in the circumstances and be justifiable in a court of law.
- The limitation should be justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation of a person's rights must be proportional to (balance) the nature and seriousness of the harm.
- Police officials should always bear in mind that a person is presumed innocent until proven guilty by a competent court of law. (This does not, however, mean that the police should not do their work: They are obliged to finalise criminal investigations to the best of their ability. The court will ultimately decide on the guilt of the accused person).

**What warning must be given to a person who is arrested/detained by the police? (Known in the United States as the so-called “Miranda rights”)**

Immediately upon a person’s arrest, there is no obligation on the South African Police Service to inform him or her of **all** his or her rights in terms of section 35(1) or (2).

Upon the arrest/detention of a person, he or she **MUST**, however, promptly (as expeditiously as possible in the circumstances) be warned as follows:

*“I am ..... (rank) {Show appointment certificate to suspect}. I am arresting you for ..... (factual reason for arrest).*

*You have the right to remain silent. Anything you say may be used as evidence in a court of law.*

*You have the right to consult with a legal practitioner of your choice. If you cannot afford one, you can apply via the Legal Aid Board to be assisted by a legal practitioner at state expense.*

*You have the right to apply for bail.’*

The suspect must receive a full copy of section 35 when he or she is booked into the cells and sign on the appropriate official SAPS form that he or she had been informed of all his or her constitutional rights.

## **UNCONSTITUTIONALLY OBTAINED EVIDENCE**

Section 35(5) of the Constitution states that evidence obtained in violation of any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. In **S v Nkabinde 1998 (8) BCLR 996 (N)**, the court emphasised that the fairness of a trial is

not only determined by what takes place in the trial itself. Fair procedures must also be followed and be seen to be followed in the preceding criminal investigations.

In ***S v Hena and Another* [2006] JOL 17160 (SE)** private persons of an “*anticrime committee*” kidnapped and assaulted a person who was accused of robbery and rape. The investigating officer testified that there was a working relationship between the SAPS and the anti-crime committees, admitting that it was practice for the police to involve community organisations in the investigation of crime.

The court held that this breach of the fundamental rights of the accused undermined both the Constitution and the integrity of the criminal justice system. Untrained civilians took the law into their own hands. The court emphasised that every police officer must be taken to know that he or she has been clothed with authority to investigate crime and that this function cannot be “sub-contracted” to untrained civilians. All that the police had to do was to investigate the case of robbery and rape themselves and to do so lawfully. The court consequently held that the evidence against the accused, linking him to the robbery and rape, could not be admitted and that he was entitled to his acquittal.

In ***Zuko v S* [2009] JOL 23541 (E)** the complainant in an armed robbery case formed a vigilante group and entered and searched the applicant’s home after the complainant’s tavern was held up in an armed robbery. There the complainant found his firearm which had been stolen in the robbery.

The court held that a number of fundamental rights of the applicant were violated by the vigilante group.

According to the court, there was a causal link between the infringement of these rights and the discovery of the incriminating evidence (firearm): if the vigilantes had not entered the applicant’s home unlawfully and assaulted him, they would not have found the

firearm. (Fruit of the poisoned tree). The court found that the vigilante group did not act in good faith, they deliberately took the law into their own hands, violating the fundamental rights of the applicant. They deliberately chose to exclude the police from their plans, thus turning their backs on lawful means of entering and searching the home of the appellant. The evidence was ruled inadmissible resulting in the setting aside of the appellant's conviction and sentence for armed robbery.

## **13. COUNTERFEIT GOODS ACT NO. 37 OF 1997**

### **INTRODUCTION**

The Counterfeit Goods Act is a mechanism available to SAPS officials (with the rank of sergeant and higher) to act against counterfeit and/or pirated goods (excluding counterfeit currency).

### **COUNTERFEIT GOODS DEFINITION**

Counterfeit goods are basically imitations or copies of goods that are protected by intellectual property rights.

Intellectual property rights include-

- Rights in a trademark conferred by the Trade Marks Act No. 194 of 1993;
- Copyright in any work in terms of the Copyright Act No. 98 of 1978;
- Prohibited marks in terms of section 15 of the Merchandise Marks Act No. 17 of 1941.

### **WHAT CAN BE COUNTERFEITED?**

Anything. Some examples are:

- Clothing,
- Shoes,
- Sunglasses,
- Motor vehicle parts,
- DVDs,
- Videos,
- PlayStation games,
- Music CDs,
- Cigarettes - some brands of cigarettes are usually illegally imported/smuggled into the country instead of being counterfeited and it is therefore more correct to refer to the term “illicit cigarettes” The FSL of the SAPS cannot determine whether a cigarette is fake, they can only confirm that the cigarette contains tobacco. The manufacturer of the original product has to be approached to determine whether cigarettes are counterfeit or illicit. A police official does not have the training nor the expertise to determine such fact.
- Counterfeit and illicit liquor poses a serious challenge to the economy and the health of consumers. Such liquid is often made with potentially dangerous materials, in poor conditions, for example:
  - Original bottles filled with fake liquid; or
  - Fake bottles filled with fake liquid.

### **DEALING IN COUNTERFEIT GOODS - SECTION 2**

According to section 2 of the Act, counterfeit goods may not be -

- in the possession or under the control of any person in the course of business in dealing in those goods;
- manufactured, produced or made, except for the private or domestic use of the person by whom the goods were manufactured, produced or made;
- sold, hired out, bartered or exchanged, or be offered or exposed for sale, hiring out, barter or exchange;
- distributed for purposes of trade or for any other purpose to such an extent that the owner of an intellectual property right in respect of any particular protected goods suffers prejudice;
- imported into or through or exported from or through the Republic except if so imported or exported for the private and domestic use of the importer or exporter, respectively; or
- in any other manner be disposed of in the course of trade.

A person who performs or engages in any act or conduct prohibited by this section, will be guilty of an offence if -

- at the time of the act or conduct, the person knew or had reason to suspect that the goods to which the act or conduct relates were counterfeit goods; or
- the person failed to take all reasonable steps in order to avoid any act or conduct of the nature contemplated in this section from being performed or engaged in with reference to the counterfeit goods.

It is to be noted that there is no offence such as the mere possession of counterfeit goods. Possession must be linked to the requirements set out in section 2 of the Act.

### LAYING OF COMPLAINT — SECTION 3

Any person who has an interest in protected goods, whether as the owner, licensee of an intellectual property right in respect of the protected goods or as an importer, exporter or distributor thereof (which includes the duly authorised agent or representative or attorney of such person), who reasonably suspects that an offence referred to in section 2 has been or is being committed, or is likely to be committed, may lay a complaint to that effect with any inspector. “Inspector” includes any police official from the rank of sergeant or higher, or the Commissioner of Customs and Excise or a person appointed as such by the Minister of Trade and Industry.

**NB: Neither members of the public who have bought counterfeit goods nor a member the Service can lay a complaint in terms of this Act.**

The complainant must furnish information and particulars to the satisfaction of the inspector that the goods with reference to which the offence allegedly has been or is being or is likely to be committed, *prima facie* are counterfeit goods. The inspector must have satisfied him or herself that -

- the person who laid the complaint is, *prima facie*, entitled to do so;
- the goods claimed to be protected goods, *prima facie*, are protected goods;
- the intellectual property rights of which it is alleged to have been applied to the offending goods, *prima facie*, subsist; and
- the suspicion on which the complaint is based appears to be reasonable in the circumstances.

In terms of section 4(2) of the Counterfeit Goods Act, an inspector's powers in relation to counterfeit goods may be exercised only on the authority of a warrant, subject to section 5(2) of the Act.

Section 5(2) of the Counterfeit Goods Act makes provision for search and seizure without a warrant. In terms of section 5(2)(a) of the Act, a person (who is investigated) may consent to the search and seizure of suspected counterfeit goods. Section 5(4)(a) of the Counterfeit Goods Act prescribes that an inspector who acted without a warrant must have his or her acts confirmed by a magistrate or judge of the High Court within ten court days of the day on which those acts were performed.

In terms of section 5(4A), the inspector must return any seized goods forthwith and make good any damage caused if the magistrate or judge contemplated above does not confirm the acts performed by the inspector.

## POWERS OF INSPECTOR - SECTION 4

If an inspector has reasonable grounds to suspect that an offence in terms of section 2 has been or is likely to take place, he or she has, after obtaining a warrant, the following powers:

- to enter upon or enter any place, premises or vehicle in order to inspect any relevant goods and seize any suspected counterfeit goods found and cause it to be detained in accordance with this Act;
- to collect or obtain evidence relating to the suspected counterfeit goods, or the relevant act of dealing in counterfeit goods;
- to conduct at, on or in such place, premises or vehicle, whatever search may be reasonably necessary; and
- to take whatever steps may be reasonably necessary in order to terminate the relevant act of dealing in counterfeit goods.

## DUTIES OF INSPECTOR FOLLOWING SEIZURE OF GOODS - SECTION 7

Duties of Inspector following seizure of goods, in terms of section 4:

- The goods must be sealed, identified and categorised.
- Make out an inventory in quadruplicate (4 copies). The person from whom goods were seized has checked the inventory for correctness, and signs every inventory.
- Furnish one of the originals of the inventory to the person from whom goods were seized, and another to the complainant.
- As soon as possible remove the goods (if transportable) to a counterfeit goods depot - if not transportable, declare the goods to have been seized, lock up the goods and/or place them under guard - that place will be deemed to be a counterfeit goods depot.
- Supply a written notice to the following persons informing them of the action taken by the inspector in terms of section 4 and of the address of the counterfeit goods depot where the goods are kept:
  - The person from whom the goods were seized
  - The complainant
  - Any person who qualifies to be a complainant in terms of section 3, but who has not yet laid a complaint.

Alleged counterfeit goods seized in terms of this Act (section 4) may not be booked into the SAPS13 register at a police station. The goods must be stored in a declared counterfeit goods depot.

Members should first consult with the Commercial Crime Component of the Directorate for Priority Crime Investigation (DPCI) and the brand holder e.g. Nike, Adidas, etc., before they exercise their powers in terms of this Act. Most owners of the particular intellectual property right (the brand holder) have their representatives/agents/attorneys in South Africa who will lay the complaint in terms of section 3.

## OTHER LEGISLATION

If a suspect cannot be successfully charged in terms of the Counterfeit Goods Act No. 37 of 1997, consideration must also be given to municipal by-laws and provisions of the Copyright Act No. 98 of 1978. The by-laws of a specific municipality may prohibit the trade of goods (any goods, counterfeit or not) outside designated areas or hours or require a permit before any trade is allowed.

According to the Copyright Act No. 98 of 1978, certain works such as artistic works, cinematograph films, sound recordings and computer programs are protected by statutory copyright. Section 27 of the Copyright Act criminalises the selling, distribution, importation, etc. of articles which are subject to copyright.

From the above – mentioned information it is clear that police officials cannot rely on their normal powers of investigation when they investigate an act of dealing in terms of the Counterfeit Goods Act. The normal rules of the Criminal Procedure Act No. 51 of 1977, do not apply. They are compelled to follow the procedures laid down by the Counterfeit Goods Act, when they are investigating an act of dealing in counterfeit goods.

### **Counterfeit currency**

The South African Reserve Bank Act No. 90 of 1989 provides for a number of offences in respect of counterfeit South African currency whilst the Prevention of Counterfeiting of Currency Act No. 16 of 1965 provides for counterfeiting of all other currency. (See discussion infra).

## 14. CRIMINAL LAW SECOND AMENDMENT ACT NO. 126 OF 1992

### PARAMILITARY TRAINING, WEAPONS AND ARMAMENT OF ORGANISATIONS

The above Act *inter alia* criminalises paramilitary training and certain acts connected with military, paramilitary or similar operations and weapons, ammunition and explosives. The Act is aimed at training for the purpose of endangering life or causing serious damage to property, for the purpose of promoting any political objective, or for military, paramilitary or similar purposes. In this regard, cognisance must be taken of the following provisions of the Act:

**“13. Prohibition regarding certain organization, training, equipment, or armament of members or supporters of organizations - No person shall -**

- (a) *take part in the control, administration or management of any organization;*
- (b) *organize, train, equip or arm the members or supporters of any organization;*
- (c) *undergo training in any organization,*

*if the members or supporters of that organization are organized, trained, equipped or armed in order to usurp some or all of the functions—*

- (i) *of the South African Police Service as contemplated in the Constitution;*
- (ii) *for which the South African National Defence Force may be employed as contemplated in the Constitution,*

*for themselves or such organization.*

**15. Offences and penalties** - Any person who contravenes or fails to comply with a provision of section 13, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.

**16. Authority of attorney-general required for prosecution** - No prosecution for an offence contemplated in section 15 shall be instituted without the written authority of the attorney-general.

**16A. Certain acts connected with military, paramilitary or similar operations and weapons, ammunition, explosives or other explosive devices prohibited** -

(1) No person shall -

- (a) in any manner train any other person or undergo any training -
  - (i) in the conducting of any military, paramilitary or similar operation; or
  - (ii) in any tactical or other procedure applicable to, or required in, the preparation for any such operation or the execution thereof;
- (b) instruct or train any other person or undergo any instruction or training in the construction, manufacture or use of any weapon, ammunition, explosive or other explosive device -
  - (i) for the purpose of endangering life or causing serious damage to property;
  - (ii) for the purpose of promoting any political objective; or
  - (iii) for military, paramilitary or similar purposes;
- (c) assist in any instruction or training contemplated in this subsection, or equip any other person who is so instructed or trained or intended to be so instructed or trained with any such weapon, ammunition, explosive or explosive

*device or organise or employ two or more such other persons, whether they are so equipped by him or her or not*

-

- (i) *for the purpose of endangering life or causing serious damage to property;*
- (ii) *for the purpose of promoting any political objective; or*
- (iii) *for military, paramilitary or similar purposes.*

(2) *The provisions of subsection (1) shall not apply in respect of -*

- (a) *any member of the South African National Defence Force or of any reserve, corps or service established by or under the Defence Act, 1957 (Act No. 44 of 1957), who -*
  - (i) *acts in the course and within the scope of his or her duties as such a member and in accordance with the requirements of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), the said Act or any order, command, instruction or regulation issued or made under the said Act; or*
  - (ii) *undergoes training in terms of the said Act or any order, command, instruction or regulation issued or made under the said Act;*
- (b) *any member of the South African Police Service or of any municipal police service established under the South African Police Service Act, 1995 (Act No. 68 of 1995), who -*
  - (i) *acts in the course and within the scope of his or her duties as such a member and in accordance with the requirements of the said Act, any other law or any order, instruction, determination or regulation issued or made under the said Act; or*

- (ii) *undergoes training in terms of any determination or regulation issued or made under the said Act;*
- (c) *any correctional official of the Department of Correctional Services or any person authorised under the Correctional Services Act, 1959 (Act No. 8 of 1959), who -*
  - (i) *in the case of any such official, acts in the course and within the scope of his or her duties as such an official and in accordance with the requirements of the said Act, any other law or any order, authorisation or regulation issued or made under the said Act or, in the case of any person so authorised, acts within the scope of and in accordance with such authorisation; or*
  - (ii) *undergoes training in terms of any order or authorisation issued under the said Act;*
- (d) *in the case of any act relating to weapons, ammunition or explosives, any employee of the Armaments Development and Production Corporation of South Africa, Limited, of Denel (Pty) Ltd, of any factory manufacturing armaments or arms in accordance with a permit issued under the Armaments Development and Production Act, 1968 (Act No. 57 of 1968), or the Arms and Ammunition Act, 1969 (Act No. 75 of 1969), or of any factory licensed under the Explosives Act, 1956 (Act No. 26 of 1956), to manufacture explosives, who -*
  - (i) *acts in the course and within the scope of his or her employment as such an employee and with a view to the promotion of the sale of armaments, arms, ammunition or explosives or the instruction or training -*

- (aa) of co-employees in the manufacture, maintenance or development of armaments, arms, ammunition or explosives; or
  - (bb) of persons employed by employers who are permitted to purchase armaments, arms, ammunition or explosives, in the construction, manufacture, use or maintenance thereof; or
- (ii) undergoes instruction or training in the manufacture, maintenance or development of armaments, arms, ammunition or explosives;
- (e) in the case of any act relating to weapons or ammunition, any person who is appointed as a traffic officer or traffic warden under the Road Traffic Act, 1989 (Act No. 29 of 1989), and who -
  - (i) acts in the course and within the scope of his or her duties as such an officer or warden and in furtherance of the objects of the said Act or in accordance with the requirements of any other law or the conditions of any approved training course; or
  - (ii) undergoes training at any recognised or approved training centre in accordance with the conditions of any approved training course;
- (f) in the case of any act relating to weapons or ammunition, any person who is registered as a security officer in terms of the Security Officers Act, 1987 (Act No. 92 of 1987), and who -
  - (i) in the case of an employer, acts in good faith in rendering a security service for the protection or safeguarding of persons or property or, in the case of an employee, acts in the course and within the scope of his or her employment as such an officer and with a view to the protection or safeguarding of persons or property; or

- (ii) *undergoes training in terms of the said Act or any regulation made under the said Act;*
- (g) *in the case of any act relating to explosives, any member of a service established by or under any law for the protection of persons or property, who -*
  - (i) *acts in the course and within the scope of his or her duties as such a member and with a view to the protection of persons or property; or*
  - (ii) *undergoes training at any recognised or approved training centre; or*
- (h) *any person who otherwise acts, or undergoes instruction or training, in a lawful manner.*

(3) *For the purposes of subsection (1)—*

- (a) *“explosive device” means any device which is capable of causing bodily injury, loss of life or damage to, or loss of, property by explosion or ignition and which is so used or intended to be so used;*
- (b) *“political objective” includes -*
  - (i) *the bringing about of any constitutional, political, social, economic or industrial change in the Republic; or*
  - (ii) *the inducement of any person, including the national, provincial or local sphere of government, to do or to abstain from doing any act, or to support or to oppose any person, cause, action or failure to take action, whether it is coupled with the use or display of force or not;*
- (c) *“weapon” includes any cannon, mortar, rocket launcher, grenade, machine gun, firearm or air rifle, or any imitation thereof.*

**16B. Offences and penalties** - Any person who contravenes a provision of section 16A (1) shall be guilty of an offence and liable on conviction to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment”.

## 15. CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT NO. 32 OF 2007

The Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 came into operation on 16 December 2007. In addition, the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 13 of 2021 amended the 2007 Act by inserting various new provisions. The 2021 Act came into operation on 31 July 2022.

The 2007 Act repealed a number of common law offences (notably rape, indecent assault, bestiality and incest) and replaced them with statutory offences.

In addition to the repeal of common law offences, the 2007 Act also includes a number of new offences to protect adult victims, child victims and mentally disabled victims. Certain forms of sexual conduct with children between the ages of 12 and 16 years are criminalised even if it takes place with the consent of the child.

**Provision is made in the 2007 Act for a victim of a sexual offence to obtain post exposure prophylaxis** to limit the risk of HIV-infection after exposure to body fluids of the perpetrator during the commission of the sexual offence. **The victim may also apply to have the perpetrator tested to determine his or her HIV status.**

The purpose of these provisions is to limit the trauma suffered by the victim and to enable the victim to obtain specialized medical treatment after having been the victim of a sexual offence.

The 2007 Act also provides for the establishment and maintenance of a National Register for Sex Offenders. The Register, which is maintained by the Department of Justice and Constitutional Development, initially contained particulars of persons convicted of sexual offences against a child or mentally disabled person. Persons whose particulars appear in the Register are prohibited from being employed to work with a child or a mentally disabled person respectively, or from becoming a foster parent, kinship care-giver or adoptive parent of a child or mentally disabled person respectively. The ambit of the Register was expanded by the 2021 Act which is discussed below.

### **Section 3: Rape**

Section 3 of the Act provides that a person is guilty of the offence of rape if he or she unlawfully and intentionally commits an act of sexual penetration with a complainant, without his or her consent.

(The gender of the perpetrator can be a male or female and the victim can also either be male or female).

### **Section 5: Sexual assault**

Section 5(1) of the Act provides that a person who unlawfully and intentionally sexually violates a complainant, without his or her consent, is guilty of the offence of sexual assault.

### **Section 11: Engaging sexual services of persons 18 years or older**

Section 11 of the Act provides that a person who unlawfully and intentionally engages the services of a person 18 years or older, for

financial or other reward, favour or compensation to that person or to another –

- (a) for the purpose of engaging in a sexual act with that person, irrespective of whether the sexual act is committed or not; or
- (b) By committing a sexual act with that person,

is guilty of engaging the sexual services of a person 18 years or older.

The above section was enacted to criminally address the **customers of sex workers**. Prostitution itself is criminalised by section 20(1A) of the Sexual Offences Act No. 23 of 1957, which is still valid and enforceable.

## SECTION 15



### **Section 15: Acts of consensual sexual penetration with certain children (statutory rape)**

Section 15 of the Act provides that a person (“A”) who commits an act of sexual penetration with a child (“B”) who is 12 years of age or older but under the age of 16 years is, despite the consent of the child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was –

- (a) 12 years of age or older but under the age of 16 years; or
- (b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

The institution of a prosecution for an offence referred to in **subsection 15(1)** must be authorised in writing by the Director of Public Prosecutions if A was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years.

## **Relationship between the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 and the Sexual Offences Act No. 23 of 1957**

The 2007 Act did not repeal the Sexual Offences Act of 1957 but substantially amended that Act. Certain offences contained in the 1957 Act such as keeping of a brothel (section 2), enticement to commission of immoral acts in public (section 19), living on the earnings of prostitution (section 20(1)) and prostitution (section 20(1A)) still remain offences in our law.

The 2021 Act expanded existing offences and created new offences, including the following:

### **Section 12: Incest**

The offence of incest is broadened by the 2021 Act. Previously the offence was only committed if persons who may not lawfully marry each other on account of consanguinity, affinity or an adoptive relationship engages unlawfully and intentionally in an act of consensual sexual penetration.

However, the offence of incest will now also be committed if the persons within the same prohibited relationship unlawfully and intentionally engaged in an act of sexual violation (not only sexual penetration) where one of the persons involved is a child and the act was of such a nature that it is reprehensible for the adult person to have acted in that manner under the circumstances. The amendment Act does not provide any guidance on a definition of what is considered as "reprehensible". This means that various subjective interpretations may be assigned to the meaning. Police officials are

advised to obtain guidance from the public prosecutor beforehand on whether specific conduct should be viewed as “reprehensible”.

The 2021 Act also inserted a new section 56(4) to provide that a perpetrator cannot be convicted of incest if, he or she was younger than 18 years at the time when the sexual act was first committed and the other person exercised power or authority over the perpetrator or there was a relationship of trust between the parties.

### **Section 14A: Sexual intimidation**

Sexual intimidation is committed if a perpetrator unlawfully and intentionally utters or conveys a threat to a complainant that inspires a reasonable belief of imminent harm in the complainant that a sexual offence will be committed against the complainant, a family member of the complainant or any other person who is in a close relationship with the complainant.

Previously, a threat that inspired the belief that a complainant would be sexually violated was criminalised in terms of section 5(2) of 2007 Act. This constituted the offence of sexual assault. However, if the threat was made that a person would be raped (in other words, sexually penetrated), such a threat was not criminalised in accordance with section 5(2).

The insertion of section 14A has now addressed this *lacuna* by creating a new offence to address matters of this nature. As a result, the offence provided for in section 5(2) of the 2007 Act has been

repealed (a threat that inspired the belief that a complainant would be sexually violated).

Section 14A criminalises any threat that inspires a reasonable belief of imminent harm in the complainant that any sexual offence will be committed against himself or herself, or a family member of the complainant or any other person in a close relationship with the complainant. This means that the threat itself may relate to the commission of *any* sexual offence, including rape or sexual assault or even the threat that a child will be used in the creation of child pornography. In addition, the intended victim of the offence is wider than the complainant only, but may be a family member of the complainant or someone (not family) who is in a close relationship with the complainant. For example, if a father is threatened that his daughter and their domestic worker will be raped. The mere uttering of the threat that inspires the belief that such a sexual offence may be committed is sufficient for the offence. The perpetrator is not required to carry out the threat, the threat itself is sufficient for the commission of the offence.

#### **Section 54: Expansion of the obligation to report certain sexual offences**

In the past, a person was obliged to report to a police official, knowledge or a suspicion that a sexual offence has been committed against a child or person who is mentally disabled. The 2021 Act has expanded the obligation on a person to report knowledge, a reasonable belief or suspicion to a police official that a sexual offence has been committed against “a person who is vulnerable”. “A person who is vulnerable” is defined in the Act as follows:

- (a) child or a person who is mentally disabled;

- (b) female under the age of 25 years who —
  - (i) receives tuition at a higher education college, higher education institution or university college as defined in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);
  - (ii) receives vocational training at any training institute, other than the institutions referred to in subparagraph (i), or as part of their employment; or
  - (iii) lives in a building, structure or facility used primarily as a residence for any of the persons referred to in subparagraphs (i) and (ii);
- (c) person who is being cared for or sheltered in a facility that provides services to victims of crime;
- (d) person with a physical, intellectual or sensory disability and who —
  - (i) receives community-based care and support services, other than from a family member for;
  - (ii) lives in a building, structure or facility used primarily as a residence for; or
  - (iii) is cared for in a facility providing 24-hour care to, persons with physical, intellectual or sensory disabilities; or
- (e) person who is 60 years of age or older and who —
  - (i) receives community-based care and support services, other than from a family member for;

- (ii) lives in a building, structure or facility used primarily as a residence for; or
- (iii) is cared for in a facility providing 24-hour care to, such persons.

If a person fails to report such knowledge, belief or suspicion to a police official, he or she is guilty of an offence. However, if a person reports such reasonable belief or suspicion in good faith, he or she cannot be held liable in civil or criminal proceedings for the report that he or she has made.

## **Expansion of the ambit of the National Register for Sex Offenders Sex**

The implications of the 2021 Act also affects the National Register of Sex Offenders. The particulars of any person who is convicted after 31 July 2022 (the commencement date of the 2021 Act) of the commission of —

- **any** sexual offence;
- offences in terms of the Prevention and Combating of Trafficking in Persons Act No. 7 of 2013, if the offence was committed for sexual purposes; and
- offences which relate to child pornography (such as the possession, creation and distribution thereof) in terms of the Films and Publications Act No. 65 of 1996.

must be included in the Register.

This means that the ambit of Register has expanded substantially. Before the 2021 Act came into operation, only the particulars of a person who was convicted of the commission of a sexual offence against a child or mental disabled person was included in the Register.

## **16. CRIMINAL MATTERS AMENDMENT ACT NO. 18 OF 2015 – ESSENTIAL INFRASTRUCTURE**

### **INTRODUCTION**

The Criminal Matters Amendment Act No. 18 of 2015 (“Criminal Matters Amendment Act”) came into operation on 1 June 2016. The purpose of the Criminal Matters Amendment Act is to address the increase in crimes affecting service delivery to the public, such as theft of cable, water meters, bridge railings, manhole covers etc. by creating a new dispensation for essential infrastructure-related offences. As such, the Criminal Matters Amendment Act is often referred to as the “essential infrastructure” Act.

There is some confusion regarding the distinction between “essential infrastructure” and “critical infrastructure”. “Critical infrastructure” only refers to infrastructure that has been officially declared by the Minister of Police as critical infrastructure in terms of the Critical Infrastructure Protection Act No. 8 of 2019. “Essential infrastructure” on the other hand is infrastructure for purposes of the Criminal Matters Amendment Act.

The Criminal Matters Amendment Act —

- (a) creates new offences relating to essential infrastructure;

- (b) regulates bail in respect of essential infrastructure-related offences; and
- (c) regulates minimum sentences in the case of essential infrastructure-related offences.

The Preamble to the Criminal Matters Amendment clearly recognises the importance of essential infrastructure in providing basic services to the public. It also takes regard of the unacceptably high incidence of crime relating to essential infrastructure which poses a risk to the public safety, electricity supply, communications and transportation.

The Preamble recognises that essential infrastructure-related offences are on occasion relatively minor, but cause considerable damage to such infrastructure while the negative impact of these types of offences on our economy and peace and stability in the country is also recognised.

The Divisional Commissioner: Visible Policing issued an Implementation Guide (ref. 3/1/5 over 1/1/4(769)) dated 2017/01/16 which is available on the SAPS Intranet under the “documents” icon. What follows is a general summary of the provisions of the Criminal Matters Amendment Act – where further reading is encouraged, reference will be made to some of the Annexures of the Implementation Guide on the Intranet.

## **THE NEW OFFENCE**

The Criminal Matters Amendment Act creates a new offence in section 3. The relevant portion reads as follows:

*3.(1) Any person who unlawfully and intentionally—*

- (a) tampers with, damages or destroys essential infrastructure; or*

*(b) colludes with or assists another person in the commission, performance or carrying out of an activity referred to in paragraph (a),*

*and who knows or ought reasonably to have known or suspected that it is essential infrastructure, is guilty of an offence and liable on conviction to a period of imprisonment not exceeding 30 years or, in the case of a corporate body as contemplated in section 332 (2) of the Criminal Procedure Act, 1977, a fine not exceeding R100 million.*

The word “tamper” is defined in the Criminal Matters Amendment Act and includes a wide range of actions or activities:

*“tamper” includes to alter, cut, disturb, interfere with, interrupt, manipulate, obstruct, remove or uproot by any means, method or device, and “tampering” shall be construed accordingly.* It is important to note that violent conduct is not a requirement for “tampering”.

Section 3(1) refers to a person who “knows or ought reasonably to have known or suspected that it is essential infrastructure”.

A guideline for interpretation of section 3(1) is provided in section 3(2). Section 3(2) clarifies the phrase by stipulating that a person ought reasonably to have known or suspected such fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—

- (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
- (b) the general knowledge, skill, training and experience that he or she in fact has.

Therefore, an adult with the general knowledge of the average person in regard to the fact that, for instance, electricity services are reliant upon cable, will hardly be able to argue that he or she had not known that the theft of cable will affect the supply of electricity services to the public.

Such a person does not have to be an expert on the subject, he or she needs only to know what the average person with his or her general knowledge, training and experience, should or ought to have known or suspected.

This conclusion will be reached even easier if the suspect is not a first offender of non-ferrous related offences or where such a person is involved in a related trade, for example, a scrap metal dealer in the case of cable theft.

## ESSENTIAL INFRASTRUCTURE

The Criminal Matters Amendment Act defines certain terms used in section 3 and these definitions are very important in the interpretation of the Act:

*“ **basic service**’ means a service, provided by the public or private sector, relating to energy, transport, water, sanitation and communication, the interference with which may prejudice the livelihood, well-being, daily operations or economic activity of the public”.*

*“ **essential infrastructure**’ means any installation, structure, facility or system, whether publicly or privately owned, the loss or damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public”;*

One of the most obvious examples of conduct that constitutes an offence in terms of the Act, is cable theft. However, it must be pointed out that the offence in section 3(1) extends beyond theft of cable. Any form of tampering with essential infrastructure in the circumstances set out in section 3(1) will be sufficient to establish the crime.

From the definitions it is clear that the Criminal Matters Amendment Act deals with those indispensable services provided to the public that enables the country to function on a daily basis. Examples of these basic services are—

- (a) electricity, water and waste disposal provided by a municipality or utility companies such as Eskom or Rand Water;
- (b) services related to road, air or rail transport such as PRASA, Transnet or Gautrain or the OR Tambo airport; and
- (c) provision of telephone, cellular or other communication services by companies such as Telkom, Vodacom or Cell C.

Any tampering with these basic services will therefore constitute a contravention of section 3(1) of the Act.

### **BAIL IN RESPECT OF ESSENTIAL INFRASTRUCTURE-RELATED OFFENCES**

Section 2 of the Criminal Matters Amendment Act provides that an accused person who is in custody in respect of –

- any offence involving ferrous (containing iron) or non-ferrous (not containing iron) metal which formed part of essential infrastructure; or
- an offence referred to in section 3 of the Act,

may only be released on bail in accordance with section 60 of the Criminal Procedure Act No. 51 of 1977 (“the CPA”).

This effectively means that bail may only be granted by a court (section 60 of the CPA) and that neither a police official nor a prosecutor has the authority to grant bail to an arrested suspect for these types of offences.

The Criminal Matters Amendment Act adds several offences to Schedule 5 of the CPA which influences the granting of bail to an offender. As a result an accused person will have to satisfy the court that his or her release is in the interests of justice. Annexure “B” to the Implementation Guide on the SAPS Intranet contains more detailed information regarding the amendment and the offences.

## **MINIMUM SENTENCES**

The Criminal Matters Amendment Act amends section 51 of the Criminal Law Amendment Act No. 105 of 1997 which provides for minimum sentences for certain listed offences. Even though the minimum sentences are only of interest to the NPA and the judiciary, Annexure “C” to the Implementation Guide on the SAPS Intranet can be consulted for further information.

## **AMENDMENT OF SCHEDULE 1 TO THE PREVENTION OF ORGANISED CRIME ACT NO. 121 OF 1998**

The Criminal Matters Amendment Act amends schedule 1 to the Prevention of Organised Crime Act No. 121 of 1998. This addition to Schedule 1 affects law enforcement relating to “property freezing” (Sec 38); forfeiture (Sec 50); terrorist activities (Sec 51); exclusion of interests in property (Sec 52); exclusion of interests in forfeited

property (Sec 54); multiple court orders (Sec 58); and sharing of information with SARS (Sec 73) insofar as it relates to an offence under the Criminal Matters Amendment Act. More information is provided in Annexure “D” of the Implementation Guideline on the SAPS Intranet for attention of members of the Directorate Priority Crime Investigations.

## **GUIDELINES FOR IMPLEMENTATION**

Members, especially Designated Second-Hand Goods Officers, and members of the Detective Service and Directorate for Priority Crime Investigation (DPCI/ HAWKS) must take note that it is important that any investigation and prosecution of offenders of ferrous and non-ferrous metal related offences, must focus on the effect and impact of the offence on basic services to the public due to the fact that the metal in question formed part of an essential infrastructure.

At a minimum, the following must therefore appear in the A1 statement of a utility complainant (Telkom, Transnet, Eskom etc.):

- How the suspect tampered with, damaged or destroyed the essential infrastructure in question;
- What basic service the essential infrastructure in question renders to the public (energy, transport, water, sanitation and communication);
- What the effect of the tampering, damage or destruction has or could have on the rendering of basic services by that essential infrastructure;
- Why the suspect knew or should reasonably have known that the essential infrastructure in question is, in fact, essential infrastructure;

- What the actual value of the items stolen, destroyed, tampered with or damaged, is, and
- What the cost of replacement of the items will be (including all incidental costs to the complainant).

It is important that members ensure that statements in respect of the reporting of offences that relate to tampering with essential infrastructure clearly sets out the implication of the specific conduct. The following examples are provided:

- The interference of the coal supply at a power station resulted in the failure of a power plant that delivers 1000 megawatt power to the national grid. The conduct caused the plant to be out of operation for a week and added a stage of load shedding to the national grid;
- the blocking of the N1 by trucks (interference with the transportation system) delayed transportation of goods and passengers to the OR Tambo international airport. Warehouses of retail shops such as Checkers and Dischem are in the vicinity and the dispatching of food and medical supplies were hampered as a result of the blockage; and
- damage caused to the Transnet electrical transformer at the Durban harbour resulted in a 2 week delay of operations at the harbour. This caused the delay of motor exports and the spoiling of food destined for the international market. The value of the loss of the food is estimated to be approximately R 15 million.

When the matter is referred to a prosecutor, it is proposed that the provisions of the Criminal Matters Amendment Act be brought to the attention of the prosecutor. The prosecutor should guide the

investigator in respect of other requirements applicable to that specific case.

With regard to the arrest of suspects, note should be taken that such persons, after having been charged, must be detained in custody and bail can only be given by a court in terms of section 60 of the CPA, as set out above. All other relevant factors to be taken into account when opposing bail, should also be brought to the attention of the court, including previous arrests and criminal convictions, any weapons used in the commission of the offence, any damage to other property in the commission of the offence, for instance damage caused to gain access to the premises where the crime was committed, the possibility of flight risk, etc. (See section 60 of the CPA relating to factors to be taken into account in considering release on bail).

If the arrested suspect is a law enforcement officer, a security officer employed to guard such essential service, an employee of or contractor for the essential infrastructure or part of an organised group or syndicate, such evidence must also be brought to the attention of the prosecutor.

The National Prosecuting Authority provided some examples of charge sheets for purposes of the Criminal Matters Amendment Act – see Annexures E1 to E4 of the Implementation Guideline on the SAPS Intranet.

## **17. CRIMINAL PROCEDURE ACT NO. 51 OF 1977**

### **SEARCH AND SEIZURE**

Search and seizure operations by the police must always be executed in accordance with the provisions of the empowering legislation. The Criminal Procedure Act No. 51 of 1977 is one of the most important Acts that empowers the police to search for and seize articles. It is

essential that members also study the provisions of National Instruction 2 of 2002 which deals with search and seizure before they conduct search and seizure operations.

Section 20 of the Act makes provision for articles that may be seized by a police official. Articles may be seized with, or in specified circumstances, without a warrant.

**Section 20 reads as follows:**

*“The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) -*

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
- (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence”.

**Note**

The types of articles that may be seized are unlimited and may include money, documents, books, vehicles, weapons, etc., as long as the articles fall within the requirements set by section 20. If, for instance, a vehicle is seized, the police official must ask himself or herself whether the vehicle itself is concerned in the offence or may afford evidence of the offence, if not, the seizure may be unlawful.

It must also be noted that search and seizure operations for so-called cyber-articles (computers, cellular phones, etc.) have to be done in terms of the provisions of Chapter 4 of the Cybercrimes Act No. 19 of 2020. See the definition of an article in the last-mentioned Act.

As indicated above, section 20 will be used where other legislation do not specifically provide for seizure. For example, section 20 will not be used for seizure of counterfeit goods, proceeds of crime or precious metals as this is specifically provided for in other legislation.

## **Articles to be seized under search warrant - section 21**

Section 21 - Prescribes the procedure to be followed regarding search warrants.

The section provides as follows:

*“21(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued -*

- (a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or*
  - (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.*
- (2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorise such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.*
- (a) A search warrant shall be executed by day unless the person issuing the warrant in writing authorises the execution thereof by night.*

(b) *A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.*

(3) *A police official executing a warrant under this section or section 25 shall after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant”.*

## **Note**

An article may be seized in terms of section 20 if reasonable grounds exist from concrete evidence given under oath in terms of section 21.

Hearsay evidence may be included as information in the affidavit, as long as such evidence is believed to be true by the person providing the information on oath, as well as by the person issuing the warrant.

Section 21(3)(a) stipulates that a search warrant shall be executed by day, unless the person issuing it authorises in writing that it be executed at night. Executing search warrants at night should be resorted to in exceptional cases only. However, a lawful search that was commenced during day-light hours and, is still in progress when the sun sets does not on the strength of that fact alone become unlawful.

The section stipulates that if a person against whom a warrant has been granted demands a copy of the warrant, it must be handed to him or her. This should be done after the search has been concluded. Before the search is conducted, such a person may demand that a warrant be shown to him.

NB: Members must note that a person who is searched can also request a copy of the application for the search warrant. This must be

dealt with in conjunction with Legal Services as soon as possible to avoid unnecessary civil litigation.

### Valid warrants:

A warrant that does not state the offence(s) to which a search and seizure relates will be invalid: ***Minister for Safety and Security v van der Merwe and Others* [2011] JOL 27344 (CC)**. According to the Constitutional Court, a valid warrant is one that, in a reasonably intelligible manner:

- (a) states the statutory provision in terms of which it is issued;
- (b) identifies the searcher;
- (c) clearly mentions the authority it confers upon the searcher;
- (d) identifies the person, container or premises to be searched;
- (e) describes the article to be searched for and seized, with sufficient particularity; and
- (f) specifies the offence which triggered the criminal investigation and names the suspected offender.

### Circumstances in which an article may be seized without a search warrant - section 22

Ideally, searches should take place when they are authorised by a search warrant. However, this is not always practicable. In this way, section 22 makes provision for a search to be conducted without a search warrant.

### Section 22 reads as follows:

*“22 A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 –*

- (a) *if the person concerned consents to such search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or*
- (b) *if he on reasonable grounds believes:*
- (i) *that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and*
  - (ii) *that the delay in obtaining such warrant would defeat the object of the search.’*

**Note**

1. Seizure without warrant is the exception, not the rule.
2. Where an official has prior information, a warrant must be obtained unless information also exists that the exhibit will be destroyed, removed or be tampered with in the meantime.
3. A person can also consent to a search and seizure. However, such consent must be given by a person who, legally speaking, can consent (e.g. occupier of a premises).

**Resistance against entry or search - section 27**

This section states that a police official who may lawfully search any person or any premises or who may enter any premises under section 26 is authorised to use force to overcome any resistance against search and seizure. Only force which is reasonable to overcome the resistance is permitted. The official is authorised to resort to the use of force only after he or she has audibly demanded admission to the premises and notified the purpose for which he or she seeks to enter the premises.

However, these measures shall not apply where the police official concerned is on reasonable grounds of the opinion that any article

which is the subject of the search may be destroyed or disposed of if the provisions of the said proviso are first complied with.

It is important to remember that none of the above provisions apply in respect of a private dwelling. In such case, consent of the occupier of the premises is required.

### **Search to be conducted in a decent and orderly manner - section 29**

This section stipulates that the police official executing the warrant should at all times observe the elements of decency and orderliness. Persons of a specific gender should be searched by police officials of the corresponding sex. Where there is no such police officer, any other private person of the corresponding gender can be designated by the police official to conduct the search.

### **Disposal by police official of article after seizure - section 30**

Here a distinction should be drawn between perishables and non-perishables. In the case of perishables, the goods may, with due regard to the interests of persons concerned, be disposed of in a manner as the circumstances may require, e.g. in the case of a carcass, where the police officials are unable to locate the owner in time to save it from decay, they should keep parts or portions for identification.

In the case of stolen or suspected stolen property, the property may, with the consent of the person from whom it was seized, be delivered to the person from whom, in the opinion of the police official, it was stolen from. This person should be warned that he or she should hold the article available for production at any resultant criminal proceedings if and when required to do so. However, where there is uncertainty as to the identity of the person from whom the property was stolen, or where the person from whom the property was seized

refuses to give his or her consent, the article should be given an identification mark and be retained in police custody or the necessary arrangements be made in that regard. Where the seized articles cannot be dealt with in either of the two manners discussed above, the police official should give it an identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as circumstances may require, e.g. where an aeroplane is seized, it will be kept in a hangar at the airport, instead of the police pound which cannot accommodate an aeroplane.

Note the provisions of **National Instruction 8 of 2017: Property and Exhibit Management**

According to paragraph 14(2)(v) of the National instruction, if the physical note is not needed for court purposes, it must be deposited at Financial Services on the first working day following the decision of the SPP that the physical note is not needed, unless a disposal order has been given for the cash to be handed back to the lawful owner.

**Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings - section 31**

Section 31- Provides as follows:

- “31(1) (a) *If no criminal proceedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.*
- (b) *If no person may lawfully possess such article or if the police official charged with the investigation reasonably*

*does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.*

- (2) *The person who may lawfully possess the article in question, shall be notified by registered post at his last-known address that he may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State”.*

In ***Minister of Police v SA Metal and Machinery (462/13) [2014] ZASCA 95***, scrap metal was seized by the Police from the premises of SA Metal and Machinery (SAMM) in 2008. Early in 2010, SAMM instituted motion proceedings against the Police for an order directing them to return the seized goods. At that stage the SAPS had already disposed of the goods in terms of section 31 of the Criminal Procedure Act, 1977. SAMM subsequently amended its notice of motion and sought an order for payment of damages. During 2009, one of SAMM's directors was charged with the possession of suspected stolen property but the charge was withdrawn.

The DPP later gave instructions that the director be charged for possession of suspected stolen goods only in respect of 48 water meters that were among the scrap, allegedly the property of the City of Cape Town. This charge was also later withdrawn during 2010.

The defence raised by the Police was that SAMM was neither owner nor lawful possessor of the goods since it failed to produce any proof to that effect. The court emphasized that SAPS bore the onus of proving that SAMM's possession of the goods was unlawful. The SAPS stated that SAMM could not produce any register to verify the legitimacy of its acquisition of the goods, as required by section 6 of the (repealed) Second Hand Goods Act of 1955, therefore SAMM contravened the provisions of the Act and could therefore not lawfully possess the goods. The court rejected this argument, stating that the 1955 Act did not prohibit possession of second-hand goods by a

dealer who does not keep a register as required nor did it make such possession unlawful.

## Note

1. If no criminal proceedings are instituted or where the seized article is not required for criminal proceedings, the article must be returned to the person from whom it was seized, provided the person may lawfully possess it.
2. If the above is not applicable, to the person who may lawfully possess it; and
3. If there is no one who may lawfully possess the article, it should be forfeited to the State.
4. It should be stressed that the words “*if such person may lawfully possess such an article*” does not relate to ownership. It means that it must not be a crime for such a person to possess the article.
5. Disposal of the seized articles by the police is a very complex matter which cannot be addressed in full here. If in doubt, members must always consult with their Legal Services before disposing of seized goods.

## **Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid – section 32**

If criminal proceedings are instituted in connection with any article seized and the accused pays an admission of guilt fine, the article shall be returned to the person from whom it was seized, provided he or she may lawfully possess it. If he or she may not lawfully possess it, the article shall be returned to the person who may lawfully possess it. From here, the position as set out in section 31 above, applies.

Note the judgement in **S v Tong (1287) [2012] ZAWCHC 169**, where a conviction and sentence which followed upon the applicant paying an admission of guilt fine resulted in the applicant having a previous conviction recorded against his name. The court held that a peace officer must warn the accused of the full consequences of paying an admission of guilt fine. As such, the accused must be informed that he or she will be deemed to have been sentenced and convicted by the court with jurisdiction in respect of the offence in question. It must be furthermore explained to an accused that, if it is indeed the case, such conviction will appear on the accused's criminal record.

### **Transfer of article to court for purpose of trial - section 33**

This section states that if criminal proceedings are instituted in connection with any article seized, and such an article is required at the trial for purposes of evidence or order of court, the investigating officer must ensure that such an article is delivered, as required. This will, of course, depend on the bulk thereof. After the proceedings, the court makes a ruling as to what should happen to the articles seized.

### **Methods of securing attendance of accused in court – (sections 38 – 40) section 38 provides as follows:**

- “(1) Subject to section 4 (2) of the Child Justice Act, 2008 (Act No. 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.*
- (2) The methods of securing the attendance of an accused who is under the age of eighteen years at a preliminary inquiry or child justice court are those contemplated in section 17 of the Child Justice Act, 2008”.*

### **Section 17 of the Child Justice Act, 2008 provides as follows:**

- “(1) The methods of securing the attendance of a child at a preliminary inquiry are –*
- (a) a written notice, as provided for in section 18;*
  - (b) a summons, as provided for in section 19; or*
  - (c) arrest, as provided for in section 20.*
- (2) Where circumstances permit, a police official should obtain guidance from the Director of Public Prosecutions or a prosecutor on whether or not the child is required to attend a preliminary inquiry and, if so, the manner in which the child’s attendance should be secured”.*

## **ARREST**

Since arrest constitutes a serious infringement of an individual’s rights, members must ensure that they effect a lawful arrest when they use this method to bring a person before a court. Arrest is regulated by legislation and is lawful only when effected in accordance with legislation. (Du Toit, E. *Commentary on the Criminal Procedure Act*, Juta, 2006).

An arrest is effected with or without a warrant. Section 39 of the Act provides as follows:

*“39. Manner and effect of arrest. –*

- (1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.*
- (2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the*

*arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.*

- (3) *The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody’.*”

## **ARREST WITHOUT WARRANT**

Section 40(1) of the Criminal Procedure Act is applicable and provides as follows:

“40. *Arrest by peace officer without warrant-*

- (1) *A peace officer may without warrant arrest any person -*
- (a) *who commits or attempts to commit any offence in his presence;*
  - (b) *whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;*
  - (c) *who has escaped or who attempts to escape from lawful custody;*
  - (d) *who has in his possession any implement of housebreaking or car breaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;*
  - (e) *who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;*
  - (f) *who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;*

- (g) *who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;*
- (h) *who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;*
- (i) *who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;*
- (j) *who wilfully obstructs him in the execution of his duty;*
- (k) *who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;*
- (l) *who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;*
- (m) *who is reasonably suspected of being a deserter from the South African National Defence Force;*
- (n) *who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;*
- (o) *who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;*
- (p) *who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;*

- (q) *who is reasonably suspected of having committed an act of domestic violence as contemplated in section (1) of the Domestic Violence Act, 1998 and which constitutes an offence in terms of any law”.*

**Section 82 of the General Law Third Amendment Act No. 129 of 1993 provides as follows:**

**“Failure to give satisfactory account of possession of implement or object** – Any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking, or to break open a motor vehicle or to gain unlawful entry into a motor vehicle, and who is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding three years”.

The **Criminal and Related Matters Amendment Act 12 of 2021** came into operation on 5 August 2022. It has expanded Schedule 1 of the Criminal Procedure Act No. 51 of 1977 in so far as assault is concerned, which now reads as follows:

*Assault –*

- (a) when a dangerous wound is inflicted;*
- (b) involving the infliction of grievous bodily harm; or*
- (c) where a person is threatened –*
  - (i) with grievous bodily harm; or*
  - (ii) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act No. 15 of 2013).*

The implications of this amendment is that assault with the intent to cause grievous bodily harm (assault GBH) is now a Schedule 1 offence. In addition, the (mere) threat to cause grievous bodily harm or a threat to a person with a firearm or dangerous weapon are also Schedule 1 offences.

In view of the amendment, it is critical that the arrest statement made by a police official who has effected an arrest in accordance with section 40(1)(b) of the Criminal Procedure Act, must clearly indicate what the circumstances were that justified the arrest without a warrant (for example, that the arrested person threatened the complainant with a firearm) and that such offence is included in Schedule 1 of the Criminal Procedure Act.

## ARREST WITH WARRANT

Section 43 of the Criminal Procedure Act is applicable and provides as follows:

*“43. Warrant of arrest may be issued by magistrate or justice. –*

- (1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney general, a public prosecutor or a commissioned officer of police -*
  - (a) which sets out the offence alleged to have been committed;*
  - (b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and*
  - (c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.*
- (2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.*
- (3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.”*

**Note**

- A warrant of arrest can also be issued by commissioned police officers (who are justices of the peace) but it is advised that, to ensure judicial oversight, magistrates be approached for the issuing of warrants of arrest.
- Only commissioned police officers (apart from Directors of Public Prosecutions and public prosecutors) may apply for a warrant of arrest.

