IN THE EQUALITY COURT

(HIGH COURT, CAPE TOWN)

Case number: EC 3/2016

In the matter between:

SOCIAL JUSTICE COALITION	First Applicant
EQUAL EDUCATION	Second Applicant
NYANGA COMMUNITY POLICE 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

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APPLICANTS' HEADS OF ARGUMENT

I INTRODUCTION

1. This is an application in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (**Equality Act**) to compel the South African Police Service (**SAPS**) to remedy the manner in which it allocates police officers to police stations. The Applicants are the Social Justice Coalition **(SJC)**, a non-governmental organisation (NGO) based in Khayelitsha which (amongst other things) mobilises people to address crime, corruption and poor service delivery,[1] Equal Education **(EE)**, an NGO which seeks to achieve equal and quality education for all,[2] and the Nyanga Community Policing Forum **(the CPF)**, a statutory body established (amongst other things) to promote the partnership between SAPS and the residents of Nyanga and to improve the police services rendered to Nyanga residents.[3]

2. Section 205(3) of the Constitution states that 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"*.

3. The Applicants contend that the under-resourcing of police stations in Black townships results in widespread violations of residents' fundamental rights. Support for this proposition is to be found in *Minister of Police and Others v Premier of the Western Cape and Others,*[4] where the Constitutional Court considered a challenge by SAPS to the establishment of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha (**the Khayelitsha Commission**). In rejecting the challenge, the Court held that "*[t]he rights and interests of these residents lie at the heart of this dispute.*" Moseneke DCJ went on to note that the Premier's decision to establish the Commission was part of the

[1] Founding Affidavit (FA) at para 15: Record p 16.

[2] Ndzomo at para 10: Record p 1033.

[3] Makasi at para 8: Record pp 1326 – 1327.

[4] [2013] ZACC 33; 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC).

fulfilment of her obligation "*to take reasonable steps to shield the residents of Khayelitsha from an unrelenting invasion of their fundamental rights because of continued police inefficiency in combating crime and the breakdown of relations between the police and the community.*"[5] The Court was clearly disturbed by the evidence in the complaints that led to the establishment of the Commission:

> "*The details of incessant crime emerging from the complaint are unsettling. There is much to worry about when the institutions that are meant to protect vulnerable residents fail, or are perceived to be failing. The police service has been entrusted with the duty to protect the inhabitants of South Africa and to uphold and enforce the law.*"[6]

4. The Applicants case is that 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. The result is that residents of these Black communities are less safe, more at risk of crime, and their constitutional rights are more likely to be violated.

5. In 2014, the Khayelitsha Commission found that *"[o]ne 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."* Before the Khayelitsha Commission, the then Western Cape Provincial Commissioner conceded that the current system for allocating human resources was "*irrational*". The Commission held that:

> "*the residents of the poorest areas of Cape Town that bore the brunt of apartheid are still woefully under-policed twenty years into our new democracy*

[5] Ibid at para 51 (emphasis added).

[6] Ibid at para 52.

> *and are often the police stations with the highest levels of serious contact crime. This pattern needs to change as a matter of urgency.*"[7]

The Applicants' case

6. There are three stages to the allocation of resources within SAPS:

   6.1. The theoretical determination of how many police officers are required at each station if there were unlimited human resources;[8]

   6.2. The second stage, which requires the theoretical allocations to be adjusted in light of the available budget; and

   6.3. The third stage entails the actual allocations of officers to police stations, which is subject to the discretion of the Provincial Commissioner of the province concerned.[9]

7. The Applicants' case is that at both the theoretical and the actual stages, the results unfairly discriminate against poor, Black communities, in favour of rich, white communities.

8. In summary, the case made out in the founding papers is as follows:[10]

   8.1. It is the primary responsibility of SAPS to allocate police resources. In doing so, it must consider a number of factors, including reported crime, population, and other factors that impact on the police resources required to fulfil their constitutional obligations. That is a complicated process that requires SAPS to

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[7] FA at paras 4- 6: Record pp 13 - 14.

[8] This theoretical allocation is based on a model named the Theoretical Human Resource Requirement (THRR).

[9] The evidence reflects that prior to the Khayelitsha Commission there was some confusion about the nature of Provincial Commissioners' powers. Although there have been some changes in allocations in the Western Cape since this application was launched, which we consider in Part III of these submissions, in practice the actual allocations are determined primarily by the THRR, with the adjustments required by the available budget.

[10] The Applicants' case is summarised in their Replying Affidavit (RA) at para 8: Record pp 3481 – 3484.

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

8.2. However, the results of the allocation may not be unfairly discriminatory on the grounds of race or poverty. SAPS is not lawfully permitted to allocate its human resources in a manner that results in poor, Black communities being systematically under-resourced in comparison to rich, white communities. It may not do so intentionally, and it may not do so unintentionally.

8.3. The results of the allocation process may also not be irrational – they must respond to actual crime rates, and must allocate more resources to the policing of more serious crimes.

8.4. SAPS is obliged to redress apartheid era inequalities in the provision of policing services to Black communities which are disadvantaged in many other respects, even prior to the allocation of police resources.

8.5. The reality of life in Cape Town – as in most of South Africa – is that serious violent crime is concentrated in areas that are predominantly poor and Black. One would expect that those areas would have the highest concentration of police resources as they bear the greatest burden of serious and violent crime. This is not the case.

8.6. The Applicants' statistical evidence shows that the allocation of police resources in the Western Cape is unfairly skewed in favour of rich, white communities. The Applicants also presented statistical evidence showing that those areas with higher rates of murder (and therefore higher actual rates of other serious, violent crimes) had the lowest police: population ratios. This statistical evidence is not contested.

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

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

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

8.8. These irrational and discriminatory results flowed both from flaws in the THRR and the failure of the Western Cape Provincial Commissioner to exercise his powers under s 12(3) of the South African Police Services Act 68 of 1995 **(the SAPS Act)**.[11]

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

8.10. The Applicants' expert witness, Ms Jean Redpath **(Redpath)** concluded that the THRR figures, which guide the allocation of resources across the country, appear to prejudice township areas to an even greater extent than the actual allocations.[12]

8.11. In addition, Redpath used service delivery variables – the percentage of households in an area that have electricity and piped water – to measure levels of poverty and informal housing in each police precinct. The fewer people receive electricity and piped water, the higher the levels of informal housing and poverty. Redpath then compared that data to the actual police: population ratio by dividing the stations into quintiles. The conclusion she drew is that "*The overall trend is clear – higher levels of water and electricity service provision are associated with higher levels of police resourcing.*"[13]

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[11] Section 12(3) and the powers it confers on Provincial Commissioners are considered in greater detail below in Part III of these submissions.

[12] Redpath FA at para 85: Record p 673.

[13] FA at para 89: Record p 41.

9. Although after this application was launched in March 2016 SAPS has taken steps, no doubt prompted by the need to justify its allocation process to this Court, to address the discriminatory allocation of police resources in the Western Cape, these steps (which we address in greater detail below) are insufficient to alter the fundamental pattern of discrimination on the grounds of race and poverty and the irrational allocation of police resources.

10. After filing its answering affidavits, SAPS made available to the Applicants data reflecting the allocation of police resources across the country. Redpath in her replying affidavit analysed this data and confirmed that the discriminatory and irrational pattern of resource allocation occurs nationally.

11. This application seeks to remedy this pattern of unfair discrimination. It seeks to compel the Minister and the National Commissioner to take urgent steps to:

    11.1. Revise the theoretical system of allocating human resources through an open, consultative process in order to ensure outcomes that are rational and non-discriminatory;

    11.2. Make the theoretical and actual allocation of police human resources publicly available;

    11.3. Remedy, as a matter of urgency, the discriminatory allocation of resources within the Western Cape; and

    11.4. Declare that Provincial Commissioners have the power and the obligation to deviate from the theoretical human resource allocation in order to provide a fair and equitable distribution of policemen.

12. In addition, the Applicants seek an order maintaining this court's supervision of the process of revising the theoretical system, and the actual allocation in the Western Cape, in order to ensure that the Minister and the National Commissioner comply with their constitutional and statutory obligations. This is necessary given the Minister and the National Commissioner's inexplicable and ongoing refusal to act on the Khayelitsha Commission's recommendations.

SAPS' Response

13. SAPS' answering affidavits, which were filed piecemeal over a period of almost a month, are voluminous and, in a number of respects, unclear and contradictory.[14] They also mis-characterised the Applicants case in relation to several issues.[15] Furthermore, despite the hostile approach to the application adopted by SAPS in the answering affidavits, it was for some time unclear whether SAPS was persisting in its opposition to the relief sought by the Applicants, as the Deputy Minister of Police, Mr Bongani Mkgoni addressed a public meeting in Khayelitsha in April 2017 and described the application (that is, the Applicants' case) as one that sought to reinforce values that SAPS believes in and stated emphatically that SAPS would not oppose the claim.[16]

14. SAPS struggled to formulate a coherent response to the proposition - which lies at the heart of the Applicants case[17] - that SAPS' allocations of personnel to township areas almost all reflect a massive downward adjustment from what would be expected by the size of their populations and, unless SAPS can demonstrate that the burden of policing is lower in these areas, the police: population figures suggest a flaw in the allocation model. General Rabie **(Rabie)**, who deposed to SAPS' principal answering affidavit, does not address the issue. In his affidavit, General Makgato[18] **(Makgato)**: (i) states that Redpath relies on only one crime element to determine allocations;[19] (ii) claims that the allocations are weighted in favour of disadvantaged areas (without explaining why these areas then have lower police: population ratios); (iii) denies (without motivating) that the THRR is racially discriminatory; and (iv) concludes by stating that

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[14] RA at paras 5 – 5.12: Record pp 3472 – 3481.

[15] See RA at paras 9.1 – 9.5: Record pp 3484 – 3485.

[16] RA at para 5.1: Record p 3473.

[17] See Redpath FA at paras 50 - 51: Record p 664.

[18] Answering Affidavit (AA) at paras 110 – 112: Record 3007 – 3008.

[19] This is irrelevant.

Brigadier Voskuil will deal with the issue. Brigadier Voskuil[20] **(Voskuil)** can only: (i) claim that Redpath relies on outdated figures;[21] (ii) allege that she overlooks the onus, which he claims rests on the Applicants;[22] and (iii) contend that the most recent crime statistics paint a different picture. The most recent crime statistics are irrelevant to the issue. If he intended to refer to the information furnished in the answering affidavits relating to the most recent police allocations, Redpath has analysed the data in her replying affidavit and demonstrated that there has been no substantial change to the pattern of unequal distributions.[23]

<u>The Common Cause Facts</u>

15. It is helpful to summarise briefly some of the primary issues which are not in dispute in this application, as the Applicants contend that they are entitled to relief on the basis of the following facts and considerations, which are common cause:[24]

15.1. Redpath's calculations, upon which the founding papers are based;

15.2. The racial composition of township and "white" areas;

15.3. The THRR is, in substance, unchanged since prior to the Khayelitsha Commission;

15.4. The THRR broadly guides the actual allocation of police resources;

15.5. Poor areas with high crime rates are likely to have lower rates of reported crime;

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[20] Voskuil AA at paras 194 – 195: Record p 3222, read together with Redpath RA at paras 76 – 92: Record pp 3788 – 3794.

[21] This claim is rebutted in RA at paras 19 – 20.4: Record pp 3488 – 3490.

[22] The onus will be considered in greater detail below in Part IV, the which deals with the unfair discrimination analysis. It is not correct that the Applicants bear the onus with regard to all the issues in the application.

[23] RA at para 5.4: Record pp 3476 – 3477.

[24] See RA at paras 70 – 83: Record pp 3507 – 3511.

15.6. The percentage of households that have electricity and piped water is a measure of poverty and informal housing;

15.7. In principle, most policing resources should be allocated to areas in which crime is the highest;

15.8. Policing is more difficult in Black townships, which still suffer from systemic discrimination;

15.9. The quality of policing in Black townships is inferior to that in white areas;

15.10. Adequate resources are a necessary condition for effective policing; and

15.11. The THRR is race neutral.

16. We shall consider each of these facts, or undisputed issues, in turn.

Redpath's calculations

17. While SAPS questions Redpath's expertise in relation to policing,[25] particularly with regard to organisational development within SAPS, and it contends that the data on which her calculations are based are outdated, it does not question the correctness of the calculations which form the basis for her evidence (nor do they challenge the correctness of the calculations which she presented to the Khayelitsha Commission).

18. While not contesting Redpath's calculations, SAPS seeks to avoid the conclusions which flow from them, namely irrational and discriminatory allocations of police resources.[26]

[25] The criticisms of Redpath's expertise are dealt with in detail in our analysis of the evidence in section III below.

[26] See RA at paras 72 – 73: Record p 3508.

Racial composition of communities

19. Although it is not possible to align racial profiles of communities directly with police precincts,[27] SAPS does not place the racial composition of the communities analysed by Redpath in dispute.[28]

THRR unchanged

20. Redpath states that the THRR formula has, at least in substance, remained unchanged since 2002.[29] This was confirmed in Rabie's evidence to the Commission.[30]

The THRR broadly guides the allocation process

21. Rabie does not dispute that the THRR broadly guides the allocation process[31] and Redpath's analysis of the national allocations confirms that the discriminatory distribution of resources in the Western Cape is replicated in the other provinces.[32]

Poor areas with high crime rates are likely to have lower rates of reported crime

22. Rabie does not dispute that poor areas with higher crime rates are likely to have far lower rates of reported crime.[33]

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[27] See FA at para 91: Record p 41.

[28] Rabie AA at para 165: Record p 1875.

[29] Redpath RA at para 74: Record p 3787.

[30] See RA at para 44: Record p 3499, read with Annexure PM25: Record p 448 (lines 4 – 11).

[31] FA at paras 73 and 74.2: Record pp 36 – 37, read together with Rabie AA at paras 138 – 143: Record pp 1868 – 1869.

[32] Ibid, read with Redpath, RA at paras 93 – 129: Record pp 3794 – 3807 and her conclusion at para 130: Record p 3807.

[33] FA at para 82: Record p 39, read together with Rabie AA at para 157: Record p 1873.

Measure of poverty

23. Rabie accepts that the percentage of households that have electricity and piped water is a measure of poverty and informal housing.[34]

Higher deployments to high crime areas

24. The Applicants contend that it is irrational to allocate fewer police officers to poor Black areas burdened with high rates of (particularly violent) crime. SAPS acknowledges that, in principle, there should be higher levels of police deployments to areas where there are higher levels of crime.[35]

Policing is more difficult in Black townships

25. It is not in dispute that there is a lack of safety in Black townships, but SAPS attributes the high contact crime rates in these areas to socio-economic factors such as under-development and inadequate housing rather than inadequate police resources.[36] SAPS acknowledges that conditions such as over-crowding, lack of infrastructure and employment opportunities add to the burden of policing in Black areas[37] and that because of such environmental factors, policing in poor areas poses *"unique and difficult problems"*.[38] There is no dispute that policing in these areas is *"complex"*.[39]

26. SAPS also accepts that most of the areas with lower than average police resources are those in which police stations were built after 1994 in response to increases in informal settlements and government housing developments.[40]

[34] FA at para 84: Record p 39, read together with Rabie AA at paras 159 – 162: Record p 1874.

[35] Rabie AA at paras 144 – 145: Record p1870.

[36] Rabie AA at para 72: Record p 1847.

[37] Rabie AA at para 77: Record p 1849.

[38] Rabie AA at para 159: Record p 1874.

[39] Voskuil AA at para 149: Record p 3211. See also Makgato AA at para 150: Record p 3018.

[40] Makgato AA at para 61: Record p 2994.

Black communities receive inferior policing

27. The Applicants state that SAPS' resource allocation policy has resulted in the provision of inferior services to largely Black communities, while traditionally affluent white areas receive the bulk of human and physical resources.[41] SAPS in its response does not dispute that Black communities receive inferior policing services, but attributes the disparity to *"the standard of living black communities are exposed to"* rather than to the allocation of police resources.[42]

Adequate resources necessary for effective policing

28. SAPS acknowledges that appropriate staffing levels are a necessary (but not a sufficient) condition for effective and efficient policing[43] and it accepts that the lack of police resources may compound the high crime levels experienced in communities across South Africa[44] and lead to inefficiencies in the provision of policing services.[45]

The THRR is race neutral

29. SAPS states that the THRR is a technology based model for determining the minimum number and level of posts for police stations given the minimum standards[46] and claims that it allocates resources on a racially neutral basis.[47]

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[41] FA at paras 159 – 160.

[42] Rabie AA at para 220: Record p 1889.

[43] FA at para 58: Record p 28, read with Rabie AA at para 120: Record p 1862.

[44] Rabie AA at para 85: Record pp 1852 – 1853.

[45] Rabie AA at para 119: Record p 1862.

[46] Makgato AA at para 25: Record p 2981.

[47] Rabie AA at para 230: Record p 1892.

Obligation to reverse apartheid inequalities

30. We submit that the issues which are not in dispute, summarised above, provide a sufficient basis for the determination of this claim. In section IV below dealing with the unfair discrimination analysis we shall elaborate on the legal grounds on which the relief is sought, but for present purposes it suffices to observe that s 9(2) of the Constitution and the Equality Act oblige SAPS to eradicate apartheid era social and economic inequalities, particularly those that are systemic in nature. Section 7(d) of the Equality Act explicitly prohibits the continued provision of inferior services to one racial group compared to another.

31. The allegation in the founding affidavit[48] that the Constitution and the Equality Act require SAPS to reverse apartheid inequalities, is not dealt with by Rabie[49] or SAPS' other deponents.[50] It is not in dispute that predominantly Black areas receive inferior policing services compared to their white counterparts and, we submit, the reason SAPS fails to deal with the obligation to reverse apartheid era inequalities, is because it is unable to do so – it has no answer to this element of the claim.

The Structure of these Submissions

32. The remainder of these submissions is structured as follows:

    32.1. Part II deals with the *in limine* objections raised by SAPS;

    32.2. Part III analyses the evidence;

    32.3. Part IV sets out the unfair discrimination analysis; and

    32.4. Part V considers the proposed remedy;

    32.5. Part V1, the conclusion, sets out the terms of the order sought.

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[48] FA at para 154: Record p 58.

[49] Rabie AA at para 211: Record p 1887.

[50] See Voskuil AA at paras 174 – 177: Record p 3218.

II IN LIMINE OBJECTIONS

33. In Voskuil's affidavit[51] SAPS raises various points in limine, namely:

    33.1. The application is premature;

    33.2. The Applicants incorrectly assume the findings of the Commission are binding;

    33.3. The application is based on outdated material;

    33.4. The relief sought is polycentric;

    33.5. The Applicants have not made out a case in terms of the Equality Act;

    33.6. This Court lacks jurisdiction;

    33.7. The Applicants lack standing to challenge the THRR; and

    33.8. The Nyanga CPF has not complied with the Court order for its admission.

34. We submit that none of these points has any merit. Indeed, the majority are not points *in limine*, but substantive arguments. For present purposes it is only necessary to consider the objections based on the application being premature (together with the related point with regard to the binding nature of the Commission's recommendations), standing, jurisdiction and the CPF's compliance with the order for its admission. The other objections have been dealt with comprehensively in the Applicants' replying affidavit.[52]

<u>Prematurity and the Khayelitsha Commission</u>

35. The first two arguments are inter-related and are untenable for the same reason. SAPS' position rests on the assumption that the Applicants believe "*the findings of the Commission are indeed binding*".[53] On that basis, it argues:

[51] Voskuil AA pp 3167 – 3176.

[52] RA at paras 11 - 29, Record pp 3486 – 3492.

[53] Voskuil AA at para 25: Record p 3168.

35.1. The Commission's recommendation afforded SAPS three years to overhaul the allocation process. Those three years have not yet expired. Therefore the application is premature.[54]

35.2. The findings of the Commission are not binding, but are merely recommendations.[55]

36. The assumption underlying these complaints is incorrect. The Applicants agree that the findings and recommendations of the Commission are not binding. Nothing in the founding papers suggests otherwise.

37. The Applicants rely on the Commission because:

37.1. That is where the irrational and discriminatory allocation of police resources was first raised;

37.2. The Commission's findings (chaired by a former Constitutional Court Justice) are highly persuasive and support the constitutional analysis advanced by the Applicants; and

37.3. There is significant evidence that was presented before the Commission that is an important part of the Applicants' case.[56]

38. As the Applicants do not contend that the Commission's findings are binding, they were not obliged to wait for the three-year period to expire before bringing this application.

39. In any event, the Commission's recommendation was that "*once the new allocation method is determined, it should be phased in over a period of time that should not exceed three years*."[57] (emphasis added) The basis for the allocation of police personnel remains the THRR model, which has not changed in any material fashion since Rabie gave evidence before the Commission. As SAPS has not changed this model, the three year period is not applicable.

[54] Voskuil AA at paras 22 - 23, Record pp 3167 – 3168.

