IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
CASE NO: 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
WOMEN'S LEGAL CENTRE TRUST	Fifth Respondent

FIRST TO THIRD RESPONDENTS' HEADS OF ARGUMENT

Table of Contents

I INTRODUCTION

1. On 14 December 2018 the Western Cape High Court ('**the Equality Court**') delivered judgment in this matter, in terms whereof it: (a) declared 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; (b) declared that the system employed by the South African Police Service ('**SAPS**') to determine the allocation of Police Human Resources, insofar as it had been shown in the Western Cape Province, unfairly discriminates against Black and poor people on the basis of race and poverty; (c) postponed the hearing on remedy to a date to be arranged with the parties; and (d) ordered that costs shall stand over for later determination.

2. The above Order remains extant. The question of remedy has never been determined by the Equality Court. This notwithstanding, the Applicants seek to pursue before this Court: (a) an application for leave to appeal; (b) *alternatively*, an application for direct access to determine the question of remedy; (c) *further alternatively*, an application for direct access for the issue of directions to the Equality Court.

3. As regards the application for leave to appeal, the Applicants seek direct leave to appeal to this Court against the alleged constructive refusal by the Equality Court to grant them a remedy under section 21 of the Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 ('**the Equality Act**').[1] The merits were decided

[1] The issue of the merits and remedy having been separated by the Equality Court. SAPS's AA (CC Bundle) 587 : 49.5; 590 : 55.

separately from remedy ('**merits judgment**' or '**merits order**', as appropriate).[2] We submit that the application falls to be dismissed because:

3.1. The legal threshold for a constructive refusal (as determined by this Court) has not been met in that the evidence in this matter does not support a conclusion that the Equality Court constructively refused a remedy. In particular: (a) there has been no unreasonable delay in the determination of the question of remedy; (b) a finding of a constructive refusal will cause prejudice to SAPS; (c) a finding of a constructive refusal is not a measure of last resort on the facts of this matter; and (d) an order on remedy is not urgent in light of the measures that are underway so as to address the findings in the merits judgment.[3]

3.2. The Equality Court is the appropriate forum to make a remedial order based on the new, material evidence concerning the ongoing revision and implementation of the Theoretical Human Resources Requirement ('**THRR**').[4]

3.3. It is not in the interests of justice to grant leave to appeal.

3.4. Even if this Court grants leave, the Applicants cannot claim a supervisory order in respect of the '*National relief*', having abandoned their challenge to the declaration of invalidity, being limited to the Western Cape.[5]

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[2] Merits order (Record, vol 8) 768 : 94.

[3] *Minister of Health NO v New Clicks SA (Pty) Ltd (TAC as Amici Curiae)* 2006 (2) SA 311 (CC) ('*New Clicks*') at par 68 to 72.

[4] "AA1" to SAPS's AA (CC Bundle) 619 provides in relevant part:

> 'The THRR system is the methodology applied to determine post requirements based on the evaluation of various factors (internal and external variables). Demographics (increase in informal settlements, daily influx, new developments and etc.), socio economic (migration, poverty, unemployment and etc.), crime analysis, changes in the historical workload data, the splitting and merging of police stations boundaries into one or more policing areas, the establishment movement or closing down of other service points. Also included is the activities performed at a police station.'

[5] Merits order (Record, vol 8) 768 : 94.2.

3.5. In any event, an appeal against the merits order has been perempted, and the supervisory remedy sought is inappropriate for reasons canvassed below. The '*Western Cape relief*' is also inappropriate, being premised on outdated information from 2013/2014. The factual landscape, almost eight years later, has changed significantly.

4. As regards the first alternative Order sought, which is to determine the question of remedy by way of direct access based on the merits judgment, which the Applicants now embrace fully,[6] the Applicants do not satisfy the test for direct access because:

4.1. There is no basis for a claim of direct access on the question of remedy where the merits have been determined by the Equality Court and the question of remedy is pending before the Equality Court in terms whereof it ordered that the hearing in respect thereof '*is postponed to a date which shall be arranged with the parties*'. To do so would result in piecemeal litigation before different Courts on different elements of a single case. Such a course is not in the interests of justice.

