

**IN THE EQUALITY COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: EC03/2016

In the application of:

SOCIAL JUSTICE COALITION First Applicant

EQUAL EDUCATION Second Applicant

NYANGA COMMUNITY POLICING FORUM Third Applicant

and

THE 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

JUSTICE MOKGORO N.O. Fifth Respondent

and

WOMEN'S LEGAL CENTRE TRUST Amicus Curiae

AFFIDAVIT ON BEHALF OF THE APPLICANTS ADDRESSING REMEDY

I, the undersigned,

AXOLILE NOTYWALA,

do hereby make oath and state:-

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I INTRODUCTION

- 1 I am an adult male and the General Secretary of the First Applicant, the Social Justice Coalition. I am duly authorised to depose to this affidavit on behalf of the Applicants.

- 2 This affidavit sets out the Applicants' response to the 10 August 2020 affidavit of Major-General Mbeki, filed on behalf of the First to Third Respondents (collectively "SAPS"). I shall confine my responses to matters that will be of assistance to this Court in determining an appropriate remedy in these proceedings and shall avoid repeating what has been stated in previous affidavits. It follows that my failure to deal with any allegation in Major-General Mbeki's affidavit should not be construed as an admission of its correctness.

SUMMARY OF RESPONSE

- 3 In July 2019 SAPS stated that it was in the process of developing a plan to remedy the discriminatory allocation of police resources identified in this Court's judgment of 14 December 2018. The "*plan*" – the Integrated Resource Strategy (IRS) - was subsequently made available to this Court and the Applicants. In my October 2019 affidavit I pointed out several of the flaws in the IRS including:
 - 3.1 It does not explain how SAPS intends to remedy the unfair discrimination in the allocation of police resources;

- 3.2 The proposals in the IRS for amending the system of allocating police resources – the THRR – are so vague that one cannot determine whether they will have any impact in remedying the ongoing discrimination;
- 3.3 The IRS in no way addresses the urgent need to re-allocate sufficient resources to poor Black communities in the Western Cape;
- 3.4 This Court accepted [at para 75] the evidence of Ms Jean Redpath that environmental, social and economic factors taken into account in the THRR resulted in discriminatory allocations in favour of historically privileged, White areas. This conclusion was based on the following findings:
- 3.4.1 The THRR appears to prejudice township areas to an even greater extent than the actual allocation figures do and leaves Black township areas at the bottom of the allocation of resources [para 48];
- 3.4.2 The THRR failed to take into account that poor, Black, more informal areas demonstrated low levels of reporting crime when compared to richer, White, more formal areas. The allocation of resources on the basis of reported crime led to allocations skewed against areas which had high levels of under-reporting [para 49];
- 3.4.3 The THRR failed to give sufficient weighting to violent crime [para 50]; and

3.4.4 The majority of ostensibly neutral weightings which were used tended to skew the allocation towards formal areas. This led to an outcome that factors relating to formal areas are taken into account to a far greater extent than those of informal areas [para 51];

3.5 The flaws in the allocation system resulted in poor, Black areas with the highest rates of contact and violent crime having the lowest police to population ratios [para 87].

4 In Ms Redpath's October 2019 affidavit she pointed out:

4.1 The IRS does not envisage a change in the process by which the "ideal" allocations are made.

4.2 The IRS still relies primarily on reported crimes.

4.3 The IRS continues to privilege factors that are present in rich stations that are currently well-resourced.

4.4 The IRS does not explain how "actual" allocations will be made based on the "ideal" allocations produced by the THRR.

4.5 The IRS envisages that "high crime stations" will be granted a minimum level of resourcing, but those stations are not defined, nor is the minimum level of resourcing.

5 Major-General Mbeki's affidavit does not address these shortcomings in the IRS. Similarly, he has no answer to the criticism that the amendments

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proposed in the IRS are so vague that it is impossible to know whether they will have any impact on the ongoing discrimination.

6 The aim of the IRS was far broader than providing a response to the judgment of this Court. It did not set out or attempt to analyse the findings made concerning the allocation system, made only passing reference to the judgment itself and failed to identify any concrete measures to address the short-comings identified by this Court.