[55] Voskuil AA at para 25, Record p 3168.

[56] RA at paras 13 - 16, Record pp 3486 – 3487.

[57] Annexure LR1 at para 36, Record p 1905.

40. Accordingly, we submit that these two points *in limine* must be dismissed.

Standing

41. Section 20(1) of the Equality Act has extremely wide standing provisions. Any person may approach this Court acting (amongst other things): in their own interest (s 20(1)(a)); on behalf of a class of persons (s 20(1)(c)); in the public interest (s 20(1)(d)); or as an association acting in the interests of its members (s 20(1)(e)).

42. SJC and EE approached this Court in three capacities: as organisations acting: in their own interest, on behalf of their members and in the public interest.[58] Rabie stated that their standing to institute this application is not in issue.[59]

43. Section 20(1) of the Equality Act in essence mirrors the standing provisions with regard to the Bill of Rights entrenched in s 38 of the Constitution. The Constitutional Court has held that s 38 constitutes a radical departure from the common law and considerably expands the scope of standing in Bill of Rights cases. The reason for this is, that in contrast to private litigation in which the relief will be specific and often retrospective, in public litigation the relief sought is usually forward looking and general in its application, directly affecting a wide range of people. A generous approach to standing in constitutional litigation facilitates the protection of the Constitution and is particularly important in our country, where a large number of people have had scant educational opportunities and may not be aware of their rights.[60]

44. In the present matter, all of these considerations militate in favour of a broad approach to standing: the relief sought is of a general nature, forward looking and will impact significantly on the circumstances of many people who have been denied educational opportunities and would struggle to assert their rights.

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[58] FA para 22: Record p 19.

[59] Rabie AA at para 94: Record p 1855.

[60] *Kruger v President of the RSA and Others* 2009 (1) SA 417 (CC) at paras 22 – 23.

45. Notwithstanding Rabie's concession that SJC and EE have standing, Voskuil asserts that[61] the Applicants lack standing to challenge the THRR because (it is alleged): Ms Redpath is not an expert in policing; the Applicants rely on outdated statistics, do not consider budget constraints, and have not sufficiently considered the variables in the THRR or how they have changed.

46. There are a number of difficulties in relying on these arguments to challenge the Applicants standing:

    46.1. SAPS fails to explain why it contends that SJC and EE do not have standing to challenge the THRR, yet it accepts their standing in relation to the other relief sought – for example, with regard to the actual allocations in the Western Cape (prayer one)[62] or the powers conferred by s 12(3) of the SAPS Act (prayer three);

    46.2. The objection is misdirected, as the Applicants do not challenge the THRR in isolation. In prayer two of the notice of motion they seek an order declaring that the system used to determine the allocation of police resources is unfairly discriminatory. This system is broader than the THRR (which is an important component of the system). In order to succeed with their objection, SAPS would have to establish that the Applicants do not have standing to challenge the allocation system as a whole, but this is not its case;

    46.3. The grounds raised by SAPS to motivate the objection are either wrong or irrelevant to the case the Applicants have brought;[63] and

[61] Voskuil AA at paras 41 – 45: Record pp 3173 – 3174.

[62] Notice of motion: Record pp 7 – 10.

[63] The grounds raised by SAPS in its objection are dealt with in the Applicants' reply: Ms Redpath is not an expert in policing (RA at para 5.12: Record pp 3480 – 3481 and Redpath RA at paras 5 – 11: Record pp 3763 – 3765); outdated statistics (RA at paras 19 – 20: Record pp 3488 – 3490); budget constraints (RA at para 9.4: Record p 3485 and at para 178: Record p 3541); and the variables in the THRR and how they have changed (RA at para 44: Record p 3499 and at para 243.3: Record p 3567).

46.4. Given the broad approach to standing in Bill of Rights cases (of which this application is a prime example) and the compelling public interest in having all the issues raised by the Applicants determined, we submit that SAPS has failed to establish any defensible basis for its challenge to the Applicants standing.[64]

Jurisdiction

47. SAPS argument with regard to jurisdiction proceeds as follows:

47.1. some of the relief sought by the Applicants impacts nationally;

47.2. the Applicants fail to set out sufficient details with regard to policing outside of the Western Cape;[65]

47.3. the Applicants fail to explain why this Court would have jurisdiction to grant relief which would have a national impact or in respect of Respondents who are not within the jurisdiction of this Court; and

47.4. the relief should be granted and overseen by the courts where the relief will be implemented.[66]

48. SAPS does not dispute that the Equality Court has jurisdiction, merely that this particular Equality Court – sitting in the Western Cape High Court – does not have jurisdiction. The argument is unfounded.

49. The Applicants seek two forms of relief. The one part applies nationally, the other applies only in the Western Cape. It is not in dispute that this Court has jurisdiction to grant (and oversee) the Western Cape specific relief. The objection that this Court

[64] Either with regard to SJC and EE's standing to challenge the THRR or the CPF's standing to act as representative of the residents of Nyanga (see Makasi at para 3: Record p 1641, read with Voskuil AA at para 206: Record p 3224).

[65] The Applicants placed before the Court as much evidence concerning police allocations nationally as was available to them. Their attempts to obtain further information from SAPS in this regard are described at RA paras 19 – 20.4: Record pp 3488 – 3489.

[66] Voskuil AA at para 39- 40: Record pp 3172 - 3173.

does not have jurisdiction to grant the national relief stands to be rejected both in terms of:

49.1. the general principles applicable to this Court's jurisdiction; and

49.2. the doctrine of cohesion of a cause of action.

General Principles of Jurisdiction

50. Section 16(1)(a) of the Equality Act states that, for purposes of the Act, every Division of the High Court or local seat thereof is an equality court for the area of its jurisdiction.[67] The Constitutional Court has applied a line of Supreme Court of Appeal **(SCA)** judgments which have held that this Court is separate and distinct from the High Court and that it is a creature of statute which derives its powers from the Equality Act.[68]

51. In terms of s 19(1) of the Equality Act, the provisions of the Supreme Court Act 59 of 1959[69] apply, with the necessary changes required by the context, to the jurisdiction of this Court.

52. The starting point in analysing the High – and, by necessary implication, this - Court's constitutional jurisdiction is s 169 of the Constitution, which provides that a High Court may decide "*any* constitutional matter" (emphasis added) not assigned to the Constitutional Court or another court of similar status. This is a notable change from the equivalent provisions of the Interim Constitution which explicitly limited the High Courts' constitutional jurisdiction, stating that:

> Subject to the Constitution, a Provincial or Local Division of the Supreme Court shall, *within its area of jurisdiction*, have jurisdiction in respect of the following additional matters, namely –

[67] This is subject to s 31 of the Equality Act, which is, for present purposes, irrelevant.

[68] *De Lange v Methodist Church and Another* 2016 SA 1 (CC) at para 56.

[69] This Act has now been superseded by the Superior Courts Act 10 of 2013.

(a) any alleged violation or threatened violation of any fundamental right entrenched in chapter 3.[70]

53. The broad scope of this Court's constitutional jurisdiction should be read together with the strong common law presumption, which can only be rebutted by a clear legislative provision, against any legislative ouster or interference with a court's jurisdiction.[71]

54. SAPS's objection is based, in part, on the fact that not all the Respondents reside within the jurisdiction of this Court. This is not a relevant consideration. In *Ramphele v Minister of Police*, the Court concluded that the effect of s 1 of the State Liability Act 20 of 1957[72] was "to substitute the State for the resident subject and, therefore, so far as the State was concerned, to eliminate residence as an element of jurisdiction."[73] Similarly, in *Hako v Minister of Safety and Security & Another* it was held that "any Division of the Supreme Court is able to entertain proceedings against the Government if the wrong was committed within the area of jurisdiction."[74] Both *Ramphele* and *Hako* are based on the 1916 decision of the Appellate Division in *Du Plessis v Union Government*.[75] The basic rationale was that the Act implied that when suing the state

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[70] Interim Constitution s 101(3)(a).

[71] *Lenz Township Co v Lorentz NO en Andere* 1961 (2) SA 450 (A) 455B – C.

[72] Section 1 reads: "Any claim against the State, which could, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognisable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant."

[73] 1979 (4) SA 902 (W) at 904. See also *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape, and Others* 1998 (4) SA 908 (TK).

[74] 1996 (2) SA 891 (TkS).

[75] 1916 AD 57. In *Du Plessis* Innes CJ held that the purpose of the 1910 Crown Liabilities Act – which used very similar wording to the State Liability Act – was "to substitute the crown for the resident subject, and therefore, so far as the Crown was concerned, to eliminate residence as an element of jurisdiction." *Du Plessis* at 61.

there was no concern about a court being able to enforce its order. Therefore, in claims against the state, residence does not matter to jurisdiction, only subject matter.[76]

55. The Applicants act not only in their own interest, but also in a representative capacity: (i) on behalf of their members; and (ii) in the public interest. The right of SJC and EE to represent their members (whom, in the case of EE are spread across five different provinces) and the general public, is not disputed by SAPS.[77]

56. SAPS' claim that the relief should be sought and (if granted) overseen by the courts where it will be implemented, is impractical and seemingly devoid of any legitimate rationale: it would require different claims to be launched in up to nine courts across the country, thereby creating the potential for conflicting judgments, considerably increasing burden of the litigation on the judiciary and escalating the legal costs for the parties exponentially. These factors will be considered further below.

57. We submit that all Equality Courts can grant relief with a national impact if their jurisdiction is otherwise engaged. As the impact of the national allocation of police resources is spread across the country, all the Equality Courts, including this Court, have jurisdiction to determine whether the system of allocating police resources is unfairly discriminatory. The jurisdiction of this Court is engaged, amongst other things, because <u>all the relief</u> the Applicants seek has an impact on their members, who are spread across at least five provinces, and the general public, whom they represent. The fact that some of the relief sought will affect people in other provinces cannot deny

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[76] *Du Plessis* was partly over-ruled in *Minister of Law and Order v Patterson* 1984 (2) SA 739 (A). But the reasoning in *Patterson* was based on changes to the Magistrates' Courts Act. *Patterson* did not affect the reasoning in *Du Plessis* as it applies to High Courts (see Van Winsen, Cillers & Loots *The Civil Practice of the Supreme Court of South Africa* (2009) at 72. This conclusion is re-inforced by the strong presumption against the ouster of the jurisdiction of the High Court, which is not applicable to Magistrates' Courts. Furthermore, s 23 of the RSA Constitution Act 110 of 1983 stated that the "residence" of the state was Pretoria. The 1996 Constitution contains no similar provision.

[77] RA at para 25: Record p 349, read together with FA para 22: Record p 19 and Rabie AA at para 94: Record p 1855.

this Court jurisdiction to determine a matter which the interests of justice overwhelmingly favour it deciding.

The doctrine of cohesion of a cause of action

58. In terms of the common law principle of cohesion of a cause of action (*continentia causae*), where a court has jurisdiction over part of a cause of action and considerations of convenience, justice and good sense weigh in favour of it exercising jurisdiction over the whole cause, it may do so. The considerations underlying the principle are clear: the unnecessary multiplicity of actions and the possibility of conflicting judgments on the same issue must be avoided and the more convenient means of disposing of cases must be taken into account. If justified by these considerations, different proceedings (which would otherwise be heard) in different courts, may be consolidated into one case.[78]

59. In *Permanent Secretary, Department of Welfare EC v Ngxuza*[79] the SCA made the following findings in relation to an objection to jurisdiction on the grounds that some of the plaintiffs in a proposed class action lived outside the jurisdiction of the court in which the proceedings had been instituted (in Grahamstown):

    59.1. The case under consideration was a class action, an innovation expressly mandated by the Constitution, as opposed to ordinary litigation.

    59.2. Courts are required to interpret the Bill of Rights, including its standing provisions, so as to promote its spirit, purport and objects;

    59.3. Our courts have in the past developed the common law principles of jurisdiction so as to ensure rational and equitable rules (including the doctrine of cohesion of a cause of action);

[78] *Roberts Construction Co v Willcox Bros* 1962 (4) SA 326 (A) ("*Roberts*") at 336F-H and *Multi-Links Telecommunications v Africa Prepaid* 2014 (3) SA 265 (GP) at para 21.

[79] 2001 (4) SA 1184 (SCA) ("*Ngxuza*").

59.4. In *Roberts* it was held that where one court had jurisdiction over part of a cause, considerations of convenience, justice and good sense justified it exercising jurisdiction over the whole cause;

59.5. Even if a strict application of the common law principles would weigh against the inclusion of extra-jurisdictional applicants in the plaintiff class, it is plain that the Constitution requires adjustment of the relevant rules, along sensible and practical lines, to ensure the efficacy of the class-action mechanism;

59.6. The constitutional provisions on standing are a recognition of our courts' responsibility to ensure that constitutional rights are honoured and in constitutional challenges, where remedies may have a wide impact, it is important that not only those with vested interests should be afforded standing;

59.7. A further reason why the jurisdictional objection lacked any merit was its utter lack of any practical import, as suing in Bisho (as opposed to Grahamstown) would have made no difference to the legitimate interests and convenience of the provincial government which had raised the objection.[80]

60. The above principles apply with equal force to the present matter:

60.1. This is not ordinary litigation. The Applicants act in a representative capacity, in terms of s 38 of the Constitution, on behalf of their members and in the public interest, in a claim to enforce constitutional rights;

60.2. This Court has jurisdiction over the Western Cape specific relief and SAPS, in raising its objection, has not pointed to any considerations of convenience, justice and good sense which would weigh against this Court exercising jurisdiction over the whole cause;

60.3. SAPS' jurisdictional objection is devoid of any practical merit as it does not advance any legitimate interests of the Respondents, would result in a multiplicity of actions, create the potential for conflicting judgments,

[80] Ibid, at paras 22 – 26.

unnecessarily burden the courts and greatly increase the cost to the parties of what is already prohibitively expensive litigation; and

60.4. Even if a strict application of the common law principles would weigh against this Court exercising jurisdiction over the national relief, the Constitution would then require the adjustment of the relevant rules, in the interests of justice, convenience and good sense, to ensure the efficacy of the representative action procedures provided for in s 38 of the Constitution.

The Nyanga CPF

61. The claim that the Nyanga CPF failed to comply with the order permitting it to join as a party lacks substance:

61.1. The order of 23 September 2016 granted the CPF leave to intervene, *subject to the ratification of the decision to bring this intervention application and other ancillary decisions related thereto at a properly constituted meeting of the applicant in compliance with Clause 10.4.4 of the Uniform Constitution for Community Police Forums and Board in the Western Cape*.[81]

61.2. Clause 10.4.4 of the Uniform Constitution provides: In the case of a Forum and the Provincial Board, at least four (4) members of the Executive Committee of which the Station Commander and the Provincial Commissioner or a Representative must be part of, constitutes a quorum at an Executive Meeting.[82]

61.3. The CPF meeting held on 26 September 2016, which ratified the joinder of the CPF, was quorate in terms of clause 10.4.4 of the Constitution, as six members of the Executive Committee were present, as well as Brigadier Ncata, the Nyanga Station Commander. The Provincial Commissioner does not attend

[81] Court order of 23 September 2016, para 1: Record p 1616.

[82] Annexure **MM2**: Record p 1368.

Executive Committee Meetings of the CPF as he is always represented by the Station Commander of the applicable station or the Station Commander Representative.[83]

61.4. But for pointing out that "Martin Makasi" and "Buyisile Makasi" are one and the same person, the chairperson of the CPF, the other grounds on which SAPS relies to argue that the CPF's resolution was defective, are without merit.

[83] Affidavit of Martin Makasi, at paras 5 – 12: Record pp 1622 – 1625, read together with RA at para 233: Record pp 3562 – 3563. Apart from the station commander, SAPS was represented by 3 additional members and the Cluster Commander (Makasi, para 12: Record p 1625) – it was not apparent to the CPF which of these members was the representative of the Provincial Commissioner, a matter which is particularly within the knowledge of SAPS and its representatives. If SAPS's case is that none of its representatives present at the meeting were authorised to represent the Provincial Commissioner, it should, and would, have stated this in its answering affidavits. It did not do so (see Voskuil AA at para 50: Record pp 3175 – 3176).

III THE EVIDENCE

62. In this Part, we analyse the evidence in this application in the following sections:

    62.1. The THRR;

    62.2. The s 12(3) allocations;

    62.3. The challenge to Redpath's expertise;

    62.4. Police resources in the Western Cape;

    62.5. The 2017 re-allocations;

    62.6. Policing in Nyanga;

    62.7. The distribution of police resources outside the Western Cape;

    62.8. Causes of the discriminatory allocation of resources:

        62.8.1. Under-reporting of crime;

        62.8.2. The failure adequately to weight violent crime; and

        62.8.3. The THRR weighting favours wealthy communities.

<u>The THRR</u>

63. The first stage in the allocation of human resources to police stations is the theoretical determination of the resources needed by each station. This determination does not take into account available resources. It simply asks how many policemen and women will be needed to perform all the tasks that each station is required to perform.[84] The determination is known as the Theoretical Human Resource Requirement ('THRR') and is calculated at a national level.

64. According to Rabie's evidence to the Commission, the THRR was largely intended to: (a) determine the allocation of resources between provinces; and (b) provide a guide to Provincial Commissioners on how to distribute their resources. It was not meant to

[84] FA at para 114: Record p 46, read with Rabie AA at para 175: Record p 1878.

be an absolute determination of the distribution of resources, which would remain in the Provincial Commissioner's discretion based priorities.[85]

65. This view was, however, not shared by the then Provincial Commissioner, General Lamoer. He testified before the Commission that he could only re-allocate resources from the fixed establishment on a temporary basis. In his words:[86]

> *"The utilisation of my staff, yes that is my responsibility. I can shift people to do a specific task in a specific area, but I can't shift the funded posts to that. That means in simple terms, Chair, Khayelitsha, for argument sake, have 100 people, they are struggling with 100 people. With the input from the station commander, with the request from the station commander, I can say I will give you the 50 members but on a short-term basis, just to address a specific crime threat. But those members will never be able to be placed permanently at that specific station."*[87]

66. The THRR is based on a complex formula that considers a wide range of variables, including: population size, prevalence of all types of crimes, the type of station, the size of the area, transient populations, unemployment levels, the presence of informal settlements, the topography of the area, the distance from courts and the number of schools, malls, highways and liquor outlets in the area. It uses different formulae for determining the number of detectives, visible policing, crime intelligence and administrative staff that each station would require to perform its functions. For example:[88]

    66.1. The number of detectives is based on the number of reported crimes and an assessment of how long a detective will need to properly investigate each type of crime.

[85] FA at para 129: Record p 52.

[86] FA at para 130: Record p 52.

[87] See PM27: Record p 646.

[88] FA at para 116: Record p 47.

66.2. Visible policing is determined primarily by reported crime rates and population. One post is provided for every 20 contact crimes, and for every 5000 people. That number is then adjusted by considering environmental factors, including informal housing.

66.3. The number of police required to staff a Community Service Centre is determined by the number of documents certified, cases registered, accidents dealt with, and so on. Importantly, the determination of the THRR depends on information supplied by each station to the national office in Pretoria.

67. The THRR is also meant to give effect to policy decisions taken by SAPS. If SAPS determines that all stations must be open 24 hours a day, the THRR determines that even the smallest station must have at least 16 personnel (the minimum needed to accomplish this). Similarly, when legislation imposes additional requirements on SAPS, the expected burden of those requirements needs to be worked into the calculation.[89]

The results of the THRR

68. The Applicants do not dispute that the exercise of determining the needs of stations is a difficult one. Nor do they assert that SAPS has designed a system that intentionally discriminates against poor, Black people. In this regard, the Applicants accept that the THRR was developed to meet a particular need - an assessment of how many police officers should ideally be allocated to each station, and that this is a complicated task.[90]

69. However, the Applicants contend that the THRR results in the provision of more resources to rich, white, low-crime areas than poor, Black, high-crime areas.[91] Almost without exception, relatively rich, predominantly white areas with very low contact

[89] FA at para 117: Record p 47.

[90] FA at para 118: Record p 47.

[91] FA at para 119: Record p 48.

crime rates have far more police for every 100 000 people than poor, predominantly Black areas with high contact crime rates. The determination of resources - even at an ideal, theoretical level - results in an outcome that discriminates against Black people on the basis of their race. When leading evidence before the Commission, neither Rabie nor any other member of SAPS was able to provide a satisfactory explanation for the discriminatory allocation of resources resulting from the THRR.[92]

The reasons for these results

70. The testimony of Redpath to the Commission identified the following five explanations for these consequences of the THRR:

70.1. The THRR is highly complex.[93] It is so complex that many people within SAPS do not understand it. They view it as *"irrationaf'* and as preventing them from doing their job, rather than facilitating it. Rabie does not dispute this.[94]

70.2. The THRR is not publicly available nor debated, even within SAPS or by the key oversight bodies, such as the national Parliament and the provincial legislature. As a result, it has not been subjected to independent- oversight.[95]

70.3. The data provided by police stations used to calculate the THRR is often inaccurate.[96] Rabie acknowledged at the Commission that police stations often fail to provide data or (intentionally or unintentionally) provide inaccurate data which can dramatically affect their allocations.[97]

70.4. The weightings attached to different environmental factors may result in over- or underestimation of the policing implications of those factors. For example,

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[92] FA at para 122: Record p 48.

