IN THE EQUALITY HIGH COURT

(HIGH COURT, CAPE TOWN)

Case No.: **Equality Court 3/2016**

In the application of:

SOCIAL JUSTICE COALITION	First Applicant
EQUAL EDUCATION	Second Applicant
NYANGA COMMUNITY POLICING FORUM	Third Applicant
and	
MINISTER OF POLICE	First Respondent
NATIONAL COMMISSIONER OF POLICE	Second Respondent
WESTERN CAPE POLICE COMMISSIONER	Third Respondent
MINISTER FOR COMMUNITY SAFETY, WESTERN CAPE	Fourth Respondent
and	
WOMEN'S LEGAL CENTRE TRUST	Amicus Curiae

HEADS OF ARGUMENT ON BEHALF OF THE FIRST, SECOND AND THIRD RESPONDENTS

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INTRODUCTION

1. The complainants instituted this application on 31 March 2016 in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 ("**the Equality Act**").

2. In their notice of motion, the complainants seek wide ranging substantive relief:

   2.1. In the first instance, they seek three declaratory orders, *viz*:

      2.1.1. That the allocation of police human resources in the Western Cape unfairly discriminates against black and poor people on the basis of race and poverty.[1]

      2.1.2. That the system employed by the South African Police Service ("**SAPS**") to determine the allocation of police resources unfairly discriminates against black and poor people on the basis of race and poverty. [2]

      2.1.3. That section 12(3) of the South African Police Service Act No 68 of 1998 ("**the SAPS Act**") grants Provincial

[1] NM; page 8; par 1.
[2] NM; page 8; par 2.

Commissioners the power to determine the distribution of police resources between stations within their province, including the distribution of permanent posts under the fixed establishment and not merely on a temporary basis. [3]

2.2. In the second instance, compelling the Provincial Commissioner to prepare a plan (Provincial Plan) for the reallocation of resources within the Western Cape to address the most serious disparities in the allocation of police human resources in the province within a period of three months from the date of any order issued by this Court. Specific provision is made for a consultative process and for the exercise of this Court's supervisory jurisdiction in respect thereof. [4]

2.3. In the third instance, compelling the National Minister of Police ("**the National Minister**") to re-evaluate the system that the SAPS uses to allocate and distribute its human resources, coupled with a reporting and consultative process.[5]

2.4. In the fourth instance an ongoing supervisory jurisdiction. [6]

3. The underlying basis for the relief sought is a factual allegation that the allocation of police officers to police stations is both irrational and discriminatory in that it provides more police officers to stations servicing rich, white populations with low

[3] NM; page 8; par 3.
[4] NM; page 8; par 4 to 8.
[5] NM; page 9; par 9 to 10.
[6] NM; page 10; par 11.

contact crime rates and fewer police officers to stations serving poor, black (including both African and coloured) communities with high contact crime rates.[7]

4. The result, so the complainants contend is that black communities are less safe, more at risk of crime and their constitutional rights are more likely to be violated.[8]

5. Against this background, the complainants contend that despite the Khayelitsha Commission having issued a clear recommendation that SAPS revise its theoretical system for the determining the allocation of human resources, "no action has been taken" by the SAPS.[9]

6. Two important aspects of the complainants' case require early attention and disposal. The first is that the complainants do not allege that the Theoretical Human Resource Requirement ("**THRR**") discriminates directly against poor black communities. The complaint is that the application and impact of the THRR results in the "provision or continued provision of inferior services to any racial group, compared to those of another racial group."[10]

7. The second is that the allocation of resources in the SAPS is based on a variety of factors. The nature or business of policing requires an allocation policy that enables the SAPS to be effective in its primary constitutional mandate – which is to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. The issue therefore is whether the SAPS has the resources

[7] FA; page 13; par 3.
[8] FA; page 13; par 3.
[9] FA; page 13; par 5.
[10] Section 7(d) of the Equality Act.

necessary to fulfil its constitutional mandate. This calls for a thorough understanding of the business of policing and what this entails. An indispensable feature of effective and efficient business is community involvement and participation. The attitude and role of the community towards crime determines in large measure whether policing is a successful service.

8. In assessing whether the resources necessary for effective and efficient policing have been given to specific communities, it is also necessary to consider the environmental factors. These include whether the community is a built-up community. Policing in communities with proper infrastructure and housing present different demands to policing in communities that lack basic infrastructure and housing. This, however does not necessarily mean that more police resources should be deployed in communities with poor socio-economic and political infrastructure. A community with poor infrastructure could still have less malignant crime generators than an affluent community with good infrastructure. This therefore means that when allocating police resources, the question is not necessarily whether there is equal allocation of police resources but whether there is effective and efficient allocation of police resources to each community to enable the SAPS to perform its constitutional functions. The main criticism that against this complaint is that it is premised on the (erroneous) view that the more police resources are deployed in poor black communities, the safer the communities will be.

9. When determining whether or not the allocation policy is racially discriminatory, the Court must not engaged in a technical analysis of how many police officers and stations exist in the communities of Khayelitsha as against those at

Rondebosch. It must examine the allocation of police resources within the context presented by each community. The guiding principle must be effectiveness in utilising police resources given to the community of Khayelitsha. Police stations operate in different social, economic, political and geographical environments. These different socio-economic and political scenarios present different policing needs that cannot be resolved through an equal allocation of resources or premised upon race and socio-economic considerations. The burden of policing in Khayelitsha or similar communities differs substantially from that of Rondebosch and communities similar to it. The allocation of police resources must be directed at providing an effective and efficient policing service to poor and rich communities, as well as black and white communities.

10. In summary, the respondents contend that this application must be dismissed for the following reasons:

10.1. First, the evidence demonstrates that the system of resource allocation is weighted in favour of poor communities which are predominantly black.

10.2. Second, in addition, the Provincial Commissioner has exercised his statutory powers in terms of section 12(3) of the SAPS Act to supplement and increase policing resources in poor and predominantly black areas.

10.3. Third, the result of the allocation system as formulated and applied is that greater police resources are directed at communities where crime rates are highest.

10.4. Fourth and in any event, that the relief sought in this application is both premature and inappropriate.

11. In the remainder of these heads of argument:

11.1. First, we address certain background with reference to the Khayelitsha Commission.

11.2. Second, we identify the complainants' case as made out in the founding affidavit.

11.3. Third, we address the obvious but fundamental difficulty of the complainants' case being founded on outdated data and information.

11.4. Fourth, we identify the fundamental flaws underpinning the subject-challenge.

11.5. Fifth, we address the constitutional and legislative framework governing the allocation of policing resources.

11.6. Sixth, we address the law and the threshold test that the complainants must satisfy in this matter in order to vindicate their charge of unfair discrimination and irrationality.

11.7. Seventh, we address the principles of separation of powers, deference and the polycentric nature of the subject issues.

11.8. Eighth, we address in some detail the allocation policy as adopted and applied by SAPS.

11.9. Ninth, we address the results of the allocation process which, we submit, dispositively shows that it is neither irrational nor discriminatory.

11.10. Tenth, we summarise our arguments in response to the claims of unfair discrimination and irrationality.

11.11. Eleventh, we address and respond to the unwarranted criticisms by the complainants in respect of the answering affidavits filed by the respondents.

11.12. Finally, we address the actual import of the relief sought in this application and why we submit that it is not appropriate.

BACKGROUND TO THE CHALLENGE: THE KHAYELITSHA COMMISSION

12. The complainants rely on the findings contained in the report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between the SAPS and the Community of Khayelitsha ("**the Khayelitsha Commission**").

13. Chapter 13 of the Khayelitsha Commission Report dealt with "Inefficiencies in policing in Khayelitsha and the reasons for them". The Commission identified the "key issues that are of such importance that they warrant the attention of both

provincial and national government."[11] It painted the picture accurately by acknowledging that several witnesses had testified that "policing in Khayelitsha is profoundly challenging. Deep levels of poverty, poor levels of infrastructure and very high crime rates means that Khayelitsha is among the most difficult areas of the country to police."[12]

14. Importantly, the Commission made a request directed at "those people who read this report, in the first place, the Premier and members of the provincial Cabinet and provincial legislature, as well as the national Minister of Police, members of the national Cabinet, and Parliament to remember, as they formulate their response to the report, that the most important consideration in assessing this report is the need to improve the safety of people who live and work in Khayelitsha. This is a strategic goal for both national and provincial government…"[13] The Commission further requested for a balanced reporting of its findings, emphasising that the fact that there are "such inefficiencies does not mean that there are no aspects of policing that are efficiently performed, nor that there are not members of the SAPS, of every rank, who strive to provide a professional policing service in Khayelitsha."

15. The Commission dealt with whether "adequate human resources are allocated to the three police stations and the FCS Unit. All the station commanders told the Commission that they had too few SAPS members at their police stations."[14] It concluded in the following terms:

[11] Page 353, para 2 of the Report.
[12] Page 353, para 3 of the Report.
[13] Page 354, para 4 of the Report.
[14] Page 391, para 153.

"[159] The Commission concludes that the three SAPS police stations, and especially Harare and Khayelitsha Site B, are significantly under-staffed. The Commission also concludes that the system for the allocation of human resources within the SAPS, the THRR, while a sophisticated system that appears to have been developed in good faith, appears to produce an in-built bias against poor areas in the Western Cape, as such as Khayelitsha Site B and Harare. In the view of the Commission, the structural under-staffing of the Khayelitsha police stations which resulted from the application of the biased THRR, is one of the reasons for many of the inefficiencies identified above. The Commission emphasises, however that although staffing levels are important, there is not a direct correlation between appropriate staffing levels and effective and efficient policing. Appropriate staffing levels may be a necessary condition for effective and efficient policing, but they are not a sufficient condition for it.

[160] One of the questions that has most troubled the Commission is how a system of human resource allocation that appears to be systematically biased against poor black communities could have survived twenty years into our post-apartheid democracy. In the view of the Commission, the survival of this system is evidence of a failure of governance…"

THE CASE MADE OUT IN THE FOUNDING AFFIDAVIT

16. It is common cause that there is a two stage process for the allocation of police resources within SAPS, *viz*[15]:

16.1. The theoretical determination of how many police officers would be required at each station if there were unlimited human resources; and

16.2. The actual allocation or distribution of the limited number of police officers that are available.

[15] FA: page 14; par 8.

17. The founding affidavit makes clear that while Redpath only analysed the actual allocation of police resources for the purposes of the Khayelitsha Commission, she also analysed the theoretical allocation for the 2012/2013 years which was provided to the Commission for the purposes of this application.[16]

18. According to Redpath, the THRR figures which guide the allocation of resources across the country "appear to prejudice township areas to an even greater extent than do actual figures and still leave black township areas at the bottom of the allocation of resources."[17]

19. Her evidence is further that the rate of murder is the best predictor of the actual rate of violent crime because it does not suffer from under reporting. She further states that the stations with the highest rates of murder are also likely to be the stations with the highest real rate of violent crime.[18]

20. The complainants identify seven stations that have the highest total number of murders in the Western Cape and are amongst the 15 stations with the highest rates of murder by population *viz*[19]:

    20.1. Nyanga;

    20.2. Khayelitsha;

    20.3. Harare;

[16] FA; page 36; par 73.
[17] FA; page 37; par 74.
[18] FA; page 37; par 75.
[19] FA; page 37; par 76 and 77.

20.4. Kraaifontein;

20.5. Gugulethu;

20.6. Delft;

20.7. Mfuleni.

21. Despite this, the complainants allege that these stations are on the bottom fifteen on both the theoretical and actual allocations. [20]

22. It must be emphasised that the central premise underlying the subject challenge is the allocation of human resources and not other physical resources such as vehicles, computers, infrastructure and the like. According to the complainants, human resources are the primary driver of physical resources.[21] The complainants baldly contend that to the extent that human resources are unfairly distributed, the same is likely to be true for other physical resources.[22]

The theoretical determination

23. The complainants' challenge to the theoretical determination recognises that:

23.1. The exercise of determining the needs of stations is a "difficult one"[23] and that it entails a "complicated task".[24]

[20] FA; page 37; par 78.
[21] FA; page 46; par 113.
[22] FA; page 46; par 113.
[23] FA; page 47; par 118.
[24] FA; page 48; par 118.

