

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 21600/12

In the matter between:

MINISTER OF POLICE

First Applicant

NATIONAL COMMISSIONER FOR THE

SOUTH AFRICAN POLICE SERVICE

Second Applicant

THE PROVINCIAL COMMISSIONER OF

THE SOUTH AFRICAN POLICE SERVICE

FOR THE WESTERN CAPE

Third Applicant

THE CIVILIAN SECRETARIAT OF THE

POLICE SERVICE

Fourth Applicant

COLONEL M.F. REITZ

Fifth Applicant

BRIGADIER Z. DLADLA

Sixth Applicant

COLONEL TSHATLEHO RABOLIBA

Seventh Applicant

and

THE PREMIER OF THE WESTERN CAPE

First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR COMMUNITY SAFETY, WESTERN CAPE

Second Respondent

THE CITY OF CAPE TOWN

Third Respondent

THE HONOURABLE JUSTICE

CATHERINE O'REGAN NO

Fourth Respondent

ADVOCATE VUSUMZI PATRICK PIKOLI NO

Fifth Respondent

SECRETARY TO THE COMMISSION

Sixth Respondent

ADVOCATE T. SIDAKI

Seventh Respondent

WOMEN'S LEGAL CENTRE

Eighth Respondent

THE SOCIAL JUSTICE COALITION

Ninth Respondent

ANSWERING AFFIDAVIT

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I, the undersigned,

MANDLA MAJOLA

do hereby affirm and state under oath that:

1. I am adult male residing at Vukuzenzele, Phillipi East. I am married to Vuyiseka Dubula and we have a five year old daughter, Nina. I am duly authorised by the Ninth Respondent, the Social Justice Coalition ("SJC"), to make this affidavit on its behalf as a member of the organisation and its campaigns' coordinator.
2. The facts contained herein are within my knowledge unless the context indicates otherwise, and are true and correct. The legal submissions made are based on advice furnished by SJC's legal representatives and my experience and training as an activist.
3. I grew up in Gugulethu and I have witnessed and personally experienced crime as a victim since childhood. I have been a political activist since my high school days at Sizamile Senior Secondary School (now Oscar Mpetha High School) in Nyanga-East in 1987.
4. In 1999, some of my comrades were diagnosed with HIV and I heard about an organisation called the Treatment Action Campaign (TAC). Siphokazi Mthathi and Dr. Hermann Reuther recruited me to the TAC where I learnt about science, medicines, intellectual property law, constitutional rights and organising in a

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different way. I worked as a baker at the Amy Biehl Foundation while volunteering at TAC. From the first day I joined TAC, I started working actively in Khayelitsha where the first mother-to-child HIV prevention programme and later community-based antiretroviral programme was started.

5. In 2000, I was employed as an HIV counselor at the Gugulethu Maternity Obstetrics Unit. Work at TAC became intense during this period and in January 2001, TAC employed me as a full-time organiser. In August 2004, I became the Khayelitsha District Coordinator guiding about 6 branches with a membership of about 1300 people. We engaged in prevention and treatment literacy work and by 2008, TAC's Khayelitsha District office was distributing about 750 000 male condoms per month.
6. I conducted workshops and mobilised for every campaign of the TAC from 1999 to 2010 and most of my work for more than a decade has taken place in Khayelitsha, where I continue to work. I was a co-founder of the SJC on 16 June 2008 after the xenophobic violence in Western Cape and started helping its campaigns for safety and security. In January 2011, I started working full-time for the SJC.

THE SJC'S STANDING AND PUBLIC INTEREST

7. The SJC was founded on 16 June 2008 as a consequence of the xenophobic violence in May 2008 that left many immigrants, asylum seekers, refugees and other people across South Africa dead, injured or displaced.
8. The SJC has approximately 2000 members in 13 branches in Khayelitsha (and one in Mfuleni) including RR1 Section, RR Nyanga, Nkanini, Green Point, Makhaza and Monwabisi Park. The SJC is a democratic membership-based social movement. The majority of its approximately 2000 members are working-class and poor individuals, most of whom live in the informal settlements of Khayelitsha in Cape Town.
9. The SJC is a registered public benefit organisation with the Department of Social Development with the number 067-689-NPO. It is authorised to initiate litigation to promote its objectives. Its objectives are set out in its Constitution (**MM 1**) as follows:
 - 9.1 To build a movement of individuals united across the divisions of race, gender, class and nationality dedicated to build active citizenship.
 - 9.2 To ensure that every person in South Africa shall be free from all sources of violence both public and private.

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- 9.3 To ensure that every person has the right to life, dignity, equality, freedom and the pursuit of a decent life.
 - 9.4 To organise people of all backgrounds to realise these rights and to fight against crime, unemployment, homelessness, ill-health, unequal and poor education.
 - 9.5 To ensure an open, accountable, ethical and efficient government that eradicates, condemns and punishes corruption.
 - 9.6 To uphold the rights in our Constitution that the Constitutional Court and the judiciary have upheld since the advent of democracy in 1994.
 - 9.7 To use petitions, protest, education, the Parliament and the Courts to build the Social Justice Coalition.
 - 9.8 As a social movement, we are politically independent, open to members of all political parties and as our record shows (when necessary) equally critical of the ANC and Democratic Alliance. We are also prepared to work with government to achieve our goals.
10. The primary campaigns of the SJC are focused on the provision of safe, clean sanitation and water in informal settlements; building safe communities free from violence and crime through the rule of law; and, working for open, accountable, and ethical government based on the supremacy of the Constitution. The SJC

works with other non-governmental organisations and with organs of state to achieve this.

11. The campaigns in which the SJC has participated include the following: the call for a commission of inquiry into the Arms Deal; the release of the convicted Arms Deal broker Schabir Shaik on “medical parole”; the call for the National Prosecuting Authority to take action on the report of the Public Protector (*Against the Rules*) on the SAPS renting of premises; and the intimidation of the Public Protector and her staff by members of the SAPS Criminal Intelligence division. Press statements detailing these campaigns are annexed marked “MM2” to “MM5”.
12. For the sake of fullness, I also wish highlight the fact that the SJC is a co-applicant with Corruption Watch and Freedom Under the Law against Richard Mdluli interdicted by the North Gauteng High Court. The National Commissioner of SAPS (Second Applicant) is a co-Respondent in that case (the notice of motion in this matter is attached as “MM6”).
13. The SJC has also been an active member of the Right to Know Campaign, an alliance of more than 700 organisations across South Africa formed to ensure that the Protection of State Information Bill meets the requirements of open, accountable and ethical government based on the rule of law.

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14. Our campaign for “Clean and Safe Sanitation” commenced at the beginning of 2010 and though we have been in serious disputes with the City of Cape Town since then. Mayor Patricia de Lille has acknowledged serious problems and though our relationship remains one of contestation there is also a commitment by all parties to work together. We continue to demand the voluntary participation of the City of Cape Town in the O’ Regan Commission of Inquiry to ensure the safety of people in Khayelitsha and elsewhere.