7 I turn now to respond, to the extent necessary, to the allegations in Major-General Mbeki's affidavit.

Ad paragraph 4

8 To assert that SAPS' application for leave to appeal was withdrawn rather than abandoned, is to make a distinction without a difference. I deny that the reference to SAPS abandoning its application for leave to appeal is incorrect.

Ad paragraph 6

9 SAPS' July 2019 claim that it was developing a plan in response to the judgment of this Court proved to be unfounded. This is apparent from the following summary of the IRS (on page 1 of the document):

"The integrated SAPS Resource Strategy aims to provide a source of information and support on the common elements of resource planning

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for SAPS. The overall aim of this Strategy is to support the department in ensuring appropriate resource planning and allocation criteria ... that support the SAPS Turnaround Vision with specific focus on the Strategic Outcome Orientated goals."

- 10 The IRS makes only passing reference to this Court's judgment and, for the reasons set out above in **The Summary Response**, cannot be described as a plan developed in response to the judgment.

Ad paragraphs 9 to 13

- 11 By October 2019, 10 months had passed since this Court handed down its judgment in December 2018. The IRS did not engage meaningfully with the short-comings identified in this Court's judgment or attempt to redress them in any substantial manner. SAPS had by this time already had ample opportunity to engage with the Applicants over these issues, had there been any genuine desire to do so.
- 12 However, dating back to the Khayelitsha Commission in 2013 - 2014, SAPS has been resistant to external (civil-society) input into its resource allocation processes. This hostility to civil-society assistance in redressing its resource allocation deficiencies is reflected again in Major-General Mbeki's affidavit [*"government must be allowed to govern"*, para 42].
- 13 In the circumstances, the Applicants quite justifiably have concluded that SAPS will not take any meaningful steps to redress its discriminatory allocation of

resources unless compelled to do so by this Court, and any attempt to engage with SAPS would only result in further stone-walling and delays.

Ad paragraphs 14 and 19

14 I deny that the Applicants have repeatedly shifted the goal-posts with regard to the relief sought. The order we now seek is, for the greater part, identical to the relief sought in the notice of motion at the outset of the proceedings. To the extent that the relief now sought differs from the notice of motion, this has been carefully explained and motivated in my October 2019 affidavit and is dealt with in the heads of argument filed by the Applicants earlier this month.

15 It is not correct that the relief granted by this Court is confined to the Western Cape. Paragraph 2 of the December 2018 order makes it clear that the system employed by SAPS to allocate resources is the root of the problem. This is confirmed by the finding in paragraph 75 of this Court's judgment that Ms Redpath's analysis:

"showed that the demographics, such as environmental, social and economic factors present in informal areas, which were taken into account when allocations were made in terms of the THRR and which were ostensibly intended to benefit these areas actually resulted in allocations which were skewed and in favour of privileged and historically White areas."

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16 Given the above, and the further findings of this Court referred to in the **Summary Response**, there can be no doubt that any attempt to eliminate the discriminatory allocation of police resources without addressing the defects in the THRR will be doomed to failure.

Ad paragraph 21

17 One would have expected a body which is committed to upholding the Constitution to have responded with alacrity to a judgment of this Court declaring that its allocation of resources unfairly discriminated against Black and poor people.

18 The Applicants could scarcely be expected to provide any stronger evidence that a supervisory interdict is required to ensure an effective remedy than: (i) SAPS' failure, in the 20 months since this Court's judgment, to take any concrete steps to address the defects identified in the judgment; and (ii) the best SAPS can come up with is the IRS - which (in relation to the issues at stake) is so vague as to be devoid of any meaningful content, fails to analyse or engage with this Court's judgment and, in Major-General Mbeki's own words, "*is no more than a plan*" which is not intended to represent SAPS' "*full response to the judgment*" [at para 32.2].

Ad paragraphs 22 and 23

19 For present purposes, the most important features of the IRS are that it: (i) was not developed as a response to this Court's judgment; (ii) fails entirely to set

out or engage with the reasoning and findings of this Court; (iii) does not attempt to identify the root causes of the discriminatory allocation of police resources; and (iv) does not set out any meaningful way the steps which need to be taken in order to redress the situation.

- 20 Save to note that the IRS is formulated in such generalised terms that it cannot constitute a meaningful plan to redress the discriminatory allocation of police resources, the further allegations in these paragraphs are denied to the extent that they are inconsistent with what is stated in the IRS.