23.2. The system that SAPS has designed does not intentionally discriminate against poor black people. [25]

23.3. Despite the efforts of SAPS, the THRR returns results that are patently discriminatory. [26]

23.4. Despite the THRR being designed to achieve a fair outcome, it achieves the opposite.[27]

23.5. Some discrepancies have entirely reasonable explanations, viz: (a) the THRR grants additional resources to areas with transient populations; (b) smaller stations serving small, disperse communities will naturally have a higher police-to-population ratios because they require a certain minimum to function; (c) Table Bay has a high number of police to deal with crime in and around the harbour despite the small number of permanent residents. [28]

23.6. There are many other individual cases that may also have explanations.[29]

24. The complainants' core complaint however is that there is a clear pattern of discriminatory distribution of resources in that "almost without exception, relatively rich predominantly white areas with very low contact crime rates have

[25] FA; page 47; par 118.
[26] FA; page 48; par 119.
[27] FA; page 49; par 124.
[28] FA; page 48; par 120.
[29] FA; page 48; par 121.

far more police for every 100 000 people than poor, predominantly black areas with high contact crime rates."[30]

25. According to the complainants there are five reasons (identified by the Commission) as to why the THRR which is designed to achieve a fair outcome, actually achieves the opposite, *viz*:

25.1. First, the THRR is highly complex and that many people within SAPS do not understand it. [31]

25.2. Second, that the THRR is not publically available; it is also not the subject of debate either independently or within SAPS. [32]

25.3. Third, that the data provided by police stations used to calculate the THRR is often inaccurate. [33]

25.4. Fourth, that the weightings attached to different environmental factors may result in over or under estimation of the policing implications of those factors. [34]

25.5. Fifth, there appears to be no practice of checking the system against a simple per capita calculations to check anomalies. [35]

[30] FA; page 48; par 122.
[31] FA; page 49; par 124.1.
[32] FA; page 49; par 124.2.
[33] FA; page 49; par 124.3.
[34] FA; page 50; par 124.4.
[35] FA; page 50; par 124.5.

26. In addition to those articulated by the Commission, the complainants believe that the allocation model suffers from the following further flaws:

26.1. First, it does not adequately account for the under reporting of crime. [36]

26.2. Second, the determination becomes a self-fulfilling prophecy because it is based on current capacity. [37]

26.3. Third, that the theoretical ideal of the THRR does not seek to prioritise resources by, for example, granting more posts to poor areas with high rates of contact crimes. [38]

26.4. Fourth, according to Redpath that the THRR in itself has a number of flaws. Redpath recognises that the THRR purports to relate to the burden of policing with reference to the difficulty and extent of policing, the actual incidence of crime and the burden of police interaction with the Courts and prisons.[39] However, she identifies the following problems with the model, which she reasons "may introduce error"[40]:

26.4.1. That it is impossible to take note of all relevant factors which impinge on the burden of policing. [41]

[36] FA; page 50; par 125.1.
[37] FA; page 50; par 125.2.
[38] FA; page 50; par 125.3.
[39] FA (Redpath); page 662; par 43.
[40] FA (Redpath); page 664; par 49.
[41] FA (Redpath); page 663; par 44.

26.4.2. That different factors may amount to counting the same thing resulting in double counting of some factors. [42]

26.4.3. That the approach is highly dependent on accurate information being supplied.[43]

26.4.4. That the weightings "seem to have been arrived at in an arbitrary manner and without basis in any evidence". [44]

The actual allocation

27. The complainants' challenge to the actual allocation recognises that:

27.1. SAPS can and must prioritise whether policing property crime in Constantia and Sea Point is as important as policing rapes and murders in Khayelitsha and Nyanga. [45]

27.2. SAPS must take into account the serious under reporting of crimes in areas where confidence in police is low. [46]

28. In challenging the actual allocation, the complainants rely on the evidence of Brig Rabie, given before the Commission that in 2013/14 SAPS was only able to provide 59% of the total posts that the THRR determined were required and 68% of posts assigned for police stations.[47]

[42] FA (Redpath); page 663; par 45.
[43] FA (Redpath); page 663; par 46.
[44] FA (Redpath); page 663; par 47.
[45] FA; page 53; par 136.
[46] FA; page 53; par 136.
[47] FA; page 51; par 127.

29. As to how the reduction from the theoretical to the actual allocation is made, relying on the evidence of Brig Rabie before the Commission, the complainants contend that[48]:

29.1. National SAPS determines the number of posts that each station will in fact receive (the RAG or fixed establishment); giving consideration to the need for minimum numbers of staff at certain stations the fixed establishment is generally an across the board reduction from 100% of the THRR to 68% of available posts; and

29.2. The Provincial Commissioners are then meant to distribute the allocated resources amongst the stations to give effect to the province's priorities.

30. According to the complainants, the actual allocation of resources produces a pattern that in the words of Commissioner O' Regan, is very close to an apartheid list.[49] They allege that the pattern that emerges is that the areas with the highest black population and the highest rates of murder have the lowest number of police per 100 000 people and the lowest number of police per murder.[50]

The "model" adopted by the complainants

31. Redpath explains the approach that she adopted which may be broadly summarised as follows:

[48] FA; page 51; par 128.
[49] FA; page 53; par 133.
[50] FA; page 53; par 134.

31.1. First, she obtained estimated population numbers for nine police stations and three of the Khayelitsha policing areas.[51]

31.2. Second, she determined the number of police personnel for every 100 000 of the population in each policing area of the Western Cape.[52]

31.3. Third, she ranked the resultant figures from most resourced to least resourced (i.e. in terms of the number of personnel per 100 000 people).[53]

31.4. Fourth, she determined the average ratio to be 283 police personnel per 100 000 of the population. [54]

31.5. Fifth, she found that all three Khayelitsha policing areas demonstrated less than the average allocation with Khayelitsha at 190 per 100 000 and Lingelethu-West at 275 per 100 000. [55] Redpath also found that a number of areas with large informal settlements and/or serious violent crime had a ratio that was much lower than the average. [56]

31.6. Sixth, she calculated the number of police personnel per 100 reported crimes and found that the range is from 1.9 police officials per 100

[51] FA (Redpath); page 655; par 13.
[52] FA (Redpath); page 656; par 17.
[53] FA (Redpath); page 656; par 19.
[54] FA (Redpath); page 656; par 19.
[55] FA (Redpath); page 656; par 20.
[56] FA (Redpath); page 657; par 21.

reported crimes to 37 police per 100 reported crimes, with an average of 3.4. police per 100 crimes per year.[57]

32. According to Redpath's conclusions, the 10 police stations with the lowest actual allocation are predominantly black townships[58] and the 10 police precincts with the lowest THRR allocation remain predominantly black and township areas. [59]

THE INFORMATION WHICH THE PRESENT CHALLENGE IS BASED ON IS OUTDATED

33. It is apparent from a consideration of the founding affidavit that the analysis undertaken by the complainants is based on 2012/3 data.[60] This, in circumstances where the application was instituted in 2016. For this reason alone, we submit that the challenge is entirely historic in nature and not in any way reflective of the current state of affairs.[61]

34. The respondents have made clear in their answering affidavits that this data is outdated and that those statistics have changed considerably.[62]

35. In this regard, the respondents have explained that numerous changes have been made to policing in this province to ensure that the quality of policing improves significantly. In making distributions in terms of section 12(3) of the SAPS Act, the Provincial Commissioner takes a number of considerations into account, including crime patterns and crime trends, crime rates, situational

[57] FA (Redpath); page 658; par 22 and 25.
[58] FA (Redpath); page 672; par 82.
[59] FA (Redpath); page 672; par 83.
[60] FA; page 36; par 73 and page 51; par 127.
[61] AA (Voskuil); page 3169; par 28.
[62] AA (Voskuil); page 3200; par 117; 150.

factors, the generators of crime, the need for force multipliers, the setting up of additional service points (satellite stations), the need to further capacitate specialised units, develop new units, *etc*.[63]

36. The complainants do not address this complaint in any meaningful way in their heads of argument. They contend:

    36.1. First, that they were seemingly entitled to rely on data for 2012/2013 "because it was the most recent data available to [them], because SAPS had refused to provide more up to date data".[64]

    36.2. Second, that the January 2017 data (as addressed in the replying affidavit) does "not substantially alter the irrational and discriminatory allocation of police resources in the Western Cape".[65]

37. We submit that neither of these reasons have merit in that:

    37.1. First, the lack of access to current data does not justify a reliance on outdated information.

    37.2. Second, the complainants are not entitled to rely on new matter in reply and this should properly be struck. In any event, we address the merits of the argument in relation to the 2017 figures elsewhere in these heads of argument.

[63] AA (Voskuil); page 3202; par 122.
[64] Complainants' Heads of Argument; page 42; par 108.
[65] RA (Redpath); page 3988; par 79.

THE FUNDAMENTALLY DIFFERENT APPROACHES ADOPTED BY THE COMPLAINANTS ON THE ONE HAND AND SAPS ON THE OTHER

38. It is clear from a consideration of the evidence that the respective parties adopt a fundamentally different approach to what is a rational approach to the allocation of human resources for policing. The difference may be broadly summarised as follows:

38.1. On the complainants' version, the current allocation of police resources is both irrational and discriminatory in that it provides more police officers to stations servicing rich, white populations with low contact crime rates and fewer to stations serving poor, black communities with high contact crime rates.[66]

38.2. SAPS, however approaches the question of resourcing on a different basis:

38.2.1. First, in determining the theoretical allocation a weighting in favour of disadvantaged areas is provided.

38.2.2. Second, in the ultimate allocation of resources, there is a priority in allocations given to police stations that generate the most crime; it is not always the case that stations in poor areas have higher rates of crime.

[66] Complainants' Heads of Argument; page 3; par 4.

39. The complainants however contend that because there is an under reporting of crime in poor areas, the SAPS determination of weighting is flawed. Instead, according to the complainants, murder is one of the best predictors of actual crime, as opposed to reported crime rates.[67]

40. While the respondents accept that there is an under-reporting of crime, they contend that the import thereof appears to have been inflated by the complainants.[68] According to the respondents:

40.1. SAPS undertakes its work in terms of reported crime. [69]

40.2. SAPS has no way of knowing the extent of unreported crime and cannot therefore reasonably account for it. [70]

40.3. No sensible model may be created without the necessary information; it is unrealistic to expect anyone to determine allocation from "*unreported cases*". [71]

40.4. Current capacity is what the SAPS must work with; speculative capacity is just that but it would not assist the SAPS to ensure an equitable allocation of its allocated resources. [72]

40.5. There is no rational principle on which police resources may be allocated on the basis of poverty and race. The Provinces, once they receive their

[67] Complainants' Heads of Argument; page 44; par 115.
[68] AA (Rabie); page 1882; par 193.
[69] AA (Rabie); page 1882; par 193.
[70] AA (Rabie); page 1882; par 193.
[71] AA (Rabie); page 1882; par 193.
[72] AA (Rabie); page 1882; par 194.

allocations, may prioritise certain areas and target them for more deployment of resources. [73]

41. As regards the complainants' contention that murder should be used as a predictor of actual crime, the respondents disagree. They contend[74]:

41.1. That murder rates alone, bear no correlation to overall crime rates.[75]

41.2. That their position is borne out by, for example, the statistics of the Cape Town Central police station which has the highest crime rate. According to the latest crime statistics (April 2016 to January 2017) in respect of serious crime which would include murder, Cape Town Central has 14 838 serious crimes recorded whereas Nyanga had 8044 recorded serious crimes. [76]

41.3. That murder is by no means the sole reliable indicator of reported crimes; to isolate murder, distorts the picture. [77]

41.4. No concrete data is provided in support of this contention by Redpath.[78]

42. The respondents have further explained that:

42.1. First, when a murder has taken place, the police must investigate it and determine the cause and if indeed it meets the requirements of murder,

[73] AA (Rabie); page 1882; par 195.
[74] See too: AA (Rabie); page 1841; par 54.1. and par 102.
[75] AA (Rabie); page 1825; par 18.
[76] AA (Rabie); page 1825; par 18.
[77] AA (Rabie); page 1825; par 18.
[78] AA (Rabie); page 1825; par 18.

to look for the suspect, arrest and charge him or her. That does not necessarily require the deployment of more investigators or detectives. It requires that the investigation be conducted thoroughly and in accordance with the relevant prescripts.[79]

42.2. Second, consideration must be given to the policing required to prevent murders from taking place. Simply put, a core question in this analysis is whether it is possible to prevent murders from taking place solely by employing more police officers to patrol the streets. [80]

42.3. Third, as far as the investigative capacity of the police is concerned, it is not necessarily true that the increased numbers will improve this.[81]

42.4. Fourth, the notion that resources are allocated solely based on crime works only with deployments done at provincial levels. This is currently the situation. Deployments to police stations and policing precincts are done in accordance with crime trends. The areas with the most crime get more polices officers allocated to them. [82]

42.5. Fifth, there are instances where high deployments have been made but that has not necessarily resulted in a decrease in violent crimes. Sometimes there is a decrease in violent crime but an increase in other crimes such as contact crime.[83]

[79] AA (Rabie); page 1872; par 153.1.
[80] AA (Rabie); page 1872; par 153.2.
[81] AA (Rabie); page 1872; par 154.
[82] AA (Rabie); page 1872; par 155.
[83] AA (Rabie); page 1873; par 156; AA (Voskuil); page 3200 ; par 118.

