

Vicious Attacks on Foreign Nationals in South Africa: An Entrenched Culture of Impunity

Raligilia Happy Konanani

Kola O. Odeku

Faculty of Management and Law, School of Law,
University of Limpopo, South Africa
E-mail: raligilia@gmail.com

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Abstract

The recent occurrence of violent attacks by the law enforcement agents and the South African citizens on foreign nationals living in South Africa has attracted international attention and projects the country as hostile to foreigners. Even though the Government has come out openly to condemn these dastardly acts, it is contended that the condemnation has not been backed up with any serious action to bring the culprits to book in order to serve as deterrent to would-be perpetrators. This article argues that the perpetrators continue to violently attack and murder foreign nationals in South Africa because in previous cases nothing was done to bring the culprits to book. The action of the Government, to say the least, is tantamount to promoting culture of impunity. While the article highlights various remedies available to the victims, the situation is that conviction in such cases are rare in view of the 2008 xenophobic attacks in South Africa which up till today, a single conviction is yet to be recorded thereby consolidating an entrenched culture of impunity. The article concludes that unless government talks are backed with action by ensuring that perpetrators are brought to book, there is every likelihood for reoccurrence. The article highlights remedies available to the victims and how to seek redress at the appropriate institutions.

Keywords: Attacks on Foreigners, Lack of accountability, Impunity, Remedy

1. Introduction

Since the dawn of the Democratic dispensation in 1994, South Africa like in any other emerging new democratic country has increasingly experienced violent crimes due to inequality, lack of opportunity and socio-economic factors (Mistry, 1997). Against this backdrop, crimes in South Africa are increasing at an alarming rate and the biggest problems affecting the society and the law enforcement agencies who have the duty to uphold the law and also to ensure that where there is travesty of law, justice is to be served. South Africa seems to be one of the world's most crime ridden societies and this is exacerbated by failure of the law enforcement agents to apprehend criminals or sometimes they collude with criminals to perpetrate crimes (Lemanski, 2004). As a result, problems arise when the law enforcement agencies in this case the members of the South Africa Police Service (SAPS) who are entrusted with the responsibility to protect the citizens from criminal activities and uphold the law are now the culprits in the commission of crimes, viciously attacking citizens and foreigners. The focus of this study is on the police brutality which occurs when members of the police service use the rights vested in them unlawfully and consequently results in the abuse of power (Bruce, 2012). The police brutality is generally a deliberate unlawful violence towards the suspects in order to enforce thereby resulting to criminally negligent use of force (Kennison and Loumansky, 2007). Pursuant to this, both South African nationals and foreigners have been victims of police brutality.

It is the general belief that violence perpetrated against foreigners by the members of the law enforcement agencies in South Africa has an element of xenophobia (McKnight, 2008). The xenophobic attacks on the foreigners in South Africa was first given a public face in 1999 when six white police officials were shown on national television racially assaulting and abusing two illegal immigrants from Mozambique (Masuku, 2006). The amount of violence and injuries inflicted on the two illegal immigrants prompted global frenzy in the media industry. Since then, there have been other media and research reports documenting the abuse and ill-treatment of foreign nationals by the South African police officials (Masuku, 2006).

This is also evident from the qualitative research conducted by the Institute of Security Studies in 2010 which

explored civilians' as well as foreigners' experiences of police corruption and showed that most of the participants reported robbery, theft, torture and gross sexual harassment by police (Faul, 2011). This is absolutely a clear deviation from the constitutional mandate in terms of section 205(3) of the South African Constitution Act 108 of 1996, which provides that members of the SAPS have the duty to prevent, combat and investigate crime and also the duty to maintain public order, to protect, secure the inhabitants of the Republic irrespective of their nationality and their property, and to uphold the law. The concern is that police discharges their duties under the direct supervision of the political head (Commissioner of Police) who either possesses little or no policing exposure and expertise. According to section 206(1) of the Constitution, a member of the Cabinet must be responsible for policing and must determine national policing policy after consulting with the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives. The impact of an oversight in the political deployments in the SAPS has contributed to the escalation of police brutality and unlawful conduct by the police which translates to negative impacts on the services they deliver to the South African citizens and non-nationals (Pelser and Louw, 2002).

The effect of violence on the foreigners does not only affect the victims but also the diplomatic relationship between South Africa and the countries where the foreigners are from. It is therefore imperative that the political heads in the police service must acknowledge the supremacy of the Constitution and the rule of law as well as the duty of the State in terms of section 7(2) to respect, protect, promote and fulfil the rights in the Bill of Rights (Kruger 2013).

