

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case number: CCT 121/21

In the matter between:

SOCIAL JUSTICE COALITION	First Applicant
EQUAL EDUCATION	Second Applicant
NYANGA CPF	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
WOMENS LEGAL CENTRE TRUST	Fifth Respondent

APPLICANTS PRACTICE NOTE

A NATURE OF THE PROCEEDINGS

- 1 The primary relief that the applicants seek in this application is: (i) leave to appeal to this Court against the Equality Court's constructive refusal to grant them a remedy; (ii) alternatively, direct access to this Court in order to determine an appropriate remedy.

B ISSUES TO BE ARGUED

- 2 The issues to be argued are whether: (i) in the first instance, leave to appeal to this Court should be granted against the Equality Court's constructive refusal to grant the applicants a remedy; (ii) alternatively, whether direct access to this Court should be granted, in order to determine the outstanding issues in the Equality Court application; and (iii) in the further alternative, whether this Court should grant direct access to it for the limited purpose of issuing directions to the Equality Court with regard to the finalisation of the proceedings before it.

C DURATION OF ARGUMENT

- 3 One day

D PARTS OF THE RECORD NECESSARY TO DETERMINE THE MATTER

4 The entire record is of the present application under case number CCT 121 / 21 is of relevance.

5 Only the following portions of the Equality Court record are relevant:

5.1 The whole of **Volume 1**;

5.2 **Volume 2**: Only the Supporting Affidavit of Martin Makasi, beginning at 159-200;

5.3 **Volume 3**:

5.3.1 The Supporting Affidavit of Martin Makasi, page 201-210;

5.3.2 The Answering Affidavit of Leon Rabie, page 218-300;

5.4 **Volume 4**:

5.4.1 The Answering Affidavit of Leon Rabie, page 301-307;

5.4.2 The Answering Affidavit of Stephanus Nelson, pages 337-347; and

5.4.3 The Answering Affidavit of Mathapama Makgoto, pages 348-400;

5.5 **Volume 5:** only the Answering Affidavit of Mathapama Makgoto, pages 401-403.

5.6 No part of **Volume 6;**

5.7 **Volume 7:**

5.7.1 The Expert Affidavit of Jean Redpath, pages 641-87;

5.7.2 The Further Affidavit of Preston Voskuil, pages 688-693;

5.8 **Volume 8:**

5.8.1 The Expert Affidavit of Jean Redpath, pages 706-714; and

5.8.2 The Judgment of the Equality Court, pages 719-768.

**E AUTHORITIES TO WHICH PARTICULAR REFERENCE WILL
BE MADE**

6

- 6.1 Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae 2006 (2) SA 311 (CC)
- 6.2 Pharmaceutical Society of South Africa v Tshabalal-Msimang 2005 (3) SA 238 (SCA)
- 6.3 Minister of Police and Others v Premier of the Western Cape and Others 2014 (1) SA 1 (CC)
- 6.4 Qwelane v South African Human Rights Commission and Another [2021] ZACC 22
- 6.5 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)
- 6.6 Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another 2019 (6) SA 597 (CC)
- 6.7 Secretary of the Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others [2021] ZACC

- 6.8 Electoral Commission v Mhlope and Others [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) at para 132
- 6.9 Minister of Health and Others v Treatment Action Campaign and Others (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 113
- 6.10 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)

F SUMMARY OF ARGUMENT

Leave to appeal

- 7 The applicants will argue that, applying the New Clicks principles, the circumstances of the case are such that the Equality Court's unreasonable delay in hearing the remedy component of the application amounts to a constructive refusal of the relief sought. The relevant considerations are that: (i) on 14 December 2018 the Equality Court made an order postponing the hearing on remedy "to a date which shall be arranged with the parties"; (ii) the applicants repeatedly stressed that the hearing on remedy should be convened as a matter of urgency; (iii) the urgency of the hearing

has been acknowledged in the Equality Court order of 6 August 2019; (iv) while SAPS appears to be content to allow the proceedings to be dragged out indefinitely, it is respectfully submitted that Dolamo J's failure to engage with the parties is the primary cause of the delay in finalising the application. On 23 June 2020, his registrar advised the parties that the matter would be dealt with on the papers on 11 August 2020. He then changed his mind on the issue, as appears from the email sent by his registrar on 8 September 2020; (v) since 8 September 2020 to the launching of this application on 10 April 2021, a period of over seven months, Dolamo J failed to respond in any meaningful way to the applicants' persistent and repeated attempts to engage with him to arrange a hearing date (the last three communications being in the form of letters addressed to both him and Hlophe JP); and (v) given that the 14 December 2018 order postponed the hearing on remedy to "a date which shall be arranged with the parties", Dolamo J's failure to engage with the applicants' attempts to arrange a hearing date is entirely inexplicable.

