

**IN THE EQUALITY COURT
(HIGH COURT, CAPE TOWN)**

Case number: EC3/2016

In the matter between:

**SOCIAL JUSTICE COALITION
EQUAL EDUCATION
NYANGA COMMUNITY POLICING FORUM**

First Applicant
Second Applicant
Third Applicant

and

**MINISTER OF POLICE
NATIONAL COMMISSIONER OF POLICE
WESTERN CAPE POLICE COMMISSIONER
MINISTER FOR COMMUNITY SAFETY, WESTERN CAPE**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

and

WOMEN'S LEGAL CENTRE TRUST

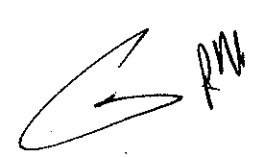
Amicus Curiae

REPLYING AFFIDAVIT

I, the undersigned


PHUMEZA MLUNGWANA

do hereby make oath and state as follows:



INTRODUCTION

1. I am an adult female residing at L691 Gwabeni Crescent, Site B, in Khayelitsha. I am the General Secretary of the First Applicant, the Social Justice Coalition (**SJC**).
2. The facts contained herein are true and correct and are within my personal knowledge, unless the context indicates otherwise. Where I rely on legal advice conveyed to me by my legal representatives, I believe it to be accurate and correct.
3. In this affidavit I shall respond on behalf of the Applicants to the answering affidavits and I confirm that I have the authority to do so. This affidavit will respond to the allegations made by the Respondents – apart from the averments pertaining to the evidence of Ms Jean Redpath, who will file a separate supporting affidavit - in the affidavits deposed to by:
 - 3.1. Major General Rabie;
 - 3.2. Major General Sekhukhune;
 - 3.3. Major General Brand;
 - 3.4. Major General Nelson;
 - 3.5. Major General Makgato;
 - 3.6. Brigadier Voskuil; and
 - 3.7. Provincial Commissioner Jula.
4. To avoid confusion in the reference to Respondents, I will refer to the First to Third Respondents collectively as SAPS and the Fourth Respondent as DOCS.
5. SAPS' affidavits often mischaracterise the Applicants' case and devote much time to answering claims not made in the founding papers. Despite being so

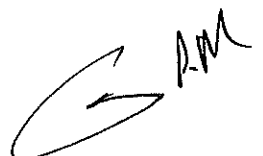


voluminous, the affidavits also fail to engage cogently with the core of the Applicants' case: Ms Redpath's evidence that Khayelitsha and many other similar communities have lower than average police: population ratios than rich, white areas. The task of replying to SAPS' affidavits is compounded by the manner in which their position shifted in the period between the filing of the first answering affidavit¹ and the last,² and their case is in a number of respects incoherent and contradictory. The following examples illustrate the point:

- 5.1. First, it is unclear whether SAPS is opposing the application. Despite having filed answering affidavits which contend vigorously that the relief sought is unfounded (and even claim that the application constitutes an abuse of court process), on Sunday 23 April 2017 a community meeting was held in Khayelitsha to discuss the issue of allocation of police resources in light the proposed R100 million upgrade to the Muizenberg Police Station. SAPS was represented at this meeting by, amongst others, Provincial Commissioner Jula, General Brand and General Mancini. I attended this meeting with other SJC employees. The Deputy Minister of Police, Mr Bongani Mkhongji, addressed the meeting and described this case as one that sought to reinforce values that SAPS believes in and stated emphatically that SAPS would not oppose the application. I have attached a transcription of the Deputy Minister's address prepared by the SJC marked **PM28**. Following the Deputy Minister's statement the Applicants' attorneys drafted a letter to the

1 Deposited to by General Rabie on 17 February 2017.

2 Deposited to by Brigadier Voskuil on 13 March 2017.



state attorney to inquire whether the First to Third Respondents would withdraw their opposition to the application. The following letters were sent:

5.1.1 A letter from the Legal Resources Centre, dated 25 April 2017, which drew the state attorney's attention to the community meeting and the Deputy Minister's public support for this application. In response to this letter, the state attorney confirmed that he would engage with his clients and revert with instructions. The letter and email are attached marked **PM29** and **PM30** respectively.

5.1.2 A further letter was addressed to the state attorney by Webber Wentzel on 28 April 2017 that noted that the Applicants should wait to file their replying affidavits until SAPS decided whether to oppose the application. This letter is attached marked **PM31**. A follow-up letter enquiring whether the State Attorney had received instructions was sent on 4 May 2017. This letter is attached marked **PM32**. Following this letter, our attorney received an email from the state attorney stating that his instructions were that the Applicants should file their replying affidavits.

5.1.3 In addition, I received a telephone call from the Deputy Minister on 25 April 2017 and I advised him that the matter was currently before this Court and suggested that he engage directly with the state attorney who had filed

opposing papers in the application. I provided him with both the email address and cell phone number of Mr. Manuel, the state attorney representing SAPS. This email is attached marked **PM33**. I did not receive a response to this email;

5.2. In short, despite the hostile approach to the application adopted in the answering affidavits, it remains unclear whether SAPS is in fact opposed to the relief sought;

5.3. Second, the answering affidavits reflect confusion concerning the basis upon which SAPS is opposing the application (if indeed it is still doing so). General Rabie in his answering affidavit (para 71) denies that the allocation process provides more police officers to stations serving rich white areas than those serving poor black communities. In contrast, General Makgato does not dispute Ms Redpath's evidence that Khayelitsha and many other similar areas have lower than average police: population ratios, but claims that SAPS' explanation for the differences in the allocation of police personnel is rational (paras 59 – 60, read with paras 19 – 21 of Ms Redpath's affidavit). General Makgato also concedes (at para 37) that policing in South Africa has an unfortunate association with apartheid, that the transition to democracy did not entirely eradicate this legacy and claims that any remnants of racial discrimination are historic and not the consequence of the theoretical allocation of resources (THRR);

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5.4. Third, in paras 50 – 51 of Ms Redpath's affidavit she summarises the nub of the Applicants' case, which is that SAPS' allocations of personnel to township areas almost all reflect a massive downward adjustment from what would be expected by the size of their populations and, unless SAPS can demonstrate that the burden of policing is lower in these areas, the police: population figures suggest a flaw in the allocation model. SAPS struggled to furnish a coherent answer on this point. General Rabie does not deal with the issue.³ In his answer, General Makgato (at paras 110 – 112): (i) states that Ms Redpath relies on only one crime element to determine allocations;⁴ (ii) claims that the allocations are weighted in favour of disadvantaged areas (without explaining why these areas then have lower police: population ratios); (iii) denies (without motivating) that the THRR is racially discriminatory; and (iv) states that Brigadier Voskuil will deal with the allegations. Brigadier Voskuil (paras 194 – 195) can only: (i) claim that Ms Redpath relies on outdated figures; (ii) allege that Ms Redpath overlooks the onus, which he claims rests on the Applicants;⁵ and (iii) contend that the most recent crime statistics paint a different picture. The most recent crime statistics are irrelevant. If he intended to refer to the data relating to the most recent allocations, Ms Redpath has analysed these allocations in her replying affidavit and

3 He only deals with Ms Redpath's evidence to the extent that it is summarised in the founding affidavit.

4 This is irrelevant.

5 The onus will be considered in legal argument. It is sufficient at this point to state that in certain critical respects it rests on SAPS.



demonstrated that there has been no substantial change to the pattern of unequal distributions;

5.5. Fourth, SAPS' version concerning its own performance is inconsistent. Brigadier Voskuil states (in para 114 of his affidavit) that "[t]here can be no doubt" that SAPS is executing its constitutional mandate efficiently, effectively and in compliance with its statutory obligations. Not only does this statement fly in the face of the evidence before, and the findings of, the Khayelitsha Commission of Inquiry ("the Commission"), it is contradicted by SAPS' annual performance plan, annexed to General Makgato's affidavit as "MJM2", in which it is stated that: "*[e]xplicit chronic areas of underperformance were identified*" in police stations in every province, the areas of underperformance including "*administration, visible policing and detective service capabilities*"; SAPS has not achieved its required level of performance in terms of either the prevention or investigation of crime; the incidence of all serious crime has been identified as an area of underperformance over the past two years; and "*the apparent absence of 'command and control'*" is a contributing factor to most areas of underperformance and non-compliance, together with the "*gradual but consistent eroding of levels of discipline in the organisation*";

5.6. Fifth, SAPS' affidavits reflect contradictory positions on a range of issues. A few examples illustrate the point. General Rabie⁶ states

6 Para 94, pp of record 1855.



that the Applicants' standing is not in issue, while Brigadier Voskuil, in his affidavit, disputes⁷ the Applicants' *locus standi* to attack the THRR;

- 5.7. In a similar vein, SAPS changed tack on the issue of whether it would seek a referral to oral evidence. In General Rabie's answering affidavit he stated that SAPS would apply to lead oral evidence concerning, amongst other things, the elements of the THRR.⁸ General Makgato adopted the same stance (para 97, pp of record 97). However, Brigadier Voskuil⁹ takes a different position, stating that the application should be determined on the affidavits;
- 5.8. Similarly, General Rabie¹⁰ stated that SAPS has no objection to providing the Applicants with the THRR determinations for the provinces other than the Western Cape, while Brigadier Voskuil¹¹ states that little point would be served in making this information available as it would only serve to generate more paper;¹²
- 5.9. General Rabie states (at para 53) that the THRR model has never been rigidly applied. This is contradicted by General Lamoer's evidence before the Commission, where he stated that he, as the Western Cape Provincial Commissioner, had no discretion to deviate from the THRR in the allocation of permanent posts. General Rabie impliedly concedes (at para 115) that Provincial

7 Paras 41 to 45 pp of record 3173 – 3174.

8 Paras 4, 33 and 229.

9 Para 8, pp of record 3161.

10 Para 188, pp of record 1881.

11 Para 162, pp of record 3215.

12 Eventually, on 19 April 2017 SAPS provided the Applicants with the allocation data for the other provinces.

Commissioners had regarded the THRR as binding, when he states that if, prior to the Commission, they did not use their power to make deployments *"that was because of a misinterpretation of the powers of the Provincial Commissioners to deploy the allocated resources in accordance with the crime trends or density of the policing area"*;

5.10. Brigadier Voskuil (para 131) claims that there *"has always been a positive response"* (emphasis added) to the recommendations of the Khayelitsha Commission from SAPS. This statement is contradicted by the National Commissioner's letter to the Premier of the Western Cape of 5 June 2015¹³ which concludes that the Commission *"highlighted what was already known"*, impacted negatively on public perceptions of the police and that it was an expensive and resource hungry *"paper exercise"* whose findings and recommendations were biased and misdirected;

5.11. Sixth, in the founding affidavit¹⁴ it is pointed out that a flaw in the THRR model is that it does not adequately take into account the under-reporting of crime. This fundamental weakness in the model is confirmed in the May 2003 memorandum by Dr Eugene van Vuuren¹⁵ (which General Rabie states best explains the rationale for the THRR),¹⁶ where it is stated that crimes which are committed but not reported are *"the dark figure of crime"* and result in a *"distorted picture"*, but until police are able to determine the *"dark*

13 Annexure "PM23" to the founding affidavit, pp of record 337 – 369.

14 Para 125.1, pp of record 50.

15 Annexure "LR5" pp of record 2107 – 2160.

16 Para 32, pp of record 1830.

figure of crime" at local station level at regular intervals, they will have to rely exclusively on reported crime levels.¹⁷ General Rabie attempts to gloss over this flaw in the THRR, stating simply that while under-reporting represents an ongoing challenge, SAPS has no way of knowing the extent of unreported crime and cannot reasonably account for it;¹⁸

5.12. Finally, SAPS representatives launch entirely unwarranted attacks on Ms Redpath's expertise. General Rabie denies that Ms Redpath is an expert on policing and dismisses her evidence as *"unworkable and unresponsive to the complexities of proper policing"*.¹⁹ General Makgato describes her report as valueless.²⁰ Ms Redpath will deal with the attack on her expertise in greater detail, but for present purposes it suffices to note that when she testified before the Khayelitsha Commission, senior counsel for SAPS in cross-examination: (i) stated that *"we're indebted to you for assisting and Brigadier Rabie is appreciative of the work you've done and takes seriously what you suggest"*;²¹ (ii) conceded that black and coloured areas are *"quite heavily"* under-resourced²² (which is the core of her evidence both before the Commission and in this Court); and (iii) stated that he took his hat off to her, as it

17 Annexure "LR5", paras 3.2 and 3.3. pp of record 2125 – 2126.

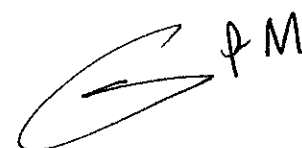
18 Para 193, pp of record 1882. This claim is incorrect, as is demonstrated in Ms Redpath's reply.

19 Para 18, pp of record 1825 – 1826.

20 Para 8, pp of record 2971 – 2972.

21 Annexure "JR4", pp of record. 798.

22 Annexure "JR4", pp of record. 805.

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appeared that for 20 years the [basis for the allocation of police resources] had not been questioned at all.²³

6. In order to contain the scope of this affidavit and avoid repetition, before replying *seriatim* to SAPS' answering affidavits, I shall set out a general response to their case consisting of the following:
- 6.1. a summary of the Applicants' case, which explains how it has been mischaracterised by SAPS;
 - 6.2. an answer to the points in limine raised by SAPS;
 - 6.3. a response to the defences raised by SAPS; and
 - 6.4. an outline of the issues which are not in dispute.

THE GENERAL RESPONSE

THE NATURE OF THE APPLICANTS' CASE

7. The answering affidavits appear to be based on a fundamental misunderstanding of the Applicants' case. It is therefore necessary to restate precisely what case the Applicants have brought, and to dispel some of the misunderstandings or mischaracterisations of that case that arise in the answering affidavits.
8. Simply stated, the Applicants case is as follows:
- 8.1. It is the primary responsibility of SAPS to allocate police resources. In doing so, it must consider a number of factors, including reported crime, population, and other factors that impact on the police resources required to fulfil their constitutional obligations. That is a

²³ Annexure "JR4", pp of record 817.



complicated process that requires SAPS to do the best it can with limited resources. It is not for the Applicants or the Courts to dictate to SAPS exactly how it should perform this task.

- 8.2. However, the results of the allocation may not be unfairly discriminatory on the grounds of race or poverty. SAPS is not lawfully permitted to allocate its human resources in a manner that results in poor, black communities being systematically under-resourced in comparison to rich, white communities. It may not do so intentionally, and it may not do so unintentionally.
- 8.3. The results of the allocation process may also not be irrational – they must respond to actual crime rates, and must allocate more resources to the policing of more serious crimes.
- 8.4. SAPS is obliged to redress apartheid era inequalities in the provision of policing services to black communities which are disadvantaged in many other respects, even prior to the allocation of police resources.
- 8.5. The reality of life in Cape Town – as in most of South Africa – is that serious violent crime is concentrated in areas that are predominantly poor and black. One would expect that those areas would have the highest concentration of police resources as they bear the greatest burden of serious and violent crime. This is not the case.
- 8.6. The Applicants' statistical evidence shows that the allocation of police resources in the Western Cape is unfairly skewed in favour of rich, white communities and against poor, black communities.

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The Applicants also presented statistical evidence showing that those areas with the higher rates of murder (and therefore higher actual rates of other serious, violent crimes) have the lowest police: population ratios. This statistical evidence is also not contested.

8.7. The only conclusion that can be drawn is that the allocation of police resources is both irrational and unfairly discriminatory (on the basis of race and poverty):

8.7.1 It is irrational because it makes no sense to allocate fewer resources to areas that have a greater need for policing.