4.2. The threshold of this Court for granting direct access has not been met with particular regard to the following: (a) it is an *extraordinary procedure* that ought to be followed only in *exceptional* circumstances; (b) *persuasive and compelling* reasons are required before this Court will exercise its discretion to grant direct access; (c) some pertinent considerations include the prospects of success, a caution against dealing with disputed facts on which evidence might be necessary and a

[6] Having abandoned their challenge to paragraph 2 of the merits order.

further caution against this Court hearing cases without the benefit of the views of other courts having constitutional jurisdiction.[7]

4.3. The application for direct access is manifestly inconsistent with the well-established *dicta* of this Court that: (a) it is not ordinarily in the interests of justice for this Court to sit as a court of first and last instance; (b) there is no doubt that more thorough, and therefore arguably better, decisions are arrived at where many minds have considered a matter; (c) leapfrogging the High Court and the Supreme Court of Appeal is seldom desirable; (d) this Court benefits greatly from the well-reasoned judgments of those courts on matters that come before it.[8]

5. As regards the second alternative Order sought, *viz*, direct access to this Court to issue '*directions*' to the Equality Court to make a remedial order,[9] this Order too is still borne. This is so for two key reasons: (a) the Equality Court is presently seized with the matter, as a result of which, a dismissal of this application has the natural consequence of the matter being remitted to the Equality Court for determination; and (b) the independence of the judiciary does not (with respect) permit this Court to prescribe to the Equality Court the terms on which the matter falls to be heard by it in the absence of any finding of unconstitutionality.

6. In light of the aforegoing, this application is indeed unprecedented. We have not been able to identify a single case (and nor have the Applicants) in terms of which the merits

[7] *Moko v Acting Principal, Malusi Secondary School and Others* 2021 (3) SA 323 (CC) at par 17.
[8] Id at par 18 and *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) 7-8 and 19.
[9] NOM (CC Bundle) 7 : 7.

of a matter were determined by the Equality Court and the remedy separately determined by an Appeal Court. The Applicants persist in such a course notwithstanding:

6.1. The merits of the matter, which was determined by the Equality Court, being integrally linked to any Order and judgment in respect of remedy.

6.2. That on a proper understanding of the evidence, the delay in respect of the determination of remedy (based on the Applicants' calculation of time) is not unreasonable.

6.3. The proposal from the Respondents (as set out in their letter of 30 April 2021) as to a joint approach to the Judges whereby the question of remedy may be determined by way of an alternative course. The merit of this course is amplified in light of the Applicants' acceptance that the relief sought in their NOM, in respect of paragraph 2 of merits order,[10] has been rendered moot.[11] In the proposed draft order,[12] the relief now sought is limited to remedy.[13]

6.4. The fact that it is clear that matters have progressed substantially since the inception of this matter and that further evidence is required for a proper determination on the question of remedy.

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[10] Merits order (Record, vol 8) 768: 94.2:

> '2. It is declared that the system employed by the South African Police Service to determine the allocation of Police Human Resources, in so far as it has been shown to be the case in the Western Cape Province, unfairly discriminates against Black and poor people on the basis of race and poverty'.

[11] Applicants' heads of argument ('HoA') 5 : 6.

[12] Applicants' draft order 2-4 : 3-5.

[13] Applicants' HoA 5-6 : 6, in respect of the '*National relief*':

> 'The focus on the national relief sought by the applicants is now on ensuring that SAPS implements its process of revising the THRR speedily and effectively.'

And Applicants HoA 39-40 : 57.

And Applicants' HoA 25 : 36; 26 : 38; 37-39 : 56; 49 : 69, in respect of the '*Western Cape relief*'.

6.5. This Court does not have evidence before it as to the Applicants' response to the latest draft THRR. Evidence of this nature (coupled with a response to it from the Respondents) is indispensable to the question of remedy. Absent that evidence, this Court is limited to the position taken in the Applicants' heads of argument that: (a) SAPS is "*squarely addressing the Commission's findings in its draft revision of the THRR*" [14]; (b) the amendments "*seem to be a real attempt to cure the discriminatory allocation of police resources*" [15]; (c) the Applicants "*welcome this effort and believe that it could cure the unfair discrimination*"[16]; (d) SAPS "*has finally committed to revising the THRR*" which the Applicants welcome and "*will naturally affect the Court's assessment of the appropriate remedy*". [17]

7. Despite the foregoing, the Applicants seek to short circuit the judicial process by way of a direct escalation to this Court as a Court of first and last instance on the question of remedy.