15. On 28 November 2011 the SJC, together with five other organisations, TAC, Equal Education, Free Gender, Triangle Project and Ndifuna Ukwazi (the organisations collectively will be referred to as the “*complainant organisations*” – Free Gender subsequently withdrew as a complainant organisation for reasons which are explained below) lodged a complaint with the First Respondent (“the Premier”) in terms of section 206(5)(a) of the Constitution (“the complaint”). The complaint can be found in annexure “**AL38**” to the Third Applicant’s (“the Provincial Commissioner’s”) affidavit. In paragraph 1 of the complaint it was stated that the complainant organisations “*jointly lodge this complaint in respect of police inefficiency and a breakdown in relations between the police and the community of Khayelitsha.*” The lodging of the complaint was the culmination of many years of campaigning to improve the quality of policing services provided to residents of Khayelitsha, as will be detailed below in the section entitled *The History of the Complaint*.

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16. On 15 August 2012, the Premier together with her Cabinet resolved to institute a Commission of Inquiry into the complaint concerning police inefficiency and a breakdown in police community relations in Khayelitsha ("the Commission"). The Commission was established by proclamation in the Provincial Gazette on Friday, 24 August 2012 (the proclamation forms part of annexure "AL74").
17. The Applicants seek an interim interdict preventing the Commission from continuing its work pending the finalisation of their application to set aside the Premier's decision to appoint the Commission. This affidavit, which was drafted under severe time constraints in response to founding papers almost 900 pages long, is of a preliminary nature and will address only the issues relevant to the interim relief sought. A more comprehensive answering affidavit will be drafted in response to the final relief sought in Part B of the notice of motion. It has not been possible in the time available to deal with all the issues raised in the founding affidavits and in the interests of brevity I have attempted to avoid repeated denials of facts which have been dealt with elsewhere in the affidavit. I accordingly request that allegations in the founding affidavits which have not been explicitly denied, but which are inconsistent with what is stated in this affidavit, be taken as denied.
18. This remainder of this affidavit is divided into four parts:

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- 18.1 *The Introduction* sets out the context to the complaint and summarises the basis for the SJC's contention that the Applicants should not be granted the interim relief sought;
- 18.2 *The Vindication of the Commission* deals with two documents, which are relied upon by the Applicants and are attached to their founding papers, which demonstrate in stark terms why the Commission is necessary;
- 18.3 *The History of the Complaint* sets out how the complainant organisations have struggled since 2003, through marches, demonstrations, memoranda and other forms of peaceful protest, to get the relevant authorities to address the systemic failures of policing and criminal justice in Khayelitsha; and
- 18.4 *The Response* deals with the allegations made in the founding affidavits which are most relevant to the interim relief. It does not purport to be a comprehensive answer to the founding affidavits.

INTRODUCTION

19. At the outset, I request this Court and the parties not to overlook the most important issue raised by this application. This issue does not relate to the principles of co-operative governance or to whether the Premier's decision to establish the Commission was rational or even to the political sniping and barbs
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exchanged between the Premier and the First Applicant (“the Minister”). Ultimately, this case is about the appalling level of crime experienced by residents of Khayelitsha on a daily basis. This is context against which this application must be viewed.

20. The SJC submits that this case must in the first instance address the state’s duty to respect, protect, promote and fulfil, among others, the rights to life, dignity, freedom and security of the person, equality, privacy and the best interest of children. A criminal minority terrorises people living and working in Khayelitsha day and night, but we believe that this case must also take into account the constitutional rights of arrested, detained and accused persons.
21. While I and the other deponents on behalf of the SJC are often critical of the Applicants, we would far prefer to be working together with them, and the other parties, in addressing the circumstances of people living in informal settlements in Khayelitsha who are too scared to go out to the toilet at night or residents who are struggling to come to terms with the shock of having been robbed or raped without the benefit of counselling or institutional support.
22. In particular, I wish to commend the Second Respondent (“the National Commissioner”) for the attempts that she made to address the issues raised in the complaint after she was appointed to her position in June this year. The proposal formulated by her office in July 2012, as set out in annexure “AL67_A”, for an independent policing panel reflects a clear understanding of what is required to

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address the negative perception of the South African Police Services (“SAPS”) in Khayelitsha and could have provided an invaluable model for policing throughout the country. If this proposal had been tabled and presented to the complainant organisations in early August this year, I have little doubt that there would have been no need for the Commission to be established.

THE INTERIM INTERDICTION HAS NO LEGAL BASIS

23. The four requirements to be established by an applicant seeking an interim interdict are well established. In respect of a *prima facie* right, the nub of the Applicants’ complaint is that the Premier’s decision to establish the Commission was irrational and she that failed to comply with her constitutional and statutory obligations with regard to co-operative government before making her decision. Both claims are devoid of merit.

The rationality of the decision

24. The rationality challenge fails to overcome the following hurdles:

- 24.1 The Premier’s power to appoint a commission of inquiry in terms of section 127(2)(e) of the Constitution is an original constitutional power of a discretionary nature;

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- 24.2 The threshold for rationality is low: no more is required than that the decision must be rationally related to the purpose for which the power was conferred;
- 24.3 The rationality of the Premier's decision is to be determined at the time at which the establishment of the Commission was promulgated in August 2012. Despite the Premier repeatedly having requested the First to Third Applicants to provide input with regard to the complaint (as will be detailed below) and having granted them several extensions of time within which to provide their responses, the Applicants failed to provide the comment requested, either on the complaints or the procedure to be followed;
- 24.4 The Premier took into account reports that at least 13 people had been killed in vigilante attacks over the period in which she had been requested to address the complaint, as evidence in support of a breakdown in relations between the community of Khayelitsha and the police;
- 24.5 The Minister has proposed, in his letter dated 12 October 2012, annexure **"AL67"**, that the National Inspectorate of SAPS investigate and report on the issues raised in the complaint. The framework for the investigation is set out in this letter. The Minister states in this letter that the National Commissioner acknowledges *"that a full police*

investigation is needed” into the complaint. In the circumstances, the claim made in the founding affidavits that there is no rational basis for the Premier’s decision to appoint a commission of inquiry to investigate and report on the complaint, is scarcely credible;

- 24.6 In any event, the need for a Commission to investigate the complaint is confirmed in irrefutable terms in two reports which form part of the founding papers. These reports, annexures “AL87” and “AL88”, are discussed below in the section entitled *The Vindication of the Commission*.

Co-operative governance

25. The claim that the Premier established the Commission without complying with her constitutional and statutory obligations in terms of the principles co-operative government, can only be explained on the basis of the Applicants’ failure to comprehend the implications of the Premier’s power in terms of section 206(5)(a) of the Constitution to appoint a commission of inquiry. The Applicants also conflate the powers of the Premier and the powers of the Commission. The function of a commission of inquiry is to investigate and determine facts, and to furnish advice in the form of recommendations.
26. In enacting section 206(5)(a) of the Constitution, the Constitutional Assembly was well aware that a commission of inquiry is an investigative body which may

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be clothed with potentially invasive coercive powers in order to assist it in discharging its mandate. Insofar as the Applicants might be concerned that the Commission intrudes upon the statutory and constitutional powers of the Provincial and National Commissioners, such an intrusion is constitutionally mandated, provided only that the Commission has been lawfully established and that it operates within its terms of reference.

