

THE SANDF and Operation Fiela

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On 21 April 2015 the SANDF was employed to aid the South African Police Service (SAPS) throughout the country in order to help maintain law and order. The President notified the Speaker of the National Assembly in a letter on 23 April of this deployment which was tabled on 30 April. The letter stated that the President ‘had employed 338 members of the South African National Defence Force to assist the South African Police Service (SAPS) to maintain law and order in Kwazulu-Natal, Gauteng and any other area in the republic of South Africa as the need arises...for the period 21 April to 30 June 2015’.

The background that precipitated this action is not without varying interpretations. However, political and factual factors provide two salient points for analysis. The factual scenario leading up to the 21 April deployment is as follows: xenophobic violence had gripped the country with increasing ferocity since large-scale attacks began on foreign nationals in and around Durban on April 12. These were by no means the first xenophobic attacks of the year. They however appeared more organised and violent than those that occurred earlier in the year. It has also been suggested that they were greatly influenced by the anti-immigrant comments made by Zulu King Goodwill Zwelethini.

The political factors can largely be attributed to what many see as the nadir of this violence, the much publicised death of Mozambican national, Emmanuel Sithole. Images of the death of Mr. Sithole saturated the nation’s media on 19 April. In a subsequent media briefing on 21 April the Minister of Defence Nosiviwe Mapisa-Nqakula stated that the Defence Forces had been brought in as a last resort to support the police in suppressing xenophobic violence. Commentators have thus argued that deployment ostensibly sought to quell instances of xenophobia, but was likely to also provide other African states and the people of South Africa with assurances that the government was taking the situation seriously. This is bolstered by both the Department of Home Affairs and SAPS having stated that the situation was under control during the week prior to Mr. Sithole’s death.

However, when looking at the terms of deployment as outlined by the Presidency it appears that a variety of reasons for deployment are plausible. An understanding of the legal basis for deployment will clarify this point.

The Constitution states in section 201(2) that only the President has the power to deploy the defence force. By the Presidents admission this was presently enacted according to s. 201 (2)

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(a) which authorises the employment ‘in co-operation with the police service’. Of greater relevance is section 201(3) which states:

“the President must inform Parliament promptly and in appropriate detail, of –

- (a) The reasons for the employment of the defence force,
- (b) Any place where the force is being deployed,
- (c) The number of people involved, and
- (d) The period for which the force is expected to be employed.

The Defence Act of 2002 further adds in section 19(3)(a) that employment in co-operation with the South African Police Force ‘may only be performed in such area or at such place as the President may order at the request of the Minister [of Defence] and the Minister of Safety and Security’.

On this basis it is clear that the Presidents letter to Parliament is at best inadequate and at worst dangerous. The phrase ‘...and any other area in the republic of South Africa’ is arguably far too vague and provides no clear indication of the ambit of employment. Furthermore, the reason for employment given, as required by section 201(3)(a) of the Constitution, is likewise ambiguous. ‘To maintain law and order’ is an omnibus term allowing for innumerable actions. The exact mandate for the employment of the SANDF was in fact only provided by the Minister of Defence after the SANDF was already employed in conjunction with SAPS.

The controversial Operation Fiela shows this lack of clarity in action. What began as an operation to quash opportunistic crime and nefarious activity linked to the xenophobic attacks is quickly looking like a witch hunt – one that is targeting the very people that, according to Minister Mapisa-Nqakula, the SANDF were employed to protect. Close to 4000 arrests have already been made nationwide. A large proportion of these arrests have involved foreign nationals. In a statement issued by the Minister in the Presidency, Jeff Radebe, the purpose of Operation Fiela is to ‘rid our country of illegal weapons, drug dens, prostitution rings and other illegal activities’. While the Minister maintains that foreigners are not the target of the operation, a dividing line has been drawn between the Government’s view of Operation Fiela and that of opposition parties and civil society.

One cannot outright deny that the operation has had some success in fighting crime. Brigadier Billy Jones, spokesperson for Free State SAPS, stated that the operation had resulted in short-term decreases in crime in the areas targeted. The KwaZulu-Natal government has also thrown its weight behind the operation. Community Safety and Liaison MEC Willies Mchunu commented that, though it should not be an everyday occurrence, Operation Fiela is ‘a model to be encouraged’. At a press conference on June 24 the Kwazulu-Natal provincial police commissioner, Lieutenant-General Mmamonye Ngobeni, presented a 40 page report to members of the media which lauded the success of the operation. However, the report itself was not made available to the media nor did it address whether these trends were different in comparison to the previous year. While the efficacy of the operation regarding crime fighting

is in dispute, of greater concern is the targeting of foreigners and the use of the SANDF to do so.