[93] FA at para 124.1: Record p 49, read with Rabie AA at para 189: Record p 1881.

[94] Rabie AA at para 189: Record p 1881.

[95] FA at para 124.2: Record p 49.

[96] FA at para 124.3: Record p 49, read with Rabie AA at paras 189 – 192: Record p 1881.

[97] FA at para 124.2: Record p 49. See also PM26: Record p 550

"number of shopping malls with more than 100 shops" introduces a 5% weight for the sector team and crime prevention component of policing whenever one or more such malls are present. As pointed out by Redpath, there is no explanation in the THRR of why 5% weighting is applied, and not, for instance, 2% or 12%.[98]

71. We shall consider the flaws in the THRR in greater detail below, in analysing the causes of the skewed allocations of resources generated by it.

The Actual (as opposed to the Theoretical) Allocation and its method

72. The THRR determines the ideal requirement without regard for the available budget. Once the budget is determined the National Commissioner determines the actual fixed establishment of SAPS based on the resources available. Rabie testified at 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.[99]

73. The reduction from the 100% THRR determination to the 68% actual allocation is meant to happen in two stages:

    73.1. National SAPS determines the number of posts that each station will in fact receive. This was known as the Resource Allocation Guide (or RAG) and is now known as the "fixed establishment". Giving consideration to the need for minimum numbers of staff at certain stations, it appears that the fixed establishment is generally an across-the-board reduction from the 100% of the THRR to the 68% of available posts;[100] and

[98] FA at para 124.4: Record p 50.

[99] FA at para127: Record p 51.

[100] FA at para 128.1: Record p 51.

73.2. The Provincial Commissioners are then meant to distribute the allocated resources amongst the stations to give effect to their province's priorities.[101]

74. The re-allocation by Provincial Commissioners rarely happens. A breakdown between the national and provincial offices concerning the responsibility for distributing resources, about which more is said below in the section dealing with allocations under s 12(3) of the SAPS Act, is, we submit, a serious flaw in SAPS's current system.

The results of the actual allocation

75. As with the theoretical allocation of resources, the actual allocation of resources produces a pattern where 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 policemen and women per-murder.[102]

76. We submit that it is apparent from annexure LR3[103] to Rabie's affidavit that there has been no significant changes to the THRR model since the Commission heard evidence in 2014.[104] In addition, in his evidence to the Commission, Rabie stated that the basic principles of the model had remained the same since 2002.[105] The only evidence of any material changes in the allocation of police resources since the time of the Commission is contained in the affidavit of Voskuil and those changes, made in terms of s 12(3), date from June 2016, after this application was launched and are limited only to the Western Cape.[106]

77. We turn now to deal with the allocation of resources under s 12(3) of the SAPS Act.

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[101] FA at para 128.2: Record p 52.

[102] FA at para 134 : Record p 53.

[103] Record p 1909.

[104] RA at para 44: Record p 3499.

[105] Ra at para 44: Record p 3499. See PM25 : Record p 373.

[106] RA at para 44: Record p 3499.

Allocations under s 12(3)

78. Section 12 of the SAPS Act deals with the powers of Provincial Commissioners, and provides in subsection (1) that they shall have command and control of SAPS members within their provincial jurisdiction. Sections 12(2) and (3) provide as follows:

> *'(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 purpose 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.'*

79. Section 11(2)(b) of the SAPS Act assigns the National Commissioner the responsibility for determining the fixed establishment of the Service and the number and grading of posts, while regulation 3(1) of the Regulations for the South African Police Service purports to afford that power to the Minister of Police.[107]

80. The Applicants contend that the three functionaries – being the National Commissioner, the Western Cape Police Commissioner and the Minister - are jointly responsible for ensuring a fair and equitable distribution of police resources.[108] The Respondents do not dispute this contention.[109]

81. However the inconsistency between the SAPS Act and the Regulations, which creates an overlap in the powers of the Minister, the National and Provincial Commissioners is

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[107] Regulation 3(1) stipulates that: *'Subject to the provisions of subsection (2) of section seven of the Public Service Act, 1957 (Act 54 of 1957), the fixed establishment of the Department shall be determined by the Minister.'*

[108] FA at para 111: Record p 45.

[109] Rabie AA at para 173: Record 1877.

part of the reason for the current discriminatory and unfair allocation of resources. Part of the problem is a disagreement or misunderstanding between the national and provincial arms of SAPS about their respective responsibilities. Although Voskuil claims that there is no disagreement between the National and Provincial Commissioners as to who is responsible for the equitable distribution of police resources,[110] Rabie does not dispute that there had been a *"breakdown between the national and provincial offices concerning the responsibility for distributing resources"* and that this *"is a fundamental flaw in SAPS's current system"*.[111]

82. It is accordingly necessary, we submit, for this Court to determine clearly how the SAPS Act allocates powers and obligations to the relevant functionaries.[112]

83. In his evidence to the Commission in 2014, General Lamoer stated that as Provincial Commissioner he had no discretion to deviate from the THRR in the allocation of permanent posts. We submit that one can infer from this evidence that no Provincial Commissioner re-allocations in terms of s 12(3) had occurred in the Western Cape before 2014.[113]

84. Rabie differed from General Lamoer with regard to the s 12(3) powers in his evidence to the Commission, but pointed out that the Provincial Commissioner's powers were limited in that: (i) the command structure created by the THRR was of a generic, fixed nature and any s 12(3) allocations which deviated from this overall structure would constitute irregular expenditure; (ii) it was not possible to fund a police station to a higher level than it had been graded by the THRR; (iii) the THRR grading of posts and span of control could not be exceeded; and (iv) although the Provincial Commissioner did have a discretion to increase the production core of station to 100% of its

[110] Voskuil AA at para 169: Record p 3217.

[111] FA at para 132: Record p 53, read together with Rabie AA at paras 198 – 200: Record pp 1883 – 1884.

[112] FA at para 100: Record p 43.

[113] RA at para 34.1: Record p 3494.

theoretical allocation as per the THRR, Rabie stressed that once the Provincial Commissioner started exercising such powers *'you start compromising the principle of equal distribution, because there are other stations that you are now going to have to staff at a lower level to compensate for that 100% level'* and suggested that this could compromise constitutional rights of equal access to services.[114]

85. In June 2015, almost a year after the Commission had released its report, a letter from the (then) National Commissioner to the Premier of the Western Cape relegated the Provincial Commissioners to a subordinate role in the determination of employee appointments, stating that *'the National Commissioner and the Provincial Commissioner, to a certain extent, pronounce based on predetermined financial constraints.'* [115]

86. We submit that this evidence demonstrated a confusion that prevailed amongst the national and provincial authorities about the powers of Provincial Commissioners in the allocation of SAPS resources to the stations that fall within their jurisdictions.

87. In its evidence before this Court, SAPS has shifted its position regarding the significance of the THRR and the powers of Provincial Commissioners in terms of s 12(3). Voskuil states in his affidavit that once the National Commissioner has allocated police resources to the provinces, the Provincial Commissioners are responsible for the distribution of those resources to ensure effective policing within the provinces and they have an unfettered discretion to do so in terms of section 12(3).[116] The THRR is no more than a 'useful tool' for assessing human resource requirements.[117]

88. Rabie in his affidavit contradicts his evidence to the Commission, stating that: (i) the Applicants' analysis is based on a fundamental misconception that the allocation of police resources is done through the national office, rather than the provincial offices;

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[114] RA at para 34.2: Record p 3494.

[115] RA at para 34.3: Record p 3495.

[116] Voskuil AA at para 87: Record 3189.

[117] Voskuil AA at para 159: Record p 3214.

and (ii) the role of the National Commissioner in formulating the THRR *'is to provide strategic guidance but in no way fetters or interferes with a Provincial Commissioner's determination of how the allocated resources are deployed in the police stations.'*[118]

89. In short SAPS has sought to minimise the role of the THRR in the allocation process as its position has evolved and it has focused instead on the powers of the Provincial Commissioners.

90. In his answering affidavit Voskuil states that the Western Cape Provincial Commissioner recently exercise his powers to increase the allocation of police resources to stations with high crime rates. SAPS has however not provided any evidence that before the launching of this application in March 2016, the Provincial Commissioners in the Western Cape, or any of the other provinces, ever made use of their powers under s 12(3) to adjust the THRR. Voskuil states that the first phase of *'the policing approach which is currently being implemented in the Western Cape Province'* started on 16 June 2016.[119] Given that he does not state what considerations gave rise to this new policing approach and when or by whom it was initiated, we submit that it is reasonable to infer that this new approach was prompted by the launching of this application in March 2016.

91. Annexure PLV2 to Voskuil's affidavit is the document setting out the allocations made in terms of the *"new policing approach"*.[120]

92. According to Voskuil:

    92.1. Phase 1 of this new policing approach involved the Provincial Commissioner re-deploying existing specialist human resource capacities to three police stations with high crime rates *"where they were most needed"* in terms of his s 12(3) powers.[121]

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[118] Rabie AA at para 78: Record p 1849.

[119] Voskuil AA at para 91: Record p 3191.

[120] PLV2 : Record p 3247.

[121] Voskuil AA at para 91: Record p 3191.

92.2. Phase 2 commenced in August 2016 and entailed the deployment of 790 permanent members to the 30 police stations responsible for approximately 52% of the reported serious crime in the province. This deployment was pursuant to the graduation of 1269 entry level constables from Police College. The evidence before the Commission indicated that such newly trained constables are of limited value until they have gained sufficient on-the-job experience.[122] An additional *"temporary stabilisation capacity"* of 425 visible policing and specialised officers was also deployed to 10 identified high crime stations, including Khayelitsha, Gugulethu and Nyanga.[123]

92.3. Phase 3 commenced in January 2017 and involved further resourcing the stations and strengthening the stabilisation capacity, and extended the project to a second tranche of 30 police stations, which account for 28% of reported serious crime in the province.[124]

92.4. There have been a multiplicity of changes in policing since the Commission and it would be *"unacceptable"* for the Applicants to request relief on the basis of data that is critically outdated and have been overtaken by subsequent events.[125]

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

[123] Voskuil p. 3191, paras 91-93

[124] Voskuil AA at para 94: Record p 3191.

[125] Voskuil AA at para 29: Record p 3169.

92.5. The Provincial Commissioner takes a number of considerations into account in making distributions in terms of s 12(3), including *"crime patterns and crime trends, crime rates, situational factors, the generators of crime, the need for force multipliers, the setting up of additional service points (satellite stations) the need to further capacitate specialised units, develop new units, etc"*.[126]

92.6. The Provincial Commissioner has used his s 12(3) powers *"in a rational, reasonable and equitable manner to address crime in this province* (para 185) and this has resulted in *"significant improvements in the deployment of resources to areas with high crime rates"*.[127]

93. We make the following submissions in response to these assertions.[128]

94. First, a close analysis of **PLV2** demonstrates that the allocation of resources has largely remained the same over time. It was only following the fresh allocation of further resources in January 2017 that there was some relative improvement. However, even with the additional allocation of resources in 2017, those stations which have high actual crime rates and poor, Black populations are still comparatively under-resourced.

95. Second, SAPS has been aware of this problem since at least 2014. Yet meaningful steps were only taken in January 2017 – shortly before the respondents' long-delayed answering affidavits were filed – to redress the discriminatory allocation of resources. It is difficult to avoid the conclusion that the re-allocation was a direct result of this litigation. Far from absolving SAPS of wrongdoing, we submit that the allocations made in terms of the *"new approach"* constitute a tacit admission that the default position is unconstitutional and unlawful.

96. Third, even if the recent re-allocation cured the irrational and discriminatory allocation of resources in the Western Cape (which we submit it does not), it could only ever be

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[126] Voskuil AA at para 122: Record p 3202.

[127] Voskuil AA at para 134: Record p 3208.

[128] See RA at paras 48 – 51: Record pp 3500 – 3501.

a partial answer to the Applicants' complaint. The Applicants have attacked both the theoretical allocation of resources in terms of the THRR, and the actual allocation of resources following the budget reduction steps taken in terms of s 12(3). SAPS in its answering affidavits provides no evidence of any allocations made under s 12(3) outside of the Western Cape. The evidence of Redpath is that although legislation permits a Provincial Commissioner to make adjustments within the provincial allocation, the power is seldom exercised.[129] Makgato responded to this statement by stating that it is correct that the legislation permits the Provincial Commissioner to make adjustments, but *"I am not in a position to comment on how frequently this done"* and the matter would be dealt with by a deponent from the office of the Provincial Commissioner.[130] It is noteworthy that Makgato does not deny the allegation. However, we submit that his response is both evasive and hardly credible – if the head of Organisational Development in SAPS is not in a position to inform this Court how often the s 12(3) powers are exercised, then one must ask who would be? Voskuil, who filed the only substantive affidavit on behalf of the Provincial Commissioner, also does not deal with para 41 of Redpath's affidavit.[131]

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

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[129] Redpath FA at para 41: Record p 662.

[130] Makgato AA at para 93: Record p 3003.

[131] Voskuil AA at paras 191 – 192: Record p 3221.

Redpath's Expertise

98. The Respondents launch a vigorous attack on Redpath's expertise. Rabie denies that Redpath is an expert on policing and dismisses her evidence as *'unworkable and unresponsive to the complexities of proper policing'*.[132] Makgato describes her report as valueless.[133]

99. There is no merit in this unwarranted attack. They appear to be based on a misunderstanding of Redpath's expertise and the nature of her evidence both before the Commission and this Court.

100. Redpath, an admitted attorney with a Bachelor of Science degree in chemistry and mathematics,[134] has been working as a researcher in the criminal justice sector since 1999.[135] Her particular speciality lies where quantitative analysis informs public policy and legislative reform. During this time she has carried out a large number of quantitative research projects for international and local clients.[136]

101. Redpath has written crime prevention strategies for local and provincial government entities in South Africa. She has designed research for and analysed the data arising from audits of entire criminal justice systems, in Moldovia, Malawi, Zambia, and Kenya. In respect of the latter, this was done under the auspices of the Kenyan National Criminal Justice Steering Committee. She has written on policing and other parts of the criminal justice value chain in both South Africa and in other countries.[137]

102. Because of her particular skills in data analysis, she was chosen by the Commission to analyse the data made available to it by SAPS.

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[132] Rabie AA at para 18: Record p 1825.

[133] Makgato AA at para 8: Record p 2971.

[134] Redpath FA at para 2: Record p 653.

[135] Redpath RA at para 8: Record p 3764.

[136] Redpath RA at para 8: Record p 3764.

[137] Redpath RA at para 9: Record p 3764.

103. Redpath unquestionably has expertise. The issue is whether she has the expertise necessary to perform the analysis which underpins the Applicants' case, which is – in summary - that SAPS' allocations result in township areas, known for their difficulty of policing, almost all demonstrating massive downward adjustments from what would be suggested by the size of their populations and that unless SAPS can demonstrate that the burden of policing is lowest in these townships, the per 100 000 population figures suggest that SAPS' system of allocating resources is flawed.[138]

104. The challenge to Redpath's expertise is remarkable in three respects, the first of which is the intemperate nature of the attack. However, the hostile approach adopted to Redpath's evidence in this application is undercut by SAPS attitude towards her testimony at the Commission in 2014. In this regard, it bears noting that when Redpath testified before the Commission, senior counsel for SAPS in cross-examination: (i) stated that *'we're indebted to you for assisting and Brigadier Rabie is appreciative of the work you've done and takes seriously what you suggest;'*[139] (ii) conceded that black and coloured areas are *'quite heavily'* under-resourced[140] (which is the core of her evidence both before the Commission and this Court); and (iii) stated that he took his hat off to her, as it appeared that for 20 years the [basis for the allocation of police resources] had not been questioned at all.[141]

105. The second remarkable feature of the attack is that nowhere in SAPS' answering affidavits, including that of General Sekhukhune who is a qualified statistician,[142] do any of the deponents question the accuracy of her statistical analyses of the data.

106. Third, the attack is misdirected. The thrust of the criticism of Redpath is that she does not have any particular skill in organisational development or human resource

[138] Redpath FA at paras 50 – 51: Record p 664.

[139] See JR4: Record p 798.

[140] See JR4: Record p 805.

[141] See JR4: Record p 817.

[142] Sekhukhune AA at para 4: Record pp 2243 – 2244.

management. While this might have been relevant had she sought to design a model to allocate resources on behalf of SAPS, this was not the purpose of her evidence before this Court. It is abundantly clear from the relief sought[143] in this application, that the Applicants accept that if this Court upholds their claim, it is for SAPS, and not the Applicants, to adjust its allocation process in order to render it compliant with the Constitution.

107. Redpath's evidence is limited to demonstrating how SAPS has allocated its resources, and assessing those allocations against race, indicators of poverty, and incidents and rates of crime. There can be no doubt that Redpath has the skills to perform these functions, and if the Respondents wishes to make an argument to the contrary, they should start by pointing out where Redpath has erred in her calculations or conclusions. This they conspicuously fail to do.

<u>The 2016 Western Cape distributions</u>

108. This section sets out the distribution of resources as described in the founding affidavit. It is based on the data of theoretical and actual allocations for 2012/13.[144] That is because it was the most recent data available to the Applicants, because SAPS had refused to provide more up-to-date data.

109. There are two key elements to that evidence: (a) the discriminatory allocation of resources on the basis of race and poverty; and (b) the distribution of fewer resources to areas with higher actual crime rates.

<u>Discrimination on the basis of Race and Poverty</u>

110. Perhaps the most compelling and disturbing aspect of Redpath's analysis is how allocations track poverty – poorer areas receive fewer police officers. To demonstrate

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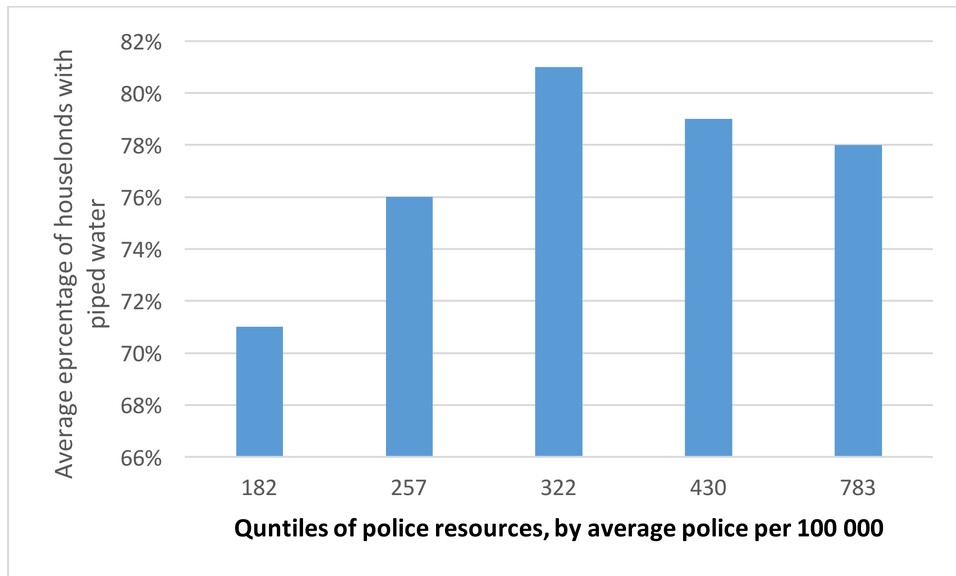
[143] Which is dealt with in detail below in section V.

[144] Redpath FA at para 79: Record p 670.

this, Redpath relied on rates of access to electricity and piped water in both the Western Cape and KwaZulu-Natal. These are indications of informal or rural housing.[145] As poorer black people tend to live in areas where informal settlements are more prevalent, these are not only good indicators of poverty, but also of race: "*the lower the levels of service provision, the higher the percentage of Black residents.*"[146] These facts, and the statistics that follow are not denied.[147]

111. There is close to a 100% probability that "*lower levels of service provision are associated with lower levels of police resourcing*".[148] This is perhaps best demonstrated by the following graph which compare police resources and access to piped water:[149]



112. This graph demonstrates that those areas with fewer police resources are also the areas with less piped water. That also means that those areas with more Black people are also the areas with fewer police resources.

[145] Redpath FA at para 94: Record pp 675-676.

[146] Redpath FA at para 95: Record p 676.

[147] Makgato AA at paras 154-155: Record pp 3018-9; Voskuil at para 199: Record p 3223.

[148] Redpath FA at para 97: Record p 676. See also Redpath FA at para 101: Record p 679 (for Western Cape only).