27. Section 199(5) of the Constitution requires the police service to act in accordance with the Constitution and the law. The Minister has stated (as is described below) that he regards the establishment of the Commission as an act of aggression on the part of the Premier and this unwarranted hostility towards the Commission has caused him (and the other Applicants) to lose sight of their constitutional obligation to assist and cooperate with the Commission. The record of the engagement between the Premier and the Applicants clearly reflects that the Applicants have set their faces against the establishment of the Commission from the outset and (with the exception of the National Commissioner) have failed to engage, or cooperate, at any stage in the process leading to the establishment of the Commission or with the Commission itself:

- 27.1 The complainant organisations lodged the initial complaint with the Premier on 28 November 2011 (annexure “**AL38**”);

- 27.2 On 9 December 2011 the Premier forwarded the complaint to the Provincial Commissioner under cover of a letter requesting him to

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comment on the substance of the complaint and the appropriate method proposed to deal with it, by no later than 30 January 2012. The letter was copied to the Minister and the then Acting National Commissioner (annexure “AL38”);

27.3 On 12 December 2011 the Minister’s office acknowledged receipt of the Premier’s letter and gave the assurance that the matter “*is receiving our utmost attention and further correspondence will be directed to you in due course*” (annexure “AL60”);

27.4 None of the Applicants made any substantive response prior to 30 January 2012;

27.5 On 14 February 2012 the Premier addressed a further letter to the Provincial Commissioner (copied to the Minister and the then Acting National Commissioner) stating that the letter was addressed to him, given that the relevant policing district fell under his control, and that the letter was sent to him as a colleague in a spirit of mutual co-operation. The Premier expressed her extreme disappointment at the lack of response from SAPS to her previous letter and requested comments on the complaint by 28 February 2012;

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- 27.6 On 27 February 2012 the Provincial Commissioner informed the Premier simply that the matter had been referred to SAPS head office for instructions;
- 27.7 On 22 May 2012 the Premier again wrote to the Provincial Commissioner (annexure **"AL42"**) - copied to the Minister and the Acting National Commissioner - stating that she was forced to conclude that SAPS refused to engage with her concerning the complaint and that the on-going acts of vigilantism in Khayelitsha appeared to be giving credence to the claims of a breakdown in trust between the community and the police. The Premier stated that if she did not receive a response from SAPS within ten days, she would make a decision without their input;
- 27.8 On 7 June 2012 Major General Jephtha submitted a report (annexure **"AL48_A"**) to the Divisional Commissioner of the SAPS Inspectorate in which it was concluded that the complaint was too vague and lacking in specificity to be able to be investigated properly and that there was no breakdown between the community and the police in Khayelitsha *"because there are functioning community police forums at all the stations"*. I can only infer, for reasons which are apparent from what is stated below, that the National Commissioner rejected these conclusions. Major General Jephtha's findings in any event cannot be reconciled with

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the content of the subsequent report of the Divisional Commissioner of the SAPS inspectorate (annexure **"AL87"**) ("the Task Team report");

27.9 Having received supplementary evidence from the complainant organisations concerning the systematic failure of policing in Khayelitsha, on 13 June 2012 the Premier again wrote to the Provincial Commissioner (annexure **"AL46"**) - copied to the Minister and the National Commissioner - noting the failure of either the Provincial or the National Commissioner to respond in the six months since the initial complaint was first forwarded to them and requested a response by 20 June 2012;

27.10 On 14 June 2012 the SJC wrote to the Premier and urged her to proceed with the establishment of a Commission on the basis of escalating crime and violence in Khayelitsha (a copy of this letter is annexed marked **"MM7"**);

27.11 On 21 June 2012 the Minister's office acknowledged receipt of the Premier's letter of 13 June 2012 and gave the assurance that the matter *"is receiving our utmost attention and further correspondence will be directed to you in due course"* (annexure **"B"** to annexure **"AL60"**);

27.12 On the same day (21 June 2012) the executive legal officer in the office of the National Commissioner wrote to the Premier and requested an

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extension to 29 June 2012 in order to provide comments on the complaint. The Premier granted the extension;

27.13 On 27 June 2012 the Provincial Commissioner drafted a further report (annexure **"AL48_B"**) directed to the office of the National Commissioner (this report incorporated much of the content of Major General Jeptha's report) and concluded, amongst other things, that: there is no *"extraordinary amount"* of complaints against the police in Khayelitsha; there is no crisis of police inefficiency in the area; and there is also no breakdown in the relations between the community and the police;

27.14 On 29 June 2012 the National Commissioner wrote to the Premier (annexure **"AL48"**) confirming that she had been briefed on the matter and had received a report from the Provincial Commissioner, but she requested an extension until 20 July 2012 in order to afford her a *"realistic"* timeframe within which to consider the issue and respond in a meaningful way. The Premier granted this extension;

27.15 On 13 July 2012 the Women's Legal Centre ("WLC") wrote to the Premier (annexure **"AL51"**), stating that the SJC, Ndifuna Ukwazi and TAC had met with a team from the SAPS inspectorate and that constructive discussions had been held, which the SAPS team had found enlightening. The SJC and the other organisations had undertaken to

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furnish the SAPS team with information concerning older cases and complaints. In the circumstances, the WLC contended, it would be reasonable to allow the National Commissioner's team until 31 July 2012 to produce its investigation report. Although the Premier initially stated that she refused to grant this further extension, it subsequently transpires that she did in fact grant a further extension;

27.16 The National Commissioner's team then requested certain further information from Mr Joel Bregman of the SJC, which he duly furnished (to the extent that he was able to do so). The last interaction between the SJC and the National Commissioner's team took place on or about 20 July 2012. After this date no further communication took place between the complainant organisations and the National Commissioner's team, as is confirmed by Mr Bregman, who was dealing with the matter on behalf of SJC, in his affidavit filed together with this answering affidavit;

27.17 The 31 July 2012 deadline expired without any further communication from the Applicants to either the complainant organisations or the Premier;

27.18 On 6 August 2012, representatives from the SJC and the other complainant organisations met with the Premier (as will be described in greater detail below) and, in light of SAPS' failure to comply with the

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extended deadline or to communicate further, they urged the Premier to establish a commission of inquiry;

- 27.19 On 7 August 2012 the National Commissioner addressed a letter to the Premier (annexure “AL54”) which consisted of little more than generalisations (apart from the misleading statement that, having received communication from the complainant organisations “*We are arranging to meet and discuss the issues they raise*”). The letter is conspicuous by its failure to deal with the substance of the complaint or to explain why the National Commissioner had not responded before the 31 July 2012 deadline;
- 27.20 On 15 August 2012, the Premier and the Provincial Cabinet met and resolved (in the absence of any substantive response from SAPS) to establish the Commission. The Commission was formally proclaimed in the Government Gazette of 24 August 2012 (see annexure “AL74”).
28. The Applicants’ failure to respond prior to the expiry of the 31 July deadline is all the more extraordinary because it is apparent from annexure “AL67_A” to the founding papers that the National Commissioner’s office had formulated a comprehensive working plan and terms of reference for an independent investigation into the issues raised by the complaint before the end of July 2012 (this can be established from the table of timelines attached at the end of annexure “AL67_A”). In annexure “AL67_A” the National Commissioner’s