Ad paragraph 24.3

- 21 While the IRS purportedly recognises the “*vital role*” of consultation and engagement [para 24.3], SAPS formulated the “*plan*” without consulting either the Applicants or the Fourth Respondent (as Mr Morris points out in paragraph 16 of his affidavit, SAPS was obliged in terms of sections 206(1) and (2) of the Constitution to take into account the policing needs and priorities of the Western Cape as determined by the Provincial Government). I refer further to what is stated above in response to paras 9 to 13 of SAPS’ affidavit.

Ad paragraph 28.1

- 22 SAPS claims that one of the “*deliverables*” of Pillar 1 (the Integrated Resource Demand Plan) of the IRS was to “*confirm the outcome of the court ruling that impact [sic] on the Integrated Resource Management Strategy*”, which requires

an analysis of the relevant court ruling. The timeline for this was "31 March 2020 and beyond".

23 The above statements have far-reaching implications with regard to what constitutes an appropriate remedy in this case. Firstly, as Major-General Mbeki noted [at para 6], in July 2019 SAPS stated that it was developing a plan in response to the judgment of this Court, which was subsequently made available to the Applicants [at para 9], while the IRP shows that it only intended conducting an analysis of the judgment and its impact on resource allocation and determination by 31 March 2020 "or beyond". Secondly, they can only mean that SAPS has still not conducted any such analysis, for if it had, Major-General Mbeki would surely have said so and explained what conclusions have been reached.

24 SAPS failure - in 20 months - to analyse this Court's judgment and assess its impact on resource determination, allocation and management demonstrates an astounding dereliction of duty on the part of the officials concerned.

Ad paragraph 29

25 The repeated references to an equitable allocation and distribution of resources are of little moment – SAPS has for many years maintained that its resource allocation system (based on the THRR) produces equitable outcomes.

26 This Court's findings based on Ms Redpath's analysis have been summarised above in the **Summary Response** section and need not be repeated. Until

SAPS addresses the short-comings identified by this Court (on the basis of Ms Redpath's evidence), the system of allocating police resources will continue to discriminate against poor, Black communities.

- 27 It is for this reason that the Applicants seek an order directing SAPS to take these factors into account in reviewing the allocation system and to report back on how this was done (or why it was not done).

Ad paragraph 32

- 28 I note that Major-General Mbeki:

28.1 does not deal with paragraph 23 of my October 2019 affidavit in which I stated that the IRS does not explain how SAPS intends to remedy the unfairly discriminatory allocation of police resources; and

28.2 does not provide any substantive answer to the statement that the proposals made in the IRS to the system for allocating resources are so vague that it is impossible to know whether they will have any impact in remedying the discrimination.

- 29 I can only infer that the reason for these omissions is that SAPS is unable to answer what is stated in my earlier affidavit.

Ad paragraph 33

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30 I refer to my response to paragraph 29 with regard to the reference to an equitable distribution of resources.

Ad paragraph 35

31 I deny that the references in the IRS are a direct response to this Court's judgment. This claim is not borne out by the content of the IRS (which only makes passing reference to the judgment) and is contradicted by the statement in the IRS that an analysis of the court ruling that impacts on the allocation of resources will be made by 31 March 2020.

Ad paragraph 36

32 Major-General Mbeki does not – despite his claim to the contrary – deal with Ms Redpath's evidence.

Ad paragraphs 37 and 38

33 In paragraph 38 of my October 2019 affidavit I noted that the target date in the IRS for reviewing the THRR was 30 November 2019. I invited SAPS to report fully to this Court at the hearing of this matter with regard to: (i) the progress made in the review of the THRR; (ii) the ambit of the review; (iii) the progress made in implementing the reviewed THRR; and (iv) the impact, if any, the changes made had on curing the unfair discrimination.

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34 Major-General Mbeki has not taken up the invitation and attempts to evade the issues raised. The unavoidable inference to be drawn from this is that no meaningful progress has been made in reviewing the THRR. This provides further evidence in support of the Applicants' contention that they will not be afforded an effect remedy in the absence of an order providing for judicial supervision.