43. In any event, policing in respect of murder presents a unique set of challenges in that it is a particularly difficult crime to police.[84]

44. It is against the backdrop of both of these fundamentally different approaches to the allocation of human resources for policing that this Court has been asked to pronounce of the alleged irrationality and unfair discrimination in the respondents' approach. We submit that when the complainants' challenge is considered against the applicable legal principles, the challenge must fail.

THIS APPLICATION IS PREMATURE

45. The Commission's recommendations are contained in Chapter 15. SAPS was given three years within which to implement the remedial measures.[85]

46. The Report of the Commission was finalised in August 2014 and issued shortly thereafter. These proceedings were instituted less than two years after the release of the report and, according to the respondents, while the recommendations were still in the process of being implemented.[86]

47. In their heads of argument, the complainants make two arguments, viz:

    47.1. First, because the complainants do not contend that the Commission's findings are binding, they were not obliged to wait for the three year period to expire before bringing this application.[87]

[84] AA (Rabie); page 1856; par 99.
[85] AA (Brand); page 2328; par 17 and AA (Voskuil); page 3167; par 22.
[86] AA (Voskuil); page 3167; par 21.
[87] Complainants' Heads of Argument; page 16; par 38.

47.2. Second, in any event the Commission's recommendation provided that once the new allocation method was determined, it should be phased in over a period of time that should not exceed three years; accordingly to the complainants, because the model has not changed, the three year period is not applicable. [88]

Response to the argument that the Complainants bore no obligation to wait for a three year period

48. While there is no dispute between the parties that the recommendations of the Commission are not binding, the evidence tendered by SAPS indicates clearly that it has taken those recommendations seriously and that a range of measures have been adopted in order to improve the system of allocation.

49. SAPS has also indicated that many of those measures are underway; and that SAPS is working in accordance with the three year timeframe. Through the process of engagement, the complainants were fully aware of the processes that were underway.

50. The respondents have explained in this regard that overhauling the allocation model is an ongoing and time consuming process; thereafter the implementation of the new model will take time.[89]

[88] Complainants' Heads of Argument; page 16; par 39.
[89] AA (Voskuil); page 3168; par 23.

51. It is also not correct that the respondents have done nothing to implement the recommendations of the Commission. The respondents have explained that the following measures have been taken to date:

51.1. In light of the Commission's statement to engage in debate, a meeting was held between the then National Commissioner (General Phiyega) and Premier Zille. Both had senior representatives in attendance. At this meeting, it was resolved that a Task Team would be formed; this was subject to Ministerial approval. Once this approval was received the Task Team was established immediately thereafter. It essentially comprised three sectors, viz, community organisations, five members of SAPS and five members from the Provincial Government represented by DOCS.[90]

51.2. The community organisations represented on the Task Team comprise the SJC, Khayelitsha Development Forum (KDF), the Religious Fraternity, CODETA and the Community Police Forum (CPF). This was done in agreement (after vigorous debate) with the broader community (during a consultative process) and DOCS. In addition to the aforementioned Task Team, there is also the Priority Committee (formerly known as the Joint Committee) and established before the Task Team. The Priority Committee is divided into five sub-priority

[90] AA (Brand); page 2329; par 19.

committees representative of the key crime generators, more particularly[91]:

51.2.1. Substance abuse (chaired by the Harare station commander, Colonel Raboliba).

51.2.2. Youth, the purpose being to deal with violence, bullying and youth at risk at schools and in the community. This subcommittee is chaired by Adv Anthea Michaels of the Provincial Department of Sport and Recreation.

51.2.3. The Economic Sub-Forum which has as its primary focus business and transport issues. It is co-chaired by Mr Andrew Anthony of Business against Crime and Brigadier Hosking of the SAPS.

51.2.4. Gender-based violence aimed at protecting women, children, elderly persons and LGBTI members. This subcommittee is chaired by Ms Funeka Soldaat of the LGBTI who is also the project manager of the CPF at Harare police station.

51.2.5. Community intolerance which seeks to counter vigilantism and is chaired by Brigadier Nkwitshi.

51.3. Many of the concerns raised at the Commission and reported upon have been addressed. There is a much improved relationship and community

[91] AA (Brand); page 2329; par 20.

interaction with the police. Contact between the various stakeholders is ongoing and occurs at fixed and regular intervals. The SJC enjoys representation on the Task Team but has not once complained that the Commission's findings were not being implemented.[92]

Commission's recommendation provided for a three year period for the phasing in of the implementation period of the new allocation process

52. It is correct that the Commission did not prescribe a timeframe for the determination of a new allocation system. The respondents however do not contend that this is what the Commission did.

53. The point the respondents make is as follows:

53.1. First, while the Commission did not prescribe a timeframe for a formulation of a new allocation system, it did provide SAPS with a period of three years for the implementation of a new system.

53.2. Second, since the release of the Commission's report SAPS has effected certain changes to its system.

53.3. Third, that because the applicants seek to challenge the impact of the allocation system, the impact cannot be properly determined until the system is fully implemented.

54. For all of these reasons, we submit that the present challenge is premature.

[92] AA (Brand); page 2330; par 22.

THE FUNDAMENTAL FLAWS UNDERPINNING THIS CHALLENGE

55. The respondents have identified a range of flaws underlying the complainants' challenge. Each of these flaws (both individually and cumulatively) demonstrate that the complainants and the respondents adopt a fundamentally different approach to the subject issue before this Court.

56. We submit that the key flaws underpinning the complainants' challenge are the following:

56.1. The first fundamental misconception is that the complainants focus on: (a) a single crime, being murder (as a determinant of other violent crime); (b) a single correlation of police officers to population. The position however, according to the respondents, is far more complex in that[93]:

56.1.1. A proper analysis of police resourcing cannot be undertaken on the basis of a consideration of a single crime, being murder, as the complainants' contend.[94] This, the respondents submit is inconsistent with section 205 of the Constitution. An exclusive focus on murder, according to the respondents, carries with it the inevitable consequence of insufficient regard being had to other crimes, and an attendant increase in those crimes if not adequately catered for. It also ignores the reported crime statistics in relation to other crimes. By contrast, the approach adopted by SAPS is a

[93] AA (Rabie); page 1840; par 54.
[94] AA (Voskuil); page 3208; par 143.

consideration of all crime, with a higher weighting afforded to contact crimes (i.e. violent crimes).

56.1.2. Its single focus is a correlation of police officers to population. This, according to the respondents, will yield an untenable outcome because it ignores the dynamics associated with policing in specific environments. By contrast, the respondents explain that the THRR focuses on all the variables that influence policing. The primary factor in the initial assessment of resource allocation is the prevalence or otherwise of all categories of crime; this vital consideration is ignored on the complainants' approach.

56.2. The second fundamental misconception in the complainants' criticism of the allocation process is the fact that they appear to proceed on the incorrect premise that the allocation of police resources in the police stations is done through the national office of the police service when this is not so[95]:

56.2.1. The SAPS, as required by section 205(1) of the Constitution, must be structured to function in the national, provincial and, where appropriate, local spheres of government. The SAPS Act is the legislation envisaged in section 205(2) of the Constitution, which establishes the powers and functions of the police service and 'must enable the police service to

[95] AA (Rabie); page 1842; par 55.

discharge its responsibilities effectively, taking into account the requirements of the provinces.' The allocation of police resources is aimed at achieving the objects set out in section 205(3) of the Constitution. The allocation of police resources must be directed at ensuring that the police service are able to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

56.2.2. In this regard, the respondents have explained that the national management of the SAPS takes into account the provincial needs and priorities. Viewed in this context, the respondents have explained that there are two critical phases in the allocation process. The first phase focuses on determining the theoretical human resource requirements of police stations which is facilitated by Head Office. The second phase includes the distribution of funded posts facilitated by the provincial office. This has been addressed in an affidavit by Brig Voskuil who is the Provincial Head of Organisational Development and Strategic Management, whose primary role and responsibility is to render an effective management advisory service to the Provincial Commissioner in order to address crime effectively.[96]

[96] AA (Voskuil); page 3162; par 11.

56.2.3. Simply put, the complainants miss the fact that the Provincial Commissioner is not fettered in his or her decision to allocate resources in accordance with provincial crime trends. This means that the Provincial Commissioner may deploy more police resources to high crime police stations. As is apparent from the affidavit of Brigadier Voskuil, this is happening in the Western Cape. More police resources are deployed to high crime areas wherever they occur.

56.3. The third error underpinning the complainants' challenge is the contention that the information technology-based solution is discriminatory on the grounds of race.[97] This is an issue that we address in detail elsewhere in these Heads of Argument.

56.4. The fourth misconception is that the allocation process is discriminatory in its impact / application. This is not so; it is specifically designed to be weighted in favour of poorer areas.[98]

56.5. The fifth misconception underpinning this application is that the allocation process is a fixed, rigid and inflexible model; this is plainly not the case.[99]

[97] AA (Rabie); page 1843; par 59.
[98] AA (Rabie); page 1843; par 60.
[99] AA (Rabie); page 1843; par 61.

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK FOR THE DELIVERY OF POLICE SERVICES

57. To appreciate the allocation policy of the SAPS, it is important to set out the constitutional and legislative context within which policing services must be provided.

58. The SAPS is established as a security service in terms of Chapter 11 of the Constitution. Section 205 of the Constitution provides as follows:

> "*205 Police service*
>
> *(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.*
>
> *(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.*
>
> *(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*"

59. In terms of section 206 of the Constitution, a member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial government and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.[100]

[100] Section 206(1) of the Constitution.

60. According to the Constitution, the national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.

61. Section 207 of the Constitution regulates control of the police service. It provides:

> "*207 Control of police service*
>
> *(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.*
>
> *(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.*
>
> *(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.*
>
> *(4) The provincial commissioners are responsible for policing in their respective provinces –*
>
> *(a) as prescribed by national legislation; and*
>
> *(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).*
>
> *(5) 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.*
>
> *(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action*

against, that commissioner, in accordance with national legislation."