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office proposed a process that was independent, transparent and participatory. It envisaged that the independent panel would assist SAPS in coming up with strategies to correct service delivery deficiencies and the negative perception of policing and should be used as a *“precursor to the real turnaround strategy for SAPS in the province which eventually should be cascaded to every province in the country . . .”*. As I indicated at the beginning of this affidavit, had SAPS tabled this proposal in early August 2012, there can be no doubt that the SJC and the other complainant organisations would have welcomed the opportunity to work in a co-operative fashion with SAPS, the Premier and the Second Respondent (“MEC Plato”), to address the issues raised by the complaint. However, the National Commissioner’s proposal was not tabled in early August. The only inference I can draw is that the Applicants, or other senior members of government, were unable to agree on the acceptability of the proposal. The National Commissioner’s failure to respond to the complaint beyond the level of generalisations in her letter of 7 August 2012 (annexure “AL54”) can therefore be understood: she did not respond substantively as she was unable to do so - the relevant authorities were deadlocked over her office’s proposal and no alternative had been formulated.

29. In the interim, the Commission commenced its work. On 6 September 2012 the secretary to the Commission sent a letter to the Provincial and National Commissioners in which she, amongst other things, requested certain documents from the Provincial Commissioner by 5 October 2012 (see annexure “AL74”). On the same day she also sent letters to the Fifth, Sixth, and Seventh Applicants

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(“the Station Commanders”) requesting documents by 5 October 2012 (annexure “AL75”).

30. On 12 October 2012, the Minister set out his own proposed investigation into policing in Khayelitsha, which entailed an inquiry into the complaint by the National Inspectorate of SAPS and only at a later stage, “*if necessary*” would a more formal inquiry take place in which the police would be assisted by non-SAPS representatives (see annexure “AL67”).
31. Notwithstanding concerns about the ability of SAPS to investigate itself and whether Khayelitsha residents would be prepared to come forward and raise their grievances with such a panel, the SJC and the other complainant organisations were prepared to consider the Minister’s proposal. On 22 October 2012 the WLC directed a letter to the Premier in which further information was requested from the Minister and SAPS, in order to enable the complainant organisations to decide whether they should support the proposal. Our concerns related, amongst other things, to:
 - 31.1 a commitment to clear timelines;
 - 31.2 the participation of independent civil society nominees in the inquiry;
 - 31.3 whether public hearings would be held; and
 - 31.4 whether the full report of the panel would be published.

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32. The Premier was also open to the proposal, but raised similar concerns, as is reflected in her letter of 19 October 2012, annexure **"AL68"**.
33. In the absence of any substantive response from either the Provincial Commissioner or the Station Commanders to the Commission's request for information of 6 September 2012, the Sixth Respondent ("the secretary for the Commission") issued and served subpoenas on 30 October 2012 compelling production of the documents required by the Commission. (See annexures **"AL83"**, **"AL84"**, **"AL85"** and **"AL86"**. This step was unavoidable if the Commission was to discharge its mandate.
34. Despite the Minister stating in his letter of 24 October 2012 (annexure **"AL71"**) that he had received a copy of the complainant's letter of 22 October 2012, that he had considered the letter and that he would, once he had received the Premier's response to his letter of 24 October 2012, decide how best to address the issues raised by the complainant organisations, the Applicants launched these proceedings on 5 November 2012 without responding to our letter of 22 October or the issues raised in it (or, for that matter, the related issues raised by the Premier).
35. The above summary demonstrates that, in contrast to the Premier (who at almost every turn attempted to accommodate the Applicants and went the extra mile in order to comply with her co-operative governance obligations), the Applicants (with the exception of the National Commissioner) have responded to the

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complaint with unbridled hostility and contemptuous disregard for their constitutional obligation to co-operate with the Premier and the Commission. The Applicants have compounded the situation by launching this application in contravention of section 45(1) of the Intergovernmental Relations Framework Act 13 of 2005 ("the Framework Act"), without first declaring a formal intergovernmental dispute.

The further claims

36. The other grounds for relief relied upon by the Applicants include the following:

36.1 that the *"pith and substance of the original complaint"* of November/December 2011 does not warrant the appointment of a commission of inquiry in terms of section 206(5) of the Constitution, as the eight complaints referred to have been dealt with (para 10 of the Applicants' notice of motion). In this regard:

36.1.1 section 206(5)(a) does not stipulate any requirements that the complaint must satisfy in order for it to be entertained;

36.1.2 the complainant organisations did not make a number of individual complaints. The complaint was of a systemic failure of the police in Khayelitsha *"to prevent, combat and investigate crime, take statements, open cases and apprehend criminals"*

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(paragraph 49 of the complaint, annexure “AL38”). The eight case studies attached to the initial complaint were cited as “*a small sample of the widespread inefficiencies, apathy, incompetence and systemic failures of policing routinely experienced by Khayelitsha residents*” (paragraph 4 of the complaint);

36.1.3 there is in any event no basis for not considering the complaint as a whole and taking into account the supplementary case studies furnished by the complainant organisations to the Premier on 4 April 2012 (a copy of which is attached marked “MM8”) and 5 June 2012 (see Annexure “AL46”) respectively; and

36.1.4 the rationality of the Premier’s decision stands to be determined on the facts known to her when she made her decision in August 2012. If the Applicants were of the view that the substance of the complaint had been dealt with, they should have communicated this to the Premier before she made her decision. They did not do so;

36.2 the Premier had made the decision to establish the Commission without engaging with various other constitutional and statutory structures prior to making her decision. This contention overlooks:

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36.2.1 the Applicants' failure to establish any constitutional or statutory obligation (apart from the co-operative governance principles considered above) for the Premier to engage with these structures prior to making her decision;

36.2.2 the statement, which stands unrebutted, by the Premier in her letter of 22 May 2012 (Annexure "AL42") that "*the SAPS, both provincially and locally, refuse to engage with us on the complaint*"; and

36.2.3 the repeated attempts by the complainant organisations, over a period of almost 10 years, to engage with a wide range of statutory bodies and officials, over the failure of policing and the criminal justice system in Khayelitsha. These attempts are detailed below in the section entitled "*The History of the Complaint*";

36.3 The decision was vitiated by ulterior motive and "*naked political preference*". While it is primarily for the Premier to respond to this allegation, the SJC wishes to point out that, particularly in light of the ongoing vigilante killings, it would have been unreasonable (and possibly irrational) for the Premier not to have established the Commission and the SJC might well have instituted review proceedings against a decision not to appoint a commission of inquiry;