- 8 It will further be argued that the requirements for a constructive denial of a remedy have been satisfied in light of: (i) the delay of over five-and-a-half years since the Equality Court application was

launched in March 2016, together with the further delay of almost three years since judgment was delivered on the merits; (ii) the ongoing infringement to the s 34 rights of the applicants – and those they represent - to have the dispute determined; (iii) the enormous importance of the matter; (iv) its acknowledged urgency; (v) the ongoing prejudice to which poor and vulnerable communities are being subjected; and (vi) the applicants have approached this Court only as a last resort, in the absence of any alternative remedy.

Direct access

- 9 In the alternative, and if this Court is not minded to grant leave to appeal, the applicants will argue the following in respect of the relief for direct access to this Court.

- 10 The applicants' founding affidavit sets out: (i) the limited nature of the relief – direct access being sought only for the purpose of determining the narrow issue of whether a supervisory order is appropriate; (ii) their contention that although this Court will not have the benefit of the views of another Court on remedy, this is outweighed by the pressing need for the litigation to be brought to a conclusion; and (iii) the absence of any alternative remedy.

11 In the further alternative, if the applicants have not persuaded this Court that it should determine an appropriate remedy, they request that direct access be granted for the limited purpose of issuing directions to the Equality Court with regard to the urgent finalisation of the proceedings. SAPS has argued this Court's powers under s 173 of the Constitution are limited to regulating its own processes and that such relief is incompetent. It will be argued that this is misconceived – in *Mwelase* this Court stated that the power granted to courts hearing constitutional cases by s 172(1) of the Constitution to "make any order that is just and equitable" is an injunction to do practical justice and it is wrong to understate the breadth of these very wide remedial powers, the outer limits of which are bounded only by considerations of justice and equity. SAPS' argument fails to take account of these extensive powers.

Structural relief

12 If this Court decides to determine the just and equitable remedy, what remedy should it grant?

13 SAPS has not clearly articulated what relief they believe the Equality Court, or this Court, should grant to cure the ongoing unfair discrimination against the residents of the Western Cape.

Nor – until it answered this application – had SAPS filed any evidence demonstrating that they had engaged meaningfully with the redistribution of resources required to remedy the unfair discrimination identified by the Equality Court. For the very first time, when it answered this application, SAPS has put up evidence showing that it is in fact taking steps to remedy the unfair discrimination in the Western Cape and nationally. SAPS has shown that it is in the process of amending the THRR. Those amendments seem to be a real attempt to cure the discriminatory allocation of police resources. While it has taken seven years for SAPS to act, the applicants welcome this effort and believe that it could cure the unfair discrimination.

- 14 But this is no reason for the Court not to supervise SAPS's implementation of the process on which it has engaged. There remain three central justifications for supervisory relief. First, the rights at stake and the vulnerability of the people affected by the racially discriminatory allocation of police resources demand a remedy that ensures that the ongoing discrimination is brought to an end. If supervisory relief is not granted, this Court and the applicants will have no way of knowing how the process of revising the THRR will unfold, or even if the National Commissioner will

approve the proposed revisions. Second, reviewing the THRR is the beginning of remedying the unfair discrimination, not the end. Whether the revisions will cure the discrimination depends on: (i) the changes that are made and how they will alter the theoretical allocation; and (ii) the extent to which those theoretical allocations are translated into reality. A just and equitable remedy must ensure that the unfair discrimination is in fact cured. That requires an assessment of the likely impact of the new THRR, and ensuring that its implementation cures the defects. Third, a declaration or interdict without supervision will not be effective. SAPS has not committed to when it will complete its process of reviewing the THRR. If the applicants were able to establish that the revised THRR does not cure the unfair discrimination, or that the proposed revisions had not been approved, they would have to bring entirely new proceedings. And SAPS has still made no commitment to re-allocating resources within the Western Cape.