[149] Redpath FA, figures 9 and 10: Record pp 680-1

113. To visualize the racially discriminatory allocation of police resources in the Western Cape is to look at the tables that list the 149 stations according to the number of police allocated (actual and theoretical) per 100 000 people.[150]

114. These tables demonstrate that the 20 worst-resourced stations are almost all poor, Black areas:

 114.1. **According to the actual allocation:** Harare, Lwandle, Belhar, Nyanga, Ocean View, Delft, Cloetesville, Kraaifontein, Mfuleni, Strandfontein, Kleinvlei, Gugulethu, De doorns, Grassy Park, Table View, Khayelitsha, Muizenburg, Paarl East, Macassar, Prince Alfred Hamlet and Durbanville.

 114.2. **According to the THRR**: Harare, Nyanga, Paarl East, Gugulethu, Lwandle, Khayelitsha, Cloetsville, Kraaifontein, Delft, Ocean View, Strandfontein, Mfuleni, Malmesbury, Durbanville, Belhar, Prince Alfred Hamlet, Phillipi East, Atlantis, Grabouw, Grassy Park and De Doorns.

Allocation by murder rate

115. The mere misallocation of resources on its own might not be concerning. If poor, Black areas had a lower burden of crime, one would expect that they would have fewer police resources. But the opposite is true: "*as the police resources increase the rate of murder decreases.*"[151] This is a statistically significant relationship. As we explain in more detail below, murder is one of the best predictors of actual crime, as opposed to reported crime rates.

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[150] Table 5H Record p 727; and Table 2: Record p 1018. Unfortunately, it was not possible to do a comparison based on actual racial data because racial data is not collected in a way that it can be compared to the areas for police stations. Redpath FA at para

[151] Redpath FA at para 89: record p 674.

116. To look at it in more practical terms: the seven areas with the most murders (and some of the highest murder rates) are also the least resourced stations on the basis of the both the theoretical and actual allocations.[152]

Combined Effect

117. The combined effect is that the areas that are most in need of police resources to stem alarmingly high rates of actual crime, are the areas that are most deprived of policing. As Redpath puts it: "*[the] data shows unequivocally that the lowest allocation of police resources on a per 100 000 person basis in the Western Cape occurs in poor, black areas with high levels of serious violent crime.*"[153] This leads to precisely the inefficiencies and breakdowns in relationships that the Commission identified in Khayelitsha.

118. The simplest way to visualize this is to compare some of the Black townships with high numbers of murders, with White suburbs with few, if any, murders. One would expect that the areas where there are more than 100 murders a year would have a relatively higher allocation of police officers than areas where there are no murders. That is not the case, as the below table demonstrates:

[152] Redpath FA at paras 86-88: Record p 673.

[153] Redpath RA at para 13.

Area	Police:100 000[154]	Murders[155]
Nyanga	143	262
Khayelitsha	190	168
Harare	111	132
Gugulethu	172	129
Rondebosch	521	0
Pinelands	338	0
Fish Hoek	295	1
Sea Point	592	4

119. To summarise: In her evidence before the Commission and her first affidavit filed in this application Redpath conducted an analysis of the THRR and actual allocations, and demonstrated that poor, Black communities with high crime rates generally have the lowest police-to-population ratios.[156] Given her evidence that the murder rate is the best predictor of the actual rate of violent crime - because murder does not suffer from the problem of under-reporting - Redpath concluded that the stations with the highest rates of murder are also likely to be the stations with the highest real rate of violent crime.[157]

120. Redpath's analysis of the allocation of police resources to the seven police stations with the highest number of murders in the Western cape revealed that these stations all receive less than the average number of police per 100 000 people, both according to the theoretical determination and the actual allocation of resources.[158] The stations

[154] Actual allocation based on Table 5H: Record p 727.

[155] Total number of murders based on Table 3: Record p 1022

[156] FA at para 70: Record p 35.

[157] FA at para 75: Record p 37.

[158] FA at para 78: Record p 37.

with the most violent crime were amongst the least resourced according to both the theoretical and actual allocation of resources.[159]

121. Not only are these stations relatively worse off, but they are below the minimum international guidelines. The United Nations recommends a minimum of 220 police per 100 000 people. The most resources of the seven stations with the highest murder rate was Khayelitsha, which had only 190 police to 100 000 people. The worst resourced was Harare, with only 111 police: 100 000 people. Even on the 'perfect' theoretical allocation, Harare (158) and Nyanga (205) fell below this minimum.[160]

The re-allocation in 2017

122. In his answering affidavit, Voskuil asserted that there have been significant improvements in the deployment of resources to areas with high crime rates.[161] He attached new information to his answering affidavit providing for the allocation of resources in June 2016; August 2016 and in January 2017.[162]

123. Redpath considered the changes in the allocation at each of the different times. She then considered the persistently high murder rates using the crime statistics released on 3 March 2017, and how these relate to the new allocations.[163] After conducting this exercise Redpath concluded that the new adjustments in allocation do not substantially alter the irrational and discriminatory allocation of police resources in the Western Cape.[164]

124. In regard to the January 2017 allocations, Redpath's evidence is as follows:

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[159] FA at para 79: Record p 38.

[160] FA at para 80: Record p 38.

[161] Voskuil AA at para 134: Record p 3206.

[162] PLV2: Record p 3247.

[163] Redpath RA at para 78: Record p 3788.

[164] Redpath RA at para 79: Record p 3788.

124.1. Plotting the adjusted January 2017 allocations of police personnel per 100 000 people against the 2013 figures shows some adjustments, but the overall trend remains the same. In particular, most areas with very low relative allocations still have very low relative allocations, although there are some slight improvements. [165]

124.2. The bottom 20 areas in 2013 all had allocations of under 200 police per 100 000 people. In 2017, including the stabilization figures, these 20 police stations all remain with a police: people rations of under 200:100 000.[166]

124.3. In the circumstances, the complaint of inequality persists to date with no substantial changes evident.[167]

125. According to SAPS's crime statistics released in March 2017, the four areas of Nyanga, Harare, Gugulethu and Khayelitsha accounted for 24% (790) of the 3224 murders recorded in the Western Cape in 2015/16, despite the fact that only approximately 11% of the Western Cape's population lives in them. This means that the murder rate in these four precincts is 2.5 times higher than the rest of the Western Cape. Yet, these areas consistently have low levels of police resources.[168]

126. Redpath's conclusion is that the overall trend observed in her analysis of the 2013 allocations does not change even with the adjusted 2017 figures. She plotted the murder rate per 100 000 people for 2015 against the 2017 adjusted allocations per 100 000 people. As with her analysis before the Commission and her evidence before this Court in the founding appears, an inverse relationship can be observed even with the inclusion of stabilisation numbers. Areas with high murder rates in 2015/16 were allocated relatively low levels of police resources during the following year. Despite the stabilisation allocations, it remains a fact that higher murder rates are associated

[165] Redpath RA at para 89: Record p 3792.

[166] Redpath RA at para 89: Record p 3792.

[167] Redpath RA at para 89: Record p 3792.

[168] Redpath RA at para 90: Record p 3792.

with lowers rates of allocation. All the areas with more than 120 murders per 100 000 people have allocations of fewer than 300 operational members per 100 0000, despite the inclusion of stabilisation figures. [169]

Policing in Nyanga

127. Nyanga is one of the oldest townships in South Africa located on the Cape Flats. When Nyanga was established in 1946, it was designated exclusively for Black people in order to reduce the huge influx of migrants in Langa location. In 1984, a community profile stated that Nyanga was viewed by residents of Langa and Gugulethu as being crime-ridden. This reputation has not changed.[170]

128. The population remains predominantly black, making up 98.8% of the residents. According to the Census of 2011, Nyanga had a population of 57 996 in 15,993 households. 57 295 of Nyanga's residents are Black Africans. However, according to the Policing Needs and Priorities Nyanga SAPS Cluster Report for 2015/16, in 2011 the population of the area covered by the Nyanga Police Station was 200 913.[171]

129. Nyanga is one of the poorest townships in Cape Town. In 2001 its unemployment rate was estimated at around 56% and HIV/AIDS is a huge community issue. The Census of 2011 recorded that 45.53% of the labour force of the population in Nyanga was unemployed and 74% of households have a monthly income of R3 200 or less.[172]

130. Nyanga has a population density of 18 775 persons per km², with the average household size being 3.63 persons. Of the 15 993 households, 46.4% are classified as female-headed households. The largest percentage of the population is made up of those aged between 25 and 29, at 6.3% for both males and females, respectively. The second largest percentage of the population is between the ages of 20 and 24,

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[169] Redpath RA at para 91: Record p 3793.

[170] Makasi at para 20: Record 1651.

[171] Makasi at para 21: Record p 1652. The Cluster Report is MM3: Record p 1391.

[172] Makasi at para 22: Record p 1652. See MM4: Record p 1415 for an extract of the census report.

with 6% for both males and females. In total, 60.7% of the population in Nyanga is between the ages of 0 and 29 years old, making the population a predominantly young one.[173]

Crime levels in Nyanga

131. According to crime statistics released by SAPS, Nyanga has consistently been rated as one of the worst police precincts in the Western Cape Province for over a decade with a disturbingly high number of reported violent crimes. Over the last 10 years crime statistics indicate that Nyanga has also experienced very high rates of contact crime. The Nyanga police precinct has consistently accounted for one of the highest murder rates over the past 10 years. It also has accounted for one of the highest number of reported rape cases in Cape Town over the last 10 years. A breakdown of reported crimes in Nyanga over the last decade indicates that from 2006 crime is increasing from 8360 reported crimes compared to 9464 reported crimes in 2016.[174]

Murder in Nyanga

132. Nyanga is one of the most dangerous places in Cape Town and the township has been commonly known as the "murder capital" of South Africa for over a decade. In the Nyanga Safety Audit Report of 2007/2008 it was noted that when the then Minister of Safety and Security Minister, Charles Nqakula, was releasing crime statistics during June 2007 he identified Nyanga Policing precinct as South Africa's murder capital. The same sentiments have been repeated over and again about Nyanga because of its murder rate.[175]

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[173] Makasi at para 23: Record p 1652.

[174] Makasi at para 26: Record p 1653.

[175] Makasi at para 27: Record p 1653.

133. Nyanga had 300 reported murders in 2015, the highest number in the entire country. The next highest was Inanda in KwaZulu-Natal which had 179 murders. Though the current figures for 2016 report that the number of reported murder cases currently stands at 279 in Nyanga, the precinct still has the highest reported number of murders to date. The number of reported murders in Nyanga accounted for 16.6% of all reported murders in South Africa in 2016.[176]

134. Nyanga has consistently over the last ten years experienced extremely high rates of murder in the precinct. Crime statistics demonstrate that for a decade or more Nyanga has consistently had the highest (or one of the highest) rates of murder in the country.[177]

135. The rate of murders in Nyanga does not seem to be improving as there were 11 reported murders from 01 to 12 October 2016 at Nyanga SAPS - which is almost one murder reported per day over this period.[178]

136. Nyanga has also experienced alarming levels of violent crime other than murder.[179]

Lack of adequate resources in Nyanga

137. It is submitted that the most basic question with regard to human resources is: Are there enough officers at the Nyanga Police stations? We submit that the police resources allocated to the Nyanga precincts are grossly inadequate, given the high level of contact crimes, particularly murders, in Nyanga.[180]

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[176] Makasi at para 28: Record p 1653.

[177] Makasi at para 29: Record p 1654.

[178] Makasi at para 32: Record p 1655.

[179] Makasi at paras 33 - 36: Record pp 1655 - 1657.

[180] See MM1: Record p 1338; MM4: Record p 1415; MM5: Record p 1422; MM7: Record p 1439; MM8 Record p 1445; MM9: Record p 1455 and MM10: Record p 1466 for reports detailing the shortage of resources at the Nyanga Police Station.

138. Nyanga Police station is a Brigadier level station with a satellite station in the Samora Machel informal settlement. Nyanga station has three heads of component, namely VISPOL (meaning visible policing) head, Detective Branch head and Support head.[181]

139. Nyanga station is also responsible for policing Crossroads, Browns Farm, Samora Machel and Zwelitsha informal settlements. Nyanga precinct is currently divided into six sectors serviced by one fully fledged Brigadier Station. The sectors are divided as Brown's Farm; Old Cross road; Nyanga East; Sweet Home Farms; Heinz Park and Samora Machel.[182]

140. It was noted in the Police Oversight Report of 2012/2013 that the ideal number of sectors for Nyanga should be 10, as the precinct of Nyanga consists of about 25 square kilometers that includes Nyanga, Cross Roads, Sweet Home Farms, Samora Machel, Browns Farm and Heinz Park.[183]

141. The lack of human resources in the Nyanga Police Station was highlighted in group discussions that were held when the Department of Community of Safety engaged with the community of Nyanga, in the development of the Policing Priorities and Needs of Nyanga Cluster Report for the 2015/2016 period (the Cluster Report).[184]

142. The Cluster Report identified the lack of adequate human resources for Nyanga as a key concern, stating that: '*Organisational concerns include a shortage of human resources in the SAPS. Although there are some new recruits at police stations, it will take two years before they are fully trained. In the meantime, police officials are leaving the Service. SAPS need to find effective ways to manage with limited resources. Duty arrangements and absenteeism create* a *drain on existing human resource allocations at police stations*.'[185]

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[181] Makasi at para 44: Record p 1661.

[182] Makasi at para 45: Record p 1661.

[183] Makasi at para 45: Record p 1661.

[184] Makasi at para 47: Record p 1662.

[185] Makasi at para 48: Record p 1662.

Understaffing generally

143. In the Police Oversight report of 2012/2013, the staff establishment in all components of SAPS (VISPOL, Detectives and Support) was 292 including civilians. The total number of commissioned officers at the Nyanga Station was 37, with two hundred and six (206) non-commissioned officers.

144. In the 2012/2013 oversight report, it was recommended that:[186]

144.1. The three vacancies in Human Resource Management should be filled;

144.2. Within sector policing, additional personnel based on the fact that Nyanga was the murder capital in the country.

145. In 2014 Nyanga Station had 292 allocated staff members with 285 actual members. 30 staff members have either been transferred, received promotions or resigned. 10% of the members take leave over weekends, and 5% of the members work on night shifts. There were 19 visible policing unit members that were working elsewhere as a result of transfers and promotions.[187]

146. In 2014 during an oversight visit, the Portfolio Committee found that there was a shortage of detectives which was attributed to the fact that some of the Nyanga detectives were stationed at other units and have not been replaced. Some detectives were seconded to other units including South African Social Security Agency, the Taxi Violence Unit, the Tactical Response Team and the Operational command centre.[188]

147. The Committee noted that the station recently experienced a problem with sick leave of detectives when many of them took sick leave within one week, creating problems for the investigation of cases.[189]

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[186] Makasi at para 57: Record p 1668.

[187] Makasi at para 58: Record p 1669.

[188] Makasi at para 59: Record p 1669.

[189] Makasi at para 61: Record p 1669.

148. Following this visit the Committee made a number of recommendations. One of the recommendations was that the Provincial management must allocate more members to the Nyanga station.[190]

Detectives

149. The Detectives branch unit of Nyanga Station is located at Group 40 building in Eiseleben Road, which is roughly 2km away from the Nyanga police station itself. This results in obvious inefficiencies and adversely impacts on service provision.[191]

150. At the time of the visit of the Portfolio Committee in 2014 it was found that the detectives then stationed at the Nyanga Police Station were investigating 10 643 cases. The Police Portfolio Committee during its oversight visit found that Nyanga had sixty-three (63) detectives allocated, yet the Station required at least 71 detectives. The number of detectives had actually decreased as the 2012/13 Police Oversight Report noted that there were 68 detectives at the Station. The Committee, during its oversight visit, stated that the new upgraded Resources Allocation Guide (RAG) puts the total allocated staff at 293 with 93 detectives on the fixed establishment.[192]

151. The Portfolio Committee found that, of the allocated detectives, seven had either been transferred, received promotions or had resigned, and yet they were still on the staff establishment.[193]

152. The remaining 56 detectives were investigating 9000 dockets. The Committee, during the oversight visit, was informed that because of the massive shortages, detectives at the Nyanga Station manage high numbers of dockets. Detectives with the most

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[190] Makasi at para 62: Record p 1670.

[191] Makasi at para 64: Record p 1670.

[192] Makasi at para 68: Record p 1672, para 68. The documents related to the Portfolio Committee Oversight visit and reports tabled following the visit are attached as MM7 to MM10, from pp 1439 to 1473.

[193] Makasi at para 69: Record p 1672.

dockets were investigating 600 cases each. In the Police Oversight report of 2012/2013 it was reported that the highest case load carried by a detective was 930 dockets.[194]

153. The Acting Station Commander informed the Portfolio Committee that the shortage of detectives was attributed to the fact that some of the Nyanga detectives were placed at other units and have not been replaced. Some of the detectives have been seconded to other units such as the South African Social Security Agency (SASSA), the Taxi Violence Unit, TRT and the Operational command centre. There are also twelve others who have left the station through retirement, death and promotion who have never been removed from the staff establishment. They are in the process of having these individuals removed from the establishment.[195]

154. The Committee oversight visit concluded that Nyanga Police Station had inadequate detectives allocated to it and recommended that 15 additional detectives be allocated to the station.[196]

<u>Police to Population Ratios in Nyanga</u>

155. According to the SAPS Strategic Plan (2014 - 2019) the United Nations average police to population ratio is 220: 100 000. South Africa's police to population ratio is 279:100 000. That translates to roughly one police officer for every 358 citizens.[197]

156. According to Redpath, Nyanga has only 143.82 police officers: 100 000 people (1 police officer for every 695 people). That is the third lowest in the Western Cape, after Harare and Lwandle. It is significantly below the average allocation of 283:100 000.[198]

[194] Makasi at para 70: Record p 1672.

[195] Makasi at para 73: Record p 1674.

[196] Makasi at para 74: Record p 1674.

[197] Makasi at para 78: Record p 1675.

[198] Makasi at para 79: Record p 1676. These figures (and the other statistics reflected in this section) pre-dated the temporary re-allocations that took place after this application was launched.

157. In the Western Cape there are 40 police precincts *with* a police to population ratio that is above the United Nations' norm and 76 that are above the SAPS police to population ratio.[199]

158. Critically, nine of the ten stations with the highest number of murders in the Province have police to population ratios of more than 1:450 and Mitchells Plain has a police to population ratio of 1:438. These stations are Harare; Nyanga; Delft; Mfuleni; Kraaifontein; Gugulethu; Khayelitsha; Philippi East, and Bishop Lavis.[200]

159. All of the areas for which these stations are responsible are inhabited by mostly black people (African and coloured) of low income and have high contact crime rates.[201]

160. Even if the theoretical allocation is considered, Nyanga is the second worst resourced police station in the province. It would then have a ratio of 205:100 000 - still significantly below the national average. That is despite the fact that Nyanga has some of the highest serious crime rates, especially murder, in the entire country.[202]

161. In our submission, there is no doubt that lack of human resources affects the ability of the police to carry out their mandate.[203]

162. The effect of the serious shortage of resources allocated to Nyanga is that crimes cannot be investigated or prevented. The evidence of the Nyanga CPF is that there are serious delays in responding to urgent calls to the Nyanga Police station, and sometimes those calls are not answered at all. As a result, people in Nyanga do not feel safe and they do not trust the police.[204]

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[199] Makasi at para 80: Record p 1675.

[200] Makasi at para 81: Record p 1676.

[201] Makasi at para 82: Record p 1677.

[202] Makasi at para 85: Record p 1677.

[203] Makasi at para 86: Record p 1677.

[204] Makasi at para 88: Record p 1678.

Distribution of Police Resources outside the Western Cape

163. In addition to irrational and discriminatory allocation of resources in the Western Cape, the evidence demonstrates similar patterns in KwaZulu-Natal, Gauteng, and nationally.[205] We describe each in turn.

KwaZulu-Natal

164. First, as noted above, the data for poverty applied to both the Western Cape and KwaZulu-Natal.[206]

165. Second, like the Western Cape, "*poorer, Black areas, particularly rural areas, were amongst the least resourced.*"[207] Indeed, 29 stations are less-resourced than the worst stations in the Western Cape, ranging from 57 per 100 000 to 105 per 100 000.[208]

166. Third, unlike the Western Cape, the allocation of police resources increased in line with increasing murder rates.[209]

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[205] The evidence regarding KwaZulu-Natal was dealt with in the Founding Affidavit as the relevant allocation data had been provided to a newspaper in the Province. Redpath FA at para 73: Record p 668. The Gauteng and national evidence is based on data only provided to the Applicants following the filing of the Answering Affidavits, and was therefore dealt with in reply. The Respondents have not sought an opportunity to rebut any of Redpath's conclusions on this data. They should therefore be accepted as correct. *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 51.

[206] See the section above dealing with Police and poverty.

