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

Case No:21600/2012

In the matter between:

MINISTER OF POLICE	First Applicant
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 AND SECURITY, 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 N.O.	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

MINORTYJUDGMENT DELIVERED 14 JANUARY 2013

SALDANHA, J

[1.] Since drafting the judgment and order that I would have proposed in the matter I have had the advantage of reading the judgment of my brother Yekiso J and agreed to by my sister Traverso DJP. I am regrettably unable to agree with the decision reached therein. This is my dissenting judgment;

Introduction

[2.] Mr Mandla Majola an adult male resident of Vukuzenzele, Philippi East, Cape Town and the campaign coordinator of the Social Justice Coalition deposed to the answering affidavit on behalf of the ninth respondent. He specifically drew the attention of the court to the following:

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

20. The SJC submits that this case must in the first instance address the state's duty to respect, protect, promote and fulfil, among others, the rights to life and dignity, freedom and security of the person, equality, privacy and the best interest of children. A criminal minority terrorises people living and working in Khayelitsha day and night, but we believe that this case must also take into account the constitutional rights of arrested, detained and accused persons.

21. While I and the other deponents on behalf of the SJC are often critical of the Applicants, we would far prefer to be working together with them, and the other parties, in addressing the circumstances of people living in informal settlements in Khayelitsha who are too scared to go out to the toilet at night or residents who are struggling to come to terms with the shock of having been robbed or raped without the benefit of counselling or institutional support.

22. In particular, I wish to commend the Second Applicant ("the National Commissioner") for the attempts she made to address the issues raised in the complaint after she was appointed to her position in June this year. The proposal formulated by her office in July 2012, as set out in annexure "AL67_A", for an independent policing panel reflects a clear understanding of what is required to address the negative perception of the South African Police Services ("SAPS") in Khayelitsha and could have provided an invaluable model for policing throughout the country. If this proposal had been tabled and presented to the complainant organisations in early August this year, I have little doubt that there would have been no need for the Commission to be established."

[3.] In the prelude to his address, Mr Hathorn who appeared on behalf of the 9th respondent likewise emphasised the above context and considerations that the court should take into account.

[4.] While I, and no doubt my colleagues, are acutely mindful of the desperate conditions that the community of Khayelitsha live in, with extreme levels of crime, poverty and inequality as in many other townships in South Africa, this application in the context of the interim relief sought, does however, in my view raise very important constitutional principles such as that contained in chapter 3 of the Constitution of the Republic of South Africa with regard to co-operative governance and inter-governmental relations and the foundational principal of legality that executive organs of state are required to observe in the exercise of both their Constitutional and statutory powers.

[5.] Central to the determination as to what in my view is the dispute between the principle antagonists namely the first, second and third applicants on the one side and the 1st respondent (and the 2nd respondent to a limited extent) on the other, is whether the 1st respondent in appointing the commission of inquiry complied with the relevant provisions of the Constitution that delineates the powers, functions and responsibilities of the South African Police Services in chapter 11 of the Constitution and whether the antagonists have properly complied with their obligations under chapter 3 thereof that prescribes the principles of co-operative governance and inter-governmental relations.

Section 205(1) under chapter 11 of the Constitution provides;

"(1) The national police service must be structured to function in the national, provincial and where appropriate, local sphere of government"

Section 206(3) provides;

"(3) Each province is entitled –

(a) to monitor police conduct;

(b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;

(c) to promote good relations between the police and the community;

(d) to assess the effectiveness of visible policing; and

(e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province."

Section 206(4) provides:

"A provincial executive is responsible for policing functions-

(a) vested in it by this Chapter

(b) assigned to it in terms of national legislation; and

(c) allocated to it in the national policing policy."

Section 206(5) provides:

"In order to perform the functions set out in subsection (3), a province-

(a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and

(b) must make recommendations to the Cabinet member responsible for policing."

Section 207 provides:

"National legislation must provide a framework for the establishment, powers, functions and control of municipal police services."

Section 41(1) of Chapter 3 under the heading CO-OPERATIVE GOVERNMENT provides;

"All spheres of government and all organs of state within each sphere must

(a) ...

(b) ...

(c) ...

(d) ...

(e) Respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in other spheres; and

(h) co-operate with one another in mutual trust and good faith by-

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(iv) avoiding legal proceedings against one another."

[6.] This matter unfortunately exemplifies a breakdown in the relationship between two spheres of government; national and provincial through the conduct of the antagonists and their failure to have adhered to the Constitutional discipline and restraint required of them.

The test for the grant of an Interim Interdict.

[7.] The requirements for the grant of an interim interdict and the appropriateness for such relief has in recent months received the attention of the Constitutional Court in **International Trade Administration Commission v Scaw South Africa (Pty) Ltd 2012 (4) SA 618 CC:2010 (5) BCLR 457 (CC) ("the ITAC case")** and **National Treasury and others v Opposition to Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene) 2012 (11) BCLR 1148 (CC) ("the OUTA case").**

[8.] The test developed historically through the oft quoted decisions of **Setlagelo v Setlagelo 1914 AD 221 and Webster v Mitchell 1948 (1) SA 1186 (W)** which held that an applicant who claims an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable

apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy. Inasmuch as these requirements were initially fashioned and suited for interdicts between private parties the full bench in **Gool v Minister of Justice and Another 1955 (2) SA 682 (C)** was required to consider an interdict restraining the Minister from exercising certain powers in him by statute. Ogilvy-Thompson J, having considered the requirements for an interim interdict set out in **Setlagelo** (above) stated the following:

"The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of mala fides, the court does not readily grant such an interdict".

[9.] In the **ITAC** case the Constitutional Court accepted that it was and as a general proposition competent for a court to grant interim relief and stated that to the extent that this involves *"entering the exclusive terrain of the executive and the legislative branches of government, the intrusion is mandated by the Constitution itself."* The Constitutional Court considered cases in which it was found appropriate to grant such relief taking into account the Constitutional requirement of the separation of powers which it described as a *"delicate balance"* between the role of the courts as *"ultimate guardians of the*

Constitution" and the importance of empowering democratically elected executive organs of state to effectively exercise their powers.

[10.] In the context of the **ITAC** case Moseneke DCJ at paragraph 44 stated:

"[44] Third, the restraining order brings to the fore important issues related to the separation of powers between the courts and the national executive, and the issue of the potential breach of the state's international obligations in relation to international trade. The setting, changing or removal of an anti-dumping duty is a policy-laden executive decision that flows from the power to formulate and implement domestic and international trade policy. That power resides in the heartland of national executive authority. Separation of powers and the closely allied question whether courts should observe any level of 'deference' in making orders that perpetuate anti-dumping duties beyond their normal life span is a constitutional matter of considerable importance. Fourth,..."

[11.] In reference to the decision in **Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416(CC) (2006) (12) BCLR 1399; [2006] ZACC 11)** the Constitutional Court recorded its view on the separation of powers as:

"Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

[12.] The Constitutional Court held that where the Constitution or legislation entrusts a specific power and functions to particular branches of government the courts *"may not usurp that power or function by making a decision of their preference that would frustrate the balance of power implied in the principle of separation of powers. The principle responsibility of a court is not to make decisions reserved for or within the domain of each branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."[para 95 page 654 ,**ITAC** matter]*

[13.] Of particular concern to the court in **ITAC** was the failure of the court *a quo* to have appreciated *"the role of executive power and policy formulation"* in what the Constitutional Court regarded as clearly a policy laden matter.

[14.] In the matter of **OUTA** the Constitutional Court considered an appeal against an interim order which prevented the implementation of the *"E-tolling"* system on the highway network in Gauteng and noted that;

"A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review.