The (then) National Commissioner of the SAPS addressed the issue of arrest as follows in a circular dated 2005-04-28:

**“INSTRUCTIONS RELATING TO THE ARREST AND DETENTION OF SUSPECTS**

1. *It has come to my attention that there are commanders (including station commissioners and area commissioners) who are issuing clearly unlawful instructions relating to arrest and the detention of suspects. Such instructions have resulted in civil claims being instituted against the Service by persons who either were unlawfully arrested or unlawfully detained. This has already resulted in the Service being ordered to pay thousands of rand in compensation for such persons. This situation is totally unacceptable and must stop with immediate effect.*
2. *Examples of the aforementioned instructions include the following:*
  - (a) *The setting of targets requiring members to effect a certain number of arrests during a certain period of time. Such instructions force a member to arrest persons for petty offences in order to achieve the set target. This effectively removes the discretion of a member to decide not to arrest in a particular instance (such as where it would have been*

- perfectly appropriate to issue a written notice to the offender).*
- (b) *Instructions requiring members to arrest persons for minor offences in respect of which a police official has no power to arrest. A typical example of such an instruction is a general instruction that persons should be arrested for common assault even if the assaults were not committed in the presence of a member and did not take place during a domestic violence incident and the member had reason to believe that the victim will be in danger of imminent harm if the perpetrator is not arrested. Such an instruction is clearly in contravention of section 40 of the Criminal Procedure Act, 1977.*
- (c) *Instructions requiring members to arrest persons for shoplifting simply because the shop owner or security officer insists on the arrest. Such an instruction requires the member to arrest and detain the suspect even though the suspect may be a child or an adult who has a fixed address and who is a learner or a student at a training institution or has a job. In such a case there is no reason whatsoever why the particulars of the suspect cannot be taken, the investigation completed, the docket referred to the public prosecutor and the public prosecutor be requested to issue a summons in terms of section 54 of the Criminal Procedure Act, 1977, to ensure the presence of the alleged perpetrator at the trial.*
- (d) *Instructions requiring members to detain arrested suspects for a full period of 48 hours and thereafter to take them to court, irrespective of whether preliminary inquiries indicate that the suspect (i) is innocent; or*
- (ii) is probably guilty but is a child or an adult and there is reason believe that the person will attend his or her trial since he or she has a fixed address and is a learner or student at a school or other training institution or has a job and may therefore be released*

*on bail or on written warning without the further investigation being jeopardized.*

- (e) *Instructions requiring members to arrest persons for serious offences even though such offences were committed in circumstances where the person acted in what appears to be, self-defence or private defence and where there is reason to believe that the suspect will attend his or her trial since he or she has a fixed address and is a learner or student at a school or other training institution or has a job and is unlikely to interfere with the further investigation and that the investigation may be completed and the docket referred to the public prosecutor to issue a summons in terms of section 54 of the Criminal Procedure Act, 1977, to ensure his or her presence at the trial.*
  - (f) *Instructions requiring members to wait until the middle of the night (for no apparent reason other than to humiliate the suspect) before arresting the suspect in his or her house for a serious offence in circumstances in which the whereabouts of the suspect are well known and the suspect has a fixed address or a job and the investigation may be completed and the docket referred to the public prosecutor to issue a summons in terms of section 54 of the Criminal Procedure Act, 1977.*
3. *By complying with such instructions, members are alienating the public from the Service and causing communities to lose their trust in the Police Service. The Service cannot afford this.*
  4. *Any instructions of the aforementioned or a similar nature are accordingly hereby withdrawn with immediate effect.*
  5. *In order to ensure that there is a common understanding of what is expected of members in this regard, it is necessary to reiterate certain principles that govern the arrest and detention of persons and to, once again, explain how those principles should be applied in practice.*

6. *There are various methods by which an accused's attendance at a trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and should therefore be regarded as an absolute last resort. It is expected of a member to always exercise his or her discretion in a proper manner when deciding whether the presence of a suspect at his or her trial should be secured through an arrest or can be ensured in another manner.*
7. *A member, even though authorised by law to arrest a person, should normally refrain from arresting the person if -*
  - (a) *the attendance of that person at his or her trial may be secured by first completing the investigation and referring the docket to the public prosecutor to issue a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or*
  - (b) *the member believes that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister of Justice from time to time by notice in the Government Gazette, (at present R 2 500,00) [R5 000,00 at the time of review of the booklet], in which event such member may hand to the accused a written notice 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.*
8. *There are circumstances where the law permits a member to arrest a person although the purpose of the arrest is not solely to take the person to court. These circumstances are outlined in standing order (G) 341, paragraph 4(2), [the standing order has since been repealed and replaced by National Instruction 11 of 2019] 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 studied carefully 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.*

9. *In terms of section 50(1)(c) of the Criminal Procedure Act, 1977, a person who has been arrested as a suspect and who is not released because no charge is to be brought against him or her and who is not released on bail or on warning (SAPS 496) must be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest. Although the Service is authorised, in terms of this section, to detain a person for 48 hours, every effort must be made to take a person to the lower court as soon as reasonably possible.*
10. *I expect every investigating officer to plan his or her work in such a manner that he or she will be in a position to make a decision as to whether the suspect can be released on -*
  - (a) *a SAPS 328 (if no charge is to be brought against him or her);*
  - (b) *warning (SAPS 496); or*
  - (c) *bail (if the investigating officer is of the opinion that the suspect will attend his or her trial) as soon as possible after the arrest has been made. I further expect officers who inspect dockets to ensure that this instruction is complied with and to make sure that the investigation diary (SAPS 5) of the docket contains detailed explanation by the investigating officer for any undue delay in this regard.*
11. *Once an investigation officer is satisfied that a suspect who is in detention cannot be released as set out in paragraph 10, I expect the investigating officer to ensure that the suspect is brought to a lower court as soon as reasonably possible. Once this decision has been taken, there is no justification to continue the detention of the suspect until the expiry of the 48 hours before he or she is taken to court.*

12. *A tendency seems to have developed in certain areas and at certain stations to arrest suspects on Wednesday and Thursday evenings because the Service is then authorised to detain the suspect until Monday, before taking him or her to court. This is totally unacceptable and I expect an investigating officer who arrests a suspect after 16:00 on a Wednesday or Thursday afternoon and who fails to take that suspect to the lower court before the weekend starts, to make an entry in the Investigation Diary (SAPS 5), setting out the reasons why the suspect was not arrested earlier and why the suspect was not taken to court or released before the weekend commenced. Officers inspecting dockets must ensure that this Instruction is complied with.*
13. *Provincial Commissioners, Area Commissioners and Station Commissioners must study the contents of this letter very carefully and will be held personally responsible to see to it that these instructions are complied with. 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.*

### **The use of force in effecting an arrest - section 49**

From 25 September 2012, section 49 reads as follows (to align it with the Walters judgement of the Constitutional Court).

#### **“49 Use of force in effecting arrest**

(1) *For the purposes of this section-*

- (a) *‘arrestor’ means any person authorised under this act to arrest or to assist in arresting a suspect;*

- (b) 'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and
- (c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

(2) *If any arrestor attempts to arrest a suspect and the suspect resist the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonable necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonable necessary and proportional in the circumstances, the arrestor may use deadly force only if-*

- (a) *the suspect poses a threat of serious violence to the arrestor or any other person; or*
- (b) *the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later”.*

#### Note

In ***Ex parte Minister of Safety and Security and Others: In re S v Walters and Another*** 2002 (4) SA 613 (CC); 2002 (2) SACR 105 (CC) the Court held the following:

1. The purpose of arrest is to bring before court for trial persons suspected of having committed offences.

2. Arrest is not the only means of achieving this purpose, nor always the best means of doing so.
3. Arrest may never be used to punish a suspect.
4. Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
5. Where force is necessary, only the least degree of force reasonably necessary in order to carry out the arrest may be used.
6. In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.
7. Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
8. Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
9. These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

It is important to note that shooting at a suspect with a firearm is regarded as deadly force!

## Procedure after arrest

As soon as a person is arrested, he or she must be brought to a police station and be charged. If he or she has been arrested with a warrant, he or she must be delivered at the place which is expressly mentioned in the warrant.

### A person in detention may be released -

- On written warning (section 72 of the Act) [SAPS 496];
- On written notice (section 56 of the Act)[J534];
- After payment of an admission of guilt fine (section 57 of the Act);
- On bail (section 59, 59A and 60 of the Act) [J398 or J399];
- After a charge has been withdrawn through an arrangement with the public prosecutor; or
- If he or she was detained as a suspect, but is released from detention before expiry of the 48-hour period because no charge can be brought against him or her (section 50(1)(c) of the Act)[SAPS 328].

Depending on the seriousness of the matter, the arrested person can be granted bail by the police in terms of section 59 of the Criminal Procedure Act No. 51 of 1977. If bail is not granted as above, the arrested person is to be held in police custody and to be brought before court within 48 hours after the arrest.

After arrest, the person making the arrest or any other police official may take the fingerprints or body-prints of an arrested person or cause them to be taken. A buccal sample must be taken from a person arrested for a schedule 8 offence. Buccal samples may only be taken by police officials who have completed the required training.

Section 36A (1) of the Criminal Procedure Act No. 51 of 1977 provides the following definitions:

*“**authorised person** means, with reference to photographic images, fingerprints or body-prints, any police official in the performance of his or her official duties”.*

*“**body-prints** means prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person”.*

Apart from the prints mentioned above, the police official may also take a photograph of the arrested person or ensure that it is taken. The police official may make the arrested person available for an identification parade or ensure that such a person is made available.

## Police bail

Police officials with the rank of sergeant or higher, may release on bail accused persons who are in custody in respect of minor offences. In this regard, section 59(1) (a) of the Criminal Procedure Act provides as follows:

“Bail before first appearance of accused in lower court. - An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official”.

The **Criminal and Related Matters Amendment Act No. 12 of 2021** has strengthened the bail processes in as far as domestic violence related offences or contraventions of a protection order (be it in terms of the Domestic Violence Act No. 116 of 1998 or the Protection from Harassment Act No. 17 of 2011) are concerned. No police or prosecutor's bail may be given for such offences. This means that police bail may no longer be considered in a case of assault common where the alleged perpetrator and victim are in a domestic relationship. If the case relates to an offence committed within a domestic relationship, an accused may only be released on bail by court.

An accused is now required to inform a court during a bail application of any protection order or similar court order issued against him or her to protect the person against whom the offence in question was allegedly committed and also whether that order is still in force. Failure to inform the court of such information constitutes an offence. If the accused fails or refuses to inform the court or furnishes false information to the court, he or she will be guilty of an offence.

Bail may be cancelled if the accused has allegedly contravened a protection order or is threatening the safety of the victim of the alleged crime while the accused is on bail.

### **Police bail exclusions**

If an accused is in custody in respect of allegedly committing one of the following offences, such an accused cannot be released on bail by a police official:

## Schedule 2

## Part II

*“Treason.*

*Sedition.*

*Murder.*

*Rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.*

*Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.*

*Offences provided for in section 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.*

*Robbery.*

*Assault –*

- (a) when a dangerous wound is inflicted;*
- (b) involving the infliction of grievous bodily harm; or*
- (c) where a person is threatened –*
  - (i) with grievous bodily harm;*
  - (j) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act No. 15 of 2013).*

*Arson.*

*Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.*

*Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500.*

*Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones.*

*Any offence under any law relating to the illicit-*

*(a) possession of-*

- (i) dagga exceeding 115 grams; or*
- (ii) any other dependence-producing drugs; or*

*(b) conveyance or supply of dependence-producing drugs.*

*Any offence relating to the coinage.*

*Any conspiracy, incitement or attempt to commit any offence referred to in this Part.*

*Any of the following offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004):*

- (a) the offence of terrorism referred to in section 2 of the said Act;*
- (b) an offence associated or connected with terrorist activities referred to in section 3 of the said Act;*
- (c) a Convention offence as defined in section 1 of the said Act; or*
- (d) an offence referred to in section 13 or 14 of the said Act (in so far as it relates to the aforementioned sections).*

*Offences referred to in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act 13 of 2013.*

*Any person who-*

- (a) commits torture;*
- (b) attempts to commit torture; or*
- (c) incites, instigates, commands or procures any person to commit torture,*

*is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.*

*Any person who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life”.*

**Schedule 2****Part III**

*“Sedition.*

*Public violence.*

*Arson.*

*Murder.*

*Kidnapping.*

*Childstealing.*

*Offences provided for in section 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.*

*Robbery.*

*Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence.*

*Contravention of the provisions of sections 1 and 1A of the Intimidation Act, 1982 (Act No. 72 of 1982).*

*Any conspiracy, incitement or attempt to commit any of the above-mentioned offences.*

*Treason.*

*Any of the following offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004):*

*(a) the offence of terrorism referred to in section 2 of the said Act;*

- (b) *an offence associated or connected with terrorist activities referred to in section 3 of the said Act;*
- (c) *a Convention offence as defined in section 1 of the said Act; or*
- (d) *an offence referred to in section 13 or 14 of the said Act (in so far as it relates to the aforementioned sections).*

*Offences referred to in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act 13 of 2013.*

*Any person who-*

- (a) *commits torture;*
- (b) *attempts to commit torture; or*
- (c) *incites, instigates, commands or procures any person to commit torture,*

*is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.*

*Any person who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life”.*

The sum of money for police bail is determined by the member, but may only be in the form of cash or a bank-guaranteed cheque. A receipt (the J398) shall be issued to the accused before his or her release. Paragraph 7(4) of National Instruction 3 of 2016 provides that a person who is in custody for an offence for which bail may be fixed, may be granted bail as determined by the designated member only if the designated member consulted with the investigating official before taking a decision to release the arrested person on bail. In deciding whether to release or not, the designated member must

consider whether the granting of bail would be in the interest of justice or not. In this regard, the investigating official must inform the designated member of any factor that he or she is aware of, that may indicate that it will or will not be in the interest of justice to release the arrested person on bail.

## **Compensation and restitution - section 300**

According to this section, where a person is convicted by a court of an offence which has caused damage to another or loss of property, the court in question may award the victim compensation for such damage or loss. The victim or the prosecutor acting on the instructions of the victim may bring an application in this regard.

Investigating officers are strongly urged to bring this section to the attention of victims or, alternatively, remind prosecutors where appropriate.

## **FORENSIC PROCEDURES IN TERMS OF THE CRIMINAL PROCEDURE ACT NO. 51 OF 1977**

Any police official may, in terms of section 37(2)(a) of the Criminal Procedure Act No. 51 of 1977 request a registered medical practitioner or a registered nurse to take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person arrested upon any charge; or of any such person released on bail or on warning, has any mark, characteristic or distinguishing feature or shows any condition or appearance. In terms of section 37(1)(c) of the Criminal Procedure Act, 1977 **no police official may take any blood sample** of a person nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female.

The **Criminal Law (Forensic Procedures) Amendment Act No. 37** of 2013 came into operation on 31 January 2015 (with the exception

of section 2 of the Act which inserted section 36D(1) in the Criminal Procedure Act No. 51 of 1977) to specifically achieve the following:

- to amend the Criminal Procedure Act, 1977, so as to provide for the taking of specified bodily samples from certain categories of persons for the purposes of forensic DNA analysis;
- to provide in particular for the protection of the rights of women and children in the taking of DNA samples;
- to further regulate proof of certain facts by affidavit or certificate;
- to add to the Criminal Procedure Act, 1977, a Schedule 8 of offences in respect of which DNA samples must be taken;
- to amend the South African Police Service Act, 1995, to establish and regulate the administration and maintenance of the National Forensic DNA Database of South Africa;
- to provide for the conditions under which the samples or forensic DNA profiles derived from the samples may be retained or the periods within which they must be destroyed;
- to provide for the use of forensic DNA profiles in the investigation of crime and the use of such profiles in proving the innocence or guilt of persons before or during a prosecution or the exoneration of convicted persons,
- to assist in the identification of missing persons and unidentified human remains; to provide for protection of the rights of children in the retention and removal of forensic DNA profiles;
- to provide for oversight over the National Forensic DNA Database and the handling of complaints relating to the taking, retention and use of DNA samples and forensic DNA profiles;
- to repeal certain provisions of the Firearms Control Act, 2000, and the Explosives Act, 2003, which overlap with powers provided for in the Criminal Procedure Act, 1977, regulating the

powers in respect of the taking of fingerprints and bodily samples for investigation purposes;

- to provide for transitional provisions in respect of the DNA database;
- and to provide for matters connected therewith.

The Act is aimed at establishing a comprehensive DNA database and provides for a power given by the Act to police officials, who have undergone the relevant training, to take **buccal samples** in order to analyse the DNA sample so obtained. A buccal sample is gathered by swiping a specially prepared cotton bud, prepared and sealed in a container in the mouth of the person involved, or to allow the person to swipe the bud in his or her mouth. This procedure may only be performed by police officials who have been trained to perform it.

Section 2 of the Amendment Act came into operation on 31 January 2022, thereby inserting section 36D(1) into the Criminal Procedure Act, 1977 which provides for the mandatory taking of a buccal sample or other bodily sample from a person arrested or summoned in respect of an offence referred to in Schedule 8 of the Criminal Procedure Act. Schedule 8 includes certain serious and violent crimes and sexual offences.

***“Schedule 8***

*(Sections 36D and 36E)*

- Treason.
- Sedition.
- Public violence.
- Murder.
- Any offence referred to in Part I or Part II of Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002).

- Culpable homicide.
- Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
- Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), respectively.
- Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), respectively.
- Robbery.
- Kidnapping.
- Childstealing.
- Assault -
  - (a) when a dangerous wound is inflicted;
  - (b) involving the infliction of grievous bodily harm; or
  - (c) where a person is threatened –
    - (i) with grievous bodily harm; or
    - (ii) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act No. 15 of 2013).

Arson.

- Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.
  - Theft, whether under the common law or a statutory provision.
- 
- Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in Schedule 1, or is in such custody in respect of the offence of escaping from lawful custody.
  - Any —

- (a) *offence under the Firearms Control Act, 2000 (Act No. 60 of 2000), which is punishable with imprisonment for a period of five years or longer in terms of the said Act;*
  - (b) *offence under the Explosives Act, 2003 (Act No. 15 of 2003), which is punishable with imprisonment for a period of five years or longer in terms of the said Act;*
  - (c) *Convention offence or specified offence as defined in section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004);*
  - (d) *offence of trafficking in persons as defined in section 1 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013); or*
  - (e) *offence of torture as defined in the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013).*
- Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule”.

Section 113 of the Firearms Control Act No. 60 of 2000 and section 9 of the Explosives Act No. 15 of 2003 were repealed from 31 January 2015. These sections provided for the taking of fingerprints and bodily samples in circumstances where it was required to prove the innocence or guilt of a person where the alleged commission of offences in terms of these Acts were involved.

Although police officials with the required training may take buccal samples (“authorised persons” which with reference to buccal samples means any police official or member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, who is not the crime scene examiner of the particular case, but has successfully undergone the training prescribed by the Minister of Health under the National Health Act, in respect of the taking of a buccal sample), **no blood samples may be taken by a police official**, only by a registered medical practitioner or registered nurse.

The Criminal Law (Forensic Procedures) Amendment Act No. 8 of 2022 came into operation on 3 March 2023. In terms of the Act, the National Commissioner must, with the assistance of the National Commissioner of Correctional Services, ensure that a buccal sample is taken from any person serving a sentence of imprisonment in respect of an offence referred to in Schedule 8 of the Criminal Procedure Act No. 51 of 1977 —

- (d) before the release of the person, if a buccal sample was not already been taken upon his or her arrest; or
- (e) who is released before his or her sentence is completed, either on parole or under correctional supervision by a court.

The 2022 Act provides further that the National Commissioner of Correctional Services is required to regularly report to the National Commissioner of Police on information of persons whose buccal samples have not yet been taken, but who may be released on parole or correctional supervision, at least three months prior to the planned release date of such persons. The provision aims to ensure adequate co-ordination between the respective departments to avoid the practical challenges that had previously hampered the taking of such samples. The Minister of Police is required to issue regulations on the specific information to be provided by Correctional Services, but no regulations have yet been issued in this regard.

The 2022 Act furthermore provides for measures if a convicted person refuses to submit to the taking of a buccal sample. If a convicted person does not consent to the taking of a buccal sample, an application must be made to a judge or a magistrate for a warrant that authorises the taking of the buccal sample.

According to Regulations issued in terms of section 15AD of the South African Police Service Act No. 68 of 1995, a person may take his or her own buccal sample (instead of the sample being taken by an authorised person) in the presence of an authorised person and a witness. It is therefore envisaged that the convicted person will also be afforded the option to take his or her own sample, but if the person still refuses, a warrant will have to be obtained by the Police to proceed with the taking of such sample as a last resort.

Correctional officials are authorised by the 2022 Act to assist an authorised person to use minimum force against a person who refuses to submit to the taking of a buccal sample under authority of a warrant obtained from a judge or magistrate. In order to give effect to this provision, the National Commissioner of the Police is required, in consultation with the National Commissioner of Correctional Services, to issue and publish in the *Gazette* national instructions regarding the use of minimum force used during the taking of a buccal sample. If force was used in the process of obtaining a buccal sample, the person must undergo an immediate medical examination and receive the treatment determined by the correctional medical practitioner. In addition, all instances where force was used must immediately be reported to the Inspecting Judge, who is responsible to oversee the treatment of inmates in correctional centres and on conditions in correctional centres.

## **Taking of body prints (including fingerprints), and photographic images and bodily appearance of accused**

The Criminal Law (Forensic Procedures) Amendment Act No. 6 of 2010 amended the Criminal Procedure Act by authorising these aspects. The Act came into operation on 18 January 2013.

Section 36B of the Criminal Procedure Act No. 51 of 1977 provides for powers relating to body-prints and the bodily appearance of accused and convicted persons.

A police official must take the fingerprints or must cause such prints to be taken of any—

- person arrested upon any charge related to an offence referred to in Schedule 1;
- person released on bail if such person's fingerprints were not taken upon arrest;
- person upon whom a summons has been served in respect of any offence referred to in Schedule 1;
- person convicted by a court and sentenced to a term of imprisonment without the option of a fine, whether suspended or not, if the fingerprints were not taken upon arrest;
- person convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subsection.

A police official may take or cause —

- (a) fingerprints to be taken of any person arrested upon any charge; or
- (b) fingerprints to be taken of a person deemed under section 57 (6) to have been convicted in respect of any offence, which the

Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subsection.

The fingerprints taken in terms of this section must be stored on the fingerprint database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act No. 68 of 1995.

A police official may retake the fingerprints of any person referred to above, if —

- the fingerprints taken on the previous occasion do not constitute a complete set of his or her fingerprints;
- some or all of the fingerprints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis, comparison or matching; or
- the fingerprints taken were lost, misfiled or not stored on the database.

The fingerprints taken under any power conferred by this section, may be the subject of a comparative search.

### **Destruction of fingerprints:**

In a case where **a decision was made not to prosecute** a person, if the **person is found not guilty** at his or her trial, or if his or her **conviction is set aside** by a superior court or if he or she is **discharged** at a preparatory examination or if **no criminal proceedings** with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the **prosecution declines to prosecute**, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act No. 68 of 1995 has been notified.

**Note: It is a serious offence to abuse fingerprints: Purpose for which it may be used**

Fingerprints retained in terms of this section, may only be used for purposes related to the **detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.**

It is not prohibited to use any fingerprints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence. (Criminal convictions (SAPS 69))

Section 15A(6) of the South African Police Service Act No. 68 of 1995 provides as follows:

*“Any person who, with regard to any fingerprints, body-prints or photographic images referred to in this Chapter-*

- *uses or allows the use of those fingerprints, body-prints or photographic images for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or*
- *tampers with or manipulates the process or the fingerprints, body-prints or images in question; or*
- *falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source, is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.”*

The fingerprints may be taken of any person convicted of any crime by a court and sentenced to a term of imprisonment without the option

of a fine, whether suspended or not, if the fingerprints were not taken upon arrest, and irrespective of the sentence, including -

- any person serving such a sentence at the time of the commencement of this section; and
- where applicable, any person released on parole in respect of such a sentence, irrespective of the fact that such a person was convicted of the offence in question, prior to the commencement of this section.

**Section 36C of the Criminal Procedure Act No. 51 of 1977 provides for “fingerprints and body-prints for investigation purposes”.**

Any police official may without warrant take fingerprints or body-prints of a person or a group of persons, if there are reasonable grounds to -

- suspect that the person or that one or more of the persons in that group has committed an offence referred to in Schedule 1; and
- believe that the prints or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence.

Prints taken in terms of this section may —

- be examined for the purposes of the investigation of the relevant offence or caused to be so examined; and
- be subjected to a comparative search.

In terms of section 36A(2) of the Criminal Procedure Act No. 51 of 1977, a police official who, in terms of this Act or any other law takes

the fingerprints, a body-print or ascertains any bodily feature of a child must -

- (a) have due regard to the personal rights relating to privacy, dignity and bodily integrity of the child;
- (b) do so in a private area, not in view of the public;
- (c) ensure the presence of a parent or guardian of the child, a social worker or an appropriate person; and
- (d) treat and address the child in a manner that takes into account his or her gender and age.

## **18. CUSTOMARY INITIATION ACT 2 OF 2021**

### **INTRODUCTION:**

The Customary Initiation Act No. 2 of 2021 came into effect on 1 September 2021 and has created a legal framework to regulate initiation schools from a national level. The Act applies to male and female customary initiation practices in all initiation schools and in respect of all role-players involved in initiation practices.

It is important to take cognisance of circular 1/1/4/1 dated 2022-05-12 “Implications of the Customary Initiation Act, 2021 (Act No. 2 of 2021) on the South African Police Service”.

The Act aims inter alia to —

- protect, promote and regulate initiation by providing acceptable norms and standards and initiation oversight and coordinating structures at the national and provincial level to ensure that initiation takes place in a controlled environment; and
- prevent injuries and abuse of initiates and protect their lives.

The Act creates new structures, both on national and provincial level, to manage initiation schools. The National Initiation Oversight Committee (NIOC) is established to *inter alia* monitor the implementation and promote compliance of the Act, provide guidance on initiation practices and make recommendations to provinces on closing of non-registered initiation school or the deregistration of any initiation school and keep statistics on initiations.

The Committee consists of representatives from, *inter alia*, the National House of Traditional Leaders, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and key government departments, such as SAPS, the Departments of Health, COGTA and the NPA. The NIOC liaises with Provincial Initiation Coordinating Committees (PICC), to be established by the relevant Premier in provinces where initiations take place, to ensure compliance with the Act.

The PICC will consist of members of the provincial house of traditional leaders (or if not yet established, members of the National House of Traditional Leaders), representatives from the provincial government, affected municipalities, emergency services and the traditional health practitioner who is a member of the Interim Traditional Health Practitioners Council of South Africa.

In terms of section 15(6), any evidence of abuse found by a PICC during an investigation or information of a non-registered initiation school must be reported to the Service within one day of its investigation. The Service is required to investigate any possible incident of abduction or kidnapping. The Act defines “abduction” as “the unlawful removal of a child from the control of his or her parents or customary or legal guardian, as the case may be, or unlawful retention of such child, for the purposes of attending an initiation

school, whether registered or not” and “kidnapping” as “the unlawful and intentional deprivation of the freedom of movement of any person for the purposes of attending an initiation school, whether registered or not”.

Section 33 creates offences:

“Offences

- (1) Any person who—
- (a) holds a non-registered initiation school or is involved in any initiation practices at such non-registered initiation school;
  - (b) accepts at any initiation school, whether registered or not, an initiate who is under the age of 16; or
  - (c) accepts an initiate at an initiation school or is involved in any initiation practices at such initiation school without having received the required medical certificate or consent contemplated in section 28(1) and (3),

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both a fine and such imprisonment.

- (2) A person who forces any person to attend an initiation school or who forges any consent or consent form as contemplated in section 28 or obtains such consent by means of duress, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.
- (3) Any traditional surgeon who is not registered, whether in accordance with the provisions of section 41 of this Act or in terms

of the Traditional Health Practitioners Act, but performs duties at an initiation school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment, or to any relevant fine or imprisonment as may be provided for in terms of the Traditional Health Practitioners Act.

(4) Any—

(a) principal, care-giver, traditional health practitioner or, subject to subsection (3), traditional surgeon, including any substitute contemplated in section 15(11), who does not meet any requirements provided for in this Act or determined in terms of this Act, or falsely pretends to meet such requirements; or

(b) principal who contravenes section 27(2),

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.

(5) Any person who is involved in any initiation practices or any of the structures provided for in this Act and fails to disclose the information referred to in section 2(5)(a) and (b), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment.

(6) Any alleged offences relating to—

(a) the death of an initiate;

(b) the abduction or kidnapping of an initiate;

(c) male or female circumcision, genital mutilation or virginity testing as part of initiation practices;

- (d) the abuse of initiates;
  - (e) the use, possession, supply or manufacturing of liquor or drugs or dealing in liquor or drugs by an initiate or any other person involved in initiation; or
  - (f) the involvement of a medical practitioner at an initiation school, must be dealt with in terms of the offence clauses provided for in the Criminal Procedure Act, the Children's Act, the Health Professions Act, the Drugs and Drug Trafficking Act or the Liquor Act, as the case may be.
- (7) Subject to subsection (6), if any principal, care-giver or traditional surgeon does not arrange medical attention for an initiate as contemplated in section 21(5) or 23(3), such principal, care-giver or traditional surgeon is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years, or to both a fine and such imprisonment.
- (8) If—
- (a) any principal does not comply with the provisions of section 21(9) and (10), section 26(4) or section 29(3)(c);
  - (b) any parents or legal or customary guardian of an initiate fails to disclose the information contemplated in section 22(1)(d), (e) or (f); or
  - (c) any traditional surgeon fails to comply with the provisions of section 23(1)(b), such principal, parents, legal or customary guardian, or traditional surgeon, as the case may be, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment.

- (9) If any initiation activity was declared not to be illegal as contemplated in the proviso to section 15(1)(i), but found to be illegal following the investigation by the SAPS, the principal who made the declaration and any other person who authorised, arranged or supervised such illegal activity may be prosecuted in terms of the provisions of the relevant law.
- (10) A PICC must, in respect of any principal, care-giver, traditional surgeon or any other person involved in initiation who has been convicted of an offence as contemplated in this section, enter the details of such conviction in the database referred to in section 15(2)."

## **19. CYBERCRIMES ACT NO. 19 OF 2020**

### **INTRODUCTION:**

The Cybercrimes Act No.19 of 2020 (CCA) came partially into operation on 1 December 2020. The purpose of the CCA is to create offences which have a bearing on cybercrime and to provide new mechanisms to deal with cybercrime. The concept "cybercrime" is not to be confused with "cybersecurity". The CCA does not deal with "cybersecurity", it only deals with cybercrime. Although these concepts are inter-related, "cybersecurity" involves technologies, measures and practices designed to protect data, computer programs, computer data storage mediums or computer systems against cybercrime, damage or interference.

There is no universal definition of cybercrime and the CCA also does not attempt to define this concept. Instead, it creates a number of offences in Part I and Part II of Chapter 2 which includes so-called "malicious communications". When regard is had to the provisions of the Act, specifically the definition of "article", it is clear that the CCA regime applies to both "cyber-dependent" as well as "cyber-enabled offences". The result of this is that the investigative powers set out in

Chapter 4 of the CCA will apply to both these categories of cybercrime.

## **CYBER-DEPENDENT OFFENCES:**

These are crimes that can only be committed by using a computer or another device, e.g., by unlawfully gaining access to a computer system. This category of offences are aimed at information and communications technology (ICT) infrastructure such as malware, ransomware, etc.

## **CYBER-ENABLED OFFENCES:**

These are traditional or entrenched offences, either in terms of the common law or statutory law, which are committed in a new way by using technology, e.g. the distribution of child pornography by means of a cellular phone, human trafficking, etc.

## **ARTICLE:**

One of the core definitions of the CCA is “article” which is defined in section 1 as —

“any —

(a) *data*;

(b) *computer program*;

(c) *computer data storage medium* ; or

(d) *computer system,*

*which —*

- (i) *is concerned with, connected with or is, on reasonable grounds, believed to be concerned with or connected with the commission or suspected commission;*
- (ii) *may afford evidence of the commission or suspected commission; or*
- (iii) *is intended to be used or is, on reasonable grounds believed to be intended to be used in the commission or intended commission of-*

**(aa) an offence in terms of Part I and Part II of Chapter 2;**

**(bb) any other offence in terms of the law of the Republic;**  
or

**(cc) an offence in a foreign State that is substantially similar to an offence contemplated in Part I or Part II of Chapter 2 or another offence recognised in the Republic.** (Own underlining).

This means that if an offence of any nature is committed or facilitated through the use of an article such as a cellular phone, one will have to seize and access the article in terms of the CCA. The Criminal Procedure Act No. 51 of 1977 ("CPA") cannot be used to seize an article as defined by the CCA.

## WHAT IS LAW AND WHAT IS NOT YET?

As stated above, the CCA is not in full operation at the time of this publication. The following provisions are currently in operation:

- Chapter 1 (definitions);
- Chapter 2 (categories of cybercrime), **but not** Part VI;
- Chapter 3 (jurisdiction);
- Chapter 4 (powers to investigate, search, access or seize, **but not** sections 38(1)(d), (e) and (f), 40(3) and (4), 41, 42, 43 and 44 (preservation/disclosure of data/evidence));
- Chapter 7 (proof of certain facts by means of affidavit);
- Chapter 8 (capacity building), **but not** section 54 (compulsory reporting of cybercrime).

## CHAPTER 2: PART I: CYBERCRIMES

### 2. *Unlawful Access*

(1) *Any person who unlawfully and intentionally performs an act in respect of—*

- (a) *a computer system; or*
- (b) *a computer data storage medium,*

*which places the person who performed the act or any other person in a position to commit an offence contemplated in subsection (2), section 3(1), 5(1) or 6(1), is guilty of an offence.*

(2) (a) *Any person who unlawfully and intentionally accesses a computer system or a computer data storage medium, is guilty of an offence.*

(b) *For purposes of paragraph (a) —*

(i) *a person accesses a computer data storage medium, if the person—*

(aa) *uses data or a computer program stored on a computer data storage medium; or*

(bb) *stores data or a computer program on a computer data storage medium; and*

(ii) *a person accesses a computer system, if the person —*

(aa) *uses data or a computer program held in a computer system;*

(bb) *stores data or a computer program on a computer data storage medium forming part of the computer system; or*

(cc) *instructs, communicates with, or otherwise uses, the computer system.*

(c) *For purposes of paragraph (b) —*

(i) *a person uses a computer program, if the person—*

(aa) *copies or moves the computer program to a different location in the computer system or computer data storage medium in which it is held or to any other computer data storage medium;*

- (bb) causes a computer program to perform any function;  
or*
- (cc) obtains the output of a computer program; and*
- (ii) a person uses data, if the person —*
- (aa) copies or moves the data to a different location in the computer system or computer data storage medium in which it is held or to any other computer data storage medium; or*
- (bb) obtains the output of data.*

Section 2 affects the person(s) that performs the act to gain unlawful access, but also another person that is so enabled to then commit the offences of unlawful access, unlawful interception, unlawful interference with data or computer program or, unlawful interference with computer data storage medium or computer system.

Mr. X is not an employee of XYZ Bank. He knows that it would be wrong to try and access their computer systems. He researches ways that he could unlawfully access the bank's systems and uses these means to access their systems.

### **3. Unlawful interception of data**

*(1) Any person who unlawfully and intentionally intercepts data, including electromagnetic emissions from a computer system carrying such data, within or which is transmitted to or from a computer system, is guilty of an offence.*

(2) *Any person who unlawfully and intentionally possesses data or the output of data, with the knowledge that such data was intercepted unlawfully as contemplated in subsection (1), is guilty of an offence.*

(3) *Any person who is found in possession of data or the output of data, in regard to which there is a reasonable suspicion that such data was intercepted unlawfully as contemplated in subsection (1) and who is unable to give a satisfactory exculpatory account of such possession, is guilty of an offence.*

(4) *For purposes of this section “interception of data” means the acquisition, viewing, capturing or copying of data of a non-public nature through the use of a hardware or software tool contemplated in section 4(2) or any other means, so as to make some or all of the data available to a person, other than the lawful owner or holder of the data, the sender or the recipient or the intended recipient of that data, and includes the —*

- (a) examination or inspection of the contents of the data; and*
- (b) diversion of the data or any part thereof from its intended destination to any other destination.*

Mr X gains unlawful access to XYZ Bank's computer systems. He had previously installed a keylogger on their systems and through means of the keylogger he obtained the username and password for the IT administrator. Mr. X uses these credentials and gains access to the CEO's mailbox. He sets up a rule so that copies of all the CEO's mails are forwarded to his (Mr X's) own email address.

Mr X also shares copies of these emails with Miss Y. Miss Y knows that Mr. X was not supposed to have the emails and that he had

used a key logger to access the user credentials of the IT administrator.

#### **4. Unlawful acts in respect of software or hardware tool**

(1) Any person who unlawfully and intentionally —

(a) uses; or

(b) possesses,

any software or hardware tool for purposes of contravening the provisions of section 2(1) or (2), 3(1), 5(1), 6(1) or 7(1)(a) or (d), is guilty of an offence.

(2) For purposes of this section “software or hardware tool” means any electronic, mechanical or other instrument, device, equipment, apparatus or a substantial component thereof or a computer program, which is designed or adapted primarily for the purpose to —

(a) access as contemplated in section 2(1) or (2);

(b) intercept data as contemplated in section 3(1);

(c) interfere with data or a computer program as contemplated in section 5(1);

(d) interfere with a computer data storage medium or a computer system as contemplated in section 6(1); or

(e) acquire, make available or use a password, access code or similar data or device as defined in section 7(3).

Mr X is part of a syndicate that targets online banking clients. He has to assist the syndicate in obtaining user credentials of XYZ Bank employees. Mr X obtains a computer software program that can be used to capture the keystrokes of users as they type on their computers. He buys the software and then installs it on some of the bank employees' computers. Mr X knows that what he is doing is wrong, but he proceeds to install the software so that he can capture the information as the bank employees capture their logon details on their computers. This information is transmitted to an email address and Mr. X decodes the information. He then makes a copy of the list of user credentials for the syndicate.

### **5. Unlawful interference with data or computer program**

(1) *Any person who unlawfully and intentionally interferes with —*

- (a) *data; or*
- (b) *a computer program,*

*is guilty of an offence.*

(2) *For purposes of this section “interfere with data or a computer program” means to permanently or temporarily —*

- (a) *delete data or a computer program;*
- (b) *alter data or a computer program;*
- (c) *render vulnerable, damage or deteriorate data or a computer program;*
- (d) *render data or a computer program meaningless, useless or ineffective;*

- (e) *obstruct, interrupt or interfere with the lawful use of, data or a computer program; or*
- (f) *deny access to data or a computer program,*  
*held in a computer data storage medium or a computer system.*

Mr. X decides that whilst he has gained access to XYZ Bank's computer systems, he will deploy a virus that will wipe out all their payroll information that is contained on their HR computer system. He proceeds to do so. He also deploys other another type of software on the finance system that encrypts all the data. XYZ Bank is now not able to access the data on their finance system.

### **6. Unlawful interference with a computer data storage medium or computer system**

- (1) *Any person who unlawfully and intentionally interferes with a computer data storage medium or a computer system, is guilty of an offence.*
- (2) *For purposes of this section "interfere with a computer data storage medium or a computer system" means to permanently or temporarily —*
- (a) *alter any resource; or*
- (b) *interrupt or impair —*
- (i) *the functioning;*
- (ii) *the confidentiality;*

*(iii) the integrity; or*

*(iv) the availability,*

*of a computer data storage medium or a computer system.*

The malware that Mr. X deployed on the computer systems of XYZ Bank also spreads to the backup system that the Bank has in place. They can no longer access their backups.

**7. Unlawful acquisition, possession, provision, receipt or use of password, access code or similar data or device**

*(1) Any person who unlawfully and intentionally —*

*(a) acquires;*

*(b) possesses;*

*(c) provides to another person; or*

*(d) uses,*

*a password, an access code or similar data or device for purposes of contravening the provisions of section 2(1) or (2), 3(1), 5(1), 6(1), 8 or 9(1), is guilty of an offence.*

*(2) Any person who is found in possession of a password, an access code or similar data or device in regard to which there is a reasonable suspicion that such password, access code or similar data or device—*

*(a) was acquired;*

*(b) is possessed;*

*(c) is to be provided to another person; or*

*(d) was used or may be used,*

*for purposes of contravening the provisions of section 2(1) or (2), 3(1), 5(1), 6(1), 8 or 9(1), and who is unable to give a satisfactory exculpatory account of such possession, is guilty of an offence.*

*(3) For purposes of this section “password, access code or similar data or device” includes —*

*(a) a secret code or pin;*

*(b) an image;*

*(c) a security token;*

*(d) an access card;*

*(e) any device;*

*(f) biometric data; or*

*(g) a word or a string of characters or numbers,*

*used for financial transactions or user-authentication in order to access or use data, a computer program, a computer data storage medium or a computer system.*

As a result of unlawfully installing spy software on the computer systems of XYZ Bank, Mr. X has gained access to the usernames and passwords of several employees. These user credentials are part of XYZ Banks' measures to protect their systems and to

ensure that only authorised users have access to their computer systems. Mr. X wants to use these credentials to access the information contained on several of XYZ Bank's systems.

Ms Y is a business associate of Mr. X. Her job is to sell the user credentials to other criminals that want to target XYZ Bank's customers. She knows that Mr. X is not legally in possession of the usernames and passwords of the XYZ Bank employees. She keeps spreadsheets with all the information in her possession.

### **8. Cyber fraud**

*Any person who unlawfully and with the intention to defraud makes a misrepresentation —*

*(a) by means of data or a computer program; or*

*(b) through any interference with data or a computer program as contemplated in section 5(2)(a), (b) or (e) or interference with a computer data storage medium or a computer system as contemplated in section 6(2)(a),*

*which causes actual or potential prejudice to another person, is guilty of the offence of cyber fraud.*

Ms D is an employee of Capital Sales. The company uses an electronic system where employees have to capture all their work hours, kilometres travelled and other business expenses. Once the information is captured on the system it is sent electronically to HR. Ms D knowingly captures more hours and inflates the total number of kilometres travelled for the month, knowing that her employer will pay out more than she was actually entitled to during the particular month.

### **9. Cyber Forgery and Uttering**

*(1) Any person who unlawfully and with the intention to defraud makes—*

*(a) false data; or*

*(b) a false computer program,*

*to the actual or potential prejudice of another person, is guilty of the offence of cyber forgery.*

*(2) Any person who unlawfully and with the intention to defraud, passes off—*

*(a) false data; or*

*(b) a false computer program,*

*to the actual or potential prejudice of another person, is guilty of the offence of cyber uttering.*

Ms Y wants to inflate the value of the sales of her company, T-Enterprises so that she can convince the bank to grant her a loan. Had the bank known what the true financial state of T-Enterprises was, they never would have granted her a loan. Ms Y uses a software program to manipulate the financial statements of the business.

Ms Y then sends copies of the forged financial statements to various banks to apply for loans.

## 10. Cyber Extortion

*Any person who unlawfully and intentionally commits or threatens to commit any offence contemplated in section 3(1), 5(1), 6(1) or 7(1)(a) or (d), for the purpose of —*

- (a) obtaining any advantage from another person; or*
- (b) compelling another person to perform or to abstain from performing any act,*

*is guilty of the offence of cyber extortion.*

Mr. X sends a mail to a XYZ Bank employee. The email contains hidden malware. When the employee clicks on the link, it installs malware also known as ransomware on the employees' computer. The malware spreads throughout the systems of XYZ Bank and encrypts all their data. There is a message that is displayed on their screens stating that until XYZ Bank pays 5 bitcoins to the Warriors of the Dark Coin they will not have access to their company data. XYZ Bank is unable to access any of their computer systems or the data contained on any of their systems.

Note that cyber extortion is not simply the extortion of another by means of an article. The Act requires that there must be an unlawful and intentional commission, or attempt to commit the offences of unlawful interception of data, unlawful interference with data/computer program/computer data storage medium or a

computer system or the unlawful acquisition or use of a password or access code.

## 11. Aggravated Offences

(1) (a) Any person who commits an offence referred to in —

(i) section 3(1), 5(1) or 6(1), in respect of; or

(ii) section 7(1), in so far as the passwords, access codes or similar data and devices relate to,

a restricted computer system, and who knows or ought reasonably to have known or suspected that it is a restricted computer system, is guilty of an aggravated offence.

(b) For purposes of paragraph (a), a “restricted computer system” means any data, computer program, computer data storage medium or computer system —

(i) under the control of, or exclusively used by —

(aa) a financial institution; or

(bb) an organ of state as set out in section 239 of the Constitution, including a court; and

(ii) which is protected by security measures against unauthorised access or use.

(2) Any person who commits an offence referred to in section 5(1), 6(1) or 10, and who knows or ought reasonably to have known or suspected that the offence in question will —

- (a) endanger the life or cause serious bodily injury to, or the death of, any person, or any number or group of persons;*
- (b) cause serious risk to the health or safety of the public or any segment of the public; or*
- (c) create a serious public emergency situation,*

*is guilty of an aggravated offence.*

*(3) The Director of Public Prosecutions having jurisdiction must authorise in writing a prosecution in terms of subsection (1) or (2).*

Mr. X is charged with the unlawful interception, unlawful interference with data and unlawful interference with the computer storage mediums of XYZ Bank, this will also constitute an aggravated offence. XYZ Bank is a financial institution and their computer systems, data, programs, data storage mediums will therefore fall under the definition of restricted computer systems. This would mean that upon conviction, Mr. X could face a heavier sentence as provided for in section 19 of the Act.

Offences such as interference with data and systems, as well as extortion and that can put people's lives at risk or cause of public emergency are also aggravated offences.

## **12. Theft of Incorporeal Property**

*The common law offence of theft must be interpreted so as not to exclude the theft of incorporeal property.*

The implication of section 12 is that a suspect can now be charged with common law theft when the suspect steals e.g. the data of a victim and which data is contained in online format. Examples would include offences such as the theft of a database. Suspects are not charged under section 12 of the CCA, but under the common law offence of theft.

## CHAPTER 2: PART II: MALICIOUS COMMUNICATIONS

### 13. **Definitions** (relating to Part II Offences)

*In Part II, unless the context indicates otherwise —*

*“damage to property” means damage to any corporeal or incorporeal property;*

*“disclose” in respect of a data message referred to in sections 14, 15 and 16, means to —*

- (a) send the data message to a person who is the intended recipient of the electronic communication or any other person;*
- (b) store the data message on an electronic communications network, where the data message can be viewed, copied or downloaded; or*
- (c) send or otherwise make available to a person, a link to the data message that has been stored on an electronic communication network, where the data message can be viewed, copied or downloaded;*

*“group of persons” means characteristics that identify an individual as a member of a group, which characteristics include without limitation, race, gender, sex, pregnancy, marital status, ethnic or*

*social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth or nationality;*

*“related person” means any member of the family or household of a person or any other person in a close relationship with that person; and*

*“violence” means bodily harm.*

#### **14. Data message which incites damage to property or violence**

*Any person who discloses, by means of an electronic communications service, a data message to a person, group of persons or the general public with the intention to incite —*

*(a) the causing of any damage to property belonging to; or*

*(b) violence against,*

*a person or a group of persons, is guilty of an offence.*

Mrs X posts a message on a social media platform and shares with all her friends that it is high time that they take action against Super Liquors Inc. by marching there, burning the shop down and beating the employees to a pulp because their brandy prices are ridiculously high. The message soon spreads over the social media platform with people saying they are going to join Mrs X in burning down the shop and beating the employees.

#### **15. Data message which threatens persons with damage to property or violence**

*A person commits an offence if they, by means of an electronic communications service, unlawfully and intentionally discloses a data message, which —*

*(a) threatens a person with —*

*(i) damage to property belonging to that person or a related person; or*

*(ii) violence against that person or a related person; or*

*(b) threatens a group of persons or any person forming part of, or associated with, that group of persons with —*

*(i) damage to property belonging to that group of persons or any person forming part of, or associated with, that group of persons; or*

*(ii) violence against the group of persons or any person forming part of, or associated with, that group of persons,*

*and a reasonable person in possession of the same information, with due regard to all the circumstances, would perceive the data message, either by itself or in conjunction with any other data message or information, as a threat of damage to property or violence to a person or category of persons contemplated in paragraph (a) or (b), respectively.*

Mr. C posts a message on a social media platform in which he states that he is fed up with the noise that his neighbour makes every day when he starts up his motorcycle and he is now going to break down the neighbour's gate, take a crowbar and smash the motorcycle to pieces and then give the neighbour a good beating with the same crowbar. Mr. K posts photographs of himself

posing at the neighbour's front gate with the crowbar where he also states that he knows the neighbour comes home from work at 5pm. He also posts photos of the neighbour's motorcycle, as well as pictures of a similar motorcycle that is smashed up. He also tags his neighbour in the post and leaves a personal comment that his neighbour should watch out: "today is the day when he is going to pay."

### **16. Disclosure of data message of intimate image**

(1) *Any person ("A") who unlawfully and intentionally discloses, by means of an electronic communications service, a data message of an intimate image of a person ("B"), without the consent of B, is guilty of an offence.*

(2) *For purposes of subsection (1) —*

(a) *"B" means —*

- (i) *the person who can be identified as being displayed in the data message;*
- (ii) *any person who is described as being displayed in the data message, irrespective of the fact that the person cannot be identified as being displayed in the data message; or*
- (iii) *any person who can be identified from other information as being displayed in the data message; and*

(b) *"intimate image" means a depiction of a person —*

- (i) *real or simulated, and made by any means in which —*

- (aa) *B is nude, or the genital organs or anal region of B is displayed, or if B is a female person, transgender person or intersex person, their breasts, are displayed; or*
  - (bb) *the covered genital or anal region of B, or if B is a female person, transgender person or intersex person, their covered breasts, are displayed; and*
- (ii) *in respect of which B so displayed retains a reasonable expectation of privacy at the time that the data message was made in a manner that —*
- (aa) *violates or offends the sexual integrity or dignity of B; or*
  - (bb) *amounts to sexual exploitation.*

Mr. X and Mrs Y were in a relationship. Mr. X had certain nude images of Mrs Y which she shared with him in confidence during the course of their relationship. The couple breaks up and in an act of revenge Mr. X posts the nude images of Mrs Y on social media, as well as in his work WhatsApp group. The images portray a naked Mrs Y. Mr. X adds a message to the images stating that this will now teach Mrs Y not to mess with him.

## **PORNOGRAPHY OFFENCES**

The CCA also amends the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 (SORMA) and in this regard it is important to take cognisance of circular 1/1/4/1 dated 12 May 2022. “*Commencement of certain sections of the Criminal*

*Law (Sexual Offences and Related Matters Amendment Act, 2007 (Act No. 32 of 2007) inserted by the Cybercrimes Act, 2020 (Act No. 19 of 2020) and new offences inserted in the Films and Publications Act, 1996 (Act No. 56 of 1996) by the Films and Publications Amendment Act, 2019 (Act No. 11 of 2019)”.*

Section 11A of SORMA creates the offences of harmful disclosure of pornography, threatening to disclose pornography and harmful disclosure of pornography related extortion (so-called “revenge porn”). Although section 11A(1) of SORMA substantially corresponds to section 16(1) of the CCA it is to be noted that there are differences between these sections which have to be considered when a complaint of this nature is lodged with the SAPS. One of the differences is that section 11A of SORMA requires that disclosure must have caused the victim harm whilst harm is not required by the offence set out in section 16(1) of the CCA.

The CCA repealed section 24B of the Films and Publication Act No. 65 of 1996 that, prior to 1 December 2021, criminalised child pornography. Child pornography is with effect from 1 December 2021 criminalised in terms of section 19A of SORMA.

It is to be noted that the Films and Publication Act No. 65 of 1996 also contains new offences that came into operation on 1 March 2022. Some of these offences, such as section 24E which criminalises the distribution of private sexual photographs and films are addressed in both the CCA as well as SORMA.

## MECHANISMS TO INVESTIGATE CYBERCRIME (AND OTHER CRIMES): SEARCH AND SEIZURE

### Introduction:

Chapter 4 of the CCA contains the powers of the SAPS to investigate, search, seize and access an article. It is important to note that this Chapter is not in full operation and that the powers set out in this Chapter are (for now) **limited to search and seizure** with a warrant or without a warrant. The CCA provides for a mechanism to obtain a warrant orally and therefore introduces new procedural law. This mechanism is spelled out in section 30 of the CCA and is already in operation. The preservation of evidence and data provisions which also constitutes new procedural law, are **not** yet in operation (sections 40(3), 41, 42, 43 and 44). The preservation procedures are only applicable to articles in the context of the CCA and therefore do not apply to articles in the context of the Criminal Procedure Act No. 51 of 1977 (“CPA”).

Chapter 4 must be read in conjunction with **Standard Operating Procedures** for the investigation of cybercrime, issued in terms of section 26 of the CCA. These SOPs must be observed by the SAPS or any other person or agency who or which is authorised in terms of the provisions of any other law to investigate any offence or suspected offence in terms of Part I or Part II of Chapter 2 or any other offence or suspected offence which may be committed by means of, or facilitated through the use of, an article.

It is also important to note that the SAPS may be assisted in this regard by a so-called “**investigator**”. An investigator is “*any fit and proper person, who is not a member of the South African Police Service and who is identified and authorised in terms of a search warrant contemplated in section 29(3) or requested by a police official in terms of section 31(2), 32(3) or 33(4) to, subject to the direction and control of a police official, assist the police official with the search for, access or seizure of an article.*”

## **Application of the Criminal Procedure Act No. 51 of 1977 to the CCA:**

According to section 27 of the CCA, the CPA applies **in addition** to the provisions of Chapter 4 of the CCA, in so far that it is not inconsistent with the provisions of Chapter 4. This simply means that aspects which are not specifically mentioned in Chapter 4 of the CCA, such as the handling of exhibits or disposal thereof, must be dealt with in terms of the provisions prescribed by the CPA.

The above-mentioned does not mean that one can rely on the CPA to search for, seize or access a cyber-article. Last-mentioned articles have to be dealt with in terms of the provisions of Chapter 4 of the CCA. Any other exhibits that are not connected or concerned with a cyber-article still have to be dealt with in terms of the search and seizure provisions of the CPA. Examples are offences relating to firearms, drugs, documents, etc. which are not facilitated by means of a cyber-article. Once a cyber-article is involved in the commission of an offence, the rules of the CCA must be followed.

**Exhibits connected with** or concerned with or facilitated by means of a cyber-article must be searched for, seized and accessed in terms of the provisions of Chapter 4 of the CCA. **Exhibits not connected with** or concerned with or facilitated by means of a cyber-article have to be seized in terms of either section 21 or section 22 of the CPA. The police should therefore obtain two separate search and seizure warrants if they conduct a search and seizure operation at a crime scene where both section 20 articles (CPA) and CCA articles (cyber-articles) are expected to be found.