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36.4 The decision to establish the Commission was made under dictation by the Women's Legal Centre ("WLC"). This claim is demeaning of the Black working-class people, particularly women and youth in Khayelitsha, who form the bulk of the membership of the SJC, TAC and Equal Education. It is also demeaning of the African, Coloured, Indian and White people in our organisations who work in Khayelitsha on a daily basis. The WLC is the attorney of the SJC in this matter and of the complainant organisations in the proceedings before the Commission. At every step, it has represented the views of its clients and acted solely on their instructions. In particular it has represented the views of those members of the complainant organisations who live and work in Khayelitsha. From SJC's perspective, and much to our concern, the Premier acted cautiously in applying her mind to our complaint and only appointed the Commission some ten months after we met with her about the issue, and nine months after receiving the original complaint. Our frustration stemmed from the numerous extensions the Premier afforded the Applicants in order to comment on the complaint. The original complaint was sent to the Provincial Commissioner, amongst others, from whom we never received the courtesy of an acknowledgment or a response. We have made similar complaints to the Minister and his predecessor, to no effect. The Applicants' failure to act in response to complaints affecting the fundamental rights of Khayelitsha residents immensely frustrated our members. Therefore, our organisations protested at the indulgences granted to the Applicants by the Premier (with one exception, which has been explained above). The claim that the Premier has been acting under dictation by the WLC is, furthermore, entirely speculative and is marked by the absence of any factual basis for

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the allegations. The Applicants do not state who at the WLC did the dictating, what was dictated or when the dictation took place. It is any event contradicted by the facts that the Premier:

36.4.1 has sought to exclude the City of Cape Town's ("the City's") Metropolitan ("Metro") Police from the Commission's terms of reference, contrary to the request by the WLC on behalf of the complainant organisations;

36.4.2 failed to extend the terms of reference of the Commission to the interface between the police and the broader criminal justice system as requested in the complaint; and

36.4.3 refused the request (in the open letter of 14 June 2012, attached as annexure "**MM7**") for her to establish the Commission without further delay, and (initially) refused the request made on 19 July 2012 (annexure "**AL52**") to grant an extension until the end of July 2012 to enable the National Commissioner's team to complete its investigation;

36.4.4 We view the allegations against the WLC as mischievous and an attempt to misconstrue their role for the Applicants' own purposes.

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- 36.5 The decision of the Premier acting through the Fifth (“Adv Pikoli”), Sixth (“the Commission Secretary”) and Seventh Respondents (“Adv. Sidaki”) to authorise the issue of subpoenas against members of the SAPS usurped the statutory and constitutional powers of the National Commissioner and the Provincial Commissioner (paragraph 6 of the notice of motion). The Applicants make grave allegations of impropriety on the part of members of the Commission, without a jot of evidence to support the claim that they are acting as tools of the Premier. For reasons which are not explained on the papers, they exclude the Fourth Respondent (“Justice O’ Regan”) from this attack; and
- 36.6 The decision of the Commission to issue and serve subpoenas on the Provincial Commissioner and the Station Commanders is illegal and unconstitutional. The founding papers disclose little or no evidence to support the claim that the Commission intruded unlawfully on the powers of the police or exceeded the scope of its terms of reference.
37. In the alternative, if the Applicants do not succeed in having the establishment of the Commission set aside, they seek an order directing Justice O’Regan, Advocate Pikoli and Advocate Sidaki to recuse themselves from participation in the Commission. Justice O’ Regan’s role as a patron of the WLC is dealt with by the WLC, in the affidavit filed on its behalf by Ms Jennifer Williams, the Director of the WLC. It is submitted that:

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37.1 the order sought in paragraph 9 of the notice of motion directing the three Respondents to recuse themselves is incompetent. The Commission sat for the first time on Monday 29 October 2012. The proper remedy for the Applicants was to launch a recusal application at the 29 October hearing (or any subsequent sitting of the Commission) and, should they still not be satisfied with the decision or decisions made, to institute review proceedings in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The Applicants have not satisfied the requirements for the mandatory interdict sought by them as they have an alternative remedy, and, furthermore, the order sought is precluded by section 7(2) of PAJA, as the Applicants have not exhausted their internal remedies; and

37.2 in any event, the Applicants fail to set out any sufficient basis for the recusals sought.

Further interim interdict requirements

38. Both the Applicants' papers and the affidavits filed on behalf of SJC demonstrate that there has been a systemic failure of policing in Khayelitsha. It is imperative that the Commission should be allowed to continue its work so that these failings can be remedied without further delay.

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39. The Applicants papers do not show that they will suffer any *irreparable* prejudice if the Commission continues its work. There is little substance to such claims of prejudice as the papers do disclose, in that:

39.1 the allegations that obtaining the documents required by the Commission will place an undue administrative burden on SAPS over the festive season are made in the most vague and general terms: no indication is given of the number of officers that will be diverted from their ordinary duties, for how long they will be diverted, what proportion they make up of the SAPS staff complement in the Western Cape or what it will cost SAPS to produce the documents. In any event, it is apparent that many, if not all, of the documents required have already been obtained – it follows that the Applicants will suffer little or no prejudice if the interim relief is refused, particularly if regard is had to the fact that the Commission will not be in a position to commence hearings until after the festive season, given the suspension of public hearings in terms of the order made by this Court on 12 November 2012;

39.2 The Minister claims (at paragraph 18.6 of his affidavit) that issuing subpoenas against senior SAPS members is demeaning, impugns their integrity and that of SAPS as a whole and causes much reputational damage to SAPS. The subpoenaing of police officers to produce documents in court is an everyday occurrence in South Africa. The claim that it impugns the reputation and dignity of senior police officers

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for them to be subpoenaed is simply untenable, unless a distinction can be drawn between senior officers and other members of the SAPS. The Minister is invited to draw this distinction in his replying affidavit and explain to this Court precisely which ranks in SAPS should be immune from being subpoenaed on the grounds that it is demeaning and undignified and to set out the legal basis for the contention.

40. The Minister also alleges but does not show that irreparable harm will be suffered by the SAPS if the interim relief is not granted. The Minister has not revealed what it is about the Commission's sittings that will impair SAPS's standing and reputation in the community at large, and why this is irreparable. On the contrary, one of the aims of the Commission is to restore that very reputation and integrity and belief in the SAPS, the complaint being that a breakdown in trust has occurred. When the Minister's unsubstantiated claim is measured against the graveness of the situation for Khayelitsha residents, it cannot prevail.

41. I submit that in determining where the balance of convenience lies in the granting of the interim relief sought, this Court should also have regard to the considerable efforts expended by representatives of the SJC and the rest of the complainant organizations in publicising the Commission and encouraging the community to participate in it, combined with the anticipation in the Khayelitsha community that the Commission will ultimately lead to improved policing.

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42. These efforts include the following:

- 42.1 As soon as the Commission was announced at the end of August 2012, SJC, TAC, Equal Education, Triangle Project and Ndifuna Ukwazi representatives implemented a drive to engage with members of the community who had been affected by crime. We encouraged them to appear before the Commission and have their voices heard there.
- 42.2 In this regard we conducted a door to door campaign of engaging with the community, visiting people in their homes; making arrangements to return to their homes and take down their statements; having them depose to affidavits; transporting them to commissioners of oath; arranging with attorneys to commission those affidavits. Since the establishment of the Commission, we managed to obtain approximately 60 affidavits which have been submitted to the Commission.
- 42.3 Four different marches were held on 6 October (in Site B); 12 October (in Nkanini); 13 October (in Site C) and 27 October (in Ndlovini) the sole purpose of which was to make the community aware that the Commission had been established, explaining its purpose and encouraging people to participate in its work.
- 42.4 Another march was held on 2 November 2012. We marched from Site B to Lingeletu police station. The aim of the march was to focus on the

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unacceptable levels of crime and to demand visible policing in the streets of Khayelitsha.

