IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO.: 13/13
WCHC CASE NO.: 21600/12

In the matter between

MINISTER OF POLICE	**First Applicant**
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	**Second Applicant**
THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE FOR THE WESTERN CAPE	**Third Applicant**
THE CIVILIAN SECRETARIAT FOR THE POLICE SERVICE	**Fourth Applicant**
COLONEL MF REITZ	**Fifth Applicant**
BRIGADIER Z DLADLA	**Sixth Applicant**
COLONEL TSHATLEHO RABOLIBA	**Seventh Applicant**

And

THE PREMIER OF THE WESTERN CAPE	**First Respondent**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR COMMUNITY SAFETY, WESTERN CAPE	**Second Respondent**
THE CITY OF CAPE TOWN	**Third Respondent**
THE HON. JUSTICE CATHERINE O'REGAN N.O.	**Fourth Respondent**
ADV VUSUMZI PATRICK PIKOLI	**Fifth Respondent**
THE SECRETARY TO THE COMMISSION	**Sixth Respondent**

ADV T SIDAKI	**Seventh Respondent**
WOMEN'S LEGAL CENTRE	**Eighth Respondent**
SOCIAL JUSTICE COALITION	**Ninth Respondent**

NINTH RESPONDENT'S HEADS OF ARGUMENT

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I INTRODUCTION

1. At one level, this case raises questions of intergovernmental relations and the extent of the province's powers of oversight of the South African Police Service ("**SAPS**"). But that is not what this case is truly about. It is about the constitutional rights of the residents of Khayelitsha: their rights to equality, dignity, life, freedom from public and private violence, privacy, movement, property, housing and the rights of accused and detained persons.[1] It is about whether political posturing, party politicking, and prideful obstructionism are more important than working to improve the lives of ordinary South Africans.

2. The Ninth Respondent, the Social Justice Coalition ("**the SJC**") is a democratic membership-based social movement. The majority of its approximately 2000 members live and work in informal settlements in Khayelitsha.[2] The SJC, together with five other organisations,[3] ("**the Complainant Organisations**") lodged the complaint with the First Respondent ("**the Premier**") that led to the establishment of the Commission of Inquiry headed by the Fourth Respondent ("**the O'Regan Commission**" or "**the Commission**") that the Applicants seek to attack. The

[1] Sections 9, 10, 11, 12, 14, 21, 26 and 35 of the Constitution.

[2] Ninth Respondent's HC Answering Affidavit at para 8; Record Vol 10, p 851.

[3] Ninth Respondent's HC Answering Affidavit at para 15; Record Vol 10, p 854. The other organisations were: Equal Education; Treatment Action Campaign; the Triangle Project; Free Gender; and Ndifuna Ukwazi. Free Gender subsequently withdrew as a complainant organization.

O'Regan Commission was designed to address longstanding complaints by residents of Khayelitsha about the failures of policing in their communities.

3. The Applicants sought to have the Commission interdicted from performing its functions pending a review of its legality. That interdict application was rejected by the Western Cape High Court. In this Court, the Applicants originally sought: (a) leave to appeal the refusal of interim relief; and (b) direct access to attack the legality of the Commission, and its coercive powers.

4. The SJC supports this Court granting direct access to determine whether or not the Commission was validly appointed. The most pressing concern – and the reason the SJC opposed the application for interim relief in the High Court – is to determine the legal position as soon as possible. If this Court refuses direct access (whether or not it grants leave to appeal the interim relief) the review will have to be decided by the High Court. Together with the inevitable appeals that will follow, it is likely to take several years before the O'Regan Commission can continue its work. By contrast, if this Court finally decides the matter, it will be able to continue its work as soon as this Court gives judgment.

5. We submit that, given: (a) the urgency of the matter; (b) the fundamental rights at stake; (c) the full argument this court will hear; (d) the fact that this court has the views of the High Court on the questions before it; (e) it raises purely constitutional issues and (e) the agreement of all the parties that this Court should

finally determine the dispute, it is in the interests of justice for this Court to grant direct access.[4]

6. These heads of argument are structured as follows:

   6.1. We explain factual basis for the establishment of the Commission;

   6.2. We address attack based on co-operative government;

   6.3. We demonstrate that the Commission's coercive powers have not been properly challenged and are, in any event, necessary for it to perform its functions; and

   6.4. We illustrate why the Commission's Terms of Reference are neither vague, nor overbroad.

7. The issues identified above are likely to be dispositive of both the appeal against the High Court's refusal of an interim interdict and the direct access application. We accordingly do not deal with the appeal and the direct access application separately.

II THE NEED FOR THE COMMISSION

8. Before the High Court, the Applicants argued that the Commission was unlawful because it was "*irrational*", and that the SJC's Complaint did not constitute a

[4] See Rule 18 of this Court's Rules.

proper complaint for the purposes of s 206(5) of the Constitution.[5] The Applicants have abandoned those challenges before this Court.

9. However, both the National Commissioner's affidavit, and the Applicants' Heads of Argument[6] are littered with intimations that there was no warrant for the Premier to appoint the Commission. These assertions have two general forms: (a) the complaints are misguided or have already been addressed; or (b) there is no justification for the link between SAPS inefficiency and vigilantism.

10. Although the Applicants do not directly challenge the substantive justification for the Commission in this Court, the allegation that a commission was unnecessary colours many of their legal complaints. It is necessary to dispel any false impression that the Commission is not urgently needed to deal with the functioning of SAPS in Khayelitsha.

11. The primary justification for the Commission appears in the Complainant Organisations Complaint ("**the Complaint**") to the Premier on 28 November 2011.[7] The Complaint identified a range of problems with the SAPS's operations in Khayelitsha, including: the police are overburdened and under-resourced; there is a lack of co-ordination between the SAPS and the prosecuting services; dockets are often lost; investigating officers do not communicate with victims; witnesses

[5] Notice of Motion in the High Court, Part B, prayers 2 and 10; Record: Vol 1, pp 4 and 7.

[6] See, for example, Applicants' Heads of Argument at paras 35-37.

[7] Record: Vol 3, pp 209-250.

are not given protection and "*disappear*"; there are short-comings in investigations and gathering of forensic evidence, the police often ignore basic procedures; there is insufficient visible policing; the lack of street lights and roads makes it easier for criminals to hide and escape; victims who report crimes are treated with contempt; and many crimes go unreported because the community has lost faith in the police.[8]

12. As the SJC noted in its Answering Affidavit before the High Court,[9] the need for the Commission appears from three documents attached to the Applicants' own founding papers:

12.1. The executive summary to a report by the SAPS Crime Research and Intelligence Unit, titled "*Serious Crime in Khayelitsha and Surrounding Areas*", prepared in August 2012[10] demonstrates the continuously high levels of crime in Khayelitsha. It notes that the greater Khayelitsha area[11] "*occupies national rankings in position 1, 2 and 3 with regards to TRIO*

[8] The Complaint, Record: Vol 3, pp 234-235.

[9] The Affidavit appears at Record Vol. 10, p 848-1008.

[10] 'AL 30'; Record Vol 3, p 200. Only the Executive Summary of this Report is attached. The SJC intends to bring an application in terms of Rule 29 of this Court's Rules, read with Rule 35(12) of the Uniform Rules of Court for access to the full document.