An article in the context of the CCA is not only an article that is concerned with, may afford evidence of or is intended to be used in the commission of the cybercrimes referred to in Part I or II of Chapter 2 of the CCA. Any offence in terms of the law of South Africa or even

an offence in a foreign state substantially similar to South Africa's law which was committed/planned by means of or using an article (concerned with) or may afford evidence or is intended to be used in the commission of such an offence obliges the police to utilise the provisions of Chapter 4 of the CCA to search for, seize or access an article. In this regard it is important to note the provisions of section 37 of the CCA which provide that a police official or investigator who unlawfully and intentionally acts contrary to, *inter alia*, a search warrant issued in terms of section 29 of the CCA or without being authorised by the CCA or any other law to search for, seize or access data, a computer program, computer systems, etc., is guilty of an offence. Note must be taken that the CPA does not provide for access to an article and although the last-mentioned Act was used prior to 1 December 2020 to search for, and seize computers and cellular phones, Chapter 4 of the CCA prescribes that search and seizure, as well as access to these devices must now be conducted in terms of the CCA.

### **The general rule: warrant for search, seizure and access: section 29**

As stated above, an article as defined in the CCA can no longer be searched, seized or accessed in terms of the provisions of the CPA (J51 warrant). From 1 December 2020, a warrant for search, seizure and access of an article in the context of the CCA (cyber-article) has to be issued and approved in terms of section 29 of the CCA.

The written application for the warrant can only be done by a police official who, under oath or by way of affirmation must convince a magistrate or judge of the High Court that there are reasonable grounds for believing that a cyber-article:

- Is within their area of jurisdiction or;
- Is being used/is/was involved in the commission of an offence;

- Within their area of jurisdiction; or;
- Within the RSA, if it is unsure within which area of jurisdiction the cyber-article is being used or is/was involved in the commission of an offence. (Section 29(1)(a))

The powers and obligations of the police official as far as search, seizure and access are concerned are set out in section 29(2), (3), (4) and (5) of the CCA. This includes the utilisation of an investigator during the search, seizure and access operation. The investigator has to be identified in the warrant, together with the role and functions of such investigator during the operation. The investigator does not have any powers or authority to act on his or her own in relation to search, seizure and access of cyber-articles: he or she is subject to the direction and control of the police official, to assist the police official, not to act on his or her own accord and/or to promote his or her own interest or the interest of a third party.

A few differences between warrants issued under the Criminal Procedure Act, 1977 and the Cybercrimes Act, 2019:

<b>CPA Warrant (J.51)</b>	<b>CCA Warrant</b>
Traditional section 20 article to be searched for and seized for an offence <b>not</b> concerned with, connected with or facilitated by means of a computer, data or a cellular phone.	Article (cyber –article) defined in section 1 of the Act to be searched for and seized for any offence committed or facilitated by means of a computer, data or cellular phone.
Does not provide for access or downloading of data and computers.	Does provide for access or downloading of data and computers.

<p>Issued by magistrate or justice of the peace in terms of section 21 of the Act. Commissioned officer of the SAPS as justice of the peace can issue a warrant.</p>	<p>Issued by magistrate or Judge of the High Court in terms of section 29(1)(a) of the CCA. Commissioned officer of the SAPS cannot issue a warrant in terms of section 29 of the CCA.</p>
<p>Application can only be done in writing, under oath.</p>	<p>Application can be done orally or in writing, under oath or by way of affirmation by a police official or a “specifically designated police official”</p>
<p>Section 20 article must be in possession or under control or upon a person or premises within his or her area of jurisdiction.</p>	<p>Cyber-article does not have to be physically in the area of jurisdiction of the magistrate or judge, e.g. where the cyber-article was used or was involved in the commission of an offence within the magistrate’s or Judge’s area or where it is unsure within which area of jurisdiction the cyber-article is being/was used.</p>
<p>Private persons cannot be included in the warrant</p>	<p>Private persons (investigator) can be included in the warrant.</p>
<p>Must be executed by day, unless authorised to be executed during the night.</p>	<p>May be executed at any time, unless otherwise specified.</p>
<p>Police official must, after execution of the warrant, upon</p>	<p>Police official who executes a warrant under section 29 must</p>

demand of any person whose rights have been affected by the search and seizure, hand him or her a copy of the warrant.	hand to any person whose rights in respect of any search, or article accessed or seized under the warrant have been effected, a copy of the warrant and the written application of the police official who applied for the warrant.
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### Oral application for a warrant or an amendment of a warrant: section 30

The CCA introduces a new procedure to the CCA: a “specifically designated police official” may make an oral application for a warrant (or an amendment thereto) relating to a cyber-article. Such application must indicate why it is not reasonably practicable to make a written application and must indicate:

- the particulars of the urgency of the case or;
- other exceptional circumstances which, in the opinion of the police official, justify the making of an oral application.

**“Specifically designated police official”** is a police official with the rank of Captain or above who has been designated in writing by the National Commissioner and the National Head of the DPCI to perform certain functions, *inter alia* to make an oral application for a warrant to a judge or magistrate.

The police official who wishes to make an oral application must make such application through the “specifically designated police official” but the motivation for such application is expected from the police

official who intends to search for, seize or access a cyber-article. This police official is obliged to make a written application to the judge or magistrate within 48 hours after the issuing of the warrant or amendment of the warrant. The judge or magistrate may, when considering the written application, confirm, amend or cancel the warrant which is based on the original oral application.

The oral application process for a warrant must not be overseen when a police official acts without a warrant. The warrant requirement must, as far as possible, always be met. It is only in exceptional circumstances that the police will be entitled to act without a warrant which exceptional circumstances will briefly be discussed below. The oral application process creates an additional step that must be complied with before the police official can act without a warrant. The police official who is of the view that the urgency of a matter or other exceptional circumstances which created a challenge for him or her to obtain a warrant may have to explain to the court why an oral application had not been made, prior to resorting to the exceptions in the CCA that allow for search, seizure and access without a warrant.

## **Exceptions to the rule: search, seizure and access of a cyber-article without a warrant:**

There are three exceptions in Chapter 4 of the CCA to act without a warrant. These exceptions are:

- if there is consent of a person who has lawful authority to consent (**section 31** of the CCA);
- if the police official on reasonable grounds believe that warrant will be issued if he or she has to apply for the

warrant and that the delay in obtaining the warrant would defeat the object of the search and seizure (**section 32** of the CCA) and

- if a person is arrested for a cyber-enabled or cyber-dependant offence (**section 33** of the CCA).

Two definitions, contained in section 25 of the CCA, are of specific relevance to search, seizure, and access operations/investigations without a warrant in relation to a cyber-article.

**“Access”** includes without limitation to make use of —

(a) a computer data storage medium, or a computer system, or their accessories and components or any part thereof or any ancillary device or component thereto; and

(b) data or a computer program held in a computer data storage medium or a computer system, to the extent necessary to search for and seize an article.”

**“Seize”** includes to —

(a) remove a computer data storage medium or any part of a computer system;

(b) render inaccessible, data, a computer program, a computer data storage medium or any part of a computer system in order to preserve evidence;

(c) make and retain a copy of data or a computer program; or

*(d) make and retain a printout of the output of data or a computer program.”*

### Section 31 of the CCA

In terms of this exception, any police official may, without a warrant, execute the powers set out in section 29(2) of the CCA if there is consent, in writing, of a person who has the lawful authority to consent to the search for, access to, or seizure of the cyber-article. This includes the right of the police official to be assisted by an investigator, as long as there is written consent by the person who has the lawful authority to consent to the search for, access to, or seizure of the cyber-article.

### Section 32(1) of the CCA

A police official may, in terms of this section, without a warrant, search any person, premises, vehicle or container if the police official on reasonable grounds believes that a warrant will be issued if he or she has to apply for the warrant and that the delay in obtaining the warrant would defeat the object of the search and seizure **BUT**:

- can only perform the powers referred to in paragraphs (a) and (b) of the definition of “**seize**” (see above)
- in respect of a **computer data storage medium or any part of a computer system** referred to in paragraphs (c) or (d) of the definition of “**article**”.

The police official relying on this section can therefore not make and retain a copy of data or a printout of the output of data. His or her powers only extend to a computer data storage medium or a computer system in paragraphs (c) and (d) of the definition of an article. Data and computer programs as referred to in paragraphs

(a) and (b) of the definition of article are excluded. The police official can remove a computer data storage medium or render data or a computer data storage medium inaccessible to preserve data/evidence but he or she can, for all practical purposes, not access such data or computer data storage medium to look for, and prepare data as evidence. **The police official can only make and retain a copy of data, a computer program or the output of data (displaying data) on the strength of a warrant issued in terms of section 29(1)(a)**

Note the definitions of “computer”, “computer data storage medium” and “computer system” in section 1 of the CCA. A modern cellular phone or tablet is indeed a computer, computer data storage medium and a computer system.

### Section 32(2) of the CCA

In terms of this sub-section a police official may only **access** or perform the powers in paragraphs (c) and (d) of the definition of “**seize**” in respect of a **computer data storage medium or a computer system mentioned in sub-section (1)** in accordance with of a search warrant issued in terms of section 29(1)(a). Sub-section (2), however, contains a proviso to the following effect:

- A police official may, if he or she on reasonable grounds believe that a search warrant will be issued to him/her under section 29(1)(a) if he or she applies for such warrant; and
- It is not reasonably practicable, having regard to the urgency of the case or the existence of exceptional

circumstances, to make a written or oral application for a warrant;

- Access and perform the powers in paragraphs (c) or (d) of the definition of “seize”, without a warrant.

Note the differences between section 32 (1) and (2): In the first sub-section the police official have **limited powers** in terms of the definition of “seize” in that he/she acts without a warrant in view of a reasonable belief, inter alia, that the **delay** in obtaining a warrant would defeat the object of the search and seizure. In sub-section (2) the police have **all the powers** contained in the definition of “seize” and have full access to the cyber-article (paragraphs (a), (b), (c) and (d) of the definition: data, computer program, computer data storage medium or computer system) in view thereof that they **cannot apply for a warrant** as a result of the **urgency** of the matter or as a result of **exceptional circumstances**.

### Section 33 of the CCA: search for, access to, or seizure of cyber-article on arrest of a person

The above-mentioned section (33(1)) extends the powers of the police to arrest a person without a warrant in terms of section 40 of the CPA to offences in terms of Part I or Part II of the CCA or foreign offences similar to those offences or to any **foreign offence** substantially similar to an offence in the Republic which may be committed or facilitated by means of a cyber-article in a foreign state.

NB: the extension of arresting powers in section 40 of the CPA does not include offences committed or facilitated by means of a cyber-article in the RSA, it only provides for those offences referred to in Part I or Part II of the CCA, not ordinary cyber-enabled offences committed locally.

On the arrest of a person in terms of section 40 or 43 of the CPA a police official may, in terms of section 33(2):

- **Search** for and perform the powers referred to in paragraphs (a) and (b) of the definition of “**seize**”(remove a computer data storage medium or render same or data inaccessible)
- Which is found in possession or in the custody or under the control of the arrested person.

The police have exactly the same powers in terms of section 33(3) as those contained in section 32(2) of the CCA, the discussion under section 32(2) above, is therefore also relevant here. They may also be assisted by an investigator in all three the exceptions to the general rule, namely sections 31, 32 and 33.

Note that section 39 of the CCA creates an offence in respect of the disclosure of information which have been obtained as a result of the implementation of Chapters 4 or 5 of the Act.

### **Concluding remarks: search and seizure**

The “Practical Guide to apply for a search warrant in terms of section 21 of the Criminal Procedure Act, 1977” signed off by the Acting National Commissioner of the SAPS during May 2016 is still relevant in terms of search and seizure operations in terms of that Act. The only proviso is that the CPA and therefore the current J. 51 warrant can no longer be used to search for, seize or access a cyber-article. At the time of the revision and publication of this booklet, an official warrant issued in terms of the CCA, pertaining to cyber-articles has not yet been finalised.

Members must note that the perceived abuse or incorrect application of legal powers as conferred by legislation may result in a declaration of unconstitutionality of such provisions. Examples in this regard include section 11(1)(a) and (g) of the Drugs and Drug Trafficking Act No. 140 of 1992 in 2016 and section 13(7)(c) of the South African Police Service Act No. 68 of 1995 in 2021. If the wording of a search and seizure warrant is too broad, vague or goes beyond the ambit of a specific empowering Act, a court will set such warrant aside and any articles seized during the search will not be admissible as evidence.

Note that an application for a warrant is nothing else than an *ex parte* application which requires good faith and, as can be seen from the above discussion, must be disclosed to an affected person during the actual search and seizure operation. All information relevant to the search and seizure must be disclosed in the founding affidavit. Never approach a magistrate or judge with an approach that he or she knows everything. If the affidavit contains lies or incomplete information the magistrate or judge will not necessarily know it. Such affidavit will not withstand legal challenges and will only nullify the actual warrant and expose the credibility and reputation of the SAPS as well as the individual applicant

Always make sure that articles to be searched for, or which are to be seized and/or accessed are identified and described with sufficient particularity and that the powers to be executed during the search and seizure operation are clearly described in the warrant itself.

Where possible, always approach Legal Services prior to a search and seizure operation to ensure that the relevant documents are in order.

## 20. DANGEROUS WEAPONS ACT NO. 15 OF 2013

The Dangerous Weapons Act No. 15 of 2013 came into effect on 2 January 2014.

According to Section 1 of the Act, **dangerous weapon** is defined as an object, other than a firearm, capable of causing death or inflicting serious bodily harm, **if it was used for an unlawful purpose**.

**Examples of dangerous weapons, include, but are not limited to, the following:**

- Knife, such as gravity knife, switchblade, sword, dagger, blackjack, brass knuckles, ballistic knife;
- Spear, tomahawk, crowbar, nunchaku, and a hammer;
- Any other sharp and/or harmful object that a person carries and possesses with the intention to use if for an unlawful purpose.

**The following factors must be considered to determine whether a person who is in possession of an object intends to use it for an unlawful purpose:**

- The place and time where the person is found;
- The behaviour of the person, including making any threats or the display of intimidating behaviour;
- The manner in which the object was displayed within the context of drug dealing, gang association or any organised crime or criminal activities; or
- Any other relevant fact, including any explanation the person may wish to provide with regard to his or her possession of the object; provided that the person is not under an obligation to give an explanation should he or she so chooses.

## When is possession of dangerous weapon(s) prohibited in terms of the Act

Section 3(1) of the Act stipulates that, any person who is in possession of any dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years. It is important to note that the suspicion must be based on, **solid grounds (*Manase v Minister of Safety and Security and another 2003(1) SA 567(Ck)*)**. This means that the arrestor must be able to provide the court with the relevant facts on which his or her suspicion was based.

However, in terms of the Act the **following activities are excluded** from the application of the Act.

- Possession of dangerous weapons while a person is in pursuit of any lawful employment, duty or activity;
- Possession of dangerous weapons during participation in any religious or cultural activities, or any lawful sport, recreation or entertainment;
- Legitimate collection, display or exhibition of weapons.

The Dangerous Weapons Act of 2013 repealed the Dangerous Weapons Act No. 71 of 1968 as well as similar legislation of the former TBVC States. The 2013 Act also amended certain provisions of the Firearms Control Act No. 60 of 2000 namely, section 120(10) and the Regulation of Gatherings Act No. 205 of 1993 namely, section 8(4).

## 21. DIPLOMATIC IMMUNITIES AND PRIVILEGES ACT NO. 37 OF 2001

### INTRODUCTION

The Act makes provision for immunities and privileges of diplomatic missions and consular posts and their members, heads of states and certain representatives of the United Nations. The Act also provides that certain Conventions such as the Vienna Convention on Diplomatic Relations, 1961, Vienna Convention on Consular Relations, 1963, the Convention on the Privileges and Immunities of the United Nations, 1946 and the Convention of Privileges and Immunities of the Specialised Agencies, 1947 have the force of law in the Republic of South Africa.

#### (1) Diplomatic premises are inviolable

As a general rule an embassy, consulate or other premises where the official business of any foreign representative is conducted, may not be entered without the prior consent of the head of that specific mission. This also applies to the official residences or other premises occupied by these persons. As such it is unlawful for a member to enter the relevant premises without the required consent and members who do so will be committing an offence in terms of the Act.

#### 15 Offences and penalties

*“(1) Any person who willfully or without the exercise of reasonable care issues, obtains or executes any legal process against a person who enjoys immunity under this Act or in terms of the Conventions, whether as party, attorney or officer concerned with issuing or executing such process, is guilty of an offence.*

*(2) Any person who contravenes subsection (1) or who willfully or without the exercise of reasonable care commits any other offence which has the*

*effect of infringing the inviolability of any person contemplated in subsection (1), or of his or her property or of the premises occupied by him or her, is liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment”.*

## **(2) Diplomatic personnel immune from civil and criminal jurisdiction**

Diplomatic agents, their families, diplomatic personnel and their families -

- are immune from the civil and criminal jurisdiction of the courts of the Republic;
- may not be arrested or detained;
- their private residences are inviolable; and
- their documents and correspondence inviolable.

**A certificate of identity** (*identification card*) bearing a photograph of the holder is issued to each person to whom immunities, rights and privileges have, in terms of the Act, been granted by the Department of International Relations and Cooperation (DIRCO).

**Diplomatic vehicles are issued with unique number plates.** A diplomatic agent's vehicle cannot be searched or interfered with (it may not for instance be driven by a police official or towed away).

In order to ensure that South Africa is not in breach of its international obligations it is essential that members exercise extreme caution when dealing with persons of - or professing to have diplomatic status. If a member is in doubt regarding the immunities or privileges of a person, he or she may approach the Protocol Section of DIRCO for clarity (The Protocol Section of the DIRCO provides a 24 hour telephone service at number (012) 3511000 in order to answer any question relating to immunities, rights and privileges).

Members are also advised to consult the website of DIRCO to obtain information on persons who enjoy immunity and privileges.

- (i) click on “*Foreign Relations*”
- (ii) look for the heading “Diplomatic Representation” on the left hand side of the webpage,
- (iii) click on “Foreign Representation in South Africa (Embassies and High Commissions)” under the heading “Diplomatic Representation”.

## 22. DOMESTIC VIOLENCE ACT NO. 116 OF 1998

### A. INTRODUCTION

It is clear from section 18 of the Domestic Violence Act No. 116 of 1998 that government is serious about addressing domestic violence. According to this section, the National Commissioner must issue national instructions that must be published in the *Gazette*. Section 18 further provides that the failure by a member to comply with his or her obligations imposed by the Act or the applicable instructions constitute misconduct.

The Domestic Violence Act was extensively amended by the Domestic Violence Amendment Act No 14 of 2021 which came into operation on 14 April 2023. The 2021 Act expanded the ambit of domestic violence by adding new forms of domestic violence. In addition, additional powers have been conferred and responsibilities placed on members. It is important that members take note of these developments and the implications thereof.

Police officials must read the Act in conjunction with **National Instruction 7 of 1999** that sets out the responsibilities of station commanders, community service centre commanders and members. Cognisance must also be taken of the **circular of the National Commissioner 1/1/4/1(1) dated 15 June 2013**: “*Policing the*

*Domestic Violence Act, 1998 (Act No. 116 of 1998): Improving service delivery to victims of crime: South African Police Service”.*

A **complainant** in terms of this Act can only be a person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant.

## B. DEFINITIONS

“**domestic relationship**” means a relationship between a *complainant* and the *respondent* where they –

- (a) are or were married to each other in terms of any law, custom or religion;
- (b) live or lived together in a relationship in the nature of a marriage although they are not, or were not, married to each other, or are not able to be married to each other (whether they are of the same or of the opposite sex);
- (c) are the parents of a child or have or had parental responsibility for the child (whether or not at the same time);
- (d) are family members related by consanguinity, affinity or adoption;
- (e) are or were in an engagement, dating or customary relationship: including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) are persons in a close relationship that share or shared the same residence;

Domestic violence includes the following:

- physical abuse;
- sexual abuse;
- emotional, verbal or psychological abuse;
- economic abuse;
- intimidation;
- harassment;

- sexual harassment;
- related person abuse;
- spiritual abuse;
- damage to property;
- elder abuse;
- coercive behaviour;
- controlling behaviour;
- to expose a child to domestic violence;
- entry into the complainant's residence, workplace or place of study without consent
- any other behaviour of an intimidating, threatening, abusive, degrading, offensive or humiliating nature towards the complainant;

**Domestic violence** means any one or more of the following forms of conduct performed by a *respondent* in respect of a *complainant* which consists of:

- (a) **“physical abuse”** means —
- physical violence or threats of physical violence towards a complainant;
  - to deprive the complainant of his or her liberty or threatening to do so;
  - to administer, attempt or threaten to administer —
    - (i) any drug as defined in section 1(1) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992);
    - (ii) any Scheduled substance as defined in section 1(1) of the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965), that affects or may affect a complainant's judgement or decision-making abilities or is harmful to the health or wellbeing of the complainant; or
    - (ii) any chemical or other substance that is harmful to the health or wellbeing of the complainant, to a

- complainant, without the complainant's permission;  
or
- withholding or threatening to withhold a complainant's medication;
- (b) **“sexual abuse”** means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant, irrespective of whether or not such conduct constitutes a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
- (c) **“emotional, verbal or psychological abuse”** means degrading, manipulating, threatening, offensive, intimidating or humiliating conduct towards a complainant that causes mental or psychological harm to a complainant, including —
- insults, ridicule or name calling;
  - threats to cause emotional pain;
  - the exhibition of obsessive possessiveness or jealousy, which constitutes a serious invasion of the complainant's privacy, liberty, integrity or security;
  - the wilful damaging or destruction of any property in close vicinity of a complainant;
  - to harm or threaten to harm a household pet or other animal, whose welfare affects a complainant's well-being;
  - to disclose or threaten to disclose a complainant's sexual orientation or other private information concerning a complainant, to others against the complainant's wishes;
  - to threaten the complainant with the death or injury of another person or damage of another person's property; or
  - threats to commit suicide or self-harm;
- (d) **“economic abuse”** which may consist of —
- the deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant

requires out of necessity, including education expenses, household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence or accommodation;

- the disposal of household effects or other property in which the complainant has an interest, without the complainant's permission;
- the use of financial resources of a complainant, without the complainant's permission; or
- the coercing of the complainant to —
  - (i) relinquish control over assets or income; or
  - (ii) sign a legal document that would enable the complainant's finances to be managed by another person;

(e) **“intimidation”** means —

- physical violence, or damage to property belonging, to a complainant or any other person;
- threats of physical violence, or damage to property belonging, to a complainant or any other person; or
- to deprive the complainant or any other person of their liberty or threatening to do so, where such conduct is intended to compel a complainant to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing;

(f) **“harassment”** means —

- the unreasonable —
  - (i) following, watching, pursuing or accosting of the complainant or a *related person*; or
  - (ii) loitering outside of or near the building or place where the complainant or a *related person* resides, works, carries on business, studies or happens to be,

which inspires the belief in the complainant that he or she or a *related person* may be harmed or their property may be damaged;

- to repeatedly contact the complainant by means of an electronic communications service, irrespective whether or not —
  - (i) a conversation ensues; or
  - (ii) any information is conveyed to the complainant;
- the repeated sending or delivering of packages, communications or other objects to the complainant, or leaving them where they may be found by, given to, or brought to the attention of, the complainant;
- the unauthorised access to a complainant's communications or electronic communications;
- the monitoring or tracking of the complainant's movements, activities or interpersonal associations without the complainant's consent, including, for example, by using technology;
- to enter any part of the joint *residence* that is exclusively used by the complainant or other property of the complainant, without the complainant's permission;
- to unreasonably interfere with any property that is exclusively used by or in the possession of the complainant;
- to disclose an electronic communication to the complainant, or cause the complainant to receive a communication, which—
  - (i) is abusive, degrading, offensive or humiliating;
  - (ii) violates or offends the sexual integrity or dignity of a complainant; or
  - (iii) inspires the belief in the complainant that he or she or a *related person* may be harmed or their property may be damaged; or
- to disclose an electronic communication, or to make a communication available, to another person concerning a complainant, which —

- (i) contains information of a private nature;
- (ii) violates or offends the sexual integrity or dignity of a complainant;
- (iii) is abusive, degrading, offensive or humiliating; or
- (iv) inspires the belief in the complainant that he or she or a *related person* may be harmed or their property may be damaged,

and communications in this context, refer to anything that is used to impart information or ideas, and includes a letter, text, photo, video recording, audio recordings, but excludes an electronic communication;

- (g) “**sexual harassment**” means any —
- unwelcome sexual attention from a *respondent* who knows or ought reasonably to know that such attention is unwelcome;
  - unwelcome explicit or implicit behaviour, suggestions, gestures, remarks made, communications sent or delivered, or electronic communications disclosed, to the complainant —
    - (i) of a sexual nature; or
    - (ii) regarding the complainant's or *related person's* sexual orientation, gender or gender expression,
 by a *respondent*, that has the effect of offending, intimidating or humiliating the complainant;
  - implied or expressed promise of reward made to the complainant if he or she complies with a sexually oriented request; or
  - implied or expressed threat of reprisal made to, or actual reprisal against, the complainant for refusal to comply with a sexually oriented request;
- (h) “**related person abuse**” means to —
- threaten the complainant with causing of physical violence to, or the damage of property of, a *related person*;
  - threaten a *related person* with physical violence or causing

- damage to the property of, such a person;
  - threaten a *related person* with causing of physical violence to, or the damage of property of, a complainant; or
  - commit an act of physical violence against, or cause damage to property of, a *related person*, where such actions can in the circumstances be regarded as abuse to cause harm to the complainant;
- (i) **“spiritual abuse”** means —
- advocating hatred against the complainant because of his or her religious or spiritual beliefs, that constitutes incitement to cause harm to the complainant;
  - preventing the complainant from exercising his or her constitutional right to freedom of conscience, religion, thought, belief and opinion, including to give external manifestation to his or her religious or spiritual convictions and beliefs; or
  - manipulating the complainant’s religious or spiritual convictions and beliefs to justify or rationalise abusing the complainant;
- (j) **“damage to property”** consisting of the —
- the wilful damaging or destruction of property; or
  - threats to damage or destroy property, belonging to, or which is in the possession or under the control of, the *complainant*, or in which the complainant has a vested interest;
- (k) **“elder abuse”** means abuse of an *older person* as contemplated in section 30(2) of the Older Persons Act, 2006 (Act No. 13 of 2006), occurring within a *domestic relationship*;
- (l) **“coercive behaviour”** means to compel or force a complainant to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing;

- (m) **“controlling behaviour”** means behaviour towards a complainant that is aimed at making the complainant dependent on, or subservient to, the *respondent* and includes —
- isolating the *complainant* from sources of support;
  - exploiting the resources or capacities of the *complainant* for personal gain;
  - depriving the *complainant* of the means needed for independence, resistance or escape; or
  - regulating the everyday behaviour of the *complainant*;
- (n) **expose a child to domestic violence** means to intentionally cause a child to —
- see or hear domestic violence; or
  - experience the effects of domestic violence;
- (o) **entry into the complainants’** —
- residence (albeit permanent or temporary *residence*) without his or her consent, where the parties do not share the same *residence*; or
  - *workplace* or place of study, without his or her consent, where the parties do not share the same workplace or place of study; or
- (p) any other behaviour of an intimidating, threatening, abusive, degrading, offensive or humiliating nature towards a *complainant*,

where such conduct harms, or inspires the reasonable belief that harm may be caused to the *complainant*;

### Duty to report

Section 2A and 2B of the Domestic Violence Act place a duty on certain persons to report domestic violence:

**“Section 2A:*****Obligations of functionaries relating to domestic violence***

- (1) *A functionary, who in the course of the performance of his or her duties or the exercise of his or her functions obtains information which, after evaluation by him or her, causes him or her to believe or suspect on reasonable grounds, that a child, a person with a disability or an older person, may be a complainant as contemplated in section 1 —*
- (a) *must without delay —*
    - (i) *complete a report in the prescribed form setting out the reasons for such belief or suspicion; and*
    - (ii) *in the prescribed manner submit the report to —*
      - (aa) *a social worker; or*
      - (bb) *a member of the South African Police Service;*
  - (b) *must conduct a risk assessment as prescribed in terms of section 18B; and*
  - (c) *may, after the evaluation of the risk assessment referred to in paragraph (b), provide or refer the complainant for further services as prescribed in section 18B.*
- (2) *A functionary referred to in subsection (1) —*
- (a) *who makes the report, referred to in subsection (1)(a), in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information; and*
  - (b) *is entitled to have his or her identity kept confidential, unless the interests of justice require otherwise.*

**2B      *Obligation to report domestic violence and to provide information***

- (1) *In circumstances, other than those contemplated in section 2A(1), an adult person who knows, or believes or suspects on reasonable grounds, that an act of domestic violence has been committed against a child, a person with a disability or an older person, must report such knowledge, belief or suspicion as soon as possible, to a social worker or the South African Police Service.*
- (2) *The report referred to in subsection (1) must —*
- (a) *be made in the prescribed form;*
  - (b) *set out the reasons for such knowledge, belief or suspicion; and*
  - (c) *in the prescribed manner be submitted to a social worker or a member of the South African Police Service.*
- (3) *A person referred to in subsection (1) —*
- (a) *who makes the report in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information; and*
  - (b) *is entitled to have his or her identity kept confidential, unless the interests of justice require otherwise.*
- (4) *A person who fails to comply with subsection (1), is guilty of an offence.”*

**C. DUTY TO ASSIST AND INFORM COMPLAINANT OF RIGHTS: RESPONSIBILITY OF A MEMBER WHO ATTENDS A SCENE OF DOMESTIC VIOLENCE**

- The member must first of all determine whether the complainant is in any danger and take all reasonable steps to secure the scene.
- If a member —
  - (i) receives information that an offence containing an element of violence (including common assault) has been committed against the complainant; and
  - (ii) reasonably suspects that a person who may furnish information regarding that alleged offence is in any private residence,  
the member may, without a warrant, enter that residence to interrogate that person and obtain a statement from him or her. (Section 3A of the Domestic Violence Act.)
- Circumstances which may indicate to the need for such action include cries for help, visible injuries or weapons, obvious signs that a struggle has occurred or the account of a witness that a crime has been committed and that the complainant could reasonably be expected to be injured and in need of urgent medical attention.
- In such circumstances, the member —
  - (i) must audibly demand admission to the residence and notify the purpose for which he or she seeks to enter that residence; and
  - (ii) may, if admission is not provided by any occupier of the residence, use force that is reasonably necessary to overcome any resistance against entry to the residence. This may include the breaking of any door or window of the residence.

- Where the complainant is in imminent danger the official must protect the complainant or any other person from imminent physical harm.
- Securing a scene may include separation of the complainant and respondent.

### Arrest without a warrant

- In terms of section 3(1) of the Domestic Violence Act 116 of 1998, a member **may arrest** without a warrant any person —
  - (i) who is or has been in a domestic relationship with the complainant; and
  - (ii) whom the member reasonably suspects of having committed any offence against the complainant. The power to arrest in these circumstances is not limited to offences where violence is an element or circumstances as provided for in section 40(1) of the Criminal Procedure Act 51 of 1977).
  - (iii) (See National Instruction 11 of 2019 (Arrest, treatment and transportation of an arrested person) for general information concerning “arrest”).
- A member **MUST**, in terms of section 3(2) of the Act, without a warrant, arrest any respondent at the scene of an incident of domestic violence, if the member reasonably suspects that the respondent committed an offence containing an element of violence against any complainant (including the offence of common assault). If the member reasonably suspects that more than one respondent committed an offence containing an element of violence against a complainant, all respondents must be arrested.
- In this regard, see also National Instruction 3 of 2010 (Children in need of care and protection) in respect of children that may be affected by such the arrest and furthermore, see National Instruction 3 of 2016 in respect of the prohibition of the release

of an accused on police bail in cases that relate to domestic violence.

### Arrest with a warrant – section 8

- Whenever the court issues a protection order, the court must authorise the issue of a warrant for the arrest of the respondent. If, upon receipt of the warrant of arrest together with the affidavit wherein it is stated that the respondent contravened the protection order, it appears to the member that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order, the member must arrest the respondent for contravening the protection order on the strength of the warrant.

Take note that a complainant of domestic violence can be of any gender. Likewise, a perpetrator can also be a person of any gender, as long as there is a domestic relationship between a complainant and a perpetrator.

In considering whether or not the complainant may suffer imminent harm, the member of the South African Police Service must take into account —

- (a) the risk to the safety, health or wellbeing of the complainant or related person or damage to their property;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order;
- (c) the length of time since the alleged breach occurred; and
- (d) the nature and extent of the harm previously suffered in the domestic relationship by the complainant or a related person.

**D. DUTY TO RENDER GENERAL ASSISTANCE TO THE COMPLAINANT**

In terms of section 2 of the Act a member of the Police must, at the scene of domestic violence or as soon thereafter as is reasonably possible, or when the incident is reported -

- (i) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
- (ii) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and
- (iii) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.

**E. SEIZURE OF WEAPONS WITHOUT A WARRANT**

Where a member has reason to believe that a person used a firearm/dangerous weapon the member may seize the firearm/dangerous weapon without a warrant.

Where a member has reason to believe that a person —

- has threatened or expressed the intention to kill or injure himself or herself or any other person by means of a firearm or any other weapon; or
- who is in possession of a firearm and whose possession thereof is not in his or her interest or in the interest of any other person as a result of his or her physical or mental condition, his or her inclination to violence (whether an arm was used in the violence

or not), or his or her dependence on intoxicating liquor or a drug which has a narcotic effect,

such member may at any time, in terms of section 110(1) of the Firearms Control Act, without a warrant enter upon and search such place or search such person and seize any arm or ammunition, for the purposes set out in section 102(1)(a) - (e) of the said Act (which *inter alia* provides that the National Commissioner may declare a person to be unfit to possess a firearm).

A member who seizes such a firearm must ascertain whether such firearm is licensed and, if not, record the relevant charge in the docket.

### **SEIZURE OF WEAPONS IN TERMS OF A COURT ORDER AND CONSIDERATION OF THE FITNESS OF THE RESPONDENT TO POSSESS A FIREARM**

The court may, in terms of section 7(2)(a) of the Domestic Violence Act, order a member to seize any weapon in the possession or under the control of a respondent.

Any such weapon seized must be handed in at the police station and, where the weapon is an airgun, ammunition, initiation firearm, muzzle loading firearm or handgun as defined in the Firearms Control Act, the matter to be dealt with in accordance with section 102 or section 103 of the Firearms Control Act, whichever may be applicable.

Any weapon seized must be handed in at the police station and a SAPS 13 tag must be attached to such weapon and the weapon must be retained in police custody for such period of time as the court may determine and may only be returned to the respondent or, if the respondent is not the owner of the weapon, to the owner thereof, by order of court and on such conditions as the court may determine.

The normal procedures, as set out in National Instruction 8 of 2017 (Property and Exhibit Management) and Standing Order (General) 336, and which are applicable to exhibits or lost or stolen property must be followed, bearing in mind the provisions of section 9(3) of the Act which provides that such weapon may only be disposed of in accordance with an order of court.

Once a final protection order has been issued against a respondent, the clerk of the court will inform the relevant station commander and Divisional Commissioner: Visible Policing and Operations thereof. The relevant station commander must, once such order has been received, —

- (i) determine whether the respondent holds any licence, permit, competency certificate or other authorisation in terms of the Firearms Control Act for any firearm;
- (ii) institute an inquiry into the fitness of the respondent to possess a firearm in terms of section 102 of the Firearms Control Act; and
- (iii) inform the Divisional Commissioner: Visible Policing and Operations of the decision contemplated in paragraph (ii).

## **REMEDIES AT THE DISPOSAL OF A COMPLAINANT IN TERMS OF THE ACT, ARE AS FOLLOWS:**

- the right to lay a criminal charge;
- the right to apply for a protection order and simultaneously, if the complainant and respondent share the same residence, to apply for a domestic violence safety monitoring notice to ensure the safety, health and wellbeing of the complainant; or

- the right to lay a criminal charge and apply for a protection order and, where applicable, for a domestic violence safety monitoring notice.

In order to ensure that a complainant is informed of his or her rights as well as the remedies at his or her disposal in terms of the Domestic Violence Act, the member must, where reasonably possible to do so, hand to the complainant a copy of the Notice as provided for in the Domestic Violence Act (Form 5 of the Regulations, previously Form 1) of the Regulations in terms of the Act) in the official language of the complainant's choice.

The member must request the complainant to sign in the Occurrence Book or in his or her pocket book, whichever may be applicable. By so doing, the complainant acknowledges that he or she has been informed of his or her rights and remedies in terms of the Domestic Violence Act and that he or she understands the contents thereof.

## **F. OTHER SPECIFIC POWERS AND DUTIES OF MEMBERS IN TERMS OF THE DOMESTIC VIOLENCE ACT**

- Service of documents: a member may be ordered by court to serve an interim or final protection order; and
- accompanying complainant to collect personal property. The court may order a member to accompany the complainant to a specified place to collect personal property.

If a member is of the opinion that there are insufficient grounds to arrest the respondent, he or she must immediately hand a Notice to the respondent as provided for in Form 36 (previously Form 11) to the Regulations. The member must insert the first court day thereafter as date of appearance on the form and complete the certificate, provided for in the Notice. The member must put the duplicate original of this Notice in the docket which is opened for the contravention. This docket must be taken to court on the first court day thereafter.

## Keeping of records

All domestic violence incidents reported to the police must be recorded in the Domestic Violence Register: SAPS 508(b). Members must fully record their responses to every incident of domestic violence on a Report of Domestic Violence Incident-form: SAPS 508(a).

## 23. DRUGS AND DRUG TRAFFICKING ACT NO. 140 OF 1992

The purpose of this Act is to prohibit the use, possession of/or dealing in certain drugs or the manufacture or supplying of such drugs.

The Act criminalises the manufacturing and supplying of any substance included in Schedule 1 to that Act and the use possession and dealing in any drug included in Schedule 2 to the Act.

Previously, in terms of section 63 of the Act, the Minister of Justice and Constitutional Development could, by notice in the Gazette, amend Schedules 1 and 2 to the Act. However, in **Jason Smit v Minister of Justice and Constitutional Development and Others [2020] ZACC 29**, the Constitutional Court declared section 63 unconstitutional and invalid to the extent that it purports to delegate plenary legislative power to the Minister to amend the Schedules to the Act, invalid. The court also declared amendments that have been effected during 1996, 1998, 1999, 2002, 2010 and 2014 in terms of section 63 of the Act, invalid. As a result of the declaration of invalidity by the constitutional Court, the Drugs and Drug Trafficking Amendment Act No. 14 of 2022 was passed by Parliament to repeal section 63 of the Act and to substitute Schedules 1 and 2 of the Act with new and amended Schedules 1 and 2.

**MANUFACTURING OR SUPPLYING OF SCHEDULED SUBSTANCES - SECTION 3**

Prohibits the supply of any scheduled substance to any other person, knowing or suspecting that such substance is to be used in the unlawful manufacturing of any drugs.

This section states that: *“No person shall manufacture any scheduled substance or supply it to any other person, knowing or suspecting that any such scheduled substance is to be used in or for the unlawful manufacture of any drug”*.

**USE AND POSSESSION OF DRUGS - SECTION 4**

Use and/or possession of prohibited drugs is regulated by section 4 of this Act.

*“No person shall use or have in his possession-*

- (a) any dependence-producing substance; or*
- (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance”*.

The following are exceptions to the provisions of section 4:

- (i) Unless he or she is a patient and requires the substance from a medical practitioner or pharmacist acting in his or her professional capacity.
- (ii) He or she bought or acquired the said substance for medicinal purposes from a medical practitioner or pharmacist acting in his or her professional capacity.
- (iii) He or she is a Director-General of the Welfare Department who acquired the substance in accordance with the law.

- (iv) He or she is an employee of a pharmacist, manufacturing company or wholesale dealer who came into possession of this substance in the scope of his or her work, or
- (v) He or she came into possession of this substance in a lawful manner.

A person who is found in illegal possession of drugs contravenes section 4 of this Act.

## CANNABIS

On 18 September 2018 in the matter of *Minister of Justice and Constitutional Development and Others v Prince: National Director of Public Prosecutions and others v Rubin: National Director of Public Prosecutions and others v Acton and others* [2018] ZACC 30, the Constitutional Court declared certain sections of the Drugs and Drug Trafficking Act No. 140 of 1992 unconstitutional. The Court held that the provisions of section 4(b) of the Drugs Act, read with Part III of Schedule 2 of the Act and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substance Control Act No. 101 of 1965, read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of that Act are inconsistent with the right to privacy entrenched in section 14 of the Constitution and therefore invalid to the extent that they make the **use or the possession of cannabis in private by an adult person for his/ her own consumption in private**, a criminal offence. The Court further declared that the provision of section 5(b) of the Drugs and Drug Trafficking Act which relates to dealing in drugs, is constitutionally invalid to the extent that it prohibits the **cultivation of cannabis by an adult in a private place for his or her personal consumption in private**.

The Court suspended the declaration of invalidity for a period of 24 months to enable Parliament to rectify constitutional defects and declared that during this period certain additional exceptions have to be read into section 4(b) of the Drugs Act, the definition of "deal in" in section 1 of the Drugs Act and the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965.

Parliament is yet to pass legislation to cure the constitutional defect. In the interim, the Court ordered that section 4(1)(vii) must be read in as a new insertion to the Act:

*“4 No person shall use or have in his possession –*

- (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, unless –*  
*(vii) in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private”.*

Wording similar to the above is to be read in to section 22A(9)(a)(i) of the Medicines and Related Substances Act.

The following insertion was made to the definition in section 1 of the Drugs Act:

*“deal in’, in relation to a drug, includes performing any act in connection with the transshipment, importation, cultivation **other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private**, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug”.*

#### **Effect of the judgment:**

- An adult person may use or possess cannabis in private for his or her personal consumption in private.
- The use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons is not permitted.
- The use or possession of cannabis in private other than by an adult for his or her personal consumption is not permitted.
- The cultivation of cannabis by an adult in a private place for his or her personal consumption in private is no longer a criminal offence.
- Dealing in cannabis has not been decriminalised by the Court and remains a serious criminal offence.

The Court did not prescribe the quantity of cannabis that will be regarded as “for personal use”. Police officials must rely on their discretion, based on reasonable grounds, to assess situations where persons are found in the possession of cannabis in public or who are cultivating cannabis other than in a private place. Members must rely on their observation of the circumstances and surrounding facts and pose questions to the person implicated. If there is a clear indication that the cannabis does not qualify as personal consumption (*inter alia* large quantities and an unsatisfactory explanation provided) or where a suspect had been dealing in cannabis,

normal police practice must be followed. This will include seizure of the cannabis and the registering of criminal charges and may or may not include arrest, based on the circumstances of a specific situation.

The President of the Republic of South Africa has indicated in various State of the Nation Addresses that the cannabis sector should be opened up and developed. During a Cannabis and Hemp Phakisa Action Lab meeting during the week of 19 to 23 June 2023, participants have collectively agreed on regulatory reforms required to better enable the development of the hemp and cannabis sector. The Phakisa resolved to reinforce instructions to the SAPS to respect the rights of cannabis cultivators and users by stopping the arrests of adults who are authorised by the Prince judgment to consume, possess or cultivate cannabis for their own use within a private space. Members must ensure that they respect the right to privacy and dignity of adult users who comply with the Prince judgement. In all matters involving cannabis, care should be taken to consider the least intrusive manner to bring suspected offenders before a court of law. Efforts must also be made to, where at all possible, liaise with the prosecuting authority before SAPS resort to arrest or seizure. It serves no purpose to arrest and seize if the prosecuting authority is not going to prosecute such matter. The only result of such uncoordinated action by the SAPS is to open its doors to civil litigation and a declaration of unconstitutionality of the powers that the SAPS relied on.

#### Possession and/ or use of cannabis by a child

Subsequent to the Prince judgment discussed above, the Constitutional Court considered the possession and/ or use of cannabis by children in ***Centre for Child Law v Director of Public Prosecutions, Johannesburg and others [2022] ZACC 35***. The Court found section 4(b) of the Act to be inconsistent with the Constitution and invalid to the extent that it criminalises possession and/ or use of cannabis by a child.

The operation of the order of invalidity was suspended for a period of 24 months from the date of the judgment on 29 September 2022.

During the period of suspension, no child may be arrested and/ or prosecuted and/ or diverted for contravening section 4(b) of the Act insofar as it criminalises the use and/ or possession of cannabis by a child. A child apprehended for the use and/ or possession of cannabis may however be referred to civil processes, including those found in the Children's Act No. 38 of 2005 and the Prevention of and Treatment for Substance Abuse Act No. 70 of 2008.

The Court stressed that the case does not concern the legalisation and condonation of the use and/ or possession of cannabis by a child. It is merely concerned with the repercussions of such use and/ or possession by a child. In other words, the effect of the judgment is not that children are now allowed to use and/ or possess cannabis, but merely that they can no longer be prosecuted for such use and/ or possession as such conduct by a child is now decriminalised.

## DEALING IN DRUGS

The unlawful selling of or dealing in drugs is regulated by section 5 of this Act. Section 5 - provides the following:

*“No person shall deal in -*

- (a) any dependence-producing substance; or*
- (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, without a lawful cause. The exceptions stated in section 4 are also applicable to this section, except with regard to the acquiring of drugs by patients from medical practitioners and the lawful possession of drugs”.*

Schedule 2 of the Act was amended (with effect from 28 March 2014 in Gazette No. 37495) to include new chemical compounds (**so-called designer drugs**) that share a degree of chemical similarity of pharmacological effect to other listed substances but which, in itself, were not covered by the Act. Schedule 2 of the Act contains a list of dependence-producing substances such as, *inter alia*, amphetamine (speed), cannabis (dagga), methaqualone (including mandrax), methamphetamine (tik), morphine and diacetylmorphine (heroin). Examples of some of the new designer drugs that are now included in Schedule 2 are cannabicyclohexanol, CP 47, 497-C8 HU-210 and JWH-073. These substances are not natural cannabis and do not contain the components of cannabis but have the same effect when ingested. The amendment was aimed at expanding the list of dependence-producing substances

contained in Schedule 2. The amendment did not amend/expand the normal policing powers of members of the SAPS and did not create new criminal offences in respect of drugs.

Nyaope / Whoonga: the Act has not been amended to address the street drug nyaope / whoonga *per se* since the main ingredients found in these drugs, namely cannabis and heroin, have already been listed as undesirable dependence – producing substances in the 2014 amendment of the Act. The amendment simply ensured the listing of more ingredients that may theoretically be found in Nyaope / Whoonga. Scheduled medicines that may be found in the drug can be addressed by the provisions of the Medicines and Related Substances Act No. 101 of 1965 that criminalise the unlawful selling, possession, manufacturing or supply of medicines and substances contained in the Schedules to that Act.

## **DEALING IN CANNABIS/ PRODUCTS CONTAINING CANNABIS**

There appears to be a misunderstanding of the law following the Prince judgement of the Constitutional Court. Medicines, medicinal products, as well as foodstuffs claiming to contain Cannabidiol (CBD) and Tetrahydro-Cannabinol (THC) are sold everywhere

It has to be noted that the Prince judgement did not legalise dealing in cannabis. THC is listed as a Schedule 6 substance under the Medicines and Related Substances Act No. 101 of 1965 and as a medicine, is subject to the regulatory framework of the said Act. Cannabis itself is listed as a Schedule 7 substance in terms of this Act which makes it subject to control by means of a permit issued by Director-General of Health, as a scheduled medicine.

Cannabis is also still listed in Part 111 of Schedule 2 of the (amended) Drugs and Drug Trafficking Act of 1992 which has the result that dealing in cannabis is prohibited and a criminal offence. Even CBD is, with a few exceptions, listed as a Schedule 4 substance in terms of

the Medicines and Related Substances Act. Schedule 4 substances may only be sold by pharmacists, medical practitioners and persons registered under the Health Professions Act No. 56 of 1974.

Outlets selling cannabis products have to comply with the Regulations relating to the labelling and advertising of foodstuffs, issued by the Minister of Health under section 15(1) of the Foodstuffs, Cosmetics and Disinfectants Act No. 54 of 1972 (GG No. 32975 of 1 March 2010, which came into operation on 1 March 2012). Such outlets are also subject to the Consumer Protection Act No. 68 of 2008 which, in terms of section 110 of that Act, criminalises the altering, obscuring, falsifying, removing or omission of a displayed price, labelling or trade description without authority.

As far as hemp (so-called low THC cannabis) is concerned, it needs to be noted that hemp (not traditional dagga) has been declared as an agricultural crop by means of amendments to regulations issued in terms of the Plant Improvement Act No. 53 of 1976 that allow certain limited activities relating to the importation, exportation, cultivation and selling of hemp. These activities are subject to the granting of a permit issued by the Department of Agriculture, Land Reform and Rural Development (the Registrar of Plant Improvement).

Extreme care must be taken when police operations are launched against entities in the cannabis sector. Although not fully legal yet, the Phakisa referred to supra is indicative of the opening up of this sector and a more cautious and consultative approach should be adopted in dealing with matters of this nature in the interim.

**POWER OF POLICE OFFICIALS - SECTION 11**

Section 11(1) provides that a police official may –

- “(a) if he or she has reasonable grounds to suspect that an offence under this Act has been or is about to be committed by means or in respect of any scheduled substance, drug or property, at any time –*
- (i) enter or board and search any premises, vehicle, vessel or aircraft on or in which any such substance, drug or property is suspected to be found;*
  - (ii) search any container or other thing in which any such substance, drug or property is suspected to be found;*
- (b) if he has reasonable grounds to suspect that any person has committed an offence under this Act by means or in respect of any scheduled substance, drug or property, search or cause to be searched any such person or anything in his possession or custody or under his control: Provided that a woman shall be searched by a woman only;*
- (c) if he has reasonable grounds to suspect that any article which has been or is being transmitted through the post contains any scheduled substance, drug or property by means or in respect of which an offence under this Act has been committed, notwithstanding anything to the contrary in any law contained, intercept or cause to be intercepted either during transit or otherwise any such article, and open and examine it in the presence of any suitable person;,*
- (d) question any person who in his opinion may be capable of furnishing any information as to any offence or alleged offence under this Act;*
- (e) subject to section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, require from any person who has in his or her possession or custody or under his or her control any register,*

*record or other document which in the opinion of the police official may have a bearing on any offence or alleged offence under this Act, to deliver to him or her then and there, or to submit to him or her at such time and place as may be determined by the police official, any such register, record or document;*

- (f) *examine any such register or document or make an extract therefrom or copy thereof, and require from any person an explanation of an entry in any such register, record or document;*
- (g) *seize anything which in his opinion is connected with, or may provide proof of, a contravention of a provision of this Act.”*

The Constitutional Court in ***Minister of Police and others v Kunjana [2016] ZACC 21***, declared sections 11(1)(a) and (g) of the Drugs and Drug Trafficking Act No. 140 of 1992 to be invalid. The judgment originated from two searches conducted by the DPCI at private dwellings in Cape Town. Information was received from an informant that large quantities of illegal drugs were kept at the premises and that the drugs would be moved during the course of the day. The searches were conducted without a warrant, pursuant to section 11 of the Drugs Act and a large quantity of drugs and cash were seized.

The Constitutional Court's main problem with section 11(1)(a) and (g) of the Act was that it allowed police officials to conduct warrantless searches, thereby bypassing the usual rigors of obtaining a warrant, even in cases where urgent police action is not required nor is there an indication that the delay in obtaining a warrant would result in an article or exhibits being lost or destroyed. The Court found that less restrictive measures, such as section 22 of the Criminal Procedure Act No. 51 of 1977 are available to the police to successfully address drug related offences.

Following the judgment, members can no longer rely on section 11(1)(a) and (g) of the Act to conduct drug-related operations without a warrant. Searched must be conducted in terms of the relevant provision of the Criminal Procedure Act. Search and seizure operations with a warrant are the rule, not the exception. The exception, confirmed by the Constitutional Court, is to be found in section 22 of the Criminal Procedure Act: where swift action by the police is required and they have no warrant, they can still rely on section 22 of the Criminal Procedure Act, i.e. if the person who is searched consents to the search and seizure or if the police official, on reasonable grounds believes that a warrant referred to in section 21(1)(a) of the Criminal Procedure Act, 1977 will be issued to him if he applies for such warrant and the delay in obtaining such warrant would defeat the object of the search.

## **FALSE INCRIMINATION - SECTION 13(a)**

This section provides as follows:

*“Any person who places any drug in the possession, or in or on the premises, vehicle, vessel or aircraft, of any other person with intent that the latter person be charged with an offence under this Act shall be guilty of an offence.”*

In terms of this section it is an offence to “**set up**” or “**frame**” a person by placing any prohibited drugs in his possession, premises or vehicles with the intent that the person concerned be charged with an offence under this Act.

## **REGULATIONS FOR SAFETY MEASURES AT PUBLIC SCHOOLS**

Police officials should note that the Minister of Education issued Regulations in Gazette 22754 (Notice 1040) of 12 October 2001 in terms of which all public schools have been declared drug free and dangerous object free zones. The Regulations were issued in terms of the South African Schools Act No. 84 of 1996.

Regulation 4(3) of the above Regulations authorises police officials to, without warrant,-

- (a) search any public school premises if he or she has a reasonable suspicion that a dangerous object (including explosives, firearms or gas weapons) or illegal drugs may be present in such premises in contravention of the Regulations;
- (b) search any person present on the public school premises; and
- (c) seize any dangerous object or illegal drugs present on public school premises, or on the person in contravention of these Regulations.