[207] Redpath FA at para 73: Record p 669.

[208] Redpath FA at para 73: Record p 668.

[209] Redpath FA at figure 2: Record p 669.

Gauteng

167. Redpath analysed Gauteng because it has a similar profile to the Western Cape. It too has large, poor, black townships and informal settlements.[210] The data show the following.

168. First, "*the majority of the areas with the lowest theoretical allocation in Gauteng are township areas, largely populated by persons who are black and poor.*"[211] The same is true of the fixed establishment. Diepsloot – an area notorious for both poverty and crime – has the lowest allocation of resources: only 80 police officers per 100 000 people.[212]

169. Second, just like the Western Cape, the four areas with the lowest fixed establishment – Diepsloot, Mamelodi East, Rietgat and Ivory Park – account for 24% of Gauteng's murders. Yet they are assigned only 7% of the police resources. In order to grant them only the average rate of resources in the province, they would need an additional 2 594 police officers.[213]

National

170. The national data supports the claim that SAPS' system for the allocation of resources discriminates on the basis of race and poverty. The following evidence is important.

171. First, the actual allocations are even less correlated to population size than the theoretical allocations. As Redpath puts it: "*This means that the fixed establishment adjustments to the theoretical worsen inequality on a per capita basis.*"[214]

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[210] Redpath RA at para 122: Record p 3804.

[211] Redpath RA at para 125: Record p 3805.

[212] Redpath RA at para 127: Record p 3807.

[213] Redpath RA at para 128: Record p 3807.

[214] Redpath RA at para 105: Record p 3797.

172. Second, the 20 stations with the lowest relative allocations are all areas that are poor and Black.[215]

173. Third, seven of those areas have higher than average murder rates. More tellingly, those 20 areas account for 4% of all murders in the country, yet they have been allocated only 1.3% of the total number of police officers.[216]

174. Third, if we look at the stations with the most murders, there are 19 areas with more than 80 murders. They serve 7% of the population and account for 14% of all murders in the country. Yet they have been allocated only 5% of the total police officers. Those same areas account for only 6.4% of the total reported crime – suggesting significant under-reporting. Again, these are all areas that are primarily poor and Black.[217]

175. In conclusion, this analysis supports the findings regarding allocations in the Western Cape. Poor, Black areas with high actual crime rates have some of the lowest allocations of resources. This establishes that the discriminatory and irrational allocation of resources is not a result of unusual demographics or geography of the Western Cape. Nor is it a result of particular allocation decisions taken in this province. It flows from the system that SAPS uses to allocate resources. That system rests, primarily, on the THRR.

Under reporting

176. One of the key reasons for the discriminatory and irrational allocation of resources is that SAPS fails to take account of under-reporting. Instead, the focus is myopically on policing the total reported crime. For example, Rabie states:

> *"SAPS undertakes its work in terms [of] reported crime. It has no way of knowing the extent of unreported crime and cannot therefore reasonably account for it. While I accept that this notwithstanding, the under reporting of*

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[215] Redpath RA at para 109: Record pp 3798 - 3799.

[216] Redpath RA at para 114: Record p 3800.

[217] Redpath RA at paras 117-119: Record pp 3801 - 3802.

crime does present an ongoing challenge, the import of which though, appears to have been inflated by the applicants. In any event, no sensible model may be created without the necessary information; it is unrealistic to expect anyone to determine allocation from 'unreported cases'."[218]

177. Unreported crime is sometimes referred to as the "*dark figure*" of crime.[219]

178. In short, SAPS admits that it fails to take account of under-reporting. And it admits that this failure has a negative effect on how it allocates its resources. Its only defence is to claim that it is impossible to do anything else.

179. SAPS is correct that under-reporting seriously affects its allocation of resources. But it is wrong that it has no other option.

Possible to account for under-reporting

180. If it were impossible to determine where under-reporting was higher, there might be some validity to the claim that SAPS has no option but to rely on reported crime. But, as Redpath demonstrates, it is possible through three measures.

181. First, murder serves as an excellent means to estimate under-reporting because murder has a very high reporting rate.[220] It is used internationally as a measure of actual violence, including by the United Nations, the Inter-American Development Bank, and the US Congress.[221] Empirical data supports the correlation between murder and violent crime rates.[222]

182. That is why the Applicants rely on murder rates: because they provide the best indicator of where crime (and particularly violent crime) is actually happening. They

[218] Rabie AA at para 193: Record p 1882.

[219] LR5 at para 3.2: Record p 2125.

[220] Redpath FA at para 31: Record p 660.

[221] Redpath RA at paras 36-7: Record pp 3772 - 3773.

[222] Redpath RA at para 37: Record pp 3772 - 3773.

do not contend that SAPS should only police murder,[223] but that murder is the best way to determine where resources are actually needed.

183. Second, there are surveys that provide rates of under-reporting in different areas. Redpath refers to the Community Barometer Surveys,[224] and the Victims of Crime Survey.[225] Both provide measures of under-reporting. SAPS could conduct its own surveys if it believed these were unsatisfactory. SAPS has provided no reason why these, or other similar, surveys cannot be used to meaningfully measure under-reporting.

184. Third, the best way to determine under-reporting is to compare the number of murders (and aggravated robberies) to the total number of reported crimes. If the area has a higher share of the total murders, and a lower share of the total crime, there is probably under-reporting. Redpath explains with an example:

> "*The four highest murder rate areas in the Western Cape (Nyanga, Harare, Gugulethu and Khayelitsha) accounted for only 6% of all reported crimes. As the four areas comprise 11% of the population, one would expect the four areas to at least account for 11% of the total crime, instead of only 6%. But largely because the THRR allocates resources based mainly on who reports crime, these areas receive only 6% of the resources. This is the major reason underpinning their under-resourcing: the fact that they have a lower total reported crime rate than other areas.*"[226]

[223] Rabie AA at para 54.1: Record p 1841.

[224] Redpath RA at para 29: Record p 3770.

[225] Redpath RA at para 32: Record p 3771.

[226] Redpath RA at para 28: Record p 3770.

185. As Redpath notes, this method also reflects fairly similar results to relying on surveys. Applying the survey data on under-reporting, those four areas experience 22% of total crime. They also make up 24% of the total number of murders.[227]

Impact of under-reporting

186. Under-reporting has a particularly pernicious effect because "*it creates a vicious spiral where inadequate resource allocation leads to low reporting levels, which in turn leads to fewer resources being allocated.*"[228]

187. In addition, under-reporting is related to trust in police. People do not report crimes if they do not trust the police.[229] Surveys also show that Black and Coloured people have the lowest satisfaction with the police. Black and Coloured areas are therefore likely to have lower reporting rates than White areas.[230] The failure to take account of under-reporting not only leads to resources not being sent to the areas where they are most needed, it is a large part of the reason that "*the THRR is systematically biased against black and coloured populations.*"[231]

Failure to adequately weight violent crime

188. The THRR does weigh different crimes differently. But as Redpath explains, these weightings are patently inadequate when compared to other countries. Canada weighs a murder 1000 times more than possession of cannabis, while in the UK murder is given 2700 times more weight.[232] By contrast, in South Africa a murder is weighted

[227] Redpath RA at para 30: Record p 3771.
[228] Redpath RA at para 16: Record p 3766.
[229] Redpath RA at para 33: Record p 3771.
[230] Redpath RA at para 34: Record pp 3771 - 3772.
[231] Redpath RA at para 34: Record p 3772.
[232] Redpath RA at para 47: Record p 3777.

only 2.5 times more than less serious crime. One detective is appointed for every 240 murders, or for 600 petty crimes – again a ratio of 2.5:1.[233]

189. This needs to be combined with the distribution of property crime. In Claremont, Sea Point and Camps Bay, more than 85% of the reported crimes are property crimes. In Nyanga, Gugulethu, Harare and Khayelitsha, it Is never higher than 36%. While the rich white areas may appear to have a large crime burden, it is made up almost entirely of non-contact crime.

190. The position is worsened because poor, Black areas under-report crime generally, and property crime in particular because they do not have the incentive of insurance claims.[234] When insufficient weight is given to violent crime compared to property crime, rich, White areas receive more resources, and poor, Black areas receive fewer resources.

Weighting within the THRR favours rich communities

191. The THRR goes to great lengths to measure and account for different factors that could affect the burden on police stations. It seeks to account for everything from the proximity of courts and prisons, or shopping malls and schools. The Applicants do not object to this exercise in principle. Any rational allocation system should take account of the additional burden imposed by the area in which the station operates.

192. But the way in which the THRR in fact uses those factors favours rich, White areas:

192.1. 41 of the 56 environmental, social and economic factors are far more likely to occur in rich, developed areas.[235]

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[233] Redpath RA at para 48: Record p 3778.

[234] Redpath RA at para 45.3: Record p 3775.

[235] Redpath RA at para 49.1: Record p 3779.

192.2. Each of these factors provides an additional 5% weighting. Formal areas can therefore obtain up to 205%, whereas informal areas have a maximum potential additional weighting of 75%.[236]

192.3. While the THRR does provide additional resources to informal settlements, the maximum increase is 5%, even if the area is 90% informal housing.[237]

192.4. The 5% also applies equally to factors that clearly will have different impacts on crime rates. A station will receive an additional 5% if there are three main roads, or one shopping mall, and 5% if the area has 60% unemployment.[238]

192.5. The Station Input Sheet that police stations must complete in order to determine their theoretical allocation requires 550 inputs.[239] As the evidence before the Khayelitsha Commission showed, this information was often inaccurate, and could be manipulated to obtain additional resources.[240]

193. The results are clear. Despite an intent to capture all the relevant factors, and to recognise the particular challenges of poor communities, the THRR assigns fewer police officers to poor, Black areas than rich, White areas.

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[236] Redpath RA at para 18.2: Record p 3767.

[237] Redpath RA at para 51: Record p 3779.

[238] Redpath RA at para 52: Record p 3779.

[239] Redpath RA at para 53: Record p 3779.

[240] Redpath FA at para 46: Record p 663.

IV UNFAIR DISCRIMINATION

194. In this Part, we explain why the theoretical and actual allocation of police resources constitutes unfair discrimination on the grounds of race and poverty. The analysis takes place in four stages:

194.1. First, we summarise the test for unfair discrimination under the Equality Act;

194.2. Second, we establish that poverty is a ground of discrimination;

194.3. Third, we demonstrate that the theoretical and allocation amounts to discrimination on the basis of race and poverty; and

194.4. Fourth, we explain why the Respondents have failed to discharge their burden to show that the discrimination is fair.

The Test for Unfair Discrimination

195. This section first sets out the objects and guiding principles of the Equality Act. It then outlines the basic test for unfair discrimination. Lastly, it addresses in more detail, the nature of indirect discrimination.

Objects and guiding principles

196. The preamble and ss 2, 3 and 4 of the Equality Act set out the general principles that must guide the interpretation and application of its operative provisions. We highlight the following:

196.1. The preamble recognises precisely the type of entrenched inequalities that arise in this matter:

> "*The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;*

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy".

196.2. The objects of the Equality Act include:

"*(b) to give effect to the letter and spirit of the Constitution, in particular-*

(i) the equal enjoyment of all rights and freedoms by every person

(ii) the promotion of equality;

(iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution".[241]

196.3. When interpreting the Act, this court must give effect to:

"*(a) the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination;*

(b) the Preamble, the objects and guiding principles of this Act, thereby fulfilling the spirit, purport and objects of this Act."[242]

196.4. A "guiding principle" of the Act is that courts must recognise and take into account:

[241] Equality Act s 2(b).

[242] Equality Act s 3(1).

> "*(a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and*
>
> *(b) the need to take measures at all levels to eliminate such discrimination and inequalities.*"[243]

The basic test

197. As the Applicants allege unfair discrimination on the grounds of both race and poverty, two provisions of the Equality Act are relevant. Section 6 contains the general prohibition. It reads: "*Neither the State nor any person may unfairly discriminate against any person.*" Section 7 establishes an additional prohibition of discrimination on the basis of race, and provides examples of what constitutes unfair discrimination:

> "*Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-*
>
> *…*
>
> *(d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;*
>
> *(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.*" (emphasis added)

198. In light of that prohibition, there are two stages to the unfair discrimination analysis:

198.1. Is there discrimination?

198.2. If so, is it unfair?

199. Both s 6 and s 7 rely on the general definitions of "*discrimination*" and "*prohibited grounds*" in s 1. Discrimination is defined as:

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[243] Equality Act s 4(2).

> *"any act or omission, including a <u>policy</u>, law, rule, <u>practice, condition or situation</u> which directly <u>or indirectly</u> –*
>
> *(a) imposes burdens, obligations or disadvantages on; or*
>
> *(b) <u>withholds benefits, opportunities or advantages from</u>,*
>
> *any person on or more of the prohibited grounds."* (emphasis added)

200. Importantly, the Equality Act recognises that discrimination can occur based not only on a rule, but based on a "*condition or situation*". The factual existence of discrimination is sufficient, even without proof that it was caused by a particular law or policy. Of course, in this instance the Applicants argue that both a policy (the THRR, which underpins the system for allocating resources) and a condition or situation (the actual allocation) constitutes unfair discrimination.

201. The "*prohibited grounds*" are defined as

> *(a) <u>race</u>, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or*
>
> *(b) <u>any other ground</u> where discrimination based on that other ground-*
>
> *(i) <u>causes or perpetuates systemic disadvantage</u>;*
>
> *(ii) <u>undermines human dignity</u>; 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)*"

202. The only question at this stage is whether poverty constitutes a ground contemplated in paragraph (b). As we show below, it does.

203. If there is discrimination on a listed or unlisted "prohibited ground", then the inquiry is whether the discrimination is unfair. That is determined in terms of s 14.

204. Section 14(2) provides that in assessing whether or not the discrimination is fair, a court must have regard to:

204.1. the context;

204.2. the factors listed in s 14(3); and

204.3. "*whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.*"

205. The factors listed in s 14(3) are:

> *"(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."*

206. The final part of the analysis is the shifting onus to establish the various elements of unfair discrimination. That is determined by s 13,[244] and operates as follows:

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[244] Section 13 reads:

"***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;

206.1. The complainant need only show a "*prima facie case of discrimination*".

206.2. Thereafter, the onus is on the respondent to prove either that:

206.2.1. The discrimination did not take place;

206.2.2. The discrimination was not on one of the listed grounds; or

206.2.3. The discrimination was fair.[245]

207. As Moosa J explained in *Manong*, "*the overall onus … at all times rests with the complainant*", but the rebuttable presumptions of discrimination and unfairness "*assists complainant to cross the hurdle from prima facie proof to proof on a balance of probabilities.*"[246]

208. Put simply, the Applicants must establish a prima facie case that the system for allocating resources or the allocation of resources itself imposes a burden or withholds a benefit on the basis of race or poverty. As is made clear by s 7, inferior access to services constitutes just such a burden. Thereafter, the onus is on the respondents to either rebut that prima facie case, or establish fairness.

209. In the remainder of this section, we consider – with reference to relevant case law – two relevant questions: indirect discrimination, and unlisted grounds of discrimination.

(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."

[245] While s 13(2)(b) seems to distinguish between discrimination on a listed ground, and discrimination on an unlisted ground, in reality there is no distinction. Discrimination only occurs if it is on a prohibited ground. That already requires the complainant to establish one of the factors in paragraph (b) of the definition of "prohibited grounds". If that is done, under s 13(2)(b)(ii), the onus is on the respondent to show the discrimination is fair.

[246] *Manong and Associates (Pty) Ltd v City Manager, City of Cape Town, and Others* 2009 (1) SA 644 (EqC) at para 12. See also *Osman v Minister of Safety and Security and Others* [2010] ZAEQC 1 ("*The phrase prima facie case employed in section 13 of the Act, presumably is used in its generally accepted meaning of 'in the absence of further evidence from the other side, that which is prima facie now becomes conclusive proof.*")

Indirect discrimination

210. As stressed earlier, the Applicants do not allege that there has been direct discrimination. The claim is limited to indirect discrimination.

211. Indirect discrimination occurs when a law or policy appears to be neutral, but has a disproportionate adverse impact based on a prohibited ground. The most relevant example of indirect discrimination is *City Council of Pretoria v Walker*.[247] The case concerned a challenge to Pretoria's electricity rate and collection policies. Different tariffs and different collection rules applied in historically white areas compared to historically Black areas. The Constitutional Court held that this constituted indirect discrimination on the basis of race. Langa DP (as he then was) held that the prohibition of indirect discrimination "*recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination*". He explained the indirect discrimination in *Walker* as follows:

> "*[C]onduct 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. It would be artificial to make a comparison between an area known to be overwhelmingly a "black area" and another known to be overwhelmingly a "white area", on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between*

[247] [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) ("*Walker*").

> *black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this.*"[248]

212. A similar approach was adopted in *Mvumvu and Others v Minister of Transport and Another*,[249] a challenge to a provision of the Road Accident Fund Act. Section 18 of the RAF Act limited the compensation available to passengers if they were using the vehicle for public transport. The evidence demonstrated that "*the vast majority of poor people in this country are black people and the mode of transport accessible to them is public transport consisting of, amongst others, taxis and buses.*"[250] Quoting the same passage from *Walker*, Jafta J concluded that this constituted indirect discrimination on the basis of race:

> "*It will be observed that the applicants do not assert that the impugned provisions discriminate against black people in a manner that is direct. Indeed they could not make the assertion because the provisions do not expressly place a cap on claims by black people. … What is established by the applicants' evidence though is the fact that at a practical level the majority of the victims affected by the cap are black people. This in turn shows that indirectly the provisions discriminate against black people in a manner that is disproportionate to other races.*"[251]

213. Vitally, it is not necessary to establish an intent to discriminate in order to succeed for a claim for unfair discrimination. As Langa DP observed in *Walker*: "*In many cases, particularly those in which indirect discrimination is alleged, the protective purpose*

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[248] Ibid at para 32 (our emphasis).

[249] [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC). See also *Da Silva v Road Accident Fund and Another* [2014] ZACC 21; 2014 (8) BCLR 917 (CC); 2014 (5) SA 573 (CC) at para 8 (holding that a similar provision in the RAF Act limiting compensation paid to people related to the driver indirectly discriminated on the basis of marital status and age because it was more likely to affect spouses and children).

[250] Ibid at para 28.

[251] Ibid at para 29.

would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional."[252] Showing intention will be extremely difficult in cases of indirect discrimination because "*there is almost always some purpose other than a discriminatory purpose*".[253] Instead, discrimination "*must be determined objectively in the light of the facts of each particular case.*"[254]

Poverty as a Ground of Discrimination

214. The Applicants claim is that the allocation of police resources discriminates "*on the overlapping or intersectional discrimination on the grounds of both race and poverty*".[255] The Constitutional Court has repeatedly stressed that grounds often intersect with one another. In *Harksen*, Goldstone J warned as follows:

> "*There is often a complex relationship between [the listed] grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.*"[256]

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[252] *Walker* at para 43.

[253] Ibid.

[254] Ibid (emphasis added).

[255] FA at para 146: Record p 56.

[256] *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) ("*Harksen*") at para 49. In *MEC for Education: Kwazulu-Natal and Ohters v Pillay* (CCT51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) ("*Pillay*")– the case concerning wearing a nose-stud at school – the Court repeated this dictum and found that, while culture and religion were distinct, "*in this matter, culture and religion sing with the same voice and it is necessary to understand the nose stud in that light – as an expression of both religion and culture.*" *Pillay* at para 60.

215. We repeat that this case must be evaluated in light of the burden imposed on people who are both poor and Black.

216. However, it is still necessary to establish that poverty is a ground which can found a claim of discrimination. As far as we are aware, our courts have not yet been called on to pronounce on this issue. This section first sets out the law on establishing unlisted grounds, and then explains why poverty is such a ground.

Unlisted grounds

217. Discrimination must occur on a "prohibited ground", which is either one listed in paragraph (a) of the definition, or one that meets one of the criteria in paragraph (b). Poverty is not listed in paragraph (a), so the question is whether it qualifies in terms of paragraph (b).

218. Under the Constitution, there is a similar test for establishing if discrimination can occur on an unlisted ground. It is whether "*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.*"[257]

219. The test in the Equality Act is clearly modelled on this constitutional standard. To recall, it is whether discrimination on the unlisted 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 listed ground]*".

[257] *Harksen* at para 53(b)(i). See also *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) at paras 31-33.

220. Although no court has directly considered whether poverty is a ground of discrimination, several decisions[258] have applied the constitutional test and found discrimination on an unlisted ground:

220.1. *Larbi-Odam* held that citizenship was an analogous ground on the basis that "*foreign citizens are a minority in all countries, and have little political muscle*" and "*citizenship is a personal attribute which is difficult to change*".[259] This finding was applied again in *Khosa*.[260]

220.2. The minority in *Union of Refugee Women*[261] (Mokgoro and O'Regan JJ, Langa CJ and Van der Westhuizen J concurring) held that distinguishing between permanent residents and refugees constituted discrimination on the analogous ground of refugee status. The majority did not decide the question.