- 42.5 We distributed 150 000 thousand pamphlets to commuters at the following train stations: Nonkqubela, Kuyasa, Khayelitsha and Nolungile. These pamphlets explained what the commission was about and provided details of how people could participate in its work.
43. Understandably, there is a heightened level of expectation within Khayelitsha regarding the establishment of the Commission, and there is hope that it will finally address the complaints the community has had over the years, and that it will lead to improved policing and restore trust in the police. Unfortunately there is also a level of cynicism among some members of the community. When handing out pamphlets at the train stations, I was often met with comments to the effect that the police will always be corrupt and nothing will change. In light of the long standing complaints, I submit that this attitude is also understandable.
44. If the working of the Commission is delayed for an extended period, which will be an inevitable consequence of the granting of the interim interdict, much of the preparatory work done by SJC and the other complainant organisations will have to be repeated. The frustration felt by Khayelitsha residents at the failure of the authorities to address the unacceptably high levels of crime in the area will increase.
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45. Given the importance of the work to be conducted by the Commission and the tenuous nature of the Applicants' claim, the balance of convenience overwhelmingly favours the dismissal of the interim interdict.

Non-joinder

46. The Applicants joined the WLC, the firm of attorneys representing the complainant organisations, but not the complainant organisations themselves, as is explained in the affidavit filed by the Director of the WLC, Ms Williams. The SJC, at its own request, was joined as a party by agreement in terms of the order granted by this Court on 12 November 2012. The other complainant organisations have been participating in the Commission and have been represented in its proceedings, but they are not parties to this application and accordingly will not be bound by any orders that this Court makes. They have a direct and substantial interest in the relief sought by the Applicants. This can be illustrated with regard to paragraph 10 of the notice of motion, in which the Applicants seek an order declaring effectively that the November 2011 complaint was not a proper complaint warranting the appointment of a commission of inquiry. Such an order is incompetent in the absence of four of the five (initially six) organisations that lodged the complaint.

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Urgency

47. If there is any urgency at all in this case, it arose when the first three Applicants received the letter from the Premier in December 2011 informing them of the complaint.
48. The founding papers indicate that the Applicants have been preparing this application since the proclamation of the Commission on 24 August (Annexure "AL31" refers to a meeting attended by Major General Jephtha and the State Law Advisor on 23 August 2012 at which it was agreed that the latter would be furnished with details of complaints against members of SAPS in Khayelitsha. The information was obviously readily available, as it was furnished the same day). The Applicants delayed for a month and a half before launching the application on 5 November, giving the Respondents less than a week (the papers were only served the following day) to answer papers running to almost 900 pages. The Applicants fail to explain the delay in launching the application between 23 August and 5 November, and it is accordingly submitted that any urgency which might exist is self-created.

THE VINDICATION OF THE COMMISSION

49. Three reports which form part of the Applicants' founding papers, when read together, establish the need for the Commission more comprehensively and with

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greater clarity than the SJC, or the other complainant organisations, ever could have done.

50. The Minister of Police and the SAPS have failed the people of Khayelitsha in fulfilling their primary constitutional obligation, that is protection of their lives and property. On the Applicants' own papers, Khayelitsha experiences one of the highest rates of murder and attempted murder in the country, violating the rights to life, bodily and psychological integrity of its people on a daily basis.
51. Khayelitsha is regarded as one of the largest townships in the Western Cape divided into about 22 sub-sections and three sub-councils. The area is estimated to have a population of at least 500 000 people living in formal, semi-formal and mainly informal housing.
52. Originally, one police station Khayelitsha Site B covered 43.5 square kilometers with a density of about 11 500 people per square kilometer. Since 2004/5, three police stations have covered the entire area: Harare; Khayelitsha (Site B) and Lingeletu West.

THE 3rd AUGUST 2012 REPORT (CRIME INTELLIGENCE REPORT)

53. In the Executive Summary of its report "**Serious Crime in Khayelitsha and Surrounding Areas**" (3rd August 2012), the SAPS *Crime Research and Statistics Crime Intelligence Unit* stated that:

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"The high levels of particularly violent crime in these precincts were also due to an extremely complex web of historical, social, economic and environmental issues which could only be addressed by a massive, fully integrated effort involving both Government (not only the SAPS) and the community." (AL 30)

54. The SJC agrees with this executive summary of the Crime Intelligence report, as it echoes our own experiences. In the complaint, we set out the context of policing in the area as follows:

"Khayelitsha is made up of predominantly black working-class and poor communities ...

The area suffers from extremely high levels of poverty and unemployment. More than 50% of its inhabitants are unemployed and the majority of these are young men and women of working age. Khayelitsha is a combination of formal and informal settlements. People in formal areas live in brick homes that are connected to the electricity grid, have water and sanitation services and regular refuse removal. Many residents, however, continue to live in informal structures, commonly referred to as "shacks" or as backyarders. People who live in informal settlements and as backyarders do not have adequate housing, access to electricity, clean and safe water and sanitation services, and consistent refuse removal. As a result of living

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in such unhealthy an environment, there are high levels of illness, especially affecting children and the elderly.” (Annexure “AL38”).

“Crime is a much more dangerous and pervasive threat for people living in over-crowded, under-serviced neighbourhoods and informal settlements than in middle-class suburbs. People living in these areas are often assaulted, robbed, raped and murdered while engaged in activities that others take for granted, such as using the toilet or accessing transport to work. A lack of infrastructure such as street lights and roads makes these areas far more dangerous than those that enjoy such amenities.” (Annexure “AL38”).

55. Contrary to the Provincial Commissioner’s reading (at paragraphs 27-32 of his affidavit), the Crime Intelligence Report points out that the area experiences much higher levels of crime than most of the Western Cape and South Africa:

“If Khayelitsha, Harare and Lingeletu West ... are considered together, this combined entity today occupies a first position as far as national murder, attempted murder and aggravated robbery figures are concerned.” (AL 30)

56. The fact that SAPS’ national crime statistics reflect a decline in crimes such as murder and rape, while Khayelitsha has experienced an increase suggests that

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there is a problem with policing in the area. See annexure “MM9”. The Crime Intelligence Report states further:

“The crime profile of Khayelitsha has actually not changed over the past 12 to 13 years. It still remains a dominantly social contact crime station [context] ...The way to address the situation also still remains the same: Only an integrated Government – community response can really address the high levels of social contact crime. It seems as if nothing happened in this regard since 1999.” (“AL 30”)

57. The statement that nothing has changed since 1999 needs to be read in the context of the widely reported statement, made on 25 May 2004 by the then Minister of Safety and Security, Mr Charles Nqakula, confirming that Khayelitsha had the highest incidence of murder, rape and serious and violent assault in the country. I refer in this regard to annexure “MM10”, a Mail and Guardian report on Minister Nqakula’s statement dated 25 May 2004.