The Minister have also identified the devices to be used for drug testing and the procedure to be followed in using them (see Government Notice 1140 of 19 September 2008: *Gazette* No: 31417).

## **24. ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT NO. 25 OF 2002**

The Electronic Communications and Transactions Act No. 25 of 2002 previously provided for the facilitation and regulation of electronic communications and transactions such as electronic signatures as well as the creation of certain cybercrime offences. The partial entry into force of the Cybercrimes Act No. 19 of 2020 on 1 December 2020 has however repealed the cybercrime offences created by the Electronic Communications and Transactions Act No. 25 of 2002. A discussion of the Cybercrimes Act No. 19 of 2020 is included earlier in this booklet.

The Act should not be confused with the Regulation of Interception of Communications and Provision of Communication-related Information Act

No. 70 of 2002, which, *inter alia*, provides for the interception of communications. It must also not be confused with the Electronic Communications Act No. 36 of 2005 that promotes convergence in the broadcasting, broadcasting signal distribution and telecommunication sectors and provides the legal framework for convergence of these sectors. This Act for instance, contains specific provisions in terms of which no person may transmit any signal by radio or use radio apparatus except under, and in accordance with a licence. This Act also prohibits the possession of any radio apparatus except in accordance with a licence or an exemption in terms of the Act.

## ELECTRONIC SIGNATURES

The Act recognises the legality of so-called electronic signatures. Section 13 of the Act provides for two types of electronic signatures namely an “ordinary electronic signature” and an “advanced electronic signature” Electronic signatures fulfil the same function as conventional paper based signatures in that they serve as a means of achieving certainty about the identity and authority of a person. A signature can also be indicative of a person’s approval or disapproval of something.

An **ordinary electronic signature** is defined in the Act as “*data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature*”. An **advanced electronic signature** is defined as “*an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37*”. (The Accreditation Authority is the Director General of the Department of Communications which function is, as far as government departments are concerned, performed by the South African Post Office.) **An advanced electronic signature is therefore nothing else than an accredited electronic signature. Electronic signatures are admissible and can be utilised to “sign” an electronic document, but “where the signature of a person is required by law (e.g. an affidavit) and such law does not specify the type of signature, that requirement in relation to a data message is**

*met only if an advanced electronic signature is used” (Section 13(1) of the Act).*

## 25. EXPLOSIVES ACT NO. 26 OF 1956

The Explosives Act No. 26 of 1956 deals with the manufacture, storage, sale, transport, importation, exportation and the use of explosives.

### EXPLOSIVES

In terms of section 1 of the Act –

“explosives’ means -

- (r) gunpowder, nitro-glycerine, dynamite, guncotton, blasting powders, fulminate of mercury or of other metals, coloured fires, and every other substance whether similar to those herein mentioned or not, which is used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect;
- (s) Any fuse, rocket, detonator, cartridge, and every adaptation or preparation of an explosive;
- (t) Any other substance which the President may from time to time by proclamation in the *Gazette* declare to be an explosive”.

### WHAT IS PROHIBITED BY THE ACT?

The Act, *inter alia*, prohibits -

- the manufacture of explosives, subject to certain exceptions (sections 3 and 4);
- the storage or possession of explosives, subject to certain exceptions (sections 5 and 6);
- the dealing or selling of explosives without a licence by persons other than the manufacturer (section 7);

- the importation or exportation of explosives without a permit (section 8);
- the use of blasting materials (any explosive used for the purpose of blasting) without a permit (section 9).

## PERMITS

Permits for explosives are issued by the Chief Inspector of Explosives or inspectors designated by the Minister of Police.

## PETROL BOMBS

The possession of petrol bombs is prohibited by section 28 of the Act.

Section 28 provides as follows:

*“(1) Any person who is found to have in his possession or under his control any explosive under such circumstances as to give rise to a reasonable suspicion that he intended to use such explosive for the purpose of injuring any person or damaging any property, shall, unless he satisfies the court that he had no such intention as aforesaid, be guilty of an offence and liable on conviction to the penalties in paragraph (c) of subsection (1) of section 27.*

*(2) For the purposes of subsection (1) “explosive” includes*

*(a) a petrol bomb;*

*(b) any container, apparatus, instrument or article which -*

*(i) contains any inflammable substance and can be used, or can be adapted so that it can be used, to cause an explosion or a fire; or*

*(ii) was made, or can be adapted, to cause, in combination with or by means of any inflammable substance, an explosion or a fire”.*

## **BOMB THREATS**

Persons who make false bomb threats contravene section 27(1A) of the Act.

Section 27(1A) provides as follows:

*“(1A) Any person who in any manner –*

- (a) threatens, or falsely alleges, knowing it to be false, that any other person intends to cause an explosion whereby life or property is or may be endangered or in order to intimidate any person;*
- (b) communicates false information, knowing it to be false, regarding any explosion or alleged explosion or any attempt or alleged attempt thereto, shall be guilty of an offence and liable on conviction to imprisonment without the option of a fine for a period of not less than three years and not more than fifteen years”.*

## **CAUSING AN EXPLOSION**

The causing of an explosion is an offence. Persons who cause an explosion whereby life or property is endangered commit an offence in terms of section 27 of the Act.

## **FIREWORKS**

Fireworks are regulated by the Regulations issued in terms of the Explosives Act. The applicable regulations are regulations 9.2, 9.11.1 to - 9.19, 10.34, 10.35, 10.36, 10.37, 10.38 and 10.39. These regulations provide as follows:

**9.2** *No person, other than the manufacturer, shall sell or deal in blasting materials and fireworks unless he is in possession of a licence issued by an inspector, and except in accordance with the conditions of that licence.*

**9.11.1** *Fireworks.- All fireworks manufactured in the Republic or imported into, or which are offered for sale within the Republic shall be marked, labelled and packed in accordance with the provisions of Chapter 3 of these regulations and any person found in possession of fireworks not so marked and labelled shall be deemed to be in possession of "unauthorised explosives" and guilty of an offence.*

**9.11.2** *Fireworks shall be packed by the manufacturer or importer in suitable cartons which shall be sealed ready for sale to the public, before dispatch to a dealer.*

**9.12.1** *Premises in which fireworks are handled preferably should have at least two exits. Where any premises have only one exit the fireworks shall be kept at the rear (relative to the exit) of the premises.*

**9.12.2** *The doors to the exits shall be kept unlocked and unbolted during trading hours and a clear passage shall exist between the counters holding the fireworks and the exits and no obstacles shall be placed in these passages.*

**9.12.3** *Fireworks shall not be displayed in any window or any other place where such fireworks can be interfered with by the public.*

**9.13.1** *Every retail dealer shall have affixed -*

- (a) to the outside of his premises in a prominent position adjacent to every entrance, notices reading "Dealer in Fireworks" or "Handelaar in Vuurwerke"; and*
- (b) in prominent positions inside the premises, "No Smoking" signs in both official languages.*

**9.13.2** *These notices shall have red letters not less than 100 millimetres high on a white background.*

- 9.14.1** *Every dealer and every person employed in or about the premises shall take all due precautions for the prevention of accidents by fire and for preventing unauthorised persons having access to the fireworks and shall abstain from any act whatsoever which tends to cause fire. Goods of a dangerous nature such as inflammable liquids, acids, alkalies and the like shall not be kept on the same premises together with fireworks and safety matches, and Bengal matches shall be kept at least 5 metres away from the fireworks.*
- 9.14.2** *No person shall smoke in, or take a naked light or fire into, premises where fireworks are kept, stored or being handled, nor shall any person be allowed to do so.*
- 9.14.3** *Every person on such premises shall abstain from any act whatsoever which tends to cause fire.*
- 9.14.4** *Any person on such premises who fails to comply with a request made by the licensee or his employees in the interests of safety, shall be guilty of an offence.*
- 9.15.1** *A dealer in fireworks when purchasing or obtaining fireworks shall demand from the seller or supplier a properly executed, signed and dated invoice which he shall retain for a period of at least two years for production on demand of an inspector.*
- 9.15.2** *A manufacturer or wholesale dealer shall furnish a properly executed, signed and dated invoice with each sale or supply of fireworks.*
- 9.16** *A wholesale dealer in fireworks shall at no time have on his premises more than 1 000 kilograms gross mass of fireworks, contained in the original inner packings as received from the manufacturer or other supply magazine.*
- 9.17.1** *A manufacturer or wholesale dealer shall supply fireworks only to a dealer who is in possession of a valid licence issued in terms of these regulations, and the number of such licence shall be quoted on the invoice.*
- 9.17.2** *The manufacturer or wholesale dealer shall keep a register in which full particulars of each transaction and the aforementioned licence*

*number shall be recorded. This register shall be kept up to date and be available for inspection at any time and shall not be destroyed until after the lapse of two years from the date of the last entry in it.*

**9.18** *A retail dealer in fireworks -*

- (a) may keep on his premises not exceeding 500 kilograms gross mass of fireworks, provided the fireworks, contained in their inner or outer packings, are kept on shelves or other fittings separated from goods of an inflammable or combustible nature;*
- (b) shall not interfere with the inner packing of the fireworks, or allow or permit it to be interfered with;*
- (c) shall supply fireworks to the public only in the sealed inner packing as received from the manufacturer or wholesale dealer, provided that the packages are still in good condition;*
- (d) shall not sell or allow or permit to be sold any firework to a child under the apparent age of 16 years;*
- (e) shall furnish each employee engaged in selling fireworks with a copy of the regulations of part "Fireworks" of this chapter and of the conditions attaching to his licence to deal.*

**9.19** *No person shall allow or permit any children under the age of 16 years to handle or use fireworks except under the supervision of an adult person. USE OR EXPLODING OF FIREWORKS 10.34 It shall be unlawful for any person to use or explode any firework –*

- (a) within 500 metres of any explosives magazine, explosives factory, petroleum depot, or gasometer;*
- (b) in any building or on any public thoroughfare; or*
- (c) on any public place or resort, except with the prior written permission of the local authority.*

**10.35.1** *No person shall operate a public display of fireworks on any premises without the written permission of the Chief Inspector of Explosives.*

**10.35.2** *Such permission shall stipulate the conditions to be complied with and noncompliance with any of these conditions shall constitute an offence under this regulation.*

10.36 *Application for permission to operate a public display of fireworks shall be made in writing and shall set forth –*

- (a) *the name of the person or organisation sponsoring the display together with the names of the persons actually in charge of the firing of the display who shall be at least 18 years of age and competent for the work;*
- (b) *the date and time of day at which the display is to be held;*
- (c) *the exact location planned for the display;*
- (d) *a description setting forth the age and qualifications of the persons who are to do the actual discharging of the fireworks;*
- (e) *the numbers and kinds of fireworks to be discharged and the value of the display;*
- (f) *the manner and place of storage of such fireworks prior to the display; and*
- (g) *a diagram of the grounds on which the display is to be held showing -*
  - (i) *the point at which the fireworks are to be discharged, which shall be at least 100 metres from the nearest building, road or railway, and at least 20 metres from the nearest telephone, telegraph or powerline, tree or other overhead obstruction;*
  - (ii) *the direction in which aerial fireworks, if any, are to be fired;*
  - (ii) *the area to be kept clear of persons which shall extend at least 50 metres from the front and to the sides of the point at which the fireworks are to be discharged;*
  - (iii) *the area to be kept clear on which falling residue from aerial fireworks is expected to drop, which shall extend for at least 100 metres to the rear of the firing point; and*
  - (iv) *the location of all buildings and roads within 200 metres of the firing site and of all trees, telegraph or telephone lines or other overhead obstructions at or adjacent to the firing site.*

10.37 *At a public display of fireworks it shall be an offence -*

- (a) *for any person wilfully to enter on or remain in that area reserved for receiving falling residue from aerial fireworks; and*
- (b) *for any unauthorised person wilfully to proceed beyond the area demarcated by the organisers of the display for spectators.*

**USE OF OTHER EXPLOSIVES**

10.38 *Any explosives for the use of which provision is not made in the preceding regulations of this Chapter, shall be used only in such manner and under such conditions as may be prescribed, in writing, by an inspector.*

**PENALTY**

**10.39** *Any person who by any act or omission commits a breach of any of the regulations of this Chapter, shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment, and the explosive, if any, in respect of which the contravention or noncompliance has taken place, may be confiscated”.*

The use of fireworks can also be regulated by means of specific by-laws which have been issued by local authorities and/or by means of noise pollution regulations issued by the various local authorities.

## **FUTURE POSITION**

The Act will in future be replaced by the Explosives Act No. 15 of 2003. The 2003 Act was not yet in operation during the compilation of this booklet.

## **26. EXTENSION OF SECURITY OF TENURE ACT NO. 62 OF 1997, PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT NO. 19 OF 1998 AND TRESPASS ACT NO. 6 OF 1959**

### **INTRODUCTION**

There are a variety of legal mechanisms available to deal with illegal occupiers of land and/or premises. Police officials are sometimes confused as to what their functions and responsibilities are and for this reason a circular by the Provincial Commissioner of the Free State Province, dated 2015-01-12 is inserted here to clarify the legal position. The rules set out in the circular remain the same, irrespective of whether a member performs his or her powers in the Free State or in any other province. .

## **“ILLEGAL OCCUPIERS OF LAND AND TRESPASSING: OBLIGATION OF LAND OWNERS AND THE ROLE OF THE SOUTH AFRICAN POLICE SERVICE”**

1. *The purpose of this letter is to explain to members when trespassing cases can be registered against threatening illegal occupants, as well as the difference between the application of the two pieces of legislation which currently regulate the eviction of occupiers of land and/or premises, namely:*
  - *The Extension of Security of Tenure Act No. 62 of 1997 (ESTA), and*
  - *The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (the PIE Act).*
  
2. **Registering of Trespassing Cases against Threatening Illegal Occupants**

*Members are often approached by land/property owners who want to open a case of trespassing against a person who has erected a structure on his or land or who refuses to vacate structures on the land/premises. In these instances, one of the two abovementioned pieces of legislation will be applicable, as explained in this letter.*

*If, however, a person/persons enter(s) upon land or a premises without the permission of the owner/person in charge and without any lawful right to be on such land or such premises, the owner or person in charge may lay a charge of trespassing against such person/persons if he or she has informed them to leave the premises and they refused.*

*If it is clear to the land owner or owner of the premises in question, that the persons who are trespassing on the land or premises, are doing so with the intention to erect structures which can be*

*used for accommodation (shacks, etc.), he or she may still lay a charge at the police for trespassing if such structures have not been erected yet.*

*The SAPS may not refuse to register a case of trespassing when it is clear that there is no “occupation” yet on the land or premises. Even if the perpetrators are still in the process of erecting shacks or other structures, a case of trespassing can still be opened.*

*Once a structure has been erected and is ready for occupation, then the owner of the land/premises will have to approach the court to apply for a court order in terms of the existing legislation, to evict the occupants. (See also the court judgement below).*

### **3. Extension of Security of Tenure Act No. 62 of 1997 (ESTA)**

*An “occupier” for the purposes of ESTA, is a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, excluding a person using the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land for himself or herself and only employs a member/s of his or her family.*

*Section 4 provides that this Act applies to all land other than land in a township established as such in terms of any law, but including land within such township which has been designated for agricultural purposes by law or which has been approved in respect of a person who was an occupier immediately before the establishment of the township.*

#### **Right of Residence of an Occupier and Termination of Consent to Reside on Land:**

*Section 3 states that consent to an occupier to reside on or use land, shall, only be terminated or withdrawn in accordance with section 8.*

Section 8 provides that an occupier's **right of residence may be terminated on any lawful ground**, provided that such termination is just and equitable, having regard to relevant factors like the fairness of a provision in an agreement on which the owner relies, the fairness of the procedure followed by the owner, etc.

Section 8(2) states that the right of residence of an occupier **who is an employee and whose right of residence arises solely from an employment agreement**, may be **terminated** if the occupier **resigns from employment or is dismissed** in terms of the Labour Relations Act.

For the purposes of civil proceedings in terms of this Act, a person who has **continuously and openly resided on land for a period of one year, shall be presumed to have consent** unless the contrary is proved, and, a person who has **continuously and openly resided on land for a period of three years, shall be deemed to have done so with the knowledge of the owner** or person in charge of land (section 3), excluding land held by the State.

The right of residence of an occupier who has **resided** on the land in question or any other land belonging to the owner, **for 10 years and has reached the age of 60 years**, or is an employee or former employee of the owner or person in charge, and is **unable to provide labour due to ill health**, may **not be terminated unless the occupier has committed a breach** contemplated in section 10(1)(a), (b) or (c) (damage to property, intimidation of other occupiers, etc.).

On the death of such an occupier, the owner or person in charge of the land, must give 12 months' written notice to the spouse or dependant of such an occupier, to leave the land, unless such spouse or dependant has committed a breach contemplated in section 10(1).

It is clear that this Act **mainly applies to land in rural areas and agricultural land, (farms, etc.)**. In most instances, occupiers in

terms of this Act, are **employees or former employees of a land owner, and their spouses and dependants**, who have established a right of occupation in terms of the Act.

### **Rights and Duties of an Occupier:**

In terms of section 6, an occupier shall have the right to reside on land and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.

These rights include the right to security of tenure (occupancy) and to **receive bona fide visitors at reasonable times** for reasonable periods, subject to reasonable conditions by the owner of the land to protect property and prevent disruption of work on the land.

An occupier shall also have the **right to bury a deceased member of his or her family** who, at the time of the person's death, was residing on the land on which the occupier is residing.

An occupier may not unlawfully harm any other person occupying the land, cause material damage to the property of the owner, threaten or intimidate other lawful occupiers or assist unauthorised persons to establish new dwellings on the land in question.

Reasonable **visitation of family graves** on the land of an owner, must be allowed and family members of an occupier have the right to bury such occupier on the land on which he or she was residing at the time of his or her death.

Members should **take note of these rights of occupiers in order to be able to advise a land owner** that, for instance, the visitation of family graves will not amount to trespassing or another offence, unless the persons visiting the graves also commit other unlawful acts, for instance entering the buildings of the land owner without consent, damaging property, etc.

### **Eviction of Occupiers:**

Section 9(1) determines that an occupier **may be evicted only in terms of an order of court issued under this Act**. In terms of section 9(2), such a court order may be issued if –

- (a) the occupier's right of residence has been terminated in terms of section 8;
- (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an eviction order in terms of section 10 or 11 have been complied with; and
- (d) the owner or person in charge has, after the termination of the right of residence, given the occupier, the municipality in whose jurisdiction the land is situated and the head of the provincial Department of Land Affairs, at least two calendar months' written notice of the intention to obtain an order for eviction.

Where eviction orders are granted, the **court shall determine a date on which the occupier shall vacate the land and a date on which the eviction order may be carried out** if the occupier has not vacated the land on such determined date.

In urgent cases, the land owner or person in charge may make an **urgent application to court for the removal of an occupier** pending the outcome of the proceedings for a final order, if, for instance, there is a real and imminent danger of substantial injury or damage to a person or property if the occupier is not immediately removed or if the owner will most likely suffer hardship that exceeds the hardship to the occupier, etc. (section 15).

In terms of section 14, an occupier who has been evicted contrary to the provisions of this Act, may approach the court for an order for restoration residence, payment of damages, repair or replacement of structures, etc.

### **Role of the South African Police Service:**

When members receive complaints from either land owners (or persons in charge of land), or occupiers, in terms of the ESTA, they should be wary not to become involved in negotiations between the land owner and occupier which may create certain expectations that the SAPS have any powers which they do not have in terms of this Act.

**Members may not assist land owners to “evict” or remove so-called “illegal occupiers” or employees or family members of employees, from the land of a land owner. The SAPS only have a mandate to prevent and investigate crime and to maintain law and order.**

**The land owner must be informed of the provisions of the Act if he or she approaches the SAPS to request the removal of an occupier/employee, etc. who is residing on his land. Even if the right of residence of such person has been terminated, according to the land owner, he or she cannot approach the SAPS to lay a charge of “trespassing”. The land owner must still approach a court for an order of eviction.**

**If an occupier commits an offence on the land of the complainant, or against the complainant or his or her family, for instance damage to property, assault, theft, etc., members must investigate such complaints and register the relevant criminal charges against the occupier in question. The occupier may not be removed from the land in question, unless it is as a result of a lawful arrest for an offence that warrants his or her arrest.**

### **Offences:**

Section 23(1) determines that it is an **offence to evict an occupier, except on the authority of an order of a competent court.** A case may be registered against a land owner who is alleged to have contravened section 23(1), but due to the fact that it must be

**established through investigation whether the complainant is indeed an “occupier” as required for the purposes of this Act, or whether the land owner has indeed evicted the person without a court order, no arrest should be effected against the land owner in question, unless exceptional circumstances exists (for instance imminent threat of assault of the occupier).**

#### **4. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998**

*The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE Act), provides for procedures for the eviction of unlawful occupiers on all land, in urban and rural areas, whether owned by the State or a private person or institution.*

*An “unlawful occupier” for the purposes of this Act, is a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding an occupier for the purposes of ESTA.*

#### **Eviction of Unlawful Occupiers:**

*In terms of section 8(1), no person may evict an unlawful occupier except on the authority of an order of a competent court.*

*Section 4 sets out the procedure for application for a court order for eviction of unlawful occupiers, including the service of notice upon unlawful occupiers, which notice must state that proceedings have been instituted for an order for eviction and indicate the hearing date and the grounds for the proposed eviction.*

*The court must grant an order for eviction if it is satisfied that no valid defence has been raised by the unlawful occupier and determine in such order the date on which the eviction order may be carried out if the unlawful occupier has not vacated the land on a date*

determined in the court order. The court may order the demolition or destruction of buildings or structures that were occupied by such person.

**The eviction order must be executed by the sheriff and the court may authorise any person to assist the sheriff** to carry out the eviction of the unlawful occupier(s), and the demolition or removal of structures.

**Urgent proceedings** for the eviction of unlawful occupiers may be instituted and the court will grant an interim eviction order, pending the outcome of proceedings for a final order, if there is an **imminent danger** of substantial **injury or damage to a person or property** by the unlawful occupier(s) or the likely hardship to the land owner or other person exceeds the likely hardship to the unlawful occupier(s) if the urgent order is not granted.

#### **Period of Occupation by an Unlawful Occupier:**

If an unlawful occupier has occupied the land in question for **less than six (6) months** at the time when proceedings for an eviction order are initiated, the **court does not have to consider whether land has been made available** or can reasonably be made available by a municipality or other organ of state or another land owner, **for the relocation** of the unlawful occupier. When an unlawful occupier **has occupied land for more than six (months), the court must consider alternative accommodation** for relocation of the unlawful occupier (except when land is sold in execution pursuant to a mortgage).

In all instances, the court must consider other relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by woman.

#### **Offences:**

Apart from the offence mentioned above (evicting an unlawful occupier without a court order), the Act also creates the following offences:

- Section 3(1) determines that no person may receive or solicit payment of money or any other consideration for arranging or organising or permitting a person to occupy land without the consent of the land owner or person in charge of the land. Contravention of this section is an offence in terms of section 3(3). (Note that a charge of fraud or corruption, depending on the circumstances, may also be opened together with this offence).
- Section 8(2) states that no person may wilfully obstruct or interfere with an official in the employ of the State in the performance of his or her duties in terms of this Act. This will include the sheriff (and his or her appointed assistants) who executes the eviction order, and, where a court order instructs the SAPS to assist with the eviction, it will include police officials who act in terms of the court order.

*Role of the SAPS in relation to the PIE Act:*

When a complaint is laid by a land owner or person in charge of land that persons are unlawfully occupying the land in question, a **police official must determine whether any structures have been erected which are occupied or meant for occupation** by the alleged unlawful occupiers.

If structures have been erected and the provisions of ESTA is not applicable (in other words, the alleged perpetrators are not employees or other persons who has a right of occupation on the land), the **complainant must be informed of the provisions of the PIE Act**, namely that he or she must **approach a court for an eviction order** for the unlawful occupiers. This also applies to land owned by the State.

*When the alleged perpetrators have entered upon land without permission, but no structures have been erected yet for occupation, a case of trespassing can be registered against the perpetrators, even if they are still in the process of erecting structures.*

*It is clear that police officials should act immediately when a complaint is made that persons have entered upon land with the alleged intention of erecting structures to occupy the land in question. If time is wasted attending to the scene, it will allow the perpetrators time erect structures, in which instance it will not amount to mere trespassing any longer.*

*In Fisher and Another v Persons Unknown 2014(3) SA 129 (Western Cape High Court), the municipality demolished a number of informal structures that had been erected over the previous 2 days on their land, without first obtaining a court order under the PIE Act.*

*The municipality claimed that they were not bound to the provisions of PIE because it only applied to persons who occupied land in “homes”, and that the structures concerned could not be termed “homes” because they had not been on the land for a sufficient period of time and were vacant in the sense that they were not furnished and no persons were present at the time of demolition.*

*The court held that: the question was not whether the temporary structures were homes, but rather whether those structures were occupied at the time when they were demolished. The court stated that the PIE Act prevents that a person is deprived of the occupation of a building or structure or land, where such occupation had occurred without the consent of the owner or person in charge thereof. In this case, it was common cause that the occupiers had no consent to be on the landowner’s property, and the only question was then whether the occupiers were deprived of*

occupation of the temporary structures or occupation of the land on which it was erected.

All the structures in question were completed and the court stated that, the fact that a particular structure was vacant/empty at the time it was demolished, does not mean it was unoccupied: the occupant may have been at work, etc. **The court concluded that, if the structure was complete, the invasion of the piece of land in question had taken place, occupation had occurred and the provisions of PIE were applicable.**

The court also noted that, in this case, it was **not so much the period of occupation of the property (two days), which rendered PIE applicable, but the intention behind the erection of the structures.** Even the most humble structure, erected with basic materials, can be called a home by persons with limited means.

## 5. Conclusion

In light of the above, the following **basic guidelines** can be highlighted, but each case has to be assessed on its own merits:

- When a complainant lays a complaint of trespassing, the member must first attempt to determine whether ESTA or PIE Act is relevant, namely whether the complaint relates to a person who is occupying the land/premises in question and whether such person has/had a right of occupation, whether he or she is an employee of the land owner, etc.;
- If it is clear that the alleged perpetrator is **either an “occupant”** for the purposes of ESTA or an **“illegal occupier”** for the purposes of the **PIE Act, the complainant should be informed that he or she is required to apply for an eviction order** in terms of the relevant Act and that a charge of trespassing cannot be registered;

- *The complainant should also be **advised that he or she may not remove/demolish any structures** of an occupier and that the **SAPS may not assist with removing any such structures**;*
- *If the complainant informs a member that a **person have entered his or her land/premises without consent, a case of trespassing should be registered**;*
- *If the complainant informs a member that **persons who have entered his or her land/premises without consent, are threatening to erect structures or they are in the process of erecting structures for occupation, the member should act immediately to obtain assistance from other members and go to the scene as soon possible in order to assess the situation and determine whether there is a threat of unlawful occupation**;*
- *If **persons are found on the land/premises who are in the process of erecting structures or who are threatening to erect structures, they should be informed that they are trespassing** and that they will be arrested if they do not leave the land/premises immediately;*
- *If the **trespassers refuse to leave the land/premises, they may be arrested in order to stop them from continuing to commit the offence** of trespassing. (This will also to prevent illegal occupation of the land);*
- *If the trespassers have **completed structures on the land/premises of the complainant when the SAPS arrive at the scene, the complainant will have to apply for an eviction order in terms of the PIE Act, in light of the provisions of the Fisher-judgement referred to above**".*

National Instruction 7 of 2017 Unlawful occupation of land and evictions, is relevant and an extract from the instruction is included hereunder.

**“4. Practical guidance for operational commanders**

- (1) *Station Commanders, as well as operational commanders, must ensure that members are conversant with the provisions of legislation in regard to trespassing and unlawful occupation of property, including the rights of all involved parties, in order to ensure that members follow the correct procedures when confronted with situations of such nature.*
- (2) *A police member will most likely come into contact with the above mentioned issues, if –*
  - (a) *A property owner lodges a complaint at the Community Service Centre of the police station that his or her land was illegally trespassed on, occupied or invaded by a person or persons; or*
  - (b) *An occupier complains of an unlawful eviction.*
- (3) *Whenever an owner or a person in charge of vacant land, place, premises or property approaches the Service to lay a charge of trespass in terms of the Trespass Act, the members must ascertain whether the rights of the person against whom the charge is laid are not protected by other legislation, e.g. the Extension of Security Tenure Act, 1997 (ESTA), the Land Reform (Labour Tenants) Act, 1996 (LRA) or Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (PIEA).*
- (4) *If it is clear that the person against whom the complaint lodged does not reside on the land or the property and that the person is not an occupier, the police member attending to the complaint*

*must deal with the matter according to the normal procedures for trespassing.*

- (5) *However, when the person “trespassing” is an occupier, that person enjoys the protection of the LTA, ESTA or PIEA and the police member should immediately advise the complainant to obtain legal advice or consult an attorney in order to obtain an eviction order in terms of the applicable legislation. No person may evict an unlawful occupier except on the authority of an eviction order of a competent court.*
- (6) *Evictions outside the applicable legislation are illegal and the legislation provide for criminal offences – section 8(1) of PIEA and section 23(1) of ESTA provide that eviction without a court order is an offence.*

## **5. Responsibilities of members of the Service**

- (1) *Only a sheriff and persons authorised by a court to assist the sheriff may carry out an eviction order, provided that the sheriff must at all times be present during such eviction or actions authorised by the court (e.g. demolition and removal of buildings or structures), subject to the conditions as determined by the sheriff.*
- (2) *In situations where there is sufficient information to indicate that a sheriff and his or her employees may be exposed to injury, death or damage to property, members of the Service will be requested to assist the sheriff to enforce law and order, as well as protection service.*
- (3) *The sheriff may request assistance from the Service with the execution of a court order where the sheriff expects resistance. In practice, the following process should be followed:*

- (a) *The sheriff applies in writing to the Station Commander. The applications must –*
- (i) provide the date of execution of the court order;*
  - (ii) be accompanied by a copy of the court order;*
  - (iii) provide a brief description of the nature and extent of the assistance; and*
  - (iv) State reasons why assistance is needed and in the case of expected resistance, information available to the sheriff.*
- (b) *The Station Commander must consider the application and decide whether assistance may be given in the light of –*
- (i) the necessity demonstrated by the sheriff;*
  - (ii) the available resources; and*
  - (iii) threat assessment reports from Crime Intelligence; and*
  - (iv) Weather conditions, such as rain, extreme cold, etc. (the sheriff must be informed that should adverse weather conditions exist on the particular day that assistance is requires, he or she should wait for conditions to improve before assistance can be provided).*
- (c) *Where assistance is refused, full reasons must be provided and a copy of the refusal must be forwarded to the Office of the relevant Provincial Commissioner.*
- (d) *If the Station Commander is in doubt concerning the legal position of an application, he or she may obtain legal advice from the relevant Provincial Legal Services.*

- (4) Members of the Service may not participate in the eviction, but must render protection to the sheriff and his or her staff. A person, who wilfully obstructs or interferes with the duties of a sheriff or his or her assistants in the performance of their duties, is guilty of an offence. Where the sheriff and his or her staff exceeds his or her powers, assaults or otherwise act unlawful in the presence of members of the Service, he or she or the relevant member of his or her staff must be requested to refrain from such conduct or restrained (and a case be opened and investigated).
- (5) The Station Commander must ensure that a written operational plan is drafted by the officer responsible for the operation and that full and proper records are kept of the event. Even if it is not expected that the assistance may involve the management of crowds, the planning principles contained in National Instruction 4 of 2024 with regards to crowd management, may be of some assistance in the planning phase.
- (6) In all cases where assistance is to be rendered, consideration must be given to request assistance from the relevant Public Order Policing Unit.

## **6. Dealing with land invasions**

- (1) If a member of the Service is notified of an invasion of land on a large scale, it is important to act within the shortest possible time. Land invasions are usually associated with the occupation of land by force or threat of force. Keeping in mind that if a person in the process of erecting a building or structure and not inhabiting the building or structure he or she is not residing on such land and therefore a case of trespassing may be made out.

- (2) *The Station Commander must inform the Provincial Head: Operational Response Services and the Provincial Commissioner immediately if he or she becomes aware of an intention to invade land or of a land invasion, to immediately activate or place the relevant Provincial Public Order Policing Unit or National Intervention Unit on standby depending on the severity of the incident.*
- (3) *If a complainant informs a member that a person or persons have entered his or her land or premises without consent and are threatening to erect buildings or structures or they are in the process of erecting buildings or structures for habitation, the member must act immediately to ensure that the complaint is attended to and the situation on the land (at the crime scene) is assessed to determine if there is a threat of unlawful occupation. If persons are found on the land or premises that are in the process of erecting buildings or structures for habitation or threatening to erect such buildings or structures, the member at the scene must inform them that they are trespassing and that they will be arrested if they do not leave the land or premises immediately. If the trespassers refuse to leave the land or premises they must be arrested in order to stop them from continuing to commit the offence of trespassing. If trespassers have erected the building or structure on land and is inhabiting it (the person has factual control of the building or structure), the complainant must be informed that he or she will have to apply for an eviction order in terms of PIEA.*
- (4) *If a specific person can be identified who is planning or instigating persons to invade a specific land an interdict may be obtained by the owner or occupier to prevent the invasion of the land. The Service can only act against a respondent who is*

*committing contempt of court and for this purpose the Service would require statements indicating that the respondent was in breach of the conditions as set out in the interdict. However, a warrant of arrest is required before such person may be arrested.*

- (5) *In addition to the above, if information exists under oath that a person or persons are conspiring to invade land such person or persons may be arrested in terms of section 18(2)(a) of the Riotous Assemblies Act, 1956 (Act No. 17 of 1956).*

## **7. Responsibilities during an unlawful land invasion**

*Members must take note of the responsibilities of the following role-players:*

- (1) *Owner of land*
- (a) *Both state-owner land and privately owned land can be invaded unlawfully.*
  - (b) *State-owned land is land that is under the control of the Departments of Rural Development and Land Reform or Public Works, provincial government or the municipality.*
  - (c) *Depending on available resources, the state has a constitutional duty to ensure that all citizens can enjoy their basic right to have access to land and housing. In special circumstances, such as large-scale invasions, the state has a similar duty to assist private landowners to protect their land.*
  - (d) *Where unlawful occupiers whose basic rights are not at risk need to be evicted, the government authority responsible for the state land concerned or the private*

*land owner must, without delay, approach the court for an eviction order in terms of PIEA.*

- (e) Individuals (including unlawful occupiers) who have no access to agricultural land can approach the Department of Land Affairs for assistance to find suitable agricultural land.*
  - (f) Individuals in need of housing can approach the local municipality or, if necessary, the provincial or national Department of Housing for assistance.*
- (2) Department of Rural Development and Land Reform*  
*The Department of Rural Development and Land Reform must –*
- (a) approach the court for an order to evict unlawful occupiers of state land under its control as long as the basic rights of the unlawful occupiers are not in question;*
  - (b) assist unlawful occupiers of any state or private land who need and have no agricultural land to obtain access to suitable agricultural land;*
  - (c) assist other government authorities to find suitable alternative land for the unlawful occupier in need of housing; and*
  - (d) if required and where special circumstances exist, assist private agricultural land owners whose land has been unlawfully invaded to relocate occupiers in need of agricultural land to alternative land.*
- (3) The Service*
- (a) Where a complaint is laid which seems to be related to land invasion, a member of the South African Police*

*Service on duty in the Community Service Centre must-*

- (i) advise the land owner to approach the court without delay for an eviction order in terms of the PIEA and inform the land owner that any delay may have an impact on the implementation of an eviction order – where private land has been unlawfully invaded and no special circumstances exist with regards to the vulnerability of the occupiers;*
  - (ii) advise the land owner to approach any office of the Department of Rural Development and Land Affairs for assistance – where private land has been unlawfully invaded and special circumstances exist regarding the vulnerability of the occupiers, e.g. a need for access to agricultural land exists; or*
  - (iii) advise the land owner to approach the area's local municipality or, if necessary, the provincial or national Department of Housing for assistance – where private land has been unlawfully invaded and special circumstances exist, e.g. a need for housing exists.*
- (b) The Service must investigate offences committed.*
  - (c) In all cases where members of the Service act during land invasions or illegal evictions, proper records must be kept for evidence purposes.*
  - (d) Even though the Service has a role to play in evictions, that role is limited to its mandate. It is clear that land invasions and evictions must be dealt with through proper court processes.*

- (e) *It is important to establish operational protocols to deal with requests for assistance, whether it is in the form of a criminal complaint by a property owner or an evictee or a request for assistance by the Sheriff.*
- (f) *If the circumstances are of such a nature that the incident results in public violence, the Provincial Head: Operational Response Services should be contacted to activate the responsible Public Order Unit, who are properly trained to deal with such incidents, to assist in dispersing disorderly crowds. If suspects are arrested in huge numbers proper record must be kept of the police official who arrested each suspect. The circumstances which resulted in the public violence must be clearly recorded. Each different offence will be dealt with and investigated according to its own criteria and requirements.”*

Section 8 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 provides as follows:

“8. Offences and private prosecutions -

- (1) No person may evict an unlawful occupier except on the authority of an order of a competent court.
  - (2) No person may wilfully obstruct or interfere with an official in the employ of the State or a mediator in the performance of his or her duties in terms of this Act.
- (3) Any person who contravenes a provision of subsection (1) or (2) is guilty of an offence and liable on conviction to a fine, or to imprisonment not exceeding two years, or to both such fine and such imprisonment.
  - (4) Any person whose rights or interests have been prejudiced by a contravention of subsection (1) has the right to institute a private prosecution of the alleged offender.

- (5) The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), apply to a private prosecution in terms of this Act: Provided that if -
- (a) the person prosecuting privately does so through a person entitled to practice as an advocate or an attorney in the Republic;
  - (b) the person prosecuting privately has given written notice to the public prosecutor with jurisdiction that he or she intends to do so; and
  - (c) the public prosecutor has not within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence, then—
    - (i) the person prosecuting privately need not produce a certificate issued by the Attorney-General stating that he or she has refused to prosecute the accused;
    - (ii) the person prosecuting privately need not provide security for such action;
    - (iii) the accused is entitled to an order for costs against the person prosecuting privately if -
      - (aa) the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal; and
      - (bb) the court finds that such prosecution was unfounded or vexatious; and
    - (iv) the Attorney-General is barred from prosecuting except with the leave of the court concerned".

## 27. EXTRADITION ACT NO. 67 OF 1962

### WHAT IS EXTRADITION?

Extradition in essence amounts to a request by one state to another state through the diplomatic channels for the delivery to it of an alleged criminal and the delivery of the person requested for the purpose of trial or sentencing in the requesting state.

In South Africa extradition is regulated by the provisions of the Extradition Act No. 67 of 1962. The procedures prescribed in the Act must be followed when South Africa receives a request from a foreign state for extradition, as well as, where the extradition of an individual is requested from South Africa to a foreign state.

## **WHICH ENTITIES DEAL WITH EXTRADITION?**

All requests for extradition to and from South Africa are administered by the Department of Justice and Constitutional Development, which will ensure that all relevant processes are followed.

Interpol NCB Pretoria is the only office within the SAPS that manages extradition processes to and from South Africa. All requests in this regard must be directed to this office. Within the SAPS, the Extradition Desk at the Interpol National Central Bureau is responsible for facilitating all requests for extradition. This desk, which can be contacted at (012) 309 3745 or 082 778 3640 must be approached if members encounter a fugitive from a foreign country, or where the extradition of a person is sought from another state.

If such a fugitive is located in the Republic, that person may be arrested in accordance with a warrant issued by a magistrate in terms of section 5 of the Act.

A fugitive may also be arrested without warrant in accordance with the provisions of section 40(1)(k) of the Criminal Procedure Act. If that person *“has been concerned in or against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition of fugitive offenders liable to be arrested or to be detained in custody in the Republic”*.

If a person has been arrested under the provisions of section 40(1)(k), the Extradition Desk at Interpol must be notified immediately as they will assist members further.

Under no circumstances may members effect the removal of a person **wanted** in a foreign state without the provisions of the Extradition Act being complied with as such conduct is unlawful.

If a person is sought in a foreign state, he or she cannot be removed from the Republic of South Africa other than in accordance with the Extradition Act. Members may not use the provisions of other legislation by, for example, deporting an individual in order to circumvent the requirements of the Extradition Act. Where an individual is illegally in the Republic and is at the same time sought in another country, the Extradition Desk at Interpol must be notified.

**Members may not remove a fugitive from the Republic even if he or she consented to be removed.** All such cases must be reported to the Extradition Desk of Interpol NCB Pretoria.

**Disguised extraditions: *Mohamed and Another v President of the RSA and Others* 2001 (7) BCLR 685 (CC):**

In this matter a Tanzanian national (Mohamed), who had been sought by the United States (US), as a suspect on capital charges arising from the bombing in 1998 of the US embassy in Dar es Salaam, was traced to Cape Town where he lived under an assumed name and with a false passport. South African immigration officials arrested him as an illegal immigrant and thereafter handed him to FBI agents for removal to the US. This was done without obtaining an assurance from the US government that the US would not impose or carry out the death penalty on Mohamed if convicted.

The Constitutional Court found that the handing over of Mohamed for removal to the US, as well as the subsequent removal were in breach of South Africa's (then) Aliens Control Act and infringed Mohamed's

constitutional rights. As to the validity of the deportation, the Court held that there was a **clear distinction between extradition and deportation**. Extradition involves three elements: acts of sovereignty on the part of two States, a request by one State to another State for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial or sentence in the territory of the requesting State. **Deportation**, on the other hand, **is a unilateral act** of the deporting State in order **to get rid of an undesired alien (illegal immigrant)**. The purpose of deportation is achieved when the immigrant leaves the deporting State's territory, the destination of the deportee is irrelevant to the purpose of deportation.

The Court held that the Constitution imposes an obligation on the South African government to protect the fundamental rights contained in the Bill of Rights. The Constitution not only enjoins the South African government to promote and protect these rights but also precludes it from imposing cruel, inhuman or degrading punishment. The Constitution also forbids it from knowingly participating, directly or indirectly, in any way in imposing or facilitating the imposition of cruel, human or degrading punishment. This includes the imposition of a sentence of death. Therefore, even if it was permissible to deport Mohamed to a destination to which he had consented the government would have been under a duty to secure an undertaking from the US that a sentence of death would not be imposed on him before permitting his removal to that country. Capital punishment is inconsistent with the values and provisions of the (interim) Constitution. For the South African government to cooperate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he has no connection other than that he was to be put on trial for his life there, is contrary to the underlying values of the South African Constitution in that it is inconsistent with the government's obligation to protect the right to life of everyone in South Africa. In this matter it had also not been established that Mohamed's "consent" to be delivered to the US constituted valid consent.

**Unlawful Removal:**

A State cannot exercise its powers in the territory of another State. The SAPS can therefore not, for instance, arrest a suspect in the territory of State Z to stand trial in South Africa.

In **S v Ebrahim 1991 (2) SA 553 (A)** the then Appellate Division of the Supreme Court held that a South African court has no competence to try a person unlawfully removed from another State (in this case Swaziland) by agents of the prosecuting state.

**Rendition:**

Rendition is a practice which involves the “*surrender*” or “*handing over*” of persons or property from one jurisdiction to another. South African law does not provide for rendition of suspects and/or illegal immigrants. Suspects or fugitives have to be addressed by means of extradition in terms of the Extradition Act and illegal immigrants have to be addressed by means of deportation in terms of the Immigration Act.

In recent years the concept of so-called “extraordinary or irregular renditions” has received negative comment from a human rights perspective. This controversial form of rendition, also known as “*torture by proxy*” often involves the transfer of terror suspects to countries where torture is not outlawed or where the laws on torture are weak. This practice, which is in conflict with international law and due process, **is not part of South African law.**

**On 11 April 2023 South Africa had extradition agreements with the following countries:**

- Botswana
- Lesotho
- Malawi

- Swaziland
- United States of America
- Canada
- Australia
- Israel
- Egypt
- China
- India
- Argentina
- United Arab Emirates
- Argentina

## **Treaties negotiated, but not yet signed:**

- Zambia (Extradition and MLA)
- Hungary (Extradition) (Covered under Council of Europe Convention on Extradition)
- Namibia (Extradition and MLA) (Covered by SADC Protocol on Extradition)
- Cuba (Extradition and MLA)
- United States of Mexico (Extradition and MLA)
- United Arab Emirates (Extradition and MLA)
- Belarus (Extradition and MLA)
- Vietnam (Extradition and MLA)

- Brazil (MLA)
- Taiwan (MLA)

## **Extradition and Mutual Legal Assistance Treaties signed but not yet ratified:**

- Republic of Korea
- Hong Kong
- Iran

## **Treaties where ratification was approved, but not in force yet:**

- Algeria
- Nigeria

**The Treaty with the Republic of China (Taiwan)**, signed on 30 December 1987, is deemed to be terminated in terms of the Memorandum of Understanding between the Government of the Republic of South Africa (RSA) and the Government of the People's Republic of China (PRC) on the Establishment of diplomatic relations between the RSA and the PRC.

## **South Africa has Mutual Legal Assistance in Criminal Matters Treaties with the following countries:**

- **Argentina** (Extradition and MLA) GG 40978, GeN 518, 14 Jul 2017
  - Ratified by Parliament on 29 August 2007

- Entered into force 16 October 2015
- **Canada**
  - Ratified by Parliament on 3 April 2001
  - Entered into force 5 May 2001
- **China**
  - Ratified by Parliament on 21 October 2003
  - Instruments of ratification exchanged on 18 October 2004
  - Entered into force on 17 November 2004
- **Egypt**
  - Ratified by Parliament on 11 November 2002
  - Entered into force on 16 September 2003
- **France**
  - Ratified by Parliament on 11 November 2002
  - Entered into force on 1 March 2004
  - Notice in *Gazette* 27371 of 18 March 2005
- **India**
  - Approval to ratify on 3 November 2004
  - Instruments of ratification exchanged on 6 December 2005
  - Entered into force on 6 December 2005
- **Lesotho**
  - Ratified by Parliament on 7 November 2001

- Entered into force on 23 December 2003
- **USA**
  - Ratified by Parliament on 9 November 2000
  - Entered into force on 25 June 2001

**The following Mutual Legal Assistance in Criminal Matters Treaties have not entered into force yet:**

- **Algeria**
- **Nigeria**

The Department is currently busy setting up **negotiations for the conclusion of extradition and mutual legal assistance treaties with various countries including:**

- Brazil
- Chile
- Ethiopia
- Pakistan
- Paraguay
- Peru
- Tunisia
- Uruguay
- Venezuela

South Africa has also designated **Ireland, Zimbabwe, Namibia** and the **United Kingdom** in terms of section 3(2) of the Extradition Act.

**South Africa's accession to the Council of Europe's Convention on Extradition entered into force on 13 May 2003.** A request was directed to the Council of Europe that South Africa accede to the Convention on Mutual Legal Assistance. The Council of Ministers approved that South Africa accede to the MLA Convention. South Africa must now indicate any possible reservations.

**In terms of the Extradition Act, any arrangement made with any foreign State which, by virtue of the provisions of the Extradition Acts, 1870 to 1906 of the Parliament of the United Kingdom** as applied in the Republic, was in force in respect of the Republic immediately prior to the date of commencement of the Act shall be deemed to be an agreement entered into and published on the said date by the President under the Act.

**SADC Protocols** on Extradition and Mutual Legal Assistance (MLA) in Criminal Matters

- This Protocol was signed by Summit on 3 October 2002 and ratified by Parliament on 14 April 2003. The Protocol on Extradition entered into force on 18 August 2006. The MLA Protocol still needs one ratification before it can enter into force (to be confirmed by SADC Secretariat).

South Africa's accession to the Council of Europe's Convention on Extradition entered into force on 13 May 2003.

In terms of the Extradition Act, any arrangement made with any foreign State which, by virtue of the provisions of the Extradition Acts, 1870 to 1906 of the Parliament of the United Kingdom as applied in the Republic, was in force in respect of the Republic immediately prior to the date of commencement of the Act shall be deemed to be an agreement entered into and published on the said date by the President under the Act.

SADC Protocols on Extradition and Mutual Legal Assistance (MLA) in Criminal Matters -

- The Protocols were signed by the SADC Summit on 3 October 2002 and ratified by Parliament on 14 April 2003. The Protocol on Mutual Legal Assistance entered into force on 1 March 2007. Both Protocols were published in *Gazette* 35368 on 25 May 2012.

## **28. FILMS AND PUBLICATIONS ACT NO. 65 OF 1996**

The Films and Publications Act No. 65 of 1996, contains important provisions to, *inter alia*, address films, games, publications and Internet content which contain sexual violence and violence against children, propaganda for war, incitement of imminent violence and advocacy of hatred based on identifiable group characteristics and that constitutes incitement to cause harm, bestiality and rape.

### **PORNOGRAPHY**

- As a general rule, the mere possession of pornography (excluding child pornography) is not an offence in terms of the Act. Distribution or broadcasting of certain films, games or publications may, however, constitute an offence in terms of the Act, e.g. if the film, game or publication has been classified as "XX" by a classification committee of the Film and Publication

Board or if a film, game or publication, classified as “X18”, is distributed or exhibited to a person under the age of 18.

- The Films and Publications Amendment Act No. 11 of 2019 that came into operation on 1 March 2022 creates various new offences, which include the following:

Section 18F, read with section 24E criminalises the distribution of private sexual photographs and films, through any medium, including the internet and social media, if such disclosure is made without the consent of the individual featured in the photograph or film and is made with the intention to cause harm to the individual concerned. Section 24E(2) makes provision for more severe sentences to be imposed upon conviction if the individual in such photographs or films is identified or identifiable

**Note:** Part 3A of the amended Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 (“SORMA”) has inserted provisions regarding the harmful disclosure of pornography involving an adult which are quite similar to the provisions in section 18F of the Films and Publications Act No. 65 of 1996.

**Section 24B of the Films and Publications Act No. 65 of 1996 which created prohibitions, offences and penalties in respect of child pornography and the sexual exploitation of children has been repealed.** The Cybercrimes Act No. 10 of 2020 inserted section 19A to the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007, which provides for an extensive number of offences relating to child pornography, including the creation, possession, distribution, viewing and selling of child pornography. The recruitment of a child to create pornography is an offence (section 19A(4)) as is the using of a child for purposes of creating any image or depiction of child pornography (section 20).

Any person who gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, for the using of a child for child pornography, will be guilty of the offence of benefiting from child pornography (sec 20(2)).

Section 20 of SORMA also provides for the offence of attending, viewing or participating in, a performance involving child pornography (section 20(3)) and the offences of recruiting a child for child pornography and recruiting a child for participating in a live performance involving child pornography (section 20(4)).

- In terms of section 18G, no person may create, produce or distribute in any medium, including the internet and social media, any film or photograph depicting sexual violence and violence against children.
- Section 18H prohibits the distribution through any medium, including the internet or social media, of any film, game or publication which amounts to propaganda for war, which incites imminent violence or advocates hate speech.
- Internet service providers are compelled to furnish the Films and Publication Board or a member of SAPS with information of the identity of the person who published the private sexual photograph or film or a film or photograph depicting sexual assault and violence against children.
- Failure by a person to immediately report his or her knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is vulnerable (which includes any child) to a police official constitutes an offence in terms of section 54(2)(a) of the Criminal Law (Sexual Offences and

Related Matters) Amendment Act No 32 of 2007. (In this regard, it must be noted that section 24B of the Films and Publications Act which previous criminalised matters relating to child pornography, has been repealed by the Cybercrimes Act No. 19 of 2020.)

- Internet service providers that know that their services are being used for the hosting or distribution of child pornography, propaganda for war, incitement of imminent violence or advocating hatred based on an identifiable group characteristic and that constitutes incitement to cause harm and fail to take reasonable steps to prevent access to the child pornography, to report the presence of such content to a police official of the SAPS or to take all reasonable steps to preserve such evidence for purposes of investigation and prosecution, commit an offence in terms of section 27A(2) and (4) of the Act.

**Note:** Following the enactment of the Sexual Offences and Related Matters Amendment Act No. 13 of 2021 on 31 July 2022, convictions of offences which relate to child pornography in terms of the Films and Publications Act No. 65 of 1996 must be recorded in the national register for Sex Offenders.

## DISTRIBUTION OF FILMS, GAMES AND PUBLICATIONS

Any person who distributes, broadcasts or exhibits any film or game in the Republic must register with the Film and Publication Board as a distributor or exhibitor of games and films. A distributor or exhibitor must submit any unclassified games or films to the Board for examination and classification.

Certain films and publications may not be exhibited, distributed, offered or advertised for distribution or exhibition. This includes films and publications which -

- amounts to propaganda for war;

- incites imminent violence; or
- advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm and imminent violence.

Films, games and publications, containing bestiality or incest may also not be distributed, broadcast or exhibited.