This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully. ."[para 26, page 231]

[15.] In its consideration of the common law in **Setlagelo v Setlagelo** (above) and **Gool v Minister of Justice (above)** the Constitutional Court remarked that *"Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself." [para 44, page 236]*

[16.] The Constitutional Court was however of the view that the Constitution did not require that a new test be fashioned and held that:

"However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution. [para 45, page 236]

A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases.' However, one important consideration would be whether the harm apprehended

by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights."[para 47, page 237]

[17.] Mr Rosenberg SC who appeared on behalf of the 1st and 2nd respondents submitted that the applicants in this matter were inviting the court to make the very same mistake as the courts *a quo* in both the **ITAC** and **OUTA** cases. He submitted that the 1st respondent's decision to establish the commission of inquiry involved an executive power in terms of the Constitution which was reserved to her as the democratically elected executive leader in the Province. He submitted that in making the decision the 1st respondent had exercised a discretion that involved the weighing up of policy-laden issues. For that reason, he submitted this court should be reluctant to interfere with what he regarded as a policy-laden decision of the 1st respondent. Mr Arendse SC who appeared on behalf of the applicants, submitted to the contrary that the establishment of a commission of inquiry in terms of section 206(5) of the Constitution did not involve issues of policy or a polycentric decision and in this regard pointed to the media statement on the 2nd August 2012 by the 1st respondent on the appointment of the commission of inquiry in which she stated that the appointment of the commission of inquiry *"...is the first step in a process that I hope will ultimately result in recommendations being implemented which give rise to more effective and efficient policing being applied by SAPS in Khayelitsha so as to eliminate the scourge of vigilantism and restore the affected residents respect for the application of the rule of law. The appointment of the Commission aims to contribute to the realization of that positive change. I have every hope*

that SAPs will support and co-operate with the Commission's investigation given that the main purpose of this process is to assist the police in fulfilling their mandate."(my emphasis)

[18.] In this regard Mr Arendse submitted that the Premier's decision did not fall in the same category as the **ITAC** and **OUTA** matters. This court, he urged should in fact apply the principles as stated in both those matters but in this instance by granting an interdict otherwise the court would fall foul of allowing an intrusion on the principles of the separation of powers in the context of protecting the Constitutional mandate of the different spheres of government. The grant of interim relief, Mr Arendse submitted, would in fact be promoting *"the objects, spirit and purport of the Constitution,"* in particular, the provisions relating to inter-governmental co-operation and the power of control over the police services as contained in section 207 of the Constitution.

[19.] Mr Arendse further submitted that where the right asserted in the claim for an interdict is sourced from the Constitution itself it was redundant to enquire whether the right existed and in the weighing up where the balance of convenience rested the Constitutional Court remarked that a court *"may not fail to consider the probable impact of the restraining order on the Constitution and statutory powers and duties of the state functionary or organ of state against which the interim order is sought."* In respect of the balance of convenience requirement the Constitutional Court at paragraph 47 in the **OUTA** matter remarked that *"The balance of convenience enquiry must now carefully probe*

whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must alongside other relevant harm have a proper regard to what may be called separation of powers harm. The court must keep in mind the temporary restraint against the exercise of statutory power well ahead of the final adjudication of the claimants case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm."

[20.] It is in the context of these requirements for an interim interdict that the central challenges of the applicants to the appointment of the commission of inquiry by the 1st respondent are to be considered and the respective party's compliance with their inter-governmental obligations.

Background

[21.] In providing the background to the establishment of the commission of inquiry, all the parties in their respective affidavits set out in detail the interaction between themselves and relied amongst others on records of meetings (in some instances agenda's and in others minutes) various letters of correspondence, emails, media releases, investigative reports, crime statistics and an academic article etc. In considering the background I have discerned three phases or stages in the interaction between the parties prior to the 22nd August 2012, the date of the proclamation of the commission of inquiry.

[22.] The first phase is set out in detail by the 9th respondent which covers a period of more than ten years that they campaigned around the ever deteriorating and despairing conditions of criminal activity and impunity in the greater Khayelitsha area. In this regard the campaign of the 9th respondent and other complainant organisations highlighted the extent to which there appeared to be serious challenges in not only policing services in Khayelitsha but in the broader criminal justice system. These campaigns highlighted and what appeared to be common cause between all the parties was that the problems of policing and in the criminal justice system had to be understood within the broader socio economic conditions of poverty, high unemployment, and social disaffection, all of which were compounded by the sprawling and ever growing population of the under resourced community of Khayelitsha. In that context the parties were in agreement that policing was just one of the factors that required urgent attention and that other state institutions such as social welfare, housing, roads and infrastructure, the National Prosecuting Authority and the Department of Justice should be part of an overall and integrated process of dealing with the scourge of unlawfulness, marginalisation and the on-going violations of the most basic and fundamental rights of human dignity, equality and safety of all the people of Khayelitsha. In this context the parties were also in agreement that the conditions in Khayelitsha were no more than a microcosm of the sprawling townships of not only the Western Cape but that which existed throughout most of the country.

[23.] The second phase in the background relates to the submission of the substantive complaint by the 8th respondent on behalf of the 9th respondent and the other complainant organisations, in which eight case studies were used as exemplars of the systemic problems that faced not only the policing services in Khayalitsha but that of the broader criminal justice system as well. These complaints were raised with the 1st respondent in December 2011 and in which the complainant organisations requested that the 1st respondent exercise her power in terms of Section 206(5) of the Constitution and appoint a commission of inquiry into police inefficiency and a breakdown in the relationship between the police and the community of Khayelitsha. The 1st respondent referred the complaint and the request for a commission of inquiry to the 3rd applicant, the Provincial Commissioner of Police in the Western Cape for comment and response and copied, "cc ed" it to both the 1st and 2nd applicants. The 3rd applicant simply acknowledged receipt of the compliant and advised that he had referred it to his national headquarters for a response.

[24.] It is apparent though that throughout the entire process the 3rd applicant failed to furnish the 1st respondent with any substantive response to both the complaints and to the issue of the appointment of a commission of inquiry. The 1st applicant had also merely acknowledged receipt of the complaint. The 1st respondent was forced to send repeated reminders to the 3rd applicant (which were copied to the 1st and 2nd applicants) for a full response.

[25.] It appears that at that stage the office of the 2nd applicant had been occupied by an Acting National Commissioner of Police who by all accounts had simply done nothing about the complaint. In this regard Mr Arendse urged the court to take judicial notice of what could only be described as the notorious dysfunctional state of the office of the Acting National Commissioner of Police at the time. Moreover it appears that the office of the Acting National Commissioner of Police had been ill served by its legal advisor who simply stated that the police had no business in involving itself with a decision of the 1st respondent to appoint a commission of inquiry.

[26.] The substantive complaint dealt with inefficiencies in both the SAPS and the Cape Town Municipal Police Department (the Metro Police) in the Khayelitsha area. The City in its response claimed that none of the cases referred to in the complaints involved the Metro Police and for its part explained the role of and procedures used by the Metro Police.

[27.] The 1st respondent had also noted that during March 2012 there were news reports with regard to the brutal killing of eight suspected criminals by community members. The 2nd respondent apparently raised the issue directly with the 3rd applicant and claimed that the 3rd applicant again failed to provide any substantive response. The 3rd applicant claimed though that he together with the 1st applicant met with the community of Khayelitsha in March 2012 where they discussed a number of problems relating to policing in the area. They claimed that the issue of vigilantism was not raised with them by the community.

[28.] In the light of further vigilante killings the 1st respondent in May 2012 again raised the matter with the 1st, 2nd and 3rd applicants. She claimed that the vigilante attacks had lent *"credence to the alleged breakdown of trust" between the residents of Khayelitsha and the police. No response was received from any of them. The first respondent noted a further increase in vigilante killings. On the 14 June 2012 the ninth respondent in an open letter to the first respondent directly linked the vigilante killings to a failure of policing in Khayelitsha. In this regard they noted "violent crime continued to plague the Khayelitsha community... victims are turned away or treated badly by police officers, and investigations are not followed up. The Metro Police and the ALIU are seen as evicting people and destroying their homes... in the light of the crisis it is no surprise that communities have taken the law into their own hands because angry residence no longer believe the police or the courts will keep them safe or respond appropriately."*

[29.] On the 5 June 2012 a public participation programme was held in Khayelitsha which was attended by members of senior provincial SAPS officers, the commanders of the various police stations in the Khayelitsha cluster, community leaders from the community policing forums (CPF`S) and members of the community. On the 5 June 2012 the Cape Argus also reported that the 1st respondent was consulting lawyers with regard to setting up of a commission of inquiry into the apparent breakdown in the relationship between SAPS and the community of Khayelitsha.