G ERROR IN THE FOUNDING AFFIDAVIT

15 At paragraph 60 of the applicants founding affidavit in this Court, it is stated that in annexure “MD10” (the Equality Court order of 4 July 2019) the matter would be set down “on an expedited basis” if the parties did not report back to the Court as arranged. This is

incorrect. Annexure “MD10” to the founding affidavit is not the Court order, but a draft dated 2 July 2019. A copy of the 4 July 2019 order is annexed to this practice note. The order states that if the parties failed to report back, the Court would “set the matter down to a suitable date” not “on an expedited basis”.

- 16 The applicants’ legal representatives apologise to this Court and the other parties for the error, for which they – and not their clients – are responsible. To date they have been unable establish the source of the incorrect wording “on an expedited basis”, reflected in the affidavit.

PETER HATHORN SC

NCUMISA MAYOSI

MICHAEL BISHOP

**Counsel for the
Applicants Chambers
Cape Town**

25 November 2021

**IN THE EQUALITY COURT
(HIGH COURT, CAPE TOWN)**

Case number: EC3/2016

47 X 11
pp. [Signature]
[Signature]
4/07/2019

**Before the Honourable Justices Dolamo and Boqwana
Cape Town: 04 July 2019**

In the matter between:

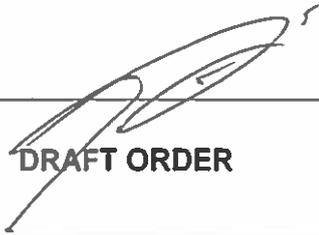
SOCIAL JUSTICE COALITION	First Applicant
EQUAL EDUCATION	Second Applicant
NYANGA COMMUNITY POLICING FORUM	Third Applicant

and

MINISTER OF POLICE	First Respondent
NATIONAL COMMISSIONER OF POLICE	Second Respondent
WESTERN CAPE POLICE COMMISSIONER	Third Respondent
MINISTER FOR COMMUNITY SAFETY, WESTERN CAPE	Fourth Respondent

and

WOMEN'S LEGAL CENTRE TRUST	Amicus Curiae
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DRAFT ORDER

By agreement between the parties, the following order is made:

1. The parties will meet by not later than **Friday 12 July 2019** to agree the process the parties will follow in order to attempt to agree on an appropriate remedy for approval by the court;
2. The parties will report back to the court on the details of this process by not later than **Friday 26 July 2019**; and
3. Should the parties fail to report back to the court as provided in paragraph 2, or if the report indicates that an agreement is not possible, the court will set the matter down to a suitable date to hear argument on the appropriate remedy.

By order of the Court

COURT REGISTRAR

WEBBER WENTZEL

15th Floor Convention Tower

Heerengracht

CAPE TOWN

(Box: 154)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case number: 121/2021

In the matter between:

SOCIAL JUSTICE COALITION First Applicant
EQUAL EDUCATION Second Applicant
NYANGA CPF 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
WOMENS LEGAL CENTRE TRUST Fifth Respondent

APPLICANTS' CHRONOLOGY

ITEM	DATE	EVENT
1.	2003	TAC activist Lorna Mlofana was raped and killed outside a tavern in Khayelitsha in 2003 after revealing that she was HIV positive.

2.	2003	TAC launched a campaign to end the scourge of violent crime plaguing townships around Cape Town and to improve the quality of policing.
3.	2005	TAC activist Nandipha Makeke is murdered.
4.	2006	TAC activist Zoliswa Nkonyana is murdered. TAC started its Safety and Justice Campaign.
5.	June 2008	SJC joined the TAC's Safety and Justice Campaign.
6.	November 2011	SJC, EE and their partner organisations lodged a formal complaint with the Premier of the Western Cape calling for a commission of inquiry into policing in Khayelitsha in terms of s 206(3) of the Constitution.
7.	August 2012	The Premier of the Western Cape appointed the Khayelitsha Commission of inquiry to investigate allegations of police inefficiency and a breakdown of relations between the community and the police in Khayelitsha.
8.	2012 to 2013	SAPS resisted the inquiry and mounted an unsuccessful challenge to the legality of the Commission's appointment which culminated in this