[11] Including the communities served by the Khayelitsha, Harare and Lingelethu West Stations (which are all part of the Commission's mandate). Serious Crime Report; Record: Vol 3, 201-202.

crimes,[12] *social contact crime and robberies respectively.*"[13] The report also confirms that "*[t]he crime profile in Khayelitsha has actually not changed over the past 12 to 13 years. It still remains a dominantly social contact crime station.*"[14] The SAPS' own research unit concludes that the problems can only be addressed through "*a massive, fully integrated effort involving both Government (not only the SAPS) and the community.*"[15] A commission of inquiry would surely be part of such an effort.

12.2. The "*Task Team Report*" of the team set up by the National Commissioner to investigate the SJC's complaints[16] more than justifies the SJC's complaint about police inefficiency and a breakdown of relations between the police and the community in Khayelitsha. The report concludes, for example:

12.2.1. In a case of severe understatement, it found that "*the investigation of case dockets by the Detectives does not result in any extraordinary achievements or successes*"[17] and that "*the administration of case dockets and System Management needs to improve at the Police Stations.*"[18]

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[12] House robberies, vehicle hijackings and business robberies.

[13] Ibid at Record: Vol 1, p 202.

[14] Ibid.

[15] Ibid at 201.

[16] 'AL 87'; Record Vol 5, p 485.

[17] Task Team Report at para 8.4.2; Record: Vol 5, p 493.

[18] Task Team Report at para 8.4.3; Record: Vol 5, p 493.

12.2.2. The Task Team concluded that "*the constitutional structures established ... to enhance Police-Community relations [are] not functioning effectively and optim[ally] in the Khayelitsha area.*"[19]

12.2.3. "*The large number of suspects that are detained, not charged, and then later ... released ... is however of concern.*"[20]

12.2.4. A large number of [SAPS] members are subjected to disciplinary steps, some members even repeatedly", but steps taken against them do "*not seem to have a positive effect on the discipline as non-compliance to departmental directives and procedures seems to continue*".[21] Moreover, despite the many disciplinary steps, there has been an increase in complaints against the police.[22]

12.2.5. There were 78 "*'Bundu Court' executions*" from April 2011 to June 2012.[23]

12.3. A report by Benjamin Häefele for the Provincial Department of Community Safety entitled "*Vigilantism in the Western Cape*"[24] explains the clear link between police failings and vigilantism. The report was written in 2004, and

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[19] Task Team Report at para 6.12; Record: Vol 5, p 491.

[20] Task Team Report at para 8.3.2; Record: Vol 5, p 493.

[21] Task Team Report at para 9.2; Record: Vol 5, p 499.

[22] Task Team Report at para 9.3.1; Record: Vol 5, p 502.

[23] Task Team Report at para 8.6.2; Record: Vol 5, p 498.

[24] 'AL 88'; Record Vol 15, p 1430. A full discussion of this Report appears at Majola Answering Affidavit at paras 61-69; Record Vol 10, p 897-901.

uses Khayelitsha as a case study in considering vigilantism in the Western Cape. The focus groups Häefele consulted identified the following causes for vigilantism in Khayelitsha: (a) "*Lack of trust in the SAPS due to the political history, poor service delivery, rumours of corruption*"; (b) "*lack of trust in or understanding of the Judicial System due to insignificant sentences, bail granted, insignificant witness protection, lengthy court trials and non-transparency in the parole granting process*"; (c) "*Perception of the increase of crime*"; (d) "*Fear or sense of unsafe* (sic) *by communities. A culture of fear has developed.*"; (e) "*Inadequate communications with regard to successes of Justice System*".[25] These complaints directly echo the complaints made by the SJC to the Premier[26] and fully substantiate the link both the SJC[27] and the Premier[28] drew between the failures of SAPS and the spate of vigilantism in 2012.

13. In sum, on the Applicants' own version: Khayelitsha suffers from extremely high levels of violent crime, there are serious and ongoing concerns about police inefficiency, mismanagement and ill discipline, the community has lost trust in the police, and that leads to vigilantism. Coupled with the SJC's complaint, which

[25] Vigilantism Report; Record Vol 15, pp 1436-1437.

[26] Proclamation at Record Vol 4, p 410.

[27] SJC Supplementary Complaint at para 4; Record Vol 11, p 1013.

[28] Proclamation at Record Vol 4, p 411.

represents the perception of a significant part of the community of Khayelitsha, it is difficult to think of a more compelling case for a commission of inquiry under s 206(5).

III COMPLIANCE WITH CHAPTER 3 OF THE CONSTITUTION

(a) Introduction

14. This section is devoted to the examination of the contention by the Applicants that there was no compliance with the provisions of chapter 3 of the Constitution, particularly, that the Premier failed to comply with the principles of cooperative governance.

15. The bases upon which the decision of the Premier is impugned can be distilled into two main areas of attack. The first is that the Premier was mistaken in taking the view that at the time she appointed the Commission, no intergovernmental dispute had arisen. Flowing from this, the second area of attack is that the Premier was under a duty to comply with s 41 of the Constitution and s 41 of the Intergovernmental Relations Framework Act 13 2005 (*"the Framework Act"*), a duty that she failed to discharge.

16. It will be recalled that on this score, the majority judgment in the court *a quo* concluded that that it was *"not obligatory"*[29] on the part of the Premier to consult with certain organs of state[30] before appointing the Commission. This finding is challenged on the grounds that the Premier should have invoked the mechanisms in s 41 of the Framework Act when she decided to appoint a Commission with coercive powers – the decision to appoint a Commission being the jurisdictional fact that *"triggers"* the application of the section.

17. These contentions are without merit, as we demonstrate below. We begin by considering the nature of the powers over policing conferred by the Constitution on provinces and then briefly recapitulate the key principles emerging from the jurisprudence of this Court as it pertains to the content and ambit of the duties of cooperative government as imposed by chapter 3 of the Constitution.

(b) Provincial policing powers

[29] Vol14; p1280; para 69 of HC judgment.

[30] Vol 14; p1278; para 65 of HC judgment. As recorded in the judgment of the court *a quo*, these organs of state were: meetings of the Executive, office of the Minister, MinMec structures, Civilian Secretariat for the Police, standing meetings between MEC and the Provincial Commissioner, internal channels within the Police and the Provincial Commissioner and community forums.

18. The Applicants, relying on the Cape High Court judgment in *City of Cape Town v Premier, Western Cape and Others*[31] describe the provincial policing powers as *"non-intrusive"*.[32] This is not accurate. Under s 219 of the Interim Constitution (IC) the provincial policing responsibilities included the investigation and prevention of crime, the development of community-policing services and the provision of all other visible policing services.[33] While there was a diminution of these powers in both the original text of the Constitution (NT) and the amended text (AT),[34] there were important differences between the two, which we consider below.

19. The basic policing functions of the provinces are set out in s 206(3) of the Constitution[35] which "*entitles*" them to: (a) "*monitor police conduct*"; (b) "*oversee the effectiveness and efficiency of the police service*"; (c) "*promote good relations between the police and the community*"; (d) "*assess the effectiveness of visible policing*"; and "*liaise*" with the Minister about "*crime and policing in the province*".