Ad paragraph 39

35 I did not (in my earlier affidavit) conflate this Court's judgment and the recommendations of the Khayelitsha Commission. The IRS makes no provision for civilian oversight or public participation in the review of the THRR and SAPS views the prospect with hostility [as is apparent from para 42 of Major-General Mbeki's affidavit].

Ad paragraphs 40 and 41

36 These allegations strengthen the case for a supervisory remedy. Firstly, there is no evidence which indicates that SAPS is trying in good faith to remedy the unfair discrimination. Secondly, the fact that it will only be apparent whether the measures adopted will be effective in remedying the defects after they have been adopted, highlights the need for a structural interdict, given that it is trite that the Applicants (and those whom they represent) are entitled to an effective remedy.

Ad paragraphs 42 and 45

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37 In its August 2014 report the Khayelitsha Commission stated that one of the issues that had most troubled it was how a system of resource allocation which was systematically biased against poor black communities could have survived twenty years into our post-apartheid democracy. In December 2018 this Court confirmed this flaw in the resource allocation system in a binding judgment. SAPS has already had ample opportunity to redress the defect, but it has failed to grasp the nettle. It has also been unable to give any coherent explanation or reason for its inaction. Despite the claim that there is a process underway which demonstrates SAPS' commitment to addressing the shortcomings, the evidence demonstrates the opposite. In this regard, SAPS failure to respond to the invitation in my October 2019 affidavit to report fully to this Court on the progress made in reviewing the THRR is particularly telling. If SAPS really was committed to redressing the shortcomings identified in this Court's judgment, it would have had no difficulty in accounting to this Court on the progress it has made rather than attempting to avoid the issue.

38 The claim that public engagement is adequately catered for in the IRS is undercut by page 58 of the document (which is relied upon by Major-General Mbeki) – although page 58 refers to the value of stakeholder involvement, it does not make provision for any form of public engagement.

Ad paragraphs 47 to 49

39 The relief sought by the Applicants has been considered in some detail both in my October 2019 affidavit and the Applicants' August 2020 Heads of Argument on Remedy. For present purposes I only need to point out that:

39.1 The need for an order: (i) requiring SAPS to take into account the factors identified in this Court's judgment as causing discriminatory outcomes; and (ii) appointing a panel of experts, has been fully motivated in my October 2019 affidavit [at paras 53 to 57 and 58 to 63 respectively];

39.2 The Applicants do not seek the appointment of a special master, as was the case in *Mwelase*. In the *SASSA* case,¹ the Court appointed a panel of experts to assist it by providing independent advice on the process to be followed in paying social grants. This more closely approximates the relief sought by the Applicants in the present matter;

39.3 I am advised that where a constitutional breach has been established, a litigant is not confined to the relief originally sought in his or her notice of motion.² The over-riding consideration is for the Court to provide a just, equitable and effective remedy. It follows that the limited extent to which the relief was not initially sought in the notice of motion is not a decisive consideration.

Ad paragraph 51

40 SAPS' claim that nothing more than the existing declaratory orders is required would have greater credibility if it had taken concrete measures to redress the discriminatory nature of its allocation system. The absence of any such steps

¹ *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC).

² *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another* [2019] ZASCA 57; 2020 (1) SA 52 (SCA) at para 23.

highlights the need for the limited form of judicial supervision sought by the Applicants.

Ad paragraph 54

41 The Applicants launched these proceedings, in the interests of poor Black communities which have been discriminated against by SAPS in the allocation of police resources, in order to compel SAPS to give effect to a key recommendation of the Khayelitsha Commission. The relief sought has been doggedly resisted, in the face of clear evidence of the discriminatory effect of SAPS allocation system. The litigation has been protracted, complex and costly, but it has ultimately resulted in the rights asserted being vindicated. The Applicants are not well-resourced and have incurred substantial legal costs in litigating on behalf of poor, vulnerable communities. If they were to be denied their costs, it would be contrary to the principle that litigants who achieve substantial success are entitled to their costs. More significantly, it would have a chilling effect on individuals and organisations considering similar litigation in the public-interest.



AXOLILE NOTYWALA

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. Th is affidavit was signed and sworn to before me at Harare on this the 13 day of AUGUST 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

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SIHO / AFIK / AFISE / POLICE / DEPT /
COMMUNITY SERVICE
CENTRE
13 AUG 2020
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