[30.] The 9th respondent and the other complainants supplemented their initial complaint with a number of statements from victims of crime in the Khayelitsha area and set out in detail the extent to which the matters had not been properly dealt with by the police and what they perceived to have also been the conduct of prosecutors and the failures of the courts.

[31.] During the course of this phase of interaction it is clear from the papers that the 1st and 2nd applicant the then Acting National Commissioner as well as the 3rd applicant were remiss in providing any substantive response to the 1st respondent. The applicants however claimed though that the 2nd respondent in particular had failed to raise the complaints and the issue of vigilantism in the statutory forums and in meetings with the 3rd applicant which were apparently held on a regular basis between the two of them during this period.

[32.] The third phase commenced on the 12th June 2012 with the appointment of the present National Commissioner of Police, General Mangwashi Victoria Phiyega into office.

[33.] General Phiyega introduced herself formally to the 1st respondent and requested time within which to familiarise herself with the conditions that related to policing not only in Khayelitsha but elsewhere in the country and committed herself to a formal response to the complaints and the request by the complainants for a commission of inquiry. She also requested an extension of

time by which to respond to the 1st respondent. The request was granted. In a letter dated the 29th June 2012 General Phiyega acknowledged to the 1st respondent her gratitude for the indulgence given to her and confirmed that she had since been briefed on the matter. She also advised that she had received feedback from the 3rd respondent and *"assistance and advice of my National Inspectorate, the latter being the office responsible for investigation of complaints."* She also informed that in order for her to do justice to the matter she needed to consult with the provincial management of the police and other role players at both provincial and national level. She advised that she regarded it as important to obtain full clarification before she assumed a particular position on the matter and that it was *"her duty and desire that citizens be the beneficiaries of services that the police were bound by law to deliver and that any allegations that suggested the lapse in that regard needed to be addressed seriously."* She informed the 1st respondent that she was to conduct a *"qualitative assessment"* of the implicated police stations, the outcome of which she believed *"would resolve the issues without necessarily resorting to the process of a commission of inquiry"*. She therefore requested a realistic time frame to give the matter careful consideration and to produce a report that would hopefully be of assistance to those concerned. She also claimed that she was seriously committed to looking at the issues and *"to respond in a meaningful way in due course"*. She had hoped that realistically she would have been able to respond with a report by the 20 July 2012.

[34.] On the 7th June 2012, Major-General SJ Japhta on behalf of the 3rd applicant addressed a letter to the office of the 2nd applicant in which he responded to the various complaints received from the 9th respondent and others. The response however is of little assistance as Japhta appeared to have adopted the attitude that because the complainants had not been *"forthcoming"* at the Community Policing Forums the police were not able to have dealt with the complaints. Japhta further commented that it did not appear that there was a breakdown between the community and the police and in particular the Khayelitsha cluster. So too did it appear from a document marked *"Information Note"* from the 3rd applicant and dated the 26 June 2012 that the complaints of the 9th and other complainants were dealt with rather cursorily and in which it was also concluded that because the 9th respondent and others had not reported the complaints to the police, the ICD or the Secretariat for investigation the complaints were regarded as been unfounded. The 3rd applicant was of the view that the complaints did not warrant *"a board of enquiry in terms of the Constitution of the Republic of South Africa."*

[35.] On the 3rd July 2012 the 1st respondent replied to General Phiyega in which she granted an extension until the 20th July 2012, and also stated that *"given our own oversight and monitoring role vis-à-vis the SAPS in the Western Cape by way of our co-operative governance obligations towards your office against inter alia the rights of the complainants to redress with respect to the complaints they have laid including a timeous and appropriate response thereto. My own response has already been severely delayed as a result of the lack of*

response from SAPS to my communications in this regard to date." The 1st respondent also pointed out that she regarded the situation in Khayelitsha as volatile with regard to the vigilantism and the failure of the police to have taken *"any action whatsoever."* She also informed that she would be advising the complainants of the contents of the letter from General Phiyega to ensure that the process remained *"transparent."*

[36.] It appeared that General Phiyega had immediately requested the National Inspectorate to investigate the complaints. The Divisional Commissioner of the Inspectorate, Lieutenant General Tshabalala in turn appointed a task team under the leadership of Major General Rapodi to conduct a qualitative assessment of the issues raised in the complaint.

[37.] On the 2nd July 2012 the 1st respondent issued a press statement in which she informed the public of the National Commissioners request and her decision to hold in abeyance for three weeks any process towards the establishment of the commission of inquiry pending investigation into the complaints. She also pointed out that in the seven month period that she had corresponded with the Provincial and National Commissioners *"the crisis of vigilante killings continued to escalate and the death toll currently stood at eleven known murders."* The 1st respondent decried what she regarded as a completely untenable situation and bemoaned what she regarded as the provinces Constitutional role in policing matters as confined to oversight and stressed that *"the consistent delay in response by SAPS had made it difficult for us to fulfil this function. We have*

been patient in our engagement with SAPS but this patience is finite and in fact the patience of the residents of Khayelitsha has already run out." The 1st respondent also indicated that the extension until the 20th July 2012 would be the last and she informed the complainant organisations and encouraged them to engage directly with the 2nd applicant's office, *"regarding any further complaints they have and on the progress of the investigation over the next three weeks."*

[38.] On the 5th July 2012 the 3rd applicant met with the task team to discuss the complaints. The task team informed him that they were mandated to investigate the allegations made by the complainants and to investigate the reasons, relationships and quality of service delivery with a view briefing the second applicant on the most effective and appropriate action. Between the 9th and 13th July 2012 the task team also conducted inspections at the three police stations that had formed the subject matter of the November 2011 complaint and considered a number of other issues of concern which had not been raised expressly in the complaints. On 11th July 2012 the task team met with the complainant organisations and the 8th respondent. The team also met with the chairpersons of the Community Policing Forums for the respective police stations and met with the Khayelitsha Development Forum and other community based organisations.

[39.] On the 13th July 2012 the 1st applicant requested a meeting with the 1st and 2nd respondents, the Executive Mayor of Cape Town and the Police Chief of the Cape Metro Police. The meeting was held on the 18th June 2012 for the

purposes of discussing what the 1st applicant termed a framework for partnership policing.

[40.] On the 13th July 2012 the 8th respondent in a letter to the 2nd applicant which was copied to the 1st respondent confirmed that they had met with the investigative team set up by General Phiyega and that the team had offered an undertaking to not simply intervene in the individual cases but to view the emerging problems in a proper systemic light and to keep an open mind into the establishment of a commission of inquiry, where all role players can be brought together under one objective as a *"solution to the systemic problems"*.

[41.] The 8th respondent also directed correspondence to the 1st respondent on behalf of the 9th respondent and the other complainants and requested that the 1st respondent hold over her decision with regard to the establishment of a commission of inquiry until the 31st July 2012 as a result of the efforts by the 2nd applicant to deal with the complaints. The 1st respondent rejected the request and expressed surprise at the clients of the 8th respondents *"about turn"* and informed them that their clients were not the only *"complainants about the police services."* The 1st respondent again raised her concern about vigilante action which she claimed arose out of a lack of confidence of the community of Khayelitsha in the police.

[42.] The 18 July 2012 General Phiyega and the 3rd applicant attended a meeting with the 1st respondent at the offices of the 1st respondent in Cape

Town. It appears from the affidavits filed by both the 2nd applicant and 1st respondent that there is a dispute about what exactly was discussed at this meeting and in particular whether the 2nd applicant had requested a further extension within which to respond to the 1st respondent. However, it appears from the version of the 1st respondent that she confirmed that she informed the 2nd applicant that she was aware that the 1st applicant was opposed to the appointment of a commission of inquiry but that she, the 1st respondent, was willing to defend such a decision(to appoint a commission of inquiry) in court if necessary.

[43.] On the 20th July 2012 the 1st respondent's second deadline expired and so too did the deadline of the 31st July 2012 which had been proposed by the 8th respondent. On the 6 August 2012 the 1st respondent met with representatives of the complainant organisations and the 8th respondent at her instance. The complainant organisations confirmed their request for the establishment of a commission of inquiry and also confirmed that they had not heard anything further from the SAPS task team after they had furnished further information to them.