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[31] 2008 (6) SA 345 (C).

[32] Applicants' Heads of Argument at paras 57 and 84. It was counsel, not the High Court, who referred to the provincial powers (over local government, not police) as *"non-intrusive"*. See paras 48.8.3 and 48.9 of the judgment.

[33] See IC s 219(1).

[34] See *Ex Parte Chairperson of the Constitutional Assembly of South Africa in re: Certification of the Amended Text of the Constitution of The Republic of South Africa*, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1 (CC); 1997 (2) SA 97 (CC) (*Second Certification case*) at para 166.

[35] NT ss 206(2)(a) – (e) contained the same provisions.

20. These are important functions which, if exercised effectively, could have a profound influence on policing in the province.[36] With regard to the *"monitoring"* function, this Court has held, in the context of the relationship between provincial and local authorities, that a power to *"monitor"* is an *"antecedent or underlying power"* which corresponds to *"'observe', 'keep under review' and the like"*.[37] It is not in itself an extensive power – *"beyond perhaps the power to measure or test at intervals ...compliance with national and provincial legislative directives or the NT itself"* – however, in the context of provincial policing powers, it should be interpreted with reference to the broader oversight function in s 206(3)(b).[38]

21. The provincial power of *"oversight"* in s 206(3)(b) explicitly includes the power to receive reports on the police service. It is similar in certain respects to the provincial powers of supervision over local government. These entail a process of provincial review of local government actions and, where necessary, the implementation of corrective measures.[39] Although the oversight power falls short of hands-on management, supervision and interference,[40] at a minimum it requires the police to be

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[36] 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification Case*), para 397.

[37] *First Certification case,* para 372.

[38] *Cf First Certification case,* paras 372 and 373.

[39] *First Certification case*, para 370.

[40] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 235.

accountable to the province and to report to it on the effectiveness and efficiency of policing services.

22. Section 206(3)(c) is significant in that it authorises the province itself to play an active role (as opposed to monitoring and overseeing the work of others) in *"promoting"* relations between police and communities throughout the province, while s 206(3)(d) confers particular responsibility on the province to assess visible policing. Section 206(3)(e) deals with liaison between the province and the national minister .

23. The AT differed in four important respects from the NT with regard to provincial policing powers: (i) the concurrence of the provincial executive was required for the appointment of the provincial commissioner;[41] (ii) the provincial executive was given the power to institute proceedings to discipline or remove the provincial commissioner in accordance with national legislation;[42] (iii) the province was given the power to appoint an investigation or commission of inquiry into complaints of inefficiency or breakdown in relations with any community;[43] and (iv) the provincial legislature was given a *"potentially important power of control"* through the right to require the

[41] Failing which mediation was required. See AT 207(3) and *Second Certification case* para 167.

[42] AT 207(6) and *Second Certification case* para 167.

[43] *Second Certification case* para 168.

provincial commissioner to appear before it or any of its committees to answer questions.[44]

24. In the *Second Certification case* this Court rejected the argument that the AT had improperly diminished the powers of the provinces with regard to policing, and it pointed out that the monitoring and oversight functions of the provinces had been given *"more teeth"*:

> *"The monitoring and overseeing functions of the provinces in the AT are also given more teeth by the power given to the provinces to investigate or to appoint a commission of enquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community..."*[45]

25. This Court concluded that *"a significantly greater degree of power and control"* over policing vested in the provinces under the AT compared to the NT.[46] In short, we can safely conclude that the four additional powers provided for in the AT ensured that the provinces would be able to perform their monitoring and oversight functions effectively.

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[44] *Second Certification case* para 168.

[45] *Second Certification case* para 168.

[46] *Second Certification case* para 169.

26. The Applicants' case is based on the provincial powers being *"non-intrusive"*. They claim, amongst other things, that: (i) a provincial legislature may not require a provincial commissioner to appear before it to provide documents relating to operations; and (ii) neither a provincial legislature nor a Premier may require a provincial commissioner or station commanders to appear before them to answer questions.[47] The Applicants seek to strip the provinces of all *"power and control"* over policing, failing to recognise that no province can perform the monitoring and oversight role required by the Constitution without the information necessary to assess the effectiveness and efficiency of police services and relationships between the police and communities.

27. In the *Second Certification case* this Court placed particular emphasis on the power granted by s 206(5) of the Constitution to establish an investigation or commission *"giving teeth"* to the monitoring and oversight functions of provinces.[48] The Applicants point out[49] that an investigation or commission of inquiry without coercive powers has no powers beyond those enjoyed by any individual or state agency conducting an investigation. What they do not, and cannot, explain is how such a

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[47] Applicants' Heads of Argument, paras 83 and 84. The claims overlook the right to receive reports in s 206(3)(b) of the Constitution and that s 115(a) of the Constitution and s 25(a) of the Western Cape Constitution empower the Western Cape Parliament, or any of its committees, to *"summon <u>any person</u> to appear before it to give evidence under oath or affirmation, or to produce documents"*.

[48] Ibid at para 168.

[49] Heads of Argument, para 94.

body could have the *"teeth"*, referred to by this Court in para 168 of the *Second Certification case,* necessary to enable provinces to perform their monitoring and oversight functions.

(c) Chapter 3 of the Constitution

28. Chapter 3 of the Constitution comprises two sections. Section 40(1) affirms that the three spheres of government – national, provincial and local – are *"distinctive, interdependent and interrelated"*. Section 40(2) requires organs of state to comply with the principles of cooperative government in the Constitution.

29. The principles of cooperative government are spelt out in s 41. This section provides that all spheres of government must, *inter alia*:

29.1. "respect *the constitutional status, institutions, powers and functions of government in the other spheres"* (s 41(1)(e));

29.2. "exercise *their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere"* (s 41(1)(g)); and

29.3. "*co*-operate *with one another in mutual trust and good faith by*

29.3.1. *fostering friendly relations;*

29.3.2. *assisting and supporting one another;*

29.3.3. *informing one another of, and consulting one another on, matters of common interest;*

29.3.4. *co-ordinating their actions and legislation with one another;*

29.3.5. *adhering to agreed procedures; and*

29.3.6. *avoiding legal proceedings against one another."* (s 41(h)(i)-(vi))

29.4. In terms of s 41(3) of the Constitution, an organ of state *"involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."* Finally, s 41(4) gives the Court a discretion to refuse to hear a dispute if it is not satisfied that the parties have complied with s 41(3).

30. In a quartet of cases decided prior to the enactment of the Framework Act, this Court crafted a particular approach towards the interpretation of chapter 3. We deal with these cases below and distil the principles that we contend must guide this Court in dealing with the concerns raised by the Applicants.

31. In *The First Certification case* this Court recognised inter-governmental cooperation as implicit in the structure of the Constitution. This arose from the fact of concurrent allocation of powers to the different levels of government.[50]

[50] *First Certification* case para 290

32. In relation to the duty to avoid litigation among organs of state, this Court held *"disputes should where possible be resolved at a political level rather than through adversarial litigation."*[51] However, this, and s 41(4), did not imply an ouster to the jurisdiction of courts or deprive any organ of state of the powers vested in it by the Constitution.[52]

33. Having regard to the scope of the provincial policing powers discussed above, it follows that by exercising the power to appoint a commission of inquiry, the Premier was not usurping a power allocated to another organ of state in breach of s 41(1)(g). She was exercising powers properly vested in her. The fact that the Commission had coercive powers was not an aberration from the path of the Constitution. It was expressly envisaged by this Court that any commission appointed in terms of s 205(a) of the Constitution, would not be toothless – it would be capable of monitoring and overseeing the functions of the police in the province. It is plain that unless a commission of inquiry has coercive powers, it cannot play the effective role that is envisaged by s 205 of the Constitution.