8.7.2 It is unfairly discriminatory because it imposes a disparate impact on poor, black communities compared to rich, white communities.

8.8. These irrational and discriminatory results flow both from flaws in the THRR and the failure of the Provincial Commissioner to exercise his powers under s 12(3) of the SAPS Act.

8.9. A similar discriminatory and irrational allocation of police resources is apparent in KwaZulu-Natal, the only other province for which data was available to the Applicants when they launched the application.

8.10. SAPS has been aware of this problem at least since the findings of the Khayelitsha Commission in August 2014, yet it has failed to take systemic action to remedy it. It continues to defend the present discriminatory system. It also does not appreciate its obligation to redress apartheid era inequalities in the provision of

policing services. For that reason, it is appropriate for this Court to not only require SAPS to remedy the discrimination, but to supervise that process.

9. That is the Applicants' case in a nutshell. But it is also important to be clear about what the Applicants' case is not. SAPS repeatedly misunderstands or misrepresents the Applicants' case. It is therefore necessary to clarify what is not part of the Applicants' case:

9.1. It is not the Applicants' case that *SAPS has intentionally discriminated on the basis of race or poverty* (Rabie para 59). The Applicants have never alleged that SAPS is actively biased against black people or poor people. However, whatever its intention, the existing system has irrational and discriminatory results. The fact that SAPS did not intend those results is no defence to a claim of indirect discrimination.

9.2. It is not the Applicants' case that *SAPS should only focus on policing murder* (eg. Rabie at para 54). Of course SAPS is required to police all crimes. The Applicants have never suggested otherwise. The Applicants rely on murder because it is a better indicator of the actual crime rate rather than the reported crime rate. SAPS fails to take into account the difficulties of under-reporting and therefore do not base allocations on the actual rates of serious violent crime (of which the murder rate is the best predictor).

9.3. The Applicants are not propagating a racially driven allocation mechanism (Rabie para 215) and it is not our case that the SAPS

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must take into account race and class for purposes of allocating police resources (Voskuil para 153). We do not contend that SAPS must directly consider race or class when it allocates resources. Nor do the Applicants contend that wealthy white areas should not have a minimum of policing services (Rabie para 186). In summary terms, we argue that: SAPS cannot ignore the difficulties faced in policing poor, black areas; the outcome of the allocation process must be rationally connected to actual crime; and it must not be unfairly discriminatory. That can be achieved without directly taking race into account.

- 9.4. It is not the Applicants' case that SAPS' finite pool of resources must necessarily be increased (Nelson paras 7 - 9).
- 9.5. It is not the Applicants' case that *SAPS should adopt the model proposed by Redpath* (Rabie paras 23 - 24). Nor is it the Applicants' case that police resources should be distributed solely according to population (Voskuil para 77). Nor is it the Applicants' case that they have identified the single flaw in the THRR. The model offered by Ms Redpath was at the request of the Commission to demonstrate how a simple allocation based on population would alter the existing allocation and avoid the irrational and discriminatory effects of the current model. It is not for the Applicants to devise a system of allocation for SAPS; that is SAPS' task. The Applicants need only show that the current system is irrational and/or unfairly discriminatory.

A handwritten signature in black ink, consisting of a stylized, cursive letter 'G' followed by the initials 'P.M.'.

10. Having outlined what the Applicants' case is, and what it is not, I turn to consider the points in limine raised by SAPS.

POINTS IN LIMINE

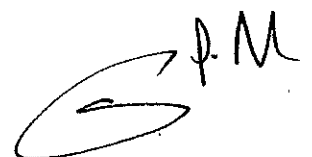
11. In the affidavit of Brigadier Voskuil (paras 21- 52) SAPS raises various points in limine, namely:

- 11.1. The application is premature;
- 11.2. The Applicants incorrectly assume the findings of the Commission are binding;
- 11.3. The application is based on outdated material;
- 11.4. The relief sought is polycentric;
- 11.5. The applicants have not made out a case in terms of the Equality Act;
- 11.6. This Court lacks jurisdiction;
- 11.7. The applicants lack standing to challenge the THRR; and
- 11.8. The Nyanga CPF has not complied with the court order for its admission.

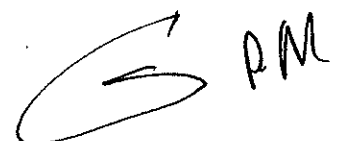
12. None of these points has any merit. Indeed, the majority are not points *in limine*, but substantive arguments. Nonetheless, I deal with each in turn.

Prematurity and the Khayelitsha Commission

13. The first two arguments are inter-related and are misguided for the same reason. SAPS' position rests on the assumption that the Applicants believe "*the findings of the Commission are indeed binding*" (Voskuil at para 25). On that basis, it argues:



- 13.1. The Commission's recommendation afforded SAPS three years to overhaul the allocation process. Those three years have not yet expired. Therefore the application is premature.
- 13.2. The findings of the Commission are not binding, but are merely recommendations.
14. The assumption underlying these complaints is incorrect. The Applicants agree that the findings and recommendations of the Commission are not binding on SAPS. Nothing in the founding papers suggests otherwise.
15. The Applicants rely on the Commission because:
- 15.1. That is where the irrational and discriminatory allocation of police resources was first raised;
- 15.2. The Commission's findings (chaired by a former Constitutional Court Justice) are highly persuasive and support the constitutional analysis advanced by the Applicants; and
- 15.3. There is significant evidence that was presented before the Commission that is an important part of the Applicants' case.
16. As the Applicants do not contend that the Commission's findings are binding, they were not obliged to wait for the three-year period to expire before bringing this application.
17. In any event, the Commission's recommendation was that *once the new allocation method is determined, it should be phased in over a period of time that should not exceed three years*. The basis for the allocation of police personnel remains the THRR model, which has not changed in any material fashion since General Rabie gave evidence before the Commission. As SAPS has not changed this model, the three year period is not applicable.



18. Accordingly, these two points *in limine* must be dismissed.

Based on Outdated Material

19. SAPS complains that the Applicants rely on the evidence before the Commission which is outdated. This then extends to an argument that “[i]t is unfair, and indeed unacceptable, to request this court to grant relief on historic data which is not only critically outdated but to the applicants’ knowledge have been overtaken by subsequent developments”. Brigadier Voskuil then accuses the Applicants of “misleading” the court and describes the application as “abusive of this court’s process” (paras 29-30).

20. These allegations are both unfortunate and unwarranted. I respond to them as follows:

20.1. This is not a point *in limine*, but an argument as to why the application should fail on its merits. I deal in full with the new evidence that SAPS has advanced below and explain why it strengthens the Applicants’ case and demonstrates why this litigation was necessary to address SAPS’ discriminatory allocation practices.

20.2. The Applicants relied on the most up-to-date evidence available to them. Brigadier Voskuil appears to be unaware that the Applicants and their partner organisations have repeatedly sought updated information about police resource allocation from SAPS:

20.2.1 On 3 August 2015 SJC and its companion organisation, Ndifuna Ukwazi (NU), wrote to the Minister of Police requesting police: population data for all police stations

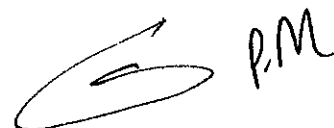
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across the country. A copy of this letter is attached to the Founding Affidavit marked PM19. The Minister failed to respond to it.

20.2.2 On 14 September 2015 NU filed a request in terms of the Promotion of Access to Information Act 2 of 2000 (**PAIA**) for the disclosure of, amongst other things, the human resource allocation data for all police stations across the country. I attach a copy of that request marked **PM34**. In SAPS's response, dated 9 October 2015, it refused access to information about, amongst other things: (i) the number of operational personnel and police to population ratios, for each precinct. I attach a copy of the response marked **PM35**. An internal appeal to the Minister was also refused on 20 January 2016. I attach the appeal and the refusal marked **PM36** and **PM37** respectively.

20.3. It is therefore disingenuous for SAPS to criticise the Applicants for relying on older statistics when they refused to provide the new statistics when requested to do so. The Applicants relied on the best information available to them. That is neither "*misleading*" nor "*abusive*".

20.4. The new information provided in Brigadier Voskuil's affidavit does not alter the analysis. As Ms Redpath demonstrates in her replying affidavit, even taking into account the most recent allocations in the Western Cape, the distribution of police resources remains skewed against poor, black people and in favour of rich, white people. In



addition, the allocations in terms of s 12(3) do not affect the systemic problems with the THRR.

Polycentric Nature and Failure to Make out a Case

21. SAPS argues that: (i) the Applicants have failed to make out a case of discrimination; and (ii) the relief they seek violates the separation of powers (Voskuil paras 34-8, 81).

These are not grounds *in limine*. They are substantive defences to the relief sought. With regard to the former, I pointed out above in the section entitled *Introduction* that Generals Rabie (para 71) and Makgato (paras 59 – 60) adopt contradictory positions on whether the allocation process provides more police officers to stations serving rich white areas than those serving poor black communities. In any event, while SAPS attempts to contradict many aspects of Ms Redpath's evidence, it does not dispute her calculations which show that police: population ratios are lower in predominantly black townships than in wealthy (historically) white areas. In the circumstances, its claim that the Applicants have failed to make out a case of discrimination cannot be sustained.

With regard to SAPS' second contention, it simply repeats a substantive defence raised by General Rabie. I deal with it below under the heading *The Separation of Powers*.


Jurisdiction

22. SAPS argues that, because some of the relief sought would have a national impact, this Court lacks jurisdiction (paras 39-40).

23. SAPS does not dispute that the Equality Court has jurisdiction, merely that this particular Equality Court – sitting in the Western Cape High Court – does not have jurisdiction. The argument is unfounded.
24. The Applicants seek two forms of relief. The one part applies nationally, the other applies only in the Western Cape. Clearly this Court has jurisdiction to grant the Western Cape specific relief.
25. Furthermore, the Applicants act not only in their own interest, but also in a representative capacity: (i) on behalf of their members; and (ii) in the public interest. Our right to represent our members (whom, in the case of Equal Education are spread across five different provinces) and the general public, is not disputed by SAPS.
26. It is not clear which Court would be better placed to grant the national relief. There is no principle that one Equality Court is entitled to grant relief with a national impact while other Equality Courts are not. All Equality Courts can grant relief with a national impact if their jurisdiction is otherwise engaged. The jurisdiction of this Court is engaged, amongst other things, because all the relief the Applicants seek has an impact on the general public, whom we represent, and our members, who are spread across at least five provinces. The fact that some of the relief sought will affect people in other provinces accordingly cannot deny this Court jurisdiction to determine a matter which the interests of justice overwhelmingly favour it deciding.

Standing

27. I have noted above that SAPS' position on standing is contradictory. I do not comprehend on what basis SAPS challenges the Applicants' standing to challenge the THRR. The complaint (Voskuil paras 41-5) appears to be that

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the Applicants lack standing because (it is alleged): Ms Redpath is not an expert in policing; we rely on outdated statistics; we do not consider budget constraints; and we have not sufficiently considered the variables in the THRR.

28. There are two difficulties in relying on these arguments to challenge the Applicants standing:

28.1. They go to the merits of the matter, not the Applicants standing to approach this Court for relief; and

28.2. For the reasons which I advance below, these complaints are either wrong or irrelevant to the case the Applicants have brought.

29. It is important to stress that s 20(1) of the Equality Act has extremely wide standing provisions. In terms of s 20(1)(d), any person acting in the public interest may approach this Court for relief. And in terms of ss 20(1)(c) and (e), a person may approach this Court on behalf of its members, or on behalf of a class of persons. That is precisely what SJC, EE and the Nyanga CPF have done. Whatever the merits of the Applicants' complaint, there can be no question about their standing to bring this challenge, both in respect of the Western Cape and the national relief.

SAPS' DEFENCES


30. SAPS never clearly sets out all its substantive defences in a single affidavit. The Applicants have therefore been forced to deduce the defences from the multiple affidavits filed. I attempt to address each defence, but to the extent that any argument is not specifically addressed here, it will be dealt with in the *seriatim* response.

31. In summary, SAPS advances five defences:

- 31.1. The Provincial Commissioner has recently increased the allocation of police resources to the most severely under-resourced stations in the Western Cape;
- 31.2. Additional police resources make no difference to crime rates, which are caused by socio-economic factors over which SAPS has no control;
- 31.3. Any apparent discrimination in resource allocation is not a result of SAPS' conduct, but a result of apartheid spatial planning;
- 31.4. The allocation process is not fixed or rigid, and is open to amendment; and
- 31.5. The relief sought is a violation of the separation of powers.
32. It is important to note that despite raising numerous defences, SAPS does not question the core factual elements of the Applicants' case. It does not allege that Ms Redpath's statistical calculations are incorrect. It does not dispute that – on the data she analysed – there is a negative correlation between the murder rate and police allocations.

The Recent Allocation of Police Resources

33. Brigadier Voskuil states that the Western Cape Provincial Commissioner recently exercised his powers to increase the allocation of police resources to stations with high crime rates. Read with the earlier complaint that the Applicants rely on outdated data, the argument appears to be that, even if there was a problem in 2014 when the Commission released its report, or in 2016 when this litigation was launched, there is no longer a problem.

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34. As the Applicants challenge both the THRR model and the actual allocations, this defence is a double-edged sword – it amounts to an admission that the THRR is deficient in allocating resources, in an attempt to defend the actual allocations (through reliance on the s 12(3) powers of Provincial Commissioners). This results in an ambivalence towards the THRR allocations underlying the SAPS’ response and its position with regard to this model has shifted markedly since it presented evidence to the Commission:

34.1. General Lamoer, who in 2014 was the Western Cape Provincial Commissioner, stated in his evidence to the Commission that he had no discretion to deviate from the THRR in the allocation of permanent posts. One can infer from his evidence that no Provincial Commissioner re-allocations in terms of s 12(3) took place, at least in the Western Cape, prior to 2014;

34.2. General Rabie²⁴ differed from General Lamoer with regard to the s 12(3) powers in his evidence before the Commission, but pointed out that the Provincial Commissioners’ powers were limited in that: (i) the command structure created by the THRR was of a generic, fixed nature and any s 12(3) allocations which deviated from this overall structure would constitute irregular expenditure (Annexure PM25, pp. 477 – 479); (ii) it was not possible to fund a police station to a higher level than it had been graded by the THRR (Annexure PM25, p. 407); (iii) the THRR grading of posts and span of control could not be exceeded (Annexure PM25, p. 409-410); and (iv) although the Provincial Commissioner did have a discretion

24 In 2014 he was a Brigadier.

to increase the production core of a station to 100% of its theoretical (THRR) allocation, he stressed that once the Provincial Commissioner started exercising such powers *"you start compromising the principle of equal distribution, because there are other stations that you are now going to have to staff at a lower level to compensate for that 100% level"* and suggested that this could compromise constitutional rights of equal access to services (Annexure PM25, pp. 410 - 411);

34.3. In June 2015, almost a year after the Commission had released its report, a letter from the (then) National Commissioner to the Premier of the Western Cape relegated the Provincial Commissioners to a subordinate role in the determination of employee appointments, stating that *"the National Commissioner and the Provincial Commissioner, to a certain extent, pronounce based on predetermined financial constraints"* (emphasis added, Annexure PM23, p. 354);

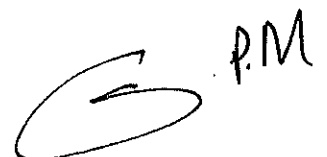
34.4. In its evidence before this Court, SAPS shifted its position. Brigadier Voskuil states in his affidavit that once the National Commissioner has allocated police resources to the provinces, the Provincial Commissioners are responsible for the distribution of those resources to ensure effective policing within the provinces (para 87) and they have an unfettered discretion to do this in terms of s 12(3) (para 178). The THRR is no more than *"a useful tool"* for assessing human resource requirements (para 159);

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- 34.5. General Rabie in his affidavit contradicts his evidence to the Commission, stating that: (i) the Applicants' analysis is based on a fundamental misconception that the allocation of police resources is done through the national office, rather than the provincial offices (paras 55 – 57); and (ii) the role of the National Commissioner in formulating the THRR *"is to provide strategic guidance but in no way fetters or interferes with a Provincial Commissioner's determination of how the allocated resources are deployed in the police stations"* (para 78; emphasis added). General Rabie's affidavit on this point is, in light of his evidence to the Commission concerning the constraints imposed by the THRR on Provincial Commissioners, demonstrably wrong.
35. In short, SAPS has sought to minimise the role of the THRR in the allocation process as its position has evolved and it has focused instead on the powers of the Provincial Commissioners. It seems clear that it has done this because of the problems it faces in defending the THRR allocations. I turn now to consider the actual allocations made under s 12(3).
36. After the Commission released its recommendations on 25 August 2014, in the period between September 2015 and November 2015 the Applicants attempted to engage SAPS about the discriminatory manner in which it allocated policing resources. After these attempts, which are spelt out in my founding affidavit (paras 65 – 69), proved fruitless, this application was launched in March 2016.