[44.] On the 7th August 2012 the 1st respondent received a letter from the 2nd applicant under the heading: *"Complaints regarding alleged police inefficiency and a breakdown in police-community relations Khayelitsha, Cape Town,"* in which she advised as follows:

(i) That since the 29 June 2012, as the newly appointed National Commissioner of Police she had visited the Province and Cape Town, in particular, on more than one occasion, and met with several stakeholders. She claimed that these visits were aimed at familiarizing herself with the work of SAPS in the Province and to gain an insight into the challenges faced by SAPS with the delivery of services. The 2nd applicant claimed that the *"The findings are intricate and complex. Factors observed cannot be addressed overnight but rather require a progressive* long-term turnaround strategy." She also claimed that the SAPS team in the Western Cape enjoyed *"solid and robust leadership focused on deliberate turnaround strategies"* and assured the 1st respondent of her *"continued full support"*. She also informed the 1st respondent that her office *"received communication from the complainants"* and are *"arranging to meet and discuss these issues they raised"*. She further advised that after meeting with the stakeholders her office would *"announce our agreement on the nature of co-ordination and collaboration"*. 2nd Applicant emphasised that her office sought to achieve integrated interventions and hoped to involve the City of Cape Town in this regard, since they indicated an interest to participate in the proposed integrated interventions her office would be advancing. She undertook to *"keep the Province informed of developments and progress and remained committed to the course"*.

[45.] The 1st respondent's office thereafter checked with the complainant's offices with regard to whether any further meetings had been arranged to which

they were advised that none had been arranged and that they had not heard from the task team since their meeting in July 2012.

[46.] On the 15 August 2012, the 1st respondent and her Cabinet *"resolved to institute a Commission of Inquiry into alleged police inefficiency and a breakdown in police-community relations".*

[47.] On the 22 August 2012 the 1st respondent issued a media statement announcing her appointment of the commission of inquiry into policing in Khayelitsha. In the media statement the 1st respondent highlighted the lack of any progress and proper responses from the South African Police Services and the fact that they had missed successive deadlines. In the light thereof the 1st respondent claimed that she *"decided to accede to the complainants' request."*

[48.] In response to the 1st respondent's media statement the 9th respondent and the other complainants welcomed the appointment of the commission of inquiry but were critical of its terms of reference inasmuch as it did not include the City of Cape Town's Metro Services which they regarded as an integral part of policing in Khayelitsha.

[49.] On the 24 August 2012, the 1st respondent issued a Proclamation, in terms of section 1 of the Western Cape Provincial Commissions Act 10 of 1998 with regard to the establishment of the commission of inquiry into allegations of

police inefficiency in Khayelitsha and a breakdown in the relationship between the community and the police in Khayelitsha.

The Report of the Task Team

[50.] The 2nd applicant claimed that it was during the period towards the end of July 2012 and early August 2012 that the task team completed their investigation and compiled their report. It appears that the 2nd applicant only received the report on or about the 8th August 2012 and claimed that before she could consider the report and formulate a response the 1st respondent announced the appointment of the commission of inquiry.

The contents of the Report.

[51.] Lt Gen Tshabalala submitted a substantive report to the 2nd applicant and although the date on the report itself is illegible it appeared that the report was received by the office of the 2nd applicant on the 8th August 2012. I briefly record the contents of the report of the task team because it provides a useful insight into the nature of the problems of policing at the different police stations in Khayalitsha and with the police services in general and what appeared to be a substantive and serious effort on the part of the 2nd applicant to respond to the complaints of the complainant organizations.

[52.] The Introduction to the report records that complaints were received by the 1st respondent on the 9th December 2011 and the 13 June 2012 from the 8th respondent on behalf of a number of complainant organizations. It also recorded

that on the 29th June 2012 the National Commissioner, General Phiyega acknowledged receipt of the complaints to the 1st respondent and confirmed that she had been briefed in the matter and that she initiated a task team to conduct a qualitative assessment of policing in the affected area in response to the complaints. The report records the methodology adopted by the task team and the various meetings it held with a number of role players in both the police services and civil society. It also contains an overview of the complaints made and sets out an overview of the crime situation in the Khayelitsha area. The task team consulted with the Community Police Forums in Khayelitsha and apart from the CPF that covered the Lingalethu West Police Station the other two CPF`s appeared not to be fully functional. The team also considered the prevention and combating of crime strategies employed, the use of sector policing and crime prevention awareness strategies in the area. The team made various findings with regard to the lack of proper statement taking at the police stations, the failure to apprehend suspects and the lack of feedback to complainants with regard to specific cases. The team recorded that suspects were generally not charged within 48 hours and that the quality of investigations by detectives did not result in *"any extraordinary achievements of success."* It found that very little impact was made on serious crimes such as armed robberies and housebreaking and the team also found that the crime information officers at police stations did not assist the investigating officers with providing positive information and feedback.

[53.] In order to determine the quality of investigations they randomly selected a number of case dockets from the archives and found, *inter alia*; that witness statements were not obtained before case dockets was sent to court with the result that the cases were withdrawn, case dockets were also closed without stolen property with serial numbers been circulated, closed case dockets were also found in the archives with exhibits still on hand and without being disposed of, case dockets were also withdrawn in court because of statements by the arresting officers were not filed in, case dockets were also withdrawn because witnesses had not been summoned, crime scene experts were not always summoned to attend crime scenes and case dockets were found in the archives for which SAPS 69 (fingerprints) were not completed and were sent back to the Local Criminal Record Centre.

[54.] The task team also considered each of the complaints referred to by the complainants. They found that the Cluster Commander's Office Khayelitsha had also made a study of cases that were referred to as *"Bundu Court Executions"* and that for the period April 2011 to June 2012, seventy eight incidents were reported at the three police stations for which murder dockets had been opened and were being investigated. They also considered the performance of the police at the various police stations with regard to the Performance Chart and with regard to discipline and found that there were large numbers of members at the three police stations who were the subject of disciplinary proceedings. They also found that a large number of police officers suffered from work related stress and that there were also a large numbers of vacancies in senior positions.

[55.] At each of the police stations they also considered the number of complaints received at both a Provincial and Cluster level and noted an increase of complaints that pertained to the Khayelitsha police stations. They made findings with regard to victim support centres and considered the need for training at the various police stations and the need for the appointment of legal advisors at each of the centres. They also considered the management of absenteeism at the police stations.

[56.] In conclusion the task teams found that it was evident from reports that the South African Police Services *"cannot claim that the services they are rendering to the community in Khayelitsha area is of such a standard that the community does not have any reason for complaining."* On the other-hand the task team claimed that it was unreasonable for non-governmental organizations to make statements that *"there's a total breakdown in police community relations."* The report noted that despite the challenges facing the South African Police Services they were in fact executing *"its core functions and had noted the extent to which the police members have become truncated by the circumstances of the heavy workload that they are continuously facing."* However they noted that what was required was co-operation with the community to develop *"a new approach which the SAPS could embark upon to prevent crime and to attend to complaints in the Khayelitsha area."* It recommended a number of remedial measures with regard to interventions at the various police stations and also a need for psychological services to enhance organization and employee wellness and also recorded the

inadequacy in the feedback to the complainants in the matters which they had raised.

[57.] They also made a number of recommendations with regard to the enhancement of partnerships and the fighting and prevention of crime between the police and the community and the management of perceptions created by the media and NGO's regarding the services of police in specific areas.

[58.] It was common cause that the report of the task team had not been furnished to the 1st respondent or to any of the complainant organizations prior to the decision by the 1st respondent to establish the commission of inquiry. In fact it was only disclosed in the applicants founding papers for the first time. In his address before us, Mr Arendse submitted that there were two reasons why that did not occur; the first being that the 2nd applicant was not accountable to the 1st respondent and secondly that upon the receipt of the task team`s report the 2nd applicant had already become overwhelmed with the occurrences at Marikana in the North West Province in which a number of miners were apparently killed by members of the SAPS. While the second of the excuses raised a realistic practical constraint the first excuse did not accord with the attitude of co-operation that General Phiyega herself professed in her dealings with the 1st respondent.