2. Methodology

The methodology for this article involves the application of qualitative as against the quantitative method of research. The traditional method of citation, analysis of cases and other sources are the main scientific methods in legal scholarship, therefore, analysis of and engagement with contemporary literature in the field of law were used for this article. Other relevant statutory, legislative and policy frameworks were also thoroughly analysed and applied to find solutions to the problem of police brutality against foreigners in South Africa.

3. Aims

The aim of this article is to examine different forms of violent abuses and human rights violations by the South African law enforcement agencies on foreign nationals. The article also emphasises that foreigners have equal rights of protection as the citizens under the South African constitution and that those who violate these rights must be brought to book.

4. Objectives

To determine the effects of police brutality on the foreigners living in South Africa.

To determine whether xenophobia is one of the reasons for police brutality towards the foreigners living in South Africa

To examine salient provisions of the South African Constitution against discrimination on any grounds.

To create public awareness on the impact of police brutality towards foreigners.

To accentuate that perpetrators of vicious attacks should be brought to book to prevent culture of impunity.

5. Literature Review

According to Burger (2013), all police agencies all over the world and in varying degrees, exhibit elements of militarism. To this end, Burger emphasised that police agencies in countries such as the United Kingdom made an attempt to replace the term force with service, the result was largely superficial and has had very little practical value. It has been said that South Africans need to make an effort to get to know and befriend foreigners in the country and this does not have to rest only with citizens but also with the members of the South African police force (Dodson, 2010). The backdrop of this view points to the fact that foreigners suffer and endure consistent inhuman, cruel and degrading treatments at the hands of the South African civilian citizens as well as the law enforcement agencies.

Exposing various vicious attacks being suffered by foreigners in the hands of police during arrest, Silva (2013) pointed out some of the inhumane, cruel and degrading treatments of foreigners by the police when arresting them. There have been scenarios whereby the police has kicked, slapped, shouted at the foreigners. Foreigners have also been shot at and died or injured for no valid reasons, all in the name of reducing crime (Silva, 2013).

Jackson seemed to acknowledge the salience of crime as an issue in South Africa and the social divisions fostered

by extreme inequality and the legacy of apartheid have, along with other factors, catalysed alarming displays of xenophobia (Bradford et al. 2013).

People in authority are expected to talk and act responsibly but some have decided to throw caution to the wind, the slogan 'Shoot to Kill', entrenched under disgraced former police boss Bheki Cele seems to have worsened the situation by legitimising police brutality in South Africa (Silva, 2013).

Bruce (2012) opined that the problem of police brutality is not restricted to the problem of torture but also includes other problems of serious nature which include apparent execution type killings in custody and at the point of arrest, deaths apparently linked to torture or other assaults in custody and outside of custody, other deaths related to apparently unjustified reckless or accidental shootings including killings during demonstrations.

According to statistics during the last three years, over 1,500 people mostly foreigners have been killed by the police in South Africa, with many more being injured (Bruce, 2012). This assertion was substantiated by Ramjathan-Keogh, head of the Refugee and Migrants Rights Programme at Lawyers for Human Rights, who indicated that her organisation had seen many attacks on foreigners instigated by xenophobic sentiments and that attacks have been taking place throughout South Africa for several years (Keepile, 2010). The Police Minister Mr Nathi Mthethwa being blunt has described the recent incidents of alleged police brutality as an embarrassment to the SAPS (SA news, 2013). Mthethwa reiterated police officers should be working with communities, fighting crime within the framework of the law, and not abusing the law.

The issue of whether incidents of police brutality and trigger-happy adventurism will stop any time soon is what no one is ready to vouch for, hence, the police force are unlikely to stop anytime soon (Malala, 2012). Justice Malala also contended the ruling of African National Congress (ANC) party prominent leader, Advocate Ngoako Ramathlodi, who is a deputy minister of prisons in South Africa, for echoing the sentiments that the government should use an iron fist in dealing with the seas of anarchy emerging in South Africa. An acceptable opinion was expressed by one of the top notch of the African National Congress (ANC), Gwede Mantashe-the ANC secretary general that the rising level of violence by police must be addressed as it is equally immoral when South Africans as well as foreigners are killed by police, especially as the police have the responsibility of protecting people, not killing them (Kuper, 2013).

6. Reported Incidents of Police Brutality on Foreign Nationals

Since the enactments of both the South African Interim Constitution of 1993 as well as the final Constitution of 1996, there have been quite a number of reported incidences of police brutality on foreigners living in South Africa (Harris, 2001). Although it is settled law that these constitutions laid solid foundation for basic human rights to human dignity, equality and life, however most of these incidences were neither reported nor were actions taken against the culprits whenever violations occur. This is evident from the recent attack on the Mozambican national, Mr Mido Macia who was allegedly beaten and left to die in a police cell in March 2013 (De Vos, 2013).