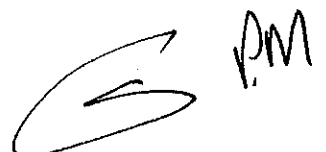


37. SAPS has not provided any evidence that, prior to March 2016, the Provincial Commissioners in the Western Cape or any of the other provinces, ever made use of their powers under s 12(3) to adjust THRR allocations.
38. SAPS was required, in terms of the order of this Court of 5 September 2016, to file its answering affidavits by 30 November 2016. It only filed its primary answering affidavits (deposed to by Generals Rabie, Sekhukhune and Brand) on 17 February 2017, after failing to comply with undertakings and Court orders to file its affidavits earlier, and only on 13 March 2017 did it file its affidavits by Brigadier Voskuil and Provincial Commissioner Jula dealing with the s 12(3) allocations made in the Western Cape between June 2016 and January 2017. Although it is not material to the outcome of this application – and the Applicants accordingly did not insist on SAPS filing an application for condonation explaining its tardiness - the delay in SAPS filing its answering affidavits could well have been influenced by SAPS' wish to rely on the allocations made in January 2017.
39. The allocations made in the Western Cape under s 12(3) are dealt with primarily in Brigadier Voskuil's affidavit. He states that the first phase of "*the policing approach which is currently being implemented in the Western Cape Province*" started on 16 June 2016 (para 91). Brigadier Voskuil does not tell us when, or by whom, this "*policing approach*" was adopted or what considerations gave rise to it. In the absence of any such information, one can only infer that it was prompted by the launching of this application in March 2016.
40. Brigadier Voskuil states that Phase 1 of this new policing approach started on 16 June 2016 and involved the Provincial Commissioner re-deploying existing

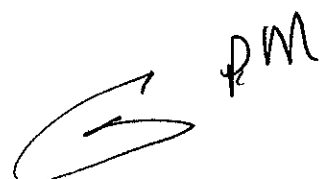
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- specialist human resource capacities to three police stations with high crime rates “where they were most needed” in terms of his s 12(3) powers (para 91).
41. Phase 2 commenced in August 2016 and entailed the deployment of 790 permanent members to the 30 police stations responsible for approximately 52% of the reported serious crime in the province. This deployment was pursuant to the graduation of 1269 entry level constables from Police College. The evidence before the Commission indicated that such newly trained constables are of limited value until they have gained sufficient on-the-job experience.²⁵ An additional “temporary stabilisation capacity” of 425 visible policing and specialised officers was also deployed to 10 identified high crime stations, including Khayelitsha, Gugulethu and Nyanga (paras 91 – 93).
42. Phase 3 commenced in January 2017 and involved further resourcing the stations and strengthening the stabilisation capacity, and extended the project to a second tranche of 30 police stations, which account for 28% of reported serious crime in the province (Brigadier Voskuil, para 94).
43. Brigadier Voskuil claims that there have been a multiplicity of changes in policing since the Commission and it would be “unacceptable” for the Applicants to request relief on the basis of data that is critically outdated and have been overtaken by subsequent events (para 29).


25 Evidence was led at the Commission on factors that negatively impact on the calibre of young recruits, which can impair the quality of candidates selected; including: that numeracy and literacy standards of new recruits are “below average”; and SAPS’ willingness to let recruits retake the entrance up to eight times means that not only the strongest recruits are accepted into SAPS. (Chapter 12 of the Khayelitsha Commission Report, paras 169 - 170, Dr Mulder van Eyk’s expert report on training) Evidence was also led that the training of new recruits does not prepare them to be job ready as one of the problems of the SAPS training systems is that many of the trainers have very little operational experience, thus providing theoretical and not practical training. Also, the training materials are often voluminous, which presents a particular challenge for persons with below average literacy standards. (Chapter 12 of the Khayelitsha Commission Report, para 172, Dr Mulder van Eyk’s expert report on training).

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44. However, with regard to staff allocations, it is apparent from Annexure LR3 to General Rabie's affidavit that there have been no significant changes to the THRR model since the Commission heard evidence in 2014. In addition, in his evidence to the Commission, General Rabie stated that the basic principles of the model had remained the same since 2002 (Annexure "PM25", transcript page 5300). The only evidence of any material changes in the allocation of police resources since the time of the Commission is contained in Brigadier Voskuil's affidavit and those changes, made in terms of s 12(3) powers, date from June 2016, after this application was launched, and are limited to the Western Cape.
45. Brigadier Voskuil emphasises that the Provincial Commissioner takes a number of considerations into account in making distributions in terms of s 12(3), including "*crime patterns and crime trends, crime rates, situational factors, the generators of crime, the need for force multipliers, the setting up of additional service points (satellite stations) the need to further capacitate specialised units, develop new units, etc*" (para 122). He states further that the Provincial Commissioner has used his s 12(3) powers "*in a rational, reasonable and equitable manner to address crime in this province*" (para 185) and this has resulted in "*significant improvements in the deployment of resources to areas with high crime rates*" (para 134) (emphasis added).
46. Brigadier Voskuil's implied admission that the THRR is deficient in deploying resources to areas with high crime rates, the relegation of the THRR to "*a useful tool*" and the reliance on "*reasonable and equitable*" allocations made under s 12(3) forms the basis of SAPS' defence to this application.
47. The Applicants' have three responses to this defence.

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48. First, a close analysis of **PLV2**, the document setting out the allocations made in terms of the "*new policing approach*", demonstrates that the allocation of resources have largely remained the same over time. It was only following the fresh allocation of further resources in January 2017 that there was some relative improvement. However, even with the additional allocation of resources in 2017, those stations which have high actual crime rates and poor, Black populations are still comparatively under-resourced.
49. Second, SAPS has been aware of this problem since at least 2014. Yet meaningful steps were only taken in January 2017 – shortly before the long-delayed answering affidavits were filed – to redress the discriminatory allocation of resources. It is difficult to avoid the conclusion that the re-allocation was a direct result of this litigation. Far from absolving SAPS of wrongdoing, the allocations made in terms of the "*new approach*" constitute a tacit admission that the default position is unconstitutional and unlawful.
50. Third, even if the recent re-allocation cured the irrational and discriminatory allocation of resources in the Western Cape (which it does not), it could only ever be a partial answer to the Applicants' complaint. The Applicants have attacked both the theoretical allocation of resources in terms of the THRR, and the actual allocation of resources following the budget reduction steps taken in terms of s 12(3). I have pointed out above that SAPS in its answering affidavits provides no evidence of any allocations made under s 12(3) outside the Western Cape. Ms Redpath in her affidavit filed together with the founding papers (para 41), pointed out that although legislation permits a Provincial Commissioner to make adjustments within the provincial allocation, the power is seldom exercised. General Makgato responded to

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this statement (at para 93) by stating that it is correct that the legislation permits the Provincial Commissioner to make adjustments, but *"I am not in a position to comment on how frequently this done"* and the matter would be dealt with by a deponent from the office of the Provincial Commissioner. It is noteworthy that General Makgato does not deny the allegation. However, his response is both evasive and hardly credible – if the head of Organisational Development in SAPS is not in a position to inform this Court how often the s 12(3) powers are exercised, then one must ask who would be? Brigadier Voskuil also does not deal with para 41 of Ms Redpath's affidavit in his response to her (paras 191 – 192).

51. I can only conclude from the evidence before this Court that Provincial Commissioners outside the Western Cape seldom, if ever, exercise their s 12(3) powers to re-allocate SAPS personnel.
52. In any event, given the challenge to both the theoretical and the actual allocation of resources, the movement of personnel in terms of s 12(3) cannot cure the discrimination inherent in the theoretical allocation under the THRR, and the reduced budget allocation.

Additional Resources Make No Difference

53. Somewhat remarkably, SAPS claims that additional police resources will make no difference to crime rates in poor, Black areas. For example, General Rabie states:

"The difficulty with the approach of the applicants in this matter is to assume that when more police resources are deployed in black

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townships, that would necessarily result in a reduction of crime rate. ... [T]he socio-economic and political instability caused by the lack of economic opportunities, proper human settlements with adequate amenities of life cannot be solved by a deployment of a large number of police.” (para 73)

54. Elsewhere, General Rabie states:

“police allocations have nothing to do with the increase in the crime of murder. ... While the statistics show that the crime of murder is high, it is also an indicator of the environmental factors responsible for the generation of crime. The solution to this problem is not police allocation but a multi-disciplinary approach involving various stakeholders, including the community members affected by these crimes.” (para 100)

55. Put in its bluntest terms, the argument appears to be that there is no disadvantage suffered as a result of an unequal distribution of resources because an equal distribution would make no difference to crime. In General Rabie’s words: *“I do not accept that ... a higher allocation of police resources will reduce crime.” (para 167)*


56. This line of reasoning is problematic on several counts.

57. First, it is concerning that SAPS adopts this attitude, which is fundamentally irrational. If additional police personnel do not affect crime, it is difficult to understand why SAPS bothers engaging in the enormously complex THRR process to determine staff allocations. It is also tantamount to an admission that SAPS is failing in its duty to keep people safe – if the presence or absence of police officers does not affect crime rates (and by implication

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people's safety), one must question why society takes the trouble to deploy them in our communities.

58. Second, General Rabie's claim is contradicted by his evidence before the Khayelitsha Commission, where in response to a suggestion by the Commission that there should be a cut back on visible policing and the number of detectives should be increased, he stated that the moment you weaken visible policing you can expect an increase in crime levels because if you deplete the capacity to prevent crime from happening "*you can expect an increase in crime immediately*" (Annexure "PM25", record p. 414). General's Rabie's far-fetched claim that a higher allocation of police resources will not reduce crime is accordingly irreconcilable with his evidence before the Commission.
59. Third, as Ms Redpath shows in her affidavit filed as part of these replying papers, the claim is wrong as a matter of fact. Increased police resources do result in a decrease in crime. It is SAPS' basic assumption that is mistaken – more resources do affect crime rates.
60. Fourth, General Rabie may well be correct in contending that the causes of crime are multi-faceted, but this is no defence to the Applicants' claim, as is shown below.
61. Fifth, SAPS' does not dispute that appropriate staffing levels are a necessary (but not a sufficient) condition for effective and efficient policing (Rabie, para 120). General Rabie accepts that the lack of police resources may compound the high crime levels experienced in communities across South Africa (para 85) and lead to inefficiencies in policing (para 119). If police stations in black and poor communities are under-staffed, they will not be able effectively

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provide the policing services which they are constitutionally and statutorily obliged to deliver.

Apartheid spatial planning

62. A recurrent theme in the SAPS' affidavits is articulated by General Rabie as follows:

62.1. The lack of safety in black townships is not due to the discriminatory allocation of police resources, but is a result of crime generators such as inadequate housing, lack of employment, poor schooling and lack of amenities such as health care facilities and entertainment (para 72); and

62.2. These problems can only be resolved by a variety of stakeholders responsible for the overall development of these communities, by means of a multi-disciplinary, multi-stakeholder approach (para 75).

63. There are two answers to General Rabie's argument. First, even if he is right about the causes of crime in black townships, it does not excuse SAPS's allocation of a higher proportion of police officers to low-crime, predominantly white, areas than townships which suffer from substantially higher rates of crime. SAPS' policy should allocate resources to where they are most needed.

64. Second, while the Applicants generally would endorse the adoption of a multi-disciplinary approach to the development of black townships, SAPS stands on a different footing to other stake-holders in that it alone bears the duty, in terms of s 205(3) of the Constitution "to protect and secure the inhabitants of

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the Republic and their property". SAPS is responsible for ensuring the safety of people living in crime ravaged townships and it cannot abdicate this responsibility on the grounds that a range of role-players can, and should, assist in addressing the causes of crime.

The allocation process is not inflexible

65. The answering affidavits repeatedly emphasise that the allocation process is not fixed or rigid, and is open to amendment. General Makgato states that the THRR has been introduced in four phases since 1998 (para 23) and that it is currently in phase three, the implementation stage. He admits (para 64) that historically infrastructure development for public services and other economic activities are in areas where they attract more policing activities *"and as such a perception of discrimination arises"*, but phase four (the monitoring and evaluation stage) is likely to identify these disparities and *"develop a mechanism to respond"*.
66. The possibility of SAPS identifying and addressing the discriminatory impact of its allocation model in the future does not constitute a defence to the claim. The shortcomings of this model have already been identified by the Commission and the Applicants in their affidavits. The priority now is for the discriminatory impact of the THRR model to be addressed without further delay.

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Separation of powers

67. General Rabie (paras 66 – 67) argues that the relief sought infringes the separation of powers, as the allocation of resources is a policy driven, polycentric and technical exercise. This relates to the misconception that the Applicants seek to have police resources allocated in accordance with Ms Redpath's model.
68. I re-iterate that the Applicants do not seek to prescribe to SAPS how it should allocate its resources, but limit their relief to orders directing SAPS not to do so in a manner which is not irrational or unfairly discriminatory. If we are correct in this regard, this Court is constitutionally obliged to grant relief. General Rabie implicitly acknowledges this in his affidavit by accepting that if the allocation process does discriminate unfairly, including on the basis of race and socio-economic status, it is irrational (para 12). If this is found to be the case, it will then be up to SAPS to establish how it should adjust its allocations so as to comply with this Court's order and, while Ms Redpath's evidence could be of considerable assistance in this regard, SAPS would be quite within its rights to develop a different means of complying with the order.
69. SAPS also argues that it is not appropriate to do revise the allocation process under judicial supervision.²⁶ Its position is that a judicial supervision order will violate the separation of powers doctrine, fails to take into account that one of the powers of this Court is to issue a directive requiring a party to make regular progress reports regarding the implementation of its order. Given SAPS' disregard for the Commission's recommendation that it urgently review

26 Paras 89.1., 89.3. Rabie answering affidavit pp of record 1854.


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its allocation model, it will be difficult for it to argue that this Court should not exercise its discretion to grant such relief in order to ensure compliance with its order.