220.3. In *Hoffmann*, the Constitutional Court held that HIV status was an analogous ground because: "*Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised.*"[262]

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[258] See also *Legal Aid South Africa v Magidiwana and Others* [2015] ZACC 28; 2015 (6) SA 494 (CC); 2015 (11) BCLR 1346 (CC) at para 116 (The minority judgment of Nkabinde J considered whether the decision of the Legal Aid Board to fund the families of the deceased miners at the Marikana Commission, but not to survive the miners who survived being shot constituted an analogous ground. She rejected this argument both because it was the incorrect comparator, and because surviving a shooting "*would typically be regarded as a benefit, and certainly cannot be seen to be based on any similar attributes or characteristics*". The majority did not address the issue because it concluded the question as moot.)

[259] *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* [1997] ZACC 16; 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC) at para 19.

[260] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) ("*Khosa*")at para 71,

[261] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) BCLR 339 (CC) at paras 113-4.

[262] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211 (CC) at para 28.

220.4. Distinguishing between attorneys admitted during apartheid in South Africa, and those admitted in the former homelands was held to constitute an analogous ground in *Mabaso*.[263]

221. The question then is whether – in light of the test in s 1, and the above judgments – poverty or socio-economic status qualifies as a prohibited ground.

Poverty as an unlisted ground

222. Before we directly address the criteria in paragraph (b), there are two preliminary points to make.

223. First, s 34(1) of the Equality Act provides express support for the notion that poverty is a prohibited ground. It reads:

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

224. The Equality Act defines "*socio-economic status*" as: "*includes 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*".

225. As far as we are aware, neither the Minister nor the Equality Review Committee has acted under s 34(1). However, s 34(2) makes it clear that action under s 34(1) does

[263] *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 38.

not affect the ability of this Court to assess a claim that socio-economic status constitutes a prohibited ground under either paragraph (a) or (b) of the definition.[264]

226. Despite the inaction, the express mention of socio-economic status in s 34(1) of the Equality Act strongly supports the claim that it constitutes a prohibited ground. That is expressly so given that the Constitutional Court has already recognised that two of the other grounds mentioned in s 34 – HIV status and nationality – are analogous grounds under s 9 of the Constitution.

227. <u>Second</u>, several academic writers have supported the claim that poverty constitutes a prohibited ground of discrimination, either as an analogous ground, or within the concept of "social origin":

227.1. Albertyn and Goldblatt argue that "*[s]ocial origin discrimination is also used to describe the differential treatment of people on the basis of class.*"[265] In addition, they recognise the intersectionality between race, class and gender.[266]

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[264] Equality Act s 34(2) reads:

"*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'."

[265] C Albertyn & B Goldblatt 'Equality' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, 2007) ch35-p63.

[266] Ibid ("*In South Africa, class tends to correspond with race and gender in as much as Africans and women constitute the greatest proportion of the poor.*")

227.2. Liebenberg and Goldblatt have argued that poverty should be recognised as its own category, or it could be incorporated in the listed ground of social origin.[267]

227.3. In Canada, multiple writers have argued that poverty should be recognised as a ground of discrimination under art 15 of the Canadian Charter.[268]

228. With the support of the Equality Act and academic authority, poverty plainly qualifies under all three conditions in the definition.

229. *Causes or perpetuates systemic disadvantage:* Poverty is a systemic problem. It is the result of our history and economic system that people live in poverty. People living in poverty are already vulnerable and marginalised. In *Soobramoney*, the Constitutional Court held:

> "*We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.*"[269]

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[267] S Liebenberg & B Goldblatt 'The Interrelationship between Equality and Socio-economic Rights under South Africa's Transformative Constitution' (2007) 23 *SAJHR* 335 at 344-348.

[268] See, for example, M Jackman 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law' (1994-1995) 2 *Review of Constitutional Studies* 76; L Iding 'In a Poor State: The Long Road to Human Rights Protection on the Basis of Social Condition' (2003) 41(2) *Alberta Law Review* 513.

[269] *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

230. That remains true today. And it is why our Constitution includes commitments to ensure people have water, food, health care, social security and adequate housing.[270]

231. Continuing to impose burdens on poor people, or withhold advantages from poor people, entrenches that systemic disadvantage. Because they lack the economic means, poor people, like foreigners and refugees, often lack political voice and the ability to protect themselves through the political process.

232. Undermines human dignity: A ground of discrimination can undermine human dignity because it is an immutable characteristic of a person, or because treating someone differently on that basis is inconsistent with ideas of equal concern and equal respect. Moseneke DCJ has explained how living in poverty undermines dignity: "*The well-earned and lofty thrust of our Constitution is at strenuous odds with demeaning deprivation. Abject poverty wrenches dignity out of any life.*"[271]

233. Further burdening or depriving those whose dignity is already denied by their relative and absolute deprivation must surely further undermine their dignity. That is precisely the opposite of what the Constitution demands of us. In the context of housing, the Constitutional Court has held:

> "*Indeed, it is not only the dignity of the poor that is violated when their desperate quest for refuge is denied, but that of our society as well. Our society also carries the shame and ignominy of denying access to our own people who are especially deserving of protection, to the basic elements of a decent existence, like housing.*"[272]

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[270] Constitution ss 26 and 27.

[271] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 705.

[272] *Mathale v Linda and Another* [2015] ZACC 38; 2016 (2) BCLR 226 (CC); 2016 (2) SA 461 (CC) at para 37.

234. Similarly, when we treat people differently just because they are poor, we undermine not only their dignity, but society's dignity. This was recognised in *Khosa* where Mokgoro J wrote:

> "*Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.*"[273]

235. *Adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a listed ground*: This recognises that differentiation on certain listed grounds not only affects a person's dignity, but their enjoyment of other rights. Discriminating on the basis of gender can affect a person's reproductive freedom protected in s 12(2)(a). Discriminating against somebody because of their religion violates their right to exercise their religion protected in s 15. Discriminating on the basis of language can violate the language rights in ss 6, 29(2), and 30.

236. Discrimination on the basis of poverty clearly impacts on the social and economic rights protected in ss 26-28. Poor people already struggle to enjoy access to housing, food, education, and water. When additional burdens are placed on them, it is even more difficult.

237. In addition, as this case demonstrates, discrimination can affect their rights to life and freedom and security of the person. When rich people are threatened by rising crime levels, they can build electric fences, hire security guards and create gated communities. Poor people have no such options. They are reliant on the state for

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[273] *Khosa* at para 74.

protection. When they are provided with less access to that resource, their rights are limited in a way comparable to a limit to their human dignity.

238. For all these reasons, poverty is a "*prohibited ground*" as defined in paragraph (b) of the definition. Differentiation on the ground of poverty therefore amounts to discrimination. When that discrimination is combined with discrimination on the basis of race, its impact is only enhanced.

239. It is necessary to briefly state that the Applicants have relied on the provision of water and electricity as an indicator of poverty. This indicates lower levels of formal housing, and higher levels of poverty.[274] In any event, race is correlated with poverty in South Africa. If the allocation system discriminates against poor people, it will inevitably also discriminate against Black people.[275]

Discrimination

240. The Actual and Theoretical Allocations will discriminate on the basis of race if they:

    240.1. Impose burdens or disadvantages on poor Black people that are not imposed on rich, white people;

    240.2. Withhold benefits or advantages from poor Black people that are provided to rich, white people; or

    240.3. If it amounts to the provision of inferior services to Black people, compared to white people.

241. To repeat, the Applicants do not claim that the THRR directly takes account of race, nor that provincial commissioners intentionally discriminated on the basis of race. The claim is that the Theoretical Allocation and the Actual Allocation are in fact discriminatory.

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[274] Redpath FA at paras 94-5: Record pp 675-6. This is not meaningfully denied. Voskuil AA at para 199: Record p 3223.

[275] FA at para 92: Record p 41. This is not denied. Rabie AA at para 167: Record p 1876.

242. The Applicants have put up evidence to establish that these conditions have been met. The discrimination operates as a result of two facts.

243. First, the data shows that police stations that serve poor, Black areas have the lowest relative police:population ratios. They have the fewest number of police officers relative to the population. The claim is not merely that poor, Black areas do not have enough police officers. The claim is that they have fewer police officers than rich, White areas. It is the differentiation between rich and poor, White and Black, that is the source of the discrimination.

244. That on its own might not amount to discrimination. If the poor, Black areas had proportionately less crime, then there may be no additional burden, nor any deprived benefit. They would have fewer police officers because they needed fewer police officers. But the opposite is true.

245. Second, the same poor, Black areas that have the lowest police:population rations also have the highest rates of violent crime.[276] Those areas that need the most police officers to meet the scourge of murder, rape and robbery, have the fewest police officers. And the evidence establishes that police:population ratios do affect the quality of policing and crime rates – more police result in better policing and less actual crime.

246. The combination of those two facts about poor, Black areas – lower police:population ratios and higher violent crime rates – compared to rich, White areas constitutes discrimination:

    246.1. It imposes a burden or disadvantage on the basis of race and poverty. Poor, Black people must live in areas which have both higher violent crime rates and lower police:population ratios. They therefore endure worse policing than rich, White areas, and receive less relative protection.

    246.2. It withholds a benefit or advantage on the basis of race and poverty. Rich, White people live in areas which have both low violent crime rates and high

[276] See FA at para 75: Record p 37.

police:population ratios. They are relatively safe and well policed. Poor, Black areas do not enjoy that advantage.

246.3. It constitutes the provision of inferior service on the basis of race and poverty. Necessarily, if fewer police officers have to police more violent crime, they will provide an inferior service. This is the core conclusion reached by the Khayelitsha Commission.

247. The position is accurately summarised by the Khayelitsha Commission: "*the residents of the poorest areas of Cape Town that bore the brunt of apartheid are still woefully under-policed twenty years into our new democracy and are often the police stations with the highest levels of serious contact crime. This pattern needs to change as a matter of urgency.*"[277]

248. Importantly, the Respondents do not seriously dispute the statistics that found the above analysis. Their defence is primarily in justifying the distribution of police resources. We address that below.

249. In any event, the Applicants merely had to establish a *prima facie* case of discrimination. It was for the Respondents to rebut that *prima facie* case. They could only do that by establishing that the Applicants' statistics were mistaken, or by producing their own statistics to dispute the Applicants' version. They have not done so.

250. However, there are two parts of the defence that go to this part of the analysis:

250.1. The new allocations in 2016/17; and

250.2. The claim that additional policemen will not affect crime rates.

251. First, the Respondents claim that the new distributions in the Western Cape in 2016 and 2017 address the discrimination. But that is no answer for three reasons that have been dealt with above:

[277] FA at para 6: p 14.

251.1. *First*, as Redpath demonstrates even using the most recent numbers, the correlation of low relative police allocations with race, poverty and violent crime remains. While the allocations may have slightly ameliorated the discrimination, they have not eliminated it.

251.2. *Second*, those allocations are temporary and were prompted by this litigation. There is no guarantee that, without a finding that the existing allocation is unlawful, the temporary measures will not be reversed. That is particularly so where the THRR continues to produce irrational and discriminatory theoretical allocations.

251.3. *Third*, even if the 2016/17 changes met the claim about the actual allocation in the Western Cape, it would be no answer to the challenge to the THRR itself, or to the system for making allocations nationally.

252. Second, the Respondents make the entirely unsupported assertion that the level of police resources makes no difference to crime levels. For example, Rabie states: "*I do not accept that … a higher allocation of police resources will reduce crime.*"[278] They seek to solely blame other socio-economic factors for high crime rates in areas with low police allocations. In essence, the argument is that there is no burden on poor, Black areas, nor are they provided with an inferior service because it would make no difference even if they were allocated more policemen.

253. While the Applicants accept that SAPS does not have complete control over the factors driving crime, and that crime-fighting must be a multi-facetted approach, this cannot avoid a finding of discrimination. There are two reasons.

254. *First*, the evidence makes it absolutely clear what common sense tells us: additional police resources will help in reducing crime and improving safety. That appears from the following:

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[278] Rabie AA at para 167: Record p 1876. See also Rabie at para 73: Record p 1847; and Rabie at para 100: Record p 1857.

254.1. Redpath testifies unequivocally that "*there exists a great deal of evidence that policing and the criminal justice systems do have an impact on crime. … There is little doubt that effectrive policing can reduce crime.*"[279] Unlike SAPS, she refers to both international studies, and her own analysis of data in the Western Cape.[280] While noting the statistical difficulties in measuring the impact of additional resources, she concludes that between 2013 and 2015, every additional 6 police officers resulted in one less murder.[281]

254.2. Rabie himself testified before the Commission that if you weaken visible policing, you can expect an increase in crime levels because if you deplete capacity to prevent crime from happening "*you can expect an increase in crime immediately*".[282]

255. *Second*, even if there were no direct link between allocations and crime rates, there is an indisputable link between allocations and the effectiveness and efficiency of the service SAPS can provide. The Khayelitsha Commission conducted an extensive investigation into crime in Khayelitsha, including the evidence of numerous police officers and experts. It noted that the station commanders at all three Khayelitsha stations complained that "*they had too few SAPS members at their police stations*" and that they had "*insufficient personnel to provide an efficient and effective service*".[283]

256. This led to the conclusion that "*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*".[284] There were both insufficient detectives for the caseload, and not enough visible policing personnel to patrol informal

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[279] Redpath RA at para 57: Record pp 3780-1.

[280] Redpath RA at paras 57-62: Record pp 3781-3.

[281] Redpath RA at para 60.4: Record p 3782.

[282] RA at para 58: Record p 3503, citing Annexure **PM25**: Record p 414.

[283] FA at para 56: Record p 27.

[284] FA at para 57: Record p 27.

neighbourhoods.[285] That led to dockets taking longer to investigate, and would be less likely to result in a successful prosecution. And it also has the effect that the police are less likely to deter or prevent criminals, or arrest criminals after a crime has occurred.

257. Accordingly, the Commission concluded that "*appropriate staffing levels may be a necessary condition for effective and efficient policing*", even if staffing alone was not enough.[286] Rabie specifically admits this last quotation.[287] The provision of a less effective and less efficient policing service to poor Black areas than is provided to rich, white areas plainly constitutes discrimination.

Unfairness

258. The onus rests on the Respondents to show that the discrimination is fair. They have failed to discharge that burden. In this section, we first set out the factors that demonstrate that the discrimination is unfair. We then consider what we understand are the Respondents' reasons for claiming the discrimination is fair.

Factors establishing unfairness

259. The following factors demonstrate the unfairness of the discrimination:

259.1. The position of the complainants in society;

259.2. The impact of the discrimination; and

259.3. The systemic nature of the discrimination.

[285] FA at para 57.1-57.2: Record pp 27-8.

[286] FA at para 58: Record p 28.

[287] Rabie at para 120: Record p 1862.

The position of the complainants

260. The complainants in this matter are poor, Black people. Black people have been the victims of historical discrimination for hundreds of years in South Africa. That truth is so obvious it barely requires repetition. But it is helpful to recall the nature and extent of that historical wrong. Mogoeng CJ recently summarised our history of racial discrimination in these terms:

> "*South Africa is literally the last African country to be liberated from the system that found nothing wrong with the institutionalised oppression of one racial group by another for no other reason but the colour of their skin, shape of their nose and the length or texture of their hair. The underlying reason advanced for this irrational differentiation was that African people in particular and black people in general, were intellectually inferior, lazy and lesser beings in every respect of consequence. … Everything about the oppressed was dismissively branded as backward and inconsequential. … The system was all about the entrenchment of white supremacy and privilege and black inferiority and disadvantage. No wonder the United Nations resolved that that system was a crime against humanity.*"[288]

261. This history of discrimination infiltrated every part of Black people's lives. Black people were dispossessed of land in order to advance the interests of white people, and develop a pool of cheap labour for white farmers and capitalists.[289] Black people were

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[288] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) ("*City of Tshwane*") at para 2.

[289] *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC) at para 16 ("*The purpose of [land dispossession] was, first, the obvious one of making more land available to white farmers. The second "was to impoverish black people through dispossession and prohibition of forms of farming arrangements that permitted some self-sufficiency. This meant they depended on employment for survival, thus creating a pool of cheap labour for the white farms and the mines. White farmers had repeatedly complained that African people refused to work for them as servants and labourers". The third was the enforcement of the policy of racial segregation, which assumed heightened proportions during the apartheid era."*

denied education in order to ensure they could provide menial labour.[290] Black people were denied the recognition of having places named after their heroes and heroines.[291] As the Constitutional Court recognized in the first judgment to deal with equality:

> "*The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.*"[292]

262. Clearly, Black people were and remain the most systematically disadvantaged members of our society. But as Moseneke DCJ has explained, race always intersected with class: "*The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain.*"[293] In *Mdeyide*, the Constitutional Court was considering the adequacy of a law that provided a three-year prescription period for claims against the RAF. In assessing that law, it recognised that "*[t]he poverty, illiteracy and lack of access to transport, modern communication facilities and proper*

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[290] *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) ("*Ermelo*") at paras 45-6 ("*formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.*")

[291] *City of Tshwane*.

[292] *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 40.

[293] *Ermelo* at para 45.

legal advice, which continue to plague and marginalise many in South Africa, have diverse causes, run deep and are widespread."[294]

263. In *Walker*, the Constitutional Court found that the differential imposition of electricity fees in favour of poor, Black areas was fair, precisely because the "complainants" – the residents of rich, white suburbs – were economically advantaged:

> "*In an economic sense, his group is neither disadvantaged nor vulnerable, having been benefited rather than adversely affected by discrimination in the past. In this case for instance, the respondent did not plead poverty as his reason for not paying the amount owing by him*".[295]

264. In *Walker*, the discrimination could be justified because it favoured poor Black communities at the expense of rich, white communities. Here, the opposite is true. Rich, white communities receive disproportionately more resources than poor, Black communities. That could only be justified by the most compelling purpose.

Impact on the complainants

265. The discriminatory allocation of police resources impacts on Black and poor people in multiple ways and on multiple rights. It is clear that "*the extent to which discrimination impacts on other rights will be a relevant consideration in the determination of whether the discrimination is fair*".[296]

266. First, and most obviously, it places them at greater risk of violent crime. This impacts on a range of constitutional rights – the right to life, the right to dignity, the right to freedom and security of the person, and the right to privacy.

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[294] *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) at para 90. See also *Mohlomi v Minister of Defence* [1996] ZACC 20; 1996 (12) BCLR 1559 (CC); 1997 (1) SA 124 (CC) at para 14.

[295] *Walker* at para 47.

[296] *Pillay* at para 94.

267. But the most directly relevant is s 12(1)(c) which guarantees all people the right to be free from public and private violence. The Constitutional Court has repeatedly recognised that s 12(1)(c) imposes an obligation on the state to protect people from crime:

267.1. In *S v Baloyi*, the Court upheld a challenge to a provision of the Prevention of Family Violence Act[297] that appeared to impose a reverse onus, in part because of the importance of combatting domestic violence. Sachs J held that s 12(1)(c) made it clear that there was a positive obligation on the state to protect people from violence:

> "*The specific inclusion of private sources [in s 12(1)(c)] emphasises that serious threats to security of the person arise from private sources. Read with section 7(2), section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity*".[298]

267.2. In *Carmichele*,[299] the Court held that the common law may need to be developed to provide a delictual claim against police and prosecutors that failed to prevent a dangerous criminal from obtaining bail who subsequently assaulted the plaintiff. It held that:

> *"South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in*

[297] Act 133 of 1993.

[298] Ibid at para 11.

[299] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

particular against the invasion of their fundamental rights by perpetrators of violent crime."[300]

267.3. In *Rail Commuters*,[301] the Court held that Metrorail had a positive obligation arising both from statute and ss 10, 11 and 12 of the Constitution to take reasonable measures to protect train commuters. Justice O'Regan explained that that duty has to be "interpreted too in the context in which those obligations are to be performed". Metrorail had an effective monopoly over rail transport, and the consequence of apartheid spatial planning:

> *"means that those most in need of subsidised public transport services are those who often have the greatest distances to travel. Those people are also often the poorest members of our communities who have little choice in deciding whether to use rail services or not."*[302]
>
> *In a series of cases*[303] *concerning violence by police officers, the Court has held that the state is vicariously liable for their conduct. It has done so, in part, because all police officers have a duty "to ensure the safety and security of all South Africans and to prevent crime."*[304]

268. We have referred above[305] to the finding in *Minister of Police and Others v Premier of the Western Cape and Others*[306] that the Premier was obliged to take reasonable steps to shield Khayelitsha residents from the invasion of their fundamental rights because of police inefficiency in combating crime. It follows that increased exposure to violent

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[300] Ibid at para 62.

[301] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC).

[302] Ibid at para 82.