34. The decision in *Premier, Western Cape v President of the Republic of South Africa and Another*[53] upon which reliance is placed by the Applicants did not develop the

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[51] *First Certification* case para 291

[52] *First Certification* case para 291. In this regard, it was held that litigation among organs of state is provided for in s 167(4)(a) of the Constitution, where the issue concerns a dispute about the constitutional powers of the organs of state in issue.

[53] (CCT26/98) [1999] ZACC 2; 1999 (3) SA 657 (CC); 1999 (4) BCLR 383 (CC) (*Premier, Western Cape*).

principle in the *First Certification* case. Nor did it implicate the specific powers of appointment of commissions of inquiry by a premier of a province. Indeed, it supports the position adopted by the SJC: it makes it plain that the provisions of s 41(1)(g) cannot be used in a manner that will undermine the lawful exercise of powers by an organ of state and prevent it functioning effectively as the functional and institutional integrity of the different spheres of government must be determined with regard to their place in the constitutional order and the countervailing powers of other spheres of government.[54]

35. In *National Gambling Board v Premier of KwaZulu-Natal and Others*[55] the Court noted that the duty to avoid litigation was at the heart of chapter 3 of the Constitution. It observed that the parties had made no meaningful effort to comply with the requirements of cooperative government and that the obligation to avoid litigation entails much more than an effort to settle a pending court case: it "*requires of each organ of state to re-evaluate its position fundamentally.*"[56]

36. *Uthukela District Municipality and Others v President of the Republic of South Africa and Others*[57] dealt with the application of s 41(3) of the Constitution where a dispute resolution mechanism exists. It was held that apart from the general duty

[54] *Premier, Western Cape* para 58.

[55] (CCT32/01) [2001] ZACC 8; 2002 (2) BCLR 156; 2002 (2) SA 715 (CC) (*National Gambling Board*).

[56] *National Gambling Board* para 36.

[57] [2002] ZACC 11; 2002 (11) BCLR 1220 ; 2003 (1) SA 678 (CC) (*Uthukela* case)

to avoid legal proceedings against one another, s 41(3) of the Constitution requires organs of state, firstly to make every reasonable effort to settle disputes through the applicable mechanisms and procedures, and secondly, to exhaust all other remedies before resorting to litigation.[58]

37. It is against the backdrop of these principles that the complaints of the Applicants can be examined.

(d) Applicants' contentions

38. As noted above, the Applicants impugn the establishment of the Commission on the grounds that the Premier did not invoke the Framework Act before establishing the Commission. It is argued by the Applicants that a *"dispute"* within the contemplation of the Framework Act arose *"when the Premier felt that the SAPS were fobbing her off and not giving her any response or responses that she did not like."* [59]

39. The Applicants attempt to explain (or explain away) their own failure to invoke the provisions of the Framework Act before embarking on litigation against the Premier on the grounds that *"the Minister had no choice but to approach the Court"* because his attempt to engage the Premier had failed.

40. Neither argument can be sustained.

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[58] *Uthukela* case para 19

[59] Applicants' Heads of Argument para 67

33.1 The Premier's attempts to engage the police prior to the establishment of the Commission are recorded in detail in her affidavit and we do not intend to repeat them here. Instead of adopting a supine attitude to the communications from the Premier, the Applicants could have declared a dispute in terms of s 41(1) of the Framework Act. Having failed to do this, it is self-serving to seek to prevent the lawful exercise of powers by the Premier in the appointment of the Commission. We emphasise – as noted in *Premier, Western Cape* – that the procedural steps entailed in s 41 of the Constitution do not detract from the existence of the power of the Premier to appoint a commission of inquiry in terms of s 205 of the Constitution. If the power exists and has been lawfully exercised, the decision to appoint the Commission cannot be assailed on the grounds of s 41 of the Framework Act. In short, it is the Applicants, not the Premier, who should have declared a dispute, if they were of the opinion that a dispute existed.

33.2 The argument that the Applicants were compelled to institute legal proceedings can be dispensed with briefly. It is clear, as noted in *National Gambling Board*, that organs of state are under a constitutional obligation to avoid litigation against one another. One should not pay lip-service to this obligation: it entails, where appropriate, the duty on organs of state to "*re-*

evaluate [their] position[s] fundamentally". [60] When this obligation is juxtaposed with the actual conduct of the Applicants, it is apparent that they launched the litigation without any meaningful attempt at avoiding it. Firstly, had they engaged with the Premier before the Commission was appointed, the eventual litigation could well have been rendered moot. Secondly, the Applicants could have declared a dispute in terms of the Framework Act *after* the Premier's decision to appoint the Commission. This was not done. No explanation has been given for this.

IV THE COMMISSION'S COERCIVE POWERS

41. The Applicants recognise that the Premier is constitutionally entitled to establish a commission of inquiry to investigate the police, but contend that such a commission cannot be afforded powers to coerce members of the SAPS to testify or produce documents.

42. The SJC responds to this challenge as follows:

42.1. The attack is misdirected as the O'Regan Commission was established in terms of s 1 of the WC Commissions Act ("WCCA") which automatically confers powers of subpoena; and

[60] *National Gambling Board* case para 36.

42.2. Considering the nature and purpose of commissions of inquiry, a commission established to perform the functions in s 206(5) must have coercive powers.

43. This section is structured as follows:

43.1. We describe the general purpose and powers of commissions of inquiry;

43.2. We lay out the constitutional and statutory framework within which this case must be decided;

43.3. We explain why the Applicants' attack is misdirected;

43.4. We argue that, in order to perform the functions in s 206(5), a commission must have coercive powers; and

43.5. We deal with a specific complaint of conflict with a regulation.

(a) Purpose and powers of commissions of inquiry

44. Commissions of inquiry serve varied purposes. In *President of the Republic of South Africa v South African Rugby Football Association* ("*SARFU*"),[61] this Court identified two of those purposes, namely furnishing advice and conducting investigations:

[61] [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

"[a] commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice.";[62] and

"a commission remains an investigative body whose primary responsibility is to report to the President upon its findings."[63]

45. In *Starr v Houlden* Lamer J held that commissions serve a number of functions, including enabling government to secure information for policy making or implementation, educating the public or the legislature, investigating the state administration and *"permitting the public voicing of grievances."* Investigatory commissions in particular serve to supplement mainstream governmental activities.[64]

46. Vitally, in addition to advising the executive, commissions serve a deeper, public role at times of widespread disquiet or disillusionment. In the words of Cory J of the Supreme Court of Canada:

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[62] *SARFU* at para 147. See also *Bell v Van Rensburg NO* 1971 (3) SA 693 (C) at 705 F; *S v Mulder* 1980 (1) SA 113 (T) at 120 E, quoted in *SARFU* (n 61 above) at para 146. See further, AJ Middleton 'Notes on the Nature and Conduct of Commissions of Inquiry: South Africa' (1986) 19 *Comparative and International Law Journal of South Africa* 252 at 253 and 255-258; and Royal Commission on Tribunals of Inquiry *Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon* (1966) at 15 ("The history of inquiries to which reference has been made shows that from time to time cases arise concerning rumoured instances of lapses in accepted standards of public administration and other matters causing public concern which cannot be dealt with by ordinary civil or criminal processes but which require investigation in order to allay public anxiety.")