MATTERS NOT IN DISPUTE

70. It is helpful, before responding *seriatim* to SAPS' affidavits, to summarise briefly the issues which are not in dispute in this application. The most important of these are:

- 70.1. Ms Redpath's calculations, upon which the founding papers are based;
- 70.2. The racial composition of township and "white" areas;
- 70.3. The THRR is, in substance, unchanged since the Khayelitsha Commission;
- 70.4. SAPS is under a duty to protect all South Africans, particularly the most vulnerable;
- 70.5. In principle most policing resources should be allocated to areas in which crime is the highest;
- 70.6. Policing is more difficult in black townships, which still suffer from systemic discrimination;
- 70.7. The quality of policing in black townships is inferior to that in white areas;
- 70.8. The THRR is race neutral and does not distinguish on the basis of race or class; and

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70.9. The Constitution and the Equality Act require the reversal of apartheid era inequalities in the provision of policing services.

71. I shall deal with each of these issues in turn.

Ms Redpath's calculations

72. While SAPS questions Ms Redpath's expertise in relation to policing, particularly with regard to organisational development within SAPS, and it contends that the data on which her calculations are based are outdated, it does not question the correctness of the calculations which form the basis for her evidence (nor do they challenge the correctness of the calculations which she presented to the Khayelitsha Commission). I have pointed out above that when Ms Redpath gave evidence before the Commission, SAPS conceded that black and coloured areas were under-resourced, and the Commission subsequently made findings to this effect.

73. While not contesting Ms Redpath's calculations, SAPS seeks to avoid the conclusion which she draws from them, namely unfair discrimination on the basis of race and poverty in the allocation of policing resources. The Applicants contend that SAPS' attempt to do this is untenable, for the reasons reflected in this affidavit.

Racial composition of communities

74. SAPS does not place the racial composition of the communities analysed by Ms Redpath in dispute (Rabie, para 165).

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THRR unchanged

75. In her supporting affidavit filed together with this reply, Ms Redpath explains that the THRR formula has, at least in substance, remained unchanged since 2002.

Duty to the vulnerable


76. It is common cause that SAPS has an obligation to protect the rights of all people and in particular the vulnerable (Rabie, para 104).

Higher deployments to high crime areas

77. SAPS accepts that, in principle, there should be higher levels of police deployments to areas where there are high levels of crime (Rabie, paras 144 – 145).

Policing is more difficult in black townships

78. SAPS agrees that there is a lack of safety in black townships, but attributes this to socio-economic factors such as under-development and inadequate housing (Rabie, para 72). Conditions such as over-crowding, lack of infrastructure and employment opportunities add to the burden of policing in black areas (Rabie, para 77). Because of such factors, policing in poor areas

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poses "*unique and difficult problems*" (Rabie, para 159). SAPS also describes policing in these areas as "complex" (Voskuil, para 149 and Makgato, para 150).

79. SAPS also accepts that areas with lower than average police resources are those in which police stations were built after 1994 in response to increases in informal settlements and government housing developments (Makgato, para 61).

Black communities receive inferior policing

80. It is common cause that black communities receive inferior policing services (Rabie, para 220). While SAPS attributes the disparity to "*the standard of living black communities are exposed to*" rather than to the allocation of police resources, it does not dispute the disparity itself.

The THRR is race neutral

81. The THRR is a technology based model for determining the minimum number and level of posts for police stations given the minimum standards (Makgato, para 25). SAPS claims that it allocates resources on a racially neutral basis (Rabie, para 230).

Obligation to reverse apartheid inequalities

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82. Section 9(2) of the Constitution and the Equality Act oblige SAPS to eradicate apartheid era social and economic inequalities, particularly those that are systemic in nature. Section 7(d) of the Equality Act explicitly prohibits the continued provision of inferior services to a racial group compared to another racial group.
83. The statement (in para 154 of the founding affidavit) that the Constitution and the Equality Act require SAPS to reverse apartheid inequalities, is not dealt with by General Rabie (para 211) or SAPS' other deponents (see Brigadier Voskuil, paras 174 – 177). I submit that it is apparent from the issues which are not in dispute, summarised above, that SAPS has made no attempt to reverse apartheid era disparities in the provision of policing services and, in consequence, it has no defence to this application.


SERATIUM RESPONSE TO THE AFFIDAVITS FILED BY SAPS

84. Insofar as any averment made in the various answering affidavits filed by SAPS has not specifically been replied to or has not been disputed, but such averment is inconsistent with the Applicants' case, such averment should be construed as though denied. In order to avoid repetition, I shall not respond to allegations that have been dealt with previously. Legal submissions will be answered, to the extent necessary, in legal argument.

RESPONSE TO AFFIDAVIT OF MAJOR GENERAL RABIE

AD PARAS 1 - 2

85. The contents of these paragraphs are noted.

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AD PARA 3

86. This paragraph is denied to the extent that it does not correctly reflect the relief sought by the Applicants.

AD PARAS 4- 5

87. Save to point out that SAPS no longer seeks a referral to oral evidence and that the proposed structure differs from the table of contents (above paragraph one of the affidavit), the contents of these paragraphs are noted.

AD PARAS 6 - 11

88. The contents of these paragraphs shall be dealt with in legal argument, to the extent necessary.

AD PARA 12

89. I note the concession that a discriminatory allocation of police resources will be irrational. The further allegations in the paragraph are denied.

AD PARA 13

90. The Applicants' case is set out fully in our affidavits. The allegations in these paragraphs are denied to the extent that they do not accurately reflect what is stated in our affidavits. I shall deal with my experience with regard to policing below.

AD PARAS 14 – 16

91. The findings and recommendations of the Commission speak for themselves. The allegations in these paragraphs are denied insofar as they are inconsistent with those findings and recommendations.

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AD PARAS 17, 20

92. I refer to the paragraphs below that respond to the averments made by General Brand.

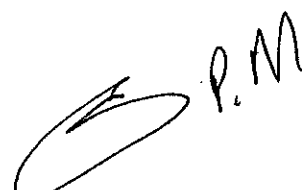
AD PARA 18

93. The allegations in this paragraph are denied for the reasons set out in Ms Redpath's affidavit.

94. I would however like to point out that the 2015/2016 Victims of Crime Survey, released by Statistics South Africa, shows that underreporting of crime remains a major issue. Only 'Murder' (95%), 'Car theft' (89,5%) and 'Car hijacking' (86,9%) had rates of reporting above 66%. This supports our case concerning under-reporting of crime and the use of murder of an indicator of crime (particularly serious, violent crime). A copy of this survey is annexed marked **PM38**.

AD PARA 19

95. General Rabie contradicts himself again with regard to the disclosure of the human resource allocation. In this paragraph he states that the information contained in the human resource allocation is sensitive and potentially detrimental to effective policing. In paragraph 190, however, he claims that the THRR is publicly available and anyone can request it directly from SAPS. I refer to what has been stated above to SJC and Ndifuna Ukwazi's attempts to obtain information concerning SAPS' resource allocations.

AD PARA 21

96. I re-iterate that SAPS has not presented evidence of any meaningful changes to the allocation process in recent years, other than those made after these proceedings were launched (and self-evidently in response to this application).

AD PARA 22

97. As described in the Founding affidavit,²⁷ the SJC and its partner organisations are working through the Safety and Justice campaign to improve policing in Khayelitsha and other similar areas. Allocation of resources is a critical component of policing, hence we took steps to engage with SAPS, without success. We therefore had to resort to approaching this Court for relief in efforts to improve safety and justice in Khayelitsha and other similar areas.

AD PARAS 23 - 43

98. Save to note that the “*information technology based solution*” as set out by General Rabie, and elaborated upon in Dr van Vuuren’s memorandum, attempts to take into account so many variables, each of which is given a small weighting of 5% or less, that it loses sight of the wood for the trees and produces inexplicable outcomes, the further allegations in these paragraphs are addressed by Ms. Redpath.

AD PARA 43 - 50

99. I refer to the concessions made by SAPS set out above under the heading *Matters not in Dispute* and in the section entitled *Apartheid spatial planning*. Although General Rabie argues that the allocation process is weighted in

²⁷ Paras 28 – 44, pp of record 20 – 24.

favour of "under-developed" areas, the small weighting assigned to factors such as the presence of informal settlements results in their being swamped in the vast range of other factors, the majority of which favour traditionally advantaged areas where greater economic activity takes place. Save to admit that the Applicants do not rely on intentional discrimination on the part of SAPS, the further allegations in these paragraphs are denied for the reasons set out in this affidavit, read together with our founding papers.

AD PARA 51

100. Annexure LR6 indicates how inappropriate the technocratic THRR model is in a South African context, which faces policing challenges fundamentally different to the United States. In order to be applied successfully in South Africa, considerably greater resources would have to be allocated to areas with high rates of violent crime, poor housing and infrastructure and a large number of people living in informal settlements.

AD PARAS 52 - 53

101. I deny the contents of these paragraphs for the reasons set out above under the heading *The Recent Allocation of Police Resources*.

AD PARAS 54 - 62

102. These paragraphs raise a number of "misconceptions" underpinning the Applicants' case. I will deal with each of these individually.

102.1. The use of murder as determinant of other violent crime. This paragraph also discusses the correlation between police officers



and population numbers. I refer Court to the affidavit of Ms. Redpath which addresses both these issues.

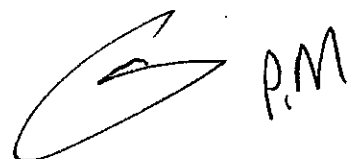
102.2. The issue relating to the allocation of police resources by both National and Provincial offices. I have dealt with this above under the heading *The Recent Allocation of Police Resources*.

102.3. General Rabie alleges that the third misconception informing this litigation is that the information technology-based solution is discriminatory on the grounds of race. It is not our submission that SAPS has “designed a system that intentionally discriminates against poor black people.” We do however maintain, “the THRR returns results that are patently discriminatory.”²⁸ General Rabie himself, in testimony given during the Commission of Inquiry, did not dispute the need to revise the maximum weighting assigned by the THRR of 5% for informal dwellings, even if 50% of the residents of a police station precinct live in informal settlements (Annexure “PM25”, pages 5291 – 5292 of the transcript).

102.4. General Rabie argues that the fourth misconception of the application is that the allocation process is discriminatory in its impact/application.²⁹ I have already pointed out that the weightings allocated for factors such as informal settlements are insufficient in a South African context.

102.5. General Rabie contends further that the fifth misconception underpinning the litigation is that allocation process is fixed, rigid

28 Founding Affidavit Para 118 – 119, pp of record 47 – 48.
29 Para 60 of General Rabie’s affidavit, pp of record 1843.



and inflexible model and the Applicants should have engaged with SAPS before embarking on litigation.

102.5.1. Before we approached Court for relief in this matter, we attempted to engage with SAPS on its allocation of resources, as is detailed in the founding affidavit in the section that is titled *Engagement with the Respondents following the Khayelitsha Commission*.³⁰ It is therefore misleading to suggest that we have not bothered to engage with SAPS before coming to Court. Its failure to engage with the Applicants on this issue led us to exercise our constitutional right to approach this Court.

102.5.2. The claim that the allocation model is flexible and constantly being revised is belied by the fact that no substantive changes have been made to it since the Commission's report in 2014, despite the concessions made by General Rabie in his evidence before the Commission. In addition, in his evidence to the Commission General Rabie stated that the basic principles of the model had remained the same since 2002 (Annexure "PM25", transcript page 5300). I refer further to what is stated above under the heading *The Recent Allocation of Police Resources* and Ms Redpath's evidence that the THRR has essentially remained unchanged since 2002.

30 Founding Affidavit. Para 60 – 69, pp of record 29 – 35.



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102.5.3. I have already addressed the basis upon which this application falls within the ambit of the Equality Act.

103. In contending that the recommendations of the Commission were not necessary in light of his evidence to it (para 62), General Rabie is attempting to distort the nature of his evidence, in which he was twice unable to defend the allocations produced by the THRR (at Annexure "PM25", transcript page 5382 and 5386, in the latter instance stating "*maybe there is a need for us to revisit the model in the sense that we must make provision for these unique issues that are sometimes very difficult to quantify and build into a model*"). In addition, senior counsel for SAPS conceded the force of Ms Redpath's evidence, as has been summarised above in the *Introduction* to this affidavit and stated that his instructions were that an engagement would take place between General Rabie and Ms Redpath once the Commission's recommendations had been placed before the Minister and National Commissioner (Annexure "JR4", transcript page 6795). Despite the approaches made by the Applicants to SAPS prior to launching this application, which I have already described, no such engagement took place.

104. With regard to the meeting of experts proposed after the application had been launched, SAPS have twice raised this issue:

104.1: On 21 June 2016, our attorney received an email from SAPS' attorney requesting that Ms. Redpath meet with General Rabie and Brigadier Voskuil in order to see the extent to which they can reach agreement on what issues are in dispute and what issues can be

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agreed. After taking instructions, our attorney advised that we were amenable to the meeting and we proposed the following:

- 104.1.1. In addition to Ms. Redpath, the Applicants should attend the meeting, together with our attorneys (who would be present only as observers).
- 104.1.2. Secondly, SAPS should, prior to the meeting, provide the Applicants with documents indicating the key developments in relation to personnel allocations undertaken.
- 104.1.3. Thirdly, minutes of the meeting should be taken and be made available for publication.

104.2. The letter sent to SAPS' attorney is attached marked **PM39**. I am advised that my attorney did not receive a response to this letter.

104.3. Almost six months later, on 5 December 2016 our attorneys once again received an email from SAPS's attorneys requesting that "*the parties, more specifically the experts, to address the issues raised in your papers.*" The email further stated that "We are of the view that this may result in the issues being significantly curtailed or the matter being resolved." I attach the email marked **PM40**

104.4. At the time SAPS was out of time with its answering affidavits and we were of the view that this might well be a delaying tactic. As there was a Court order (of 5 September 2016) in place regulating the conduct of the matter, our attorney reminded the SAPS of this and requested that they file their papers in terms of the order. Our

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attorney further noted that SAPS had also failed to respond substantively to our letter of 21 June 2016.

105. We were willing to meet with SAPS to discuss the issues raised in this case but we were not willing to meet secretly and have nothing come out of the meeting. We were also unwilling to meet without our attorneys in order to ensure that our rights were at all time protected by the presence of our legal representatives.
106. I wish to point out further that the potential for a meeting between experts is included in the current agreed timeline for the matter, which they have also failed to mention.
107. The further allegations in these paragraphs are denied.

AD PARA 63

108. I deny that both the Applicants and the Khayelitsha Commission failed to appreciate the flexibility of the allocation of resources. I emphasise again that our case is about the outcome of the allocation which favours police stations serving predominantly white rich areas over those serving predominantly black poor areas.

AD PARA 64

109. I refer to Ms Redpath's affidavit which deals with General Makgato's evidence.

AD PARA 65

110. I refer to what has been stated above under the heading *The Nature of the Applicants' Case*.

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AD PARAS 66 – 67

111. I refer to what has been stated above concerning the claim that the relief sought infringes the separation of powers.

AD PARA 69

112. General Rabie alleges that I have no personal knowledge of what I discuss in the founding affidavit and that I am not an expert.³¹ I joined the Social Justice Coalition in 2011 and started working on the Safety and Justice Campaign. In 2013 I was elected as the Secretary General of the First Applicant. I depose to my affidavit based on experiences that I have had as a person who works and lives in Khayelitsha and on the knowledge and experience of policing that I have acquired through my work for the SJC, especially on the Safety and Justice campaign, over the last six years.

AD PARAS 70 - 71

113. The legal points raised have been dealt with above. Insofar as General Rabie wishes to dispute the factual basis for the claim, he would need to deal with Ms Redpath's analysis, point out where the data she uses, or the calculations she makes, are wrong and why this leads to her drawing incorrect conclusions. This General Rabie manifestly does not do, and he accordingly establishes no grounds upon which to dispute the facts upon which the claim is based.