#### **Note**

The Act creates an exemption in respect of the distribution of certain publications and films, classified as X18” by so-called adult premises. Section 24 of the Act is relevant in this regard. According to section 24(1) of the Act, any person may exhibit in public or distribute any film, game or publication classified as “X18” in terms of this Act if such person is the holder of a licence to conduct the business of adult premises, issued by a licensing authority in terms of relevant national, provincial or local government laws: Provided that such exhibition or distribution takes place on or within premises forming part of a building. The premises must, in terms of section 24(2), comply with certain conditions, e.g. no admission to persons under 18, non - visibility of the films, etc. from the outside of the premises, etc.

**In terms of section 24(3), a person who is duly registered as a film or game distributor may distribute a film or game classified as “X18” online, subject to the conditions listed in section 24(3)(a)-(k). These include that the distributor must ensure that children under the age of 18 years would not be able to access such game or film on-line; that the age restriction must be clearly displayed on the user’s screen throughout the screening; that the user must confirm that he or she is 18 years or older before the access is granted, etc.**

## **SUPPLEMENTARY TO OTHER ACTS**

The Act can be used as a supplement to, for instance, the Counterfeit Goods Act No. 37 of 1997, to address pirate copies of films (or pornography) which are sold and distributed illegally at flea markets

and on streets corners. Counterfeit films/ games or pornography sold informally, often do not comply with the prescripts of the Films and Publication Act. As can be seen from the exemption created by section 24, only so-called “**adult premises**” which are licensed to conduct the business of adult premises, may exhibit or distribute films, games or publications classified as “X18” Section 24A (2) (a) of the Act provides, for instance, that it is an offence to exhibit in public or distribute a film, game or publication **which has not been classified** by the Films and Publication Board, while section 24A(1) prohibits the **exhibition in public** or distribution of any film or game by a person **who has not been registered** with the Board as an exhibitor or distributor of films or games. Any person who knowingly distributes a film, game or publication which has been classified by the Board without displaying, clearly, conspicuously and in the prescribed manner, the classification reference number, the age restriction, consumer advice and any other condition imposed on distribution of that film, game or publication shall be guilty of an offence in terms of section 24A (5) of the Act. In terms of section 24A (6) of the Act, it is an offence to **advertise** a film or game without indicating the age restriction, consumer advice and any other condition imposed on the film or game being advertised.

NB The Films and Publications Amendment Act No. 11 of 2019 has established an Enforcement Committee whose powers and duties include the investigation of all matters in respect of non-compliance with the provisions of the Act (exclusive of sections 24A, 24C, 27A(2), (3) and (4)) by a distributor or exhibitor, referred to it by the Board. A compliance officer may request the assistance of a member of the South African Police Service in performing his or her duties in terms of the Act as set out in section 15A.

## 29. FIREARMS CONTROL ACT NO. 60 OF 2000

The purpose of this Act is to control legal firearms and to reduce the proliferation and availability of illegal firearms in South Africa.

Section 1 (xii) - *“Firearm” means any -*

- (a) *device manufactured or designated to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);*
- (b) *device manufactured or designed to discharge centre-fire, rim-fire or pin-fire ammunition;*
- (c) *device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);*
- (d) *device manufactured to discharge a bullet or any projectile of .22 calibre or higher at a muzzle energy of more than 8 joules, by means of compressed gas and not by means of burning propellant; or*
- (e) *barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d),*

*but does not include any device contemplated in section 5”.*

**NB: What is the situation with air-guns and tasers?**

A number 2 air-gun (.22 calibre) is a firearm if its muzzle velocity exceeds 8 joule. A number 1 air-gun (.177 calibre) is not regarded as a firearm in terms of this Act.

The **taser device (stun gun) does not qualify** as a firearm as defined if the probes (darts) discharged by the taser are less than .22 calibre, there is no burning propellant and the muzzle energy is less than 8 joules.

**Blank firearms**

An increase in the marketing and availability of blank firearms for sale has been observed lately. These items are made of steel and look, sound and feel like “real” firearms. Although these firearms are manufactured to only fire blank ammunition, the mechanism is the same as that of other centre-fire firearms and they can be readily altered to fire ammunition which contain bullets. The use of blank firearms, whether altered or not, in the commission of offences has highlighted the need to exercise effective control over these items.

Contrary to claims by retailers, it is the view of the Service that blank firearms are indeed firearms in terms of the Firearms Control Act No. 60 of 2000 (“FCA”). Any person wanting to possess a blank firearm would therefore have to comply with the provisions of the FCA. At the time of publication of this booklet discussions are on-going between the SAPS and external role-players to ensure a uniform approach going forward. Once consensus has been reached regarding the regulation of blank firearms, the public will be informed of the decision through an awareness campaign.

**Section 4(1)-(3)****PROHIBITED FIREARMS**

The following firearms are prohibited firearms and may not be possessed or licensed in terms of this Act, except as provided for in sections 17, 18(5), 19 and 20(1)(b):

- (a) *Any fully automatic firearm*
- (b) *Any gun, cannon, recoilless gun, mortar, light mortar or launcher manufactured to fire a rocket, grenade, self-propelled grenade, bomb or explosive device*

- (c) *Any frame, body or barrel of such a fully automatic firearm, gun, cannon, recoilless gun, mortar, light mortar or launcher*
- (d) *Any projectile or rocket manufactured to be discharged from a cannon, recoilless gun or mortar, or rocket launcher*
- (e) *Any imitation of any device contemplated in paragraph (b), (c) excluding the frame, body or barrel of a fully automatic firearm, or (d)*
- (f) *Any firearm–*
  - (i) *the mechanism of which has been altered so as to enable the discharging of more than one shot with a single depression of the trigger;*
  - (ii) *the calibre of which has been altered without the written permission of the Registrar;*
  - (iii) *the barrel length of which has been altered without the written permission of the Registrar;*
  - (iv) *the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar.*

Section 5(1) provides as follows;

**Devices not regarded as firearms by the Act, are the following:**

- (a) Any explosive powered tool manufactured specifically for use in industrial application, including line-throwing guns and impex-type building pistols;
- (b) any explosive powered tool manufactured to split rock or concrete by means of discharging an explosive cartridge;
- (c) any industrial tool manufactured for use in the mining and steel industry to remove refractory material;
- (d) any captive bolt gun manufactured for use in an abattoir in the humane killing of animals;
- (e) a muzzle loading firearm;
- (f) an airgun (with a calibre of less than .22 Read with the definition of a “firearm”);

- (g) a tranquilliser firearm;
- (h) a paintball gun;
- (i) a flare gun;
- (j) a de-activated firearm; and
- (k) any other device which the Minister may, by notice in the *Gazette*, exempt.

Section 3 provides that –

No person may **possess** a firearm unless he or she holds a **licence**, permit or authorisation issued in terms of this Act for that firearm.

In terms of section 21 –

the Registrar may issue a **temporary authorisation** to possess a firearm.

**Note:** Firearm licences issued in terms of the Firearms Control Act No. 60 of 2000 have a limited lifetime, as determined by the type of licence. Firearm licences must be renewed before the expiry of the lifetime, failing which the licence terminates automatically.

In the matter of *Minister of Police and Others v Fidelity Security Services (Pty) Ltd [2022] ZACC 16* the Constitutional Court held that although a firearm owner whose licence has expired is not allowed to possess the firearm without a valid licence, the expiry of the licence does not terminate the owners ownership of the firearm. The Court confirmed that a licence which has terminated cannot be renewed, however there is nothing preventing the owner from lodging an application for a new licence in respect of the same firearm.

### **Declaration of persons unfit to possess a firearm by the Registrar**

- (a) **Section 102** - The Registrar may declare a person unfit to possess a firearm based on information under oath or affirmation, including a statement, where it appears that —

- (i) a final protection order has been issued against such a person in terms of the Domestic Violence Act No. 116 of 1998;
- (ii) a final protection order has been issued against such a person in terms of the Protection from Harassment Act No. 17 of 2011;
- (iii) a person expressed the intention to kill or injure him or herself or another person by means of a firearm or any other dangerous weapon;
- (iv) a person's mental condition, inclination to violence or dependence on any substance which has an intoxicating or narcotic effect, is such that the possession of a firearm by such a person is not in the interests of that person or any other person;
- (v) a person failed to take prescribed steps for safekeeping of firearms; or
- (vi) a person has provided false or misleading information required in terms of the Firearms Control Act.

### By the court

- (b) **Section 103** - Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of certain serious offences, namely:
- the unlawful possession of a firearm or ammunition;
  - any crime or offence involving the unlawful use or handling of a firearm, whether the firearm was used or handled by that person or by another participant in that offence;
  - an offence regarding the failure to store firearms or ammunition in accordance with the requirements of the Firearms Control Act ;
  - an offence involving the negligent handling or loss of a firearm while the firearm was in his or her possession or under his or her direct control;

- an offence involving the handling of a firearm while under the influence of any substance which has an intoxicating or narcotic effect;
- any other crime or offence in the commission of which a firearm was used, whether the firearm was used or handled by that person or by another participant in the offence;
- any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;
- any other offence under or in terms of this Act in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
- any offence involving physical or sexual abuse occurring in a domestic relationship as defined in section 1 of the Domestic Violence Act 116 of 1998;
- any offence involving the abuse of alcohol or drugs ;
- any offence involving dealing in drugs;
- any offence in terms of the Domestic Violence Act No. 116 of 1998 in respect of which the accused is sentenced to a period of imprisonment without the option of a fine ;
- any offence in terms of the Explosives Act No. 26 of 1956, in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
- any offence involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping, or child stealing;
- any conspiracy, incitement or attempt to commit an offence referred to above.

The words “*determine otherwise*” mean that any person convicted of any of the above offences is **automatically** declared unfit to possess a firearm unless the court clearly states that despite the conviction, such a person may still legally possess a firearm.

**Note:** Sabotage is not a separate offence anymore. The Protection of Constitutional Democracy against Terrorist and Related Activities Act No. 33 of 2004 provides for a broad range of terrorist activities which may constitute the offence of terrorism.

## **Powers of police**

### Section 107 -

Any person who carries with him or her a firearm must, after a police official has identified himself or herself to such a person, and requested him or her to produce the licence, permit or authorisation in respect of such firearm, produce such licence, permit/authorisation for inspection. If such person fails to do so, the police official may seize the firearm without a warrant and keep the firearm in custody until the licence, permit or authorisation is produced.

### Section 108 -

A police official who has reasonable grounds to believe that a person has a firearm or ammunition in his or her possession may request that person to state his or her full name, age, address, produce his or her licence, permit, authorisation to possess such firearm, answer questions relating to the whereabouts of the firearm and furnish any other relevant information required by such a police official.

## **Incidental discovery of firearm**

### Section 116 -

If in the course of a lawful search for any article as mentioned in a search warrant in terms of sections 20 and 21 of the Criminal Procedure Act the person executing the search finds any firearm, imitation firearm, air-gun, device or ammunition referred to in this Act, in respect of which a **reasonable suspicion** of illegality or illegal possession exists, he or she may seize such firearm, imitation firearm, air-gun, device or ammunition, although it was not mentioned in the warrant.

**Suspicion** means - absence of certainty. In *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50 H it was defined as “a state of conjecture or surmise where proof is lacking ... Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end”.

## Offences are created by section 120:

### 120. Offences

“(1) A person is guilty of an offence if he or she contravenes or fails to comply with any –

- (a) provision of this Act;
- (b) condition of a licence, permit or authorisation issued or granted by or under this Act; or
- (c) provision, direction or requirement of a notice issued under this Act.

(2) (a) Any person who is aware of the existence of a firearm or ammunition that is not in the lawful possession of any person and fails to report the location of the firearm or ammunition to a police official without delay, is guilty of an offence.

- (b) A police official to whom a person has made a report contemplated in paragraph (a), must immediately provide the person with written proof that the report has been made

*or, in the case of a telephonic or similar report, with the official reference number of the report.*

- (3) *It is an offence to -*
- (a) *cause bodily injury to any person or cause damage to property of any person by negligently using a firearm, an antique firearm or an air-gun;*
  - (b) *discharge or otherwise handle a firearm, an antique firearm or an airgun in a manner likely to injure or endanger the safety or property of any person or with reckless disregard for the safety or property of any person; or*
  - (c) *have control of a loaded firearm, an antique firearm or an air-gun in circumstances where it creates a risk to the safety or property of any person and not to take reasonable precautions to avoid the danger.*
- (4) *It is an offence to handle a firearm, an antique firearm or an air-gun while under the influence of a substance which has an intoxicating or a narcotic effect.*
- (5) *A person is guilty of an offence if he or she gives control of a firearm, an antique firearm or an air-gun to a person whom he or she knows, or ought reasonably to have known –*
- (a) *to be mentally ill; or*
  - (b) *to be under the influence of a substance which has an intoxicating or a narcotic effect.*
- (6) *It is an offence to point -*
- (a) *any firearm, an antique firearm or an air-gun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or*

- (b) *anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an air-gun at any other person, without good reason to do so.*
- (7) *It is an offence to discharge a firearm, an antique firearm or an airgun in a built-up area or any public place, without good reason to do so.*
- (8) *A person is guilty of an offence if he or she -*
- (a) *fails to lock away his or her firearm or a firearm in his or her possession in a prescribed safe, strong-room or device for the safe-keeping when such firearm is not carried on his or her person or is not under his or her direct control; or*
- (b) *loses a firearm, or is otherwise dispossessed of a firearm owing to that person's failure to -*
- (i) *lock the firearm away in a prescribed safe, strong-room or device for the safe-keeping of a firearm;*
- (ii) *take reasonable steps to prevent the loss or theft of the firearm while the firearm was on his or her person or under his or her direct control; or*
- (iii) *keep the keys to such safe, strong-room or device in safe custody.*
- (9) *It is an offence to -*
- (a) *add any word, figure or letter to a competency certificate, licence, permit or authorisation as issued, without the Registrar's permission;*
- (b) *alter or erase any word, figure or letter on or from any competency certificate, licence, permit or authorisation, without the Registrar's permission;*
- (c) *use or possess any competency certificate, licence, permit or authorisation -*

- (i) *to which any words, figures or letters have been unlawfully added;*
  - (ii) *from which any words, figures or letters have been unlawfully erased; or*
  - (iii) *on which any words, figures or letters have been unlawfully altered;*
- (d) *part with a competency certificate, licence, permit or authorisation in order that it may be used by any person other than the person to whom it was issued or granted;*
  - (e) *use a competency certificate, licence, permit or authorisation issued in the name of another person to procure possession of a firearm or ammunition;*
  - (f) *supply particulars, information or answers in an application for a competency certificate, licence, permit or authorisation in terms of this Act, knowing them to be false, incorrect or misleading or not believing them to be correct;*
  - (g) *make a false entry in a register which is required to be kept in terms of this Act; or*
  - (h) *furnish false information in any return required to be submitted in terms of this Act.*
- (10) *It is an offence to –*
- (a) *sell, supply or in any other manner give possession of a firearm or ammunition to a person who is not allowed in terms of this Act to possess that firearm or ammunition; or*
  - (b) *be in possession of any firearm, airgun, deactivated firearm, muzzle loading firearm, or imitation firearm, with intent to commit an offence or to use the firearm, airgun, deactivated firearm, muzzle loading firearm, or imitation firearm to resist arrest or prevent the arrest of another person.*

(10A) *In determining whether a person intends to use the firearm, airgun, deactivated firearm, muzzle loading firearm or imitation firearm to commit an offence, all relevant factors, including, but not limited to, the following must be taken into account:*

- (a) *The place and time where the person is found;*
- (b) *the behaviour of the person, including the making of any threat or the display of intimidatory behaviour;*
- (c) *the manner in which the firearm, airgun, deactivated firearm, muzzle loading firearm or imitation firearm is carried or displayed;*
- (d) *whether the possession of the firearm, airgun, deactivated firearm, muzzle loading firearm or imitation firearm was within the context of drug dealing, gang association, organised crime or any other criminal activity; or*
- (e) *any other relevant factors, including any explanation the person may wish to provide for his or her possession of the firearm, airgun, deactivated firearm, muzzle loading firearm or imitation firearm: Provided that this paragraph shall not be interpreted as an obligation on the person to explain his or her possession of the firearm, airgun, deactivated firearm, muzzle loading firearm or imitation firearm.*

(10B) *The provisions of subsection (10) (b) do not apply to the following activities:*

- (a) *The pursuit of any lawful employment, duty or activity;*
  - (b) *the participation in any cultural or religious activities, or lawful sport, recreation, or entertainment; or*
  - (c) *the legitimate collection, display or exhibition of a firearm, airgun, deactivated firearm, muzzle loading firearm or imitation firearm.*
- (11) *Any holder of a licence, permit or authorisation to possess a firearm, and any other person who was in possession of or who had control of a firearm when it was lost, stolen or destroyed*

*and who fails to report the loss, theft or destruction to the police station nearest to the place where it occurred, within 24 hours after having become aware of the loss, theft or destruction of the firearm, is guilty of an offence.*

- (12) *It is an offence to obstruct or hinder any person in the exercise of any power or the performance of any duty in terms of this Act”.*

**Note:** The Act is currently under review. The Firearms Control Amendment Bill was published for comments on 21 May 2021 and has proposed extensive amendments in respect of firearm ownership.

## **30. GENERAL LAW AMENDMENT ACT NO. 62 OF 1955: POSSESSION AND RECEIPT OF STOLEN PROPERTY**

**Section 36 of the above act provides as follows:**

**Failure to give satisfactory account of possession of goods -**

*“Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act No. 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft”.*

### **POSSESSION**

The person must be found in possession of the goods. This means that the person must have personal and direct control over the goods. There must be a reasonable suspicion that the goods have been stolen. The suspicion must be based on grounds and these grounds

must be set out. The grounds or facts on which the police official bases his or her suspicion must be true and correct. The suspect must be unable to give a satisfactory account of his or her possession. Where the suspect's explanation for his or her possession is reasonably possible, he or she should not be arrested.

### **Section 37 provides for the receipt of stolen property:**

#### **Absence of reasonable cause for believing goods properly acquired -**

- “(1) (a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorised by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.*
- (b) In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause.*

*(2) For the purposes of sub-section (1) “public sale” means a sale effected -*

- (a) at any public market; or*
- (b) by any shopkeeper during the hours when his shop may in terms of any law remain open for the transaction of business; or*
- (c) by a duly licensed auctioneer at a public auction; or*

(d) *in pursuance of an order of a competent court*".

The Constitutional Court considered the provisions of section 37 in **S v Manamela and others** [2000] JOL 6381 (CC). The Court was not prepared to strike section 37 down since it was of the opinion that it would leave a vacuum in the present legislative structure to deal with "fencing" which is a pervasive evil in our society. The Court however, read certain words into the provision to replace the invalid reverse onus contained in the original wording. The present wording was effected by the Judicial Matters Amendment Act No. 62 of 2000, following the order made by the Constitutional Court.

## WHAT MUST BE PROVEN?

The State must prove that the goods in question have been stolen. The person in whose possession the goods are found must create a reasonable doubt in the mind of the court that at the time of acquisition of the goods, he or she had a reasonable cause to believe that the person who disposed of the property was entitled to do so. Should the arrested person fail to discharge this onus of proof, he or she will be convicted.

## 31. IMMIGRATION ACT NO. 13 OF 2002

The Immigration Act No. 13 of 2002 is often utilised by police officials as an additional tool to, *inter alia* address organised crime and terrorist activity. However, the Immigration Act has limitations to address these scourges and the application of the Act is regularly scrutinised by our courts.

Although the Department of Home Affairs is primarily responsible for matters concerning immigration, members of the Service are also afforded certain powers in respect of the Immigration Act, 2002.

Section 41 of the Act, for instance, allows police officials to verify the identity of persons to determine whether they are entitled to be in the Republic. The relevant section provides as follows:

**“41. Identification**

- (1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.
- (2) Any person who assists a person contemplated in subsection (1) to evade the processes contemplated in that subsection, or interferes with such processes, shall be guilty of an offence”.

Any detention as contemplated above must be based on reasonable grounds and may not exceed 48 hours. The member must provide an interpreter, access to relatives or other persons who could be of assistance, report such detention to the local Department of Home Affairs, who must visit and interview the person and furnish a statement confirming his/ her status in the Republic. A detained illegal foreigner must be charged with a crime and brought before a court or released by completing a SAPS 328 (Release of a Suspect), no later than 48 hours after being detained.

In terms of section 40 (2) of the Act, an immigration officer **or police officer** may require from any **establishment that provides lodging or sleeping accommodation** to produce a **register** for all persons who are provided with lodging or sleeping accommodation.

## Visas

The Act makes a distinction between **permanent** and **temporary residence** in the Republic. A foreigner who is **not a holder of a permanent residence permit**, may enter and sojourn in the Republic only if in possession of a **visa** issued by the Director-General of the Department of Home Affairs for a prescribed period. (Section 10 of the Act).

The Act makes provision for the following types of visas:

- port of entry visa;
- visitor's visa;
- study visa;
- treaty visa;
- crew visa;
- medical treatment visa;
- relative's visa;
- work visa;
- retired person visa;
- corporate visa;
- exchange visa; and
- asylum transit visa.

## ROLE OF THE SAPS

Whenever crime prevention operations are planned and it is foreseen that illegal foreigners may be found, officials from the Department of

Home Affairs should to be part of the planning and execution of the operation.

The SAPS is responsible for investigating the criminal offences created by the Act. This will include persons who entered the Republic other than at a port of entry or who are not in possession of a temporary or permanent residence permit.

The offences created by section 49 of the Act, are as follows:

**“49. Offences -**

- (1)
  - (a) *Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.*
  - (b) *Any illegal foreigner who fails to depart when so ordered by the Director General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years.*
- (2) *Anyone who knowingly assists a person to enter or remain in, or depart from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years.*
- (3) *Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year: Provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding five years without the option of a fine.*
- (4) *Anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled shall be guilty of an offence and liable on conviction to a fine.*
- (5) *Any public servant who provides false or intentionally inaccurate or unauthorised documentation or benefit to an illegal foreigner, or otherwise facilitates such illegal foreigner to disguise his or her identity or status, or accepts any undue*

*financial or other consideration to perform an act or to exercise his or her discretion in terms of this Act, shall be guilty of an offence and liable on conviction to imprisonment not exceeding eight years without the option of a fine: Provided that if such public servant is employed by the Department, such offence shall be punishable by imprisonment not exceeding 15 years without the option of a fine.*

- (6) *Anyone failing to comply with one of the duties or obligations set out under sections 38 to 46, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years.*
- (7) *Anyone participating in a conspiracy of two or more persons to conduct an activity intended to contravene this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding seven years: Provided that if part of such activity is conducted or intended to be conducted in a foreign country, the offence shall be punishable by imprisonment not exceeding eight years without the option of a fine.*
- (8) *Anyone who wilfully or through gross negligence produces a false certification contemplated by this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three years.*
- (9) *Anyone, other than a duly authorised public servant, who manufactures or provides or causes the manufacturing or provision of a document purporting to be a document issued or administered by the Department, shall be guilty of an offence and liable on conviction to imprisonment not exceeding 10 years without the option of a fine.*
- (10) *Anyone who through offers of financial or other consideration or threats, compels or induces an officer to contravene this Act or to breach such officer's duties, shall be guilty of an offence and liable on conviction -*
  - (a) *to a fine or to imprisonment not exceeding five years; or*
  - (b) *if subsequently such officer in fact contravenes this Act or breaches his or her duties, to imprisonment not exceeding five years without the option of a fine.*
- (11) *Anyone guilty of the offence contemplated in section 34 (10) shall be liable on conviction to a fine or to imprisonment not exceeding three years.*
- (12) *A court may make an order as to costs in favour of the Department to the extent necessary to defray the expenses referred to in section 34*
  - (3) *against*
    - (a) *any illegal foreigner referred to in section 34 (3);*
    - (b) *any person who contravened section 38 or 42;*

- (c) *any person who conveyed into the Republic a foreigner without the required transit visa; or*
- (d) *any person who committed an offence contemplated in subsection (5), (7), (8) or (10), which order shall have the effect of a civil judgment of that court.*
- (13) *Any person who pretends to be, or impersonates, an immigration officer, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding eight years.*
- (14) *Any person who for the purpose of entering or remaining in, or departing from, or of facilitating or assisting the entrance into, residence in or departure from, the Republic, whether in contravention of this Act or not, commits any fraudulent act or*

*makes any false representation by conduct, statement or otherwise, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding eight years.*

(15) Any natural or juristic person, or a partnership, who -

(a) *for the purpose of entering the Republic, or of remaining therein, in contravention of this Act, or departing from the Republic, or of assisting any other person so as to enter or so to remain or so to depart, utters, uses or attempts to use -*

(i) *any permanent residence permit, port of entry visa, visa, certificate, written authority or other document which has been issued by lawful authority, or which, though issued by lawful authority, he, she or it is not entitled to use; or*

(ii) *any fabricated or falsified permanent residence permit, port of entry visa, visa, certificate, written authority or other document; or*

(b) *without sufficient cause has in his, her or its possession -*

(i) *any stamp or other instrument which is used or capable of being used for purposes of fabricating or falsifying or unlawfully recording on any document any endorsement under this Act or required to be submitted in terms of this Act;*

(ii) *any form officially printed for purposes of issuing any permanent residence permit, port of entry visa, visa, certificate, written authority or other document under this Act or required to be submitted in terms of this Act, or any reproduction or imitation of any such form;*

(iii) *any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose possession it is found; or*

(iv) *any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years without the option of a fine.*

(16) Any person who -

- (a) *contravenes or fails to comply with any provision of this Act, if such contravention or failure is not elsewhere declared an offence, or if no penalty is prescribed in respect of an offence;*  
*or*
- (b) *commits any other offence under this Act in respect of which no penalty is elsewhere prescribed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding seven years”.*

In terms of Article 3(a) of the United Nations Protocol against the smuggling of migrants by land, sea and air (the Smuggling Protocol) of 27 May 2004 “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not national or a permanent resident.

In other words, the definition is broken into three elements -

- procurement of illegal entry;
- for financial or other material gain; and
- across a border into another country.

See section 49(2) and (15) of the Immigration Act No. 13 of 2002 in this regard.

### **Prohibited persons:**

In terms of section 29 of the Act the following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit.

- (a) Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;
- (b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping;
- (c) anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;
- (d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence;
- (e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends; and
- (f) anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.

### **Deportation and detention of illegal foreigners:**

The procedure relating to the detention of a person suspected of being an undocumented or illegal foreigner differs depending on whether the person was detained/ arrested by an immigration officer or a member of the SAPS. A distinction must also be made between a person who upon being arrested for any other offence was also discovered/ suspected to be an illegal foreigner, and a person who was detained solely for being an illegal foreigner. In the first instance, the suspect must be charged with the original crime and the charge of being an undocumented/ illegal foreigner (contravening section 49(1) (a) read with sections 34 and 41 of the Immigration Act No. 13 of 2002), must be added as an additional charge. Members should refer to National Instruction 12 of 2019 for a more detailed discussion of the detention of illegal foreigners.

Where a person is brought to the SAPS by an immigration officer for detention, the immigration officer must issue a Form 33 (DHA -1710) – Warrant of Detention of persons suspected of being an illegal foreigner. The immigration officer must also supply a statement and supporting documents proving why the person is suspected of being an illegal foreigner. The period of detention may not exceed 48 hours, after which he /she must be brought before a court by the immigration officer to obtain a confirmation of detention as per Form 30 (DHA – 1725). Persons arrested in this manner must only be detained at places of detention (which may include specific police stations) as determined and Gazetted by the Department of Home Affairs.

The Children's Act No. 38 of 2005 requires that unaccompanied minors, even if in the country illegally, be placed in temporary places of safety e.g. Bosasa and not in SAPS cells or immigration detention centres, e.g. Lindela.

Asylum seekers and refugees are NOT classified as illegal foreigners, as set out in the Refugees Act No. 130 of 1998 and the Immigration Act and are therefore not subject to this process.

The reporting of the detention, death or complaint of a foreign national involved in a criminal offence is regulated by National Instruction 5 of 2014 (reporting the detention, death or complaint of a foreign national).

In instances where an illegal foreigner was arrested for a petty/ minor crime and sentenced to a short period in prison or the payment of a

fine, such person must, upon release, not be detained in any detention facility of the Service, but should be handed over to the Department of Home Affairs. The Department of Home Affairs is responsible for the repatriation or deportation of an illegal foreigner and a member of the Service may not on his/ her own accord perform such repatriation or deportation.

The lines between deportation and extradition sometimes become blurred. There are a number of examples where deportation, instead of extradition, had been used to arrest, detain and deport criminals who are sought for prosecution in other jurisdictions.

In ***Jeebhai v Minister of Home Affairs (139/2008) ZASCA 35*** a Pakistani national, one Khalid Mahmood Rashid, was arrested during 2005 by an immigration officer who was accompanied by several member of the SAPS. Rashid was not able to produce any permit authorising his stay in the country. He was arrested as an illegal foreigner and taken to the Cullinan Police Station where he was detained. A few days after his arrest he was interviewed by another immigration officer during which Rashid admitted to being an illegal foreigner and also that he had fraudulently obtained documents purporting to authorise his presence in the country. Six days after his arrest, Rashid was handed over to five Pakistani law enforcement officials at Waterkloof Military Air Base in Pretoria from where he was flown to Pakistan and held in custody. His removal from the country was apparently effected secretly – without his relatives or friends having been apprised of what had happened to him.

In a statement of the Pakistan High Commission issued during June 2006, the following was said “*Mr. Khalid Mahmood, a Pakistani*

*national was arrested by South African Authorities on 31 October 2005. Mr. Khalid Mahmood was wanted in Pakistan for his suspected links with terrorism and other anti-state elements. The suspect was handed over to Government of Pakistan officials on 6 November 2005. Presently he is in custody of (the) Government of Pakistan”.*

The Supreme Court of Appeal held that Rashid’s detention at the Cullinan Police Station without a warrant and his subsequent removal from this facility, also without a warrant, meant that both his detention there and his deportation were unlawful.

The Court highlighted the relevant (interrelated) provisions of the Act that apply to deportation of an illegal foreigner, namely sections 1, 8, 32, 34 and 41.

The Court also assessed the meaning of the word “deportation”. According to the Court **“deportation is a unilateral act of the deporting state to remove a foreigner, who has no right or entitlement to be in its territory. Its purpose is achieved when the foreigner leaves the deporting state’s territory. The authority of and constraints on the state to deport people is to be found in the Immigration Act 13 of 2002 and the Immigration Regulations made by the Minister under s 7 of the Act. For a deportation to be carried out lawfully, the ‘action or procedure’ used to facilitate an illegal foreigner’s removal from the country must be done in “terms of the Act”.**

For the sake of completeness and the information of members, section 34 of the Immigration Act is quoted verbatim hereunder:

**“34. Deportation and detention of illegal foreigners -**

- (1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned -
  - (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
  - (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
  - (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;
  - (d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and
  - (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.
- (2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.
- (3) The Director-General may order a foreigner subject to deportation to deposit a sum sufficient to cover in whole or in part the expenses related to his or her deportation, detention, maintenance and custody

and an officer may in the prescribed manner enforce payment of such deposit.

- (4) Any person who fails to comply with an order made in terms of subsection (3) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment not exceeding 12 months.
- (5) Any person other than a citizen or a permanent resident who having been-
  - (a) removed from the Republic or while being subject to an order issued under a law to leave the Republic, returns thereto without lawful authority or fails to comply with such order; or
  - (b) refused admission, whether before or after the commencement of this Act, has entered the Republic,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and, pending his or her removal, be detained in the manner and at the place determined by the Director-General.

- (6) Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.
- (7) On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant.
- (8) A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General.
- (9) The person referred to in the preceding subsection shall, pending removal and while detained as contemplated in that subsection, be deemed to be in the custody of the master of such ship and not of the immigration officer or the Director-General, and such master shall be liable to pay the costs of the detention and maintenance of such person while so detained if the master knew or should reasonably have known that such person was an illegal foreigner, provided that -
  - (a) if such master fails to comply with the provisions of that subsection, or if required to pay such costs, such master or the owner of such ship shall forfeit in respect of every person

- concerned a sum fixed by the immigration officer, not exceeding an amount prescribed from time to time;
- (b) the immigration officer may, before such person is removed from such ship, require the master or the owner of such ship to deposit a sum sufficient to cover any expenses that may be incurred by the Director-General in connection with the deportation, detention, maintenance and custody of such person, if there are grounds to believe that the master knew or should reasonably have known that such person was an illegal foreigner;
  - (c) if such person is not removed from the Republic on the ship on which he or

she was conveyed to the Republic, except by reason of not being an illegal foreigner, and if the master knew or should have known that such person was an illegal foreigner, the owner of that ship shall at the request of an immigration officer convey that person, or have him or her conveyed, free of charge to the State to a place outside the Republic, and any person, other than an immigration officer, charged by the Director-General with the duty of escorting that person to such place, shall be deemed to be an immigration officer while performing such duty; and

- (d) if the owner of such ship fails to comply with the provisions of this section, he or she shall forfeit in respect of each such person a sum fixed by the immigration officer, not exceeding an amount prescribed from time to time.
- (10) A person who escapes or attempts to escape from detention imposed under this Act shall be guilty of an offence and may be arrested without a warrant.
- (11) A person detained on a ship may not be held in detention for longer than 30 days without an order of court”.

In ***Abdi and another v Minister of Home Affairs and others* [2011] 3 All SA 117 (SCA)** the appellants were Somali nationals who were seeking refuge in South Africa. They had first come to South Africa in that context, but had fled to Namibia as a result of their fears about xenophobic attacks in South Africa. They were, however, deported from Namibia, and landed up in an Inadmissible Facility at OR Tambo International Airport, on their way to their home country on a flight of Kenya Airways. The Somali's, however, wanted to remain in South Africa.

The court held that passengers on an international flight landing in South Africa are subject to the jurisdiction of South African courts. According to the court, the appellants were within this country and were entitled to the protection of its laws, even if they arrived here in the course of being deported from another State. Refugees entitled

to be recognised as such may more often than not arrive at a port of entry without documents. Such person have a right to apply for refugee status, and it is unlawful to refuse them entry if they are *bona fide* in seeking refuge.

The appellants would face a real risk of suffering physical harm if they were forced to return (deported) to Somalia. No effective guarantee could be given that they would not be persecuted or subjected to some form of torture, or cruel, inhuman and degrading treatment if they were compelled to return to Somalia.

In ***Minister of Home Affairs and others v Tsebe and others (Amnesty International US amicus) 2012 (10) BLCR 1017 (CC)***, Mr. T, a national of Botswana, was accused of murdering his wife in Botswana. A similar accusation was made against Mr. P. Both persons fled to South Africa when the police in Botswana tried to arrest them. Mr T's entry into the RSA was illegal. Mr. P alleged that his entry into the RSA was not illegal since he had been issued with a RSA identity document. Home Affairs denied that P was a RSA citizen. After T and P's flight from Botswana, the authorities in Botswana issued warrants of arrest against them. Botswana also requested the RSA to extradite the men to Botswana to face murder charges.

The issue for determination by the Court was whether or not the RSA Government had the power to extradite or deport Mr. T and Mr. P to Botswana to face their respective murder charges there if the death penalty was a competent sentence there, even though Botswana had refused to give the requisite assurance that the death penalty would not be carried out.

The court held that the RSA Government was under an obligation NOT to deport or extradite the fugitives in the absence of an assurance that the death sentence would not be carried out. Deportation or extradition without the exquisite assurance, would amount to the government's acting in breach of its obligations in

terms of section 7(2) of the Constitution (the State must respect, protect, promote and fulfil the rights in the Bill of Rights), the values of the Constitution and the right of the persons in question to life, to human dignity and not to be subjected to treatment or punishment that is cruel, inhuman or degrading.

(See also the discussions under the Extradition Act, 1962).

## **32. INTIMIDATION ACT NO. 72 OF 1982**

### **INTRODUCTION**

The Intimidation Act No. 72 of 1982 prohibits conduct whereby persons intimidate others to conduct themselves in a certain manner such as not to give evidence in a court, not to support a decision of Government or to participate in a strike. The offences created by the Act may overlap with other offences such as assault, extortion or even the offences created by the Prevention and Combating of Corrupt Activities Act No. 12 of 2004. **Section 1(1) of the Act provides as follows:**

“Any person who —

- (a) *without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint*
  - (i) *assaults, injures or causes damage to any person; or*
  - (ii) *in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or*
- (b) *acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be that a person perceiving the act, conduct, utterance or publication—*
  - (i) *fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person;*
  - (ii) *shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.’*

In **Holbrook v S [1998] 3 All SA 579 (E)** the appellant (at the time under the influence of liquor) threw the cat of the complainant in a swimming pool. The complainant rescued her cat and became involved in a verbal argument with the appellant. When the complainant turned away from the appellant and made her way towards her room, the appellant said “*I will kill you, you bitch.*” A charge of intimidation was laid against the appellant. The thrust of the charge was that the appellant’s actions and utterance caused the complainant to fear for her own safety.

The court held that that the State bore the *onus* of establishing beyond reasonable doubt that the appellant’s words and actions had such an effect. Whether the State discharged that *onus* must be determined in the light of the circumstances which prevailed during the incident. According to the court, there was nothing to indicate any manifestation of actual physical aggression towards the complainant at any time. The appellant was not armed with a weapon nor did he in any way attempt to even lift his hand to her. There was no evidence that he was a man of violence or that he was likely to carry out any threat of doing harm to the complainant. The court subsequently held that a reasonable man in the position of the complainant

would not have considered the utterance or actions of the appellant to be a threat to personal safety.

In the matter of *Moyo and Another v Minister of Justice and Constitutional Development and Others; Sonti and Another v Minister of Justice and Correctional Services and Others* [2019] ZACC 40, the Constitutional Court had to consider the constitutionality of section 1(1)(b) and section 1(2) of the Intimidation Act No. 72 of 1982.

The court held that section 1(1)(b) of the Act is invalid and unconstitutional because it is too vague and infringes a legitimate right to protest and freedom of expression as guaranteed in section 16 of the Constitution of the Republic of South Africa, 1996.

The court held that section 1(2) of the Act is invalid and unconstitutional because it places the onus of proving a lawful reason for alleged intimidatory conduct under section 1, on the accused. This reverse onus violates and discourages one's right to remain silent, and compels an accused to make incriminating admissions which causes an evidentiary burden on the accused.

These declarations of invalidity applies retrospectively on all cases that had not been finalised or where an appeal was still pending at the time of the Constitutional Court's judgment on 22 October 2019.

Members should take note that although section 1(1)(b) of the Act no longer constitutes an offence, section 1(1)(a) of the Act is **still valid** and must be applied where any person without lawful reason and with intent to compel or induce a particular person to do or abstain from doing any act or to assume or to abandon a particular standpoint, assaults, injures or causes damage to any person or in any manner threatens to kill, assault, injure or cause damage to that person or any other person.

### 33. INQUEST ACT NO. 58 OF 1959

**What is an inquest and what is the function thereof?**

*“An inquest is an official investigation into a death occurring otherwise than from natural causes, which has not been the subject of a criminal prosecution. Inquest proceedings are governed by the provisions of*

*the Inquests Act 58 of 1959 (“the Act”). **The function of an inquest is to determine the identity of the deceased person, the cause or likely cause of death the date of death; and whether the death was brought about by any act or omission involving or amounting to an offence on the part of any person(s).** (The latter determination would include, in so far as this possible, a finding as to who the responsible offender is or offenders are). The underlying purpose of an inquest is to promote public confidence and satisfaction; to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences, and so that persons responsible for such deaths may, as far as possible, be brought to justice”. (Marais NO v Tiley (377/88) [1990] ZASCA 40).*

The Act creates obligations for private persons as well as, *inter alia*, police officials.

Section 2 of the Act provides as follows:

- “(1) Any person who has reason to believe that any other person has died and that death was due to other than natural causes, shall as soon as possible report accordingly to a policeman unless he has reason to believe that a person has been or will be made by any other person.
- (2) Any person who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1000”.

Section 3(1) of the Act states that —

- “Subject to the provisions of any other law providing for an investigation of the circumstances of any death, any policeman who has reason to believe that any person has died and that such person has died from other than natural causes, shall-
- (a) investigate or cause to be investigated the circumstances of the death or alleged death; and

(b) report or cause to be reported the death or alleged death to the magistrate of the district concerned, or to a person designated by that magistrate”.

In terms of subsection (2) of the Act, the body of the deceased shall be examined by the district surgeon or any other medical practitioner and the police are required to attend such examination.

The police official tasked with the duty of investigating the death of the deceased is to submit a report into such death, together with all relevant statements, documents and information to the public prosecutor who will handle the matter further.

### Report to public prosecutor

According to section 4, *“the policeman investigating the circumstances of the death or alleged death of any person shall submit a report thereon, together with all relevant statements, documents and information, to the public prosecutor, who may, if he deems it necessary, call for any additional information regarding the death”*.

**When inquest is to be held:** Section 5 of the Act provides as follows:

- “(1) If criminal proceedings are not instituted in connection with the death, or alleged death, the public prosecutor referred to in section 4 shall submit those statements, documents and information submitted to him to the magistrate of the district concerned.
- (2) If on the information submitted to him in terms of subsection (1) it appears to the magistrate that a death has occurred and that such death was not due to natural causes, he shall, subject to the directions of the Minister, take such steps as may be necessary to ensure that an inquest as to the circumstances and cause of the death is held by a judicial officer in terms of section 6: Provided that no inquest in respect of which it is alleged that either the death or the incident has occurred outside the Republic shall be held unless the Minister, or any person authorised thereto by him, so directs.

- (3) If an inquest has to be held by a judicial officer other than the magistrate to whom the statements, documents and information concerned were submitted such magistrate shall transmit them to the judicial officer who is to hold such inquest as to the circumstances and cause of the death”.

**The Regulations regarding the rendering of forensic pathology service (Gazette 30075, Government notice no. R. 636 of 20 July 2007, issued in terms of the National Health Act No. 61 of 2003 contain important definitions relevant to inquests and unnatural deaths, *inter alia*:**

**“autopsy** means the post mortem dissection of a body so as to determine the cause of death and the nature of injuries and disease processes which may be present;

**medico-legal investigation of death** means the investigation into the circumstances and possible cause of death which is or may have been due to unnatural causes, and includes but which are not limited to:

- (a) the obtaining of relevant information at the scene of an accident where necessary;
- (b) the performance of a post mortem examination, which may include an autopsy;
- (c) the requesting and performance of special investigations; or
- (d) the liaison with other relevant parties; to facilitate the administration of justice;

**post mortem examination** means an examination of a body, with the purpose of establishing the cause of death and factors associated with the death, and in the context of these regulations, for medico-legal purposes;

**unnatural death** for the purposes of the medico-legal investigation of death, the following shall be deemed to be deaths due to unnatural causes —

- (a) any death due to physical or chemical influence, direct or indirect, or related complications;
- (b) any death, including those deaths which would normally be considered to be a death due to natural causes, which in the opinion of a medical practitioner, has been the result of an act of commission or omission which may be criminal in nature; or
- (c) where the death is sudden and unexpected, or unexplained, or where the cause of death is not apparent”.

In the case of **Van Heerden and Another v Joubert NO and Others 1994(4) SA 793(A)** the Appeal Court held that a stillborn baby is not a “person” as envisaged by the provisions of the Inquest Act No 58 of 1959 and an inquest into its death can accordingly not be held under the provisions of the Act.

It is thus important to establish during a post mortem examination if a baby was stillborn or proved to have breathed after he or she was born. The question then arises what crime was committed or what investigation must be done if the baby or foetus was not alive and was disposed of.

**Section 113 of the General Law Amendment Act No. 46 of 1935 provides as follows:**

- “(1) Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.
- (2) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.

- (3) *The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having jurisdiction”.*

In **S v Molefe 2012(2) SACR 574 (NGP)** the North Gauteng High Court held that the General Law Amendment Act, 1935 refers to the disposal of the body of a newborn “*child*”. In order to sustain a conviction, there had to be evidence before the court that the foetus had arrived at that stage of maturity at the time of birth that it might have been born a living child. There was no evidence in the case regarding the duration of the pregnancy nor of the viability of the foetus/child. All that was known was that the “child” was in fact born prematurely and was dead at birth. The court subsequently found that for this reason alone, it could not be found that the accused disposed of the body of a child, and consequently set aside the conviction.

The Minister of Health has, in terms of the National Health Act No 61 of 2003, issued Regulations relating to the Management of Human Remains published in *Gazette* 36473 on 22 May 2013. The Regulations regulate *inter alia*, mortuaries, the conveyance of human remains (including the exportation and importation thereof), crematoriums, exhumations and reburials of human remains.

## 34. LIQUOR ACT NO. 59 OF 2003

### INTRODUCTION

The Liquor Act No. 59 of 2003 *inter alia* mandates the National Liquor Authority (Department of Trade and Industry) to regulate the **macro manufacturing and distribution tiers** of the liquor industry. This (national) Act must not be confused with the various provincial liquor Acts which, *inter alia*, provide for liquor licenses in the provinces. According to Part A of Schedule 5 of the Constitution, liquor licenses is one of various functional areas of exclusive provincial legislative competence.

**SECTION 4**

No person may sell, manufacture or distribute liquor, except if such a person is registered and permitted to do so in terms of this Act.

**SECTION 10**

No person may sell or supply liquor to a minor (a person who is under the age of 18 years).

**SECTION 25(3)**

Members of the SAPS are not automatically regarded as liquor inspectors in terms of this Act. Liquor inspectors are appointed by the Minister of Trade Industry and Competition (DTIC) in terms of section 25 of the Act. For this reason, and to facilitate the appointment of designated SAPS members as inspectors by the Minister of Trade Industry and Competition, the National Commissioner of the SAPS and the Director-General of the Department of Trade Industry and Competition concluded a Memorandum of Understanding early in 2013 to unite their efforts towards collective enforcement of the provisions of the Liquor Act of 2003. Apart from their ordinary criminal investigation powers, designated SAPS members that were appointed as liquor inspectors in terms of section 25 of the Act also acquired compliance functions such as monitoring and inspections, in terms of the Memorandum of Understanding. This MOU was recently extended to continue the collaboration between DTIC and the SAPS.

**THE FUNCTIONS/POWERS OF INSPECTORS - SECTION 26**

An inspector is mandated to-

- investigate complaints submitted to the inspector in the prescribed manner;

- question any person who is believed to have any information relevant to a complaint involving the use of liquor;
  - question any person present at any premises where liquor is sold or consumed;
  - take samples of any substance which may be relevant;
  - inspect any document that -
    - a person is required to maintain in terms of this Act or any other relevant law; or
    - may be relevant to any liquor-related inspection.
  - copy any document referred to above or, if necessary, remove the document in order to copy it;
  - seize any liquor if it appears that the liquor is being distributed contrary to this Act;
  - seize any methylated spirits that appear to have been manufactured or sold contrary to this Act;
  - seize any liquor that appears to have been manufactured contrary to this Act;
  - for the purpose of the inspection, take photos or make audio-visual recordings of anything or any person, process, action or condition implicated in the inspection on any premises; and
  - do all things necessary for conducting the inspection.
- (a) Where any of the above-mentioned goods were seized, the inspector must issue a receipt to the owner or person in control of the goods, pending a decision concerning the forfeiture of the goods.

**COMPLIANCE FUNCTIONS**

- (b) Section 28 - An inspector may enter and inspect any premises with the consent of the owner or person in control of the land or the premises, or on a routine basis enter and inspect any registered premises. Such a routine visit may not occur more than 6 times in a 12-month period, or more frequently if permitted by any other law for the purposes of an inspection.

**USE OF FORCE - SECTION 29**

An inspector executing a warrant in terms of this Act may overcome any resistance for entry or inspection by using force that is reasonably required, including breaking a lock, door or window of the land or premises to be entered. Before using force, the person executing the warrant must audibly demand admission and announce his or her purpose, unless there is reason to believe that doing so may induce someone to destroy, dispose of or tamper with any object or document that is the object of the inspection.

**NB:** Provincial legislation must always be consulted before any action is taken against possible offenders.

**35. MENTAL HEALTH CARE ACT NO. 17 OF 2002**

The Act, *inter alia*, provides for the care, treatment and rehabilitation of persons who are mentally ill and sets out different procedures to be followed in the admission of such persons. The Act also places certain duties on members of SAPS in respect of mentally ill persons.

**INTERVENTION BY MEMBERS OF SAPS IN RESPECT OF MENTALLY ILL PERSONS WHO MAY INFLICT SERIOUS HARM**

Section 40 of the Act compels members of the SAPS to apprehend a person who, due to his or her mental illness or severe or profound intellectual disability is likely to inflict serious harm to him or herself or others and to cause that person to be taken to an appropriate health establishment.

The police may also be requested by the head of the health establishment to assist with the location, apprehension and return of mentally ill persons who have absconded from a health establishment or to assist with the transfer of mentally ill persons. **Section 40 of the Act provides as follows:**

*“40. Intervention by members of South African Police Service-*

- (1) *If a member of the South African Police Service has reason to believe, from personal observation or from information obtained from a mental health care practitioner, that a person due to his or her mental illness or severe or profound intellectual disability is likely to inflict serious harm to himself or herself or others, the member must apprehend the person and cause that person to be-*
  - (a) *taken to an appropriate health establishment administered under the auspices of the State for assessment of the mental health status of that person; and*
  - (b) *handed over into custody of the head of the health establishment or any other person designated by the head of the health establishment to receive such persons.*
  
- (2) *If a mental health care practitioner, after the assessment referred to in subsection (1), is of the view that the person apprehended is-*
  - (a) *due to mental illness or severe or profound intellectual disability, likely to inflict serious harm to himself or herself or others, must admit the person to the health establishment for a period not exceeding 24 hours for an application to be made in terms of section 33; or*
  - (b) *unlikely to cause harm, he or she must release the person immediately.*
  
- (3) *If an application is not made within the 24 hour period, the person apprehended must be discharged immediately.*
  
- (4) *If an assisted or involuntary mental health care user has absconded or is deemed to have absconded or if the user has to be transferred under sections 27(10), 33(9), 34(4)(b), 34(6) and 39, the head of the health establishment may request assistance from the South African Police Service to-*
  - (a) *locate, apprehend and return the user to the health establishment concerned; or*
  - (b) *transfer the user in the prescribed manner.*
  
- (5) *The South African Police Service must comply with the request.*

- (6) When requesting the assistance, the South African Police Service must be informed of the estimated level of dangerousness of the assisted or involuntary mental health care user.*
- (7) A person apprehended in terms of subsection (4) may be held in custody at a police station for such period as prescribed to effect the return or the transfer in the prescribed manner.*
- (8) A member of the South African Police Service, may use such constraining measures as may be necessary and proportionate in the circumstances when apprehending a person or performing any function in terms of this section”.*

## **STATE PATIENTS**

The SAPS can also be requested by the head of a health establishment to locate, apprehend and retain State patients who have absconded from such establishment.

This situation is regulated by section 44 of the Act. Section 44(2) provides that the SAPS must comply with the request of the head of the health establishment.

## **MENTALLY ILL PRISONERS**

According to section 57 of the Act, the head of a health establishment must immediately notify and request members of the Service to locate, apprehend and return a mentally ill prisoner who has absconded from a health establishment. Section 57(5) determines that a member of the SAPS may use such constraining measures as may be necessary and proportionate in the circumstances when apprehending a person in terms of this section.

## **OFFENCES**

The Act makes provision for various criminal offences. According to section 70(1)(e), any person who refuses to furnish information or provides false information to a member of the SAPS about the

whereabouts of a mental health care user who has absconded, is guilty of an offence.

## DEFINITIONS

The following definitions in the Act are relevant:

**“health establishment”** means institutions, facilities, buildings or places where persons receive care, treatment, rehabilitative assistance, diagnostic or therapeutic interventions or other health services and includes facilities such as community health and rehabilitation centres, clinics, hospitals and psychiatric hospitals;

**“mental health care user”** means a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, State patient and mentally ill prisoner and where the person concerned is below the age of 18 years or is incapable of taking decisions, and in certain circumstances may include —

- (i) prospective user;
- (ii) the person’s next of kin;
- (iii) a person authorised by any other law or court order to act on that persons behalf;
- (iv) an administrator appointed in terms of the Mental Health Care Act; and
- (v) an executor of that deceased person’s estate and “user” has a corresponding meaning;

**“mental illness”** means a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis;

**“mentally ill prisoner”** means a prisoner as defined in section 1 of the Correctional Services Act in respect of whom an order has been issued in terms of section 52(3) (a) to enable the provision of care,

*treatment and rehabilitation services at a health establishment designated in terms of section 49;*

**“State patient”** means a person so classified by a court directive in terms of section 77(6)(a)(i) or 78(6)(i)(aa) of the Criminal Procedure Act.