[303] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) (*"K"*); *Minister of Safety and Security v Luiters* [2006] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC); *F v Minister of Safety and Security and Another* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC).

[304] *K* at para 18.

[305] In the Introductory section.

[306] [2013] ZACC 33; 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC).

crime violates people's constitutional rights. And SAPS has a constitutional duty to act reasonably to prevent those violations. An allocation system that increases poor Black people's exposure to violent crime is a serious limitation on their rights, and a serious impact on their dignity. It means that poor, Black people "*feel, and are in fact, less safe*".[307] This is borne out by studies that show that people in Khayelitsha feel substantially less safe than the average for people in the Western Cape and South Africa as a whole.[308]

269. Second, the discriminatory allocation of resources impacts on the right to education. Section 29(1)(a) guarantees all people the right to a basic education. Moseneke DCJ has said the following of the importance of education:

> "*Teaching and learning are as old as human beings have lived. Education is primordial and integral to the human condition. The new arrivals into humankind are taught and learn how to live useful and fulfilled lives. So education's formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now. The indigenous and ancient African wisdom teaches that "thuto ke lesedi la sechaba"; "imfundo yisibani" (education is the light of the nation) and recognises that education is a collective enterprise by observing that it takes a village to bring up a child.*"[309]

270. Equal Education conducted a detailed social audit to determine how discriminatory allocations of police resources impacted on learners in poor, Black areas in the Western Cape.[310] The audit reached the following conclusions:

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[307] FA at para 158.2: Record p 59.

[308] FA at paras 34-36: Record pp 21-2.

[309] *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) at para 1.

[310] The Respondents do not dispute the results of this audit, but instead argues that the "*attitude of learners to crime and the involvement of the community*" is a more effective deterrent of crime than adequate police resources. Rabie AA at paras 238-241: Record pp 1894-5. We have dealt with these arguments above.

270.1. One third of learners in quintile 1 schools – that are located primarily in poor and Black communities – feel unsafe on their' travels to and from school, and at their schools.[311]

270.2. White learners suffered significantly less violence than Black learners.[312]

270.3. 81% of primary school learners and 74% of high school learners feel safer when police are present.[313]

271. Equal Education also points out how in Nquthu in KwaZulu-Natal, the allocation of only 135 police officers for every 100 000 people impacts on learners. Their experiences are summarised as follows:

> "*Learners are … a target for violent attacks and crime on their routes to and from school. The perpetrators are adults and fellow learners. The struggle of Equal Education's membership and other learners in Nquthu therefore highlights not only a barrier to access to education, but also an ongoing infringement on the rights of learners and children to safety.*"[314]

272. These realities impact on learners ability to learn. As Equal Education explains:

> "*Children should be safe in their communities and should feel safe at home as well as on their journeys to and from school. The school itself should be a place where learners can focus on their studies and the experience of growing by making friends and working together on projects. Learners in poor schools, however, are distracted by a sense of violence and crime.*"[315]

[311] EE FA at para 32.3: Record p 1039.

[312] EE FA at para 32.5: Record p 1040.

[313] EE FA at para 32.6: Record p 1040.

[314] EE FA at para 41: Record pp 1042-3. These facts are not disputed by the Respondents. See Rabie AA at paras 251-252: Record pp 1897-8. They merely argue that other stakeholders also bear a responsibility. We have dealt with that argument elsewhere.

[315] EE FA at para 34: Record p 1041. Admitted by the Respondents in Rabie AA at para 244: Record p 1896.

273. Circumstances that impose a barrier to access education violate s 29(1)(a). Where learners do not have textbooks,[316] transport,[317] furniture,[318] or teachers,[319] their right to basic education is limited.[320] Being too scared to walk to school, or too scared to concentrate in school, because there are too few police officers, also limits the right to basic education. Where that fear is felt disproportionately by poor, Black learners, it demonstrates the impact of the discriminatory allocation of police resources, and therefore its unfairness.

274. The limit imposed on the right to basic education is particularly serious because it entrenches the ongoing impact of apartheid discrimination. As Nkabinde J put it in *Juma Musjid*:

> "*The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.*"[321]

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[316] *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA).

[317] *Tripartite Steering Committe and Another v Minister of Basic Education and Others* [2015] ZAECGHC 67; 2015 (5) SA 107 (ECG); [2015] 3 All SA 718 (ECG).

[318] *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMHC 5; [2014] 2 All SA 339 (ECM); 2014 (3) SA 441 (ECM).

[319] *Centre for Child Law & others v Minister of Basic Education & others (National Association of School Governing Bodies as amicus curiae)* [2012] 4 All SA 35 (ECG).

[320] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC).

[321] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 42.

275. Third, women are particularly vulnerable to violent crime. This was recognised in *Baloyi* and *Carmichele*. As the *amicus curiae* points out, the discriminatory allocation has a particularly severe impact on poor, Black women.

276. Fourth, while the impact of the discrimination is real and practical, it is also symbolic. It entrenches the idea that poor, Black people are less deserving of protection from crime than rich, White people. It not only practically entrenches patterns of disadvantages but tells South Africans that those patterns are acceptable or inevitable.

277. That type of symbolic harm has regularly been recognised as constituting a form of harm against marginalised and historically disadvantaged groups:

277.1. In *Pillay*, the School argued that the infringement of Sunali's rights were not severe because she could wear the nose-stud at home. The Constitutional Court rejected this argument: "*What is relevant is the symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome.*"[322]

277.2. In *NCGLE v Minister of Home Affairs*, the Court struck down the criminalisation of sodomy. Part of the reason was that the law's "*symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest.*"[323]

277.3. In his minority judgment in *Walker*, Sachs J held that "*even in the absence of concrete disadvantage, the symbolic effect of a measure … could impair dignity in a way which constitutes unfair discrimination.*"[324] This was particularly likely if the symbolic harm "*was so related in impact to patterns of disadvantage as*

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[322] *Pillay* at para 92.

[323] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC) at para 28.

[324] *Walker* at para 129.

> *to leave the persons concerned with the understandable feeling that once more they were being given the short end of the stick.*"[325]

278. These are all harms that impact on human dignity.[326] Being less safe, less able to get an education, and more excluded fundamentally undermines the "*equal concern and equal respect*"[327] that the Equality Act and the Constitution demand.

The systemic nature of the discrimination

279. In *Pillay* the Equality Court held that the discrimination at issue there – a provision governing jewellery in a school's code of conduct – was systemic in nature, in part because it built on the existing marginalisation of Hindu and Tamil people. Kondile J (Tshabalala JP concurring) reasoned:

> "*The form of discrimination which results from a school's code of conduct is invisible as it is meted out through practices and rules that appear to be neutral yet they operate to exclude the disfavoured groups. As the code of conduct reinforces social, structural and institutionalised inequality and unfair discrimination it is systemic in nature and is not fair.*"[328]

280. Even more so than in *Pillay*, the discrimination here is not the result of a single decision or an isolated incident. It is built into the fabric of our police service, and exacerbates the system of spatial apartheid, and the exclusion of poor, Black people from state resources. It is the paradigm case of systemic discrimination because it is part of a larger system, and affects poor, Black people across the entire country. And it seems invisible, both because it is unintentional, and because it reinforces the way things have always been.

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[325] Ibid.

[326] Equality Act s 14(3)(a).

[327] *Pillay* at para 103.

[328] *Pillay v Kwazulu-Natal MEC of Education, Cronje and Others* [2006] ZAEQC 1; 2006 (6) SA 363 (EqC) at para 56.

281. This is a strong factor counting in favour of a finding of unfairness.

The failure to rebut the presumption of unfairness

282. In order to rebut the presumption of unfairness, the Respondents would have to demonstrate that the discrimination served some legitimate purpose that could not be achieved in any other way. They have failed to do so because they have failed to show that the discrimination serves a legitimate purpose, or that there are no less restrictive means of achieving that purpose.

Purpose of the discrimination

283. As we understand the Respondents' position, there are two elements to their argument about the purpose of the discrimination.

284. First, they contend that the purpose is to be race neutral and not to provide "*affirmative action allocation of police resources*".[329] There are two difficulties with this as a defence to unfairness:

284.1. It misrepresents the Applicants' case. The Applicants do not contend that police resources should be "*dispersed on the basis of racial criteria*".[330] The argument is that the apparently neutral system has discriminatory results. Once those discriminatory results have been established, the alleged neutrality of the system cannot displace the presumption of unfairness.

284.2. It is not really a purpose at all. Intending not to have a discriminatory allocation cannot be the purpose of a system that is, in fact, racially discriminatory.

285. Second, the real purpose seems to be that the allocation of police resources serves the purpose of policing total reported crime. As Rabie puts it: "*The results of the*

[329] Rabie AA at para 216: Record p 1888.

[330] Rabie AA at para 217: Record p 1889.

allocation process is an overall allocation of police resources across the country based on objective and rational variables." He explains the position as follows:

> "*The most important question that must guide an allocation process is how many police officers are required to perform policing tasks? What resources do they require to perform effective policing work? What is the legal environment that must be complied with relating to safety and labour relations? What skills are required to perform the policing tasks?*"[331]

286. In essence, the Respondents contend that the discrimination is fair because it is designed to fairly meet the actual policing needs of communities. If that means that poor, Black areas receive a lower police: population allocation than rich, White areas, that is because their policing needs are relatively lower.

287. The Applicants accept that SAPS should allocate its resources according to relative need. In general, they agree with the supposed purpose of providing as many resources as are needed.

288. But – leaving aside whether the system achieves that purpose – there are three fundamental problems with the way that SAPS has conceptualised what its allocation process is meant to achieve.

    288.1. *First*, the allocation is based on reported crime, instead of actual crime. As detailed above, the problem with relying on total reported crimes is that areas where there is significant under-reporting of crime will be under-resourced in respect of the true crime rate.[332] This has a self-reinforcing effect: "*skewed allocation leads to skewed reporting trends which in turn leads to further skewed allocations.*"[333] The purpose is flawed because SAPS should be policing actual crime, not only reported crime. As we point out below, that is

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[331] Rabie AA at para 49: Record p 1839

[332] Redpath FA at para 26: Record p 659. As Redpath acknowledges, relying on reported crime may make sense for the detective service as they can only investigate crimes that are reported. Redpath FA at para 30: Record p 659.

[333] Redpath FA at para 27: Record p 659.

possible to achieve. Indeed, it is precisely this purpose that <u>creates</u> the discrimination.

288.2. *Second*, those statistics demonstrate the next problem: the system ignores the reality of limited resources. As Redpath points out, there is something irrational about allocating resources in the abstract.[334] It prevents determinations of who needs resources more. Because Provincial Commissioners generally have not exercised the s 12(3) powers to permanently alter the theoretical allocations determined by the THRR, this distributive question is often left unanswered. Instead, there is an across the board cut so that all police stations only receive 68% of the theoretical allocation.[335]

288.3. *Third*, it fails to adequately weight the severity of crime. The THRR does weigh different crimes differently. But as Redpath explains, these weightings are patently inadequate when compared to other countries. Canada weighs a murder 1000 times more than possession of cannabis, while in the UK murder is given 2700 times more weight.[336] By contrast, in South Africa a murder is weighted only 2.5 times more than less serious crime. One detective is appointed for every 240 murders, or for 600 petty crimes – again a ratio of 2.5:1.[337]

289. The result is that while the THRR may be well intentioned, its purpose systematically disadvantages poor, Black areas. It fails to account for under-reporting that is more prevalent in poor, Black Areas, it is inattentive to resource constraints, and it is not based on an adequate analysis of the severity crime.

290. <u>For all these reasons</u>, the purpose of merely policing total reported crime is not a compelling purpose. The constitutional function of SAPS is "*to prevent, combat and*

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[334] Redpath FA at para 53: Record p 664.

[335] Redpath AA at para 37: Record p 662.

[336] Redpath RA at para 47: Record p 3777.

[337] Redpath RA at para 48: Record p 3778.

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." That cannot be achieved by allocating resources based primarily on reported crime. The purpose of is therefore not compelling, and not a basis to displace the presumption of unfairness.

Whether and to what extent the discrimination achieves its purpose

291. If we accept that the purpose of the discrimination is to fairly distribute police resources according to actual need, then the question is whether the theoretical or actual allocations achieve that purpose. As we have demonstrated above, they do not.

292. The allocation of resources is not only discriminatory, it is irrational. The areas with the highest burden of violent crime are granted the lowest relative allocation of resources. Even leaving aside the correlation with race and poverty, that is an irrational misallocation of resources. Where the burden of crime is highest, the resource allocation is lowest. General Lamoer acknowledged this was irrational at the Khayelitsha Commission.[338] The Commission reached the same conclusion.[339]

293. In this sense, the basis for the discrimination and its failure to achieve its purpose are interlinked. The allocation of resources imposes a burden on poor, Black communities precisely because they have higher rates of crime coupled with lower allocations of resources.

294. The Respondents' answer is that the allocation is rational because it responds to reported crime. But that cannot be a justification. People are affected by crime whether it is reported or not. SAPS is aware that not all crime is reported, and that poor, under-resourced areas have higher levels of under-reporting than rich, well-resourced areas. The resources are diverted disproportionately to rich, White areas because that is where crime is reported, not where it happens. If the true purpose is

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[338] FA at para 53: Record p 26.

[339] FA at para 51: Record p 26.

to deal with all crime then SAPS has failed to achieve that goal. If the purpose is to deal only with reported crime, then the purpose is irrational.

295. We have already described why the THRR produces these results: the failure to account for under-reporting, the failure to adequately weight the severity of crime, the way in which the weighting unintentionally favours rich areas over poor areas, the disproportionate weight afforded to property crime, and the poor information provided by police stations.

296. But whatever the reasons, the reality is undeniable. If one takes account of under-reporting, there would be a significant shift in the distribution of police resources. While Nyanga, Gugulethu, Harare and Khayelitsha account for 6% of reported crime in the Province, they likely account for roughly 22% of actual crime. This is very close to the 24% of murders that occur in those areas. If resources were distributed on that basis, those four stations would receive four times more police officers than are currently allocated to them.[340] That is even before the additional burdens of violent crime and the difficulties of policing in informal areas are taken into account.

297. Clearly, the method is not connected to the outcome. The Respondents cannot justify a system that does not do what it is meant to do: rationally and fairly distribute resources. There is no basis to displace the presumption of unfairness.

Availability of less restrictive means

298. The last option for the Respondents is to argue that they had no choice, that it is impossible for them to allocate resources in a less discriminatory way while performing their function under s 205(3).\

[340] Redpath RA at paras 29-30: Record pp 3770-1.

299. But they have failed to make that case. There clearly are ways in which the discrimination can be reduced <u>and produce a better allocation of police resources</u>. To list a few:

299.1. SAPS could take account of actual crime rates. It can do this by relying on the rates of murder and aggravated robbery,[341] or by using the available survey data on reporting rates.[342]

299.2. SAPS can use a more realistic weighting of violent crimes compared to less serious crimes that is connected to the actual impact of the crime on the victims and society at large.

299.3. SAPS could change the way in which it weighs the multitude of factors that go into the THRR to reduce the bias in favour of rich, White communities.

299.4. SAPS could rely more heavily on population numbers (rather than crime rates) to guide resource allocations.[343]

299.5. SAPS could have better guidance on how Provincial Commissioners should exercise their powers under s 12(3) to allocate resources, and the Provincial Commissioners could exercise that power in a way that is not racially discriminatory.

300. There are a multitude of other ways that SAPS could allocate its resources more equitably, rationally and fairly. Rabie repeatedly indicated at the Khayelitsha Commission that he was open to suggestions on how to improve the allocation of resources. It is not for the Applicants or this Court to dictate to SAPS how to achieve that. But the possibility of a less discriminatory and <u>more effective</u> system of allocation means that, yet again, SAPS has failed to discharge its burden to show that the discrimination is fair.

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[341] Redpath RA at paras 35-40: Record pp 3772-3.

[342] Redpath RA at paras 29-30: Record pp 3770-1.

[343] This is the model suggested by Redpath. Redpath FA at para 54: Record p 665.

Conclusion

301. The discrimination at issue here is exceptionally serious. It is against one of the most historically and currently disadvantaged groups. It has a real impact on multiple constitutional rights. It is systemic in nature.

302. SAPS has failed to explain why it this extremely serious discrimination is fair. If its purpose is to police reported crime, that is not a legitimate purpose. If its purpose is to fairly distribute resources so SAPS can perform its constitutional functions, then it has failed to achieve that purpose. And it has failed when there are readily available mechanisms to remedy the failure.

303. For all these reasons, the discrimination is unfair.

V REMEDY

304. This part describes and justifies the relief the Applicants seek. We do so in the following sections:

    304.1. A summary of this Court's remedial powers;

    304.2. The declaratory relief; and

    304.3. The supervisory relief.

Remedial Powers of the Equality Court

305. The remedial powers of the Equality Court are set out in s 21(2) of the Equality Act. In general, the court must grant "*an appropriate order in the circumstances*". In addition to that general power, the specific remedial powers include the following:

> *(b) a declaratory order;*
>
> *…*
>
> *(f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;*
>
> *…*
>
> *(h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;*
>
> *…*
>
> *(k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;*
>
> *(m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order;*
>
> *(p) an order to comply with any provision of the Act."*

306. It is also necessary to consider the constitutional provisions relating to remedies. This is so for two reasons:

    306.1. Section 21(2) of the Equality Act must be interpreted in line with the Constitution; and

306.2. This Court has not only the powers in the Equality Act, but also the general remedial powers and obligations set out in the Constitution.

307. There are two relevant constitutional provisions:

307.1. Section 38 provides an entitlement to approach a competent court for relief if a right is violated or threatened, and grants that court the power to "*grant appropriate relief, including a declaration of rights*".

307.2. Section 172(1) provides:

> *"When deciding a constitutional matter within its power, a court -*
>
> *(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
>
> *(b) may make any order that is just and equitable"*

308. In *Fose*, the Constitutional Court held that "*an appropriate remedy must mean an effective remedy*".[344] Ackermann J continued:

> *"[W]ithout effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated."*[345]

309. In sum:

309.1. This Court has wide remedial powers.

309.2. Those powers specifically include the power to make declarations of unlawfulness, and to grant supervisory orders.

309.3. In order to be appropriate, the relief must be effective.

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[344] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC) at para 69.

[345] Ibid.

<u>Declaratory Relief</u>

310. The Applicants seek three declarations, which flow naturally from the finding that the theoretical and actual allocations unfairly discriminate on the basis of race and poverty.

311. First, it seeks a declaration that the **actual allocation of resources in the Western Cape** unfairly discriminates on the basis of race and poverty. As the Applicants did not have the data to establish such a violation in other provinces or nationwide, the declaration is limited to the Western Cape.

312. Second, a declaration that the **system of allocating resources** unfairly discriminates on the basis of race and poverty. The allocation system is based on, but not limited to, the THRR.[346] As the Commission concluded, and the evidence demonstrates, that system has a "*built in bias*" against poor, Black areas. The THRR is the primary reason for the actual allocations that unfairly discriminate on the basis of race and poverty.

313. Lastly, the Applicants seek a declaration that **s 12(3) of the SAPS Act** allows Provincial Commissioners to determine the permanent distribution of resources within their provinces. As we understand SAPS' position, it accepts that the Provincial Commissioner has these powers.[347] However, given the confusion related to this issue at the Khayelitsha Commission, and the ongoing uncertainty concerning whether this is a power to make permanent or only temporary allocations, the declaration is necessary.

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[346] The THRR allocations constitute the first stage in the allocation process. The second stage, the adjustment for the actual budget, applies to all police stations. The third stage, which entails the Provincial Commissioners' discretion to alter THRR allocations, is rarely utilised (see Redpath FA at para 41: Record p 662, read with Makgato AA at para 93: Record p 3003 and Voskuil AA at paras 191 – 192 (where he avoids the issue): Record p 3221.

[347] Rabie AA at para 173: Record p 1877.

Supervisory Relief

314. In this section, we first describe the relief the Applicants seek. We then provide examples of cases where our courts have granted supervisory relief, and draw out the principles that should govern this Court's decision. Lastly, we explain why, in light of those principles and examples, the particular form of supervisory relief sought is justified in this case.

Relief Sought

315. The Applicants seek differing forms of relief to cure the immediate discriminatory allocation of resources in the Western Cape, and to remedy the systemic problem with how resources are allocated countrywide.

316. In the Western Cape, the Applicants seek the following relief:

316.1. The Provincial Commissioner must prepare a plan within 3 months to re-allocate resources within the province to address the most serious disparities, and submit it to the Court.

316.2. The Applicants and other interested parties can comment on the plan.

316.3. The Court will then either approve it, amend it, or ask the Provincial Commissioner to file an amended plan.

316.4. Once a plan is approved, the Provincial commissioner must implement the plan within 6 months, and report to the Court monthly on his progress.