8. The First, Second and Third Respondents (collectively '**SAPS**' and respectively the '**Minister**', '**National Commissioner**' and '**Provincial Commissioner**') oppose these proceedings.[18]

9. We expand on these submissions under seven headings below:

9.1. There has been no constructive refusal by the Equality Court to grant a remedy.

[14] Applicants' HoA 10 : 12.
[15] Applicants' HoA 26 : 38.
[16] Applicants' HoA 26 : 38.
[17] Applicants' HoA 45 : 64.
[18] SAPS's notice of opposition (CC Bundle) 490-493.

9.2. The abandonment of the challenge to prayer 2 of the merits order and peremption.

9.3. Refusing the application for direct leave to appeal.

9.4. Refusing the alternative application for direct access.

9.5. Refusing the further alternative application for direct access for the purpose of issuing '*directions*' to the Equality Court.

9.6. Inappropriateness of the supervisory remedy sought.

9.7. Condonation, conclusion and costs.

II NO CONSTRUCTIVE REFUSAL BY THE EQUALITY COURT TO GRANT A REMEDY

10. The Applicants argue that the principles stated in *New Clicks*[19] "*are equally applicable to an unreasonable delay in convening a hearing on remedy, particularly in circumstances where a litigant has already established an infringement of a constitutional right.*"[20] We submit that this, as a point of departure is not correct both at the level of legal principle and on the evidence for at least eight reasons.

11. However, before addressing each of our reasons in turn, there is one fundamental point that falls to be emphasised at the outset, *viz*, an apparent contention that unless this Court determines the question of remedy, the Applicants' rights of access to Courts will be infringed.[21] This argument may be easily disposed of given that this matter is

[19] *New Clicks* above n 19 at paras 68-71.
[20] Applicants' HoA 7 : 9.
[21] Applicants' HoA 7 : 9.

manifestly not a case in which the right of access to courts in compromised or indeed, infringed for the following reasons:

11.1. The Applicants asserted their rights before the Equality Court and were vindicated in the merits order and judgment. They therefore exercised their rights of access to Courts.

11.2. The merits order of the Equality Court, based on an unequivocal agreement by the Applicants reserved to itself a postponement on the question of remedy. That remains a valid and binding order.

11.3. The efforts made by the Applicants in order to arrange a date for the hearing of remedy had not run its course in accordance with the Applicants' own self-imposed timeline and for reasons addressed hereunder, amounted to a delay of four months at best. This, in circumstances where there was no express (or other) indication from the Equality Court that it refused and/or was reluctant and/or was disinclined to hear and determine the question of remedy. On the contrary, the Court had advised the parties of the possible timeframe on the question of remedy.

11.4. Far from this application vindicating or advancing the right of access to courts, it manifestly undermines this right. It does so because despite the Equality Court being seized with the question of remedy, this application leapfrogs that issue to this Court on an inadequate legal and factual premise and in so doing, undermines the position of the Equality Court and the proceedings in respect of remedy that are presently pending before it.

12. Our remaining reasons are addressed hereunder.

13. First, as to the law, we submit that this Court's *dicta* in *New Clicks*[22] concern the constructive refusal of an application for *leave to appeal*, where a court of first instance had already made a final order (on merits and remedy). On that basis, the court of first instance is *functus officio*.[23]

14. In *New Clicks*, the High Court failed to decide timeously whether there were reasonable prospects that an Appeal Court would come to a different conclusion. The Appeal Court answered that very question in granting special leave;[24] but, in doing so, it was not considering the main dispute as a court of first instance. It was also not doing so in circumstances (such as the present) where there is an extant Court Order, regulating the hearing on remedy before it.

15. *New Clicks* is thus distinguishable from this case: here the Applicants' case is that Equality Court has not (yet) discharged its function in respect of the main dispute in its entirety.[25]

16. This Court is thus presented with a novel and unprecedented circumstance for potentially extending the ambit of a constructive refusal.[26] If the Court accepts the Applicants' invitation, it will sit as a court of first and final instance in respect of a *discrete*