Members should note that the **National Health Act No. 61 of 2003** also provides for intervention by the SAPS. Following a recent amendment to the Act which came into operation on 24 July 2013, a health officer or inspector may be accompanied by a police official and may, on the authority of a warrant issued in terms of section 84(5) and subject to sections 85 and 86A of the Act, enter any premises, including a private dwelling, or health establishment, specified in the warrant, and-

- (a) Inspect, photograph, copy, and examine any document, record, object or material;
- (b) seize any document, record, object or material if there is reason to suspect that it might be used as evidence in a criminal trial; and
- (c) examine any activity, operation or process carried out on the premises or health establishment. (Refer to National Commissioner’s circular 1/1/4/1: Implications of the National Health Amendment Act, 2013 (Act No. 12 of 2013) dated 19 August 2014).

## 36. MINERAL AND PETROLEUM RESOURCES

### DEVELOPMENT ACT NO. 28 OF 2002

#### ILLEGAL MINING

Section 5A of the Act contains a prohibition in terms of which no person may **prospect** for or **remove, mine**, conduct technical co-operation operations, reconnaissance operations, **explore** for and **produce any mineral** or petroleum or commence with any work incidental thereto on any area without —

- an environmental authorisation;
- reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and
- giving the landowner or lawful occupier of the land in question at least 21 days written notice.

Section 98 creates the criminal offences of the Act.

The contravention of section 5A is at present not specifically mentioned in section 98: This charge must be discussed with the prosecutor in a particular matter.

Apart from the above Act, there is a *plethora* of other statutes and common law offences that can be considered as possible charges or alternative charges in respect of illegal mining. The most important examples are the Diamonds Act No. 56 of 1986, the Precious Metals Act No. 37 of 2005, the Hazardous Substances Act No. 15 of 1973 (in respect of mercury), trespassing, theft, fraud, etc.

## DIAMONDS

The Diamonds Act No. 56 of 1986 creates illegal acts and offences in Chapters III and VIII.

In this regard, the following acts are *inter alia* prohibited:

- possession of unpolished diamonds (subject to certain exceptions): section 18;
- sale of unpolished diamonds (subject to certain exceptions): section 19;
- purchase of unpolished diamonds (subject to certain exceptions): section 20;

- assistance of licensees by non-licensed persons (subject to certain exceptions): section 20A;
- processing (polishing, crushing or setting) of diamonds (subject to certain exceptions): section 22;
- export of unpolished diamonds (subject to certain exceptions): section 24.

## Offences:

Sections 82 to 86 create various offences whilst the penalty clauses are included in section 87.

According to **section 25**, any person who by **chance finds or picks up any unpolished diamonds** at any place where he or she is not permitted to prospect, dig or mine for diamonds must forthwith take that unpolished diamond to the nearest police station and deliver it to a member of the SAPS on duty who holds a rank of at least sergeant.

If the National Commissioner of the SAPS or any member designated by the National Commissioner is satisfied that a person is the owner of the above mentioned or is entitled in possession thereof, he or she shall deliver that diamond to such person or is not so satisfied, he or she shall cause a notice to be published in the *Gazette* calling upon any person who may be the owner or whom may be entitled to possess the diamond, to prove his or her ownership/right of possession.

If no person furnishes proof within 21 days of the publication of the notice, the Commissioner/designated member shall cause the diamond to be sold and the proceeds thereof shall be paid into State Revenue Fund.

In this instance, the person who found or picked up the diamond is entitled to one third of the amount realized at the sale of the diamond.

## **Licenses under the Diamonds Act:**

The Act provides for the following kinds of licenses, permits and certificates that may be issued by the South African Diamonds and Precious Metals Regulator:

- diamond dealer's licence;
- diamond beneficiation licence to set unpolished diamonds;
- diamond beneficiation licence to polish diamonds;
- diamond research licence;
- temporary diamond buyer's permit;
- diamond trading house licence;
- certificate entitling a person to possess an unpolished diamond obtained in a lawful manner; and
- permit entitling a person to sell, export or import an unpolished diamond on certain conditions.

## **PRECIOUS METALS**

The Precious Metals Act No. 37 of 2005 provides for the acquisition, possession, smelting, refining, beneficiation, use and disposal of precious metals.

According to section 4, no person may acquire, possess or dispose of any unwrought precious metal, unless:

- the person is the holder of a refining licence;
- the person is an authorised dealer;

- the person is a producer who has won or recovered the unwrought precious metal;
- the person has obtained a certificate from the Regulator authorising acquisition or disposal of the unwrought precious metal;
- the person is the holder of a special permit issued by the Regulator for scientific or beneficiation purposes or to make jewellery; or
- the person is the holder of a precious metal beneficiation licence.

*“precious metal means —*

*(a) the metal gold, any metal of the platinum group and the ores of such metals; and*

*(b) any other metal that the Minister has declared by notice in the Gazette to be a precious metal for the purposes of this Act, and the ores of any such metal **semi-fabricated precious metal***

*means refined precious metal that is in the form of sheet, tube, wire, granule, plate, strip, rod, or sponge (including carat gold alloys as prescribed), or such other refined precious metal as may be prescribed”.*

“unwrought precious metal means —

- (a) precious metal that —
- (i) is unrefined (including concentrate and matte), or has been refined to a purity less than 99,9% and has not undergone any manufacturing process other than being refined or formed into a bar (but not a minted bar), an ingot, a button, plate, sponge, powder, granules, (excluding granules made from precious metal that has been refined to or beyond 99,9% purity, and carat gold alloys), solution; or
  - (ii) is prescribed as any substance, material or product of similar form to any such substance, material or product listed in paragraph (a) (i); or
- (b) any article or substance containing or consisting of precious metal contemplated in paragraph (a), but does not include any article that is of archaeological interest or that has been processed or manufactured for one or more specific industrial, professional or artistic uses”.

According to section 5 of the Act, no person may acquire, possess or dispose of semi-fabricated precious metals, unless:

- such person is the holder of a refining license;
- such person is an authorised dealer;
- such person is a producer who has won or recovered unwrought precious metal which has been refined and made into such semi-fabricated precious metal;
- such person has obtained a certificate from the Regulator to acquire or dispose of such semi-fabricated precious metal;
- such person has a special permit issued by the Regulator for scientific purposes;
- such person holds a precious metals beneficiation licence; or

- such person holds a jeweller's permit.

***“13. Transportation and conveyance of precious metals.- A person may not transport or in any manner convey any semi-fabricated or unwrought precious metal outside the boundaries of any mine, works or other property or place where such metal is mined, refined or worked with, unless he or she is in possession of the prescribed documentation”.***

#### **Members should note that:**

The Precious Metals Act allows a member of the police to search for, and inspect precious metals, with or without a warrant. This authority is contained in sections 16 and 18 of the Act. The (general provisions of) Criminal Procedure Act can therefore not be used to search and seize precious metals since a specific procedure is prescribed by the Precious Metals Act. A search and seizure warrant must therefore be applied for in terms of the provisions of the Precious Metals Act.

The offences and penalties of the Act is contained in section 20 which provide for a fine up to R500 000,00 or imprisonment up to 10 years to be imposed upon conviction.

#### **POLICING OF CHROME**

The prosecution of chrome ore has been a challenge, particularly to the possession, transportation, exportation and related activities thereof in the country. The possibility of the use of various pieces of legislation to address this issue will be discussed below.

#### **Mineral and Petroleum Resources Development Amendment Act, 2008 No. 49 of 2008 (MPRDA)**

In terms of this Act, a person can apply for a mining right or mining license for minerals listed in List 2 of Regulation Gazette No. 527 dated 3 April 2004 as amended. Chrome Ore is listed as a ferrous and base metal in

terms of this list. The Act defines minerals as “any substance, occurring naturally in or on earth...which is formed by or subjected to a geological process, and includes sand, stone, rock, gravel”. According to the definition, it would appear that the Act is applicable to chrome ore as a mineral. It is an offence to prospect for, or remove, mine minerals without the necessary permits or mining in terms of section 5(A) read with sections 96 and 99.

The question that follows is whether a person can be prosecuted for acquiring, transporting, being in possession or for disposing chrome ore. The Act only criminalises the removal of a mineral. The Act does not define “removal” and therefore the ordinary definition of the word would be applicable. The dictionary defines “remove” as to “take (something) away or take something off from the position occupied, abolish or to get rid of. The word “remove” cannot be extended to include the actions of acquiring, possession, transporting or the disposal of a mineral. It would appear that the legislature’s intention was to criminalise only the removal of chrome without license or permit and **not** any act of acquiring, possession, transport or disposal thereof. A person can therefore only be charged with the illegal mining of chrome ore in terms of section 5(A) of the Act.

#### **Section 5A- prohibition relating to illegal act:**

No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for produce any mineral or petroleum or commence with any work incidental thereto on any area without —

- (a) an environmental authorization;
- (b) a reconnaissance permission, prospecting right permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

- (c) Giving the landowner or lawful occupier of the land in question at least 21 days written notice.

## **Section 98- Offences** [In as far as the policing of chrome is concerned]

Any person is guilty of an offence if he or she —

- (a) contravenes or fails to comply with -

(viii) any other provision of the Mineral and Petroleum Resources Development Act No. 28 of 2002;

## **Section 99 –Penalties**

In the case of any conviction of an offence in terms of this Act of which no penalty is expressly determined, to a fine or to imprisonment for a period not exceeding six months or both a fine and such imprisonment.

## **Precious Metals Act No. 37 of 2005**

The Precious Metals Act No. 37 of 2005 defines a “precious metal” as —

- (a) the metal gold, any metal of the platinum group and the ores of such metals; and
- (b) any other metal that the Minister [of Minerals and Energy] has declared by notice in the Gazette to be a precious metal for the purposes of this Act, and the ores of any such metal.

The Act defines a “semi-fabricated precious metal” as “refined precious metal that is in the form of sheet, tube, wire, granule, plate, strip, rod, or sponge (including carat gold alloys as prescribed), or such other refined precious metal as may be prescribed. In the light of these definitions this Act **cannot be used to address chrome ore** due to the fact that it has not been declared as such by the Minister, it is not defined as a precious metal but as a ferrous and base metal, neither has it been prescribed as a semi-fabricated precious metal.

## **National Environmental Management Act No. 107 of 1998 (NEMA)**

Section 38A of the MPRDA provides that the Minister of the Department of Minerals and Energy is the issuing authority in terms of this Act. This has resulted in the establishment of an enforcement unit within the Department of Minerals and Energy (DMRE) that is responsible for the investigation of these offences as well as the issuing of environmental authorisations as referred to in section 5A of the MPRDA.

Environmental offences committed during a mining operation are therefore prosecuted in terms of NEMA and not the MPRDA. There are various offences which might find applicability in the illegal mining of chrome ore. The NEMA protects the environment and therefore it makes no difference as to what kind of precious metal or ferrous or non-ferrous metal is being mined or how it is defined in other legislation.

Potential offences in terms of the National Environmental Management Act No. 107 of 1998 include the following:

- Contravention of section 24F(1)(a): Commencement of listed activity without environmental authorisation;
- Contravention of section 24F(2): No person may commence an activity listed or specified in terms of section 24(2)(a) or (b) unless environmental authorisation is granted for the activity;

- Contravention of section 28(14): Committing an act or an omission which causes significant pollution or degradation to the environment;
- Contravention of section 151(j) of the National Water Act No. 36 of 1998: No person may unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource (the offence still resorts under the mandate of the Department of Water and Sanitation).

## **Second-Hand Goods Act No. 6 of 2009**

In terms of the Act, chrome is both listed as “goods” in terms of Schedule 1 and a “controlled metal” in terms of Schedule 2.

The question arises as to whether chrome ore would fall under the ambit of the Second-Hand Goods Act. To answer this question, one has to look at the purpose of the Act, which explains “*To regulate the business of dealers in the second-hand goods and pawnbrokers, in order to combat trade in stolen goods; .....*”.

According to the Act, a “dealer” is defined as “*a person who carries on a business of dealing in second hand goods, and includes a scrap metal dealer and a pawnbroker*”.

It is also important to understand exactly what is meant by “goods” and, more specifically, “second-hand goods”. The applicable definition reads as follows:

*“goods” means any of the goods specified in Schedule 1, but does not include firearms or ammunitions defined in the Firearms Control Act, 2000 (Act No. 60 of 2000) or clothing.*

The following items in Schedule 1 are applicable:

- Jewellery, including unwrought precious metal as defined in the Precious Metals Act No 27 of 2005.
- o Chrome is not a precious metal and is therefore not covered by this item.
- Any controlled metal, or any unwrought article, or any article or substance consisting wholly or principally of one or more of such metals.
- o Controlled metals are defined in Schedule 2 and include copper, aluminium, zinc, **chrome**, lead, white metal, nickel, tungsten, tin, ferrovanadium, ferrosilicon, ferrochrome, brass, bronze, cobalt and precious metals as defined in the Precious Metals Act, 2005 (Act No. 27 of 2005), or any article consisting wholly or principally of any of those metals. (Note that Schedule 1 refers to “any article or substance” while Schedule 2 only refers to “any article”.)

The definition of second-hand goods reads as follows:

*“second-hand goods” means goods **which have been in use by a person other than the manufacturer or producer thereof or a person dealing therewith for such manufacturer or producer in the course of business**, but does not include goods with a value of less than R100.”*

It is submitted that chrome ore and have not *“**been in use by a person other than the manufacturer or producer**”* and a person dealing in such would not have to register as a second-hand goods dealer. Even if a person is registered, chrome ore is therefore not an article or item that must be recorded in the registers of a (registered) dealer.

Scrap metal is defined as follows:

*“scrap metal” includes any used, broken, worn out, defaced or partly manufactured **goods** made wholly or partly of non-ferrous or ferrous metal, lead or zinc or any substance of metallic waste or dye made of any of the materials commonly known as hard metals or cemented or sintered metallic carbides;”*

One can hardly argue that chrome ore is “used, broken, worn out, defaced or partly manufactured” that is “made wholly or partly” of non-ferrous metal.

It is submitted that chrome ore is neither second-hand goods for purposes of the Second-Hand Goods Act, nor is it a controlled metal for purposes of Chapter 6 of the Act. The Act can therefore not be used to police the possession of, or dealing in chrome ore.

In view of an inadequate regulatory framework to address chrome ore/unwrought chrome, the Minister of Police has requested the Minister of Minerals and Energy to consider legislative development to address chrome holistically.

## **37. NATIONAL ROAD TRAFFIC ACT NO. 93 OF 1996**

The purpose of this Act is to provide for road traffic matters which apply uniformly throughout South Africa and for matters connected therewith.

### **TRAFFIC OFFICER – SECTION 1**

The definition of “traffic officer” includes any member of the Service as defined in section 1 of the South African Police Service Act No. 68 of 1995 and any member of a municipal police service.

**POWERS AND DUTIES OF TRAFFIC AND POLICE OFFICERS – SECTION 3I**

The powers and duties of traffic and police officers include the following:

- (a) When in uniform, requiring the driver of any vehicle on a public road to stop such vehicle;
- (b) Inspecting and testing any part and the functioning of such vehicle and its equipment, with the view to ascertaining whether such a vehicle complies with the provisions of this Act;
- (c) Ascertaining the dimensions and mass of the load on any vehicle and requiring any vehicle to proceed to a massmeter or mass-measuring device, and if the mass exceeds the mass allowed in terms of this Act, prohibiting the operation of the vehicle until it has been reduced to comply with Act;
- (d) Driving any vehicle where necessary in the performance of his or her duties if he or she is licensed to drive a vehicle of the class concerned;
- (e) Regulating and controlling traffic on any public road and giving directions as may be necessary for the safe and efficient regulation of traffic;
- (f) Requiring any person to furnish his or her address and other particulars which are required if the officer reasonably suspects that an offence in terms of this Act has been committed;
- (g) At any time entering the vehicle of an operator (e.g. a bus or a minibus-taxi) and inspecting such vehicle;
- (h) Inspecting any vehicle or part thereof and seizing/impounding any document in connection with the registration or licensing of such vehicle. Where it is found that the engine or chassis (VIN) numbers of the vehicle differ from the numbers as specified on the documents, directing that the vehicle be taken to any police station to conduct the necessary inspections for a police clearance;

- (i) Requiring from the owner, operator or driver of a vehicle police clearance in respect of the vehicle before allowing the motor vehicle to be taken across the borders of South Africa.

An amended section 31 was inserted in the Act by the National Road Traffic Amendment Act No. 21 of 1999 but the amended section has not been put in operation yet.

## **DRIVER OF MOTOR VEHICLE TO BE LICENSED - SECTION 12**

No person may drive a vehicle on a public road unless he or she is the holder of a valid licence issued in terms of this Act and such valid licence is with the person while driving.

## **DRIVER'S LICENSES FROM OTHER COUNTRIES - SECTION 23**

A licence to drive a vehicle, issued in any other country, or an **international driving permit** shall be deemed to be a licence for the purposes of section 12. If that licence is a provisional licence or an international driving permit, it does not authorise the driving of a motor vehicle carrying passengers and in respect of which a professional driving permit is required.

## **FAILURE TO OBEY TRAFFIC SIGN PROHIBITED – SECTION 58**

No person shall, unless otherwise directed by a traffic officer, fail to comply with any direction given by a road traffic sign.

## **CERTAIN DRIVERS MAY EXCEED GENERAL SPEED LIMIT – SECTION 60**

Certain drivers may exceed the general speed limit, e.g. a rescue vehicle or a police vehicle, but only in the performance of their duties, provided that the vehicle is driven with due regard to the safety of other traffic.

**DUTY OF DRIVER IN EVENT OF ACCIDENT – SECTION 61(2)**

No person may remove any vehicle from an accident in which a person was killed or injured from the position it came to rest, until such removal has been authorised by a police official, or the vehicle causes a complete obstruction of the roadway and the position of the vehicle has been clearly marked on the surface by the person moving it.

According to section 61(1)(a – e) the driver of a vehicle involved in an accident where a person is killed or injured or suffered damage in respect of any property, including a vehicle or animal must immediately stop the vehicle, ascertain the nature and extent of any injury sustained by any person, render assistance to such injured person, ascertain the nature and extent of any damage sustained and give his name and address or that of the owner of the vehicle to any person having reasonable grounds for so requiring.

According to section 61(1)(f) the driver of a vehicle involved in an accident where a person was killed or injured must within 24 hours after the occurrence of the accident, or in any case, on the first working day after the occurrence of the accident, report the accident to the SAPS at a police station.

**RECKLESS OR NEGLIGENT DRIVING – SECTION 63(1)**

No person may drive a vehicle **recklessly or negligently** on a public road.

**INCONSIDERATE DRIVING – SECTION 64**

No person shall drive a vehicle on a public road without reasonable consideration for any other person using the road.

## **Driving while under the influence of intoxicating liquor or drug having narcotic effect – section 65(1)**

No person may drive or occupy the driver's seat of a vehicle while the engine of the vehicle is running, while such a person is under **the influence of an intoxicating liquor or a drug** which has a narcotic effect.

## **DRIVING WITH EXCESSIVE AMOUNT OF ALCOHOL IN BLOOD – SECTION 65(2)**

No person may drive or occupy the driver's seat while the engine of the vehicle is running while the concentration of alcohol in a specimen of blood taken from any part of his or her body is not less than 0,05 gram per 100 ml, or 0,02 gram per 100 ml in the case of a professional driver referred to in section 32.

Blood must be drawn within two hours by a doctor or registered nurse!

## **DRIVING WITH EXCESSIVE AMOUNT OF ALCOHOL IN BREATH – SECTION 65(5)**

No person may drive or occupy the driver's seat of a motor vehicle while the engine of the vehicle is running, while the **concentration of alcohol** in any specimen of **breath** exhaled is not less than 0,24 milligram per 1 000 millimetre.

According to section 65 (8) no person detained for an alleged contravention of any provision of section 65 may during such detention consume any substance that contains alcohol of any nature, except on instruction of a medical practitioner or smoke until the specimen of blood or breath has been taken. According to section 65(9) no person shall refuse that a specimen of blood, or breath, be taken of him or her.

## UNAUTHORISED ACTS IN RELATION TO VEHICLES – SECTION 66

According to section 66(2), no person shall **ride in or drive a vehicle without the consent of the owner**, operator or person in lawful charge thereof.

Section 66(3) prohibits, without lawful excuse, the **tampering with a vehicle** or with any part of the equipment or the accessories of a vehicle. The section also prohibits **wilful damage to any vehicle or the throwing of any object at any vehicle**. Section 66(4) prohibits, without written consent of the registering authority, the **removal, alteration, mutilation**, etc. of the **engine or chassis number** of a motor vehicle.

## UNLAWFUL ACTS IN RELATION TO NUMBER PLATES, REGISTRATION NUMBERS OR MARKS – SECTION 68

This section *inter alia* prohibits the **falsification**, alteration, etc. of **number plates**; tampering with the engine or chassis number of a motor vehicle etc.

## OFFENCES AND PENALTIES – SECTION 89

Section 89 creates the offences of the Act and provides for imprisonment of up to 9 years.

## PROHIBITION AND DISPLAY OF BLUE LIGHTS – REGULATION 176(3) OF THE NATIONAL ROAD TRAFFIC REGULATIONS, 2000

No person shall operate a **motor vehicle fitted** with, or in or **on which is displayed**, a lamp or lamps, emitting a blue light or capable of emitting blue light. This provision does not apply to a police vehicle, a vehicle used by the South African National Defence Force or a vehicle of a traffic officer, which displays a lamp or lamps emitting a blue light, in the execution of their duties.

Vehicles employed in the **maintenance of public roads**, distribution of electricity, essential public services, refuse are authorised to use lamps emitting flashing **amber** lights. The vehicle of a **medical practitioner** may be fitted with a lamp emitting **flashing red lights** whilst a vehicle engaged in **civil protection** may be fitted with a lamp emitting **flashing green light** in any direction. **White lights** are reserved for **security officers**.

**It is to be noted that mere possession of, the sale of blue lights, or installation of blue lights are not criminalised in any legislation. If a member of the SAPS is confronted by a vehicle fitted with, or in which a blue light is found, the member must consider the offence of impersonating a police officer (a contravention of section 68(1) of the South African Police Service Act No. 68 of 1995).**

## **USE OF CELLULAR PHONES WHILE DRIVING – REGULATION 308A OF THE NATIONAL ROAD TRAFFIC REGULATIONS, 2000**

No person shall drive a motor vehicle on a public road while holding a cellular or mobile phone in one or both hands or with any other part of the body. From 25 September 2003 members of the SAPS are no longer exempted from Regulation 308A and may no longer use a cellular phone whilst driving, unless it is affixed to the vehicle or by means of a “*hands-free kit*”.

### **NOTE:**

The national phased roll-out of the Administrative Adjudication of Road Traffic Offences Act No. 46 of 1998, (AARTO) commenced on 1 July 2021. A notice issued in terms of section 56 and 341 (J534) of the Criminal Procedure Act, 1977 may not be issued in respect of an infringement committed in terms of this Act. Note that AARTO makes a distinction between infringements and offences. A J534 may not be issued in respect of either. Only an authorised traffic official may issue an infringement notice.

On 13 January 2021 the North Gauteng High Court declared that AARTO is unconstitutional and therefore invalid, in its entirety. This was as a result of the finding that the Act unlawfully intrudes upon the exclusive executive and legislative competence of the local and provincial governments envisaged in the Constitution, preventing local and provincial governments from regulating their own affairs. The Constitutional Court was still to make a ruling on the High Court's finding of unconstitutionality at the time of publication of this booklet.

## 38. OLDER PERSONS ACT NO. 13 OF 2006

### INTRODUCTION

Older persons have specific rights and needs which must be respected, protected and promoted. Any person who abuses an older person is guilty of a criminal offence in terms of section 30(1) read with section 33(b) of the above-mentioned Act. The Act imposes obligations on members to whom a report about the abuse of an older person has been made. **National Instruction 1 of 2014: Protection of Older Persons has been issued to give effect to the responsibilities of members in terms of the Act.**

A member must always treat an older person in a manner which is in the best interest of the older person. It is therefore essential that the Act must be read in conjunction with **National Instruction 1 of 2014**. The National Instruction provides guidance to members on how to respond to a complaint of abuse of an older person in order to comply with the obligations imposed on a member in terms of the Act.

#### Who is an "older person"?

According to section 1 of the Act, an older person, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older.

#### What constitutes abuse in terms of this Act?

Section 30(2) of the Act defines “abuse” as “any conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person”. This includes physical, sexual, psychological and economic abuse. (These concepts are defined in section 30 (3) of the Act).

## **Older person in need of care and protection:**

An older person “in need of care and protection” is a person who —

- has his or her income, assets or old age grant taken against his or her wishes or who suffers any other economic abuse;
- has been removed from his or her property against his or her wishes or who has been unlawfully evicted from any property occupied by him or her;
- has been neglected or abandoned without any visible means of support;
- lives or works on the streets or begs for a living;
- abuses or is addicted to a substance and is without any support or treatment for such substance abuse or addiction;
- lives in circumstances likely to cause or to be conducive to seduction, abduction or sexual exploitation;
- lives in or is exposed to circumstances which may physically or mentally harm that older person; or
- is in a state of physical, mental or social neglect.

## **Steps to be taken in respect of older persons in need of care and protection:**

If a report is received alleging that an older person is in need of care and protection, the member receiving the report must consider the available facts and, if necessary, inquire into the circumstances of the older person (which may include a visit to the person and obtaining of information relating to the older person) to determine whether the older is in need of care and protection.

The member must inform the person making the allegation of the right to —

- lay a criminal charge (if an offence was committed) and assist in this regard;
- apply for a protection order in terms of the Domestic Violence Act No. 116 of 1998 if the older person and the respondent (alleged perpetrator) are in a domestic relationship; or
- lay a criminal charge as well as apply for a protection order and inform the person that laying a criminal charge is not a prerequisite for applying for a protection order.

A member who has reasonable grounds to believe that a specific older person may be in need of care and protection must report the matter to a social worker. A docket must be opened and registered on CAS.

If the member concludes that the older person is not in need of care and protection, an entry must be made in the Occurrence Book (OB), and must state the reasons for such a conclusion (See paragraph 7 of the National Instruction).

A member must also ensure the safety and well-being (including medical treatment) of an older person who is in need of care and protection. (See paragraph 8 of the National Instruction).

In order to protect the older person, a member may, in terms of section 27 of the Act issue a written notice (SAPS 593) to the alleged

offender of the abuse to remove the alleged offender from the home or residence of an older person. According to paragraph 9 of National Instruction 1 of 2014, a member who receives a report indicating that an older person may be in need of care and protection-

- (a) may, if he or she is satisfied that it will be in the best interest of the older person concerned if the alleged offender is removed from the home or place where the older person resides; or
- (b) must, if a report is received from a social worker indicating that it will be in the interest of the older person that the alleged offender be removed, remove the alleged offender from the home or place where the older person resides and issue a written notice (SAPS 593) to the alleged offender.

The member must explain the importance of the written notice to the alleged offender and warn such offender that refusal to leave the home or place where the older person resides; or contacting the older person in contravention of the written notice is an offence in terms of section 27(8)(2). These offences are Schedule 1 offences, and, if a member has reasonable grounds to believe that a person has committed such an offence, such a person may be arrested in terms of section 40(1) of the Criminal Procedure Act No. 51 of 1977.

The purpose of the written notice (SAPS 593) is to ensure that the alleged offender appears before a magistrate to inquire into the matter and to make an order which the court deems fit. A person who contravenes or fails to comply with an order of the magistrate's court or with any condition contained in such order commits an offence in terms of section 27(8)(b).

Take note of the legal duty to report knowledge, a reasonable belief or suspicion that an act of domestic violence has been committed against an older person to a social worker or the SAPS (as set out in section 2A and 2 B of the Domestic Violence Act No. 116 of 1998).

## 39. PREVENTION OF COUNTERFEITING OF CURRENCY

### ACT NO. 16 OF 1965

#### INTRODUCTION

The issuing of money is the exclusive monopoly of the State. In Roman law the counterfeiting of coins was seen as a very serious issue and was punishable at that time with death.

The Prevention of Counterfeiting of Currency Act is applicable to the counterfeiting of bank notes that are NOT South African bank notes (foreign bank notes) and the counterfeiting of certain coins.

#### Prohibition:

Section 2 of the Act criminalises a broad range of conduct such as counterfeiting, forging, possession, uttering, tendering, etc. As can be seen below, not only are current coins, counterfeit coins and bank notes addressed, but also the possession of medals, tools, gold and/or silver that may be used in the act of counterfeiting.

According to this section, any person who -

- (a) counterfeits or performs any part of the process of counterfeiting any **current coin**;
- (b) forges or alters a **bank note**;
- (c) utters, tenders or accepts any **counterfeit coin**, knowing it to be counterfeit, or a **forged or altered bank note**, knowing it to be forged or altered;
- (d) without lawful authority or excuse -
  - (i) has in his or her possession any **counterfeit coin** or any forged or altered bank note;

- (ii) imports or receives into the Republic any counterfeit coin or **any forged or altered bank note**; or
- (iii) exports from the Republic or puts or takes or causes to be put or taken on board any ship, vessel, boat, aircraft or vehicle for the purpose of being so exported, any **counterfeit coin** or any forged or **altered bank note**;
- (e) with intent to counterfeit current coin or to forge a bank note, makes, mends, obtains, has in his possession or disposes of any tool, **instrument or machine** (i) intended for making any counterfeit coin or forged bank note;
  - (ii) intended for the marking of coin round the edges with letters, grainings or other marks or figures resembling letters, grainings, marks or figures round the edges of any current coin; or
  - (iii) capable of being used for preparing any material for receiving any impression resembling that on any current coin;
- (f) gilds, silvers or colours **any piece of metal** of a size or figure fit to be coined, for the purpose of coining it into counterfeit coin;
- (g) makes any piece of metal into a size or figure fit to be coined, with intent to facilitate the coining therefrom of **counterfeit coin** or for the purpose of coining therefrom counterfeit coin;
- (h) buys, sells or is in possession of **a piece of metal** referred to in paragraph (f) or (g) for a purpose referred to therein;
- (i) impairs, diminishes or lightens **any current coin** with intent that such coin when so impaired, diminished or lightened may pass as current coin;
- (j) without lawful authority or excuse has in his possession or disposes of or in any way deals with **any filing or clipping, or any gold or silver bullion, or any gold or silver in dust, solution** or otherwise, produced or obtained by impairing, diminishing or lightening current coin, knowing that it has been so produced or obtained;
- (k) with intent to defraud, utters, tenders, disposes of or otherwise uses as current coin **any medal or piece of metal** which is not current coin;

- (l) without lawful authority or excuse defaces any **current coin** by stamping thereon any word, letter, device or mark, shall be guilty of an offence.

### Definitions:

According to section 1 of the Act:

*“bank note” includes any paper money which is legal tender in the State or territory in which it is issued, irrespective of the name by which it is known, but does not include a bank note issued under section fourteen of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989).*

*“counterfeit coin” means any coin, other than current coin, resembling or apparently intended to resemble or pass for current coin, and includes current coin prepared or altered so as to resemble or pass for coin of a higher denomination.*

*“current coin” means any coin the issue and circulation of which, in any State or territory, as money have been authorised by law.*

Interpretation:

- South African bank notes are excluded from the Act.
- The Act applies to current coins of any State or territory.
- South African coins can therefore also be addressed by the Act.
- Current coins are coins which are currently used as money.
- Counterfeit Krugerrands are addressed by section 34 of the SA Reserve Bank Act, 1989. (Remember: Krugerrands are coins!)
- Local and foreign coins can also be addressed by the South African Reserve Bank Act of 1989.

### The South African Reserve Bank Act No. 90 of 1989:

“Section 34 of the South African Reserve Bank Act, 1989 provides as follows:

-(1) Subject to the provisions of section 2 of the Prevention of Counterfeiting of Currency Act, 1965 (Act No. 16 of 1965), any person who-

- (a) **forges**, alters or unlawfully issues a **note of the Bank** or something purporting to be a note of the Bank, **or any coin**;
- (b) **utters**, tenders or accepts any **such note or a coin** which has been forged, altered or unlawfully issued, knowing it to be forged, altered or unlawfully issued;
- (c) without the authority of the Bank, **engraves** or makes upon any material whatsoever any words, figures, letters, marks, lines or devices the print whereof resembles in whole or in part any words, figures, letters, marks, lines or devices peculiar to and used in or upon any note of the Bank or any coin which is legal tender;
- (d) without the authority of the Bank, uses or knowingly has in his or her **possession** any material whatsoever upon which has been engraved or made any such words, figures, letters, marks, lines or devices;
- (e) contravenes the provisions of section 33;
- (f) wilfully **defaces, soils or damages any note of the Bank**, or writes or places any drawing thereon or attaches thereto anything in the nature of an advertisement, or wilfully defaces or damages any coin which is legal tender;
- (g) **removes** from the premises where coins are manufactured under this Act, without lawful authority or excuse, **any matrix, master punch, die, collar, piercing and cutting tool, pattern or mould**, or any other tool, machine, engine, instrument or thing used or employed in or in connection with the coining of coins, or any useful part of the several objects aforesaid, or any coin or bullion;

- (h) **is found in possession of any blank or defective coin of the size, shape and metal composition of any coin of which the coining is authorised by this Act, and is unable to account satisfactorily for such possession;**
- (i) *fraudulently inserts or uses in a machine that vends merchandise or services or collects fares or tolls, anything that is intended to pass for the coin or the token of value that the machine is designed to receive in exchange for the merchandise, service, fare or toll, as the case may be;*
- (j) **sells, exchanges or otherwise disposes of any metal reproduction of any gold coin contemplated in Schedule 2, or uses the word “Krugerrand”, “Natura” or “Protea”, or any derivative thereof or any combination thereof with any other word, in the furtherance of the sale, exchange or disposal in any other manner of such a reproduction or of any metal article of commerce;**
- (k) *without the written approval of the Department of Finance, intentionally destroys, melts down, dissolves in any dissolvent, breaks up or damages a coin that has been issued under section 11 of the South African Mint and Coinage Act, 1964 (Act No. 78 of 1964), or under section 14 of this Act, or removes any such coin out of the Republic, or causes or permits it to be so removed, with the purpose of so dealing with it or causing it to be so dealt with outside the Republic; or*
- (l) *sells or disposes of any coin issued as contemplated in paragraph (k), knowing or suspecting that such coin is to be dealt with in a manner constituting an offence under paragraph (k) shall be guilty of an offence”.*

**Case law:** In *Minnies and others v S* [2012] JOL 29188 (SCA) the facts of the case, referred to by the Supreme Court of Appeal as “the stuff of a low grade Hollywood thriller” were as follows: An offer was made by four suspects to an acquaintance of one of the suspects and a police agent to sell a considerable number of R100,00 counterfeit notes at 50% of their face value. Police were lurking nearby to pounce on the suspects. The suspects became edgy when they saw a Metro police vehicle and fled the scene. They were eventually apprehended after a high speed car chase

through the streets of the city. The counterfeit notes that the four suspects wished to sell were never handed over to the undercover police agent, but had merely been offered to him for purchase. The State contended that this was sufficient to charge the suspects with section 34 (1)(b) of the South African Reserve Bank Act (tendering of counterfeit banknotes), read with section 2 of the Prevention of Counterfeiting of Currency Act, 1965. The Supreme Court of Appeal held that the **charges were poorly drawn** and that the **last-mentioned act was of no relevance**. According to the Court, **“tender” in section 34(1)(b) must be construed as an action whereby counterfeit money is offered as genuine currency**. The fact that all relevant parties in the present case were aware that the suspects were attempting to sell counterfeit money amounts to an “utterance” and not a “tender”. Since there was no **unlawful tender**, as stated in the charge sheet, the conviction was set aside on this technicality.

**NB:**

Mistakes are sometimes made in respect of charge sheets. The charge sheets may lack the specific and/or correct details set out in the relevant legislation. There is also evidence of accused persons being convicted in terms of inapplicable legislation, more specifically the Prevention of Counterfeit Currency Act, which does not apply to bank notes which are issued by the South African Reserve Bank. (See, for instance: **S v Matshimela [2002] JOL 9598 (W)**). Members who investigate offences of this nature must, in conjunction with the state prosecutor, ensure that charges are correct and in accordance with the wording set out in the relevant legislation.

The South African Reserve Bank can provide valuable input to SAPS investigators in respect of counterfeit currency cases to ensure that all relevant information is placed before court. This assistance may include, but is not limited to, affidavits related to the impact of counterfeit currency on the economy.

## VICTIM IMPACT STATEMENT (VIS)

The statement presents evidence about the prevalence of counterfeiting in society and its impact on both the immediate victim

and the community as a whole. It gives the court the information it requires to impose a just sentence.

## **STATEMENT ON CURRENCY COUNTERFEITING AND ITS EFFECTS ON THE ECONOMY**

In terms of Section 14 of the South African Reserve Bank Act No. 90 of 1989, the South African Reserve Bank (the (SARB) has the sole right to issue or cause to be issued banknotes and coins in the Republic.

The SARB is responsible for issuing quality banknotes and coins that are readily accepted and secured against counterfeiting. The SARB is also responsible for designing the banknotes (for final approval by the Minister of Finance) including their security features, distributing new banknotes and replacing old banknotes. The SARB also ensures that the currency it issues is genuine and that the supply meets public demand.

Counterfeiting causes not only financial loss to the direct victims, but could seriously undermine the confidence in the South African Currency.

### **The effect on the economy:**

Banknotes are an important method of payment for goods and services and are essential to South Africa's economic well-being. Currency counterfeiting causes a decrease in the acceptability of physical cash with payees demanding electronic transfers for payments. This could impact on a large segment (section) of the South African community which has no access to such electronic means.

**The impact of counterfeiting on the direct victims:**

The SARB like other central banks in the world will not make payment to a person who wittingly (knowingly) and/or unwittingly (unknowingly) possesses a counterfeit note. All other central banks, including the SARB have concluded that providing reimbursement for counterfeits would act as an incentive that could inevitably increase counterfeiting activity. The financial loss resulting from counterfeit notes could be substantial for an individual or a small business with limited revenue. Poorer segments (sections) of the public might be affected considerably more.

**The effect of the loss of confidence in banknotes:**

Counterfeit notes in circulation in the RSA pose significant (major) risks for the SARB and public. In the long term, failure to take decisive action to combat currency counterfeiting can lead to the erosion (wearing away) of public confidence in the South African currency resulting in the SARB having to bear reputational risk in this regard.

It is, therefore, critical that severe penalties and/or legal actions are imposed on such offender/s to serve as a suitable deterrent (prevention).

**The financial impact due to increased cost for law enforcement and businesses:**

Finally, the additional human and financial resources needed to respond to currency counterfeiting have a substantial impact on the SARB, law enforcement agencies, businesses and the financial sector in general.

## 40. PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT NO. 12 OF 2004

The above Act expands the traditional meaning of the offence of corruption in that it provides for 21 different offences aimed at combating corruption. The Act is applicable to both the private and the public sector. The golden thread that is interwoven with the legislation is the unlawful giving or receiving of a so-called “gratification”, coupled with a specific intent or result.

### “GRATIFICATION”

“*Gratification*” has a broad meaning and includes the following:

- Money
- Donations and gifts
- Employment or a contract of employment
- Any favour or advantage of any description
- Any right or privilege
- Holiday accommodation
- Any discount, commission or bonus, etc.

### EXAMPLES OF CORRUPTION

The mere giving or receiving of a gratification is, in itself, not sufficient to constitute corruption. The giving or receiving of a gratification must have a specific result or objective such as -

- the illegal, dishonest, unauthorised, incomplete or biased performance of one’s functions or duties;

- misuse or selling of information or material acquired in the course of one's duties;
- an abuse of a position of authority;
- a breach of trust;
- a violation of a legal duty or set of rules;
- conduct that will achieve an unjustified result;
- any unauthorised or improper inducement to do or not to do anything;
- expediting or delaying the performance of official acts by public officers;
- showing favours to public officers;
- using someone's position to influence decisions;
- influencing the election or appointment of functionaries;
- improper influence over decision making of persons;
- accepting or giving unauthorised gratification to perform functions within the scope of an employment relationship;
- testifying in a particular way or in an untruthful manner in a trial;
- altering or destroying records;
- giving or withholding information in a police docket;
- "price fixing" in respect of contracts;
- inducement to award a tender;
- "match fixing" in respect of sporting events;
- acquiring a private interest in a contract with a public body in which a public officer is employed;

- coercion or intimidation of witnesses;
- making of false entries in books or documents;
- using, concealing or receiving of property that forms part of any gratification which is the subject of certain offences in terms of the Act;
- failure to report corruption by a person who holds a position of authority.

**Note: Gratification not always required:**

Not all corruption offences require the giving or receiving of a gratification. Section 17 of the Act, for instance, provides that mere acquiring or holding a private interest by a public officer in any contract connected with the public body in which he or she is employed, constitutes an offence.

Other offences in the Act that do not require the giving or receiving of a gratification are section 18 (unacceptable conduct relating to witnesses); section 19 (interference with investigations); section 20 (accessory to or after offence) and section 34 (failure to report corruption).

***Vermeulen v Tuks FM* [2012] JOL 28492 (BCCSA):**

In this matter it was confirmed that one does not actually have to hand over any gratification. If one merely offers a bribe, one is already guilty of corruption. It works both ways – someone who simply asks for a bribe is also guilty of corruption.

***In Director-General, Department of Public Works and Another v Public Service Sectorial Bargaining Council and Others* [2012] 5 BLLR 468(LC):**

Respondent employee, a horticulturalist, was dismissed for corruption after suggesting to a person tendering for the laying of instant lawn that the price of R8 per square meter be adjusted upward with R0.50 per square meter. Employee attempted to pocket the difference between tender price and the inflated price.

## TYPES OF OFFENCES

The Act provides for a general offence of corruption in section 3 which is applicable to -

- any person who accepts a gratification from any other person for the benefit of him or herself or for the benefit of another person; or
- who gives to any other person a gratification, whether for the benefit of that other person or another person in order to act in a manner that amounts to, *inter alia*, illegal, dishonest, unauthorised or biased performance of powers, duties or functions or the abuse of a position of authority; or ● the misuse or selling of information or material acquired in the course of the carrying out or performance of powers, duties and functions.

## SPECIFIC PERSONS

The Act furthermore provides for corruption offences relating to specific persons such as public officers, agents, members of the legislative authority, judicial officers and members of the prosecuting authority.

Police officials who are corrupt can, depending on the facts, be charged with the provisions of section 3 and/or the provisions of section 4 which deal with corruption by public officers.

## SPECIFIC MATTERS

Another category of offences is created for specific matters such as gambling games, sporting events, auctions, tenders, contracts and the manipulation of witnesses and evidence during trials, hearings or proceedings.

## **COMPULSORY REPORTING OF CORRUPTION**

Certain managers of the Service, the public sector and the private sector are compelled to report corruption and/or common-law offences such as theft, fraud, forgery, uttering and extortion.

From 14 September 2012, in accordance with an amendment to section 34 (1) of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004, persons in a position of authority who know or ought reasonably to have known or suspect that another person has committed an offence of corruption or theft, fraud, extortion, forgery or uttering of a forged document involving an amount of R 100 000.00, or more, must report such knowledge or suspicion to "*the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995*".

Failure by a person in a position of authority to report these offences constitutes a criminal offence in terms of section 34(2) of the Act.

Section 34 reports do not place a duty to report on ordinary members of the public who wish to report corrupt activities to the South African Police Service. Section 34 of the Act only places a duty on persons in a position of authority (executives).

## **REPORTING CORRUPTION: PERSONS IN A POSITION OF AUTHORITY**

The Act provides that the following persons hold a position of authority:

- The Director-General or head of a national or provincial department
- The municipal manager of a municipality;
- Any public officer in the Senior Management Service of a public body (Directors, Brigadiers, and higher);

- The head, rector or principal of a tertiary institution;
- The manager, secretary or a director of a company as defined in the Companies Act, 1973, including a member of a close corporation;
- The executive manager of any bank or financial institution;
- Any partner in a partnership;
- Any person appointed as the chief executive officer or equivalent officer of any agency, authority, board, commission, committee, corporation, council, foundation, fund or institute, whether established by legislation, contract or any other legal means;
- Any other person who is responsible for the overall management and control of the business of an employer ;
- Any person contemplated above, who has been appointed in an acting or temporary capacity.

### **WHAT ARE THE DUTIES OF A MEMBER OF THE DPCI WHO RECEIVES A REPORT OF CORRUPTION IN TERMS OF SECTION 34?**

The National Commissioner issued directions for the Service in *Gazette* 26552 of 16 July 2004. These directions were **repealed** on 7 December 2012 when directions of the National Head of the Directorate (for designated members of the Directorate) were published in *Gazette* No. 35949. These directions amongst others determine how a designated member of the Directorate must take down a section 34 report of corrupt activities by a person in a position of authority, how it must be dealt with and in which format.

**NB:** Take note of section 10(a) of the Act: a person who is party to an employment relationship and who accepts any unauthorised gratification in respect of him or her doing any act in relation to his or her powers, duties or functions is guilty of an offence.

## FOREIGN PUBLIC OFFICIALS

Section 5 of the Act creates the offence of “*foreign bribery*”. According to this section any person who gives or offers to give any gratification to a foreign public official in order to act in a certain manner commits a criminal offence.

Section 35 provides for **extra-territorial jurisdiction** of the Act. This means that a person can be trialled in South Africa if he or she commits corruption in another country, regardless whether or not it is crime in such country, if he or she is a citizen of, ordinarily resident in, or a company in South Africa.

# 41. PREVENTION AND COMBATING OF TORTURE OF PERSONS ACT NO. 13 OF 2013

## INTRODUCTION

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

## DEFINITION OF TORTURE: ACTS CONSTITUTING TORTURE (SECTION 3)

**‘torture’** 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.

**Prohibition against torture. Section 4 of the Act 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.

**WHAT MUST HAPPEN IF AN ALLEGATION OF TORTURE AGAINST THE POLICE IS MADE? (CONSULT NATIONAL INSTRUCTION 6 OF 2014)**

- The said National Instruction *inter alia* provides that the allegation or complaint must be investigated and all reasonable steps must be taken to put an end to the torture.
- A complaint of torture must be reported to the Independent Police Investigative Directorate.

**The Independent Police Investigative Directorate (IPID) is mandated in terms of section 28 of the Independent Police Investigative Directorate Act No. 1 of 2011, to investigate—**

- (a) any death in police custody;
- (b) deaths as a result of police actions;
- (c) any complaint relating the discharge of an official firearm by any police officer;
- (d) rape by a police officer;
- (e) rape of any person while that person is in police custody;
- (f) any complaint of torture or assault against a police officer in the execution of his or her duties;
- (g) corruption matters within the police initiated by the Executive Director of IPID or after report of a complaint from the public, or referred to IPID by the Minister, an MEC or the Civilian Secretary for Police and;
- (h) any other matter referred to it as a result of a decision by the Executive Director of IPID, or if so requested by the Minister, an MEC or the Civilian Secretary for Police as the case may be.

## **EXPULSION, RETURN OR EXTRADITION**

According to section 8(1) of the Prevention and Combating of Torture of Persons Act, “no person shall be expelled, returned or extradited to another State where there be substantial grounds for believing that he or she would be in danger of being subjected to torture”.

NB: In *Khalfan Khalis Mohamed v The President of the Republic of South Africa* (2001) 3 SA 893(CC) the Constitutional Court held that a disguised extradition from South Africa to the United States was unconstitutional due to the possibility of the death sentence in the particular state of the United States. The court held there was a duty on South Africa to get an assurance that the death penalty would not be applied.

## **42. PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS ACT NO. 7 OF 2014**

The Prevention and Combating of Trafficking in Persons Act No. 7 of 2013 came into operation on 9 August 2015. The Act primarily aims to prevent and combat any form of trafficking in persons, which includes all forms of slavery, sexual exploitation, forced labour, child labour, servitude and the removal of body parts.

The Act creates the offence of trafficking in persons and criminalises various acts that constitute offences related to trafficking in persons. It creates and provides for severe fines and penalties, including life imprisonment, 15 years' imprisonment for engaging in conduct that causes a person to enter into debt bondage or benefit from the services of a trafficking victim and 10 years' imprisonment for facilitating trafficking.

The Act defines and prohibits trafficking in persons (human trafficking). It adopts a broad definition of trafficking in persons, namely, that a person is guilty of human trafficking if he or she delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, through various means, including but not limited to the use or threat of force, deception, kidnapping or coercion, aimed at either the person or an immediate family member or any other person in close relation to that person, for the purpose of any form of exploitation.

The Act intends to:

- give effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements;
- provide for an offence of trafficking in persons and other offences associated with trafficking in persons;
- provide for penalties that may be imposed in respect of the offences;
- provide for measures to protect and assist victims of trafficking in persons;
- prevent and combat the trafficking in persons within or across the borders of the Republic; and
- provide for effective enforcement measures.

Note that the Act includes the provision of protection and other services to victims of trafficking.

Some of the relevant sections of the Act are:

#### **Section 4. Trafficking in Persons**

*(1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of—*

- (a) *a threat of harm;*
  - (b) *the threat or use of force or other forms of coercion;*
  - (c) *the abuse of vulnerability;*
  - (d) *fraud;*
  - (e) *deception;*
  - (f) *abduction;*
  - (g) *kidnapping;*
  - (h) *the abuse of power;*
  - (i) *the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or*
  - (j) *the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.*
- (2) *Any person who—*
- (a) *adopts a child, facilitated or secured through legal or illegal means; or*
  - (b) *concludes a forced marriage with another person,*  
*within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence.*

**Section 5. Debt bondage**

*Any person who intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence.*

A person convicted of debt bondage or using the services of victims of trafficking is liable to a fine or imprisonment for a period not exceeding fifteen years, or both.

**Section 6. Possession, destruction, confiscation, concealment of or tampering with documents**

*Any person who has in his or her possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in facilitating or promoting trafficking in persons is guilty of an offence.*

A person convicted of contravening section 6 of the Act, is liable to a fine or imprisonment for a period not exceeding ten years, or both.

**Section 7. Using services of victims of trafficking**

*Any person who intentionally benefits, financially or otherwise, from the services of a victim of trafficking or uses or enables another*

*person to use the services of a victim of trafficking and knows or ought reasonably to have known or suspected that such person is a victim of trafficking, is guilty of an offence.*

In 2014, the court demonstrated its condemnation of trafficking in persons by handing down a severe sentence in the case of **S v Mabuza and Another 2014 2 SACR 54 (GP)**. In this matter, the North Gauteng High Court sentenced a timber business tycoon to eight life terms. The accused was found guilty of preying on young victims, multiple counts of rape, human trafficking and sexual slavery. The case highlighted the cross-border human trafficking of underage girls for sexual exploitation. The victims from Mozambique who were aged between 10 and 16 years, were lured to South Africa under false pretences by a Mozambican national who had promised them the opportunity of a better life and education in South Africa. The police found the girls starved and living in appalling conditions in a locked compound in a remote part of Mpumalanga. The girls testified that they had been threatened with a firearm and had been sexually abused.

In instances where a foreign child has been a victim of human trafficking, such a child must be allowed to remain in the Republic as determined by the courts.

## **Section 8. Conduct facilitating trafficking in persons**

Subsection (1) criminalises the facilitation of trafficking in persons through means such as leasing a building or room whilst knowing or suspecting that it will be used to facilitate or promote trafficking in persons, advertising, broadcasting or distributing information to promote trafficking in persons or financing a trafficking offence.

Subsection (2) sets out what is expected of electronic communications service providers (ECSPs). The approach emphasises that obligations on ECSPs are triggered by them becoming aware of the use of their services for trafficking in persons. It is explicitly stated that ECSPs are not required to monitor the data they store or transmit, nor to take active steps to determine if their services are being used for trafficking facilitation. Once they become aware of electronic communications which facilitates or promotes trafficking in persons, ECSPs are however required to report the electronic communications identity number from where the electronic communications originated, to take reasonable steps as are necessary to preserve evidence for the purposes of investigation and prosecution by the relevant authorities and to take reasonable steps to prevent continued access to the electronic communications. ECSPs are protected from liability in instances where any loss is sustained or damage caused to any person as a result of any action taken by the ECSP in good faith to prevent continued access to the electronic communication.

### **Section 18. Reporting of and dealing with a child victim of trafficking.**

The Act provides that any person who knows or ought to have reasonably known or suspected that a child is a victim of trafficking must immediately report this to a police official for investigation. Such a person is entitled to have his or her identity kept confidential if his or her safety is at risk because of the report. A designated child protection organisation, which meets a child who is suspected of being a victim of trafficking, must immediately report this to a police official for investigation. The law protects an undocumented foreign-national child who is a victim of trafficking and deems such a child as one in need of care and protection in terms of the Children's Act No. 38 of 2005.

In terms of section 18(4) of the Act, a police official to whom a report was made in respect of the trafficking of a child or who knows or ought reasonably to have known or suspected that a child is a victim of trafficking, may where necessary and despite the provisions contained in section 26 of the Criminal Procedure Act No. 51 of 1977, without a warrant, enter any premises if he or she, on reasonable grounds, believes that the safety of that child is at risk or that the child may be moved from those premises and may use such force as may be reasonably necessary to overcome any resistance against entry to the premises, including the breaking of any door or window of those premises, on condition that the police official must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter those premises.