AD PARA 72 - 73

³¹ Para 69, pp of record 1846.



114. I refer to what has been stated above under the headings *Points in Limine* and *SAPS' Defences*. The suggestion that allocating more resources to high crime areas would lead to a police state is too far-fetched to warrant a response.

AD PARA 74

115. I note the concession that black communities are less safe, more at risk of crime and feel unsafe. I deny that this is not due to the lack of police resources allocated to these areas. Black communities feel unsafe because of high rates of violent crime. I appreciate that socio-economic factors contribute to high rates of crime, but to ignore the fact that crime is a very real and tangible part of life in black communities, that has to be addressed by SAPS, constitutes an abdication of its constitutional and statutory obligation to ensure the safety of such communities.

AD PARAS 75 -77

116. I note that General Rabie agrees that it is important to allocate resources to police stations with high levels of crime. I deny that General Lamoer was wrong in his admission that the allocation system was irrational. General Rabie himself was unable to defend the allocation system in his evidence to the Commission, as I have pointed out in response to para 62 of his affidavit, and I refer to the concessions made by SAPS' counsel (which have been dealt with above).

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117. The further allegations in these paragraphs are denied for reasons which been given above (notably in the sections entitled *Introduction* and *Apartheid Spatial Planning*).


AD PARAS 78 – 82

118. The claim that the Commission did not make any recommendations to guide the process of reviewing the allocation system is wrong: the Commission identified five reasons for the apartheid era allocation patterns identified by it³² and proposed that SAPS appoint a task team to investigate the matter and consider Ms Redpath's report as a matter of urgency. The further measures it recommended are summarised in para 59 of my founding affidavit. It is not clear what more could have been expected of the Commission.

119. I deny that the Commission (or the Applicants) have misunderstood the allocation system. No evidence was placed before it of any Provincial Commissioner having deviated from the THRR and General Lamoer explicitly denied that he had the power to do this (other than on a temporary basis). Although General Rabie differed from General Lamoer in this regard, (to the best of my knowledge) no evidence was placed before the Commission of the power to deviate from the THRR with regard to permanent posts ever being exercised. I refer further to what has been stated above in the section entitled *The Recent Allocation of Police Resources*.

120. Ms Redpath will address the issues which relate to her evidence (paras 80 – 81). The further allegations in these paragraphs are denied for reasons which have been set out above.

32 See Annexure "LR1", para 32, pp of record 1904.

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AD PARAS 83 - 84

121. The allegations in these paragraphs have been dealt with above (notably in the section entitled *Apartheid Spatial Planning*) or in Ms Redpath's affidavit.

AD PARA 85

122. I note that General Rabie does not contest Ms Redpath's analysis of the allocation of police resources in Kwa-Zulu Natal, but responds in general terms to her analysis. I have dealt with these generalised allegations above.

AD PARAS 86 - 87

123. These allegations have been dealt with above, notably in the section entitled *The Recent Allocation of Police Resources*.

AD PARA 89

124. The allegations in this paragraph are denied for reasons which have been set out above or which will be addressed in legal argument.

AD PARA 92

125. I deny that the weighting given to schools in the allocation of police resources is sufficient. This is another example of the manner in which the THRR model attempts to take into account a multiplicity of factors, each of which is given such a small weighting that the outcome produced is irrational and unjustifiable. SAPS needs to interrogate these outcomes in relation to the policing needs of each station and increase the weighting for factors such as high rates of violent crime, large numbers of people living in informal settlements and inadequate infrastructure.

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AD PARA 94

126. I note that SAPS does not dispute SJC and EE's right to act in representative capacities, both on behalf of our members and the general public.

AD PARAS 97 – 98

127. The Applicants note that SAPS appreciate their campaigns. Our objectives include improving the policing services provided to communities like Khayelitsha and Nyanga, which will improve living conditions. The further allegations in these paragraphs are denied for reasons which have been set out above, notably under the heading *Apartheid Spatial Planning*.

AD PARAS 99 – 103

128. The allegations in these paragraphs are denied for reasons set out in Ms Redpath's affidavit and in my responses to General Sekhukhune and Brigadier Voskuil.

AD PARA 105

129. Save to deny that SAPS is taking reasonable measures to provide policing services in all communities, I note the further content of this paragraph.

AD PARA 107

130. I deny that the reasons given in this paragraph justify SAPS' failure to allocate sufficient resources to poor communities ravaged by serious violent crime.

AD PARA 109

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131. The Commission's mandate included investigating inefficiencies in policing in Khayelitsha. It identified the inadequate resources allocated to the police stations in the area as an inefficiency and made appropriate recommendations.

AD PARAS 113 - 114

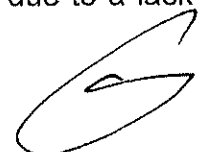
132. It would have been inappropriate for the Commission to suggest a model for the allocation of resources. I refer to what is stated above in response to paras 78 – 82 of General Rabie's affidavit, in the section entitled *The Recent Allocation of Police Resources* and in response to the evidence of General Makgato and Brigadier Voskuil.

AD PARAS 115 - 116

133. I note the tacit concession that Provincial Commissioners were not exercising their powers to re-deploy police officers prior to the release of the Commission's findings. The recommendations made by the Commission on resource allocation related to its findings that the outcome of the current resource allocation procedure was unjustifiable and the allocation method should be reviewed.

AD PARAS 117 – 119

134. SAPS' failure to dispute the contention that appropriate staffing levels are a necessary condition for effective and efficient policing is destructive of the claim that additional police resources would not reduce crime rates, as noted above in the section entitled *Additional Resources Make No Difference*. General Rabie (at para 121.3) also does not dispute the Commission's finding that the failure to conduct regular patrols in Khayelitsha was due to a lack of

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resources. This should be viewed in light of General Rabie's evidence to the Commission that the moment you weaken visible policing you can expect an increase in crime levels. The further allegations are denied for reasons which have been set out above (notably in response to paras 78 – 82 of General Rabie's affidavit).

AD PARA 121


135. I deny that SAPS has implemented all the Commission's recommendations. This is patently not the case with regard to the allocation of resources. The further allegations in this paragraph are denied for reasons which have been set out above (including in the sections entitled *The Nature of the Applicants' case, The Recent Allocation of Resources* and in response to paras 78 – 82 of General Rabie's affidavit).

AD PARA 122

136. We campaigned for implementation of the recommendations of the Commission because we had not seen any substantive move by SAPS to do so until the task team was created. SAPS is still resisting the review of its resource allocation system, which is the recommendation most likely to lead to a meaningful improvement in the provision of policing services in Khayelitsha and other similar communities. The general operation and functionality of this task team is dealt with in response to General Brand.

AD PARAS 123 - 124

137. These allegations are denied for reasons which are dealt with in response to the affidavits of Brigadier Voskuil and General Brand.

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AD PARAS 125 - 126

138. The purpose of litigation concerning the positive obligations imposed by socio-economic rights is to hold government to account through litigation. This fosters a form of participatory democracy. It means that when government policy with regard to socio-economic rights is challenged, the government agency is required to explain why its policy is reasonable, what it has done to formulate its policy, its investigation and research, the alternatives considered, the reasons why it opted for the policy selected and whether it has been reconsidered in light of the obligation to progressively realise the right concerned.³³ The obligation on the part of government to give reasons for measures taken by it flows from the value of accountability.³⁴ I am advised that the substantially the same principles are applicable to the rights to freedom and security and under s 205(3) of the Constitution. SAPS is under a duty to account to this Court as our participatory democracy allows it to be held to account through litigation.


139. General Rabie's approach explains why the Applicants had to resort to litigation as SAPS seems to think that it does not have an obligation to engage with stakeholders, contrary to their constitutional and statutory duties and their policies with regard to community policing.

AD PARAS 127 - 128

140. I note that General Rabie does not dispute the extensive efforts made by the Applicants to engage with SAPS in relation to a range of issues, including the allocation of police resources, before resorting to litigation.

³³ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) ("*Mazibuko*") [160] – [162].

³⁴ *Mashongwa v Passenger Rail Association of South Africa* 2016 (3) SA 528 (CC) [36].



AD PARAS 130 - 132

141. I refer to what is stated above under the heading *Introduction*, concerning how SAPS' claim that it has always had a positive response to the Commission's recommendations is disproved by the National Commissioner's letter. As noted in the founding affidavit, the National Commissioner's response also did not address the findings of the Commission that the allocation of resources was irrational and racially discriminatory, but simply restated the method followed in the allocation process. The further allegations are denied for reasons which have dealt with already.

AD PARAS 133 - 134

142. If General Rabie does not have knowledge as to why the Minister did not respond to the letter from our legal representatives then the Minister should have deposed to an affidavit explaining this and not General Rabie. This response highlights the manner in which the Applicants attempts to engage with SAPS over the implementation of recommendation 7 of the Commission were fobbed off. The further allegations are dealt with below in response to General Brand.

AD PARAS 135 - 136 & 138 - 205

143. These allegations are dealt with in Ms Redpath's affidavit or will be the subject of legal argument. However, I note that General Rabie:

143.1. does not dispute that the THRR broadly guides the actual allocation and that there can be little doubt that the discriminatory distribution of resources in the Western Cape is replicated in the

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other provinces (founding affidavit paras 73 and 74.2, read with Rabie 138 – 143)

143.2. does not dispute that poor areas with high crime rates and inadequate policing are likely to have far lower rates of reported crime (founding affidavit para 82, read with Rabie 157);

143.3. does not dispute the use of percentage of households that have electricity and piped water to measure poverty and the extent of informal housing (founding affidavit para 84, read with Rabie 159 – 162);

143.4. denies that SAPS members were unable to explain racially discriminatory patterns of resource allocation before the Commission (Rabie para 187) despite the concession from General Lamoer (its most senior representative) that the allocations were irrational, and his own inability to deal with the issue, leading to the concession that the THRR might need to be reviewed (see the response above to para 62 of General Rabie's affidavit);

143.5. claims that SAPS never conceded to the Commission that the THRR produced racially discriminatory results (Rabie para 187) in the face of the explicit concession by its senior counsel that black and coloured areas are "quite heavily" under-resourced (see the section above entitled *Introduction*);

143.6. responds to the statement that there is no explanation for the basis on which weightings are determined, for example, why shopping malls are weighted at 5% rather than 2% or 12% (founding affidavit, para 124.4) by stating (Rabie para 191) that "this is not an

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exact science and must be guided by experience" and contending that each of the determinants is constantly being reviewed. I refer to my response to para 61 of General Rabie's affidavit in which it is pointed out that in essence the model has remained unchanged since 2002;

143.7. admits the summary of the allocation process given in paras 127 – 132 of the founding affidavit (Rabie para 198), despite claiming elsewhere that the Applicants do not understand the allocation process; and

143.8. does not dispute that *"the breakdown between the national and provincial offices concerning the responsibility for distributing resources is a fundamental flaw in SAPS's current system"* (founding affidavit para 132 read with Rabie paras 198 – 200).

AD PARAS 206 – 208

144. The factual allegations in these paragraphs are denied for reasons which have been dealt with above. The legal issues will be addressed in argument.

AD PARA 209

145. While General Rabie baldly denies that the Applicants have established any discrimination, he does not attempt to, or cannot, deal with the explanation (in para 148 of the founding affidavit) of how the discrimination operates, namely:

145.1. in theory and practice stations which serve populations with high proportions of poor black people have significantly lower police: population ratios than stations which serve rich, white populations;

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145.2. the poor black stations generally have far higher rates of contact crime;

145.3. the lower police: population ratios in poor black areas contribute to inefficient and ineffective policing; and

145.4. this imposes serious burdens on poor black people who are less safe and whose rights are threatened as a result.

AD PARAS 210 - 211

146. I note that SAPS' defence to the claim is that the Applicants have failed to show any discrimination. While it is claimed that there is no evidence to support the conclusion that the allocation process entrenches apartheid inequalities, General Rabie does not deal with General Lamoer's admission that the process is irrational or the concession by SAPS' counsel before the Commission to the effect that it is discriminatory.

147. The claim that the Applicants have not shown any discrimination is undercut by General Makgato's acceptance (at para 60) that there have been differences in the allocation of police personnel, but these differences can be explained on rational grounds as they had to be done in the light of existing police infrastructure.

148. General Rabie does not dispute that s 9(2) of the Constitution and the Equality Act requires the reversal of apartheid era inequalities.

AD PARAS 212 - 231

149. The allegations in these paragraphs are denied for reasons which have been dealt with above (notably under the heading *Apartheid Spatial Planning*) or constitute legal submissions which will be addressed in argument.

AD PARAS 232 – 234 (answer to supporting affidavit of Equal Education)

150. While Equal Education illustrates the impact of unequal resource allocation on a particularly vulnerable group, namely learners of school-going age - and age is a prohibited ground in the Equality Act - it expressly states that this crisis cannot be resolved by government alone³⁵, which by extension include SAPS. However, SAPS fails to answer the case made by Equal Education; instead it sidesteps the issues raised by re-emphasising the truism that effective policing requires community involvement.

AD PARA 235

151. General Rabie avoids providing an explanation as to why SAPS has not yet implemented the Khayelitsha Commission's Recommendation 12 about youth safety in Khayelitsha by saying he has no personal knowledge about these matters. He does not dispute³⁶ that SAPS repeatedly failed to sign a draft Memorandum of Understanding between it and DOCS about their respective duties and responsibilities. This had the effect of frustrating the implementation of Recommendation 12.

AD PARAS 236 - 241

152. Nowhere is it Equal Education's contention that the allocation of police resources is the only reason why learners are victims of crime. However, it is

35 Para 11 Ndzomo supporting affidavit.
36 Para 28 Ndzomo supporting affidavit.

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common cause that appropriate staffing levels are a necessary condition for effective and efficient policing. I note that General Rabie (in para 236) does not dispute that an absence or shortage of police resources impacts negatively on learners and he explicitly concedes that the allocation of resources may impact on how crime is dealt with.

153. The Social Audit report was released in September 2016. On 20 September 2016 learners representing over 50 schools held a press conference outside the Western Cape Education Department offices in Parliament Street when the Social Audit report was handed to the Western Cape Education MEC Debbie Schafer, Community Safety MEC Dan Plato, and Deputy Provincial Police Commissioner Thembekile Patekile. A copy of the executive summary of the Social Audit is attached as annexure "PM41."
154. The statement (in para 240) that *"the presence of policing within school premises is not necessarily a deterrent to crime"*, is inexplicable, particularly in light of SAPS' legislative role, namely *"... to prevent ...crime ... to protect and secure the inhabitants of the Republic ..."* (section 205 of the Constitution).

AD PARA 245

155. SAPS appears to wilfully misread what is contained in Equal Education's supporting affidavit. Equal Education does not contend that crime only affects poor, Black communities. The statement that it is unclear how the disproportionate exposure to crime experienced by those in poorer areas is a consequence of fewer resources being allocated to them is inconsistent with General Rabie's acceptance (in para 236) that an absence or shortage of

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police resources impacts negatively on learners and his explicit concession that the allocation of resources may impact on how crime is dealt with.

AD PARA 246

156. Equal Education, like SJC, is not seeking a larger SAPS budget. Its contention is that available resources must be distributed more equitably so that poor black communities receive a greater share of these resources.