62. The SAPS Act seeks to give effect to the constitutional imperatives in respect of the police. Section 11 thereof provides that the National Commissioner shall exercise control over and manage the police service in accordance with section 207(2) of the Constitution. It further identifies the functions of the National Commissioner to include the following:

62.1. develop a plan before the end of each financial year, setting out the priorities and objectives of policing for the following financial year;

62.2. determine the fixed establishment of the Service and the number and grading of posts;

62.3. determine the distribution of the numerical strength of the Service after consultation with the board;

62.4. organise or reorganise the Service at national level into various components, units or groups;

62.5. establish and maintain training institutions or centres for the training of students and other members;

62.6. establish and maintain bureaus, depots, quarters, workshops or any other institution of any nature whatsoever, which may be expedient for the general management, control and maintenance of the Service; and

62.7. perform any legal act or act in any legal capacity on behalf of the Service.

63. In terms of section 12 of the SAPS Act:

> "*12 Provincial Commissioners*
>
> *(1) Subject to this Act, a Provincial Commissioner shall have command of and control over the Service under his or her jurisdiction in the province and may exercise the powers and shall perform the duties and functions necessary to give effect to section 219 of the Constitution.*
>
> *(2) A Provincial Commissioner may –*
>
> *(a) subject to a determination under section 11(2)(b), delimit any area in the province and determine the boundaries thereof until the province has been divided into as many areas as may be necessary for the purposes of the organisation of the Service under his or her jurisdiction; and*
>
> *(b) establish and maintain police stations and units in the province and determine the boundaries of station or unit areas.*
>
> *(3) A Provincial Commissioner shall determine the distribution of the strength of the Service under his or her jurisdiction in the province among the different areas, station areas, offices and units.*"

64. The legislative and constitutional context set out above requires the police to allocate resources necessary for the discharge of its functions in a reasonable manner. It stands to reason that if the allocation policy of the SAPS promotes a racially discriminatory outcome, it cannot be reasonable or lawful. The allocation policy of the SAPS must also be tested against the basic values and principles governing public administration in section 195(1) of the Constitution. Amongst others, the SAPS must promote a high standard of professional ethics by ensuring that appropriate factors are taken into account when allocating police resources to police stations across the country. It must ensure that there is efficient, economic and effective use of resources. The allocation of resources

must be provided impartially, fairly, equitably and without bias. Furthermore, the allocation of resources must be conducted in a transparent manner. Good human-resource management and career-development practices, must be adopted to ensure that human potential is maximised.

65. It is against the above legal context that the lawfulness of the allocation policy of the SAPS must be assessed.

THE LEGAL PRINCIPLES: IRRATIONALITY AND UNFAIR DISCRIMINATION

Irrationality

66. In response to the Complainants' contention that the system of allocating police resources is irrational, regard must be had to the legal principles in respect of irrationality.

66.1. In **Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others** 2017 (9) BCLR 1108 (CC) the Constitutional Court identified the limits of rationality as a ground of review; it cautioned:

> *"[6] It needs to be said that rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. It is not a uniquely designed master key that opens any and every door, any time, anyhow. Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regard to the imperatives of separation of powers. It is a good governance-facilitating, arbitrariness and abuse of power-negating weapon in our constitutional armoury to be employed sensitively and cautiously."*

66.2. In **Democratic Alliance v President of the Republic of South Africa and Others** 2013 (1) SA 248 (CC) at paragraph 36, the Constitutional Court held:

> *"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."*

66.3. The Constitutional Court has often warned that the State may not "regulate" in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose. In other words, wielders of public power - whether legislative, executive or administrative - are, at the very least, duty-bound to act rationally.

66.4. As to the purpose of the requirement of rationality in the exercise of public power, the Constitutional Court expressed itself in **Prinsloo v Van der Linde and Another** 1997 (3) SA 1012 (CC) at paragraph 25 in the following terms:

> *"This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification'."*

66.5. Rationality imposes a less onerous standard than reasonableness.[101]

66.6. A court cannot interfere with a decision simply because it disagrees with it. Indeed the jurisprudence of the Constitutional Court and the SCA has authoritatively established the following guiding principles in this regard:

> *"[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries…. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of the public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately."*[102]

and

> *"[51] The Executive has a <u>wide discretion</u> in selecting the means to achieve its constitutionally permissible objectives. <u>Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if,</u>*

[101] **Bel Porto School Governing Body v Premier, Western Cape and Another** 2002 (3) SA 265 (CC) at paragraph 46; **Khosa v Minister of Social Development** 2004 (6) SA 505 (CC) paragraph 67. See also **New National Party of South Africa v Government of the Republic of South Africa** 1999 (3) SA 191 (CC), in which the differing views of Yacoob J and O'Regan J as to the outcome of the appeal were the result of their disagreement as to whether the appropriate standard was rationality or reasonableness. Yacoob J held that the standard was rationality, which the legislation met. O'Regan J considered that the standard was the higher one of reasonableness, which the legislation did not meet.

[102] **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa** 2000 (2) SA 674 (CC) at paragraph 90.

objectively speaking, they are not, they fall short of the standard demanded by the Constitution. . . ."[103]

66.7. In **Minister of Home Affairs and Others v Scalabrini Centre and Others** 2013 (6) SA 421 (SCA) paragraph 59 the SCA emphasised:

> *"It is not the province of courts, when judging the administration, to make their own evaluation of the public good, or to substitute the personal assessment of the social and economic advantage of a decision. We should not expect judges therefore to decide whether the country should join a common currency or to set a level of taxation. These are matters of policy and the preserve of other branches of government and courts are not constitutionally competent to engage in them."*[104]

66.8. It is precisely because of the relatively undemanding nature of the test of rationality that "a decision that is objectively irrational is likely to be made only rarely".[105]

66.9. Rationality review is "about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved".[106]

66.10. In **Law Society of South Africa and Others v Minister for Transport and Another** 2011 (1) SA 400 (CC) at par 34 and 35 Moseneke DCJ aptly expressly the approach to rationality review as follows:

> *"It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court must*

[103] **Albutt v Centre for the Study of Violence and Reconciliation, and Others** 2010 (3) SA 293 (CC).
[104] **Minister of Home Affairs and Others v Scalabrini Centre and Others** 2013 (6) SA 421 (SCA) paragraph 59, quoting Hoexter Administrative Law in South Africa 2 ed at 148.
[105] **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa** 2000 (2) SA 674 (CC) at paragraph 90.
[106] **Minister of Defence and Military Veterans v Motau and Others** 2014 (5) SA 69 (CC) paragraph 69.

examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.

It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this account, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad."

66.11. In a rationality enquiry, the Constitutional Court has cautioned in **Du Plessis and Others v De Klerk and Another** 1996 (3) SA 850 (CC) paragraph 180:

"The judicial function simply does not lend itself to these kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic, and political questions requires."

Unfair discrimination

The Constitutional threshold

67. Section 9 of the Constitution provides for the right to equality in these terms:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour,

sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

68. The correct approach to a constitutional challenge based on the equality clause was summarised in **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC) as follows:

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."

69. Although this test was formulated with reference to the interim Constitution, it has been applied to challenges based on section 9. [107]

70. In **AB and Another v Minister of Social Development** 2017 (3) SA 570 (CC), the Constitutional Court explained that the correct approach to be adopted when legislative measures are challenged is to determine whether there is a rational connection between the means chosen and the objective sought to be achieved. Although legislation is not the subject of the challenge in these proceedings, we submit that this approach finds equal application. A mere differentiation does not render a legislative measure irrational. The differentiation must be arbitrary or must manifest "naked preferences" that serve no legitimate governmental purpose for it to render the measure irrational.[108]

71. As regards the relevance of differentiation, in **Sarrahwitz v Maritz NO** 2015 (4) SA 491 (CC) the Constitutional Court found that:

71.1. Differentiation is the centrepiece of the equality jurisprudence, including our constitutional right to equality. Section 9 of our Constitution seeks to uproot two kinds of differentiation from our legal landscape: (i) the one

[107] Mvumvu v Minister for Transport 2011 (2) SA 473 (CC) at par 25.
[108] At par 258.

that results in unfair discrimination; and (ii) the one that results in mere differentiation.[109]

71.2. Mere differentiation requires of the state to act rationally at all times and not in an arbitrary or whimsical way. State action must always be designed to advance a legitimate governmental purpose in consonance with the rule of law and the very essence of constitutionalism. This attribute of equality compels the state to regulate its affairs in a rational and justifiable manner; it speaks to the core business of the state, which is equal treatment of its citizens and the pursuit of what redounds to the common good of all. [110]

71.3. A differentiation between people or classes of people will fall foul of the constitutional standard of equality, if it does not have a legitimate purpose advanced to validate it. If the legislation under attack lacks that rational connection, then it violates the right to equal protection and benefit of the law as a result of the uneven conferment of benefits or imposition of burdens by the legislative scheme without a rational basis. This, according to the Constitutional Court:

> *"would be an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the rational differentiation standard set by s 9(1) thereof."*

[109] At par 51.
[110] At par 51.

72. According to the Constitutional Court in **Mazibuko v City of Johannesburg** 2010 (4) SA 1 (CC), even if it can be shown that a policy was discriminatory in impact, if it can be shown that the purpose for which the policy was introduced was not unfair for the purposes of section 9(3), then it will not be in conflict with the Constitution. To determine whether the discrimination was unfair it is necessary to look at the group affected, the purpose of the law and the interests affected.[111]

The Equality Act

73. Section 6 of the Equality Act contains a general prohibition against unfair discrimination.

74. The Equality Act defines discrimination as:

> *"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-*
>
> *(a) imposes burdens, obligations or disadvantage on; or*
>
> *(b) withholds benefits, opportunities or advantages from,*
>
> *any person on one or more of the prohibited grounds."*

75. Central to this prohibition is the definition of "prohibited grounds", which the Equality Act defines as follows:

[111] See Harksen v Lane NO and Others 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489; [1997] ZACC 12) in para 54. See also Pretoria City Council v Walker above at para 38.

"(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground-
(i) causes or perpetuates systemic disadvantage;
(ii) undermines human dignity; or
(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

76. Section 13 of the Equality Act regulates the burden of proof. It provides as follows:

"13 Burden of proof

(1) If the complainant makes out a prima facie case of discrimination-

(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place-

(a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;

(b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair-

(i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and

(ii) unless the respondent proves that the discrimination is fair."

77. Section 14 of the Equality Act identifies the test for the determination of unfairness. It provides:

"14 Determination of fairness or unfairness

(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

(a) The context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2) (b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

Indirect discrimination

78. In **Pretoria City Council v Walker** 1998 (2) SA 363 (CC), in dealing with s 8 of the interim Constitution, which entrenched the right to equality and equal protection under the law and which prohibited unfair direct or indirect discrimination, the Constitutional Court said the following (paras 30 – 31):

> *"Section 8(2) prohibits unfair discrimination which takes place directly or indirectly. This is the first occasion on which this Court has had to consider the difference between direct and indirect discrimination and whether such difference has any bearing on the s 8 analysis as developed in the four judgments to which I have referred.*
>
> *The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s 8(2)."*

79. In **Walker**, the Constitutional Court went on to observe (at par 32)[112]:

> *"It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race."*

[112] See too: Mvumvu v Minister for Transport 2011 (2) SA 473 (CC) at par 28 to 34.

Poverty as a ground of discrimination

80. While we accept that grounds that are not listed in section 9(3) of the Constitution may fall within the definition of a prohibited ground, poverty as a ground of unfair discrimination does not find support in any decided case; in almost two and a half decades of our constitutional jurisprudence, no court has thus far, found the need to venture into poverty as a ground of discrimination. The complainants accept as much in their heads of argument.[113]

81. The court in **Harksen** found that, "(t)here will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."[114] Determining whether there has been discrimination is an objective question, independent of the intentions of the legislature.[115]

82. Section 34 of the Equality Act provides:

> *"34 Directive principle on HIV/AIDS, nationality, socio-economic status and family responsibility and status*
>
> *(1) In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status-*
>
> *(a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of 'prohibited grounds' by the Minister;*

[113] Complainants' Heads of Argument; page 75; par 220.
[114] At par 47.
[115] Pretoria City Council v Walker 1998 (2) SA 363 (CC) at par 43.

(b) the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister.