		Court's judgment in <i>Minister of Police and Others v Premier of the Western Cape and Others</i> .
9.	January to May 2014	The Commission heard the testimony of dozens of witnesses and received affidavits from hundreds of residents of Khayelitsha expressing their concerns about the lack of effective policing in the area, especially within informal settlements.
10.	25 August 2014	The Commission published its findings.
11.	September 2014 and December 2015	TAC, SJC, EE <i>et al</i> attempt to engage with the Minister and the National Commissioner through letters, emails, telephonic communications and meetings.
12.	March 2016	SJC and EE launch their Equality Court application.
13.	November 2017	The application was first argued.
14.	February 2018	Argument was concluded.
15.	14 December 2018	Judgment handed down. The hearing with regard to what further remedy should be granted to address the unfair discrimination identified in the judgement was postponed to a date to be arranged with the parties.

16.	10 January 2019	SAPS respondents delivered an application for leave to appeal to the SCA against the two declaratory orders made by the Equality Court.
17.	25 January 2019	The Minister of Police, Mr Bheki Cele, stated publicly in widely reported statements that: (a) the SAPS' application for leave appeal was to be withdrawn; (b) he supported the findings of the Equality Court with regard to the Western Cape; and (c) he was of the view that these findings are also applicable to the other provinces.
18.	28 January 2019	EE's attorney addressed a letter to SAPS' attorney in which she recorded the Minister's statements and requested the State Attorney to confirm that their instructions are in accordance with the Minister's public pronouncements.
19.	30 January 2019	EE's Attorney received two email responses from the State Attorney stating that he held no instructions to withdraw SAPS' appeal, nor did he have instructions with regard to the Minister's statements as reported in the media.
20.	31 January 2019	The applicants delivered an application for leave to cross-appeal against paragraph 2 of the 14 December 2018 order of the Equality Court.

21.	5 February 2019	On 5 February 2019 SAPS made a without prejudice proposal that both parties should withdraw their proposed appeals and the matter proceed directly to the hearing on remedy.
22.	14 March 2019	The parties agreed to withdraw their respective applications for leave to appeal and cross-appeal.
23.	11 April 2019	A formal notice recording the parties agreement was filed.
24.	21 May 2019	Applicants made a proposal to the respondents that, inter alia, once it was accepted that there must be a remedy, the parties should first seek to agree on a remedy, before compelling the Court to make a determination. Applicants suggested that the parties approach the court for a directions hearing and, rather than asking the Court to hear argument on an appropriate remedy, the parties be given a period of 3 months to mediate an acceptable remedy.
25.	6 June 2019	After no response was received from the SAPS respondents, the Applicants address correspondence to the Court requesting a directions hearing before the recess on 30 June

		2019 to determine the way forward for the remedy stage.
26.	26 June 2019	The Justice indicated that they were available to meet the parties the following day.
27.	27 June 2019	A directions hearing was held with the Dolamo and Mabindla-Boqwana JJ.
28.	4 July 2019	A court order was made by agreement between the parties in terms of which the parties would meet by 12 July 2019 to agree the process they would follow to finalise a remedy; they would report back to the Court by 26 July, failing which the Court would set the matter down at a suitable date.
29.	12 July 2019	The parties met.
30.	22 July 2019	SJC's attorney addressed letter to the State Attorney confirming what had been discussed at the above meeting.
31.	26 July 2019	Parties submitted their report to the Court.
32.	6 August 2019	Court made an order substantially in the terms that the parties had proposed, paragraph 4 of which order provided that if the parties could not agree on

		the remedy, the Court would set the matter down for argument on the earliest suitable date.
33.	1 September 2019	SAPS delivered the IRS.
34.	18 September 2019	SJC's attorney addressed correspondence to the Court stating, inter alia, that the IRS was not going to take the parties forward in reaching agreement on remedy and essentially requesting that the Court set the matter down for a hearing on remedy to avoid further delays.
35.	20 September 2019	Dolamo J's registrar indicated that the judge was then acting in the SCA and the judges would revert to the parties regarding the suitability of the dates proposed in the letter of 18 September.
36.	30 September 2019	State Attorney for the WC Provincial Minister addressed correspondence to the parties stating in essence that the IRS was not a remedy for the problem identified in the Equality Court's judgment.
37.	14 October 2019	Applicants filed affidavits in response to the IRS.
38.	22 October 2019	SAPS's attorney addressed an email to the applicants' attorneys suggesting that the parties meet to discuss the possibility of settlement.