AD PARAS 247 - 248

157. The 135 police officers to every 100 000 people equates one officer for every 2857 persons, exceeding the 1:2500 ratio for disadvantaged areas used in the THRR.³⁷ I note that General Rabie does not dispute that without resources and police efficiency, Nquthu precincts are unable to provide learners with adequate protection.³⁸

AD PARAS 249 - 250

158. The allegations in these paragraphs are denied. Equal Education is not contending that lack of school transport and long distances to schools are police matters; these issues are raised to describe the context in which rural learners' access education.

AD PARA 251

159. SAPS avoids responding to Equal Education's evidence that learners often feel that SAPS have not or will not be efficient in investigating different contact crimes.

37 Para 41 Rabie, pp of record 1837.

38 Para 37 Ndzomo, pp of record 1042.

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AD PARA 253

160. Besides noting that Equal Education refers to two, and not one, incident of rape, I refer to what has been stated above with regard to SAPS' statement that a higher deployment of police resources is no guarantee or assurance of crime prevention.

AD PARA 255

161. The personal experience of violent crime by Equal Education's Deputy Secretary General is an account of first-hand experience of both the lack of SAPS resources and the lack of SAPS responses to actual crime incidents

AD PARA 256 - 258

162. The personal experiences of crime are used to describe the crime experienced by ordinary learners. The allegations in these paragraphs are denied for reasons which have been set out above.

SUPPLEMENTARY LEGAL GROUNDS**AD PARAS 261 - 271**

163. The allegations in these paragraphs will be dealt with, to the extent necessary, in legal argument.

RESPONSE TO AFFIDAVIT OF MAJOR GENERAL SEKHUKHUNE**AD PARAS 1 – 5**

164. I note that General Sekhukhune is a qualified statistician, yet save for what is stated in paras 27 – 32 (to which I respond below), he in no way disputes the



calculations and analysis of Ms Redpath or the allegations of a discriminatory allocation of police resources contained in the founding affidavit.

AD PARA 6

165. The purpose of the affidavit is noted. The content of the affidavit is disputed to the extent set out below.

The collection, authentication and accuracy of police crime statistics

AD PARAS 8 - 11

166. I note that SAPS and Stats SA entered into a Memorandum of Understanding, which is a statement of intent; and that to date the police crime statistics have not been of a standard to qualify as official statistics. General Sekhukhune does not explain in what respects SAPS has not complied with SASQAF quality standards or what steps it has taken to address these short-comings. In the absence of this information, I am unable to assess the efficacy of the remedial measures taken and General Sekhukhune fails to motivate or justify his opinion that all the requirements for the production of official statistics have been met.

AD PARAS 12 - 13

167. I take note of the contents of these paragraphs, and in particular the use of United Nations standards by SAPS.

AD PARAS 14 - 17

168. I take note of the detailed information on the Crime Administration System (CAS) in these paragraphs and in TS2 (record pp 2274 - 2294), but fail to see how it justifies the discriminatory allocations made through the THRR. In any

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event these are guidelines, which we know from the extensive evidence led before the Commission, and personal experience, are often honoured in the breach. I deny that crime scenes are immediately visited (AD para 17.4.5); that the affidavits of complainants, victims and witnesses are obtained (AD para 17.4.6); that concerted efforts are made to identify and trace unknown suspects (AD para 17.4.7); that all possible steps are taken to complete the investigation of newly reported case dockets during the tour of his/her (Detective Service Centre Commander) duty (AD para 17.4.8); or that all other case dockets that require further investigation are immediately, and not longer than 24 hours, transferred to and handed over to the Detective Service Commander for allocation to detectives (AD para 17.4.10). I also deny that the officers deployed as Detective Service Commanders ensure the effective and efficient investigation of crime (AD para 17.7); ensure that detectives timeously receive and acknowledge newly reported cases (AD para 17.7.1); ensure that all newly reported cases are promptly investigated and all attempts are made to finalise investigations during preliminary investigations (AD para 17.7.2); or conduct 24 hour inspections on case dockets to ensure speedy investigation (AD para 17.7.4).

169. I refer to what is stated above in the *Introduction* to this affidavit with regard to the admissions in SAPS' annual performance plan, annexure "MJM2", with regard to SAPS' chronic underperformance in every province in areas including the detective services and visible policing.

AD PARAS 18 - 21

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170. I have no knowledge of the so-called "*current quality checks*" and put the Respondents to the proof of how this has assisted with deploying the appropriate human resources to poor and black communities. I have no knowledge of the '*Counting Rules on Crime of the South African Police Service*' or the existence, and work, of a Standards and Compliance Unit, and cannot admit them. I note that SAPS had intended to do quality assurance checks on the CAS recorded information at the police stations in Nyanga, Khayelitsha, Mitchell's Plain, Kraaifontein and Delft (TS3 record p 2296) and I request the Respondents make available their detailed reports on the findings of these quality assurance checks.
171. The Commission in its findings (chapter 13, paras 166 - 167) noted that many of the problems at the three Khayelitsha police stations had been accurately and repeatedly identified by SAPS inspections over several years, but these problems had not been addressed as a result, primarily, of poor management. It follows that even if these quality assurance checks identify short-comings, there is no guarantee that they will be dealt with adequately.

AD PARAS 22 - 24

172. I note that SAPS claims to use the data on the CAS system to inform human resource allocation at local, provincial and national level, yet it fails to explain how this justifies the discriminatory results produced by the application of the THRR.

AD PARAS 25 - 26

173. I have no knowledge of how additional deployments made monthly, or quarterly strategic discussions, impact on the THRR and fixed establishment

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of stations such as Khayelitsha and Nyanga and do not admit the broad and generalised allegations made in this regard.

The impact of crime intelligence and statistics on murder and other violence crime

AD PARAS 27 - 32

174. I have pointed out above in the section entitled *The Recent Allocation of Police Resources* that SAPS: (i) impliedly admits that the THRR is deficient in deploying resources to areas with high crime rates; and (ii) claims that the exercise by the Provincial Commissioner of s 12(3) powers to re-allocate resources has led to "*significant improvements*" in this regard.
175. I deny that SAPS' evidence demonstrates that significant additional resources have been deployed to communities such as Khayelitsha since the Commission made its findings. Ms Redpath in her analysis of the allocation of police resources in the Western Cape found that there were no substantial changes in the relative allocations between 2013 and 2016. It was only after this application was launched in March 2016 that there were some "*marginal belated changes*", but the complaint of inequality persists, with no substantial changes evident.
176. It is therefore unsurprising that the incidence of murder and other crimes has increased or remained high in Lingeletu-West, Khayelitsha, Harare and Nyanga for the period between 2010 and 2016, as suggested by annexures "TS4" and "TS5". SAPS' claim that additional resources make no difference to crime levels is contradicted by the evidence of Brigadier Voskuil, who in his analysis of the crime statistics from April to December 2016 (Annexure PLV6)

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stated that the *"THRR allocations are contributing to achieving their purpose and that provincial distributions are achieving the desired result – a reduction in crime levels"*. (Para 110) The rationale for these *"provincial distributions"* is irreconcilable with the claim that additional resources have no impact on crime levels.

177. I deny the further allegations in these paragraphs.

RESPONSE TO AFFIDAVIT OF MAJOR GENERAL NELSON

178. The purpose of Major General Nelson's affidavit is two-fold: (i) to describe the annual budgeting process within SAPS; and (ii) to note the financial resource constraints under which SAPS operates. These two issues are not relevant to the Applicants' case, in that we are not seeking a larger budget allocation for SAPS, but we wish to have the existing human resources available to SAPS allocated in a manner that is fair and rational. In other words, this application concerns the relative allocation of resources between police stations, not the total extent of the resources available.

AD PARA 4

179. I deny that the Applicants are making far reaching allegations. General Nelson unfortunately does not explain which allegations he is referring to.

AD PARA 5

180. I deny that the Applicants have failed to appreciate that human resources takes place within the context of a finite pool of resources as alleged by General Nelson.

G P.M

AD PARAS 6 - 8

181. Save to note that whatever resources the National Treasury earmarks for SAPS and for distribution to police stations must be allocated fairly and rationally, I do not dispute the contents of these paragraphs.

AD PARAS 9 - 12

182. I appreciate that SAPS, like any organisation, has to balance and allocate resources effectively but this is no cause for it to act irrationally or to unfairly discriminate against a class of police stations. The complexity of the balancing process does not justify undermining the constitutional rights of those communities that are unfairly discriminated against by the current allocation method. I note that personnel expenses are the primary cost driver within the policing budget – it is for this reason that this application focuses on the allocation of police officers to police stations.

RESPONSE TO AFFIDAVIT OF MAJOR GENERAL BRAND

183. The purpose of Major General Brand's affidavit is to set out the extent to which progress has been made in the implementation of the Commission's recommendations and to counter the "*blatantly incorrect*" allegation, in paragraph 5 of the founding affidavit, that no action has been taken to implement them. Unfortunately, General Brand is guilty of misrepresenting the Applicants' case. In paragraph 5 of the founding affidavit I stated that the Commission made a clear recommendation³⁹ that SAPS revise the THRR as a matter of urgency and that, despite repeated requests from SJC for SAPS to

39 Recommendation 7.


act on this recommendation, it has failed to do so. Although the Applicants have been disappointed at the extent to which the Commission's recommendations have been implemented, it is not our case that no action has been taken in this regard. It is apparent from Ms Redpath's evidence that SAPS done nothing to revise the THRR and it has remained substantially the same since 2002.

AD PARA 3

184. I have responded to the manner in which our case has been misrepresented in the preceding paragraph.
185. General Brand and other SAPS representatives have made a number of submissions relevant to the implementation of recommendation 7 that are noteworthy.

185.1. In a document entitled Response on the implementation of the Khayelitsha Commission of Inquiry dated 2 February 2017, pages 2661 to 2663 of the record, it was stated that the fixed establishment is a legislative matter and that SAPS had made additional allocations to the three stations in Khayelitsha. Nothing in this report suggests that there is work being done that will address the allocation of resources as sought by the Applicants in this case.

185.2. In the Presentation to the Community Safety by the Task Team on the Implementation of the Recommendations of the Khayelitsha

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Commission – October 2016, page 2443 of the record – the following was noted in relation to recommendation 7:


- 185.2.1. The revision of the THRR is a national competency;
- 185.2.2. The allocations made in terms of s 12(3) were noted;
- 185.2.3. It is clear therefore that the Task Team will not be taking any decisions or steps that will impact on the allocation of resources. It defers to National SAPS and the Provincial Commissioner in this regard.

185.3. The presentation to the Standing Committee, on 31 August 2016, annexure "JJB3", stated the following:

- 185.3.1. "The THRR is a tool designed and enhanced at a National level, which allocates human resource posts to all stations in the SAPS."⁴⁰ We submit that General Brand concedes that the issue of resource allocation cannot be addressed in the Priority meetings or the Task Team meetings.
- 185.3.2. Further there is no clear indication of what the Priority Meetings and/or the Task Team could do that might achieve the relief sought by the Applicants in this matter.

185.4. The report entitled Briefing on the status of the implementation Khayelitsha Commission of Inquiry Recommendation, pp 2427 – 2428 of the record, confirms the conclusions set out in the

40 Page 12 on JJB3, pp 2427 of the record 2427.

 P.M

preceding paragraph. It noted the following in relation to the implementation of Recommendation 7:

- 185.4.1. The issue of fixed establishment is a legislative matter;
- 185.4.2. Provision of new posts depends on what has been allocated to SAPS in each fiscal year; and
- 185.4.3. Additional allocations have made to the Khayelitsha stations.

186. As documented in a letter to Mr Gideon Morris from Ms Amanda Dissel, pages 2633 – 2637 of the record, in April 2016:

186.1. The Task Team was established in June 2015 and had (by April 2016) met 4 times.

186.2. The first meeting of the Task Team on 29 September 2015 dealt essentially with issues of administrative functionality.

186.3. The meeting of 13 October 2015 accepted that some of the recommendations, relating to national policy or legislation issues, the Task Team had been unable to implement in Khayelitsha.

186.4. The third meeting on 23 October 2015 focused on expert evidence given to the Commission on a range of issues. None of the experts invited to this meeting testified to the Commission on the allocation of resources.

186.5. The last meeting of 2015 focused on the "Whole society approach" (SJC was represented at this meeting).

187. The minutes of the Task Team meetings attached do not always address the issue of allocation of resources. This is true for the following meeting:

- 187.1. Meeting held on 10 November 2016 (pp 2460 – 2469);
- 187.2. Meeting held on 20 October 2016 (pp 2473 – 2484) and
- 187.3. Meeting held on 11 August 2016 (pp 2614 – 2622).;
188. The meeting minutes of 1 September (pp 2544 – 2550) and 22 September 2016 (2489 – 2504) noted that the implementation of Recommendation 7 could not be discussed in the Task Team meeting because this case was before Court.
189. All these reports attached and discussed above highlight that recommendation 7 of the Khayelitsha Commission has not been implemented and nothing has been done systematically to improve the allocation problems identified by the Commission, as is confirmed in Ms Redpath's affidavit.

AD PARA 4

190. The Commission completed the hearing of evidence and argument in May 2014. Some of the concessions made by SAPS in the course of the Commission hearings have been referred to above. The evidence concerning inefficiencies in policing in Khayelitsha and the breakdown in the relationship between the Khayelitsha community and SAPS is reflected more fully in the Commission's report. Although General Brand's appointment preceded the release of this report in August 2014, it was made at a time when there was little doubt that the Commission would make far-reaching recommendations concerning policing in Khayelitsha. Poor management was at the heart of many of the policing problems identified by the Commission and the Applicants appreciate the genuine effort made by General Brand to deal with

 G. R. M.

this,⁴¹ although it is not possible for us to assess the extent to which he has been successful. It is therefore particularly disappointing that General Brand has seen fit to misrepresent the Applicants' case in the manner in which he has done in his affidavit.

AD PARAS 5 - 7

191. I note General Brand's duties and employment record, but this is information that is not within my knowledge.


AD PARA 8

192. I do not know which findings and recommendations that General Brand had already begun addressing prior to the release of the Khayelitsha Commission's report in August 2014.

AD PARA 13

193. I deny the averment that much of the crime in Khayelitsha happens spontaneously. I refer in this regard to Ms Redpath's affidavit. While it is true that domestic violence is one of the contributors to contact crimes, however, given that domestic violence is severely under reported in South Africa, it is very difficult to address the extent to which it contributes to contact crimes. It therefore can be relied upon as a clear indicator of the crime situation in Khayelitsha or any other area in South Africa.

41 Although a number of key recommendations lie beyond the scope of his duties.

 PM

194. It is worth noting that the obligations of police to address domestic violence go beyond taking steps to prevent it as noted by the Domestic Violence Act 116 of 1998 and the National Instruction (7 of 1999).

AD PARA 14

195. The contents of this paragraph are admitted. I also record that Nyanga police station falls in the top 30 contributing stations.

AD PARA 15

196. While SAPS has allocated new recruits to these stations, the Khayelitsha stations remain with fewer personnel compared to past years and compared to police stations serving predominantly white areas with low contact crimes. This is reflected in documents included by General Brand in annexure JJB4 entitled "*Human Resource Utilisation Status Report*"⁴² and the document immediately after it, "*Granted vs actuals – 2017-01-31*"⁴³

197. Despite 6 detectives being re-enlisted⁴⁴ and deployed to Khayelitsha and Harare police stations, the 3 police stations had 10 fewer detectives at the end of January 2017 than they had on 1 April 2013. That's a loss of 16 detectives since 2013.