317. This is effectively the relief the Khayelitsha Commission proposed in its recommendations. It recommended that "*the Provincial Commissioner allocate additional uniformed police to the three Khayelitsha police stations, in terms of section 12(3) of the SAPS Act, to perform VISPOL functions, particularly to enable regular*

patrolling of informal settlements, in partnership with Neighbourhood Watches."[348] The relief is wider because it is not limited to Khayelitsha, but less specific because it does not specify what functions the additional members should perform, or how they should perform them.

318. This relief is targeted with tighter timeframes because the residents of the Western Cape require urgent and real relief. In addition, the process is less complex than developing a new system for the entire country and justifies tighter and more detailed supervision.

319. Nationally, the Applicants seek an order:

319.1. Requiring the Minister and the National Commissioner to re-evaluate the system for allocating police resources and to submit a plan on how they intend to run that re-evaluation process.

319.2. They must submit reports every four months on their progress in complying with the plan.

319.3. Complete the re-evaluation process within four years.

319.4. The Applicants and other interested persons may, at any stage, make submissions on the plans or the reports and seek further directions form the Court.

320. This too reflects the recommendation of the Khayelitsha Commission. To recall, the Commission recommended that SAPS human resource allocation system "*be overhauled as a matter of urgency. Accordingly, the Commissioner recommends that the Minister of Police request the National Commissioner of SAPS to appoint a task team to investigate the system of human resource allocation within SAPS as a matter of urgency.*"[349] The relief the Applicants seek is similar to the Commission's recommendation.

[348] FA at para 178: record p 65.

[349] FA at para 170: record pp 63-4.

321. This process is more hands-off because the policy process of developing a new system for allocating resources must be driven primarily by SAPS. It only requires basic reporting requirements, not Court approval of the plan. Further, Court intervention is provided for only if deemed necessary based on SAPS' conduct.

Cases and Principles

322. In addition to the express authorisation in s 21(2)(m) of the Equality Act, there is clear precedent for an order of court supervision.

323. In *Treatment Action Campaign* the Constitutional Court was confronted with an argument that it lacked the power to grant a supervisory interdict.[350] Although it ultimately declined to do so, it held that courts have the power to grant such remedies in appropriate circumstances:

> "*South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation.*"[351]

324. The unanimous court specifically rejected the contention that supervisory interdicts violate the separation of powers:

> "*Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state*

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[350] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC).

[351] Ibid at para 113. See also ibid at para 106 ("*Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.*")

> *has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.*"[352]

325. This is a vital point as the Respondents' primary basis for opposing the relief sought is a claim that it violates the separation of powers. But that is simply not so. If supervision is necessary to prevent further discrimination, then it is not a breach of the separation of powers, but a proper exercise of this Court's constitutional duty.

326. Since *TAC*, the Constitutional Court has granted structural interdicts in a number of cases that provide guidance on when supervision is appropriate:

    326.1. *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others*:[353] The Court found that the state had taken "*far too long*"[354] to substitute death sentences with alternative punishments after the death penalty was declared unconstitutional. Although the process had commenced, Justice Yacoob held that "*the process has taken so long that it will be inadvisable for this Court to assume that the death sentences will be substituted as envisaged.*"[355] It was because of the existing delay, and the urgency of ensuring substitution occurred speedily that he ordered that the Court should supervise the substitution of the remaining sentences. The Court required the state Department to: (a) file a report with the details of all those sentenced to death; and (b) an affidavit setting out the reasons why a sentence had not yet been substituted, and the steps that would be taken to do so.[356] The Court

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[352] Ibid at para 99.

[353] [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC).

[354] Ibid at para 59.

[355] Ibid at para 60.

[356] Ibid at para 63.

recorded the results of its order in two subsequent judgments.[357] While the process took longer than expected, after filing five reports, the state eventually satisfied the Court that all the sentences had been substituted.

326.2. *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another*:[358] The Court declared s 3 of the State Liability Act unconstitutional for preventing the execution of civil claims against the state. There was evidence before the Court that there were over 200 outstanding judgment debts against the state. As a result of "*the many instances of state officials' inefficiency*", the Court held that it was necessary to oversee the process of settling those debts.[359] It therefore ordered the relevant Minister to produce: (a) a list of all the outstanding judgments; and (b) a plan for the settlement of all those debts.[360] As the Court recorded in a later judgment, the Minister filed three reports detailing its compliance.[361]

326.3. *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*:[362] Despite refusing to uphold constitutional challenges to a variety of sections of the Criminal Procedure Act related to testimony by children, the Court held that it was necessary to grant a supervisory order to monitor the provision of intermediaries in Regional Courts. The evidence before it showed that, despite a clear legislative requirement that intermediaries be available, many Regional courts had no

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[357] *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* [2005] ZACC 16; 2006 (2) BCLR 293 (CC) and *Sibiya and Others v Director of Public Prosecutions* [2006] ZACC 22; 2006 (2) BCLR 293 (CC).

[358] [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC).

[359] Ibid at para 87.

[360] Ibid at para 92.

[361] *Minister for Justice and Constitutional Development v Nyathi and Others* [2009] ZACC 29; 2010 (4) BCLR 293 (CC); 2010 (4) SA 567 (CC) at para 7.

[362] [2009] ZACC 8; 2009 (4) SA 222 (CC).

intermediaries, resulting in delays, or in children testifying without intermediaries. Ngcobo J (as he then was) held that "*the rights of child complainants in sexual offence cases are threatened by the non-availability of intermediaries and related child protection facilities*"[363] and this required "*urgent attention.*"[364] He therefore ordered the relevant Director-General to provide a report indicating which Regional courts still required intermediaries and related facilities, and what steps would be taken to meet those needs.[365]

326.4. In *Pheko and Others v Ekurhuleni Metropolitan Municipality*,[366] the Court held that the eviction of the applicants had been unlawful. It ordered the municipality to find suitable alternative land for the applicants. However, it was uncertain when and where that land would be located. For that reason, the Court maintained supervision of the implementation of its order. It instructed the Municipality to file a report on its progress in finding alternative land. Nkabinde J explained the reason as follows:

> "*The applicants are entitled to effective relief. It is, however, uncertain how long it will take for the Municipality to identify land for purposes of affording the applicants access to adequate housing. Supervisory relief is thus necessary in this case to enable the Municipality to report to this Court about, amongst other things, whether land has been identified and designated to develop housing for the applicants.*"[367]

326.5. In *AllPay 2*[368] the Court had to determine the appropriate remedy following a finding that the tender for the payment of social grants had been unlawfully

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[363] Ibid at para 202.

[364] Ibid at para 204.

[365] Ibid at para 205.

[366] [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC).

[367] Ibid at para 50.

[368] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC).

awarded. It could not simply set aside the award because of the risk that grant beneficiaries would not be paid. It therefore suspended the order of invalidity to allow SASSA to run a new tender process. It also maintained supervision over that new process:

> "*further disciplined accountability is needed in the initiation and execution of the new tender process. This needs to be monitored. This Court has wide remedial powers to ensure effective relief for a breach of a constitutional right. In light of the importance of the right to social security and the impact on and potential prejudice to a large number of beneficiaries, the public clearly has an interest in ensuring that the tender is re-run properly. In these circumstances, it is appropriate to impose a structural interdict requiring SASSA to report back to the Court at each of the crucial stages of the new tender process.*"[369]

326.6. This supervision was further extended in Black Sash.[370] SASSA had failed to properly run a new tender process. The Court then granted an exceptionally detailed order that required the Minister and SASSA to file reports every three months on their progress in making a new arrangement for the payment of grants. Moreover, it provided for the appointment of "*independent legal practitioners and technical experts*" to evaluate the steps being taken by SASSA and to report back to the Court.[371]

327. There are also numerous examples of the High Court granting structural interdicts.[372] Two recent examples warrant mention:

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[369] Ibid at para 71.

[370] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC).

[371] Ibid at para 76.

[372] See, for example, *S v Z and 23 Others* 2004 (4) BCLR 410 (E) (structural interdict monitoring the conversion of a facility into a reform school); *EN & Others v Government of the RSA & Others* 2007 (1) BCLR 84 (D) (provision of anti-retrovirals to prisoners); *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) (provision of electricity to prisoners); *Kiliko & Others v Minister of Home Affairs & Others* 2007 (4) BCLR 416 (C) (provision of services to refugees).

327.1. In 2014, the Johannesburg High Court granted an order against the Minister of Home Affairs declaring a variety of practices concerning the detention of foreigners at the Lindela Repatriation Centre unconstitutional.[373] The Court also required the Minister to regularly report to the Applicant – the South African Human Rights Commission – on its compliance with the order.[374]

327.2. In 2016, the Western Cape High Court granted a detailed supervisory order requiring the Government to improve conditions in Pollsmoor prison.[375] The order required the Government to prepare a "*comprehensive plan*" for how it would remedy the unlawful conditions, report to the court on its progress, and allowed the applicant to comment on that report.[376] Saldanha J endorsed the following justifications for that order:[377]

327.2.1. The respondents had not complied with previous reports by Constitutional Court judges who had visited Pollsmoor and recommended improvements.[378]

327.2.2. The "*consequences of even a good faith failure to comply were so serious that the court should be at pains to ensure effective compliance.*"[379]

327.2.3. Immediate compliance was impossible, and the creation of a plan was necessary to achieve constitutional compliance.

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[373] *South African Human Rights Commission and Others v Minister of Home Affairs and Others* [2014] ZAGPJHC 198; 2014 (11) BCLR 1352 (GJ).

[374] Ibid at para 52.

[375] *Sonke Gender Justice v Government of the Republic of South Africa* unreported case of the High Court, Western Cape Division, Case No: 24087/15. The judgment is http://www.genderjustice.org.za/publication/reasons-delivered-matter-sonke-gender-justice-pollsmoor-remand-detention-facility/.

[376] Ibid at para 3.

[377] Ibid at para 152.

[378] Ibid at para 151(i).

[379] Ibid at para 151(ii).

Recognizing that the constitutional breach would continue for some time required the court "*to put in place an appropriate supervisory mechanism to ensure that the breach continues no longer than is necessary*".[380]

327.2.4. Prisoners are a highly vulnerable group and their rights had continued to be violated despite the best efforts of NGOs and other entities responsible for monitoring conditions of detention.[381]

328. The SCA has recently stressed that relying on ordinary enforcement remedy of contempt is not effective in these types of situations. In *Meadow Glen*,[382] the SCA refused to uphold an order of contempt of court for a municipal official who had not complied with a complex order concerning a dispute between a rich suburb and a poor, informal settlement. Wallis JA and Schoeman AJA described why supervisory remedies are preferable to relying on contempt of court in the following terms:

> "*Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order. … Our courts*

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[380] Ibid at para 151(iii).

[381] Ibid at para 152.

[382] *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* [2014] ZASCA 209; [2015] 1 All SA 299 (SCA); 2015 (2) SA 413 (SCA).

> *may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders.*"[383]

329. The last case to mention is *Mwelase v Director-General of Rural Development and Land Reform*,[384] which draws on the dictum in *Meadow Glen*. The case arose in the Land Claims Court and concerned the implementation of the Land Reform (Labour Tenants Act) which provided labour tenants with a right to apply for rights in the land on which they lived. The relevant department had failed for more than a decade to process labour tenants' applications. The parties initially agreed to a supervisory order where the department would file regular reports on its progress. When it failed to file timeous or adequate reports, the Court appointed a special master to assist the Department to prepare an implementation plan, and then to report to the court on the Department's progress in complying with that plan. In justifying the relief, Ncube AJ wrote:

> *"Effective relief is undoubtedly required for the many thousands of vulnerable labour tenants. The Department has thus far experienced grave difficulties in providing this. If a Special Master could potentially achieve that end, such an appointment is more than justified in my view. I am satisfied that the size and complexity of the task alone supports the appointment of a Special Master to, inter alia, assist this Court to meaningfully monitor implementation.*"[385]

330. In a helpful article, Geoff Budlender and Kent Roach explain that "*[s]upervisory jurisdiction with reports back to the court should not be seen as a punishment of government for defiance of the Constitution. Rather, it is simply <u>a means of ensuring</u>*

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[383] Ibid at para 35 (emphasis added).

[384] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Others* [2016] ZALCC 23, 2017 (4) SA 422 (LCC).

[385] Ibid at para 36.

effective compliance with the Constitution, which must be the core concern of the courts."[386]

331. In a later article, Budlender draws the link between supervision, transparency and accountability.[387] He argues that if a court "*requires an elected government to communicate with its people about important matters of governance and steps taken to comply with constitutional rights [it] cannot reasonably be criticized for being undemocratic or infringing the separation of powers.*"[388] It is merely requiring the state to do what it is already required to do the Constitution. Budlender elaborates on the point as follows:

> "*The necessary precondition for accountability is transparency – unless you know what government is doing it can't be held to account. … And so it seems to me that we have really had it the wrong way around. We have assumed that there has to be some special showing to justify an order requiring government to report on what it is doing, to report to the public and to report to the parties about what it is doing to comply with an order of court. But when one thinks about it a little more closely, it seems to me that there is no need for any special showing at all. All that government is being required to do is to communicate with its people about important matters of government and what steps it is taking to comply with its people's constitutional rights.*"[389]

332. There are several common themes to draw from these cases:

332.1. They all concern vulnerable groups of people – prisoners, refugees, children, homeless people, social grant beneficiaries. The Court's obligation to ensure that its orders are implemented is heightened when those who will suffer are the vulnerable and the marginalised.

[386] Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325 at 350. See also M Bishop 'Remedies' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 9 at 9-188 to 9-189.

[387] G Budlender 'Remedying Breaches of the Constitution' in J Klaaren (ed) *A Delicate Balance: the Place of the Judiciary in a Constitutional Democracy* (2006) 83.

[388] Ibid at 88.

[389] Ibid.

332.2. They often concern situations of repeated or blatant non-compliance with legal obligations, a refusal to act on recommendations, or some other reason to believe that, without supervision, the respondents may not fully and promptly comply with the court's order.

332.3. They all concern situations where there is no easy or immediate solution to cure the unconstitutionality, and full compliance would take time. They concern the need to revisit and change existing practices, and then implement new, constitutionally-compliant practices. It is precisely in order to ensure that the illegality was rectified as promptly as possible, that the courts retained supervision.

The Supervisory Relief is Justified

333. In this instance, the Applicants do not seek a detailed, intrusive mandatory interdict. They do not ask this Court to prescribe to SAPS how it should allocate resources. They ask only that:

333.1. The Respondents undertake the task of re-evaluating the allocation system, and that they report to this Court on their progress; and

333.2. That the Respondents determine how to urgently re-allocate resources within the Western Cape to address the most severe discriminatory effects, and that the Court ensures the plans the Respondents develop meet the standard set in the Equality Act.

334. There is nothing inconsistent with the separation of powers in such a limited order that leaves the policy-making role where it should be – with the executive. The role of this Court is only to check that the executive performs its task "*diligently and without delay*"[390] and in a manner that complies with the Equality Act.

[390] Constitution s 237.

335. If the Respondents act promptly and properly, this Court's supervisory role will be extremely limited. It will read the reports and note the progress SAPS has made. If the Respondents are less then diligent and dutiful in complying with the order, then it is entirely appropriate for this Court to use its supervisory role to ensure more speedy and satisfactory compliance. The extent to which there will be judicial interference is entirely in the Respondents' hands.

336. This limited and measured form of judicial supervision is entirely justified by the three principles outlined above.

337. First, the discrimination impacts on millions of the most vulnerable and marginalised people across South Africa. It concerns the rights of people in Nyanga, Khayelitsha and similar communities. People who are poor and disempowered. And it concerns their fundamental right not only to equality, but to life, dignity and freedom from violence. If this Court concludes that the current allocation system is unfairly discriminatory, it is vital that it ensures there is an effective remedy for that discrimination. A declaration on its own will be insufficient to ensure an effective remedy.

338. Second, the task of remedying the immediate discriminatory allocation in the Western Cape, and the task of amending the THRR are clearly complex. The latter task must also be time-consuming and involve much investigation and consultation. This has two consequences:

    338.1. A simple order to fix the discrimination will not be effective because there will be no satisfactory enforcement mechanism. If SAPS delays, or produces plans that do not meet the requirements of the Equality Act, the Applicants will be forced to either institute contempt proceedings, or fresh litigation to once again demonstrate non-compliance. As the Supreme Court of Appeal noted in *Meadow Glen*, contempt is a blunt instrument; ongoing supervision is preferable.

338.2. Compliance necessarily requires multiple steps to be taken over a long period of time. This Court can only ensure that is done properly if it knows what is happening. And it can only know what is happening if the Respondents are required to file regular reports on their progress.

339. Third, SAPS has known about this problem since at least 2014 when the Khayelitsha Commission released their Report. As is explained in the Founding Affidavit:

> "*The Minister and the National Commissioner have demonstrated through their respective responses to the Khayelitsha Commission that they do not believe there is anything wrong with the current system for allocating human resources. Continued court supervision will be extremely helpful to ensure that the Minister and the National Commissioner comply with their obligations under the Equality Act and the Constitution as quickly and transparently as possible.*"[391]

340. In this litigation, SAPS continues to argue that the way in which it allocates police resources is consistent with the Equality Act. Without ongoing supervision, there is every reason to believe that SAPS will not act with urgency and intent that the situation demands.

341. Even with regard to the Western Cape, there is a need for ongoing supervision. The new allocations in 2016 and 2017 demonstrate that SAPS recognised that the existing allocation of resources was not defensible. But the slight improvements that have been made are not adequate:

341.1. As we have demonstrated, those measures have not gone far enough. The distribution of police resources remains irrational and discriminatory. Urgent measures are needed to bring that allocation in line with the Equality Act.

341.2. SAPS continues to defend both the theoretical and actual allocations. It has not accepted that the situation is inconsistent with the Equality Act.

342. For all these reasons, supervision as envisaged in s 21(2)(m) is the "*appropriate remedy*".

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[391] FA at para 174: Record p 64.

VI CONCLUSION

343. Following the notice of motion,[392] the Applicants request an order in the following terms:

*"**Declarations***

1. *Declaring 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.*
2. *Declaring that the system employed by the South African Police Service to determine the allocation of police human resources unfairly discriminates against Black and poor people on the basis of race and poverty.*
3. *Declaring that section 12(3) of the South African Police Service Act 68 of 1995 Act grants Provincial 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, not merely temporary posts.*

Western Cape Relief

4. *Compelling the Provincial Commissioner to:*
   - *4.1. Within three (3) months of the date of this order, prepare a plan (Provincial Plan) for the re-allocation of resources within the Western Cape to address the most serious disparities in the allocation of police human resources in the province; and*
   - *4.2. Submit the Provincial Plan to the court and advertise it for public comment in accordance with directions to be issued by this Court.*

[392] Apart from costs, where the costs of three counsel (rather than two, as provided for in the notice of motion) are requested. We submit that the use of three counsel is more than justified, given the importance of the relief sought and the volume of evidence presented.

5. The Applicants and any other interested person may, within one (1) month of the date on which the Provincial Plan is submitted, make submissions to the Court on the contents of the Provincial Plan.

6. After hearing argument, the Court will either:

6.1. Approve the Provincial Plan;

6.2. Approve an amended version of the Plan; or

6.3. Call for the Provincial Commissioner to file an amended Plan and issue directions for the further conduct of the matter.

7. Once the Provincial Plan is approved by the Court, the Provincial Commissioner shall:

7.1. Implement the Provincial Plan within six (6) months of the date on which it is approved by the Court.

7.2. File monthly reports on the progress in implementing the Provincial Plan.

8. The Court will retain supervision of the process described in paragraphs 4-7 until it is complete. It will have the power mero motu, to call for additional evidence, set the matter down for hearing, or alter this order.

National Relief

9. Compelling the Minister and the National Commissioner to:

9.1. Re-evaluate the system the South African Police Service uses to allocate and distribute its human resources;

9.2. Report to the Court on their progress in complying with paragraph 9.1 by:

*9.2.1. Within three (3) months of the date of this order, submitting a plan that will guide the re-evaluation process (**National Plan**); and*

9.2.2. Submitting reports to the Court every four (4) months on the progress they have made in implementing the National Plan.

9.3. Ensure that the re-evaluation process is open to public scrutiny, and institutional oversight by, amongst other bodies, the Civilian Secretariat for the Police Service and the National Assembly.

9.4. Complete the development and implementation of a new system for allocating and distributing police human resources within four (4) years.

10. The Applicants and any other interested person may make submissions to the Court about the National Plan, or the National Commissioner and the Minister's compliance with that Plan, including asking the Court to conduct further hearings, call for further evidence, or make additional orders.

11. The Court will retain supervision of the process described in paragraphs 9-10 until it is complete. It will have the power mero motu, to call for additional evidence, set the matter down for hearing, or alter this order.

Costs

12. Directing the First, Second and Third Respondents to pay the costs of the application, jointly and severally, such costs to include the costs of three counsel."

Peter Hathorn SC

Ncumisa Mayosi

Michael Bishop