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[22] *New Clicks* above n 19 at paras 68-71.
[23] SAPS's AA (CC Bundle) 574 : 34.
[24] *New Clicks* above n 19 at para 70. Accordingly, the only prejudice that would arise is if the court of first instance would have granted leave to appeal, in which case the SCA would have been burdened with an unnecessary application.
[25] i.e. is not yet *functus officio*.
[26] In *NDPP v Naidoo & others* [2010] JOL 26507 (SCA), the SCA faced the same issue that confronted it in *New Clicks* – whether an unreasonable delay to grant leave to appeal amount to a constructive refusal of leave to appeal. There the NDPP was not given full reasons for an adverse costs order, which would have enabled it to apply for leave to appeal.
See also *Ndimeni v Meeg Bank Ltd (Bank of Transkei)* 2011 (1) SA 560 (SCA) at para 3 the SCA recorded that the Labour Appeal Court granted the appellant leave to appeal to it on the ground of constructive refusal of leave by the Labour Court. The LAC judgment (*Indomeni v Meeg Bank Ltd (Bank of Transkei)* (DA 11/2007) [2009] ZALAC 31 (3 September 2009)) does not address the leave granted on the basis of a constructive refusal of leave to appeal (see para 4 – 5).

issue which forms an indispensable element of the overall application that served before the Equality Court, and in respect of which the Equality Court determined the merits.

17. Further, in *New Clicks* the High Court was presented with a *completed*, unlawful administrative act,[27] and had to grant a remedy. In this case, it is common ground that there have been, and are, *continuing* factual developments that bear pertinently on the type and extent of remedy to be granted.[28] This Court is not presented with a *fait accompli*.

18. The transcript records that the Equality Court stood down the determination of remedy, to allow the parties to engage after deciding the merits. The engagements were to address SAPS's efforts to implement the merits judgment. Thereafter, the Equality Court was to consider the acceptability of the proposed remedial process for crafting a remedy.[29]

19. Second, even if the test in *New Clicks* was applicable, we submit that the evidence falls short of the high threshold for constructive refusal based on undue delay, which this Court described as: (a) being '*exceptional*'; (b) where matters are '*urgent and the delay may cause substantial prejudice*'; (c) no prejudice will be caused by this Court granting leave to appeal; (d) being a measure of '*last resort*'[30]

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[27] In the form of regulations.

[28] Applicants' HoA 45 : 64.

[29] Transcript of Applicants' argument in reply on 15 February 2018, the relevant extracts whereof are attached to SAPS's HoA as Appendix 1 (Emphasis added):

> *DOLAMO, J:* *Maybe we need to put more thought into what kind of an order to give, once we have determined the other issues, and to me maybe a practical way, and I've just quickly conferred with my sister here is we at tend to the question of whether there is discrimination, if we conclude that there is unfair discrimination we will reconvene to deal with the structural remedy.*
>
> *MR BISHOP:* *Justice Dolamo we would have no objections at all …. Your Lordship's proposal is an excellent proposal, … and then SAPS will have to come to the table with their proposals about what does that process look like and we would be more than happy at that point to engage with SAPS but it can only be a meaningful engagement once we've crossed that first hurdle that yes what's currently happening (indistinct).*

[30] *New Clicks* above n 19 at para 68 to 71.

20. Significantly, this application has not been brought as a measure of last resort:[31]

20.1. The chronology annexed to SAPS's answering affidavit ('**AA**'), annexure "AA5",[32] traces the procedural history since the merits judgment.[33]

20.2. Surprisingly, the Applicants have omitted from their own chronology the fact that, on 30 April 2021 (and after receipt of this application), SAPS made a *with prejudice* proposal to the Applicants for a joint approach to Judge President Hlophe ('**the JP**') to allocate the matter for a decision on remedy,[34] to avoid an unnecessary and potentially wasteful application to this Court.

20.3. Although the Applicants had written to Judge Dolamo and the JP, a *joint* request had never been made. And there is no reason to believe that the JP would have refused to allocate the matter for a hearing on remedy based on a joint request by the parties. So too, there is no evidence that Judge Dolamo would have refused to hear the matter attendant on a joint request. Judge Mabindla-Boqwana was in the SCA for most of 2020 and an alternative Judge would in all likelihood have been appointed in her stead.

20.4. Yet, the Applicants rejected SAPS's proposal.[35] And in this Court they proffer no explanation as to why their refusal should not unseat their claim of a constructive refusal notwithstanding the point having been pertinently raised in

[31] *New Clicks* above n 19 at para 71.
[32] "AA5" to SAPS's AA (CC Bundle) 665-671.
[33] On 14 December 2018. Merits judgment (Record, vol 8) 719-802.
[34] "AA3" to SAPS's AA (CC Bundle) 659-662.
[35] "AA4" to SAPS's AA (CC Bundle) 663-664.

SAPS's AA.[36] Signally, even the Applicants' chronology to their HoA fails to address this crucial point.