THE TASK TEAM REPORT

58. In the Task Team report (annexure “AL87”) compiled by Lieutenant General Tshabalala, the Divisional Commissioner: Inspectorate, for the National Commissioner in early August 2011, it was concluded that the services rendered by SAPS to the community of Khayelitsha are not “*of such a standard that the community does not have any reason for complaining.*” The content of the

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report is considerably more damning than this optimistic gloss on the Task Team's findings. The Task Team identified numerous shortcomings in the services being rendered by SAPS to the Khayelitsha Community. The relevant findings may be summarised as follows:

Police-community relations

58.1 The Community Police Forums ("CPFs") are making a questionable contribution to improving police community relationships, primarily because of inadequate participation by representatives of all relevant community structures and inadequate involvement in programmes launched by SAPS (Annexure "AL87", para 6.2).

58.2 CPFs have been established at all three police stations in Khayelitsha. At the Khayelitsha police station there is a poor relationship between station management and the CPF. Neither the constitution of the CPF nor minutes of its meetings could be produced. The public relations officer of the CPF raised the concern that the CPF is not recognised by the station management. The chairperson of the CPF is not involved in the activities of the CPF and the CPF does not work together with the social crime prevention section at the station (paras 6.3 – 6.4).

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- 58.3 At the Lingeletu West police station, by way of contrast, a good working relationship exists between the CPF and station management (para 6.5).
- 58.4 At the Harare police station the CPF is also not functioning well (para 6.6).
- 58.5 CPF initiatives are not supported, or attended, by SAPS (para 6.7).
- 58.6 Although the NGO, Free Gender, had offered to assist in training and sensitising police officials handling gender based violence and crimes, SAPS had not responded to a proposal to this effect made on 5 December 2011 and the initiative had not been implemented (para 6.9).
- 58.7 There is very little or no interaction between the CPFs and the Khayelitsha cluster and Provincial CPF structures (para 6.11) and the constitutional structures established to enhance community police relations in Khayelitsha are not functioning effectively (para 6.12).
- 58.8 The Task Team finding demonstrates a largely dysfunctional relationship between at least two CPFs. This oversight failure infringes the rights to safety and justice of people in Khayelitsha.

Prevention and combating of crime

58.9 The Khayelitsha police station is insufficiently resourced with a resulting negative impact on the visible policing in its sectors as well as on the reaction time to complaints (para 7.1.2). At both the Harare and Lingeletu police stations, as reported in previous inspection reports, the provincial guidelines are not being complied with and a shortage of resources is hampering the implementation of effective sector policing (para 7.1.3).

58.10 When complainants succeed in opening a case docket at a Community Service Centre (CSC) they are sent from pillar-to-post in a time consuming and cumbersome process that results in generally poor service delivery that is contrary to the relevant National Instruction (para 8.1.4). At the Harare and Lingeletu stations the procedure is further complicated by the fact that dockets are only opened after the complaint has been authorised by a legal advisor (para 8.1.5).

58.11 The response to radio control (10111) complaints is inadequate in that the Occurrence Books (OBs) reflect that CSC commanders overstate the extent to which they are monitoring these complaints (para 8.2.2). Further, not all complaints received are captured on the incident report system. Entries are not made of all complaints received and the data integrity of the police reaction time, as indicated in performance

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monitoring records, is questionable owing to poor record keeping (para 8.2.3).

58.12 The large number of suspects who are detained but not charged is of concern. The impression is created that suspects are arrested and detained without the required reasonable suspicion and in general arresting officers do not make statements indicating the reasons for arrests made (para 8.3.2).

58.13 Suspects are generally not charged within 48 hours as required by the Criminal Procedure Act. The case dockets in which suspects have been detained, but not charged within 48 hours, and then released, reflect that there was no reasonable suspicion linking the suspects with the relevant crimes (para 8.3.2).

58.14 The investigation of case dockets by detectives makes very little impact on serious crimes such as armed robberies and housebreaking. In most of these cases no facial identification profiles are compiled, even where the suspects have been described, witness statements are not always taken, witnesses and complainants are not shown the photo albums of criminals available at the stations and no applications are sent to the cellular mobile companies to track stolen phones where necessary (para 8.4.2).

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58.15 The crime information officers at the stations do not assist investigations by providing information. Although the same suspects are described in different dockets, no information is presented in this regard (para 8.4.3).

58.16 A random search of case dockets in the archives revealed a number of causes for concern, including:

58.16.1 witness statements not being obtained before case dockets are sent to court, resulting in charges being withdrawn;

58.16.2 case dockets being closed without stolen property with serial numbers being circulated;

58.16.3 dockets being closed without exhibits being disposed of;

58.16.4 cases being withdrawn in court because statements by arresting officers have not been filed;

58.16.5 case dockets being withdrawn in court because witnesses have not been summonsed;

58.16.6 crime scene experts not being summonsed to attend to crime scenes;

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58.16.7 case dockets being closed without local criminal record centre reports being received; and

58.16.8 case dockets being found in which fingerprinting requirements have not been completed and referred to the local criminal record centre (para 8.4.4).

"Bundu Courts"

58.17 With regard to the complaint received from the Premier's office, the intimidation and "*disappearance*" of witnesses "*goes hand-in-hand*" with the "*Bundu Court*" in the Khayelitsha area (para 8.6.1).

58.18 A study of cases that can be considered "*Bundu Court*" *executions* reveals that from April 2011 to June 2012, 78 incidents were reported at the three Khayelitsha stations for which murder dockets have been opened and are being investigated (para 8.6.2).

Performance chart

58.19 The evaluation of the performance of detectives at the three stations as measured by performance charts has been reflected as having improved through a process of inflating the number of arrests made in respect of cases of possession of dangerous weapons (pocket knives) and these cases being withdrawn in court on the grounds that the accused did not

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pose an immediate danger. These arrests accounted for nearly 50% of the case dockets opened. Most case dockets in court are resolved without the accused being found guilty (para 8.7.1).

Rendering of services in a professional manner

58.20 A large number of SAPS members are subjected to disciplinary steps, some members even repeatedly, indicating that disciplinary measures do not have the requisite positive effect and do not serve as a deterrent or remedial measure. This could reflect that members are “*punch drunk*” as a result of their heavy workload and circumstances. This would be a serious situation requiring urgent intervention by the SAPS’ employee health and wellness unit. In the Khayelitsha police station there has been a dramatic increase in domestic violence and assault GBH cases registered against members from nil between January and June 2011 to 16 in the same period in 2012. This indicates that those entrusted with policing of social crimes are in fact perpetrators themselves (para 9.2).

58.21 During the period between January and December 2011, there were 209 disciplinary hearings at the Khayelitsha station, 205 at the Harare station and 205 at the Lingeletu station (para 9.2).

58.22 In the Khayelitsha and Harare police stations the number of complaints reported against SAPS members in the first six month period in 2012 is

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already greater than the total number of complaints recorded during the entire 12 months of 2011 (para 9.3.1).