[63] SARFU at para 163.

[64] [1990] 1 SCR 1366 at 1411.

> *One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment or scepticism, in order to uncover 'the truth'. ... In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.*[65]

47. It has been widely recognised that, in order to perform their functions, commissions of inquiry must – at least in some circumstances – have the power to compel witnesses to testify and produce documents. The United Kingdom's Royal Commission into Tribunals of Inquiry explained that on the rare occasions when crises of public confidence occur:

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[65] *United Steelworkers* [1995] 2 SCR 97 at 137-138 (emphasis added). See also Middleton (n 62 above) at 256 ("from the citizen's point of view, commissions of inquiry provide an opportunity to participate in the process of decision-making which affects their lives." Citing Tony Black 'Commissions of Inquiry' (1980) 19 *Newv Zealand LawJournal* 425 at 427) See also Gerald Le Dain 'The Role of the Public Inquiry in our Constitutional System' in Jacob Ziegel (ed) *Law and Social Change* (1973) 79 at 85, quoted with approval in *United Steelworkers* at 139 (argues that a commission of inquiry does not only have a technical legal function, it serves a social function and "*whether it likes it or not*", becomes part of a social process of responding to a problem. "*The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.*")

> *"the evil, if it exists, shall be exposed so that it may be rooted out; or if it does not exist, the public shall be satisfied that in reality there is no substance in the prevalent rumours and suspicions by which they have been disturbed. [T]his would be difficult if not impossible without public investigation by an inquisitorial Tribunal possessing the powers [to compel witnesses to testify and produce documents]."*[66]

48. Exactly when commissions should be entitled to exercise these powers is a matter of debate. This Court noted in *SARFU* that, as "*[c]oercive powers of subpoena are generally reserved for courts*", it was appropriate for the Commissions Act 8 of 1947 ("**National Commissions Act**") to limit the President's power to afford a commission those powers to situations where, "*viewed objectively, the matter to be investigated by the commission is one of public concern.*"[67] If the matter is not one of public concern, the President may still appoint a commission, but "*the commission will have no powers beyond those enjoyed by any individual or state agency conducting an investigation.*"[68]

49. The Law Reform Commission of Canada drew a similar distinction between "*advisory commissions*" and "*investigatory commissions*":[69]

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[66] Royal Commission (n 62 above) at para 28. See also ibid at paras 32 and 123.

[67] *SARFU* at para 176. In England, based on the recommendation of the Royal Commission, there is a similar requirement. The issue must be a "*specific matter of vital public importance*" in order for the commission to be afforded coercive powers. British Tribunals of Inquiry (Evidence) Act of 1921 s 1(1), as explained in *SARFU* (n 61above) at para 178. See also Royal Commission (n 62 above) at para 27.

[68] *SARFU* (n 61 above) at para 162, citing *S v Mulder* (n 62 above) at 121C.

[69] See Law Reform Commission of Canada *Administrative Law: Commissions of Inquiry: A New Act* (1977, Working Paper 17) and Law Reform Commission of Canada *Advisory and Investigatory Commissions* (1979, Report 13).

> *"commissions of inquiry are of two general types. There are commissions which advise. They address themselves to a broad issue of policy and gather information relevant to that issue. And there are commissions which investigate. They address themselves primarily to the facts of a particular alleged problem, generally a problem associated with the functioning of government."*[70]

50. An advisory commission would consider "*any policy matter of substantial importance, or complex problem requiring expert solution*" such as "*federal-provincial relations, health services, broadcasting, bilingualism and biculturalism, and so on.*"[71] They would not investigate particular complaints and would rely entirely on voluntary cooperation to collect information.

51. Investigatory commissions, on the other hand, would be afforded powers to compel testimony, but this would only be permissible to investigate a matter of "*substantial public importance*". That phrase would include in its ambit "*serious accusations of incompetence or venality in government itself*" and *"[s]erious breakdown in the implementation or administration of an established government*

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[70] LRCC *Report* (n 69 above) at 5. The Supreme Court of Canada endorsed this distinction in a slightly different context in *R v S. (R.J.)* [1995] 1 SCR 451 at 538 (per Iaccobucci J)(endorsed the distinction for the purpose of determining when a direct use immunity against the use of self-incriminatory evidence arises). See also *Starr v Houlden* (n 64 above) at 1403-1404.

[71] LRCC *Working Paper* (n 69 above) at 26.

policy".[72] Investigatory commissions would be sparked by some event or systemic issue causing public dissatisfaction.

52. What emerges from this analysis is that, while each commission will be unique in terms of its purpose and powers,[73] there are at least two paradigmatic types of commissions:

52.1. Commissions that do not have coercive powers and are primarily intended to advise the executive about how to approach an abstract policy problem in the future; and

52.2. Commissions that are intended to investigate an existing matter of public concern, or determine what happened in the past, and that do have coercive powers.

53. A legislature can choose to allow the appointment of commissions with or without powers of investigation, depending on the circumstances. This is the course taken by the National Commissions Act. Or it can choose to clothe all commissions with coercive powers, as the Canadian Inquiries Act does.[74] This is the course selected by the Western Cape Provincial Legislature, as discussed below.

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[72] LRCC *Working Paper* (n 69 above) at 31.

[73] LRCC *Report* (n 69 above) at 5 ("Of course, many inquiries both advise and investigate. Consideration of a wrongdoing in government naturally leads to consideration of policies to avoid the repetition of similar wrongdoings. Study of broad issues of policy may lead to study of abuses or mistakes permitted by the old policy, or absence of policy. However, almost every inquiry either primarily advises or primarily investigates.") See also Middleton (n 62 above) at 254.

[74] Despite the Law Commission's recommendations, the current Canadian legislation – the Inquiries Act RSC 1985 c I-11 – allows the Governor in Council to establish a commission to investigate "any matter connected with the good government of

(b) The Constitutional and Statutory Framework

54. It is necessary to describe carefully the constitutional and statutory framework within which the Premier exercised her power to appoint the O'Regan Commission.

55. The Minister is primarily responsible for the SAPS.[75] However, as described above, s 206(3)[76] affords the provinces important powers of monitoring and oversight.

56. The Applicants[77] make much of the fact that the powers in s 206 are less direct than those granted the provinces by the IC.[78] This is true. But it is also true that the absence of any real powers over the police was one of the reasons this Court refused to certify the original text of the Constitution.[79] As noted above,[80] s 206(5) – along with parts of s 207[81] – were inserted to meet this deficiency by giving the monitoring and overseeing functions of the provinces "*more teeth*".[82] It would be a mistake to interpret this history as pointing only to the limits of the provinces'

Canada or the conduct of any part of the public business thereof." Inquiries Act s 2. All commissions established under the Act have coercive powers. Inquiries Act s 4.