[59.] A further phase of interaction between the parties related to correspondence and a meeting after the establishment of the commission of

inquiry between the 1st applicant and the 1st respondent in which he sought to persuade her to suspend the commission of inquiry and to consider an alternate proposal with regard to dealing with the complaints under consideration in the commission of inquiry.

[60.] It appeared from the correspondence that despite the parties having been amenable to engage one another the relationship broke down when the 1st applicant was unable to secure a commitment from the 1st respondent to suspend the work of the commission of inquiry while the 1st applicant provided the details of and the parties considered the alternate proposals. That breakdown appears to have precipitated the launching of these proceedings by the applicants and in particular those applicants (5th, 6th and 7th) who were placed under subpoena by the commission of inquiry. What is apparent though is that at stage the parties were already in a process in which they had committed themselves to an ongoing interaction but which was aborted when the applicants launched these proceedings.

[61.] As already indicated I am of the view that there are two central challenges to the appointment of the commission of inquiry by the 1st respondent. In the first instance the 1st , 2nd and 3rd applicants claims that the 1st respondent has failed to properly engage inter-governmentally so as to avoid a dispute and as such the appointment of the commission of inquiry was premature and secondly that with the appointment of the commission of inquiry the 1st respondent was in breach of the provisions of the Constitution by establishing the commission of inquiry in

terms of section 1 of the Western Cape Commissions Act which automatically gave the commission of inquiry coercive powers of subpoena over members of the South African Police Services.

[62] I propose to deal with the second of these challenges first as it underscores the importance of compliance with both the Constitutional and the statutory obligations under the Intergovernmental Relations Framework Act 13 of 2005 in respect of the inter-governmental relationships which is the very subject of the first challenge.

The National and Provincial competence with regard to policing.

[63.] The South African Police Services is structured at both national and provincial level in terms of section 205(1) of the Constitution. Under the Interim Constitution (IC) the police services functioned *"under the direction of the National Government as well as the various Provincial Governments."* (sections 214 (1) and 219(1) of the Interim Constitution). Under the Final Constitution ("FC") this power of the provinces was removed and substituted with monitoring, oversight and liaising functions contained in sections 206 of the Final Constitution. In this regard Mr Arendse referred to the decision of the Constitutional Court in *In Re Certification of the Constitution 1996 (4) SA 744 CC paragraphs 392 to 401.*

In particular paragraph 397 states:

"[397] The burden of the criticism was that the monitoring, oversight and liaising powers and functions provided for in the NT hardly make up for the loss of the powers referred to in IC 219. The new structure indeed requires that the provincial commissioner be directly accountable only to the national commissioner. This flows from the abandonment of the division in functions between the national and provincial spheres of government as prescribed in IC 218 and 219. The specific functions of the provincial commissioners are not enumerated in the NT; they are a matter for national legislation. We agree that the loss by the provinces of direct control over the provincial commissioners is a significant diminution. What has been substituted is a provincial power, among other things, to monitor all police conduct in the province, to exercise an oversight role in policing, including receiving reports on police service, and to liaise with the national minister with regard to crime and policing in the province. Although these are important functions and their effective exercise by the province could have a profound influence on the performance of the provincial commissioner's functions, the measure of control is less and is indirect."

[64.] Unlike the Interim Constitution the Final Constitution does not prescribe any powers or functions to be exercised by the Province independent of the National Minister and National Commissioner. Political accountability in relation to the provinces has been reduced by removing what was a more direct relationship between the provincial commissioner and the provincial executive to an indirect one.

[65.] In schedule 4 Part 1 of the Constitution headed *"Functional areas of concurrent National and Provincial Legislative competence" provides that;*

The legislative power over the police in the provinces is tabulated as a concurrent power *"to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence".* In this regard Mr Arendse remarked that no specific provincial legislation was enacted to give effect to the power of the province to appoint a commission of inquiry (as contemplated by section 206(5) in order to perform the functions set out in sections 206(3)). Mr Arendse submitted further that the powers of such commission would have to be, (a) limited to carrying out of the monitoring, oversight and liaising functions set out in section 206(3);(b) confined to the areas set out in sections 219(1) of the Interim Constitution which also remains subject to national legislation; (c) not be inconsistent, with such legislation and in this regard referred to the **Certification** case (above); paragraph 399 at page 890 and paragraph 396 at page 889);

"NT sch 4 part A grants legislative power over policing to provinces 'to the extent that the provisions of chap 11 of the Constitution confer upon the provincial legislature legislative competence'. This pertains to legislation which might be found necessary to carry out the monitoring, oversight and liaising functions set out in NT 206(2). Apart from this, there is no express provision for provincial legislative power in the NT."

[66.] The Western Cape Provincial Commissions Act 10 of 1998 which is not the subject of challenge in this matter, Mr. Rosenberg submitted was however not limited by these requirements because it was not specifically enacted for the purposes of investigating policing. Mr Arendse on the other hand submitted that the Constitutional provisions however prohibited the use of the Western Cape Commissions Act for such purpose and in this regard relied on the provisions of sections 207(1) of the Constitution which vested the National Commissioner with the power to control and manage the police services. The South African Police Services Act 68 of 1995 and Regulations thereunder are national legislation made in terms of section 205(2) that enabled the police services to discharge its responsibilities effectively and under a chain of command that excluded the provinces. The province, the applicants claimed may not through the 1st respondent employ the provisions of the Western Cape Commissions Act to vest the commission of inquiry with powers of coercion that neither the province nor the 1st respondent enjoyed under the Constitution.

[67.] Sections 3 and 4 of The Western Cape Provincial Commissions Act deals with the powers of a commission of inquiry to coerce witnesses to comply with a subpoena and to attend and testify before it on pain of committing an offence if he/she refuses or fails to do so unless "*sufficient cause*" is established. Mr Arendse submitted that such provisions may not be applied to control members of the SAPS and added that by coercing them to appear, produce documents and testify at the behest of the Commission would be, (a) removing them from the control of the National Commissioner; (b) placing them under the direct

legislative power and control of the 1st respondent, and (c) subjecting them to the *"coercive control by her surrogate (commission)."* Such powers he contended were not conferred upon the provincial legislature by Chapter 11 of the Constitution. In this regard Mr Arendse also pointed out that the police officers would also be at risk of breaching regulations 58(24) and 58(32) which provides that;

"58 Offences against duty and discipline

(24) Without the permission of the Commissioner, directly or indirectly discloses or otherwise and in the discharge of his functions, any information gained by or communicated because of his employment in the force or uses such information for any purposes other than the discharge of his functions or official duties, whether or not he discloses such information" and

"(32) Comments unfavourably in public upon the administration of the Force or any other government department"

[68.] Mr Arendse submitted that the provisions of these regulations conflict directly with the provisions of the Western Cape Commissions Act with regard to the power of subpoena and the compulsion of witnesses to attend such proceedings.

[69.] However Mr Arendse`s position loses sight of the provisions of section 207(4), (5)and (6) which provides that the Provincial Commissioner must report to the Provincial Legislature annually on policing in the province and must send a copy of the report to the National Commissioner and in terms of section 207(6)

and if the Provincial Commissioner has lost the confidence of the Provincial Executive the Executive may institute appropriate proceedings for the removal or transfer of or disciplinary action against that Commissioner in accordance with National legislation.

[70.] Although the Provincial Commissioner is subject to the control and management of the National Commissioner for policing in the province (section 207(4) the Provincial Commissioner is at the very least accountable to the Provincial Executive on an annual basis on policing in the province and also subject to its disciplinary power in accordance with national legislation.

[71.] In the context of the powers of the National Commissioner, the 1st applicant submitted that there were two distinct legal decisions of the 1st respondent under challenge. Firstly, the decision to appoint the commission of inquiry and secondly the decision to make the powers of subpoena afforded by the Western Cape Commissions Act applicable to the commission of inquiry. Each involved an exercise of a specific power namely, the power to appoint a commission of inquiry in terms of the Constitution and the 1st respondent's power to make the provisions of the Western Cape Commissions Act applicable. In this regard Mr Arendse relied on the decision of **President of the Republic of South Africa and SARFU 2000(1) SA (1) CC;**

"[34] In part C of this judgment, at paras [126]-[222] below, we consider whether SARFU and the other respondents were entitled to a hearing prior to the President deciding to appoint a commission of inquiry.