(2) Nothing in this section-

(a) affects the ordinary jurisdiction of the courts to determine disputes that may be resolved by the application of law on these grounds;

(b) prevents a complainant from instituting proceedings on any of these grounds in a court of law;

(c) prevents a court from making a determination that any of these grounds are grounds in terms of paragraph (b) of the definition of 'prohibited grounds' or are included within one or more of the grounds listed in paragraph (a) of the definition of 'prohibited grounds'."

83. As far as we are aware, the Equality Review Committee has not made any recommendations as contemplated by the provision. Accordingly, the Equality Act does not presently provide for socio-economic status as a prohibited ground of discrimination.

84. Importantly, the Equality Act defines socio-economic status as follows:

> *"a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications."*

85. We accept that it is open to a court to recognise socio-economic status as an unlisted ground of discrimination. This however, in our submission ought to be done only in an appropriate case, where the evidence allows for this issue to be properly considered and determined. This is not such a case for at least the following reasons:

85.1. First, there is no clear determination of how poverty is to be defined in light of the subject challenge.

85.2. Second, properly construed, we submit that this case does not implicate the right to equality but rather whether the allocation of police resources is rational. (The factual basis for this argument is addressed elsewhere in these heads of argument.)

THE LEGAL PRINCIPLES: SEPARATION OF POWERS, POLYCENTRICITY AND DEFERENCE

Separation of powers

86. We submit that as a point of departure in this determination of this matter, this Court must be guided by the dictum of the Constitutional Court in **Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others** 2017 (9) BCLR 1108 (CC) where the Court cautioned:

> *"[1] Ours is a constitutional democracy, not a judiciocracy. And in consonance with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament whereas the judicial and the executive authority of the Republic repose in the Judiciary and the Executive respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible.*
>
> *[2] Turning to the Executive, one of the core features of its authority is national policy development. For this reason, any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the Executive. Meaning,*

the Judiciary may, as the ultimate guardian of our Constitution and in the exercise of its constitutional mandate of ensuring that other branches of government act within the bounds of the law, fulfil their constitutional obligations and account for their failure to do so, encroach on the policy-determination domain only when it is necessary and unavoidable to do so.

[3] *A genuine commitment to the preservation of comity among the three arms of the State insists on their vigilance against an inadvertent but effective usurpation of the powers and authority of the others. Absent that vigilance in this case, a travesty of justice and an impermissible intrusion into the policy-determination terrain would take place to the grave prejudice of the Executive or even the nation. For, that is bound to happen whenever the eyes of justice are unwittingly focused on peripherals rather than on the fundamentals.*

[4] *Driven by this reality, we were constrained to sound the following sobering reminder:*

> *"The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.*
>
> *. . .*
>
> *Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government."*

[5] *The determination of the issues must thus be grounded on and steered by the ever-abiding consciousness of the import of the principle of separation of powers. Permissible judicial intervention is quite distinct from the Judiciary's imposition of its preferred approach to the issues or what it considers to be the best or superior choice in relation to matters that the political arms are constitutionally mandated and therefore best-placed to handle. Properly contextualised, this is what this Court sought to convey in Albutt when it said:*

"Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected . . . . What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved."

…..

[26] It bears repetition that policy-formulation is the exclusive domain of the executive arm of the State. The judicial arm would do well to resist the enticement or urge to inadvertently, yet impermissibly, encroach on the Executive's national policy determination space on some elasticised rationality or other constitutional basis that purportedly justifies judicial intervention. Judicial intrusion in matters of policy formulation is permissible when policy-determination constitutes a disregard for the law or Constitution. This would be the case for instance where the rule of law or principle of legality is not observed, such as where the Executive purports to exercise the power it does not have in the name or under the guise of policy determination. Courts are thus empowered to intervene and even set aside policy but only under exceptional and separation of powers-sensitive circumstances."

Polycentricity and deference

87. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 490 (CC) the Constitutional Court held:

"[48] In treating the decisions of administration agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of

competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts".

88. At par 58 of the same judgment, the Constitutional Court recognised that a decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts.

89. In commenting on that dictum in **Bato Star**, a Full Bench of this Division in **Gerstle and Others v Cape Town City and Others** 2017 (1) SA 11 (WCC) at par 36 has recently held that it indicates a judicial recognition of the need for respect for expertise in the making of policy-laden or polycentric issues. In this regard, the Court referred to the observation of Lon Fuller, in his classic exposition of the implications of adjudication, 'The forms and limits of adjudication' (1978) 92 Harvard Law Review 353 at 398, as being of particular relevance, in that although concealed polycentric elements are probably present in almost all problems resolved by adjudication, these are significant dangers in a judicial 'over reach'. According to this Court, when polycentric elements become extremely significant and prominent, so that the proper limits of adjudication have been reached, is of course dependent on the factual matrix and context of the dispute.

90. The principle has been helpfully explained in the following passage by Prof Hoexter (endorsed by various decisions of the Courts[116]):

[116] For example in: Trencon Construction (Pty) Ltd v Industrial Dev Corp of SA Ltd 2015 (5) SA 245 (CC) at par 44; Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) ([2003] 1 All SA 424), para 21; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC) at par 46.

"[a] judicial willingness to appreciate the legitimate and constitutionally – ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord the interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal".[117]

THE ALLOCATION PROCESS EXPLAINED

91. The SAPS have filed three affidavits dealing with the allocation of police resources - the affidavits of Makgato, Rabie and Voskuil. The affidavits provide the rationale for the allocation policy and practice of the SAPS. We submit that this evidence should be given considerable weight in assessing whether or not the allocation policy and practice is racially discriminatory and irrational for the following reasons:

91.1. Major General Makgato is an expert in organisational development who has a considerable experience in the SAPS. He worked in the SAPS Organisational Development component since 1991 and as head thereof since 2011. He has practised in the field of organisational development in the SAPS for more than twenty-six years, five of which he was the head of the SAPS Organisational Development component. [118]

[117] "C Hoexter 'The Future of Judicial Review in South Africa Administrative Law' (2000) 117 SALJ 484 at 501-2. Also cited by Cameron JA in Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) at par 21

[118] AA (Makgato); page 2968; par 4.

91.2. Major General Rabie has worked in organisational development in the SAPS as its Section Head: Performance Management, Organisational Development Component. He reported to Major General Makgato.

91.3. Brig Voskuil is the Provincial Head of Organisational Development and Strategic Management in the Western Cape.[119]

92. As to the allocation process, Major General Makgato provides the following evidence:

92.1. The first principle in allocating resources is to recognise that the primary constitutional mandate of the SAPS is to prevent, combat and investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.[120]

92.2. Armed with that mandate, resources are allocated to ensure the effectiveness of a single SAPS functioning within the national, provincial and where appropriate local spheres of government.

92.3. In order to introduce a rational system to determine the human resource requirements of the SAPS, the Organisational Development component followed a systematic development process in which the following phases were followed[121]:

[119] AA (Voskuil); page 3156; par 1.
[120] AA (Makgato); page 2977; par 17.
[121] AA (Makgato); page 2979; par 23.

92.3.1. Phase 1 was the formalisation of the concept in 1998/1999 and the Resource Allocation Guide ("*the RAG*") was used as a starting point. The RAG was designed after a consultative process within the SAPS and as part of the scoping process, policing models used in foreign jurisdictions were consulted.

92.3.2. Phase 2 was the design and testing phase. This was done with the assistance of an expert in the field (Dr Eugene van Vuuren). As part of Dr van Vuuren's mandate, he considered policing models abroad and did extensive research on whether it was viable for the SAPS. As part of the SAPS' ongoing attempt to improve policing services in the Republic, in about 2004/5 the RAG became the Resource Establishment Plan ("*the REP*"). An analysis was conducted of inputs of requirements and the SAPS continued to implement it as a work in progress. It was presented regularly and annually at police management meetings and to the Portfolio Committee on Police, as well as the Civilian Secretariat for the Police;

92.3.3. Phase 3 concerned the implementation in about 2011/2012 and more variables were added as adjustments were made. At the time the REP was used by SAPS to determine post levels at police stations. The REP later became the Theoretical Human Resource Requirement (THRR) which is an enhancement of the earlier models (the RAG and the

REP). As with the previous models, the THRR also had to be linked to the budget allocation. That linkage with the budget allocation accounts for the fixed establishment of the SAPS. Major General Makgato's component is currently working within the prescripts of phase 3 which is constantly being scrutinised, evaluated and revised in order to enhance policing.

92.3.4. Phase 4 which is a monitoring and evaluation phase has not yet begun but is in any event dependent on the outcomes yielded by phase 3.

92.4. The THRR was developed to enable the National Commissioner to meet his or her statutory responsibilities which includes allocating human resources. Contrary to the allegation that the allocation system produces the results of apartheid policing, the THRR was specifically designed to give the National Commissioner a system of allocating resources that promotes accountability and transparency in the resource allocation process.[122]

92.5. The THRR is an in-house technology based solution for the determination of the minimum number and level of posts for police stations given the minimum standards. The THRR utilises various determinants including population, socio-economic factors and migration. None of the determinants are or use discriminatory elements.

[122] AA (Makgato); page 2981; par 24.

From these determinants, police management approves the different categories of police stations. [123]

92.6. For purposes of demonstrating how an expert on the allocation of police resources approaches the issue, Major General Makgato has identified two key issues. The first involves the total amount of police time required to perform tasks. The second concerns the problem of preventative patrol activity and the question of how police units should be deployed.[124]

92.7. The variables that must be factored into the allocation of police resources are complementary but varied. The first and most important fact is determining the functions of the police service. The second is determining the pattern of its demand, which in turn has constituent variables such as population demands to police demand and crime patterns. However, the sufficiency of the allocated resources depends on the budget allocation. This means that in the allocation system, the police are constantly dealing with the ideal allocation versus the actual allocation; the latter being determined by the budgetary allocations. [125]

92.8. The allocation process takes account of the following[126]:

92.8.1. demographic factors associated with the current policing area, including, but not limited to, current size, population size,

[123] AA (Makgato); page 2981; par 25.
[124] AA (Makgato); page 2984; par 33.
[125] AA (Makgato); page 2985; par 34.
[126] AA (Makgato); page 2985; par 35.

population location, formal and informal settlement patterns and infrastructure;

92.8.2. access to the SAPS services and beneficiary population;

92.8.3. minimum service policing services requirements;

92.8.4. business rules;

92.8.5. workload;

92.8.6. reported crime up to four years;

92.8.7. component and subcomponent services (CSC and Support activities);

92.8.8. service points (satellites and contact points);

92.8.9. direct work measurement in the form of time spent and activities sampling as well as indirect work estimates are used to determine standard times for these policing activities or tasks.

92.9. The allocation process includes arithmetic means, weighted averages, ratio analyses, standard times, time percentages and time estimates of specific elements of tasks or activities performed at the Crime Prevention Units, Community Service Centres (CSCs), Detective Services and Support Services at the police station in question. The total number of

tasks or activities that are performed at each police function/unit, the time required to complete these activities, taking contingency factors (i.e. absence/leave from duty) into account, and external, environmental factors (i.e. the size of the station) are calculated to determine the resource requirements. [127]

The allocation process is dynamic and evolving

93. The respondents have explained that the allocation process of the SAPS is subject to regular and annual reviews. The oversight agencies operate within their respective legislative parameters and within that, are entitled (and indeed obliged) to undertake robust oversight of both the content of the allocation process and its implementation. Indeed, the THRR states in terms (in its conclusion at page 83 thereof):

> "*6.1. The SAPS is functioning in a rapidly changing environment, and these environmental changes may have a major impact on the RAG for the SAPS. The SAPS needs to monitor new developments in the environment (e.g. movement of people), and when it does, the SAPS must make appropriate adjustments to one or more steps of the RAG process if it is to achieve its targets. The extent of the required adjustments depends on the range and speed of environmental change.*
>
> *6.2. The RAG should, therefore, be reviewed annually or biannually to enable the SAPS to include environmental changes. This does not prohibit the SAPS from reviewing the RAG more frequently. New developments in the external environment, i.e. the movement of people, large developments that occur in a given year or internal factors such as the closing of a station or establishment or a new station, are the type of causal factors which will determine whether the RAG for a particular station should be reviewed in a specific year. This review may take place*

[127] AA (Makgato); page 2986; par 36.

subject to approval by the National Head: Organisational Development."