[75] Constitution s 206(1).

[76] Section 206(3) is repeated in s 66(1) of the Western Cape Constitution.

[77] Applicants' Heads of Argument at paras 76-82.

[78] Act 200 of 1993.

[79] *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 401 read with

[80] Paras 24 to 27 above.

[81] See in particular ss 207(3) and 207(6)..

[82] *Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996* [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (CC) at para 168.

powers with regard to the SAPS. The *Certification Judgments* demonstrate that it was only by affording the provinces meaningful powers of oversight and monitoring that the Constitution could comply with Constitutional Principle XVIII(2).[83]

57. The powers in s 206(3) are not afforded to the executive or to the legislature, but to "*the province*" as a whole. They therefore accrue to both the executive and legislative branches. The provincial legislature is entitled to make legislation to regulate and give effect to the province's powers and responsibilities in Chapter 11.[84] This is confirmed by s 67(1) of the Western Cape Constitution, which reads: "*The Provincial Parliament may pass legislation necessary to carry out the functions listed in section [206(3)].*" In addition, the legislature can call the provincial commissioner and any other person to appear before it or produce documents.[85]

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[83] *"The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this [Interim] Constitution".*

[84] Constitution schedule 4A, item 18 reads: "Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence."

[85] Constitution s 206(9) states that the provincial legislature may "*require the provincial commissioner of the province to appear before it or any of its committees to answer questions.*"

58. The provincial executive has the responsibility to perform the functions afforded to the province by Chapter 11 of the Constitution, national legislation, national policing policy[86] or provincial legislation.[87]

59. The most important constitutional provision for present purposes s 206(5),[88] which limits the scope of an investigation or commission appointed in terms of the provision, to the performance of *"the functions set out in subsection (3)"*.

60. Like the other provincial powers and responsibilities in s 206, the powers in s 206(5) are conferred on "*the province*". The natural interpretation is: (a) the legislature may pass legislation to regulate the power; and (b) the executive (or the Premier) exercises the power.

61. Section 127(2)(e) of the Constitution states that the Premier "*is responsible for appointing commissions of inquiry*" (emphasis added). Clearly, only the Premier is constitutionally entitled to exercise the function bestowed on the Province by s 206(5)(a) to appoint a commission of inquiry. An attempt by an MEC or the legislature to do so would violate s 127(2)(e).[89] When the Premier appointed the

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[86] Constitution s 206(4).

[87] Western Cape Constitution s 68(1)(a).

[88] Section 206(5) is repeated in s 66(2) of the Western Cape Constitution.

[89] *Minister of Local Government, Housing and Traditional Affairs, Kwazulu Natal v Umlambo Trading 29 CC and Others* 2008 (1) SA 396 (SCA) at para 18. However, other executive organs such as the MEC – and the legislature through its committees – may "investigate" complaints under s 206(5)(a). Those investigations must be different from a commission of inquiry. The obvious difference is, as explained above, the power to compel testimony and the production of documents.

Commission, she was exercising her responsibility under s 127(2)(e), in order to perform the function imposed on the Province by ss 206(3) and (5).

62. The final piece of the puzzle is the WCCA. The Act was passed in 1998 (shortly after the 1996 Constitution came into force) in order to "*make provision for the functioning of commissions of inquiry appointed by the Premier*". It: (a) empowers the Premier to appoint a commission of inquiry;[90] and (b) states that any such commission "*shall*" have the powers to subpoena witnesses and documents.[91] Although the WCCA refers only to s 127(2)(e) of the Constitution, not s 206, it still applies to commissions established to perform a s 206(5) function because those commissions are also appointed by the Premier under s 127(2)(e).[92]

63. The Western Cape Legislature has, therefore, adopted a different approach to the national legislature. The National Commissions Act states that when the President appoints a commission of inquiry, he "*may by proclamation in the Gazette declare the provisions of this Act or any other law to be applicable with reference to such commission*".[93] It is for that reason that this Court in *SARFU* held that the President makes two related decisions: (a) to appoint a commission of inquiry; and (b) to give it coercive powers under the National Commissions Act. That is not the case

[90] WCCA s 1.

[91] WCCA s 3.

[92] The preamble of the WCCA states: "*WHEREAS the Premier of a province is authorized in terms of section 127 (2) (e) of the Constitution of the Republic of South Africa and section 37 (2) (e) of the Constitution of the Western Cape to appoint a commission of inquiry*"

[93] National Commissions Act s 1(1)(a).

for commissions established by the Premier in the Western Cape. All commissions she establishes "*shall*" have those coercive powers.[94]

64. It is against that background that the Applicants' challenge must be evaluated.

(c) The Applicants' Challenge is Misdirected

65. It is important to clearly state the nature of the Applicants' attack on the O'Regan Commission. In its notice of motion before this Court, the Applicants frame the attack as follows:

> "*acting in terms of s 206(5) of the Constitution, the Western Cape Province is not vested with the power to appoint a Commission of Inquiry clothed with coercive powers to subpoena the Provincial Commissioner or any member of the South African Police Service ("SAPS") in terms of ss 3 and 4 of the [WC] Commissions Act*" (emphasis added).[95]

66. The Applicants case is based on the premise that the Premier acted in terms of s 206(5) of the Constitution. This is false. The Premier explicitly acted in terms of s 1 of the WCCA. The Proclamation reads as follows: "*Under section 1 of the Western Cape Provincial Commissions Act, 1998 (Act 10 of 1998), I hereby*

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[94] *City of Cape Town v Premier, Western Cape and Others* 2008 (6) SA 345 (C) paras 60 and 89.

[95] Notice of Motion, prayer 2.1, Record Vol 1, p 2.

appoint a commission of inquiry as set out in Schedule A and make the regulations set out in Schedule B."[96]

67. The Premier consciously chose to act under her power to appoint a commission in terms of s 1 of the WCCA, not in terms of s 206(5). The Applicants themselves acknowledged this in their original notice of motion.[97]

68. The Premier's references to s 206 appear in the preamble to Schedule A of the Proclamation. It states that "*SINCE section 206(3) ... provides that each province is entitled to monitor police conduct, oversee the effectiveness and efficiency of the police ... AND SINCE section 206(5) ... provides that a province may, in order to perform the functions in section 206(3), appoint a commission of inquiry into complaints of police inefficiency or a breakdown in relations between the police and any community*" *NOW THEREFORE a commission of inquiry ... is hereby appointed as follows*". But the direct source of the Premier's power was s 1 of the WCCA.

69. If the Applicants wished to bring a challenge to the Commission's coercive powers – which it enjoys automatically – they should have challenged the constitutionality

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[96] Proclamation No 9/2012, published in *Provincial Gazette* 7026 (24 August 2012); at Record Vol 4, p 410.

[97] Record Vol 1, p 4. The Applicants ask for an order "reviewing and setting aside Proclamation No. 9/2012 published in the Provincial Gazette on 24 August 2012 which established the Commission of Inquiry under s 1 of the Western Cape Commissions Act, 1998 (Act 10 of 1998) read with s 206(5) of the Constitution, on the grounds that it is inconsistent with the Constitution, and invalid." (Emphasis added.)

of ss 3 and 4 of the WCCA on the ground that – at least insofar as it applies to police – it exceeds the Province's legislative competence. They failed to do so.[98]

70. In consequence, the Applicants' attack is misdirected. Even if they were correct that a commission established under s 206(5) cannot have coercive powers over the police (a proposition we reject below), the O'Regan Commission was established under s 1 of the WC and must have coercive powers.