Besides this controversial handling of Mido Macia's death at the hands of the police in their custody, there have been many other gruesome related incidences which have sparked national outcry. These incidences have also created negative impacts on the diplomatic relations between South Africa and other countries. A recent occurrence of such incidence is the death of Mr Obinna Ugboaja in the South African police custody in January 2013. His death angered the local Nigerian community and the Nigerian consul-general, Mr Okey Emuchay who lambasted the South African Police and mentioned that this was not the first time Nigerians have been assaulted and killed by members of the South African police (Lwandle, 2013). The death of Ugboaja threatened diplomatic relations between South Africa and her Nigerian counterpart greatly.

Other incidences include another vicious attack that occurred in August, 1998 when the 20 years old illegal Mozambican immigrant Mr Sergio Cossa was apprehended by three police officials and beaten until he fell down and died on the spot (Bruce, 2012). In April 1999 barely a year after Sergio Cossa's death a police officer from Brixton police station in South Africa verbally abused, assaulted and unlawfully detained Dr Frank Nyame, a Ghanaian research scientist, claiming that he was an illegal immigrant (Amnesty International, 2000).

In March 2000, an exceptionally xenophobic exercise called Operation Crackdown was undertaken by the South Africa Police Service (SAPS) with expressed goals to thoroughly ventilate all criminal elements and illegal immigrants, while targeting areas with large migrant communities such as Hillbrow (Handmaker and Parsley, 2001). This Operation led to countless allegations of human rights abuses, including genuine refugee papers being destroyed and refugees being herded up and sent to the Lindela Deportation Camp (Handmaker and Parsley, 2001).

In February 2013, two Nigerian journalists, Mr Debo Oshundun, South Africa Correspondent of the News Agency of Nigeria (NAN), and Mr John Joshua-Akanji, Deputy Editor of the Sun Newspapers, who were in South Africa for the

recently concluded 2013 Africa Cup of Nations were harassed, brutalised and detained for insubstantial reasons by the South African police (Adeyemo, 2013).

It is against this backdrop that the South African Police Service (SAPS) has been described by critics as 'one of the most brutal police forces in the world' because of its violent methods when conducting crime detection and prevention operations. The police brutality on foreigners in South Africa has also been perceived as xenophobic and sometimes as racism (Silva, 2013). It seems police brutality is a global phenomenon. Newham (2011) has aptly observed that the use of force is an inherent characteristic of the police duty everywhere in the world.

7. Legal Frameworks Protecting Foreigners in South Africa

The establishment of the United Nation after the Second World War brought about the adoption of the Universal Declaration of Human Rights in 1948 by the UN General Assembly (Waltz, 2001). This was the major effort by the international community to prevent further atrocities committed during the war as well as the absolute prohibition of torture and cruel, inhuman and degrading treatment or punishment (Muntingh, 2011). This led to the adoption of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1975. However, the Universal Declaration of Human Rights remains as the main guiding document in all matters involving the fundamental human rights (Donnelly, 2013).

Immediately after the unbanning of South Africa from the United Nation (UN), it then developed a special relationship with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and ratified it on 10 December 1998 (Muntingh, 2008). This signified to the international community that South Africa subscribes to the international ban on torture and that it would implement national measures to give effect to the objectives of the Convention (Muntingh, 2008). Other International treaties including Geneva Convention, the International Covenant on Civil and Political Rights, Universal Declaration of Human Rights on the Law of Armed Conflict and the Rome Statute of the International Criminal Court, in one way or the other, prohibit torture and other acts of severe ill-treatment as a peremptory norm of international law (Kruger, 2011). This prohibition is absolute and non-delegable, meaning that no act amounting to torture or severe ill-treatment can be justified in any way or form, or for any reason whatsoever (Jayasinghe and Baglay, 2013).

In South Africa, members of the SAPS are burdened with a constitutional duty in terms of section 205(3) to prevent, investigate and combat crime, a duty to maintain law and public order, to ensure the protection and security of all South Africans including foreigners in the country (Botha and Visser 2012). Section 205(3) should be read in conjunction with section 8 which provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. The SAPS is an organ of state and as such bound by the Bill of Rights in the constitution.

Despite the above constitutional protections, foreigners living in South Africa continue to experience challenges whenever the members of the SAPS and other law enforcement officials violate their rights as they are consistently exposed and subjected to various t, cruel, inhuman and degrading treatments. It goes without saying that members of the SAPS have an obligation in ensuring that the rights of foreigners are observed and respected as outlined in Chapter 2 of the Bill of Rights, however, the contrary is the case as the same law enforcement officials who are supposed to protect them have consistently been violating their fundamental rights (Mangena, 2013).