94. As set out in the affidavit of Major General Makgato, there are various steps being taken to ensure that there is dedicated research capacity involving experts who are able to constantly evaluate the coherence and impact of the allocation process as well as its plans, and to monitor the implementation of such plans.

An overview of the allocation process

95. The respondents have explained that for SAPS to be successful in the fulfilment of its constitutional obligations, it must concentrate on how it can best combat crime. Ultimately, the efficiency of the police is determined according to the resources used for every core function. Jointly, all these functions contribute to the degree of productivity achieved by the organisation. In reality, the more SAPS focuses on its core functions (which are mostly performed at local level), and the closer the organisation gets to its targets in terms of resource allocation, distribution and utilisation at local level, the more effective it will become in combatting crime.

96. To this end, SAPS has explained that it has developed and maintains a procedure to calculate the human resource requirements of police stations in SAPS. For this purpose, SAPS has developed an information technology based solution for the determination of the number and levels of posts for police stations. At its simplest, the system has been developed to calculate the number of posts per level required to perform the duties associated with police stations; referred to as the theoretical human resource requirements; it represents the ideal number of employees to be placed at a specific station.

97. The THRR has been developed to calculate the number of posts per level required to perform the duties associated with police stations. This is commonly referred to as the "*ideal*" situation or theoretical requirement. In terms of the Medium Term Expenditure Framework (MTEF) posts are made available in line with the budget allocation to be allocated to all functions in the SAPS annually. However, the number of posts allocated is not equal to the "ideal" and consequently allocated posts are equally distributed between all stations and are referred to as "granted posts". The number of granted posts is ultimately determined based on the annual budget allocation and the consequent equal distribution to the ideal allocation. According to the allocation process, determining of an "ideal/granted" establishment for the SAPS is a dynamic process influenced by various factors (variables) in the internal police environment, as well as the external environment.

98. The allocation process is multi-faceted. It includes: (a) community service centres; (b) crime prevention / sector teams; (c) custody management; (d) additional service points; (e) operational support which includes court services, exhibit management and general enquiries and fire arms and second hand goods and firearms, liquor and second hand goods (FLASH); (f) investigation of crime; (g) support services including general administration, financial / human and supply chain management.

The theoretical allocation

99. In summary, the allocation process with regard to: (a) crime prevention; and (b) crime investigation, operates on the following basis:

100. As stated, the allocation is first done on the basis of a theoretical requirement; in other words the ideal requirement. Simply put, if there were no budgetary constraints police resources would be allocated in accordance with the theoretical. Every year, from January to March, the Component of Organisational Development gathers information on all 1143 police stations across South Africa. The information gathered traverses a wide range of determinants and includes[128]:

100.1. Reported Crime[129]:

100.1.1. An analysis of all reported crime over a period of four years at a particular station (a four year weighted average with the most recent carrying the highest weighting) is taken.

100.1.2. Thereafter, a ratio is applied to determine the crime prevention theoretical requirement (i.e. the number of police officer requirements). With regard to crime prevention (i.e. sector teams), one post is allocated for:

(a) 20 (on average per month) contact crimes (crimes against a person) that have been reported.

(b) 25 crimes against property (i.e. property related crime).

[128] AA (Rabie); page 1831; par 35.
[129] AA (Rabie); page 1831; par 35.1.

(c) 30 contact related crimes.

(d) 35 for other serious crimes.

(e) 50 for less serious crime.

100.1.3. The result of the above-mentioned calculation is that a baseline figure is determined. This figure is then factored into a demographic analysis; there are 79 demographic determinants which are factors that impact on crime prevention. The demographic determinants include reference to areas that SAPS is statutorily obliged to patrol; factors that complicate SAPS' response time in addressing crime (for instance a lack of lighting, street names and informal settlements). Each of these demographic determinants are weighted, with the higher weighting being given to under-developed areas, and correlatively lower weighting being given to relatively developed / advantaged areas. The higher weighting as explained by SAPS, is ultimately geared to ensure higher policing numbers for crime prevention in under-developed areas. The following are among the demographic determinants:

100.1.3.1. Registered facilities and includes: (a) population size that is serviced by a particular police station (this information is obtained from Stats SA as updated); (b) the

area size; (c) the unemployment rate; (d) the percentage of informal population; (e) daily influx of commuters (they do not live the area but come in every day) – this information is obtained from the local municipality; (f) are there venues that host sporting (local or international events), festival and religious events (how many events per year and how many venues); (g) seasonal influx (by way of example over the December period there is a very high influx of people into the Western Cape); (h) the topography such as whether the area is mountainous, has rivers or dams (these factors bear on police accessibility and therefore reaction time).

100.1.3.2. Socio-economic factors which include: (a) lack of street lights; (b) lack of roads; (c) social degradation; (d) lack of telecommunications; (e) whether or not there is formal housing; if there is no formal housing, access routes, lack of street names, lack of house numbers, all of these point to accessibility difficulties; (f) the number of identified gangs in the precinct.

100.1.3.3. Areas where people converge: (a) all transport hubs and routes, for example, airports, bus terminals, train stations; (b) overnight accommodation; (c) number of shopping malls (of different sizes), the bigger the shopping malls the greater the number of people; (d) places where people consume and buy liquor (through registered and unregistered outlets); (e) all education facilities (such as schools, universities and colleges); (f) firearm sales (requires a specific designated firearm official).

100.1.3.4. Places that SAPS bears particular statutory obligations to police and which includes: national key points; feed lots, abattoirs, pounds.

100.1.3.5. Smallholdings and farms which is a function of SAPS.

100.1.4. This is followed by the crime investigation analysis. As a point of departure and as SAPS has explained, it is impossible to determine the precise times (standard time) associated with investigating different types of crime. SAPS therefore engages experts who are able to provide an expert opinion on how many

investigations of a specific crime (for example murder) one detective would be able to deal with on a monthly basis.

100.1.5. Thereafter, crime specific ratios are applied to determine the theoretical detective requirement. By way of example, for murder there is a ratio of 1:4 (one investigator allocated for an average of every four murder charges per month); for attempted murder there is a ratio of 1:5; for common robbery there is a ratio of 1:10.

100.1.6. This is again followed by the demographic analysis. The demographic determinants at this stage of the process are again weighted in favour of under developed areas and include primarily the distances that police need to travel to entities involved in the investigation process, for example, correctional services, department of health and forensic service laboratory. These factors are relevant due to travel time taken.

101. Thereafter, the contingency allowance is applied to cater for unavoidable contingencies for the daily working routine of every member / official. Examples of these contingencies will include reporting for and off duty, station lectures, meetings, reading / studying governance, instructions and policies, hygiene needs, procurement, interaction with other officers etc. These contingencies relate to the human resources located at police stations. So too, these

contingencies may also apply to the police operational support services such as the flying squad, the canine unit, the sexual offences unit etc. [130]

102. The contingency allowance also takes into account the personal needs and recovery from fatigue of members. Another item is compulsory vacation leave.[131]

103. The result of the aforegoing analysis results in a theoretical / ideal allocation; i.e. the allocation that would be made to each police station in an ideal world with no budgetary constraints.

The second stage: the actual assessment

104. The second phase of the process relates to the allocation of posts.

105. According to the evidence of Major-General Nelson[132]:

105.1. The allocation of human resources for policing takes place within the context of a finite pool of resources. That limitation of resources, by its very nature, results in fewer human resources being allocated to policing than what the demand for policing services is.[133]

105.2. The National Treasury has to provide money for the rendering of such services; this is done through the mechanism of the Medium Term

[130] AA (Rabie); page 1836; par 36.
[131] AA (Rabie); page 1836; par 37.
[132] AA (Nelson); page 2955.
[133] AA (Nelson); page 2957; par 5.

Budget Framework and the appropriation process tabled in Parliament annually, in October each year. [134]

105.3. As regards the MTEF[135]:

105.3.1. It comprises of stages starting during June of each year and is concluded during February of a subsequent year when the Minister of Finance tables the Appropriation Bill in Parliament, together with the Estimates of National Expenditure.

105.3.2. The extended year of the MTEF (new year three) is informed by a baseline allocation figure provided by the National Treasury to departments. This takes into account inflation forecasts and macro-economic developments at a given point in time.

105.3.3. The department is then requested to review the current baseline allocations for years 1 and 2, and then, within the framework of the baseline allocation provided for year three, reprioritise and cost the activities for the new year. The inputs received from cost centres informs the costing and resource allocation process.

105.4. Any human, component, province, entity or country does not possess sufficient resources (financial or otherwise) or means to fulfil all of its

[134] AA (Nelson); page 2957; par 7.
[135] AA (Nelson); page 2957; par 8.

needs and obligations. This requires that managers, on a continuous basis, make intentional choices between needs which will most benefit his/her component with the resources at his/her disposal. The boundary of an amount (affordability) as well as the purpose for which an amount has been awarded, therefore have to be taken into account. This is an economic reality of all spheres of life; it requires that resources (and especially financial resources) should be utilised in such a manner that it is expended on the choices made between the different needs. It could be possible to fulfil all the needs partially or to fulfil urgent needs to its fullest extent and leave some less urgent needs out. The aforementioned requires the utilisation of resources in achieving priority and definite objectives which are impacted upon by the decision maker in the application thereof. [136]

105.5. Any budgeting system is therefore essentially concerned with the allocation of means i.e. what is referred to as the "allocation problem". The wants or needs for services are relatively unlimited whilst the means and resources at disposal are limited. An important aspect thus entails how was the need for a service/ product established and whether the extent of the need is justified in relation to other services, priorities, costs, implications, outputs etc. Some recourse as to whether resources are allocated in accordance with priorities thus exists namely

[136] AA (Nelson); page 2958; par 9.

the budgetary process. The key aspects of the budgetary process are as follows[137]:

105.5.1. Prioritisation stage: Cabinet considers policy priorities.

105.5.2. Preparation of budget: Compilation of budget submission which is prescriptive in nature.

105.5.3. Review of macro-economic and fiscal framework and division of revenue ("*DOR*").

105.5.4. Recommendation stage: MTEC hearings / MinComBud / Cabinet.

105.5.5. Medium Term Budget Policy Statement.

105.5.6. Special Joint Committee on the Budget.

105.5.7. State of the Nation Address.

105.5.8. Budget Day: Estimates of National Expenditure (ENE) tabling by Minister of Finance.

105.5.9. Appropriation (Parliament).

[137] AA (Nelson); page 2959; par 10.

105.6. Apportioning is performed according to priorities, specific allocations by Treasury, inputs received from centres (divisions / provinces), baseline analysis and personnel levels as the main driver of operational funds.[138]

105.7. In respect of the internal apportioning funds for operational expenditures the following should be noted[139]:

105.7.1. Inputs are requested from divisions / provinces.

105.7.2. All inputs are then consolidated and presented for consideration to an internal Finance Committee consisting *inter alia* of the National Commissioner as chairperson, two Provincial Commissioners.

105.7.3. The main aspects that are considered to arrive at operational expenditures for divisions / provinces include:

105.7.3.1. Strategic operational priorities embedded in the policy documents as indicated above.

105.7.3.2. ENE aggregate growth for the Vote per category.

105.7.3.3. Analysis of baseline operational expenditures which includes function shifts.

[138] AA (Nelson); page 2960; par 14.
[139] AA (Nelson); page 2961; par 16.

105.7.3.4. Specific requests (inputs) from divisions / provinces above baselines for new or intensified needs.

105.7.3.5. Discernible attention and focus on machinery and equipment specifically relating to vehicle needs and amounts to maintain and even enhance the personnel per vehicle ratio.