71. It is common for legislation to be passed to give effect to constitutional rights and obligations. This Court has repeatedly held that, when that is done, the legislation gives content to the constitutional right/obligation. The executive should rely on the legislation, not the Constitution, and challenges to the executive's conduct should either: (a) allege non-compliance with the legislation; or (b) attack the constitutionality of the legislation.[99] It is not permissible to go behind the legislation and rely directly on the Constitution in these circumstances.

(d) Section 206(5) Commissions may be afforded coercive powers

72. Even if the Applicants' attack were not fatally misconceived, it should fail on substance. The essence of the Applicants' complaint is that s 206(5) commissions

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[98] See, for example, *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) at paras 15-18 (if a decision-maker consciously relies on a provision that does not empower her to take the decision, the decision will be invalid even if there is another provision that she could have (but did not) rely on).

[99] See, for example, *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 40.

are different from other commissions because they involve provincial interference into a primarily national domain: the police. For that reason, commissions established under s 206(5) can never have coercive powers (at least over the police). This view is mistaken.

73. First, the Premier has a responsibility under s 7(2) of the Constitution to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". She is therefore under an obligation to promote and fulfil the rights of residents of Khayelitsha that continue to be infringed by police inefficiency and the breakdown of the relationship between the police and the community. These rights include the rights to dignity, life and freedom and security of the person. Her ability to effect that purpose will be better served by an interpretation of s 206(5) that permits a commission with coercive powers. It should therefore be preferred to an interpretation that would deny her those powers.

74. Second, as we noted above, there are different types of commissions of inquiry designed to serve different purposes. Some are meant to advise the executive on broad questions of public policy. Others are meant to investigate specific incidents or situations of public concern, partly to advise the executive, but also to provide a forum for the public to air their concerns and to assure the public that a problem is being addressed. Based on comparative experience, the former need not have coercive powers. The latter, if they are to achieve their objectives, must.

75. A commission established to fulfil the purpose of s 206(5) is self-evidently an investigatory inquiry. It can only be established following "*complaints of police inefficiency or a breakdown in relations between the police and any community*". Such commissions are not designed to address general questions of policy but to address specific complaints. The Premier may not establish a s 206(5) commission unless there are complaints.

76. Moreover, given the Province's limited powers over the police, there will always be a likelihood that the police will refuse to co-operate with a s 206(5) commission. The Applicants' obstructive attitude vividly demonstrates that danger. In those circumstances, a commission without coercive powers would indeed be "*fruitless and wasteful expenditure*" as the Applicants alleged in their original application.[100] It is only with coercive powers that the O'Regan Commission can fulfil its mandate.

77. Third, a commission without coercive powers would be no different to an investigation. When the Constitutional Assembly in s 206(5) empowered a province to establish a commission of inquiry or an investigation, it identified two different procedures that would apply different circumstances. The Applicants' interpretation of the provision renders the words *"or appoint a commission of*

[100] High Court Notice of Motion, Part B, prayer 5; Record: Vol 1, pp 5-6.

inquiry into" in s 206(5) otiose, as both commissions and investigations would have identical powers and functions.

78. Fourth, even if we applied, in substance, the test set out in the National Commissions Act, the O'Regan Commission is seized with a matter of "*public concern*". If an investigation into the management of rugby clears that hurdle, so too must an investigation into the breakdown of policing in an area inhabited by 750 000 people.

79. Finally, the architecture and limitations of the extraordinary immunity from subpoena by s 206(5) commissions of inquiry, claimed on behalf of SAPS, are not defined or explained. It is not in dispute that s 206(5) commissions have powers of subpoena, but it is contended that these coercive powers do not apply to members of SAPS. It is not clear whether this *"immunity"* applies to the Minister of Police or whether it extends to members of the Defence, Intelligence or Correctional services. Does it apply to commissions established by the Premier other than for purposes of s 206(5)? For example, could a commission of inquiry into provincial ambulance services (a functional area of exclusive provincial legislative competence in terms of schedule 5 to the Constitution) subpoena a police officer to produce a docket falling within the scope of the inquiry? Is the *"immunity"* reciprocal, that is, could provincial government officials claim that commissions

established by the President are not entitled to subpoena them? Could local government officials claim a similar privilege?

80. Simply posing these questions illustrates graphically the far-reaching implications of the Applicants' argument. It is unsurprising that they point to no precedent for the immunity from subpoena which they claim, as no court would relish the prospect of opening such a pandora's box.

(e) Practical and regulatory objections

81. In addition to its constitutional broadside on the O'Regan Commission, the Applicants make two targeted strikes that allege specific interference with the SAPS. These can be disposed of shortly.

82. According to the Applicants, the Commission's power to subpoena documents and witnesses amounts to a power of "*control*" or "*direction*" that only the National Commissioner may exercise.[101] This is a false characterisation. While a subpoena will require a police officer to be somewhere at a specific time, or to produce documents, it does not give her directions on how to perform her job. It is manifestly an "*indirect*" power; the control is limited and incidental.

83. In any event, the Applicants accept that both the courts and presidential commissions to which the National Commissions Act applies may subpoena police

[101] See, for example, Applicants' Heads of Argument at para 89.

officers. There are numerous other statutes that permit statutory bodies to subpoena individuals, including police officers. None of those entities are identified by the Constitution as being directly responsible for the functioning of the police. Yet it would be absurd to suggest that they could not issue subpoenas. The SJC submits that it is equally absurd to suggest that the O'Regan Commission would violate s 207(2).

84. The Applicants also suggest that subpoenas would violate regulation 58(24) of the Regulations for the South African Police.[102] This regulation makes it an offence for a police officer to disclose "*any information gained by or communicated to him because of his employment in the Force*". There are three answers to this contention. One: regulation 58(24) itself recognises that a police officer may disclose such information "*for the discharge of his functions or official duties*". Complying with a valid subpoena is clearly part of those functions. Two: if taken literally, the regulation would prevent the police from complying with court subpoenas. The Applicants do not suggest that is the case. Three: the Commission's terms of reference adequately cater for any genuine claim of confidentiality.[103]

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[102] *General Notice* (14 February 1964-1 April 2010). The argument appears at Application for Leave to Appeal and Direct Access at para 33.11-33.12: Vol 1, pp 34-35.

[103] Terms of Reference at Schedule B, paras 3-4, 6 and 8; Application for Leave to Appeal and Direct Access; Vol 1, p 62.

85. Lastly, the Applicants contend that compliance with the subpoenas will, as a matter of fact, affect the SAPS' ability to perform its functions. According to the National Commissioner, if provincial commissions under s 206(5) have coercive powers "*the operational capacity of SAPS would be open to severe attenuation or compromise and there is strong likelihood that it would cease to function as one of the* 'Security Services of the Republic'."[104] This is a fanciful assertion with no basis in evidence. There is no reason to believe that subpoenaing three policemen will affect the ability of SAPS to perform it basic function. If any police officer was seriously needed and was unable to immediately comply with a subpoena, that could be raised with the Commission. If the Commission refused to accommodate the policeman, the issue could be taken on review. That is more than sufficient to protect SAPS.