39.	6 November 20219	SJC's attorney responded that their clients would like to proceed to the remedy hearing to avoid any further delays in the matter.
40.	4 December 2019	Applicants sent a letter requesting a directions hearing with the judges so as to arrange a date for the remedy hearing early in 2020.
41.	13 December 2019	An affidavit responding to the IRS was filed by the Provincial Minister.
42.	15 December 2019	Court term ended, by which date there was no response from the judges.
43.	20 January 2020	Dolamo J's registrar invited the parties to a meeting on 30 January 2020 to discuss further conduct.
44.	30 January 2020	The Judges advised the parties that if they were not able to settle the question of remedy, they would be available to hear argument on remedy between 2 and 12 March 2020.
45.	31 January 2020	Applicants' attorney addressed a letter to SAPS representatives stating that their counsel were available on any dates from 2 to 6 March. SAPS counsel were not available on these dates.

46.	Thereafter	Further negotiations took place between the parties in attempts to settle the question of remedy. The applicants even proposed that the judges be approached to hear the matter over a weekend, but this was not acceptable to SAPS's representatives.
47.	4 February 2020	SAPS attorney addressed correspondence to the applicants, inter alia, seeking an opportunity to respond to the applicants' affidavit of 14 October 2019, proposing that the judges be requested to dispose of the matter on the papers, without further oral argument and that if this proposal was not acceptable the matter be set down for argument in the third term.
48.	5 March 2020	SJC's attorney responded and, inter alia, proposed that given the absence of agreement on dates for the hearing on remedy the matter be heard in the third of fourth term.
49.	11 May 2020	Applicants' attorneys addressed correspondence to the Court requesting, inter alia, that the matter be set down in the third or fourth term on the first date on which the judges were available.
50.	23 June 2020	Dolamo J's registrar responded advising the parties that, inter alia, given the lack of agreement between

		the parties regarding remedy, the matter would be dealt with on the papers on 11 August 2020.
51.	4 August 2020	Applicants filed their heads of argument.
52.	7 August 202	Applicants submitted a draft order setting out the relief they proposed.
53.	11 August 2020	SAPS filed a further affidavit.
54.	13 August 2020	Applicants filed an affidavit in response to SAPS affidavit.
55.	8 September 2020	Dolamo J's registrar advise the parties that Mabindla-Boqwana J was then acting in the SCA and given that she might not return to the division the parties could elect to wait and see if she returned or the matter could be heard by a newly constituted bench of two judges (or Dolamo J and another judge).
56.	16 September 2020	SAPS responded stating that it preferred to wait for the return of Mabindla-Boqwana J.
57.	5 October 2020	SJC's representatives called Dolamo J's registrar and was advised that there was as yet no decision as to the composition of the court.

58.	18 November 2020	SJC's attorney addressed a letter to Dolamo J inter alia requesting that a new panel be constituted consisting of Dolamo J and another judge to hear and consider the outstanding issues before the end of the first term of 2021.
59.	10 December 2020	In the absence of a response, SJC's attorneys followed up telephonically with Dolamo J's registrar but she could not provide any indication regarding the further conduct of the matter.
60.	21 January 2021	SJC's attorneys again followed up telephonically with Dolamo J's registrar.
61.	11 February 2021	SJC's attorney addressed a letter to Hlophe JP and Dolamo J regarding the matter. There was no response from either.
62.	1 March 2021	SJC's attorneys addressed further correspondence to Hlophe JP and Dolamo J requesting that the matter be treated with the utmost urgency and setting down the remedy hearing.
63.	19 March 2021	SJC's attorneys addressed further correspondence to Hlophe JP and Dolamo J. There was no response.

64.	April 2021	The SJC lodged a complaint against Dolamo J with the JSC
65.	April 2021	The applicants launched these proceedings.