(a) We conclude that there are two distinct legal decisions under challenge: the decision to appoint a commission of inquiry in terms of the Constitution; and the decision to make the powers of subpoena afforded by the Commissions Act applicable to that commission. We consider whether each of these decisions constitute 'administrative action' as contemplated by s 33 of the Constitution....

[131] But that is wrong. It does not follow that, once a commission of inquiry has been appointed, the commission will automatically be vested with powers under the Commissions Act. Indeed, it is only competent to vest such powers in a commission if the commission is investigating a matter of public concern. There is no similar limitation on the power to appoint commissions in terms of s 84(2)(f). Accordingly, a commission may be appointed to investigate a matter which is not of public concern and to which the provisions of the Commissions Act do not apply. Equally, the President may decide not to make the provisions of the Commissions Act applicable even to a commission of inquiry investigating a matter of public concern. The question of procedural fairness needs to be considered in relation to three different acts, each of which involves the exercise of a specific power or powers: the President's decision to appoint a commission in terms of the power conferred upon him by s 84(2)(f); the President's decision to make the provisions of the Commissions Act applicable; and the exercise of the commission's powers by the commission itself. The third question does not arise in this case as the commission has not commenced its work. If it ever does, considerations of procedural fairness may well arise at that stage, as the Supreme Court of Appeal has recently held. The first two issues are relevant in

the current proceedings. Although they are technically separate legal acts, they are, of course, closely related..."

[72.] Mr Arendse submitted that the appointment of a commission of inquiry in terms of the Constitution is a separate legal act distinct from that which vests the powers contained in the Western Cape Commissions Act. The source of the 1st respondents power to appoint a commission of inquiry is provided for in the Constitution under Section 174 (2)(e). The two decisions arise from different sources and are therefore subject to different regulation. Mr Arendse submitted that the 1st respondent was entitled to appoint a commission of inquiry in terms of section 206(5) of the Constitution but without employing her power under section 127(2)(e) and thereby invoking the powers of coercion contained in the Western Cape Provincial Commissions Act. In effect, the applicant's submission boils down to the notion that the 1st respondent was entitled to appoint a commission of inquiry but without coercive powers over members of the police services. However, such powers could be obtained with the consent of the 1st or 2nd applicants and which should have been secured through the use of the provisions of Section 41 of the Constitution. In the absence of such *agreement the* applicants claimed that the first respondent could not invoke the provisions of Western Cape Provincial Commissions Act to automatically clothe the commission of inquiry with coercive powers.

[73.] Mr Rosenberg on behalf of the 1st respondent submitted that the applicant's contentions in this regard were without substance and failed for

several reasons. In the first place he argued that the applicants failed to recognize that the coercive powers enjoyed by the commission of inquiry did not arise from the Proclamation that established it or the regulations promulgated thereunder as clause 6 of the Schedule to the Proclamation merely noted that:

"The Commission must perform the inquiry within its terms of reference and may exercise the powers and perform the functions of the Commission as referred to in the Western Cape Commissions Act..."

[74.] In this regard the commission's power of subpoena arose from the provisions of section 3(1) and (2) of the Western Cape Commissions Act. This Act automatically applied to all commissions of inquiry established by the Premier and in all cases automatically vested such commissions with the power of compulsion. The commission thus exercised a statutory power enjoyed by all provincial commissions of inquiry and not simply powers which the 1st respondent elected to give it. In this regard he again highlighted the significance of the fact that the applicants had not sought to challenge the Western Cape Commissions Act in support of their contentions. Furthermore Mr Rosenberg submitted that the applicants had fundamentally misconceived the provisions of section 127(2)(e) and 206(5)(a) of the Constitution insofar as they do not envisage or create separate commissions of inquiry making powers. Sections 206(5)(a) merely envisaged the type of commission of inquiry by the province in respect of policing while sections 127(2)(e) of the Constitution provided such provincial commission of inquiry with the power of coercion through the exercise of the 1st respondent's powers.

[75.] The 1st respondent also claimed that the 1st applicant was inconsistent in its approach as the Farlam Commission(a judicial commission of inquiry) which had been established to investigate the Marikana incident of the 16th August 2012 also enjoyed subpoena powers. Moreover that commission of inquiry has express investigative powers into the conduct of the police and in particular the responsibility for the violent deaths of striking mineworkers. In that regard the 1st respondent noted that the 1st applicant had no problem with that commission of inquiry exercising powers of coercion. Further the 1st respondent contends that the applicants have failed to recognize that the *"intrusion"* by the commission of inquiry into the affairs of the South African Police Services is constitutionally mandated by the provisions of section 206(5) insofar as it provided that provincial oversight functions over the police services could be exercised either through an investigation or a commission of inquiry. In this regard Mr Rosenberg submitted that if the commission of inquiry did not have powers to compel witnesses it would be indistinguishable from a mere investigation. He referred to the decision of **Minister of Local Government, Housing and Traditional Affairs, Kwazulu Natal Umlambo Trading 29 CC and Others 2008 (1) SA 396 (SCA)** where it was held that section 206(2) of the Constitution meant that once provincial legislation existed regulating commissions, the powers of compulsion could only be granted in terms of that legislation. In that case, provincial legislation (similarly to the WC Commissions Act) required the establishment of a commission by the Premier. The upshot was that an MEC could appoint an

investigation but once the powers of compulsion were required the Premier alone had the power to appoint a commission of inquiry under the provincial Act.

[76.] Further, in reference to the decision in **The City of Cape Town v Premier, Western Cape, and Others 2008 (6) SA 345 CPD** the Premier appointed a commission of inquiry into the affairs of the City. The appointment was not done in terms of section 106 of the Municipal Systems Act which provides for a provincial MEC to authorize an investigation into the affairs of a municipality if the MEC believes that it was necessary and had reason to believe that the Municipality was failing in its statutory obligations and was besieged with serious malpractices. The Premier in that matter purported to act under the residual power to appoint a commission of inquiry. The court held at paragraph 70-74 that it was not open to the Premier to establish a commission of inquiry outside the circumstances provided for in s106 of the Systems Act. Mr Rosenberg submitted further that the investigation under section 106 could have been transformed into a commission of inquiry, in terms of the Western Cape Commissions Act, and that it would then have had the power to compel evidence.

[77.] Mr Rosenberg submitted also that the appointment of a commission of inquiry rationally required the power of subpoena to deal with potentially hostile or un-co-operative witnesses and institutions such as that but not limited to members of the SAPS. Further the power of subpoena by the commission of inquiry would only be used where members of the police refused to cooperate.

In this regard if members of the police under subpoena wanted to challenge the breadth of a subpoena they could bring such issue before a court but more importantly they would first be required to attend at the commission of inquiry and there raise their complaint about the subpoena.

[78.] Mr Arendse submitted that in appointing the commission of inquiry the 1st respondent employed the unlimited powers under section 127(2)(e) of the Constitution and had failed to take into account that the powers and functions of the provinces and that of Premiers are limited to monitoring, oversight and liaising over the police and that direct control over the police services is vested by virtue of section 207 of the Constitution in the National Commissioner.

[79.] I am of the view that the significance of the limit of the 1st respondents powers of appointing a commission of inquiry in terms of Section 206(5) and more so a commission of inquiry with coercive powers must be considered within the context of the Constitution itself which, (a) defines very specifically the authority and powers over the police by the National Commissioner and (b) that the appointment of the commission of inquiry under section 206(5) or for that matter any other commission of inquiry by the Premier in terms of section 127(2)(e) with regard to policing must be exercised with proper regard to the provisions of the Constitution in respect of the powers and functions over the police services and must occur within the context of Section 41 of the Constitution. On such basis while the exercise of the power of the appointment of a commissioner of inquiry under section 206(5) must not offend the principle of

legality in the Constitution the exercise of the power must also be consonant with the principles enunciated section 41 of the Constitution.