V OVERBREADTH

86. The Applicants' third challenge to the Commission is that its Terms of Reference ("**ToR**") are overbroad, and therefore invalid. The core of this complaint appears to be that it is a "*systemic investigation of policing in Khayelitsha*", and that it intends to investigate vigilantism, rather than the complaints made by the SJC.[105]

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[104] CC Founding Affidavit at para 78; Application for Leave to Appeal and Direct Access; Vol 1, p 52.

[105] Applicants' Heads of Argument at para 109. Much of the Applicants' argument on this topic, however, continues to rest on the false assertions about the limits of a commission's power to subpoena members of the police, and the supposed roles

87. The O'Regan Commission's terms of reference are:

> *"(1) to investigate complaints received by the Premier relating to allegations of–*
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> *(a) inefficiency of the South African Police Service stationed at Site B, Bonga Drive, Khayelitsha; Steve Biko Road, Harare, Khayelitsha; and Makabeni Street Lingelethu West, Khayelitsha and any other units of the South African Police Service operating in Khayelitsha, Cape Town, ("Khayelitsha"); and*
>
> *(b) a breakdown in relations between the Khayelitsha community and members of the South African Police Service stationed at the aforesaid police stations in Khayelitsha, or operating in Khayelitsha."*

88. The SJC answers the Applicants' complaint in two parts. First, we set out the law on vagueness or overbreadth of commissions of inquiry. Second, we explain why the O'Regan Commission's TOR are neither vague nor overbroad.

(a) The law on vagueness and overbreadth

89. The complaint of overbreadth is closely related to a complaint of vagueness. While the Applicants' heads of argument phrase the issue as one of overbreadth, the

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of other statutory bodies such as the Civilian Secretariat. We dealt with these arguments earlier and confine ourselves in this section to the overbreadth complaint.

notice of motion refers first to vagueness, and only in the alternative to a complaint that the ToR are overbroad. In *Affordable Medicines Trust*, Ngcobo J (as he then was) laid out the test for vagueness as follows

> *Where ... it is contended that the regulation under consideration is vague for uncertainty, the court must first construe the regulation applying the normal rules of construction including those required by constitutional adjudication. The ultimate question is whether so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them.*[106]

90. As the Court stressed, *"[w]hat is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws."*[107] Effectively, the question is whether there is any reasonable construction of the ToR that brings it within constitutional bounds.

91. A similar argument to that raised by the Applicants was (unsuccessfully) pursued in *SARFU*.[108] This Court described the inquiry as "*whether objectively the terms of reference are reasonably comprehensible to the commissioner and affected parties so as to determine the nature and ambit of the commission's mandate with*

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[106] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 109.

[107] Ibid at para 108.

[108] *SARFU* (n 61above) at paras 227-232.

reasonable certainty."[109] That commission had wide-ranging powers to inquire into "*the financial, administrative and related matters concerning the management of Rugby Union Football in South Africa by the South African Rugby Football Union (SARFU)*".[110] The terms of reference went on to list a variety of particular issues of interest, including "*professionalism in rugby*"; "*the awarding of contracts*" "*sponsorships and the ownership and management of stadia or other facilities*". This Court concluded that, the "*scope of the inquiry [was] clearly broad, but it [was] not indeterminate.*"[111]

(b) The ToR are not vague or overbroad

92. The same can be said of the terms of reference of the O'Regan Commission. They are broad, but not indeterminate.

93. It is immediately apparent that the ToR directly track the language of s 206(5). They require an investigation into complaints about: (a) police inefficiency; and (b) a breakdown in relations between the police and the community. To suggest that the ToR are overbroad, is to render it impossible to institute a commission to perform the function in s 206(5).

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[109] *SARFU* (n 61above) at para 229.

[110] Ibid at para 227.

[111] Ibid at para 230.

94. There is, moreover, nothing in the text of the Constitution to suggest that the complaints envisaged in s 206(5) must be limited to specific incidents and cannot permissibly raise broader, systemic concerns, as the Applicants seem to contend. Indeed, several textual factors point against that reading:

94.1. A "*breakdown in relations between the police and any community*" is unlikely to arise from a specific incident. A breakdown of relations is a serious state of affairs and is far more likely to arise from sustained and ongoing dissatisfaction.

94.2. It would hardly make sense to appoint a commission of inquiry into individual allegations of "*inefficiency*". Commissions can be complicated, expensive and time-consuming. It would only be rational to expend the resources of a commission to address some form of systemic problem.

94.3. The power to both investigate and appoint a commission indicates the range of possible problems that s 206(5) anticipates, and the array of responses it authorises. We argued earlier that an investigation is different from a commission because it would not include coercive powers. There is an additional difference: an investigation in the context of s 206(5) will often aim to address an individual complaint of inefficiency. A commission is better suited to wider, systemic allegations of inefficiency.

95. In addition, the ToR are further limited by the following factors:

95.1. They are tightly defined geographically; the inquiry only concerns three police stations in Khayelitsha, and other police operations in Khayelitsha;

95.2. The inquiry is limited to the complaints made to the Premier.[112] As we noted earlier, those complaints alleged a range of systemic problems. Yet they were not unlimited in scope.

95.3. Despite the SJC's wish that the complaint focus on the criminal justice system as a whole, the inquiry is limited to an investigation of the functioning of single organisation (the SAPS) rather than the general problem of crime in Khayelitsha.

96. The remaining contention that the SJC's complaints did not address vigilantism is simply false. Although the original complaint did not touch on this, the Supplementary Complaint stated: "*since the meeting on 6 March 2012, there have been a number of vigilante attacks in Khayelitsha that have resulted in the deaths of nine people. The Premier has correctly identified these 'mob justice' killings to be a direct consequence of the breakdown in relations between the police and the community of Khayelitsha.*"[113]

VI CONCLUSION

[112] See ToR clause 4(1) ("*To investigate complaints received by the Premier*") and 4(2)(a) ("*The investigation must include: (a) an investigation into the allegations*") (emphasis added).

[113] Supplementary Complaint at para 4; Record Vol 11, p 1013 (emphasis added).

97. The fundamental flaw in the Applicants' case is that on their reading of s 206(5) of the Constitution the O' Regan commission is rendered toothless, whereas it is clear from the *Second Certification case* that the very purpose of the provision was to give *"teeth"* to the monitoring and oversight powers of provinces. In the context of the present case, the interpretation of s 206(5) contended for by the SJC ensures that the constitutional rights of Khayelitsha residents, outlined in para one above, are respected, protected and promoted, rather than brushed aside in the *"turf war"* between the Applicants and the First and Second Respondents. The SJC accordingly requests that this Court: (a) refuse the application for leave to appeal; (b) hear the application for direct access; and (c) dismiss all the attacks on the O'Regan Commission, with costs, including the costs of three counsel.

Peter Hathorn

Ncumisa Mayosi

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Tembeka Ngcukaitobi

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Michael Bishop

Chambers, Cape Town and Sandton

29 April 2013