42 JJB4 record pp 2572 - 2579
43 JJB4 record pp 2580 - 2581
44 JJB3 pg. 13, pp of record 2428.

G P.M

	01/04/2013 - Actual			2017-01-31 Actual		
	Vispol	Detective	Support	Vispol	Detective	Support
Khayelitsha	161	66	73	194	62	63
Harare	115	50	28	157	44	30
Lingeletu	115	31	31	118	31	25

197.1. Despite 51 Entry-level enlistments/new fully fledged Constables deployed to Lingeletu West since 2013, Lingeletu West now has 35 less staff than it had on 1 April 2013. That is a loss of 86 members since 2013.

197.2. Despite 80 Entry-level enlistments/new fully fledged Constables deployed to Khayelitsha Site B since 2013, Khayelitsha now only has 45 more members than it had on 1 April 2013. That is a loss of 35 members since 2013.

197.3. Despite 153 Entry-level enlistments/new fully fledged Constables deployed to Harare since 2013, Harare now only has 56 more members than it had on 1 April 2013. These newly trained officers are of limited value until they obtain sufficient experience, as has been discussed above.

197.4. From General Brand's JJB4 annexure one can see the actual numbers of personnel assigned to the three Khayelitsha stations on 1 April 2013, 31 August 2016 and 31 January 2017. These figures show that these stations are getting fewer resources over time – see Information note on pp 2572 – 2581 of the record).

G P.M

197.5. I note that on Page 3 of the Task Team Minutes of 1 September 2016 it is stated that, there is now a case load of 65 dockets per members though at the time of the Commission it was 100. It was however, reported in a written reply (3 June 2016 – which I have attached here marked **PM42**), to a Western Cape Provincial Parliament parliamentary question, the detective-to-docket ratios for the three police stations serving Khayelitsha were as follows:

197.5.1.	Harare	1-79
197.5.2.	Khayelitsha	1-67
197.5.3.	Lingelethu West	1-127

AD PARA 16

198. The allocations in terms of s 12(3) of the SAPS Act have already been dealt with. The claim that recommendation 7, which required an urgent revision of the THRR as a whole, has been partly implemented is denied. It could not be addressed simply by making allocations to the Khayelitsha stations (I refer to what I have stated above in respect of these allocations).

AD PARA 17

199. It should be noted that General Brand contradicts Generals Rabie and Makgato here. If the recommendation "*is still in the process of being implemented*" then that would mean the finding that the allocation of resources is discriminatory is accepted by SAPS. I refer further to what has been stated above under the heading *Prematurity and the Khayelitsha Commission*.

AD PARAS 18 – 21

G.P.M.

200. I note that the Task Team will not be able to review and alter the process for the allocation of resources, for the reasons given above.

AD PARA 22

201. I confirm that the SJC is represented on the Task Team and has attended some of its meetings.

202. As already stated, the Task Team is incapable of implementing recommendation 7.

203. To date it is also operating without a signed memorandum of understanding between SAPS nationally and the Western Cape Government as confirmed in JJB3 p. 18. There is accordingly no point in taking up the issue of resource allocation with it.

204. In a memorandum handed to General Brand on 15 March 2016, after the brutal murder of Sinxolo Mafevuka, the SJC made the following demand:

"The Khayelitsha Cluster Commander and the Station Commanders of the three police stations serving Khayelitsha must engage with SAPS at a provincial and national level to rectify the structural inefficiency that makes the allocation of police resources inequitable, irrational and unjust."

205. The SJC's fully-fledged inclusion in the Task Team only came about after the SJC had filed its founding papers in this matter. Further as confirmed in JJB4 (in the DoCS PowerPoint presentation to the Standing Committee on 31 August 2016):

"During it's meeting on 15 July 2016, it was decided that the task team should be extended again to include civil society representatives" (page 4).

G R M

206. Further, as already stated above, this issue will not be dealt with by the Task Team, as it confirmed in its meeting on 22 September 2016 (JJB4) "SAPS reported that there is a current court case pending on THRR, so this can't be addressed by the Task Team at this stage." (page 3)

AD PARAS 22 - 24

207. I deny these paragraphs for the reasons given above. As shown in our founding affidavit, we attempted on numerous occasions to engage with SAPS on the issue of allocation of resources without success.⁴⁵ Only after making these attempts did we resort to bringing this application. The "false premise" arises from a distortion of our case.

RESPONSE TO THE AFFIDAVIT OF MAJOR GENERAL MAKGATO

208. The purpose of General Makgato's affidavit is to respond to the evidence of Ms. Redpath. Given that most of the issues raised by General Makgato are dealt with by Ms Redpath in her reply, I shall limit my response to matters not dealt with by Ms Redpath.

AD PARA 1 – 6

209. I note that General Makgato omits to set out his academic qualifications.

AD PARA 8

210. I deny that the suggested alternative method of allocating resources within SAPS as proposed by Ms. Redpath is valueless. The purpose of her evidence is to demonstrate the discriminatory nature of the current allocation of police resources. No expertise in organisational development is necessary for this

⁴⁵ See section titled Engagement with the Respondents following the Khayelitsha Commission" (Mlungwana affidavit [65.1 to 65.13])



purpose. The alternative model proposed by her was for illustrative purposes. The denial of her expertise with regard to policing is contradicted by Ms Redpath's *curriculum vitae* and the evidence in her replying affidavit that, amongst other things, she has carried out a detailed analysis of bail in South Africa for the Department of Justice and Constitutional Development and written crime prevention strategies for provincial and local governments. General Makgato does not say in his affidavit what exactly in the suggested alternative method of allocating resources proposed by Ms. Redpath is valueless, nor does he explain what fundamental shifts in policing render her report valueless. The claim that we rely on out-dated data has been dealt with above under the heading *Based on Outdated Material*.

AD PARA 9 - 10

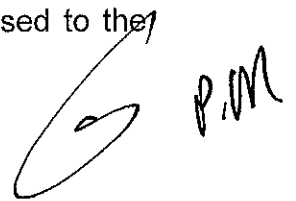
211. While I note the experience that General Makgato has, he fails to deal with whether or not, on the basis of his experience he thinks the allocation of resources is fair and rational. I deny that the allocation of resources is ever changing and improving. Ms Redpath demonstrates that the THRR is fundamentally unchanged since 2002.

AD PARA 11

212. The allegations made in this paragraph are denied. I refer this Court to Ms. Redpath's affidavit and the section above entitled *The Recent Allocation of Police Resources*.

AD PARA 12

213. Ms. Redpath's evidence is limited to demonstrating how SAPS has allocated its resources and assessing those allocations against race, indicators of poverty and incidence and rates of crime. The method she proposed to the

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Commission sought only to demonstrate that a rational method exists to address the anomalies in the current allocations. She does not contend that this is the best method for allocating police resources. We acknowledge that it is SAPS' responsibility to develop and implement a formula of allocating resources, subject however, to it being fair and rational.

AD PARAS 13- 14

214. I deny these allegations. I refer to what is stated in the preceding paragraph.

AD PARA 15

215. The allegations in this paragraph are denied. The Commission accepted the testimony of the senior SAPS officers that they have insufficient personnel to provide an efficient and effective service in Khayelitsha.⁴⁶ Neither General Rabie nor any witnesses who testified for SAPS at the Commission could give an explanation as to *"why the THRR seemed to disfavor black previously disadvantaged communities in the Western Cape in this way, nor did any other SAPS member who testified before the Commission provide any reason to explain the low levels of police to population in Harare and Khayelitsha Site B."*⁴⁷ This finding flowed inevitably from the evidence before the Commission, including the concessions made by SAPS' senior counsel, summarised above under the heading *Introduction*. The same is true in this case - no explanation has been given as to why there are fewer human resources in stations that police poor black areas with high levels of crime.

AD PARAS 17- 20

46 Paragraph 154 of the Khayelitsha Commission Report.
47 Paragraph 157 of the Khayelitsha Commission Report

216. I deny these allegations. I refer to what is stated above in response to paragraph 8 of General Makgato's affidavit, the section entitled *The Recent Allocation of Police Resources* and Ms. Redpath's replying affidavit.

AD PARAS 21 – 23

217. The Applicants in this case are challenging the current allocation of police resources and how it disadvantages police stations predominantly serving poor black areas with high levels of crime. These paragraphs are of little, if any, relevance to the case.

AD PARAS 24- 25

218. It is not our case that the individual elements used in the calculation of the THRR are, viewed in isolation, discriminatory. Our case is that the outputs generated by the THRR and the actual allocations made by SAPS are discriminatory.


AD PARA 32

219. The allegations in this paragraph are denied for reasons which have been spelt out above, notably in the sections entitled *Apartheid spatial planning* and *Separation of powers*.

AD PARA 33

220. I refer to what is stated in the founding affidavit and Ms Redpath's affidavit concerning the THRR method. I accept that the allocation of police resources is not an exact science and it is for this reason that SAPS has erred in not interrogating the rationality of the outcomes generated by the THRR model.

AD PARA 34 – 40

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221. I have previously referred to the THRR's approach to take into account a multiplicity of factors with small weightings; and I repeat that our case is not for a larger SAPS budget.

222. I deny that the theory underpinning the THRR model is sound and rational. I refer to Ms Redpath's affidavits with regard to the short-comings in the model. I note the concession that not all remnants of historical discrimination have been eliminated. With regard to provincial priorities, I refer to what is stated above in the section entitled *The Recent Allocation of Police Resources*.

AD PARA 41

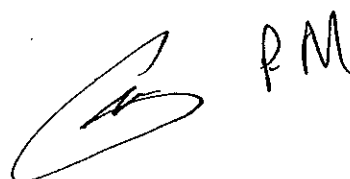
223. The information provided by General Makgato does not explain the timelines of the review, whether or not there will be public participation or how long after the review is complete will SAPS implement any of the changes suggested, if any. I therefore do not see how this information assists this Court in any way.

AD PARAS 42 - 44

224. I deny that the Applicants' analysis of allocation of resources ignores the role of the Provincial Commissioner and that the Provincial Commissioners enjoy an unfettered discretion. I refer to what is stated above, notably in the section entitled *The Recent Allocation of Police Resources*.

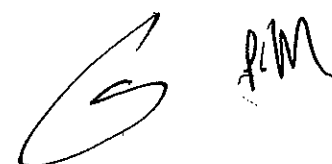
AD PARA 46 - 163

225. Save to the extent that is set out below, the Applicants have responded to the allegations in these paragraphs above (I refer in particular to the sections entitled *Based on Outdated Material* and *Recent Allocation of Police Resources*) and in Ms Redpath's affidavit and it would needlessly burden these papers to repeat what has been stated elsewhere in our affidavits:

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225.1. I note the concession (in paras 61 – 62) that most of the policing areas where resources are lower than average are in places where stations have been built after 1994 to respond to the increase in informal settlements and government housing developments. These stations will invariably be located in predominantly black communities. Furthermore, General Makgato does not dispute the data presented by Ms Redpath and he concedes that 23 years into the democratic era differences in allocation are still determined by existing infrastructure disparities. Having police resource allocations determined by existing police infrastructure, much of which was inherited from the apartheid state, is both unjust and reveals that the THRR has failed to address past policing injustices. The fear of poor areas being flooded with police (para 62) is simply fanciful;

225.2. It is common cause that policing is more difficult in informal settlements and townships which lack infrastructure (see the section entitled *Policing More Difficult in Black Townships*), yet General Makgato contends (paras 63 – 64), without explaining why, that it is not always possible to allocate more police personnel to these areas. This concession is destructive of the defences that SAPS has attempted to make to this application. The pressures of urbanisation have resulted in thousands of informal settlements being established across South Africa, which, on best estimates available, accommodate around 1.9 million households (Statistics South Africa 'Census 2011' (2012)). SAPS maintains that being



visible and accessible to these households must be contingent on the development of infrastructure in informal settlements. I submit that this shows that the police do not understand their constitutional duty to ensure the safety of the most vulnerable and it explains why they have failed to allocate resources in a manner that is fair and rational;


225.3. General Makgato assumes (in para 78) that all South Africans can afford comprehensive insurance. This is not the case. Insurance results in the rate of reporting of property crimes being greater in wealthier communities, as demonstrated in Ms Redpath's affidavit. This difference between insured and uninsured communities, the incentives to report crime and the absence of an additional incentive, skews the picture of the burden of property crime between these groups;

225.4. I note the fundamental importance of the Annual Performance Plan (annexure "MJM2" – referred to in para 87) for SAPS' strategic planning and the concessions (referred to above in the section entitled *Introduction*) contained in that Plan;

225.5. I deny that Ms Redpath's affidavit reflects any misunderstanding of the nature of crime intelligence (ad paras 127 – 128) and

225.6. Neither Ms Redpath nor the Applicants contend that stations should have the power to "*shift around resources*" (ad para 133).

RESPONSE TO THE AFFIDAVIT OF BRIGADIER VOSKUIL

 AM

226. Brigadier Voskuil's affidavit deals with the Western Cape. Its purpose is, amongst other things, to demonstrate that the Provincial Commissioner does have, and exercises powers in terms of s 12(3) of the SAPS Act, raise various points in limine and answer the case made out by the Nyanga CPF. To a large extent he covers ground already traversed by Generals Rabie and Makgato. It follows that the issues raised in his affidavit have, in many instances, been dealt with above (notably in the sections entitled *The Recent Allocations of Police Resources* and *Points in Limine*) or in Ms Redpath's affidavit. I shall attempt to avoid burdening these already voluminous papers by repeating responses to issues dealt with elsewhere. In relation to the allegations concerning the Nyanga CPF I refer to the confirmatory affidavit deposed to by the CPF's chairperson, which is filed together with this reply.

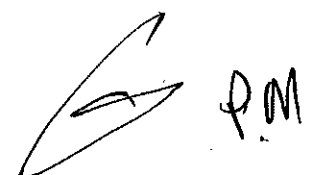
AD PARAS 1 – 4

227. It is noted that Brigadier Voskuil has been the Provincial Head of Organisational Development and Strategic Management in the Western Cape only since January 2016.

AD PARAS 6 - 8

228. As noted above, SAPS' delay in filing its answering affidavits could well have been influenced by its wish to rely on the January 2017 allocations. It seems, from these paragraphs, that the finalisation of Brigadier Voskuil's affidavit was delayed in order to rely on 2016 crime statistics. Although his affidavit was prepared before that of General Makgato (dated 27 February 2017), it was only commissioned on 13 March 2017.

AD PARA 8

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229. SAPS' *volte face* on the issue of oral evidence remains unexplained.

The relief sought by the applicants

AD PARAS 15 - 19

230. I deny that the Nyanga CPF failed to comply with the conditions for its intervention as an applicant. The further allegations are denied to the extent that they are inconsistent with the relief sought in the notice of motion.

Points in limine

AD PARAS 21 - 45

231. Save for what is stated below, the allegations in these paragraphs are denied for the reasons stated above (notably in the section entitled *Points in Limine* and in response to General Brand's affidavit):

231.1. The Applicants do not dispute that social and economic factors influence levels of crime. The unconfirmed hearsay report (the admissibility of which is disputed by the Applicants) attributes such statements to the Secretary of the Nyanga CPF (para 33). The suggestion that poverty and overcrowding need to be dealt with before crime levels will fall in Nyanga does not represent the position of the CPF, but in any event does not excuse the failure to provide adequate policing services in Nyanga. The fact that there is only one police station in Nyanga is an obstacle for policing in the area. The statement that the police are doing their job is qualified by referring to the enormous difficulties faced in policing areas such as Nyanga. These problems are exacerbated by SAPS' failure to allocate sufficient personnel to such communities. Nyanga is in the

same position as Khayelitsha, in that it has insufficient personnel to provide efficient and effective policing.⁴⁸ SAPS does not dispute that appropriate staffing levels are a necessary condition for effective policing; and

231.2. Brigadier Voskuil (paras 41 and 163) seeks to place in issue the Applicants' *locus standi* to dispute the THRR. However, General Rabie has already conceded, in unqualified terms, that SJC and Equal Education have standing in this matter. If SAPS wishes to withdraw this concession, it will have to apply to this Court for leave to do so. In any event, I deny that the grounds relied upon by Brigadier Voskuil (at paras 42 – 45) are sufficient to deny the Applicants standing to challenge the THRR.