20.5. This failure on the part of the Applicants suggests that rejecting SAPS's invitation was self-serving. In their rejection letter, the Applicants countered that the Equality Court was *functus officio*[37] and lacked jurisdiction.[38] But this begs the question on at least three bases: (a) the Equality Court reserved for itself the power to determine remedy in accordance with Order 3 – far from being *functus officio*, the Equality Court is seized with the question of remedy; (b) if the matter had been allocated in accordance with the Applicants' request, there would be no question that the Equality Court was *functus* and lacking in jurisdiction; (c) if this Court is to grant the second alternative Order sought, the effect of such an Order is a remittal to the Equality Court. It follows, we submit, that the Applicants' purported rationalisation is specious.

20.6. We submit that had the Applicants adopted the sensible course and approached the JP together with SAPS with an agreed timetable, the application to this Court would have been unnecessary. It follows, we submit, that this application is not being pursued as a measure of last resort.

[36] SAPS's AA (CC Bundle) 570-571 : 30-31.
[37] SAPS's AA (CC Bundle) 571 : 32, paraphrasing from "AA4" to SAPS's AA (CC Bundle) 664 : 4.
[38] The Applicants also cited their complaint to the JSC against Judge Dolamo, as well as the fact that the JP had not responded to their written requests, as reasons for rejecting SAPS's attempt to have the Equality Court hear the parties on remedy.

21. Third, we submit that the chronology of relevant events, which are set out in SAPS's AA,[39] do not satisfy the criterion of *unreasonable* delay, which depends on the circumstances of each case.[40] In essence—

21.1. After the Equality Court delivered judgment on the merits on 14 December 2018, the parties only *started* engaging on the question of remedy some six months later in **June 2019**.[41]

21.2. The parties initially tried to agree on a remedy without having to return to Court. Unable to do so, the Applicants approached the Equality Court only on **18 September 2019** to request a hearing on remedy.[42] This was some nine months after judgment was handed down (and after an application for leave to appeal had been brought and later withdrawn).

21.3. The Presiding Judges indicated that they could hear the matter either in **March 2020** or after **15 December 2020**, as Judge Mabindla-Boqwana would be acting in the SCA in the interim.[43]

21.4. But SAPS's legal representatives were not available on the March 2020 dates, and so the matter could be heard only after 15 December 2020.[44] The Applicants acquiesced in this without protest. Indeed, the Applicants proposed that the matter be heard in the third or fourth term of 2020.[45]

[39] SAPS's AA (CC Bundle) 576-583 : 40-43 and "AA5" to SAPS's AA (CC Bundle) 665-671.
[40] *New Clicks* above n 19 at para 71.
[41] SAPS's AA (CC Bundle) 583 : 44.1. The second terms ended on 20 June 2021.
[42] SAPS's AA (CC Bundle) 583 : 44.2.
[43] SAPS's AA (CC Bundle) 584 : 44.4.
[44] SAPS's AA (CC Bundle) 584: 44.4.
[45] "MD17" to the Applicants' FA (CC Bundle) 401 : 2.

21.5. Between **11 February 2021** and **19 March 2021**, the SJC wrote to the JP and Judge Dolamo thrice, requesting a hearing in either the *first or second terms of 2021*. Yet this application was launched in April 2021, even before the second term of 2021.

21.6. It was against that background that SAPS proposed that the parties make a joint approach to the JP, instead of burdening this Court.

22. Since the Applicants reconciled themselves to a hearing after 15 December 2020, the relevant period for gauging unreasonable delay must then start as at that date and would only have ended at the end of the second term – months after this application was instituted in April 2021.

23. It is a distortion of the facts for the Applicants to rely on an unreasonable delay of over five years (since the application was launched) and nearly two-and-a-half years (since the judgment on the merits).[46] It is a greater distortion to suggest that the period of delay commenced in **November 2011**, when Premier of the Western Cape was requested to appoint a commission of inquiry.[47]

24. To reiterate, the correct approach to determining delay is the following:

24.1. The Applicants took no issue with the matter being heard <u>after</u> 15 December 2020. Had this been objectionable, it ought to have been raised with the Judges in response to their proposal. It was not. Moreover, the Applicants had requested a hearing in the third or fourth terms of 2020.

[46] Applicants' FA (CC Bundle) 60 : 109.1. The Applicants have submitted that the delay has increased to five-and-a-half years and three years respectively in Applicants' HoA 22 : 30(i).
[47] Applicants' HoA 8-9 : 11.