105.7.3.6. Demarcation of boundaries between provinces.

105.7.4. Allocation letters are then provided to the divisions / provinces which *inter alia* require centres such as provinces to apportion and cascade further to stations.[140]

105.7.5. With regards to the supply chain process the specific needs for physical resources are captured as a demand from station level and ratified at provincial level. Planning for demand includes budgeting and determining the manner in which the need will be satisfied. [141]

106. Major-General Nelson has further explained:

106.1. SAPS does not obtain its requested budget. Although additional funding is requested for allocation in addition to the baseline allocations over the medium term, the National Treasury, especially in recent times, have

[140] AA (Nelson); page 2962; par 16.4.
[141] AA (Nelson); page 2962; par 16.5.

rather opted for reductions in baseline allocations rather than allocating additional funding. [142]

106.2. This inadequacy of allocation in the first place allows for delivery of services by the SAPS on terms that are less than what the demand therefor is. Simply put, additional resources might allow for additional personnel, more training, vehicles and basic equipment needs will no doubt increase police visibility, improved investigation of crime and services to the communities it serve. The level of funding therefore determines the level of output in relation to policing services. [143]

106.3. A breakdown of the SAPS' budget over the past 5 years demonstrates that its spend has been equivalent to its allocation. [144]

The third stage: the placement at police stations

107. As the THRR illustrates, once a station has been determined as being disadvantaged, it receives one post for every 2500 members of the community instead of one post for every 5000 members of the community in non-disadvantaged areas.

108. SAPS has explained that this weighting has been specifically determined so as to ensure that police stations in lower economically resourced areas have a higher ratio of police officers to serve them.

[142] AA (Nelson); page 2964; par 17.1.
[143] AA (Nelson); page 2964; par 17.2.
[144] AA (Nelson); page 2964; par 17.2.

109. Once the national allocation is done, provinces have the responsibility of distributing the allocated funded posts. As Brigadier Preston Voskuil explains in his affidavit, the distribution of police resources within police stations is done by the Provincial Commissioner in terms of section 12 of the SAPS Act, with due consideration to the THRR and other important considerations such as crime trends and patterns. Such distribution of resources is a dynamic and flexible process.

110. According to Brig Voskuil:

110.1. In the distribution of provincially allocated resources, consideration is given to: (a) the national allocation to the province; (b) the high volume crime generating stations; (c) crime patterns and threats; (d) critical personnel shortages and vacancies; and (e) specialised policing needs and priorities.[145]

110.2. The population of a specific station precinct cannot and has never been the sole determinant of how resources are distributed although it is a factor taken into account. Brig Voskuil has explained in this regard that one could have a police station with a high population but with low crime rates whereas a similarly sized population elsewhere may have high crime rates. It is axiomatic that the latter station would have more human resources distributed to it than the former. [146]

[145] AA (Voskuil); page 3185; par 76.
[146] AA (Voskuil); page 3185; par 77.

110.3. In the next phase, SAPS identified the top 30 stations responsible for contributing approximately 52% of the seventeen reported serious crimes in this province. This resulted in an additional 790 permanent members being deployed to those stations.[147] An additional temporary stabilisation capacity involving 425 visible policing and specialised capacities were deployed in 10 identified stations. These are Khayelitsha, Harare, Gugulethu, Nyanga, Delft, Manenberg, Kraaifontein, Bishop Lavis, Elsies River and Steenberg.[148]

110.4. Phase 3 commenced in January 2017 and involved resourcing the stations and further strengthening stabilisation capacity. Annexure "PLV2" to Voskuil's affidavit also identifies the second tranche of 30 police stations in the province which account for some 28% of the reported serious crime.[149]

110.5. The distribution of police resources to communities with high levels of reported serious crime is generally higher than the distribution to police stations with lower levels of reported serious crime. This means that over and above the basic minimum of police resources that are required at every police station to meet basic policing services, more resources are deployed in areas with higher crime levels. [150]

110.6. In summary, of the 150 police stations in this province, the top 30 account for around 52% of all 17 reported serious crime. The second 30

[147] The top 30 police stations are shaded in red on annexure "PLV2" (page 3247) to Voskuil's affidavit.
[148] AA (Voskuil); page 3191; par 93.
[149] AA (Voskuil); page 3191; par 94. These are shaded in blue on the annexure.
[150] AA (Voskuil); page 3192; par 95.

account for approximately 28% of the reported serious crime while the remaining 90 police stations are responsible for about 20% thereof. [151]

110.7. Despite the fact that 90 of the 150 police stations account for only about 20% of the crime, this does not mean that these police stations should not be resourced within the available means. According to the respondents, all police stations are open 24 hours per day, seven days per week, 365 days per annum and require staff to operate and rendering policing services to all communities. [152]

110.8. As is apparent from annexure "PVL2", a significant number of additional resources were distributed to Khayelitsha, Harare, Lingelethu-West and Nyanga. The Provincial Commissioner did so in the exercise of his powers in terms of section 12(3) of the SAPS Act. [153]

WHY THE MODEL PROPOSED BY THE COMPLAINANTS IS UNSUSTAINABLE AND UNWORKABLE

111. We have already addressed the model proposed by Redpath. As is apparent, a key contention is that policing ought to be based primarily on population size and that areas with higher murder rates must be provided with additional police personnel as the incidence of murder correlates with other incidents of violent crime.

[151] AA (Voskuil); page 3193; par 100. These police stations are depicted in red, blue and white respectively in annexure "PLV2" (page 3247).
[152] AA (Voskuil); page 3194; par 101.
[153] AA (Voskuil); page 3194; par 102.

112. The respondents contend that such an approach is not feasible as it does not address and consider the underlying root causes of crime.[154]

113. The respondents proffer the following explanation as to why Redpath's approach is not feasible:

113.1. First, that additional resources have been added to areas such as Lingelethu West, Khayelitsha, Harare and Nyanga since the Khayelitsha Commission made its findings.[155]

113.2. Second, despite the increase in resources the incidence of murder has either increased or remained at the same high levels. [156]

THE RESULTS OF THE ALLOCATION PROCESS AS ADOPTED AND IMPLEMENTED

114. SAPS has explained that in making distributions in terms of section 12(3) of the SAPS Act, the Provincial Commissioner takes a number of considerations into account, including crime patterns and crime trends, crime rates, situational factors, the generators of crime, the need for force multipliers, the setting up of additional service points (satellite stations), the need to further capacitate specialised units, develop new units, *etc*.[157]

115. SAPS has also explained that there are many factors which play an integral role in the determination of the strength of the service in the province among the

[154] AA (Sekhukhune); page 2259; par 27.
[155] AA (Sekhukhune); page 2259; par 28.
[156] AA (Sekhukhune); page 2259; par 29 read with TS4; page 2299.
[157] AA (Voskuil); page 3202; par 122.

different areas, station areas, offices and units. This process is dynamic, flexible and responsive to policing needs in the province. It is also done in a strategic manner. Much emphasis has also been laid on crime generators. As a result, various police interventions have been instituted, including targeting illegal drug and liquor outlets, the illegal possession of arms and ammunition and identifying persons of interests. These are identified by the respondents as being but a few of the initiatives undertaken by the SAPS, which have resulted in a number of successes. This, the respondents have explained is partly the reason that there has been such a significant decrease in crime in the Western Cape. [158]

116. According to SAPS, it is not correct that the stations where most crime is generated are the least resourced; through the stabilisation strategy significant re-deployments were made to the areas generating most crime.[159]

117. The respondents have explained in their answering affidavits that:

117.1. There are 150 stations in the province, of which 30 are responsible for 52% of all reported crime. Three stations in Khayelitsha fall within the top 30 contributing stations.[160]

117.2. The staffing at the three Khayelitsha has significantly increased in recent years. By way of example and in the period between August 2016 and February 2017[161]:

[158] AA (Voskuil); page 3202; par 123.
[159] AA (Voskuil); page 3207; par 139.
[160] AA (Brand); page 2327; par 14.
[161] AA (Brand); page 2327; par 15.

117.2.1. Khayelitsha received 37 new recruits in August 2016 and a further 7 in January 2017.

117.2.2. Harare received 41 in August 2016 and a further 51 in January 2017.

117.2.3. Lingelethu West received 12 in August 2016 and a further 10 in January 2017.

118. Brig Voskuil has further explained that there are ongoing managerial interventions aimed at enhancing policing in the province. Some of these more recent initiatives include[162]:

118.1. The opening of a service point (also known as a satellite police station) in the Browns Farm area in Nyanga with an officer in command and a dedicated capacity of 60 visible policing members;

118.2. capacitation of the broader Nyanga policing precinct with a total of 101 visible policing members over the last 7 months;

118.3. stabilisation of identified policing areas to achieve normalisation in the precincts;

118.4. commencement of the first phase of the stabilisation process in Nyanga, Gugulethu and Khayelitsha on 16 June 2016 and the next three stations

[162] AA (Voskuil); page 3179; par 61.

which were additionally capacitated were Kraaifontein, Delft and Harare on 11 August 2016;

118.5. additional human resource distributions to several police stations, including 41 operational members to Harare police station in August 2016 and 51 in January 2017; 37 operational members to Khayelitsha police station in August 2016 and 7 in January 2017 and 41 operational members to Nyanga police station in August 2016 and 60 in January 2017.[163]

118.6. removal of members performing court duties at Lingelethu-West police station and deploying them to Khayelitsha police station to strengthen capacity at the former;

118.7. concerted efforts and negotiations to acquire land for the building of a fully-fledged police station in Samora Machel/Weltevreden Valley in the Nyanga policing precinct;

118.8. additional operational deployments aimed at stabilising crime hotspot areas and certain identified areas where gangs are prevalent.

119. According to Brig Voskuil:

119.1. Of the 150 police stations in this province, the top 30 account for around 52% of all 17 reported serious crime. The second 30 account for approximately 28% of the reported serious crime while

[163] The additional capacitation at the three stations and at other stations appear from annexure "**PLV2**" to Voskuil's affidavit.

the remaining 90 police stations are responsible for about 20% thereof.[164] These police stations are depicted in red, blue and white respectively in annexure "PLV2" to Brig Voskuil's affidavit.[165]

119.2. Despite the fact that 90 of the 150 police stations account for only about 20% of the crime, this does not mean that these police stations should not be resourced within the available means. All police stations are open 24 hours per day, seven days per week, 365 days per annum and require staff to operate and rendering policing services to all communities.[166]

119.3. The increase in human resources in the province is evident from the document attached as "PLV2" to Brig Voskuil's affidavit.[167] A significant number of additional resources were distributed to Khayelitsha, Harare, Lingelethu-West and Nyanga pursuant to the powers of the Provincial Commissioner in terms of section 12(3) of the SAPS Act.[168]

119.4. Notwithstanding the attrition rate due to promotions, retirement, death, illness, transfers and the like, there has still been a sizeable increase in numbers at certain police stations. In June 2016 Khayelitsha had 206 operational members. This figure, excluding stabilisation members, increased to 282 in January 2017. The

[164] AA (Voskuil); page 3193; par 100.
[165] AA (Voskuil); PVL2; page 3247.
[166] AA (Voskuil); page 3193; par 100.
[167] AA (Voskuil); PVL2; page 3247.
[168] AA (Voskuil); page 3194; par 102.

percentage increase amounts to a staggering **36.9%.** Harare increased from 149 operational members in June 2016 to 225 in January 2017 (excluding the stabilisation members) which represents an increase of **51%**. The operational members in Nyanga increased from 217 in June 2016 to 303 in January 2017. It benefited by an additional 101 members (41 in August 2016 and 60 in January 2017). This increase similarly excludes the stabilisation unit members and amounts to **39.6%**.[169]

119.5. The 30 stations which account for the most crime in this province were capacitated during the period June 2016 to January 2017. Additional human resources were also distributed to certain of the remaining 120 police station, albeit not at the same level. [170]

119.6. The top 10 stations which accounted for most of the serious reported crime in the province are outlined Annexure "PLV5"[171] hereto) from which the following picture emerges[172]:

119.6.1. in both 2015 and 2016 Cape Town Central accounted for the highest crime rates;

119.6.2. Mitchells Plain was the second highest in the two year period;

[169] AA (Voskuil); page 3194; par 103.
[170] AA (Voskuil); page 3195; par 104.
[171] AA (Voskuil); PLV 5; page 3300.
[172] AA (Voskuil); page 3195; par 105.