AD PARAS 46 - 48

232. SAPS raised the issue of non-compliance with the Intergovernmental Relations Framework Act Act 13 of 2005 ("the Framework Act") in opposing the admission of the Nyanga CPF as a party to this application. This Act establishes a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations and it provides mechanisms and procedures to facilitate the settlement of intergovernmental disputes. Section 2(1) of the Act makes it clear that it only applies to national government, all provincial governments and all local governments. The Act does not have any bearing on community policing forums. There was thus no failure on the part of the Nyanga CPF to exhaust "internal remedies".

48 See para 154 of the Commission report.

G.P.M.

AD PARAS 49 – 50

233. I deny that the Nyanga CPF failed to comply with the order permitting it to join as a party.

233.1. The order of 22 September 2016 granted the CPF leave to intervene, *subject to the ratification of the decision to bring this intervention application and other ancillary decisions related thereto at a properly constituted meeting of the applicant in compliance with Clause 10.4.4 of the Uniform Constitution for Community Police Forums and Board in the Western Cape.* (Item index 86, record pp 1615 - 1616)

233.2. Clause 10.4.4 of the Uniform Constitution provides: In the case of a Forum and the Provincial Board, at least four (4) members of the Executive Committee of which the Station Commander and the Provincial Commissioner or a Representative must be part of, constitutes a quorum at an Executive Meeting. (MM2, record p 1368)

233.3. The CPF meeting held on 26 September 2016 was quorate in terms of clause 10.4.4 as six members of the Executive Committee were present, as well as Brigadier Ncata, the Nyanga Station Commander. The Provincial Commissioner does not attend Executive Committee Meetings of the CPF as he is always represented by the Station Commander of the applicable station or the Station Commander Representative. (MM3, record pp 1634 - 1635)



233.4. But for pointing out that "Martin Makasi" and "Buyisile Makasi" is one and the same person, the chairperson of the Nyanga CPF, the other grounds on which the Third Respondent relies to argue that its resolution to be part of this litigation was defective are patently without merit; and

233.5. The allegations in these paragraphs are denied insofar as they are inconsistent with what is stated above.

Introductory observations pertaining to policing

AD PARAS 53 - 54

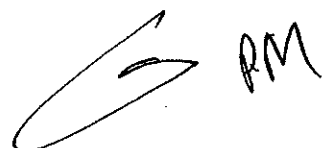
234. I confirm the provisions of Chapter 11 of the Constitution and that of s205 and how it relates to SAPS.

AD PARAS 55 - 58

235. What Brigadier Voskuil states concerning the number of police stations in the Western Cape, the existence of specialised SAPS units, the Provincial Commissioner's approach to crime reduction and situational factors is informative, but it does not answer our case, which is that poor and black communities are proportionally less resourced than their white, more affluent counterparts.

AD PARAS 59 - 61

236. It is unclear when the Provincial Commissioner adopted his "Back to Basics" approach, and I cannot therefore accept that any reduction in crime is the result of this approach. It is also unclear how the "Back to Basics" approach relates to the phased approach introduced in June 2016 (see Voskuil paras

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91 to 95); and how the four pillars of the "Back to Basics" approach - back to basics, service delivery, partnership and focussed approach - intersect with the THRR and the Provincial Commissioner's powers in terms s 12 (3) of the SAPS Act.

237. The Applicants welcome the managerial interventions listed in paragraph 61, many, if not all, which have been made since this application was launched. How and why these interventions were decided upon, is not described. I refer what to what has been stated above (in the section entitled *The Recent Allocations of Police Resources*) and in Ms Redpath's affidavits with regard to the use of s 12 (3) of the SAPS Act by the Provincial Commissioner.

AD PARAS 62 - 63

238. It is noted that the Provincial Commissioner used s 12(3) of the SAPS Act to staff Operation Combat, which appears to be a temporary initiative operating across police precincts. However, it is not explained where the initial 73 and the eventual complement of 133 members were sourced from.

AD PARAS 64 - 74

239. The broad categories of community reported serious crime and the situational aspects as are noted.

Human resource allocations to the provinces and the distribution thereof in the Western Cape

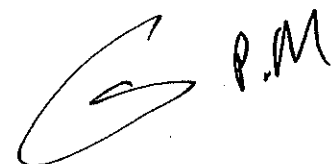
AD PARAS 75 - 98

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240. The allegations in these paragraphs have been addressed above (including in the section entitled *The Recent Allocations of Police Resources*), the founding affidavit and in Ms Redpath's affidavits. This evidence need not be repeated. The relationship between the "current policing approach", which started in June 2016 and entered its third phase in June 2017, as described in these paragraphs, and the THRR is unclear. It is encouraging that during the first phase the Provincial Commissioner re-deployed existing human resources to where they are most needed, but how the "most needed" areas were established is not explained. I note further that the steps taken by the Provincial Commissioner, as reflected in these paragraphs, support our contention that the THRR allocates insufficient policing resources to townships suffering high levels of violent crime.

AD PARAS 100 – 112

241. It is encouraging that there has been an increase in human resources in the Western Cape, and that significant numbers of police officers were distributed by the Provincial Commissioner to Khayelitsha, Harare, Lingeletu-West and Nyanga. However, it is not explained on what basis the Police Commissioner made these distributions. Ms Redpath has dealt with these allegations in her replying affidavit and the contents of these paragraphs are denied to the extent that they are inconsistent with what is stated there. I deny that the provincial distributions based on the THRR allocations are contributing to reduced crime levels (para 110), particularly given Brigadier Voskuil's admission (para 134) that there is room for "significant improvement" in the THRR's deployment of resources to areas with high crime rates.

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AD PARAS 113 - 114

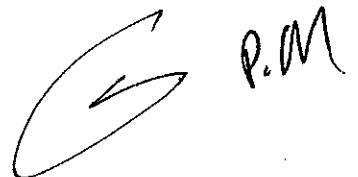
242. These paragraphs are denied for the reasons set out above under the heading *Introduction* and in Ms Redpath's affidavits.

Affidavit of Phumeza Mlungwana**AD PARAS 116 - 177**

243. Almost everything stated in these paragraphs is a repetition of allegations to which I have already responded. These allegations are disputed on the grounds set out above and in Ms Redpath's affidavits, save that:

243.1. I deny Brigadier Voskuil's evidence with regard to levels of water and electricity provision and policing (para 152). He cannot dispute the conclusions that Ms Redpath draws without establishing any basis for doing so or indicating in what respects her analysis is faulty;

243.2. The "Regulations for the South African Police" are incompatible with s 12(3) of the SAPS Act which reads: "*A Provincial Commissioner shall determine the distribution of the strength of the Service under his or her jurisdiction in the province among the different areas, station areas, offices and units.*" Yet Regulation 3(3) reserves for the National Commissioner the powers with regard to the "*distribution of the strength of the Force among the different divisions, police districts, station areas, offices, units or other institutions of any nature whatsoever*". The validity of the regulations (raised in para 158) will be addressed further in legal argument;

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243.3. The claim that Ms Redpath had difficulty understanding the THRR model (para 162) is false. In General Rabie's affidavit (para 198) he admitted the correctness of my summary of the THRR model and the determination of the fixed establishment (founding affidavit, para 127). My summary in the founding affidavit was based on Ms Redpath's evidence; and

243.4. The claim that there was no disagreement between the National Commissioner and the Provincial Commissioner concerning the power to allocate policing resources (para 169) is contradicted by General Rabie's evidence, in which he did not dispute that there had been a *"breakdown between the national and provincial offices concerning the responsibility for distributing resources"* and that this *"is a fundamental flaw in SAPS's current system"* (founding affidavit para 132 read with Rabie, paras 198 – 200).

Ad the affidavit of Ms Redpath

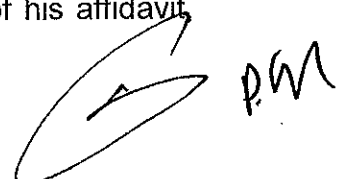
AD PARAS 178 - 201

244. Again, what is stated in these paragraphs is a repetition of allegations which have been dealt with elsewhere. The allegations are disputed on the grounds set out above and in Ms Redpath's affidavits.

Ad the affidavit of Mr Makasi

AD PARAS 205 - 207

245. Mr Makasi's experience and expertise in relation to community policing, in Nyanga in particular, have been set out in paras three to six of his affidavit

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and are not disputed by SAPS. The authority of the Nyanga CPF to act in these proceedings has been considered above.

AD PARAS 209 - 213

246. I refer to my response to General Rabie's affidavit.

AD PARAS 216 - 217

247. I repeat my response to paras 205 – 207.

AD PARAS 218 - 220

248. Mr Makasi refers to a 2012 report prepared by the Department of Community Safety as part of his description of the Nyanga CPF, and is not holding himself out as a DOCS spokesperson.

AD PARA 221

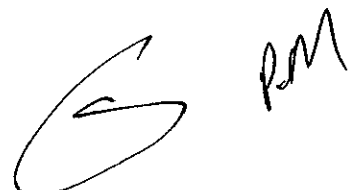
249. Mr Makasi confirms the description of Nyanga as being crime-ridden from his own experience. It is surprising that SAPS wishes to contest this evidence.

AD PARA 222

250. The allegations in this paragraph are denied for the reasons set out in Ms Redpath's affidavit.

AD PARA 223

251. I agree that other factors, in addition to resource allocation, play a role in crime generation, and I refer the Court to para 33 of my founding affidavit where I say, "*The police cannot be held solely responsible for the conditions that cause violent crime, or the victimisation of vulnerable people.*" The further

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allegations in this paragraph are denied for the reasons set out in my response to paragraph 33 of Brigadier Voskuil's affidavit.

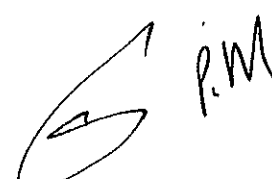
AD PARA 224 - 225

252. The **MM3** that Mr Makasi refers to here is, the "Policing Needs and Priorities 2015/16 Nyanga Cluster Report" prepared by DOCS and attached to Mr Makasi's affidavit in the intervening application. (record pp 1391 - 1414) It is clear that the source of **MM3** (record pp 1709 - 1720) that is attached to Mr Makasi's supporting affidavit, is <http://www.crimestatssa.com>, accessed on 18 October 2016, a website that displays the latest and historic South African crime statistics in an easy-to-understand format. The reference to 'Council for International Investigators' is a banner advert that appears at the top of the first page, and bears no relation to the information contained in this document. The further allegations in this paragraph are denied for the reasons set out above and in Ms Redpath's affidavit.

AD PARAS 226 - 229

253. The criticism that the Applicants rely on outdated statistics has been dealt with above and in Ms Redpath's affidavit.

254. The relevance and appropriateness of the Third Respondent using a briefing on Public Order Policing to the Portfolio Committee on Police (**PLV4**, record pp 3262 - 3292) to demonstrate that policing is expensive, is highly questionable. Our concerns are about the appropriate and adequate levels of policing in poor and Black communities, while the purpose of Public Order Policing is to deal with service delivery and related protest actions. These allegations are accordingly denied.

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AD PARAS 230 - 231

255. I am advised that Crime Report is a standing agenda item of the Nyanga CPF Executive Meeting which where Mr. Makasi was informed of the 11 murders between 1 and 12 October 2016, It is clear that the murder rate in Nyanga remains unacceptably high by any reasonable measure.

AD PARAS 232 - 233

256. I refer to Ms Redpath's affidavit with regard to the allegations in these paragraphs.

AD PARAS 234 - 237

257. The source used for Mr Makasi's figures is clearly indicated as Crime StatsSA.

AD PARAS 241 - 249

258. Mr Makasi uses reports from 2012 up to April 2016 - at the time this application was launched - to show the lack of SAPS resources in Nyanga has a history, which continues into the present.

259. Regarding the former Provincial Commissioner's description of the Nyanga police station, I refer to the full paragraph contained in the 2014 report, "Issues raised during the Nyanga / Philippi oversight visits (MM9, record p 1460): *Regarding leadership he (Provincial Commissioner Lamoer) said the acting station commander was sick but was now back again. There was a problem with absenteeism at Nyanga station. The station was being seen as a dumping station so now more staff were being rotated in and out of the station. A new branch commander for detectives was moved there. He was*

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currently on leave and indications were that he would resign. The best method was to advertise the post and get people who wanted to be there. He wanted to improve members work at station level.

260. The further allegations in these paragraphs are denied to the extent that they are inconsistent with Mr Makasi's supporting affidavit and what has been stated above.

AD PARAS 251 - 252

261. The Nyanga CPF's suggestion that there is a need for a deputy station commander is rooted in its statutory objectives in s 18(1) of the SAPS Act, which include improving the rendering of police services to the community at national, provincial, area and local levels and promoting joint problem identification and problem solving by SAPS and the community. With regard to the further allegations in these paragraphs, I refer to what has been stated above and in Ms Redpath's affidavit.

AD PARAS 253 - 255

262. The Nyanga CPF's suggestion that shift commanders be rotated is similarly rooted in its statutory objectives and is made cognisant of employment laws. That fatigue and habituation are common phenomena, emphasises the need to find local solutions to them.

AD PARAS 256 - 258

263. Without providing what it considers the most updated information, it is very unhelpful for SAPS to say that most of the information used is outdated.

AD PARA 263

 P.M.

264. It is most unhelpful for the SAPS to allege, without providing details and a time line, how exactly the Nyanga police station has been prioritised for stabilisation. While the slight increase in policing resources that has taken place since this application was launched is welcomed by the CPF, it is insufficient to have had a meaningful impact on the levels of crime in the area.

AD PARAS 265 - 270

265. It is SAPS itself, not the Nyanga CPF, that refers to the United Guidelines in its strategic plans. The allegations concerning outdated information have been dealt with above.

AD PARAS 271 - 274

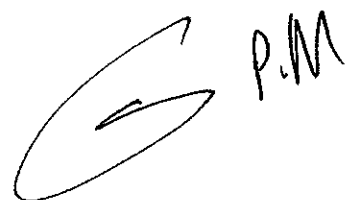
266. The Nyanga CPF has in the past been promised that the unequal allocation of SAPS resources in Nyanga would be addressed, but these promises have been slow in coming to fruition. It is accordingly sceptical about the claims made in these paragraphs. The allegations concerning the Framework Act have been dealt with above.

AD PARAS 276 - 278

267. I point out that the objectives of CPFs do not include usurping the role of the Provincial Commissioner. This is not the Third Applicant's intention. The further allegations in these paragraphs are denied.

AD PARAS 279 - 281

268. The contents of these paragraphs are denied.

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RESPONSE TO THE AFFIDAVIT OF PROVINCIAL COMMISSIONER JULA

AD PARA 1 – 4

269. The contents of these paragraphs are denied insofar as they are inconsistent with what has been stated above.

AD PARA 5 - 6

270. I deny that the Applicants have failed to make out a case for the relief sought. This application has the potential to impact positively on the lives of people in poor black areas with high crime rates. The issue of costs is a matter for legal argument.



PHUMEZA MLUNGWANA

THUS SIGNED AND SWORN TO at CAPE TOWN on this 22nd day of JUNE 2017 the deponent having acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.


COMMISSIONER OF OATHS

CHARL JOHN MAY
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