[80.] This leads me to the second substantive challenge by the 1st, 2nd and 3rd applicants against the appointment of the commission of inquiry by the 1st respondent.

[81.] In the matter **Premier, Western Cape v President of the Republic of South Africa 1993 (3) SA 657 (CC)**

"[50.] The principle of co-operative government is established in s 40 where all spheres of government are described as being 'distinctive,' inter-dependent and inter-related'. This is consistent with the way powers have been allocated between difference spheres of government. Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is 'one sovereign, democratic State, and a constitutional structure which makes provision for framework provisions to be set by the national spheres of government. These provisions to be set by the national sphere of government. These provisions vest concurrent legislative competences in respect of important matters in the national and provincial spheres of government, and contemplate that provincial executives will have responsibility for implementing certain national laws as well as provincial laws.

[51.] Local governments have legislative and executive authority in respect of certain matters but national and provincial legislatures both have competences in respect of structuring of local government, and for overseeing its functioning...

[53] The national government is also given overall responsibility for ensuring that other spheres of government carry out their obligations under the Constitution."

[82.] It is common cause that the 1st and 2nd respondents on the one side were enjoined by the Constitution to reasonably engage with the 1st , 2nd and 3rd applicants on the other side as a precursor to the establishment of a commission of inquiry by the 1st respondent into the functioning of the police in Khayelitsha. However in argument Mr Arendse sought to suggest that this burden rested only on the shoulders of 1st respondent. I do not agree with that view as it is clear from the provisions of the Constitution that the responsibility lies on both the national and provincial spheres of government. As apparent from the second phase in the background (above), the 1st applicant, 2nd applicant through the then Acting Commissioner of Police and the 3rd applicant had simply not reciprocated the engagement initiated by the 1st respondent. The request for their comments on the complaints received about policing by the 1st respondent and the request about the appointment of commission of inquiry by the complainant organizations appeared from the correspondence which was placed before the court to have fallen on deaf ears and without any substantive response to the 1st respondent. Although the 1st applicant claimed that he had met with the Khayelitsha community and the 3rd applicant claimed that he had also interacted with the

community on an ongoing basis it was clear that they had not properly communicated such interactions timeously or fully to the 1st respondent. Nor did it appear that they bothered to invite her or the 2nd respondent to the meetings with the community. The then Acting National Commissioner of Police (the unfortunate recipient of the poor advice from his legal officer) for his part displayed no initiative in responding to the very serious complaints raised about policing and vigilante activity in the Khayalitsha community. The 1st respondents compliant about the conduct of the 1st , 2nd and 3rd applicants was therefore not without merit and indeed contributed not only to her frustration but also to that of the complainant organizations who increasingly felt that the plight and desperate situation of the people of Khayelitsha was not being given proper or serious consideration and attention at a national level. Moreover, the 1st respondent became increasingly anxious by the ever increasing incidents of vigilantism that strengthened her view of a breakdown in the confidence of the police by certain sections of the Khayalitsha community. The phenomenon of vigilantism is in my view far more complex than a simplistic view of a breakdown of confidence in the police as reflected in the very insightful article by Benjamin Haefele "**Vigilantism in the Western Cape**" sourced from the Department of Community Safety, Provincial Government of the Western Cape. Nonetheless the growing incidents of vigilantism required the urgent and concerted response by all the relevant role-players and the applicants were undoubtedly central to such a process.

[83.] In my view it was apparent that there was a significant change in the response of the 2nd applicant with the appointment of General Phiyega to the

post in June 2012. In fact, the 1st respondent and the complainant organizations themselves claimed that they were initially optimistic with her response to the complaints and the 9th respondent in particular claimed that they were encouraged with the commitment of General Phiyega by having set up the qualitative assessment of the police services in respect of the complaints. It was therefore not surprising that Mr Majola remarked that the 9th respondent was impressed with the endeavours of General Phiyega and her commitment to establishing an investigation into the complaints and generally into the systemic problems faced by the police. However, what appeared to be a serious difference of opinion between the parties on the papers and in argument was whether the 2nd applicant had in fact remained consistent and committed to dealing with the complaints and in her engagement with the 1st respondent. In this regard the 1st respondent pointed to the repeated failure to comply with extensions that the 2nd applicant had given and both the 1st respondent and complainant organizations relied much on the contents of the letter of the 7th August 2012 and dismissed it as no more than a generalized and cursory response to the complaints and request for a commission of inquiry. I do not share that view. It is apparent that when the 2nd applicant addressed the letter to the 1st respondent she herself had not been in receipt of the report of the task team. In the letter she specifically refers to the interactions that she had and that which were in the process of taking place. She had visited the province of the Western Cape more than once and held meetings with several stakeholders. She had also visited some of the areas in Cape Town. Moreover she emphasized that it appeared to her that the problems were *"complex"* and required an *"integrated*

response". That in my view was neither a glib nor superficial response nor an indication that General Phiyega lacked an appreciation of the problems and the seriousness of the complaints raised by the complainants, or the systemic nature and complexity of the underlying causes of crime and vigilantism. If there was any doubt as to the seriousness or commitment of the 2nd applicant to deal inclusively and more comprehensively with the problems there was nothing that prevented the 1st respondent or the complainant organizations from responding directly to the letter of the 7th August 2012 before insisting on the appointment of a commission of inquiry. After all, they, for the first time in several months of correspondence had at long last received a positive and substantive commitment from the 2nd applicant to deal with the complaints that were raised. Moreover the complainant organizations had in fact met with the task team and they appeared by all accounts to have had a fruitful engagement with them. Although neither the 1st respondent nor the complainants were at that stage furnished with a copy of the report of the task team it was not disputed that the task team had also met with a number of other stakeholders and the task team would have been in the process of drafting a report at the very least by the end of July early August 2012.

[84.] The very appointment of the task team by General Phiyega in fact demonstrated the seriousness with which she considered the complaints and the lack of proper service by members at the three police stations concerned. The report itself indicates a serious diagnosis on the part of the task team in considering the conditions at the three police stations and to some extent the

individual complaints although Mr Majola was of the view that most if not all of the complaints had not been dealt with adequately by the task team. Further it appeared that for the first time it seemed that the police had made a serious attempt at looking at each of the complaints unlike the vain attempts by both Japhta and the office of the 3rd applicant in their dismissive attitude to the complaints.

[85.] It appears that the 1st respondent was decidedly of the view that the letter of the 7th August 2012 from the 2nd applicant was a hopelessly inadequate response to the repeated requests that she had made to the 1st , 2nd and 3rd applicants about the complaints and the establishment of a commission of inquiry for over a period of nine months. Both the 1st respondent and the complainant organizations accepted though that the appointment of the commission of inquiry was a drastic step and would have been a last resort as it also involved a considerable amount of limited state resources. Moreover the first respondent on her own version was aware that the first applicant was against the establishment of a commission of inquiry and apparently of her own accord expressed the hope that she would not have to defend the appointment of a commission of inquiry in a court. That was all the more reason for her to have enquired directly from 2nd applicant who she regarded as more receptive to working with about what exactly she had been doing about the complaints, or when the report of the qualitative assessment would be at hand or what exactly the 2nd applicant had meant in her letter of the 7 August 2012 insofar as the 1st respondent regarded it as inadequate and superficial. In my view the decision taken by the 1st respondent

at that stage to have appointed the commission of inquiry was premature and precipitous of this application and by thereafter not agreeing to suspending its operation pending the outcome of the then ongoing interactions with the 1st and 2nd applicants and to have exhausted her obligation under the Constitution of inter-governmental co-operation and by averting a dispute which at that stage was clearly imminent with the appointment of the commission of inquiry.

[86.] Moreover in invoking the provisions of the Western Cape Commissions Act with its coercive powers over the police services 1st respondent must in all probability have been aware that the issuing of subpoenas and the compelling of the police to testify before the commission of inquiry would have raised the very dispute which this court is presently confronted with.