58.23 The Victim Support Centre (VSC) at the Khayelitsha station is situated in an old Wendy house, is in a poor condition and does not conform to any standard set for such a centre. The carpet is torn and the floor constitutes a safety hazard. The five volunteers who are registered as willing to work in the centre are not effectively supported by the station management and the relevant registers are not properly kept, updated or inspected. Free Gender's offer (referred to above) to train and sensitise members handling homophobic hate crimes has not been responded to and the initiative has not been implemented. Even though there is a VSC at the Harare station, no one is working there. The Lingeletu VSC meets the required standard (para 9.4.1). In the whole of Khayelitsha only 7 out of approximately 600 police officers have been trained in victim support and gender based violence.

58.24 The legal advisors appointed to the three police stations in Khayelitsha have inadequate knowledge and understanding of policing to make an impact (para 9.4.3).

Efficient use of resources

- 58.25 Vacant posts in the command structure and critical posts in the support structures remain vacant for long periods. 65% of the warrant officer posts and 59% of the sergeant posts in visible policing at the Khayelitsha station are vacant. At the Harare station a total of 40 officials are not yet fully trained to perform their operational duties. A number of experienced members are performing duties at other units in the province and are unavailable for service in Khayelitsha (para 10.1.4).
- 58.26 National directives concerning the submission of medical certificates for taking leave more than once in an eight week period are not complied with at the Lingeletu station (para 10.2.3). Shift/relief duties are performed with a minimum number of personnel owing to absenteeism (either as a result of sick leave, annual leave or rest days). In April 2012, a shift at Lingeletu station experienced at any given time an average shortage of 30.1% of members per shift. At Khayelitsha on 7 July 2012, 33.3% of members were absent. The high absenteeism rate could be an indication of low morale (para 10.2.4).
59. The Task Team also noted that it experienced an openness and willingness to discuss the issues at hand when it met the complainant organisations on 11 July 2012 (para 2.3) and that the complainant organisations' dissatisfaction with

policing in Khayelitsha could be traced back almost ten years, in which time numerous memoranda had been presented to the relevant authorities (para 3.2).

60. In summary, the Task Team report confirms that the three police stations in Khayelitsha are largely dysfunctional. The fact that 78 people have been killed in vigilante killings in Khayelitsha between April 2011 and June 2012 is particularly alarming and is a strong indication that Khayelitsha residents have taken the enforcement of the law into their own hands.

THE VIGILANTE REPORT

61. The third report relied upon by the Applicants which confirms the validity of the complaint was compiled by Benjamin Häefe for the Department of Community Safety of the Provincial Government of the Western Cape, entitled “*Vigilantism in the Western Cape*” (“the Vigilantism report”). The report is undated but appears to have been compiled in or about 2004. It is annexure “AL88”.
62. The Vigilantism report singles out Khayelitsha for a case study due to the high number of vigilante incidents taking place there. The report notes that vigilantism in South Africa is a brutal indictment of the entire criminal justice system and “*an expression of its failure and the inadequacy of the policing that is or is not occurring*” (para 3). A number of “*hotspots*” were identified in the Western Cape, including Khayelitsha and the study noted an increase in vigilante

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incidents in Khayelitsha between 2001 and 2002/2003. With regard to Khayelitsha, the study noted (at para 4):

“- *Pretending to be Neighbourhood watches*

Street committee destroying houses

Self defence organisation.”

63. Following the necklacing of three suspects in Khayelitsha in January 2002 a register was established at the CSC in order to record all future vigilante incidents. 78 vigilante incidents were reported between April and December 2003 and in the year in which the report was compiled, 43 vigilante incidents were recorded between January and July (para 4).
64. Focus groups referred to in the SAPS Vigilantism Prevention Strategy Western Cape, 2002, identify the causes of vigilantism in the Western Cape as including “*lack of trust in the SAPS due to political history, poor service delivery, rumours of corruption.*” In interviews of individuals and focus groups in Khayelitsha, conducted by Captain Jan Witbooi of SAPS, the causes of vigilantism were identified as including easy bail conditions and lack of trust in the SAPS (under which heading the following were noted as contributory factors: slow reaction time of SAPS; lack of trust in SAPS; weak statement taking; poor detective

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work; absence of follow-up on cases; absence of communication between detectives and the community; and corruption of SAPS members) (para 5).

65. The study noted that in communities ravaged by lawlessness and a minimal police presence, community vigilantism is regarded as a legitimate effort to maintain a semblance of law and order. Many residents feel that if the police were more effective, vigilantism would not occur. Often vigilante action entails a conspiracy of silence (para 5).

66. The SAPS Vigilantism Prevention Strategy for the Western Cape, drafted in 2002, required the following measures:

- *Effective Community Police Forums at stations in the Western Cape,*
- *Effective management of the CPF by CPF chairperson,*
- *Effective management of CPF by Station Commissioners and Area Commissioners as prescribed in section 18 to 23 of the SAPS Act . .*
- *Effective implementation of Sector Policing,*
- *Effective community based crime prevention by means of partnership policing has to be launched in the community . . .*

It is clear that Community Police Forums can play a major role in combatting vigilantism. However, lack of coordination, effective oversight and necessary involvement of relevant Departments seem to be the reasons for failure of CPFs' in certain areas."

67. The report concludes that vigilantism can only occur where space is created because of the perceived failure of the state to deal with criminal violence. Accordingly, the state needs to assert its authority, enforce laws effectively and efficiently and place functioning criminal justice systems and policing in those areas that need them most (para 8). The recommendations made in the report to counter vigilantism revolve around educating, training and enhancing the effectiveness of CPFs and improving the relationships between CPFs and SAPS (para 9).

68. The *Vigilantism report* confirms that vigilantism thrives in circumstances where policing and the criminal justice system are not functioning effectively.

69. Two issues are critical:

69.1 Between April and December 2003, 78 vigilante incidents were reported in Khayelitsha. In the year the *Vigilante report* was written (presumably 2004), 43 vigilante incidents were recorded between January and July. Between April 2011 and June 2012, 78 people were killed in vigilante attacks in the area. There can be no doubt that Khayelitsha has

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experienced an extraordinary level of vigilante violence over the decade in which the complainant organisations have been campaigning to draw attention to the poor quality of policing and criminal justice in the area. The scale of the problem suggests that decent people have been driven to acts of desperation; and

- 69.2 The CPFs need to be integrated into SAPS' operations and be functioning effectively in order to address this ongoing vigilante violence. The affidavits of Ntutu Mtwana and Christopher Giles, filed together with this affidavit, provide further penetrating insights into the difficulties experienced by the CPFs, the neighbourhood watches and the other community policing structures in Khayelitsha.

CONCLUSION: THE COMMISSION VINDICATED

70. Taken together, the three reports: the Crime Intelligence report on the nature and context of crime in Khayelitsha; the Task Team report and the *Vigilantism* report demonstrate gross violations of human rights arising from the systemic failure of SAPS Khayelitsha to fulfil its fundamental constitutional and statutory obligations: to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. The rights violations include:

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