119.6.3. the crime in Stellenbosch increased in 2016, hence its position in third place;

119.6.4. Worcester and Kraaifontein respectively occupied the 4th and 5th positions followed by Nyanga which had the sixth highest crime rate;

119.6.5. Bellville, Milnerton and Parow occupied the next three places respectively;

119.6.6. Khayelitsha had the lowest crime rate of the top 10 stations;

119.6.7. Harare and Lingelethu-West do not feature;

120. As SAPS has explained in the answering affidavit of Brig Voskuil, the following conclusions can be drawn:

120.1. the crime figure in Cape Town Central is much higher than Khayelitsha[173];

120.2. the crime rates in 6 of the top 10 stations reduced[174];

120.3. Bellville and Parow had significant reductions in excess of 10%[175];

120.4. Khayelitsha reduced by 3.3% over the two year period[176];

[173] AA (Voskuil); page 3195; par 105.8.
[174] AA (Voskuil); page 3195; par 105.9.
[175] AA (Voskuil); page 3196; par 105.10.
[176] AA (Voskuil); page 3196; par 105.11.

120.5. Despite Khayelitsha having the lowest crime rate in terms of the top 10 stations, it was still capacitated by the figure enumerated. [177]

121. According to Brig Voskuil:

121.1. Cabinet has decreed that reported crime should be reduced by 2% in the provinces per annum over the Medium Term Strategic Framework ("*the MTSF*") for the period 2014 to 2019. This equates to a 10% reduction in crime over the 5 year period of the MTSF.[178]

121.2. The figures for the 9 month crime statistics for the period 1 April 2016 to 31 December 2016 were presented to the Portfolio Committee for Police and were publicly released on 3 March 2017. A copy of the latest statistics is annexed to Brig Voskuil's affidavit as "**PLV6**".[179] The Western Cape Province has achieved this target in the first three quarters of this year and is on course to improve thereon given that there is still a further quarter remaining in this financial year. The four pillar approach adopted by the province has resulted in improvements in policing and a reduction in crime levels. The latest crime statistics released on 3 March 2017 follow a similar pattern to those reported on in annexure "PLV5" and focuses on the 17 community reported serious crime and crime detected as a result of police activity. Signally, the four categories making up the community reported serious crime have all reduced overall in the

[177] AA (Voskuil); page 3195; par 105.12.
[178] AA (Voskuil); page 3196; par 108.
[179] AA (Voskuil); PVL6; page 3376.

country. Contact crime reduced by 5.3%, contact-related crime by 5.4%, property-related crime by 2.2% and other serious crimes by 5.3%.[180]

121.3. There have been a number of significant improvements in the Western Cape Province in combating crime. A reduction of 2.1% in overall reported serious crime has been achieved in the Western Cape for the first three quarters of 2016/2017. Seven of the nine provinces have seen a reduction in their crime rates, the only exceptions being the Eastern Cape and Mpumalanga. A comparison of the nationally reported 17 serious crimes between the 2015/2016 year and the first three quarters of this year shows that with the exception of four of these 17 community reported serious crimes, 13 have reduced. The four which increased are robbery with aggravating circumstances, burglary at non-residential premises, stock theft and commercial crime. [181]

121.4. As regards crime detected nationally as a result of police action, the successful policing of all four categories have increased in the last 3 quarters when compared to 2015/2016, *viz* illegal possession of firearms and ammunition is up by 4.3%, drug-related crime has increased by 11%, driving under the influence of alcohol or drugs has increased by 2.3% and the policing of sexual offences has increased by 11.6%. The provincial figures, with particular emphasis on the Western Cape Province shows remarkable successes.[182]

[180] AA (Voskuil); page 3197; par 109.
[181] AA (Voskuil); page 3197; par 111.
[182] AA (Voskuil); page 3198; par 112.

121.5. There has been a number of reductions in crime in this province. Contact crime has decreased, contact-related crime has increased marginally, property related crime has decreased substantially and other serious crime has similarly decreased. In three of the four categories of serious reported crime there has thus been a decrease. There have also been decreases in the sub-categories. There have also been staggering successes with the percentage increases in crimes dependent on police action which illustrates the effectiveness of the focused and targeted approach. These publicly available crime statistics bear testimony to the enhanced policing in this province, rendering the application unnecessary. A comparison of annexures "PLV5" and "PLV6" puts it beyond dispute that crime in this province is reducing and that the SAPS is executing its constitutional mandate. [183]

122. Having regard to the above-mentioned evidence of SAPS, there can be no doubt that the first to third respondents are executing their constitutional mandate efficiently and effectively, that they are compliant with their statutory obligations and that allocations are not done on a discriminatory basis and nor is there a discriminatory impact.

[183] AA (Voskuil); page 3198; par 113.

THE PROVINCIAL COMMISSIONER ASSUMES AN IMPORTANT ROLE IN THE ALLOCATION OF RESOURCES

123. General Magkato has explained[184]:

123.1. While the applicants appear to appreciate the stages in the allocation process and the difference between the allocation done by the national management to the provinces and that of the provincial management under the control and management of the Provincial Commissioner, they nevertheless erroneously take issue with the allocation system as arising from the THRR or the national allocation. This analysis ignores the role of the Provincial Commissioner. The applicants (and Redpath) have a flawed understanding of the THRR.

123.2. Annually the Provincial Commissioner is given the provincial allocation (fixed establishment which is aligned to the allocated compensation budget of the SAPS) which determines the numerical strength. In terms of section 12 of the SAPS Act, distribution takes place in accordance with the classification of the police station table. Over and above the distribution of posts to police stations, there are other policing operational units which are located in the province and which serve one or more clusters under which a number of police stations fall. These other policing units are classified as K9 (formerly the dog unit), Stock Theft Unit, Tactical Response Unit, the Flying Squad, the Directorate of Priority Crime Investigations (Hawks), Public Order Policing (POPs),

[184] AA (Makgato); page 2989; par 42 and following. See too: AA (Voskuil); page 3184; par 75.

Family Violence and Child Protection Services (FCS). These policing units are force multipliers to each and every police station where required.

124. Brig Voskuil has explained in this regard that the provisions of section 12(3) of the SAPS Act are self-explanatory and that there is no need for the court to grant the applicants relief in this regard. Section 12(3) of the SAPS Act grants Provincial Commissioners the power to determine the distribution of police resources between the different areas, station areas, offices and units under their command and control, including the distribution of permanent posts under the fixed establishment, not merely temporary posts. As Brig Voskuil has explained, the powers of the Provincial Commissioner are statutorily regulated in clear and unambiguous terms, and it is accordingly unnecessary for the court to pronounce thereon.[185]

125. In these circumstances we submit that there is no basis for the declaratory order sought in paragraph 3 of the notice of motion[186].

SUMMARY OF ARGUMENTS IN RESPONSE TO CLAIMS OF UNFAIR DISCRIMINATION AND IRRATIONALITY

126. It is submitted that there is no merit to the complainants' challenge of unfair discrimination or irrationality for reasons addressed. They are summarised hereunder.

[185] AA (Voskuil); page 3185; par 78.
[186] NM; page 8; par 3.

127. As a point of departure, this Court must interrogate the question of whether the allocation system (being the means chosen to give effect to the policing obligations of the State) is rationally related to the outcome of policing that is sought to be achieved.

128. We submit that this threshold has been met for at least the following reasons:

    128.1. SAPS has explained the theoretical allocation is weighted in favour of under-developed areas. This is borne out by the allocation of human resources to such areas.

    128.2. Furthermore, SAPS has explained that in the ultimate allocation of resources, there is a priority in allocations given to police stations that generate the most crime.

129. While SAPS accepts that there is the issue of under-reporting, there is no evidence before this Court as to the extent of such under-reporting so as to justify a conclusion that by relying on the extent of crime, there is an irrationality and/or unfair discrimination in the approach that SAPS adopts.

130. We submit that it is entirely reasonable for SAPS to make this determination. Simply put, what this case is about is the complainants proposing an alternative methodology for the allocation of resources. SAPS has explained at length why it does not accept the cogency of that approach.

131. As regards the claim of unfair discrimination, we submit that at its simplest the allocation system is geared at responding on “an extent of crime basis”. It follows

from this that stations with the highest incidence of crime are provided with a priority allocation of police personnel. Accordingly, the impact thereof is that stations, irrespective of where they are situated, are allocated personnel based on the demand as generated by the prevalence of crime.

132. We submit that when approached on this basis, there is no evidence of direct or indirect discrimination on any of the grounds relied on and nor has a case for irrationality been made out.

THE COMPLAINANTS' CRITICISMS OF THE ANSWERING AFFIDAVITS FILED BY SAPS HAVE NO MERIT

133. The complainants unfairly criticise the respondents' affidavits as being inconsistent or contradictory. To the extent that there was any uncertainty of the respondents' response to the subject complaint, we submit that the case has been fully set out in these heads of argument with reference to the evidence. As is apparent from the evidence as analysed herein, we submit that there is no contradiction; where the complainants allege otherwise, it is based on a misunderstanding of the respondents' case.

THE IMPORT OF THE RELIEF SOUGHT AND WHY IT IS NOT APPROPRIATE

134. The relief sought in this application is plainly far reaching. It includes: (a) a range of declaratory orders; (b) a range of mandatory orders; and (c) that this court exercise supervisory jurisdiction over the respondents.

135. For reasons addressed elsewhere in these heads of argument, we submit that the applicants have failed to make out a case for the declaratory and mandatory

orders. However, the most far reaching part of the order sought concerns the supervisory jurisdiction/ structural interdict that this Court is called upon to exercise.

136. A structural interdict has been described as being one in which the violator is instructed to take steps to comply with its constitutional obligations and then report back to the court on the extent to which it has complied with the court's order. It thus involves the continued participation of the court in the implementation of its orders.[187]

137. The Constitutional Court has granted structural interdicts in appropriate circumstances. In **Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others** 2009 (3) SA 422 (SCA), the court stated that a remedy in the form of a structural interdict or supervisory order may be very useful. This is because, the court stated, it advances constitutional justice by ensuring that the parties themselves become part of the solution.

138. A structural interdict consists of five elements. First, the court declares the respects in which the violator's conduct falls short of its constitutional obligations; second, the court orders the violator to comply with its constitutional obligations; third, the court orders the violator to produce a report within a specified period of time setting out the steps it has taken; fourth, the applicant is afforded an

[187] At par 96.

opportunity to respond to the report; and finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court.[188]

139. In **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC) para 100, Kriegler J stated that there is no reason, at the outset, to imagine that any remedy is excluded. Provided the remedy serves to vindicate the Constitution and deter its future infringement, it may be appropriate relief.

140. At par 19, Ackermann J held in **Fose** that:

> *"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."*

141. In the present instance, we submit that the complainants have failed to demonstrate any basis for any aspect of the relief sought. If the court is not with us on this primary argument and inclined to grant the declaratory and/or mandatory relief sought, then we submit that in any event there is no basis for the supervisory orders sought.

[188] See Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) (2000 (8) BCLR 837; [2000] ZACC 8) paras 67 – 70; Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) (2002 (10) BCLR 1033; F [2002] ZACC 15) paras 101 – 114 and 124 – 133; Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34) para 50; Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) (2010 (3) BCLR 177; [2009] ZACC 32) para 97.

CONCLUSION

142. In the circumstances, we ask that the application be dismissed. Finally, we point out that these heads of argument are filed only in response to the applicants' heads of argument and not the heads of argument of the Amicus Curiae; we will address the submissions of the Amicus separately.

RT WILLIAMS SC

KARRISHA PILLAY

THABANI MASUKU

30 October 2017

Chambers

Cape Town