[87.] Mr Arendse further submitted that the principles set out in the final Constitution in section 41(4) stand for two basic propositions; The first of cooperative governance which do not diminish the autonomy of any given sphere of government. **(Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)** at para 292. (The principles set out in FC s41 *'are not invasive of the autonomy of the province in a system of co-operative.')* It simply recognizes the place of each within the whole and the need for coordination in order to make the whole work. Secondly, sections 40(1) and 41(2)(e), (g) and (h) re-enforce the notion that each sphere of government is

distinct. **(Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development & Others 1999 (11) BCLR 1229** (T) at para 34,

[88.] However as already indicated, I am of the view that the responsibilities under section 41 of the Constitution burdened the parties concerned equally. The 1st applicant, save for meeting with the 1st respondent and his interactions with the community was hopelessly unresponsive to the direct request of the 1st respondent and the complainant organizations. So too was the 3rd applicant. The response of 2nd applicant in the person of General Phiyega however in my view requires to be considered differently more so in the light of the fact that she had at that stage only recently been appointed to the position and more importantly because she had proactively taken steps in investigate the complaints of the clients of the 8th respondent through the appointment of the task team.

[89.] During the course of argument and in the 9th respondent's answering papers, counsel for the 1st respondent and that of the 9th respondent suggested that the real reason why the task teams report had not been furnished to the 1st respondent was because the 1st applicant was at odds with the views adopted by the 2nd applicant in respect of having an open inquiry as part of the recommendations of taking the investigation forward. That view however appears to be contradicted by a letter dated 11 October 2012 from the 1st applicant to the 1st respondent in which he referred to the very issue and stated *that "the National Commissioner reasoned that a full police investigation is needed and that at a later stage if necessary a more formal inquiry in which the*

police will be assisted by persons outside the South African Police Services appointed by the National Commissioner will be conducted. I concur with the National Commissioner."

[90.] In this regard it was apparent that there was no difference of opinion between the 1st and 2nd applicant's with regard to the course of action that they proposed and the suggestion to the contrary was nothing more than mere speculation.

[91.] Mr Majola had also submitted that the proposal of the 2nd applicant had found favour with the complainants and had they been in receipt of the proposal at the beginning of August 2012 and the recommendations of the task team they were confident that there would have been no need for this litigation.

[92.] In the circumstances I am not satisfied that the parties, in particular the 1st, 2nd and 3rd applicants on the one side and the 1st and 2nd respondent on the other have exhausted their obligations to engage one another to explore appropriate means of avoiding or resolving the dispute between them and in respect of the complaints and the apparent breakdown in the relationship between the community of Khayelitsha and the police services. During the course of argument there was much debate about whether the applicants should have first declared a dispute in terms of the Framework Act before approaching court Mr Rosenberg submitted also that there was no dispute between the parties as the 1st applicant had repeatedly stated that he sought to *"avoid a dispute." However it was*

patently clear that the dispute between the parties arose by virtue of the very appointment of the commission of inquiry by the first respondent which incidentally the first respondent herself acknowledged in the meeting with the second applicant would occur if she appointed a commission of inquiry. It was therefore incumbent on all the parties concerned (described earlier as the antagonists) to have made an attempt of resolving the dispute by way of further negotiations and interaction between them.

[93.] The applicants have also raised a number of other grounds in which they sought and based their claim for interim relief. In the light of my findings with regard to the non-compliance with the principles of inter-governmental relationships as contained in the Constitution I do not deem it necessary to deal with each of the other grounds. Moreover there appears to some dispute of fact with regard to a number of issues in particular as to whether the 1st and 2nd respondents exhausted all the other statutory institutions and mechanisms to both raised and dealt with the complaints. It is not necessary to resolve such disputes on the papers at this stage. Further the applicants very sensibly and appropriately did not persist with their challenge for the recusal of the Chairperson of the commission of inquiry retired Judge O' Regan, commission member Mr Vusi Pikoli and evidence leader Mr Sidaki which in my view was fully dealt with by them in their respective answering affidavits. .

[94.] I am also mindful of what appears to be deterioration in the relationship between the 1st applicant and the 1st respondent from the tone of language used

in their affidavits. I have no doubt that their commitment to the principles of co-operative government will remain the guiding principle in their official responsibilities of inter-governmental relations and in their further conduct in this matter.

[95.] Further I do not deem it necessary to deal with the complaints of over breadth of the subpoenas as a basis for the challenge for seeking interim relief as the 6th respondent correctly pointed out such challenge could and should more appropriately be raised before the commission of inquiry.

[96.] In consideration of the issues of irreparable harm and the balance of convenience the Constitutional Court has in the context of the **OUTA** matter raised the question of separation of powers harm and against which the balance of convenience must also be considered.

[97.] Section 41 (4) of the Constitution provides:

"If the court is not satisfied that the requirements of sub-section 3 had been met it may refer the dispute back to the organs of state involved."

Subsection 3 provides:

"An organ of state involved in a inter-governmental 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."

[98.] Insofar as I am of the view the parties have not exhausted their Constitutional obligation to comply with Chapter 3 of the Constitution with regard to inter-governmental relations and in particular the principles referred to above I am of the view that it is necessary that I direct the parties to in fact do so, even at this stage because of the fundamental importance of the need for there to be co-operation between these two spheres of government in the investigation of the complaints and the apparent breakdown in the relationship between the community of Khayalitsha and the South African Police Services. The very concerns raised by Mr Majola on behalf of the 9th respondent and generally the people of Khayelitsha would be undermined if the 1st, 2nd and 3rd applicants and the 1st respondent are not able to co-operate with one another more especially given the complex nature of the underlying causes of crime and its socio economic dimension. In dealing with such issues it could only be in the best interests of all concerned and more importantly the community of Khayalitsha and in particular the victims of crime that there be the fullest possible cooperation between these two spheres of government and in their compliance with their Constitutional obligations. In the circumstances they should at the very least be given the opportunity for doing so pending the outcome of the substantive challenges under the relief sought in part B of the Notice of Motion. In this regard I have noted that the commission of inquiry had voluntarily suspended its proceedings subject to the determination of the interim relief. It is self-evident that the work of the commission would have been limited or affected by the end of year vacation break. Realistically the commission of inquiry would not have resumed at a fully functional pace by mid-January 2013.

[99.] I have also considered the role or assistance that could be provided by the 9th respondent, the other complainant organizations and the community based organizations such as the Khayelitsha Development Forum in the process of further inter -action between the relevant parties. Although I am not at liberty to order them to assist or participate in such process they are nevertheless urged to engage with the parties directly to arrive at a mutually suitable role that they could play. More importantly none of them should compromise their independence in doing so.

[100.] Mindful of all of the considerations referred to and that of practicality I would have proposed making the following structured order:

(i) The 1st , 2nd and 3rd applicants and the 1st and 2nd respondents are ordered to deal with the dispute between them by further engagement in accordance with the principles as set out section 41 of the Constitution and to report to this court by no later than the 31 January 2013 on the outcome thereof. Pending the steps described above.

(ii) That the 4th, 5th and 6th respondent, and any person or persons acting under their direct or control, be interdicted and restrained from giving effect to subpoenas purportedly issued in terms of section 3(1)(a) of the Western Cape Provincial Commissions Act 10 of 1998 on 30 October 2012 and served on Colonel MF Reitz, Brigadier Z Dladla, Colonel Tshatleho Rabolibela and Lieutentant General A H Lamoer, pending the outcome of (i) above and this courts further decision.

(iii) That the 4th, 5th and 6th respondents (and those acting under their direction and control) be interdicted and restrained from conducting the commission of inquiry into allegations of police inefficiency in Khayelitsha and a breakdown in relations between the community and the police in Khayelitsha (the inquiry) appointed under section 1 of the Western Cape Provincial Commissions Act, 1998 (Act 10 of 1998 and the regulations thereto pursuant to s206(5) of the Constitution of the Republic of South Africa, 1996 (the Constitution), in any form whatsoever, pending the outcome of the process directed in (i) above and the further decision of this court.

(iv) That the 4th, 5th and 6th respondents, and those acting under their direction and/or control be interdicted and restrained from issuing or cause to be issued any subpoenas to any member of the South African Police Services in terms of s3 (1)(a) of the Western Cape Provincial Commissions Act 10 of 1998, pending the outcome of the process directed in (i) above and the further decision of this court.

(v) That the cost of this application stands over for later determination by this court.

SALDANHA J