Capacity to investigate and bring perpetrators to book is vested in the South African Independent Police Investigative Directorate (IPID) which is the watchdog in terms of monitoring the activities of the police in South Africa. In so doing, the IPID also is required to investigate all deaths in police custody or as a result of police actions (Bruce and Malley, 2001). This is mainly because section 53(2)(b) of the South African Police Service Act, 58 of 1995 requires that death as a result of police action should be referred to the IPID to investigate if indeed the death was caused as a result of excessive use of force by the police.

On the other hand, the South African Police Service Standing Order 251 makes provision in terms section 53(2)(b) that the investigations by the IPID should be conducted primarily on issues of legality. Furthermore the SAPS Standing Order 251 requires that a full factual report be compiled following any incident where a member fires a weapon, allows a weapon to be fired or orders the firing of a weapon and sets out the issues which needs to be covered in such a report (Bruce and Malley 2001). This should also be in line with the provisions of section 49 of the South African Criminal Procedure Act 51 of 1977 (CPA 51 of 1977) which provides that police officers have legal justification to use force in carrying out arrests, and includes the rules governing the degree of force to be used, as well as the circumstances in which such force may be employed. The incidents of police brutality on foreigners as discussed earlier had illustrated the excessive use of force by the police while applying provisions of section 49 of the CPA 51 of 1977.

8. Government's Intervention

Following the national outcry on the level of police brutality, the South African government has tabled the Prevention and Combating of Torture of Persons Bill which is currently before the parliament for deliberation. Its principal aim is to give effect to South Africa's obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Mujuzi, 2013). This Bill provides a legal framework to combat brutality and hold perpetrators accountable (Ramagaga, 2011). There are also provisions in the legislation for the prosecution of anyone committing torture, and the appropriate training of persons involved in the custody, interrogation and treatment of arrested, detained or imprisoned suspects. Once in force, it will amend Criminal Procedure Act 51/1997 and Prevention of Organised Crime Act 121/1998 (Mujuzi, 2013).

Regular and consistent reports around allegations of police brutality and even torture at the hands of security officials, remains one of the major concerns for the South African Human Rights Commission (Pigou, 2002). The other major concern is that professionalism, police conduct, efficiency, respect for the rule of law and the quality of service delivery are fundamentally affected when police officials are racist or xenophobic (Masuku, 2006). Furthermore the Prevention and Combating of Torture of Persons Bill will try to stabilise the image of the South Africa's police force which is already dogged by allegations of brutality, corruption and incompetence (Siddique, 2013).

On the other hand, the South African justice system is also greatly concerned as it appears that cases involving the unlawful vicious attack by the police on the foreigners living in South Africa do not appear to be given priority by the National Prosecuting Authority (Keepile, 2010). Furthermore it does not appear that there is no serious commitment from justice officials to deal with these crimes and this is creating a culture of impunity where perpetrators of such crimes feel that they can go against the law as there is little chance that they will be apprehended or successfully prosecuted (Keepile, 2010).

9. Remedies Available to the Victims

According to O'Regan (2011), one of the challenging aspects of our constitutional jurisprudence is the extent to which damages are appropriate as relief for the vindication of constitutional rights, however section 38 of the Constitution provides that a person who alleges that a right has been infringed or threatened can approach a 'competent court' for 'appropriate relief' which includes declaration of rights.

In the light of the above and in the context of the foreigners living in South Africa, one of the remedies available to the victims of vicious attacks at the hands of the police is for them to sue the South African Police Service for vicarious liability for the unlawful actions and use of excessive force by its members. The other remedy available is to lodge a complaint with the IPID of the alleged brutality and this independent structure will therefore investigate and if a police is found to have exceeded the power vested in them would either be suspended, dismissed or reprimanded (Faul, 2013).

Furthermore, victims of police brutality may also institute criminal charges against police officials implicated in the excessive use of force. On the international front and under international law, South Africa has a duty to investigate crimes against humanity and it is on the basis of this that foreigners who are the victims of vicious attacks may approach the International Criminal Court to try those implicated (Grobler, 2013). Alternatively, they can approach the Human Rights Commission for redress.

10. Conclusion

This paper has highlighted the need for the South African law enforcement to desist from continuous brutal assaults on the foreigners. Against this background, the paper concludes that unless government talks are back with action by ensuring that perpetrators are brought to book, there is likelihood for reoccurrence.

11. Recommendations

Members of the law enforcement must be sensitised and taught to desist from inhuman treatments towards their fellow human beings. Compulsory induction workshops for officers may reduce police brutality. Furthermore, high ranking officers who occupy sensitive and responsible positions should desist from making remarks or utterances which may be perceived as supporting and justifying police brutality on foreigners. Commission of inquiry must be instituted by the president of the Republic of South Africa to investigate the allegations of police brutality as well as the lack of convictions against accused officers by the justice system.

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