The matter of ***Jezile v S and Others [2015] ZAWCHC 31*** dealt with the customary practice of ukuthwala. The court found that the facts in this particular case involved unlawful sexual coercion of an underage girl who had not agreed to an arranged marriage. The court interpreted the practice of ukuthwala in its distorted version as currently practiced, a harmful cultural practice as it involved the forced abduction of women or girls who are subjected to rape, violence, and non-consensual marriage. The Cape High Court then confirmed the convictions of human trafficking and rape. This case demonstrates how criminals opportunistically abuse cultural practices, which, if properly observed, do not always violate rights, to conduct trafficking of persons.

### **Section 19. Reporting of and dealing with an adult victim of trafficking**

The Act provides that notwithstanding any law prohibiting the disclosure of personal information, any person who knows or ought to have known or suspects that an adult person is a victim of trafficking, must immediately report this to the police for investigation. An accredited organisation which encounters an individual suspected of being a victim of trafficking, must immediately report this to a police

official. A police official may place an adult victim in temporary safe care, pending transfer to an accredited organisation. A police official must assist such person to obtain medical treatment and transport them to a place of temporary safe care.

As in the case of a child victim of trafficking discussed under section 18 above, a police official may in certain circumstances enter a premises without a warrant if he or she reasonably believes that the safety of the adult trafficking victim is at risk or that the victim may be moved from the premises. Members should familiarise themselves with the requirements for such conduct as contained in section 19(5)(a)(i) of the Act.

## Section 40. National Policy Framework

Section 40 of the Act requires the Minister of Justice and Correctional Services to, in consultation with other relevant departments, approve a National Policy Framework (NPF) relating to all matters dealt with in the Act. The NPF is based on a set of principles and approaches in line with constitutional imperatives, national legislation and international standards that all anti-trafficking stakeholders and service providers in South Africa shall employ during all steps of its implementation. The aim of the NFP is, *inter alia*, to establish a coordinated and cooperative institutional anti-trafficking framework involving all relevant stakeholders; to continuously improve anti-trafficking responses and to ensure the early identification of potential and presumed trafficked persons.

National Instruction 4 of 2015 The Prevention and Combating of Trafficking in Persons, places the obligation on a member to render the necessary assistance and protection to a trafficked victim and to investigate trafficking in persons and related

offences. The National Instruction also ensures that the Service complies with its obligations in terms of section 44(2) of the Prevention and Combating of Trafficking in Persons Act No. 7 of 2013.

Members should refer to the National Instruction for practical guidance on the enforcement of and an explanation of their obligations in terms of the Act.

## 43. PREVENTION OF ORGANISED CRIME ACT NO. 121 OF 1998

The Prevention of Organised Crime Act No. 121 of 1998 came into operation on 21 January 1999 as a mechanism to deal effectively with organised crime, money laundering, racketeering, criminal gang activities and the proceeds of crime. The Act must be read with the Financial Intelligence Centre Act No. 38 of 2001 which, through its Financial Intelligence Centre, serve as an additional statutory mechanism to assist in the identification of the proceeds of crime and the combating of money laundering activities as well as the financing of terrorist and related activities.

### MONEY LAUNDERING

The Prevention of Organised Crime Act, together with the Financial Intelligence Centre Act are the most important laws in South Africa to combat money laundering.

Money laundering is criminalised and defined in section 4 of the Prevention of Organised Crime Act. In essence, it is **any action or omission in terms of which the proceeds of crime are manipulated to disguise or conceal its illegitimate origin, source and/or ownership**. An example of money laundering is where a thief

buys a house for his mother with the money which he has stolen and registers the house in his mother's name. In this way the thief disguises his proceeds of the crime (stolen money).

The General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act No. 22 of 2022 came into operation on 1 April 2023. The purpose of the Act is to enhance the efforts of government to address the offences of money laundering and terrorism financing more effectively. The Amendment Act amends the following legislation:

- Trust Property Control Act No. 57 of 1988;
- Non-profit Organisations Act No. 71 of 1997;
- Financial Intelligence Centre Act No. 38 of 2001;
- Companies Act No. 71 of 2008; and
- Financial Sector Regulation Act No. 1 of 2017.

The amendments to the Financial Intelligence Centre Act improves the provisions that require financial and other institutions to perform due diligence in respect of their customers. This enables the institution to have more reliable information about their customers and places them in a better position to manage money laundering and terrorist financing risks in their businesses.

The amendments to the Trust Property Control Act and the Companies Act lay the basis for South Africa to develop a comprehensive mechanism to enhance transparency in as far as the

beneficial ownership of corporate vehicles of entities such as trusts and companies is concerned. This strengthens the ability of investigators and other authorities to determine who the natural persons are that deal with financial and other institutions at arm's length through trusts and companies.

The amendments to the Non-profit Organisations Act establish a regulatory framework to protect non-profit organisations which transfer funds internationally from possible exploitation by facilitators and financiers of terrorist organisations.

The amended Financial Sector Regulation Act improves the ability of financial sector regulators to apply fit and proper scrutiny to the beneficial owners of licensed financial institutions.

### **PROCEEDS OF CRIME/UNLAWFUL ACTIVITIES**

Proceeds of crime is any property, benefit or reward which was derived or received, in South Africa or elsewhere, as a result of, or in connection with any unlawful activity carried on by any person.

The Act is typically used to confiscate the assets of criminals who have derived such assets as a result of crime. Examples of proceeds are vehicles or fixed property which have been bought with money stolen during a heist or monies which have been generated from drug trafficking.

The Act makes provision for the confiscation of the proceeds of crime or property which is the instrumentality of certain offences. **The proceedings** to confiscate the proceeds or instrumentalities of

certain offences are not criminal proceedings but **are civil proceedings**. (See, for instance, section 13 of the Act).

**Two civil remedies** are created by the Act to deprive criminals of their ill-gotten gains. These remedies are **conviction-based confiscation** of proceeds in **Chapter 5** as well as non-conviction based forfeiture of proceeds and instrumentalities of crime in **Chapter 6** of the Act.

In the same year that the Act came into operation, the **asset Forfeiture unit (AFU)** was established by the National Director of Public Prosecutions to implement the provisions of Chapters 5 and 6. The AFU does not form part of the SAPS, but work closely with the SAPS to achieve its objectives.

## **POWER OF POLICE OFFICIALS**

It is important to note that the Act does not confer any special or exclusive powers on members of the SAPS to confiscate the proceeds of crime. A police official cannot seize proceeds of crime in terms of the Criminal Procedure Act. The confiscation of proceeds of crime is the function and responsibility of the AFU. As a general rule, police officials may only confiscate the proceeds of crime if the court has made a specific order authorising the seizure of the property concerned by the police.

In practice, a police official who suspects that someone is in possession of the proceeds of crime will have to contact the Asset Forfeiture Unit to confiscate the same on the strength of a court order which has been applied for by the National Director of Public Prosecutions.

Section 20 of the Criminal Procedure Act does not authorise police officials to seize proceeds of crime. According to that section, only articles which have been involved in the commission of an offence, which **may afford evidence** of the commission of an offence or which

are **intended to be used in the commission of an offence** may be seized.

The SAPS's interest in the Prevention of Organised Crime Act is the investigation of the criminal offences created by the Act. SAPS officials may also be required to conduct financial investigations into someone's affairs with the aim of instituting criminal investigations and/or to assist the AFU with the tracing of assets.

## MAIN OFFENCES

The main offences created by the Act are racketeering (section 2); money laundering (section 4); assisting another to benefit from the proceeds of crime (section 5); acquisition, possession or use of the proceeds of crime (section 6); gang-related offences (section 9) and offences relating to the misuse of information, failure to comply with a court order made in terms of the Act and/or hindering a person in the execution of his or her duties in terms of the Act.

## ADDITIONAL MECHANISMS

It happens from time to time that police officials are confronted with large amounts of cash in the possession of suspects. The legal basis for seizing such cash may sometimes be problematic. In ***Van der Merwe & others v Taylor & others* [2007] JOL 20635 (CC)** the court remarked as follows:

*“From the moment of Mr. Van der Merwe’s arrest to the appearance of the parties before this Court there was no certainty as to the legal basis for the seizure and holding of the foreign currency. It is notable that before the High Court, reliance was placed only on section 99 of the Income Tax Act by first, second and third respondents (the state) as the legal basis for holding the currency. However, in oral argument before this Court, respondents shifted their basis from section 99 and regulation 3(5) to section 20 of the CPA). This constant vacillation of the part of the respondents created much doubt and caused*

*inconvenience to the applicants. It was also not helpful to this Court.....Once the State seizes private property as it did in this case, and the legal basis for the seizure and holding is in dispute, the question of arbitrary deprivation of property under section 25(1) of the Constitution is clearly implicated, making the matter intrinsically a constitutional one”.*

In **Toich v Magistrate, Riversdal & others [2007] JOL 20076 (C)** the police entered the house of the suspect (who was investigated for child pornography related offences) searched it and removed R16 000 in cash from a safe on the premises. The police motivated their seizure of the cash by means of a warrant, issued in terms of the Criminal Procedure Act (CPA), but not bearing the signature of the magistrate.

The court held that the unattested document of the police which was submitted to the magistrate in support of the application for the warrant was no affidavit and that there was accordingly no information placed before the magistrate on oath. For that reason alone the warrant was invalid. More importantly, there was no indication whatsoever in the police’s “affidavit” that the cash therein referred to fell into any of the categories of articles mentioned in section 20 of the CPA. The court found that there was no justification in the “affidavit” to establish reasonable grounds as required by section 20. A magistrate must be satisfied by information on oath that there are reasonable grounds to believe that the article to be seized is concerned in the commission of an offence or may afford evidence of the commission of an offence. No such grounds were advanced by the police to the magistrate. The police were subsequently ordered to forthwith return the seized cash to the suspect.

Police officials, can, in certain circumstances, consider the provisions of the **Exchange Control Regulations, 1961** in respect of persons leaving the Republic or entering into/arriving in the Republic.

According to **Regulation 3(3)** “Every person who is **about to leave the Republic** and every person in any port or other place recognised as a place of departure from the Republic, who is requested to do so by the appropriate officer (which includes a member of the SAPS) shall –

- (a) declare whether or not he has with him any bank notes, gold, securities or foreign currency; and
- (b) produce any bank notes, gold, securities or foreign currency which he has with him;

and the appropriate officer and any person acting under his directions may search person and examine or search any article which such person has with him, for the purpose of ascertaining whether he has with him any bank notes, gold, securities or foreign currency and may seize any bank notes, gold, securities or foreign currency produced or found upon such examination or search unless either –

- (i) the appropriate officer is satisfied that such person is, in respect of any bank notes, gold, securities or foreign currency which he has with him, exempt from the prohibition imposed by sub-regulation (1); or
- (ii) such person produces to the appropriate officer a certificate granted by the Treasury which shows that the exportation by such person of any bank notes, gold, securities or foreign currency which he has with does not involve a contravention of that sub-regulation”.

**Regulation 3(6) provides as follows -**

“(6) Every person **who is about to enter the Republic** and every person in any port or other place recognised as a place of arrival in the Republic, who is requested to do so by the appropriate officer shall-

- (a) *declare whether or not he has with him any South African bank notes; and*
- (b) *produce any such bank notes which he has with him;*
- (i) *the appropriate officer is satisfied that such person is, in respect of any South African bank notes which he has with him, exempt from the prohibition imposed by sub-regulation 1(b) bis; or*
- (ii) *such person produces to the appropriate officer a certificate granted by the Treasury which shows that the importation by such person of any South African bank notes which he has with him does not involve a contravention of that sub-regulation”.*

## **44. PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT NO. 4 OF 2000**

### **Objects of the Act:**

The Act aims to give effect to the equality provisions set out in section 9 of the Constitution in order to prevent and prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination and to prevent and prohibit hate speech.

Although section 16 of the Constitution provides for the right of freedom of expression, this right does not extend to —

- propaganda for war;
- incitement of imminent violence; or
- advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

### **Proceedings in terms of the Act:**

Since matters such as unfair discrimination in itself do not constitute offences, the Equality Act does not offer an aggrieved person the option of laying a criminal complaint with the SAPS. The proceedings in terms of the Act are civil proceedings.

The forum to deal with unfair discrimination and hate speech is so-called **equality courts** established by section 21 of the Act.

In terms of section 21 of the Act, the equality court before which proceedings are instituted must hold an enquiry and determine whether unfair discrimination, harassment or hate speech has taken place as alleged. Any person acting in his or her own interest or acting in the public interest may institute proceedings by notifying the clerk of the equality court of his or her intention to do so.

After holding an enquiry, the equality court may make an appropriate order.

If there is a breach of the order, **criminal sanction may**, depending on the wording of the specific order, **follow** by way of **contempt proceedings** for non-compliance. A crime will therefore only be committed when there is failure to comply with an order of the equality order.

The Constitutional Court in ***Qwelane v South African Human Rights Commission and Another*** [2021] ZAC 22 declared section 10(1)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000, unconstitutional. This was on account of the finding that the section is too vague and that it unjustifiably limits the right to freedom of expression as guaranteed in section 16 of the Constitution, to the extent that it included the word “hurtful” in the prohibition against hate speech.

The declaration of constitutional invalidity was suspended for a period of 24 months from the date of judgment (2021-07-30), to allow Parliament to rectify the defect. In the interim, section 10 will read as follows:

- “(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.*
- (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”*

The Prevention and Combating of Hate Crimes and Hate Speech Bill is currently before Parliament. Provision is made in the Bill for the offences of hate crime and hate speech.

## 45. PROTECTION FROM HARASSMENT ACT NO. 17 OF 2011

### INTRODUCTION

The Protection from Harassment Act No. 17 of 2011 came into operation on 27 April 2013. The Act provides a remedy to victims of harassment (complainants) against such behaviour by affording them the right to apply for a protection order against a respondent (the perpetrator). Actions such as the sending of e-mails, sending of flowers or love letters, watching or following of a person or blowing of kisses to a person by means of hand gestures do not necessarily constitute a criminal offence and may not even constitute harassment in terms of the Act. The harassment must be unreasonable and of such a nature that the respondent knows or ought to know causes harm (mental, psychological, physical or economic) or inspires the reasonable belief that harm may be caused to the complainant or a member of the family or household of the complainant, or any other person in a close relationship to the complainant.

### DEFINITIONS

*“harassment means directly or indirectly engaging in conduct that the respondent knows or ought to know —*

- (a) *causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably —*
- (i) *following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;*
  - (ii) *engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or*
  - (iii) *sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or*
- (b) *amounts to sexual harassment of the complainant or a related person;*

**sexual harassment** means any —

- (a) *unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;*
- (b) *unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated”;*
- (c) *implied or expressed promise of reward for complying with a sexually oriented request; or*
- (d) *implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.”*

## NATIONAL INSTRUCTION 1 OF 2013

National Instruction 1 of 2013 complements the powers and duties placed on members by the Act and must be complied with at all times by members of the Police. When a complaint of alleged harassment is reported to the Police, the member receiving the complaint must carefully assess the complaint and consider whether the specific conduct constitutes a criminal offence. (Such as crimen iniuria, intimidation, trespassing). Keep in mind that harassment in itself (even sexual harassment) does not constitute a criminal offence. (Do not confuse sexual harassment with sexual assault. The latter is a statutory offence as provided for in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007).

If there is no crime committed, the complainant may still apply for a protection order from a magistrate's court that has jurisdiction to issue a protection order. In such an instance, a crime is only committed when there is failure by the respondent to comply with the conditions of the protection order.

**The fact that no crime has been committed at the time of a complaint of harassment to the police does not mean that the police can send a complainant away. Such complainant must be assisted in terms of the provisions of the Act and the mentioned National Instruction! The police is duty bound to do certain investigations such as to determine the identity and whereabouts of the respondent, to serve documents and to assist with the serving and execution of protection orders. Whenever a court issues a protection order, it must make an order that authorises the issuing of a warrant for the arrest of the respondent which is suspended until there is non-compliance with the order. Arrest is the responsibility of the police. If the complaint is not managed and monitored, and**

registered by the police in the Protection from Harassment Register (SAPS 590), members will not know when to act or what they must do. The Criminal and Related Matters Amendment Act No. 12 of 2021 has strengthened the bail processes in as far as the contravention of a protection order is concerned. Refer to the discussion of the Criminal Procedure Act No. 51 of 1977 earlier in this booklet for additional information.

The member **must inform** the complainant of the right to —

- apply to an appropriate magistrate's court for a protection order terms of this Act;
- lay a criminal charge (if there is a criminal offence) at the Police (for which a docket must be opened) or
- lay a criminal charge and apply for a protection order from an appropriate magistrate's court.

The fact that a complainant applied for and obtained relief against stalking or harassment in terms of the Domestic Violence Act of 1998 does not preclude him or her from applying for a protection order or the laying of a criminal charge in terms of this Act.

Section 18 of the Protection from Harassment Act of 2011 creates offences. According to this section, any person who contravenes any prohibition or condition of a protection order, makes a false statement in a material respect, disclose the identity or address of a person where a court has directed otherwise, commits a criminal offence.

Since a failure to comply with the obligations created by the Act and National Instruction 1 of 2013 may constitute a criminal offence and will constitute misconduct, members are advised to familiarise themselves with the applicable provisions.

## 46. PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RELATED ACTIVITIES ACT NO. 33 OF 2004

The above Act came into operation on 20 May 2005, repealing the Internal Security Act No. 74 of 1982. The Act contains measures to effectively deal with the prevention, investigation and combating of terrorist and related activities, both of a national and international character. The Act does not define terrorism, but defines “terrorist activity” and creates an offence of terrorism.

According to section 2 of the Act, any person who engages in a terrorist activity is guilty of the offence of terrorism. (The offence of “sabotage” in the Internal Security Act of 1982 does not exist anymore).

The Act has been amended by the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act No. 23 of 2022 that came into operation on 4 January 2023. The amendments strengthen the ambit of the Act by including aspects such as cyber-terrorism, refining the offence of terrorist financing and improving the processes for the implementation of financial sanctions against supporters of terrorist organisations.

The following definitions in section 1 of the Act are of particular importance:

### TERRORIST ACTIVITY

*“Terrorist activity”, with reference to this section and sections 2, 3 and 17(2), means any act —*

- (a) committed in or outside the Republic, which —
- (i) involves the systematic, repeated or arbitrary use of violence by any means or method;
  - (ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to —
    - (aa) any dangerous, hazardous, radioactive or harmful substance or organism;
    - (bb) any toxic chemical;
    - (cc) any microbial or other biological agent or toxin; or
    - (dd) any weapon of mass destruction in terms of section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, including those with dual-purpose capabilities as defined in section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, or any substance, mixture of substances, product or material contemplated in section 2(1) of the Hazardous Substances Act;
  - (iii) endangers the life of, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons;
  - (iiiA) is calculated to overthrow the government of the Republic or any other government;
  - (iv) causes serious risk to the health or safety of the public or any segment of the public;
  - (v) causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private;
  - (vA) causes the destruction of or substantial damage or interference to an information infrastructure or any part thereof;
 

*is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of*

*any such service, facility or system, whether public or private, including, but not limited to —*

- (aa) a system used for, or by, an electronic system, including an information system;*
- (bb) a telecommunication service or system;*
- (cc) a banking or financial service or financial system;*
- (dd) a system used for the delivery of essential government services;*
- (ee) a system used for, or by, an essential public utility or transport provider;*
- (ff) an essential or critical infrastructure, information infrastructure or a critical infrastructure complex; or*
- (gg) any essential service designated as such in terms of the Labour relations Act, 1995 (Act No. 66 of 1995), or essential emergency services, such as police, medical or civil defence services;*
- (vi) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country;*
- (vii) creates a serious public emergency situation or a general insurrection in the Republic; or*
- (viii) is the offence of –*
  - (aa) unlawful access in terms of section 2 of the Cybercrimes Act;*
  - (bb) unlawful interception of data in terms of section 3 of the Cybercrimes Act;*
  - (cc) unlawful interference with data or a computer program in terms of section 5 of the Cybercrimes Act;*
  - (dd) unlawful interference with a computer data storage medium or a computer system in terms of section 6 of the Cybercrimes Act;*

- (ee) *unlawful acquisition, possession, provision, receipt or use of a password, access code or similar data or device in terms of section 7 of the Cybercrimes Act;*
- (ff) *unlawful use or possession of a software or hardware tool for purposes of committing the offences listed in items (aa) to (ee); or*
- (gg) *cyber extortion in terms of section 10 of the Cybercrimes Act,*

*which is committed with the intention to facilitate or to commit an act referred to in subparagraph (i) to (viii) of this paragraph,*

*whether the harm contemplated in subparagraphs (i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to (ix) was committed by way of any means or method; and*

- (b) *which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to (i) threaten the unity and territorial integrity of the Republic;*
  - (ii) *intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population;*
  - (iii) *unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles, or*

- (iv) *further the objectives of any entity engaged in terrorist activity,*

*whether the public or the person, government, body or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic;”.*

## TERRORIST AND RELATED ACTIVITIES

*“Terrorist and related activities” are defined in the Act as “any act or activity related to or associated or connected with the commission of the offence of terrorism, or an offence associated or connected with a terrorist activity, or a Convention offence, or an offence referred to in sections 11 to 14”.*

## CONVENTION OFFENCES

The so-called Convention offences contained in the Act are those offences which have been created in fulfilment of South Africa’s international obligations pertaining to terrorism.

### Convention offences are -

- Offences associated or connected with terrorist activities (any form of assistance to entities which are engaged in terrorist activities, section 3);
- offences associated or connected with the financing of specified offences (terrorist financing, section 4);
- offences relating to an attempt to leave the Republic for the purpose of committing an offence outside the Republic which is related to a terrorist group (section 4A);
- offences relating to explosive or other lethal devices (section 5);

- offences relating to hijacking, destroying or endangering the safety of a fixed platform (artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for economic purposes, excluding a ship)(section 6);
- offences relating to taking a hostage(section 7);
- offences relating to causing harm to internationally protected persons (heads of states, their family as well as state officials or representatives of international organisations or intergovernmental organisations)(section 8);
- offences relating to the hijacking of aircraft(section 9);
- offences relating to the hijacking of ships or endangering the safety of maritime navigation(section 10).

## **OTHER OFFENCES**

Apart from the offences mentioned above, the following offences are also contained in the Act:

- offences relating to the harbouring or concealment of persons committing specified offences, namely the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, any Convention offence, or an offence referred to in section 13 or 14 (section 11);
- offences relating to the failure to report terrorism or the presence of persons who are suspected of intending to commit or having committed terrorism(section 12);
- offences relating to hoaxes(section 13).

## DUTY TO REPORT PRESENCE OF PERSON SUSPECTED OF INTENDING TO COMMIT OR HAVING COMMITTED AN OFFENCE AND FAILURE TO SO REPORT

Section 12(1) of the Act provides that “any person who —

- (a) *has reason to suspect that any other person intends to commit or has committed an offence referred to in this Chapter; or*
- (b) *is aware of the presence at any place of any person who is so suspected of intending to commit or having committed such an offence,*

*must report as soon as reasonably possible such suspicion or presence, as the case may be, or cause such suspicion or presence to be reported to any police official”.*

## FAILURE TO COMPLY WITH THIS PROVISION CONSTITUTES AN OFFENCE IN TERMS OF SECTION 12 (2) OF THE ACT

In terms of **section 12(3) of the Act**, the police official who receives a report in terms of section 12(1) must take the report down in the manner directed by the National Commissioner and forthwith provide the person who made the report with an acknowledgment of receipt of such report.

The directions of the National Commissioner were published in *Gazette* 27598 of 20 May 2005. According to the directions, any police official who receives a report as contemplated in section 12 (1) of the Act must -

- Take down the report in the form prescribed in the *Gazette*;
- as soon as possible open an enquiry on the Crime Administration System; and
- forthwith provide the person who made the report with an acknowledgment of receipt reflecting the relevant Crime

Administration System (CAS) number, in the format prescribed by the National Commissioner in the *Gazette*.

After the report has been taken down, it must be faxed without delay to the Central Reporting Office situated at the Divisional Commissioner: Detective Service, Pretoria as well as the Divisional Commissioner: Crime Intelligence, Pretoria.

The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act No. 23 of 2022 added sections 12(9) and (10) to the Act. Section 12(9) provides that, for purposes of the Act, no duty of secrecy or confidentiality or any other restriction on the disclosure of information, affects the duty of compliance with section 12 by an accountable institution, supervisory body or reporting institution as defined in section 1 of the Financial Intelligence Centre Act No. 38 of 2001, or any other person. Section 12(9) does however not apply to legal professional privilege between an attorney and the attorney's client in respect of communications made in confidence between –

- (a) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or which has commenced; or
- (b) a third party and an attorney for the purposes of litigation which is pending or has commenced.

(Members must note that the Central Reporting Office in respect of terrorism differs from the Central Reporting Office in respect of corruption. A suspicion of corruption must be brought to the attention of the Directorate for Priority Crime investigation).

## TERRORISM: THE MOTIVE NO LONGER REQUIRED

Previously, ordinary criminal conduct had to be distinguished from terrorism in that terrorism required a specific motive as was set out in paragraph (c) of the definition of “terrorist activity”. Without this motive, ordinary criminal conduct could not be classified as terrorism, such conduct had to be addressed with the ordinary legal mechanisms instead of the offences created by the Act. The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act No. 23 of 2022 deleted paragraph (c) of the definition of “terrorist activity”. This means that it is no longer required that the offence must have been committed for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking, in order to constitute “terrorist activity”.

### Note:

At the time of the publication of this booklet, a circular entitled “*Amendments to the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (No. 33 of 2004) and the application thereof on policing activities*” with reference number 36/1/6, had been submitted to the National Commissioner for signature. Once approved, the document will be circulated within the Service. Members should familiarise themselves with the content of the circular once it is distributed as at addresses important amendments to the legislation.

## 47. PROTECTION OF PERSONAL INFORMATION ACT NO. 4 OF 2013

The above Act (POPIA) came into operation on 1 July 2020 with and provided for a grace period for compliance until 1 July 2021. The Act

promotes the protection of personal information, strikes a balance between the right to privacy and the need for the free flow of, and access to information, and regulates how personal information is processed.

Members should refer to National Instruction 5 of 2021: Protection of personal information: Lawful processing of personal information in the South African Police Service, for an in depth discussion of POPIA and the manner in which personal information is to be handled.

“Data subject” means the person to whom the personal information relates.

“Personal information” means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—

- information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- information relating to the education or the medical, financial, criminal or employment history of the person;
- **any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;**
- the biometric information of the person;
- the personal opinions, views or preferences of the person;
- correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further

correspondence that would reveal the contents of the original correspondence;

- the views or opinions of another individual about the person; and
- the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

“Processing” means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

- the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- dissemination by means of transmission, distribution or making available in any other form; or
- merging, linking, as well as restriction, degradation, erasure or destruction of information.

In terms of section 11 of the Act, personal information may only be processed:

- with the consent of the “data subject”;
- if it is necessary for the conclusion or performance of a contract to which the “data subject” is a party;
- if it is required by law;
- if it protects a legitimate interest of the “data subject”; or
- if it is necessary to pursue your legitimate interests or the interest of a third party to whom the information is supplied.

However, members should note that POPIA **does not apply** to the processing of personal information in the following circumstances:

- in the course of a personal or household activity;
- if it has been de-identified to the extent that it cannot be re-identified again;
- by Cabinet and its committees or the Executive Council of a province;
- relating to the judicial functions of a court; or
- by or on behalf of a public body which involves national security, defence, public safety, crime prevention or detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures.

In so far as SAPS is concerned, the implication of the above exclusion includes that:

- the processing of personal information required for crime prevention or detection is excluded;
- the SAPS may access personal information of data subjects in the execution of its work. A data subject cannot refuse access to such information, unless it is protected by another legal provision (e.g. attorney-client privilege, etc.);
- criminal records may be processed;
- details of detainees may be processed;
- personal information may be recorded in the sex offender's database.

Members should take note that the above exclusion does not allow for the indiscriminate processing or disclosure of

information. Security safeguards must be put in place and adhered to.

National Instruction 5 of 2021 provides as follows:

*“6(7)(f) In order to protect the availability, privacy and integrity of data, information and intelligence that the SAPS utilizes within the context of operationalizing its mandate (information security) every employee may not (during his or her employment in the SAPS and thereafter) –*

- (i) disclose information in circumstances in which he or she knows, or could reasonably be expected to know, that such a disclosure will or may prejudicially affect the exercise or the performance of the powers or functions of the Service (including personal information relating to an employee);*
- (ii) disclose official information or personal information under the control of the SAPS to the public, unless he or she is authorised to do so (the disclosure of information is not limited to the supplying of documentation, but also the disclosure of facts by word of mouth, as well as the disclosure of facts in any other way, whether by means of photographs, videos, recordings, computers, plans, sketches, or in any other manner by means of which knowledge of facts may be revealed);*
- (iii) disclose information regarding any function of the SAPS concerning the prevention and investigation of crime, the maintenance of law and order and the preservation of the internal security of the Republic, except –*
  - where it is necessary for purposes of exercising his or her powers as a member of the Service;*

- *after he or she has been authorised by the National Commissioner or a member authorised by the National Commissioner, to disclose the information;*
  - *when he or she is legally obliged to disclose the information; or*
  - *where it is in the interest of the state to disclose the information.*
- (g) *If an employee discloses information in contravention of the above, such disclosure may constitute a criminal offence or misconduct (or both).*
- (h) *If an employee is uncertain whether specific information concerns the exercising of the powers or performance of the functions of the SAPS, he or she may not disclose the information before he or she has cleared it with his or her commanding officer.”*

For the purpose of the investigation of a complaint, the Information Regulator may apply for a warrant to be issued in terms of section 82 of the Act. Such warrant authorises any of the Regulator’s members or staff members to enter and search a premises, to inspect, examine, operate and test any equipment found there which is used or intended to be used for the processing of personal information and to inspect and seize any record, other material or equipment found there which may be such evidence. Such a warrant must be executed at any time within seven days of the date of issue. In terms of section 84 of the Act, a police officer may assist a person who is authorised to conduct an entry and search in terms of a warrant under section 82 to overcome resistance to the entry and search by using such force as is reasonably necessary.

## 48. REGULATION OF GATHERINGS ACT NO. 205 OF 1993

The purpose of this Act is to regulate the holding of public gatherings and demonstrations at certain places. The Act shifted the focus away from obtaining permission to hold a gathering, to giving notice of an intended gathering. The Act prescribes the procedure that must be followed when the constitutional rights to protest, petition and freedom of speech are exercised.

### DEMONSTRATIONS AND GATHERINGS IN VICINITY OF COURTS, BUILDINGS OF PARLIAMENT AND THE UNION BUILDINGS - SECTION 7

*“Section 7(1) provides the following:*

*Subject to the provisions of subsection (2) all demonstrations and Gatherings-*

- (1) (a) in any building in which a courtroom is situated, or at any place in the open air within a radius of 100 metres from such building, on every day of the week, except Saturdays, Sundays and public holidays; and*
- (b) in the areas defined in*
  - (i) Schedule 1; and*
  - (ii) Schedule 2 are hereby prohibited”.*

Schedule I provides as follows for the area around **Parliament**.

*“The area bounded by the following streets in the City of Cape Town, namely Queen Victoria Street from the point where Queen Victoria Street and Museum Avenue meet, up to the point where Queen Victoria Street and Wale Street meet, up to the point where Wale Street and St. George’s Street meet, up to the point where St. George’s Street and Long market Street meet, up to the point where Long market Street and Corporation*

*Street meet, up to the point where Corporation Street and Barrack Street meet, up to the point where Barrack Street and Coffee Lane meet, up to the point where Coffee Lane and Commercial Street meet, up to the point where Commercial Street and Nieuwmeester Street meet, up to the point where Nieuwmeester Street and Hope Street meet, up to the point where Hope Street and Tuinsplein Street meet, up to the point where Tuinsplein Street and Vrede Street meet, up to the point where Vrede Street and St. John's Street meet, up to the point where St. John's Street and Gallery Avenue meet, up to the point where Gallery Avenue and Government Avenue meet, up to the point where Government Avenue and Museum Avenue meet, up to the point where Museum Avenue and Queen Victoria Street meet, including the surface of the said streets and the pavement on either side thereof".*

Schedule II provides as follows for the area around the Union Buildings:

*"The area in Pretoria bounded by the following:*

- (a) To the south, the continuing line 100 metres south of the south side of the tarred road which is situated to the south of the Union Buildings and which connects Edmond Street and Government Avenue with one another.*
- (b) To the west, from the junction of Edmond Street and the tarred road referred to in paragraph (a), the line extending due north up to the crest of Meintjieskop and the line extending due south from the said junction up to where it intersects the line referred to in paragraph (a).*
- (c) To the east, from the junction of Government Avenue and the tarred road referred to in paragraph (a), the line extending due north up to the crest of Meintjieskop and the line extending due south from the said junction up to where it intersects the line referred to in paragraph (a).*
- (d) To the north, the line along the crest of Meintjieskop extending between the northern points of the firstmentioned lines referred to in paragraph (b) and (c)".*

**The provisions of subsection (1) shall not apply —**

- “(2) (a) *to any demonstration or gathering referred to in subsection 1(a) for which permission has, on application to the magistrate of the district concerned, been granted by him or her in writing; or*
- (b) *within the area contemplated in subsection 1(b)(i), to any demonstration or gathering within such area for which permission has, on application to the Chief Magistrate of Cape Town, been granted by him or her in writing; or*
- (c) *within the area contemplated in subsection 1(b)(ii), to a demonstration or gathering within such area for which permission has, on application to the Director-General: Office of the State President (President), been granted by him in writing.*
- (3) *Any application for permission contemplated in subsection 2 shall be made to the person empowered to grant such permission, within a reasonable time before such demonstration or gathering is to take place”.*

## **POWERS OF POLICE - SECTION 9**

*Section 9 of the Act provides as follows:*

- “(1) *If a gathering or demonstration is to take place, whether or not in compliance with the provisions of this Act, a member of the Police-*
- (a) *may, if he or she has reasonable grounds to believe that the police will not be able to provide adequate protection for the people participating in such a gathering or demonstration, notify the convener and such people accordingly;*
- (b) *may prevent people participating in a gathering from proceeding to a different place or deviating from the route specified in the relevant notice or any amendment thereof*

*or from disobeying any condition to which the holding of the gathering is subject in terms of this Act;*

- (c) *may, in the case of a responsible officer not receiving a notice in terms of section 3(2) more than 48 hours before the gathering, restrict the gathering to a place or guide the participants along a route, to ensure:
 
  - (i) *that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded, or an appropriate distance is maintained between participants in the gathering and rival gatherings;*
  - (ii) *access to property and workplaces is ensured; or*
  - (iii) *injury to persons or damage to property is prevented,**
- (d) *may order any person or group of person interfering or attempting to interfere with a gathering or demonstration to cease such conduct and to remain at a distance from such gathering or demonstration specified by him;*
- (e) *may, when an incident, whether or not it results from the gathering or demonstration, cause or may cause persons to gather at any public place, by notice in a manner contemplated in section 4(5)(a) specify an area considered by him to be necessary for-
 
  - (i) *the movement and operation of emergency personnel and vehicles;*
  - (ii) *the passage of a gathering or demonstration;*
  - (iii) *the movement of traffic;*
  - (iv) *the exclusion of the public from the vicinity; or*
  - (v) *the protection of property, shall take such steps,**

*including negotiations with the relevant persons, as are in the circumstances reasonable and appropriate to protect persons and property; whether or not they are participating in the gathering or demonstration.*

- (2) (a) *In the circumstances contemplated in section 6(6) or if a member of the Police of or above the rank of warrant officer (inspector) has reasonable grounds to believe that danger*

*to persons and property, as a result of the gathering or demonstration, cannot be averted by the steps referred to in subsection (1) if the gathering or demonstration proceeds, the Police or such member, as the case may be, may and only then, take the following steps:*

- (i) Call upon the persons participating in the gathering or demonstration to disperse, and for that purpose he shall endeavour to obtain the attention of those persons by such lawful means as he deems most suitable, and then*
- (ii) in a loud voice order them in at least two of the official languages and, if possible, in a language understood by the majority of the persons present, to disperse and to depart from the place of the gathering or demonstration within a time specified by him, which shall be reasonable.*
- (b) if within the time so specified the persons gathered have not so dispersed or have made no preparations to disperse, such a member of the Police may order the members of the Police under his command to disperse the persons concerned and may for that purpose order the use of force, excluding the use of weapons likely to cause serious bodily injury or death.*
- (c) the degree of force which may be so used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained.*
- (d) If any person who participates in a gathering or demonstration or any person who hinders, obstructs or interferes with persons who participate in a gathering or demonstration-*
  - (i) kills or seriously injures, or attempts to kill or seriously injure, or shows a manifest intention of killing or seriously injuring, any person; or*
  - (ii) destroys or does serious damage to, or attempts to destroy or to do serious damage to, or shows*

*manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable, such a member of the Police of or above the rank of warrant officer may order the members of the Police under his command to take the necessary steps to prevent the action contemplated in subparagraph (i) and (ii) and may for that purpose, if he finds other methods to be ineffective or inappropriate, order the use of force, including the use of firearms and other weapons.*

- (e) *The degree of force which may be so used shall not be greater than is necessary for the prevention of the actions contemplated in subparagraphs (d)(i) and (ii), and the force shall be moderated and be proportionate to the circumstances of the case and the object to be attained.*

- (3) *No common law principles regarding self-defence, necessity and protection of property, shall be affected by the provisions of this Act.”*

## **Section 8: Conduct of gatherings and demonstrations**

The following provisions shall apply to the conduct of gatherings and, where so indicated, to the conduct of demonstrations:

- “(1) *The convener shall appoint the number of marshals mentioned in the notice or, if it was amended in terms of section 4, in the amended notice, to control the participants in the gathering, and to take the necessary steps to ensure that the gathering at all times proceeds peacefully and that the provisions of this section and the applicable notice and conditions, if any, are complied with, and such marshals shall be clearly distinguishable.*
- (2) *The convener shall take all reasonable steps to ensure that all marshals of the gathering and participants in the gathering or*

*demonstration, as the case may be, are informed timeously and properly of the conditions to which the holding of the gathering or demonstration is subject.*

- (3) *The gathering shall proceed and take place at the locality or on the route and in the manner and during the times specified in the notice or, if it was amended, in the amended notice, and in accordance with the contents of such notice and the conditions, if any, imposed under section 4 (4) (b), 6 (1) or 6 (5).*
- (4) *No participant at a gathering or demonstration may have in his or her possession -*
  - (a) *any airgun, firearm, imitation firearm or any muzzle loading firearm, as defined in section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000), or any object which resembles a firearm and that is likely to be mistaken for a firearm; or*
  - (b) *any dangerous weapon, as defined in the Dangerous Weapons Act, 2013 and the convener and marshals, if any, shall take all reasonable steps to ensure that this section is complied with.*
- (5) *No person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion.*
- (6) *No person present at or participating in a gathering or demonstration shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons.*
- (7) *No person shall at any gathering or demonstration wear a disguise or mask or any other apparel or item which obscures his facial features and prevents his identification.*

- (8) *No person shall at any gathering or demonstration wear any form of apparel that resembles any of the uniforms worn by members of the security forces, including the Police and the South African Defence Force.*
- (9) *The marshals at a gathering shall take all reasonable steps to ensure that-*
- (a) *no entrance to any building or premises is so barred by participants that reasonable access to the said building or premises is denied to any person;*
  - (b) *no entrance to a building or premises in or on which is situated any hospital, fire or ambulance station or any other emergency services, is barred by the participants.*
- (10) *No person shall, in any manner whatsoever, either before or during a gathering or demonstration, compel or attempt to compel any person to attend, join or participate in the gathering or demonstration, and the convener and marshals, if any, shall take all reasonable steps to prevent any person from being so compelled”.*

**The offences of the Act are contained in section 12 which reads as follows:**

*“12. Offences and penalties*

*(1) Any person who —*

- (a) *convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3; or*
- (b) *after giving notice in accordance with the provisions of section 3, fails to attend a relevant meeting called in terms of section 4 (2) (b); or*

- (c) *contravenes or fails to comply with any provision of section 8 in regard to the conduct of a gathering or demonstration; or*
- (d) *knowingly contravenes or fails to comply with the contents of a notice or a condition to which the holding of a gathering or demonstration is in terms of this Act subject; or*
- (e) *in contravention of the provisions of this Act convenes a gathering, or convenes or attends a gathering or demonstration prohibited in terms of this Act; or*
- (f) *knowingly contravenes or fails to comply with a condition imposed in terms of section 4 (4) (b), 6 (1) or 6 (5); or*
- (g) *fails to comply with an order issued, or interferes with any steps taken, in terms of section 9 (1) (b), (c), (d) or (e) or (2) (a); or*
- (h) *contravenes or fails to comply with the provisions of section 4 (6); or*
- (i) *supplies or furnishes false information for the purposes of this Act; or*
- (j) *hinders, interferes with, obstructs or resists a member of the Police, responsible officer, convener, marshal or other person in the exercise of his powers or the performance of his duties under this Act or a regulation made under section 10,*
- (k) *who is in possession of or carrying any object referred to in section 8 (4) in contravention of that section, shall be guilty of an offence and on conviction liable -*
  - (i) *in the case of a contravention referred to in paragraphs (a) to (j), to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; and*
  - (ii) *in the case of a contravention referred to in paragraph (k), to a fine or to imprisonment for a period not exceeding three years.*

- (2) *It shall be a defence to a charge of convening a gathering in contravention of subsection (1) (a) that the gathering concerned took place spontaneously.*

NB. In *Mlungwana and Others v The State and Another [2018] ZACC 45*, the Constitutional Court found that section 12(1)(a) of the Regulation of Gatherings Act, which criminalises the failure to give notice of an intended gathering, is unconstitutional. The order of the Constitutional Court has an impact on the manner in which the South African Police Service manages gatherings as the judgement effectively removes the incentive for an organizer to give notice of an intended gathering.

Some other offences contained in section 12 are also rendered ineffective - the effect of *Mlungwana* is that the convener is not criminally liable for a failure to give notice and all the offences related to that notice are affected.

Organisers and attendees of a gathering may (depending on the circumstances) still be charged with other crimes such as public violence or malicious damage to property.

Amendments to the Regulation of Gatherings Act are included in the South African Police Service Amendment Bill which is awaiting introduction in Parliament.

A docket must be opened and registered regarding the contravention of any of the offences mentioned in this Act. Should the circumstances necessitate the immediate arrest of any participant, such arrest may be effected in terms of section 40(1)(a) of the Criminal Procedure Act. The provisions of the National Commissioner's circular dated 2005-04-28 relating to "*Instructions Relating to the Arrests and Detention of Suspects*" and circular 1/1/4/1 dated 2019-11-19 "*Instructions relating to arrest and detention of suspects*", should be complied with.

#### National Instruction 4 of 2014:

National Instruction 4 of 2014 regulates crowd management during public gatherings and demonstrations and must be read with the Act. Crowd management is the primary function of public Order Policing (“POP”) units. The Head: National POP has direct command and control over POP units in the provinces and is centralised under the Divisional Commissioner: Visible Policing and Operations.

## **49. REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION RELATED INFORMATION ACT No. 70 OF 2002**

### **APPLICATION OF THE ACT**

The Act aims, *inter alia*, to regulate the interception of certain communications (on application) by law enforcement agencies and provide certain communication related information to such agencies.

The Act will typically be used when the police want to intercept and/or record communications pertaining to serious criminal conduct that take place between persons or suspects, or when they want to intercept someone’s mail to obtain evidence in respect of criminal activities. As a general rule, all applications for interception must be approved by the judge designated for this purpose. Although section 2 of the Act prohibits the intentional interception of communications, certain law enforcement officers are, in specific limited circumstances, authorised to intercept communications without the approval of the designated judge.

The Cybercrimes Act No. 19 of 2020 made a number of amendments to the Regulation of Interception of Communications and Provision of

Communication Related Information Act No. 7 of 2002. These amendments have been incorporated in the discussion below.

**The Act defines the following key concepts:**

**“Communication”** both a direct communication and an indirect communication. **“Direct communication”** means “an —

- (a) oral communication, other than an indirect communication, between two or more persons which occurs in the immediate presence of all the persons participating in that communication; or
- (b) utterance by a person who is participating in an indirect communication, if the utterance is audible to another person who, at the time that the indirect communication occurs, is in the immediate presence of the person participating in the indirect communication”.

**“Indirect communication”** means the transfer of information, including a message or any part of a message, whether —

**“(a) in the form of —**

- (i) speech, music or other sounds;
- (ii) data;
- (iii) text;
- (iv) visual images, whether animated or not;
- (v) signals; or
- (vi) radio frequency spectrum; or

**(b) in any other form or in any combination of forms,**

*that is transmitted in whole or in part by means of a postal service or a telecommunication system”.*

## INTERCEPTION

**“Intercept”** means the aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication, and includes the —

- (a) monitoring of any such communication by means of a monitoring device;
- (b) viewing, examination or inspection of the contents of any indirect communication; and
- (c) diversion of any indirect communication from its intended destination to any other destination”.

## APPLICATION FOR INTERCEPTION AND/ OR OTHER DIRECTIONS

The following law enforcement officers are authorised to apply for the interception of communications in terms of the Act:

- a) **an officer** referred to in section 33 of the South African Police Service Act, if the officer concerned obtained in writing the approval in advance of another officer in the Police Service with at least the rank of **Major General** and who has been **authorised** in writing by the National Commissioner to grant such approval;
- (b) an officer as defined in section 1 of the Defence Act, if the officer concerned obtained in writing the approval in advance of another officer in the Defence Force with at least the rank of Major General and who has been authorised in writing by the Chief of the Defence Force to grant such approval;
- (c) a member as defined in section 1 of the Intelligence Services Act, if the member concerned obtained in writing the approval in advance of another member of the Agency or the Service, as the case may be, holding a post of at least general manager;

- (d) a member of a component of the prosecuting authority specialising in the application of Chapter 6 of the Prevention of Organised Crime Act, 1998, authorised thereto in writing by the National Director; or
- (e) a member of the Independent Police Investigative Directorate, if the member concerned obtained in writing the approval in advance of the Executive Director;

## **INTERCEPTION DIRECTION**

Interception of communications will usually take place in terms of an interception direction, authorised by a judge who has been specifically designated to approve applications for interception in terms of the Act.

Apart from interception in terms of an interception direction, a police official may also, without an interception direction, intercept communications —

- if he or she is a party to the communication; or
- with the prior consent in writing of one of the parties to the communication; or,
- to prevent serious bodily harm to another person; or
- to determine the location of a person in a case of emergency, i.e. life and death situations.

The above expectations are regulated by sections 4 to 8 of the Act and must be strictly complied with to prevent the interceptor from committing a crime and to ensure that, where applicable, the evidence so derived, is admissible in a court of law.

**Note** that the amendments affected to the Act by the Cybercrimes Act No. 19 of 2020 have certain implications for the use of body-worn cameras. Prior to the amendment, a law enforcement officer (which includes a member of the Service) was only allowed to record video footage without audio. Now, members are allowed to make recordings which include audio, provided that it complies with the specific circumstances provided for in section 4(3) of the Act:

*“Notwithstanding subsection (2), a law enforcement officer or a person who is authorised in terms of the Criminal Procedure Act, 1977, the Cybercrimes Act, 2020, or any other law to engage or to apprehend a suspect or to enter a premises in respect of the commission or suspected commission of any offence, may during the apprehension of the suspect or during the time that he or she is lawfully on the premises, record what he or she observes or hears if*

- 
- (a) *the recording relates directly to the purpose for which the suspect was apprehended or the law enforcement officer or person entered the premises; and*
- (b) *the law enforcement officer or person has –*
  - (i) *identified himself or herself as such; and*
  - (ii) *verbally informed any person concerned that his or her direct communications are to be recorded, before the recording is made.”*

## **WHAT INFORMATION MUST BE INCLUDED IN AN APPLICATION FOR AN INTERCEPTION DIRECTION?**

Applications for, and the issuing of interception directions are regulated by Chapter 3 of the Act. In essence, an interception direction will only be issued if the designated judge is satisfied that —

- “(i) a serious offence has been or is being or will probably be committed;*
- (ii) the gathering of information concerning an actual threat to the public health or safety, national security or compelling national economic interests of the Republic is necessary;*
- (iii) the gathering of information concerning a potential threat to the public health or safety or national security of the Republic is necessary;*
- (iv) the making of a request for the provision, or the provision to the competent authorities of a country or territory outside the Republic, of any assistance in connection with, or in the form of, the interception of communications relating to organised crime or any offence relating to terrorism or the gathering of information relating to organised crime or terrorism, is in-*
  - (aa) accordance with an international mutual assistance agreement; or*
  - (bb) the interests of the Republic’s international relations or obligations; or*
- (v) the gathering of information concerning property which is or could probably be an instrumentality of a serious offence or/is or could probably be the proceeds of unlawful activities is necessary”.*

*The designated judge must be satisfied that a serious offence has been/ will be committed before an interception direction is issued.*

## WHAT IS A SERIOUS OFFENCE?

The Act, as amended, defines a **serious offence** as follows:

“.....any-

- (a) offence mentioned in Schedule 1; or*

- (b) *offence that is allegedly being or has allegedly been or will probably be committed by a person, group of persons or syndicate-*
- (i) *acting in an organised fashion which includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics;*
  - (ii) *acting in the execution or furtherance of a common purpose or conspiracy; or*
  - (iii) *which could result in substantial financial gain for the person, group of persons or syndicate committing the offence, including any conspiracy, incitement or attempt to commit any of the above-mentioned offences;*

According to the Schedule to the Act, the following offences are regarded as serious offences:

- High treason;
- any offence referred to in paragraph (a) of the definition of specified offence of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004;
- sedition;
- any offence which could result in the loss of a person's life or serious risk of loss of a person's life;
- any offence in Schedule 1 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;
- any specified offence as defined in section 1 of the National Prosecuting Authority Act;

- any offence in section 13(f) of the Drugs and Drug Trafficking Act;
- any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament;
- any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones;
- any offence in Parts 1 to 4, or sections 17, 20 or 21 of Chapter 2 of the Prevention and Combating of Corrupt Activities Act;
- dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of any legislation; and
- any offence for which the punishment may be imprisonment for life or a period of imprisonment prescribed by section 51 of the Criminal Law Amendment Act, 1997, or a period of imprisonment exceeding 5 years without the option of a fine.

### **CAN INFORMATION OBTAINED AS A RESULT OF INTERCEPTION BE USED AS EVIDENCE?**

The information obtained as a result of interception may be admitted as evidence. Section 47(1) of the Act provides that "*Information regarding the commission of any criminal offence, obtained by means of any interception, ..... may be admissible as evidence in criminal proceedings or civil proceedings as contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act*".

### **OTHER TYPES OF DIRECTIONS**

Apart from interception directions, application can also be made for communication related directions, combined directions, decryption directions and entry warrants. Members should not attempt to intercept communications and request communication related

information without the assistance of the relevant offices in the Division Crime Intelligence. These officers will provide the required assistance and guidance. Any interception otherwise done, may be unlawful.

The Constitutional Court in *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v Amabhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3, declared certain provisions of the Regulation of Interception of Communications and Provision of Communication Related Information Act No. 70 of 2002 to be unconstitutional.

The Court held that the Act fails to provide adequate safeguards to protect the right to privacy as supported by the right to access courts, freedom of expression and the media as well as legal professional privilege. The declaration of unconstitutionality took effect on 4 February 2021, but was suspended for a period of 36 months to allow Parliament to make the necessary amendments to the Act to cure the defects.

During the 36 months suspension period, the following new insertions are to be read into the Act:

***“Section 23A Disclosure that the person in respect of whom a direction, extension of a direction or entry warrant is sought is a journalist or practising lawyer.***

- (1) *Where the person in respect of whom a direction, extension of a direction or entry warrant is sought in terms of section 16, 17, 18, 20, 21, 22, or 23, whichever is applicable, is a journalist or practising lawyer, the application must disclose to the designated Judge the fact that the intended subject of the direction, extension of a direction or entry warrant is a journalist or practising lawyer.*

- (2) *The designated Judge must grant the direction, extension of a direction or entry warrant referred to in subsection (1) only if satisfied that it is necessary to do so, notwithstanding the fact that the subject is a journalist or practising lawyer.*
- (3) *If the designated Judge issues the direction, extension of a direction or entry warrant, she or he may do so subject to such conditions as may be necessary, in the case of a journalist, to protect the confidentiality of her or his sources, or, in the case of a practising lawyer, to protect the legal professional privilege enjoyed by her or his clients.*

### **Section 25A Post surveillance notification.**

- (1) *Within 90 days of the date of expiry of a direction or extension thereof issued in terms of sections 16, 17, 18, 20, 21 or 23, whichever is applicable, the applicant that obtained the direction or, if not available, any other law enforcement officer within the law enforcement agency concerned must notify in writing the person who was the subject of the direction and, within 15 days of doing so, certify in writing to the designated Judge, Judge of a High Court, Regional Court Magistrate or Magistrate that the person has been so notified.*
- (2) *If the notification referred to in subsection (1) cannot be given without jeopardising the purpose of the surveillance, the designated Judge, Judge of the High Court, Regional Court Magistrate or Magistrate may, upon application by a law enforcement officer, direct that the giving of notification in that subsection be withheld for a period which shall not exceed 90 days at a time or two years in aggregate”.*

Furthermore, the Court found that the Act is unconstitutional to the extent that it fails to adequately prescribe procedures to ensure that intercepted data is managed lawfully and in a manner which prevents it from landing in the wrong hands.