The Democratic Alliance (DA) and Congress of the People (COPE) have both issued statements condemning the use of the SANDF and the targeting of foreigners. COPE maintained on May 15 that the operation is indeed targeting foreigners and that the statistics themselves speak to this. They also questioned the veracity of the ‘crime prevention’ mandate supplied at this stage given that high levels of crime are endemic to South Africa. On May 19 the DA stated that the exceptional circumstances surrounding the use of the SANDF were no longer applicable and called for SANDF services to be terminated. The Government has also had to defend itself against litigation initiated by civil society. Lawyers for Human Rights (LHR) launched an urgent high court application on 23 June claiming that the operation was unlawful due to searches being conducted without warrants. Furthermore, they challenged that the operation is in fact being carried out as an immigration clampdown. The matter was struck from the court roll as it was not deemed to be urgent.

The most damning response to Operation Fiela has come from the South African National Defence Union (SANDU). The national secretary, Pikkie Greeff, initially supported the deployment of the SANDF in a 22 April op-ed published on the Daily Maverick website. This support came with the caveat that the situation required vigilant oversight. However, on 7 May SANDU released a statement calling the use of the SANDF in an operation in Belleville unlawful and lodged a complaint with the Public Protector. The SANDF were used to aid SAPS in locating and arresting foreign nationals. According to the SANDU statement ‘this objective is not in line with the notice given by the President to Parliament three weeks ago, wherein the purpose of the deployment of the SANDF was stated as “(to) maintain law and order”.’

A similar operation was carried out on 20 June at Cape Town Station’s taxi terminus. Again the SANDF were deployed in a search and seizure operation that targeted mainly undocumented foreign nationals and the confiscation of counterfeit goods. While there is merit in enforcing the law it is alarming that the SANDF were used in such a routine operation. The ambit of the raid carried out at Cape Town station falls squarely within that of SAPS. It is clear that the SANDF were used for the role of intimidation and scaremongering, as asserted by Nigerian informal trader Fidelis Onyebuchi ‘You can’t have a soldier come out in that manner, with a gun, where there are civilians.’

The use of the SANDF in operations that would usually fall under the operational purview of the SAPS is of grave concern. The SANDF do not have investigatory powers. This severely undermines the notion that due process will be followed in raids such as the one carried out at the Cape Town station. The use of the SANDF in this manner also belies the notion that their deployment was an exceptional response to an exceptional situation. It unnervingly harkens back to the militarisation of our police forces during the Apartheid era.

The incorporation of the SANDF into the usual mandate of SAPS highlights the inadequacies with the Presidents initial letter to Parliament. The plain meaning of ‘appropriate detail’ in section 201(3) of the Constitution lies in contradistinction to the phrase ‘to maintain law and

order' used in the Presidents letter. The fact that this was not raised as an issue by Parliament is troubling.

Section 18(5) of the Defence Act provides Parliament with the following powers that may be exercised within seven days of receiving notice of employment of the SANDF:

- (a) confirm any such authorisation of employment;
- (b) order the amendment of such authorisation;
- (c) order the substitution for such authorisation of any other appropriate authorisation; or
- (d) order the termination of the employment of the Defence Force.

The Joint Standing Committee on Defence only considered the Presidents letter on 18 June. This is 28 days after employment of the SANDF commenced. The Joint Standing Committee on Defence is the relevant 'oversight committee' stated in section 201(4) of the Constitution that must be provided the relevant information stated in section 201(3), as listed a above. This is in the event that Parliament does not sit during the first 7 days after employment.

Parliament has clearly reneged on its oversight role by only considering the Presidents letter nearly a month after employment started.

The implicit endorsement of the use of the SANDF internally highlights a growing concern among civil society. Politicians are allowing a line to be blurred by their unwillingness to interrogate the use of the army. This line divides the SAPS who are trained and equipped to maintain law and order, and the Army who are first and foremost trained to seek-and-destroy. International and national studies significantly show that the Army provides no better crime prevention when it comes to maintaining law and order. Calls for the employment of the Army show that both politicians and the public at large have lost faith in the SAPS. The Democratic Alliance's call in 2013 for the Army to be employed in tackling gang-violence in the Western Cape is indicative of this. Again, no empirical study supports Army personnel as being effective in reducing gang violence.

In light of this, a strong indication is that the employment of the SANDF was done for political and not pragmatic reasons. A review of the efficacy of both crackdown operations, such as Operation Fiela, and the use of the SANDF with SAPS is needed. Parliament might then be aware of both the impotence of such measures in combating crime and the danger they pose to society.