Central control for interception and monitoring is vested in the National Office for the Control of Interception and Monitoring, Crime Intelligence Head Office (NOCIM). The NOCIM is supported by the nine decentralized Provincial Offices for the Control of Interception and Monitoring (POCIM). Any SAPS member who qualifies as an applicant in terms of the provisions of the Act who intends to obtain a direction as referred to above or who is the applicant in respect of a direction which expires from 4 February 2021 onwards, must make contact with either the NOCIM in Pretoria or the POCIM in their province to ensure that there is strict compliance with the obligations created by sections 23A and 25A of the Act.

## DUTY TO REPORT LOST, STOLEN OR DESTROYED CELLULAR PHONES AND SIM CARDS

Members should note that section 41 of the Act places a duty on owners or possessors of cellular phones and/or SIM cards whose phones or SIM cards have been stolen, destroyed or lost, to, within a reasonable time after having reasonably become aware of the loss, theft or destruction of the cellular phone or SIM card, **report such loss, theft or destruction** in person, or through a person authorised to do so by him or her, to a police official at any police station.

Instructions to police officials who receive a report of a lost, stolen or destroyed cellular phone or SIM card were issued by the National Commissioner on 6 January 2006 on the intranet of the South African Police Service and by means of a circular. In essence these instructions provide that each and every report of a lost, stolen or destroyed phone or SIM card has to be recorded on a prescribed form and captured on the Crime Administration System, irrespective of whether a crime has been committed or not.

## BLACKLISTING OF CELLULAR PHONES

Members should also note that the above instructions do not change, or repeal, the instructions of the National Commissioner in respect of the blacklisting of lost, stolen or destroyed cellular phones. That

process is still regulated in terms of the operational agreement entered into between the SAPS and the Mobile Cellular Operators on 13 April 2005 and the instructions issued in that regard by the National Commissioner. **The Act itself, does not provide for the blacklisting of cellular phones.**

In terms of the above-mentioned agreement, a member of the SAPS cannot blacklist another person's cellular phone that is the responsibility of the complainant/owner of the phone. However, the police must facilitate this process by, for instance, assisting a complainant to obtain his or her blacklisting reference number from the relevant cellular operator if the complainant does not have the resources to obtain it. The agreement, however, allows police officials to un-blacklist a cellular phone which has already been blacklisted for purposes of a criminal investigation.

## 50. RIOTOUS ASSEMBLIES ACT NO. 17 OF 1956

### PROHIBITION OF ATTEMPT AND CONSPIRACY

Mere intention or thoughts to commit a crime is not punishable by law. The above Act criminalises **attempts to commit statutory crimes and conspiracies to commit common law or statutory crimes.**

The Act also contains a presumption in respect of incitement to public violence. In this regard, section 17 of the Act provides as follows:

***“Acts or conduct which constitute an incitement to public violence - A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in***

*whose presence the act or conduct took place or to whom the speech or publication was addressed”.*

Although the above Act refers to “riotous assemblies” it has nothing to do with the topic today. The Act is used to address attempts to commit statutory crimes and conspiracies to commit any crime. (The common law addresses attempts to commit common law crimes).

## **SECTION 18(1) OF THE ACT: ATTEMPT**

*According to this section “any person who **attempts** to commit any offence against a statute or statutory regulation shall be guilty of an offence and, of no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable”.*

## **SECTION 18 (2) (a) OF THE ACT: CONSPIRACY**

*“any person who ... **conspires** with any other person to aid or procure the commission of or to commit ... any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to punishment to which a person convicted of actually committing that offence would be liable”.*

In the matter between ***Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*** [2020] ZACC 25 the Constitutional was approached by the Economic Freedom Fighters and it's President Mr JS Malema, who was being charged with contravening section 18(2)(b) of the Riotous Assemblies Act No. 17 of 1956. The applicants approached the Constitutional Court in a bid to have section 18(2)(b) of the Act declared unconstitutional and invalid.

The Constitutional Court found that section 18(2)(b) of the Act was inconsistent with section 16(1) of the Constitution, 1996 which guarantees freedom of expression, and invalid to the extent that it criminalises the incitement of another to commit “any” offence. It further ordered that, from

the date of judgment on 27 November 2020, Parliament is given 24 months to rectify the constitutional defect. During the period of rectification, the Court ordered that the wording indicated below in bold be read in to section 18(2)(b) of the Act until such time as Parliament rectifies the defect. Should Parliament fail to effect the necessary amendment within the 24 month period or within an extended period of suspension, the reading-in will become final –

“Any person who —

...

*(b) incites, instigates, commands, or procures any other person to commit, any **serious** offence, whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”*

The above reading-in strikes a balance between the Act’s aim to prevent crime and the constitutional right to freedom of expression.

Members should take note that if any alleged incitement does not relate to the commission of a **serious offence**, such conduct it would **no longer constitute a contravention** of section 18(2)(b). Therefore, when members execute their law enforcement mandate, they should carefully consider if there is prime facie evidence of the commission of the offence of incitement or whether the actions of the suspect merely amounted to an exercise of his/ her right to freedom of expression as enshrined in section 16(1) of the Constitution.

The Conspiracy or Inducement to Commit a Serious Offence Bill, 2022 is currently being developed by the Department of Justice and Constitutional Development. This Bill aims to repeal the Riotous Assemblies Act No. 17 of 1956.

## 51. SECOND-HAND GOODS ACT NO. 6 OF 2009

### INTRODUCTION

The Second-Hand Goods Act No. 6 of 2009 (hereinafter referred to ‘the SHGA’) came into operation on 30 April 2012. The Act has three broad objectives, namely to —

- regulate dealers and recyclers;
- combat the trade in stolen goods; and
- promote ethical standards in the second-hand goods trade.

The Second-Hand Goods Act creates a system in terms of which dealers in second-hand goods and recyclers of non-ferrous metal must register with the SAPS. The Act does not intend to prohibit people from dealing in second-hand goods, but to regulate the manner in which dealers and recyclers practice their trade. Dealers have certain obligations under the Act, as is explained below. The Act also deals with specific types of dealers, such as vehicle dealers, cell phone dealers and recyclers. The SAPS must ensure that dealers comply with the provisions of the Act, and also prosecute those who do not. Those dealers and recyclers that commit offences under the Act and are found guilty, may be sentenced to a fine or to imprisonment for a period ranging from three to five years, or both.

The SHGA does not replace any existing laws that provide for property crimes such as theft and robbery, but adds another dimension to the effort to prevent and reduce crime, by focussing on the market for stolen goods. The Act gives effect to the belief that property crime can be reduced by closing down on the illegal market for stolen goods. For the police to address property crimes successfully, it is necessary to see theft as the beginning of the crime and the disposal of the stolen thing the second-hand marketplace, as the *conclusion*. We therefore have to deal with this as two distinct,

but equally important functions: the detective investigates the theft while the Designated Second-Hand Goods Officer ensures registration of second-hand dealers and polices them for compliance.

The Act defines a **dealer as “a person who carries on a business of dealing in second-hand goods, and includes a scrap metal dealer and a pawnbroker”**. It is clear that the dealer must carry on a business and deal in (trade) second-hand goods. Not all goods fall under the Act and “goods” are specified in Schedule 1. **It does not include firearms or ammunition or clothing. Furthermore, recyclers of plastic or paper do not fall under the Act – only those who recycle nonferrous metals.** Goods are second-hand when they have been in use by a person other than the manufacturer or producer thereof or a person dealing therewith for such a manufacturer or producer in the course of business, **but does not include goods with a value of less than R100.**

**Every person who carries on a business as a dealer must be registered.** If the person intends to conduct business from more than one premises, or where second-hand goods are stored on additional premises, each of those premises must be registered.

Registration consists of an application process where the applicant provides all his or her information to the SAPS. Individuals and companies may apply for registration, but a company must also provide the particulars of all the persons who are in day-to-day control of the business. The SAPS may approve the application with certain conditions, or refuse. When the application is approved, a dealer will receive a **certificate of registration** issued for the premises, in the name of a specific person. That certificate may be amended if necessary and additional conditions may be imposed on the dealer. The SAPS may also withdraw a certificate in certain instances.

**The Act requires of dealers to keep records of all transactions.** Chapter 4 contains the different obligations that are on dealers, not only in general terms (sections 21 – 23 in Chapter 4) but also

regarding specific goods i.e. motor vehicles (section 24 in Chapter 5), **controlled metals** (section 25 in Chapter 6) and **communication equipment** (section 26 in Chapter 7). All dealers must **keep registers** of second-hand goods that are acquired and disposed of. The dealer must make an entry into the register when a person sells to or buys from that dealer. The particulars must at least include particulars in respect of the identity of the person from whom the second-hand goods are acquired (e.g. full names, address and telephone number); the manner in which the person's identity was verified; and the person's identity number.

The register must also reflect a description of the second-hand goods and a serial number or distinguishing mark or feature; the purchase price paid by the dealer; the number assigned to the second-hand goods by the dealer; the name and signature of the person who conducted the transaction on behalf of the dealer; the date and time of the transaction (the date on which the second-hand goods were sold or an account of how and when the second-hand goods were otherwise disposed of). The dealer must keep registers for 5 years.

In certain cases the certificate of registration may have a condition which requires separate registers for the acquisition and disposal of different classes of second-hand goods.

The Regulations for Dealers and Recyclers, 2012 contain examples of registers, but it is not necessary for registers to be in that exact format, as long as all the information is captured.

If a **dealer suspects** that any name, address or document furnished to the dealer is **false**, goods or goods for pawn, as the case may be, offered to such a dealer are **stolen goods** or the appearance or aspects of an item offered to such dealer has **been tampered with** or there was an attempt to alter the appearance or aspects thereof in order to conceal the identity of the item, the **dealer must immediately report the matter to a police official** on duty at the police station in whose area the dealer carries on business. **There is**

**a similar obligation on recyclers with regards to burnt cable and cable** that appears to have been tampered with in order to conceal its identity.

The police official who receives this report must note the report in the occurrence book and immediately provide the person with the occurrence book serial number. **A dealer who suspects that the other person intends to commit or has committed an offence may not continue with** and carry out **any transaction** to which such a suspicion relates. The police official taking down the report must also immediately provide the DSO with a copy of the report, together with any particulars on dockets arising from such report.

**The Act deals with all second-hand goods, and not only cable.**

This is illustrated by the fact that the Act also contains provisions regarding burnt cable - it provides that it is an offence to acquire or dispose of any cable consisting of controlled metal of which the cover has been burnt, unless the seller thereof is able to provide a reasonable explanation for the burnt cover, and only after the matter has been reported to as set out above. It is also an offence to be in possession of any cable consisting of controlled metal of which the cover has been burnt, unless the person is able to provide a reasonable explanation for the burnt cover.

**What is a reasonable explanation?** Although it is impossible to set out all possible explanations that may be reasonable, a few principles will guide the member. Reasonableness denotes the idea that the explanation must firstly be based on facts. Someone who explains that the cable was burnt in the course of a normal legal business, or that he or she collects scrap cable from burned buildings, offers a reasonable explanation which can be checked. The dealer or recycler who buys that burnt cable must consider the facts even though they do not have to launch a full-scale enquiry. Logic and common sense dictate that the dealer or recycler must go further than requiring the seller to sign a *pro forma* statement and apply his or her mind properly. The individual circumstances may very well indicate that the

explanation is reasonable – consider for example the difference between a corporate client who states that he or she is entitled to sell cable on behalf of a utility and can produce a contract as opposed to a destitute person who alleges that he or she has a contract with an utility. In ***Mabona & another v Minister of Law & Order & others 1988 (2) SA 654 (SE)*** the court (at 658E) gave an indication of what a reasonable suspicion entails, giving some guidance:

*“The reasonable man would ... analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain the suspicion that will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. This section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it would be flighty or arbitrary, and not a reasonable suspicion.”*

## POWERS OF THE POLICE

Routine inspections form an integral part of the monitoring function of the SAPS under the Act, while criminal investigations are aimed at the detection and investigation of crime. All National Instructions and Standing Orders related to searches and seizures must be complied with. Goods that are seized may not be returned to the “owner” without the proper procedures in the National Instruction being complied with.

Before a police member may do anything in terms of the Act, he or she must identify himself or herself and produce his or her appointment certificate. This obviously relates only to the first introduction to the dealer or recycler and the appointment certificate will only be produced on request after that.

**ROUTINE INSPECTIONS IN TERMS OF SECTION 28**

A Designated Second-Hand Goods Officer (DSO) may enter the premises of any registered dealer during business times in order to investigate compliance with this Act. The DSO may require the dealer, owner, an employee or the person in control of the premises to produce the registration certificate, registers (which includes records, books or other documents relating to the goods in or on the premises) for inspection or for the purposes of obtaining copies thereof or extracts therefrom.

The DSO may also require the dealer to produce any goods found in or on such premises for examination, explain any entry or absence of any entry in any register, book, record or document.

If the DSO discovers that any method of dealing, recording of transactions in registers or storage that is being used is in contravention of the Act, he or she may demand that the dealer stops using that method and afford the dealer a period of no more than seven days to rectify the faulty method in order to ensure compliance with the Act.

This indicates that the Act was designed to keep compliance issues separate from criminal investigations.

The dealer, owner, employee or person in charge of the premises must assist the DSO in the performance of his or her official functions under this Act.

A DSO must conduct at least one comprehensive annual inspection of each registered premises and examine all records.

When a DSO inspects a register, he or she must sign his or her name immediately after the last entry in that register, his or her number and rank and the date on which the inspection was conducted. The DSO

may also certify in the manner that the National Commissioner may from time to time direct, that the records were inspected.

## **ENTRY, SEARCH, SEIZURE AND SEAL-OFF**

A police official may get a warrant to -

- enter any premises specified in that warrant
- direct the person in control of or any employee to-
- disclose any register, record, book, other document or information that pertains to the investigation and is in the possession or under the control of that person
- render the necessary assistance that the police official requires
- inspect any register, record, book or other document and make copies thereof or excerpts therefrom
- examine any goods or other articles found on the premises
- seize records, books, documents or electronic data-storing devices that may be used as evidence
- seal or seal off the premises to prevent a person from conducting business in contravention of this Act.

A police official must audibly demand admission to the premises and give notice of the purpose of the entry, unless the demand and notification will defeat the purpose of the search. Reasonable force may be used to overcome resistance to the entry or search.

Any entry and search must be done by day, unless it reasonable and justifiable to do it in the night.

As is the case with all searches under the Criminal Procedure Act, 1977, entry, search and seizures may only be done under a warrant,

unless the person consents or circumstances exist that will defeat the purpose of the search if a warrant is sought.

NB: Goods may not be seized under a warrant obtained under the Second-Hand Goods Act, as it is aimed at ensuring that the investigator can get his or her hands on the registers and books. If it is suspected that there are stolen goods, it is necessary to obtain the normal search and seizure warrant under the Criminal Procedure Act, 1977.

## CONCLUSION

It should be clear that the Second-Hand Goods Act, 2009 is a tool that may be used in addition to other laws that already exist. The Act requires of the SAPS to monitor compliance through the office of the DSO, while the detection and investigation of crime carries on.

The Act does not solve all property related crime issues. It aims to create a system in which the SAPS can regulate dealers, thereby limiting the market for stolen goods. It gives the industry an opportunity to improve their ethical standards.

## 52. SOUTH AFRICAN POLICE SERVICE ACT NO. 68 OF 1995

The South African Police Service Act No. 68 of 1995 sets out some of the powers, duties and functions of members of the Service. There are various provisions in terms of this Act where members can act without a warrant in specific circumstances. Members should especially take note of section 13 of the Act since this section, *inter alia*, prescribes that -

- members may, without warrant, search persons, premises and vehicles within **10 kilometres** from any border of the RSA and

any foreign state, in the territorial waters of the RSA, at any airport as defined or within a reasonable distance from such airport **(section 13(6))**;

- the National or Provincial Commissioner may, where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, in writing authorise that the **particular area** or any part thereof be cordoned off for a period not exceeding 24 hours. On receipt of this written authorisation, members may search any person, premises or vehicle in such area and seize any article referred to in section 20 of the Criminal Procedure Act, 1977 to achieve the object of the cordoning off **(section 13(7))**;
- the National or Provincial Commissioner may, where it is reasonable in the circumstances, in order to perform official functions of the police, in writing authorise members to **set up roadblocks on public roads** or checkpoints at any public place (section 13(8)(a));
- members may, in certain circumstances, set up a roadblock without written authorisation where the delay that will be caused by first obtaining an authorisation will defeat the object of the roadblock, for instance, where a fugitive has escaped from custody and is travelling in a vehicle in that area or where a Schedule 1 offence has been committed by a person who is travelling in a vehicle in that particular area **(section 13(8)(d))**;
- members may, for the purposes of investigating any offence or alleged offence, cordon off the scene of such offence or alleged offence and any adjacent area which is reasonable in the circumstances to cordon off in order to conduct an effective investigation at the scene of the offence or alleged offence **(section 13(11)(a))**;
- members may, where it is reasonable in the circumstances in order to conduct such investigation, prevent any person from

entering or leaving an area so cordoned off (**section 13(11)(8)(b)**).

The relevant subsections are quoted for your information:

- “(6) Any member may, where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without a warrant search any person, premises, other place, vehicle, vessel or aircraft, or any receptacle of whatever nature, at any place in the Republic within 10 kilometres or any reasonable distance from any border between the Republic and any foreign state, or in the territorial waters of the Republic, or inside the Republic within 10 kilometres or any reasonable distance from such territorial waters, or at any airport as defined in section 1 of the Aviation Act 74 of 1962, or within any reasonable distance from such airport and seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle and which may lawfully be seized.
- (7) (a) The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, in writing authorise that the particular area or any part thereof be cordoned off.
- (b) The written authorisation referred to in (a) shall specify the period, which shall not exceed 24 hours, during which the said area may be cordoned off, the area or part thereof to be cordoned off and the object of the proposed action.
- (c) Upon receipt of the written authorisation referred to in paragraph (a) any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation, without warrant, search any person, premises or vehicle, or any receptacle or object of whatever nature, in that area or part thereof and seize any article referred to in section 20 of the Criminal Procedure Act 51 of 1977, found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are

or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation.

- (8) (a) The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to exercise a power or perform a function referred to in section 215 of the Constitution, in writing authorise a member under his or her command, to set up a roadblock or roadblocks on any public road in a particular area or to set up a checkpoint or checkpoints at any public place in a particular area.
- (b) The written authorisation referred to in (a), shall specify the date, approximate duration, place and object of the proposed action.
- (c) Any member authorised under paragraph (a), may set up a roadblock or roadblocks or cause a roadblock or roadblocks to be set up on any public road in the area so specified or set up a checkpoint or checkpoints or cause a checkpoint or checkpoints to be set up at any public place in the area so specified.

- (d) Notwithstanding the provisions of paragraph (a), any member who has reasonable grounds to suspect that-
- (i) an offence mentioned in Schedule 1 to the Criminal Procedure Act, 1977, has been committed and that a person who has been involved in the commission thereof is, or is about to be, travelling in a motor vehicle in a particular area;
- (ii) a person who is a witness to such an offence is absconding and is, or is about to be, travelling in a motor vehicle in a particular area and that a warrant for his or her arrest has been issued under section 184 of the Criminal Procedure Act, 1977, or that such a warrant will be issued if the information at the disposal of the member is brought to the attention of the magistrate, regional magistrate or judge referred to in that section, but that the delay in obtaining such warrant will defeat the object of the roadblock;
- (iii) a person who is reasonably suspected of intending to commit an offence referred to in subparagraph (i), and who may be prevented from committing such an offence

- by the setting up of a roadblock is, or is about to be, travelling in a motor vehicle in a particular area;
- (iv) a person who is a fugitive after having escaped from lawful custody is, or is about to be, travelling in a motor vehicle in a particular area; or
- (v) any object which-
  - (aa) is concerned in;
  - (bb) may afford evidence of; or
  - (cc) is intended to be used in, the commission of an offence referred to in subparagraph (i), whether within the Republic or elsewhere, and which is, or is about to be, transported in a motor vehicle in a particular area and that a search warrant will be issued to him or her under section 21(1)(a) of the Criminal Procedure Act, 1977, if he or she had reason to believe that the object will be transported in a specific vehicle and he or she had applied for such warrant, and that the delay that will be caused by first obtaining an authorisation referred to in subparagraph (i), will defeat the object of the roadblock, may set up a roadblock on any public road or roads in that area for the purpose of establishing whether a motor vehicle is carrying such a person or object.

- (11) (a) A member may, for the purposes of investigating any offence or alleged offence, cordon off the scene of such offence or alleged offence and any adjacent area which is reasonable in the circumstances to cordon off in order to conduct an effective investigation at the scene of the offence or alleged offence.
- (b) A member may, where it is reasonable in the circumstances in order to conduct such investigation, prevent any person from entering or leaving an area so cordoned off".

In **Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v The Minister of Police and Others** [2021] ZACC 37, the Constitutional Court confirmed the constitutional invalidity of section 13(7)(c) of the South African Police Service Act No. 68 of 1995 insofar as it allowed for warrantless searches.

Poor and vulnerable people were subjected to cruel, degrading and invasive raids which included the breaking down of dwelling doors, removing persons from their dwellings and searching their residences in their absence. The purpose of the raids were found to be for ulterior motives and not as authorised in the written application.

All South Africans have a vested interest in the maintenance of public order and safety in their communities. Search and seizure operations are important tools to prevent, combat and investigate crime efficiently and this results in a limitation of the searched person's constitutional right to privacy. A balance must be struck between the individual's right to privacy and the community's right to safety. Section 13(7)(c) did not provide for urgency when authorising such searches, nor did it provide guidelines for the manner in which these searches must be conducted or require that a reasonable suspicion of criminality must exist for the search to take place. Whilst the Court confirmed the constitutional validity of section 13(7)(a) and (b) of the Act, the portion of section 13(7)(c) that permits warrantless searches without appropriate safeguards was declared unconstitutional on the basis that it unjustifiably infringes upon the right to privacy. To cure this defect, the Court ruled that interim safeguards must be read in and that section 13(7)(c) must read as follows [insertion in bold]:

*“Upon receipt of the written authorisation referred to in paragraph (a), any member may cordon off the area concerned or part thereof, as may, where it is reasonably necessary in order to achieve the object specified in the written authorisation **and within the cordoned-off area, search any person, premises or vehicle, or any receptacle or object of whatever nature in terms of sections 21 and 22 of the Criminal Procedure Act 51 of 1977** and seize any article referred to in section 20 of the Criminal Procedure Act 51 of 1977, found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a*

*search under this paragraph shall upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation.”*

In conclusion, where time permits, members must apply for a search warrant when any premises is to be searched. This must be applied for beforehand from the relevant Magistrate, at the same time as the request to the Provincial Commissioner to approve the section 13(7) operation. Items and objects not named in the search warrant (such as vehicles found moving around in the cordoned-off area), and which are at least on reasonable grounds linked or suspected to be linked to an offence, are to be searched in terms of section 22 of the Criminal Procedure Act No. 51 of 1977. The aim and targets of the search must correspond with the object of the operation. A copy of the written authorisation signed by the Provincial Commissioner and of the search and seizure warrant must be produced to the affected parties.

The South African Police Service Amendment Bill, 2020 includes an amendment of section 13(7)(c) and is expected to be tabled for approval in the second half of 2023.

**There are certain other offences in Chapter 13 of the Act which members should note. According to this chapter, the following conduct is an offence in terms of the SAPS act:**

- Wearing and use of police uniforms by persons who are not members of the Service
- Hindering or obstructing members in the performance of their duties
- False representations by persons who are not members of the Service or who are not associated with the Service, e.g. persons pretending to be members of the SAPS

- Disclosure of official information by members of the SAPS which will or may prejudicially affect the powers or functions of the SAPS as set out in the Constitution.

**The relevant offences in the Act are as follows:**

*'Wearing and use of uniforms, badges, etc. of Service-*

66 (1) *Any person who wears any uniform or distinctive badge or button of the Service or wears anything materially resembling any such uniform, badge or button or wears anything with the intention that it should be regarded as such uniform, badge or button, shall, unless-*

(a) *he or she is a member entitled by reason of his or her appointment, rank or designation to wear such uniform, badge or button; or*

(b) *he or she has been granted permission by the National or Provincial Commissioner to wear such uniform, badge or button, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.*

(2) *Any person who wears, or without the written permission of the National Commissioner, makes use of any decoration or medal instituted, constituted or created under this Act, or its bar, clasp or ribbon, or anything so closely resembling any such decoration, medal, bar, clasp or ribbon as to be calculated to deceive, shall, unless he or she is the person to whom such decoration or medal was awarded, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months".*

## *Interference with members-*

- 67 (1) *Any person who-*
- (a) *resists or wilfully hinders or obstructs a member in the exercise of his or her powers or the performance of his or her duties or functions or, in the exercise of his or her powers or the performance of his or her duties or functions by a member wilfully interferes with such member or his or her uniform or equipment or any part thereof; or*
  - (b) *in order to compel a member to perform or to abstain from performing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such member having done or abstained from doing such an act, threatens or suggests the use of violence against, or restraint upon such member or any of his or her relatives or dependants, or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependants, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.*

## *False representations*

- 67 (1) *Any person who pretends that he or she is a member shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.*
- (2) *Any person who by means of a false certificate or any false representation obtains an appointment in the Service, or, having been dismissed from the Service, receives, by concealing the dismissal, any salary, wages, allowance, gratuity or pension, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.*
  - (3) *Any person who, in connection with any activity carried on by him or her takes, assumes, uses or in any manner publishes any name, description, title or symbol indicating or conveying or purporting to indicate or convey or is calculated or is likely to lead other persons to believe or infer that such activity is carried*

*on under or in terms of the provisions of this Act or under the patronage of the Service, or is in any manner associated or connected with the Service, without the approval of the National Commissioner, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.*

## *Unauthorised disclosure of information*

*70 Any member who wilfully discloses information in circumstances in which he or she knows, or could reasonably be expected to know, that such a disclosure will or may prejudicially affect the exercise or the performance by the Service of the powers or the functions referred to in section 215 of the Constitution, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years”.*

Apart from the provisions of section 70 of the Act, unauthorised/unlawful disclosure of official information can also be addressed by the **Protection of Information Act No. 84 of 1982**. Other legislation, such as the **Regulation of Interception of Communications and Provision of Communication Related Information Act. No. 70 of 2002**, tax legislation, the South African Reserve Bank Act No. 90 of 1989, etc. also contain **secrecy provisions** that prohibit the disclosure of certain information.

Whilst South Africa has enacted legislation to protect certain information, it has also enacted legislation that promotes access to (certain) information. **The Promotion of Access to Information Act No. 2 of 2000** makes it possible for any person to request recorded information (a record) from the State. Although a person may request information, it does not mean that the same will be provided since the Act provides specific grounds for refusal of access to records, e.g. identity of informers, third party information, or personal information, etc.

## DIRECTORATE FOR PRIORITY CRIME INVESTIGATION (DPCI/HAWKS)

Chapter 6A of the SAPS Act provides for the establishment, functions and mandate of the DPCI, a Directorate within the SAPS. The mandate of the DPCI is the prevention, combating and investigation of **national priority offences**, particularly **serious organised crime, serious commercial crime and serious corruption**.

According to section 17 A of the Act, “**national priority offence**” means organised crime, crime that requires national prevention or investigation, or crime which requires specialized skills in the prevention and investigation thereof, as referred to in section 16(1).

The Constitutional Court declared certain provisions chapter 6A of the SAPS Act, 1995 invalid and inconsistent with the Constitution. See *Helen Suzman Foundation and others v President of the RSA and others* (Cases CCT 07/14 and CCT 09/14), delivered on 27 November 2014. The Constitutional Court deleted, with effect from 27 November 2014 certain provisions of the Act relating to the suspension of the National Head of the DPCI as well as all references to guidelines determined by the Minister and approved by Parliament relating to the mandate of the DPCI. Within the context of the purpose of the Act, the Constitutional Court found that the DPCI has the primary duty to prevent combat and investigate those national priority offences that are intimate to its core business like corruption, crimes against humanity organised crime or serious commercial crime which in the opinion of the National Head of the DPCI need to be addressed by the DPCI. It is the DPCI itself thus has to ensure that its primary responsibilities are by no means compromised. The DPCI had been established to prevent, combat and investigate serious organised crime, serious commercial crime and serious corruption.

## GATHERING OF INTELLIGENCE

Section 2(3) of the **National Strategic Intelligence Act No. 39 of 1994** mandates the SAPS to gather, correlate, evaluate, co-ordinate and use crime intelligence in support of the objects of the South

African Police Service as contemplated in section 205(3) of the Constitution.

Crime Intelligence is defined as intelligence used in the prevention of crime or to conduct criminal investigations and to prepare evidence for the purpose of law enforcement and the prosecution of offenders.

Other related legislation is the **Intelligence Services Oversight Act No. 40 of 1994** that provides for *inter alia* the establishment of a parliamentary committee known as the Joint Standing Committee on Intelligence which is responsible for oversight of the intelligence functions of the National Intelligence Structures. The latter Act also provides for the appointment of the Inspector-General of Intelligence.

## VETTING INVESTIGATIONS

Section 2A of Act No. 39 of 1994 provides authority for National Intelligence Structures (*inter alia* the Division: Crime Intelligence of the SAPS) to conduct vetting investigations in order to determine the security competence of persons employed by the State or who is rendering a service to the State. This section authorises the use of the polygraph to determine the reliability of information gathered during such an investigation.

Vetting investigations must not be confused with so-called integrity investigations. Section 17E of the SAPS Act provides for security screening and integrity measures that are only applicable to members of the Directorate for Priority Crime Investigation (DPCI). (See also Government Notice No. R.783 of 7 September 2010: *Gazette* No. 33524).

## INVESTIGATION OF ENVIRONMENTAL CRIME

Police officials may not always be certain how to best deal with environmental crime such as pollution, damaging of natural resources or habitats, illegal disposal of waste, endangered or indigenous fauna

and flora, etc. For this reason it needs to be noted that the Department of Environmental Affairs has at its disposal a number of Environmental Management Inspectors (with policing powers) who can assist the SAPS with investigations of this nature.

The National Commissioner of the SAPS and the Director-General of Environmental Affairs concluded a Standard Operating Procedure during the second half of 2012 to enhance cooperation between the Environmental Management Inspectorate (EMI) and the SAPS. According to the agreement reached between the Parties, the SAPS will refer cases involving environmental crime to the EMI where the matter is of a pure environmental crime nature and does not involve or include organized crime. Where there is a combination of crimes involved in a particular instances (i.e. other types of crimes in addition to an environmental crime), or, where the crime is of an organized nature, the case will be investigated by the SAPS with the assistance of the EMI.

Members should note that criminal offences in respect of aquatic animals and plants such as abalone, lobsters, seaweed, etc. as provided for in the Marine Living Resources Act No. 18 of 1998 are enforced by so-called “fishery control officers”. In terms of Government Notice 2148, *Gazette* No. 21310 of 30 June 2000, all members of the SAPS are designated as fishery control officers. All EMI’s are, however, not designated as fishery control officers.

## ILLEGAL HUNTING OF RHINO

According to section 57(1) of the National Environmental Management: Biodiversity Act No. 10 of 2004, a person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of chapter 7 (of the Act) (“**Restricted activity**” includes hunting, catching or killing).

According to section 101(1)(a) of the Act, a person is guilty of an offence if that person contravenes section 57(1). According to section 102(1), a person convicted of an offence in terms of section 101 is liable to a fine or to imprisonment not exceeding five years, or to both a fine and such imprisonment.

### Missing persons

Members must take note that there is **no waiting period** to report a missing person. When a person goes missing it is essential that the Police be contacted immediately. The contact details of the Bureau of Missing Persons of the South African Police Service, Head Office are as follows: (012) 393-2002/5/7.

## 53. SAFETY AT SPORTS AND RECREATIONAL EVENTS

### ACT NO. 2 OF 2010

#### INTRODUCTION

The Ellis Park soccer disaster of 2001 and the subsequent findings and recommendations of the Commission of Enquiry into the Ellis Park Soccer Disaster necessitated this piece of legislation. The Act *inter alia* provides for measures to safeguard the physical well-being and safety of persons and property at sports, recreational, religious, cultural, exhibitional, organisational or similar events held at stadiums, venues or along a route. The Act does not apply to gatherings as defined in the Regulation of Gatherings Act No. 205 of 1993.

#### WHEN DOES AN EVENT FALL UNDER THE ACT?

The definitions in the Act are important to guide us in the interpretation of the Act. When an event is political in nature and falls within the definition of 'gathering' as defined in the Regulation of Gatherings Act

No. 205 of 1993 it is excluded from the operation of the Act. Furthermore, the Act only applies to events held in a 'stadium' or in a 'venue' with a certified capacity for more than 2000 spectators, irrespective of the actual amount of persons. To illustrate this: if an event is held in a school or church hall with a seating capacity of less than 2000 persons, the event will be excluded from the operation of the Act.

## **PROHIBITION ON EVENTS UNLESS THERE IS COMPLIANCE WITH THE ACT**

According to section 5(1) of the Act, no person may organise an event unless that person complies with the requirements of section 6(1) or 6(3) and section 25. Section 6(1) and (3) provides that a schedule of events must, prior to the actual event/activity, be submitted to the National Commissioner of the SAPS to make a risk categorisation of the events. Section 25(1) of the Act prescribes that a controlling body, an event organiser, or a stadium or venue owner, as the case may be, must ensure that public liability insurance, as prescribed, is in place for an event. A person who organises an event in contravention of section 5(1) of the Act commits an offence in terms of section 44(1), read with section 44(2) of the Act.

A person is also guilty of an offence if he or she organises an event without obtaining a valid safety certificate. Spectators who are in possession of prohibited or restricted objects or substances, damage property or engage in anti-social behaviour may commit offences in terms of section 44 of the Act. (Refer to section 44(1) for a comprehensive list of prohibited conduct).

## **RESPONSIBILITY FOR SAFETY AND SECURITY AT EVENTS**

According to section 4(1) of the Act, a controlling body, an event organiser, or a stadium or venue owner, as the case may be, must put in place such measures as may be prescribed to ensure the physical safety and security of persons and their property at an event.

**“controlling body”** means a national federation as defined in section 1 of the National Sport and Recreation Act, 1998 (Act 110 of 1998), a provincial federation or an international controlling body or other body governing a code of sport, recreational, religious, cultural or similar activity in the Republic, but excludes the National Department of Sport and Recreation of the Republic of South Africa.

**“event”** means sporting, entertainment, recreational, religious, cultural, exhibitional, organisational or similar activities hosted at a stadium, venue or along a route or within their respective precincts.

**“stadium”** means an enclosed or semi-enclosed structure which consists of seating for spectators and a field of play or a permanent or temporary podium or other area within the structure reserved for the purposes of hosting events, which has a safe seated or standing spectator capacity of at least 2000 persons as certified by a local authority;

**“venue”** means any area or place, other than a stadium where an event is hosted, that has a seating or standing spectator capacity of at least 2000 persons as certified by a local authority, within which other permanent or temporary structures may be erected and which may be demarcated by an enclosed or semi-enclosed permanent or temporary structure.

The persons identified in section 4(1) must cooperate with and assist the event safety and security planning committee and the Venue Operations Centre (VOC) commander in the performance of their functions under this Act. (Section 4(2).) The VOC at an event is where the entire safety and security operation at a stadium, venue or along a route is coordinated. (Section 17.) The National Commissioner of the SAPS must designate in writing a police official, suitably qualified and experienced in event policing matters, with at least the rank of Captain as an authorised member, either in general or for a specific event. The authorised member must establish the event safety and security planning committee for each event categorised as medium or high risk.

(The National Commissioner may, in terms of section 46 of the Act delegate any of his or her powers or assign any of his or her duties

imposed by the Act to any police official of the rank of Captain or above.)

Section 6 of the Act provides for the risk categorisation of events by the National Commissioner. The National Commissioner may in certain circumstances also refuse to make a risk categorisation. The factors to be considered by the National Commissioner in making a risk determination are set out in section 6(7) of the Act.

In the event of a low risk categorisation, the organiser must draft a safety plan according to the headings set out in section 4(9) and 4(10) of the Act. Where the risk categorisation is medium or high risk, the National Commissioner or the authorised member must, taking into consideration the risk categorisation of the event, ensure that the necessary security measures and deployments are in place for an event. (Section 24(1))

The Event Safety and Security Planning Committee is chaired by the SAPS and must ensure the smooth coordination of all role players. The SAPS is also responsible to manage the Venue Operations Centre (“VOC”).

If the admission of spectators to a stadium, venue or route involves a serious risk to any person at the event, the National Commissioner or the authorised member may, after consulting the event safety and security planning committee, issue a prescribed prohibition notice, prohibiting or restricting the admission of spectators to a stadium, venue or route. (Section 21). The National Commissioner, the event safety and security planning committee, authorised member or VOC commander may also, in certain circumstances issue spectator exclusion notices to a person or group of persons who may disrupt the event. (Section 22(1)).

It is the duty of the person referred to in section 4(1) of the Act to appoint sufficient persons to be responsible for safety and security at

an event, including an event safety officer, security officers and stewards. Security officers must be registered as such. (Section 4(4)).

The Act also provides for safety certificates that must be obtained by stadium or venue owners from their local authorities. In the case of high risk events, the event organiser must apply to the National Commissioner of the SAPS for a high-risk event safety certificate.

### **Inspectors and powers of entry and inspection**

Section 14 of the Act regulates this aspect. A person appointed in writing as an inspector by a local authority may enter a stadium, venue or other business premises to conduct inspections in order to ensure compliance with this Act. Such an inspector may be accompanied by a police official during an inspection and any other person reasonably required to assist in conducting an inspection. The inspector or police official may require the person in charge of the venue to produce a safety certificate, record or book relating to compliance with this Act, examine and make copies of these records and direct any person who appears to be in charge of the premises to take steps that will ensure compliance with the Act.

Spectator and vehicle access control are to be performed by security officers and peace officers. These persons must display accreditation cards. A peace officer/ police official may search persons and motor vehicles or containers entering a stadium. (Section 20).

### **TICKETING**

Section 19 of the Act regulates ticketing of events. This section also provides powers to the National Commissioner to, in certain circumstances, prohibit the sale of tickets at a stadium or venue on the day of the event.

## **54. STOCK THEFT ACT NO. 57 OF 1959**

The purpose of this Act is to consolidate and amend the laws relating to the theft of stock and produce.

**The Act defines “stock” as follows:**

Any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig, poultry, domesticated ostrich, domesticated game or the carcase or portion of the carcase of any such stock.

### **FAILURE TO GIVE SATISFACTORY ACCOUNT OF POSSESSION OF STOCK OR PRODUCE - SECTION 2**

Any person who is found in possession of stock or produce in regard to which there is a reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence.

### **ABSENCE OF REASONABLE CAUSE FOR BELIEVING STOCK OR PRODUCE WAS PROPERLY ACQUIRED - SECTION 3**

Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen stock or stolen produce without having reasonable cause for believing, at the time of such acquisition or receipts, that such stock or produce is the property of the person from whom he or she acquires or receives it or that such person has been duly authorised by its owner to deal with it or dispose of it shall be guilty of an offence.

In the absence of evidence to the contrary which raises a reasonable doubt proof of possession as contemplated in subsection (1) shall be sufficient evidence of the absence of reasonable cause.

**ENTERING ENCLOSED LAND OR KRAAL, SHED, STABLE OR OTHER WALLED PLACE WITH INTENT TO STEAL STOCK OR PRODUCE - SECTION 4**

Any person who in any manner enters any land enclosed on all sides with a sufficient fence or any kraal, shed, stable or other walled place with intent to steal any stock or produce on such land or in such kraal, shed, stable or other walled place, shall be guilty of an offence.

When any person is charged with a contravention of subsection (1) the onus shall be upon him or her to prove that he or she had no intention to steal any such stock or produce unless he or she was found proceeding along any road or thoroughfare traversing such land.

**DOCUMENT OF IDENTIFICATION TO BE FURNISHED BY PERSON WHO DISPOSES OF STOCK - SECTION 6**

Any person (including any auctioneer or agent) who sells, barter, gives or in any other manner disposes of any stock to any other person shall at the time of delivery to such other person of the stock so sold, bartered, given or disposed of, furnish such other person with a document called a document of identification.

Any person to whom a document of identification has been furnished in terms of subsection (1) shall retain it in his or her possession for a period of at least one year.

**STOCK OR PRODUCE DRIVEN, CONVEYED OR TRANSPORTED ON OR ALONG PUBLIC ROADS - SECTION 8**

No person may drive, convey or transport any stock or produce of which he or she is not the owner on or along any public road unless he or she has in his or her possession a certificate (removal certificate) issued to him or her by the owner of the stock or produce or the duly authorised agent of the owner.

## ARREST AND SEARCH WITHOUT WARRANT - SECTION 9

Any person may, without a warrant, arrest any other person upon reasonable suspicion that such other person has committed an offence mentioned in section 2 or 4.

Whenever any justice of the peace, policeman, or owner, lessee or occupier of land reasonably suspects that any person has in or under any receptacle or covering or in or upon any vehicle any stock or produce in regard to which an offence has been committed, such justice of the peace, policeman, owner, lessee or occupier may without warrant search such vehicle or receptacle, and shall as soon as possible convey such person and the stock or produce so found and the vehicle or receptacle so seized to a police station or charge office.

## STRAY CATTLE

Members should also take note of **National Instruction 3 of 2020: Stock Theft and Endangered Species**, and specifically **paragraph 8(13), which deals with stray animals**. The following procedures must be followed when a member of the public reports the presence of unknown or stray animals to a member of the Service or at the Community Service Centre (CSC):

- The commander of the relevant CSC or the member to whom it was reported, must make an entry to this effect in the Occurrence Book (OB) and immediately request a police officer from the station to attend to the matter.
- The details of the unknown or stray animals and the OB entry number must, as soon as possible, be reported by telephone to the office of the Stock Theft and Endangered Species Unit or the member of the Stock Theft and Endangered Species Unit on standby rendering a service in the area in which that the relevant police station is situated.

- The member of the Stock Theft and Endangered Species Unit to whom the details were reported, must register an enquiry which has to be investigated if a docket has not yet been registered in respect of the unknown or stray animals.
- The rank and name of the member of the Stock Theft and Endangered Species Unit to whom the details have been reported, as well as the Crime Administration System number, must be obtained. A further OB entry, with a cross reference to the first entry, must be made to the effect that the details have been reported. This entry must also confirm the feedback from the member attending to the matter to the relevant member of the Stock Theft and Endangered Species Unit.

Paragraph 19 of National Instruction 3 of 2020 provides that if trespassing of stray livestock is impounded, it must be taken to the nearest pound as provided for in the relevant Provincial legislation. If stray or lost livestock is sheltered by the Service, the Service is not responsible for paying the shelter fees. The member who pound the livestock to the institution in question, must collect the prescribed herding fees applicable to the institution, and pay the amount into the State Revenue Account.

Special care should be taken on the disposal of impounded animals as the Constitutional Court in **Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)**, declared certain provisions of the KwaZulu-Natal Pounds Ordinance (this can also apply to the other provincial pounds ordinances) invalid.

This is in cases where notices are given that if the owners of impounded animals do not claim their animals within a certain time, it will be sold on an auction. Stock Theft Unit members should enquire, especially in rural areas and where the owners might be illiterate or

the notices do not reach them, whether it is their animals which are impounded.

**Note:** The Stock Theft Act, 1959, is under review and will in future be replaced by new legislation

## **Illegal Hunting with dogs**

“Illegal hunting” is actually a misnomer when used to describe the actions of persons entering private property without permission, presumably with the intent to unlawfully hunt or steal stock or game.

The following are some of the possible charges to be considered, depending on the specific circumstances of the case (provincial laws and ordinances are not discussed):

- Trespassing – section 1 of the Trespass Act No. 6 of 1959;
- Entering enclosed land or a kraal, shed, stable or other walled place with intent to steal stock or produce – section 4 of the Stock Theft Act No. 57 of 1959;
- Possession of stock or produce suspected of being stolen – section 2 of the Stock Theft Act No 57 of 1959;
- Entering land or dispersing or luring away game with intent to steal game – section 3 of the game Theft Act No. 105 of 1991;

- Climbing or crawling over or through fences without permission – section 2 of the Fencing Act No. 31 of 1963;
- Wilfully damaging or removal of fences – section 24 of the Fencing Act No. 31 of 1963;
- Malicious injury to property – common law offence;
- Cruelty to animals (laying a trap for an animal, etc.) – section 2 of the Animals Protection Act No. 71 of 1962
- Restricted activity (hunting, catching, capturing or killing) with reference to listed threatened or protected species (tsesebe, mountain zebra, oribi) – section 57(1) read with section 101 of National Environmental Management: Biodiversity Act No. 10 of 2004.

When a complaint is received with reference to illegal hunting where dogs were used, the following steps could serve as guidelines:

- Ascertain from the complainant the circumstances under which the dogs were found, based on what is it alleged that the dogs were being used for illegal hunting;
- Note any instruments found in the suspect's possession that are indicative of illegal hunting activities;
- Establish whether the suspect had any permit(s) for the use of the dogs - the two justifications for using dogs during hunting

are 1) where hunted birds are being retrieved or 2) where an animal that was wounded is being tracked;

- Summon the relevant Stock Theft or Endangered Species Unit (depending on the type of animal that was hunted) and the SPCA;
- Photograph the animal that was hunted as well as the dogs that were allegedly used for hunting purposes. All possible identification marks on the dogs (unique marks, features, colouring, blemishes and injuries) should be photographed. Each dog must be photographed separately.
- Compile photo albums accompanied by an affidavit of the photographer, containing the following information:
  - The date, time and place where the photographs were taken;
  - The name of the person who pointed out the dogs as exhibits; and
  - A detailed description of each dog with specific reference to the relevant photographs.
- In the event of a dispute regarding the ownership of the animals, ensure that the relevant parties and their legal representatives are afforded the opportunity to be present during the taking of the photographs of such animals on the scene.

Where the suspect is arrested, the dogs are to be seized in terms of section 20 of the Criminal Procedure Act No. 51 of 1977 (“CPA”) if they would afford evidence of the commission of an offence or if they were concerned in the commission of the offence as an instrument to commit the offence. Exhibits must be booked into the SAPS 13 exhibit register. Note that where dogs are to be seized as exhibits, the SCPA should take control of the animals until such time that a disposal order is made in terms of section 31 of the CPA in respect of the dogs. As dogs may be legally possessed, the possibility of the dogs being returned to their owners should be borne in mind.

Should the suspect allege that the complainant injured/ shot his dogs, that he was assaulted or that he was merely passing through the farm/ land, counter-charge dockets should be opened and both cases be sent together to the National Prosecuting Authority for a decision.

## **55. TOBACCO PRODUCTS CONTROL ACT NO. 83 OF 1993 AND CUSTOMS AND EXCISE ACT NO. 91 OF 1964**

Media statements and other sources of information often refer to so-called illegal cigarettes.

### **WHAT EXACTLY ARE ILLEGAL CIGARETTES OR THE ILLICIT TRADE OF CIGARETTES?**

These are cigarettes which do not comply with the provisions of the Tobacco Products Control Act No. 83 of 1993 and the regulations thereto, or in respect of which duties (taxes) have not been paid as required by the Customs and Excise Act No. 91 of 1964.

According to the Tobacco Institute of Southern Africa, illicit trade is the supply, distribution and sale of smuggled genuine branded and counterfeit (look alike) cigarettes and tobacco products. In addition there are locally manufactured cigarette products that look compliant, but are being sold in the local market at prices less than the tax, which products had not been declared to the authorities for the payment of taxes.

### **The Tobacco Products Control Act *inter alia* criminalises:**

- Smoking of tobacco products in a public place or workplace (section 2, read with section 7);
- displaying of a tobacco product or a notice other than in the prescribed manner, (section 3, read with section 7);
- advertising or promotion of a tobacco product (section 3, read with section 7);
- manufacturing, importation or selling of a tobacco product which is not packaged in the prescribed manner (section 3, read with section 7); and
- distribution of tobacco products for free, or at a reduced price, other than a normal trade discounts (section 4A, read with section 7).

### **Indicators of possible illegal cigarettes:**

- Price (very low price may indicate that taxes have not been paid).
- Absence of a SA diamond stamp on packet (normally at bottom or back of the packet).
- Absence of, or incorrect health warnings on front and back of a packet or carton.

- Absence of the quit line number or incorrect quit line number on the back of the pack.
- Markings on the side of packet exceeding 12 mg tar and 1,2 mg nicotine.
- Absence of the exact wording “Reduced Ignition Propensity” that had to be permanently printed, engraved or embossed upon cigarette packages, cartons and cases.

Members who encounter possible illegal cigarettes/tobacco products are advised to contact the Legal Services of the SAPS to ensure that the SAPS does not act unlawfully. The Tobacco Institute of Southern Africa (TISA) could also render assistance to ensure clarity on the legislative requirements.

Additional legislative considerations in respect of illegal cigarettes or any other tobacco products;

- Counterfeit Goods Act, 1997 (if a recognised complainant has verified counterfeiting);
- Customs and Excise Act 1964; section 80 (1)(a) provides that a person who has upon his premises or in his custody or under his control, or purchases, sells or otherwise disposes of any illicit goods, knowing the same to be illicit goods is guilty of an offence.

“*Illicit goods*”, in relation to imported or excisable goods, surcharge goods or fuel levy good, means any such goods in respect of which any contravention under the Customs and Excise has been committed, and includes any preparation or other product made wholly or in part from spirits or other materials which were illicit goods.

- Agricultural Pests Act No. 36 of 1983

Section 13 of this Act *inter alia* provides that a person found in possession of controlled goods in respect of which there is a reasonable suspicion that such goods were imported without a permit referred to in section 3(1), or contrary to a condition of such permit, and who is not able to give a satisfactory account of such possession, is guilty of an offence.

“**controlled goods**” include any plant, pathogen, or anything declared by the Minister by notice in the *Gazette*.

## 56. TOURISM ACT NO. 3 OF 2014

The Act which came into operation on 16 June 2014, provides for the development and promotion of sustainable tourism for the benefit of the Republic, its residents and its visitors.

## **TOURISM COMPLAINTS OFFICER, NATIONAL AND PROVINCIAL REGISTRARS OF TOURIST GUIDES**

The Act provides for the designation of a Tourism Complaints Officer by the Minister of Tourism who must deal with complaints in respect of tourism services, facilities or products in a manner provided for in section 47 of the Act.

According to section 47(c) of the Act, the **Tourism Complaints Officer** must, upon receiving a complaint **in respect of tourism services, facilities or products**, refer the complaint to the South African Police Service, **if the complaint alleges that a person has committed an offence**.

A **National Registrar of Tourist Guides** is appointed by the Minister whilst **Provincial Registrars** are appointed by the Member of the Executive Council responsible for tourism in the particular province.

### **REGISTRATION OF TOURIST GUIDES**

Section 50 of the Act provides that any person who wishes to be registered as a tourist guide must apply to a Provincial Registrar in the prescribed manner.

Section 1 of the Act defines a “tourist guide” as any person registered as such under section 50 and who, for reward, accompanies any person who travels within or visits any place within the Republic and who furnishes such person with information or comments.

#### **“Prohibitions: section 57:**

- (1) *No person who is not a registered tourist guide or whose registration as a tourist guide has been suspended or withdrawn, may for reward, whether monetary or otherwise, act as a tourist guide.*

- (2) *No person who has become subject to any disqualification referred to in section 50(3) may for reward, whether monetary or otherwise, act as a tourist guide.*
- (3) *No person, company or close corporation may for the promotion of any business undertaking conducted by him, her or it, employ or continue to employ as a tourist guide any person who is not a registered tourist guide or whose registration as a tourist guide has been suspended or withdrawn or who has become subject to a disqualification contemplated in subsection (2)".*

### **Offences and penalties: section 59:**

The Act criminalises a broad range of conduct in respect of tourism services, facilities or products in section 59(1)(a) - (f). Section 59(1)(f) specifically designates a contravention of section 57 as a criminal offence.

### **Reporting of contraventions and lodging of complaints:**

According to section 53(1)(a) of the Act **any person** may report a **contravention of section 57 to a provincial Registrar**. Section 53(1)(b) provides that the **provincial Registrar must, if the complaint discloses an offence, lay a charge with the SAPS**.

Although the Act creates statutory duties for a Provincial Registrar, nothing in the Act prevents a person who wish to lay a criminal charge with the Police, to approach the Police directly.

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## **Notes**