24.2. The matter could not have realistically been heard between 15 December 2020 and 30 January 2021 given that this is generally over the period of Court recess.

24.3. The question then becomes whether the three letters sent between 11 February and 19 March 2021 requesting a hearing before the end of the second term (noting that the second term had not even commenced as at the date on which this application was instituted) which were unanswered, constitutes a sufficient basis for this Court to find undue delay and a constructive refusal on account thereof. We submit not.

25. We submit that the relevant period (post 15 December 2020 to the date of institution of this application on 10 April 2021) does not evidence *unreasonable* delay on the part of Judge Dolamo or the JP to convene a hearing on remedy. The Applicants themselves were prepared to wait for a hearing before 20 June 2021 (the end of the second term).

26. Fourth, a proper determination of a just and equitable remedy necessitates the leading of further evidence on the revision of the THRR, the plans for implementing it, testing and the measures already taken to give effect to the Khayelitsha Commission's recommendations and the merits judgment. In relation to the Western Cape, the steps taken by the Provincial Commissioner in terms of section 12(3) of the Act[48] since 2016 are highly relevant. It would be unreasonable to ignore all this information and for this Court to grant a remedy based on speculation.

[48] South African Police Service Act 68 of 1995 ('SAPS Act').

27. Given the expert evidence of Ms Redpath in response to SAPS's previous THRR model and statistics,[49] the current revised models and information will likely elicit similar scrutiny and disputes of an expert opinion nature. The Equality Court is best suited to evaluate that evidence and to resolve any disputes.

28. Should this Court deem the Equality Court to have constructively refused a remedy, it will be deprived of the benefit of that evidence to exercise its own remedial discretion judicially. The evidence is not amenable to admission under Rule 31,[50] the criteria for which are stringent.

29. SAPS will be severely prejudiced if this Court were to grant a supervisory order based on outdated evidence from 2013/2014 and 2016/2017 that served before the Equality Court. The grant of a remedy in these circumstances is manifestly inconsistent with the constitutional threshold of justice and equity.

30. Fifth, even if the matter did bear a degree of urgency before SAPS delivered its AA (which is not conceded), any need for urgent relief has since dissipated. The Applicants themselves accept that SAPS is currently taking constructive measures that are likely to cure the constitutional difficulties identified by the Equality Court.[51] Notably, SAPS has done so in the absence of a Court Order directing it to adopt specific measures.

31. Sixth, the Applicants have not met the criterion of '*substantial prejudice*' to themselves and members of the public whose interests they represent.

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[49] Supporting affidavit of Redpath to the FA (Record, vol 1) 86-87 : 77-78. Supporting affidavit of Redpath to the RA (Record, vol 7) 642 : 4. Affidavit of Redpath responding to Voskuil (Record, vol 7) 707 : 3.

[50] In terms Rule 31 of this Court's Rules: further facts may be introduced before this Court as evidence only if they are: *(a)* are common cause or otherwise incontrovertible; or *(b)* of an official, scientific, technical or statistical nature capable of easy verification.

[51] Applicants' HoA 5 : 6.

32. Having extolled SAPS for taking meaningful steps for the redistribution of resources to remedy the unfair discrimination identified in the merits judgment and nationally,[52] the Applicants' alleged prejudice has altered to complaints that they cannot know how the process of revising the THRR will unfold;[53] the likely impact of a revised THRR needing to be assessed;[54] and SAPS not having committed to timelines for the revision or for reallocation of resources in the Western Cape.[55]

33. But SAPS openly invited the Applicants to engage on multiple occasions, which they declined.[56] The very purpose of standing down a decision on remedy was to allow for engagement.[57] SAPS was never closed to taking on board constructive input from the Applicants.

34. Further, public comment is expressly envisaged as part of the revision process of the THRR as is expressly stated in SAPS's AA before this Court.[58] Thereafter, further analysis on the impact of changes to police stations will be undertaken as part of the revision '*to ensure that those changes adequately respond*' to the merits judgment.[59]

35. Seventh, the evidence before the Equality Court at the time of the hearing was that significant revisions to the reallocation of resources in the Western Cape by the Provincial Commissioner had already been made and further reallocations were underway.[60] Measuring the sufficiency of the steps taken by the Provincial

[52] Applicants' HoA 26 : 38.
[53] Applicants' HoA 27 : 39.
[54] Applicants' HoA 27 : 39.
[55] Applicants' HoA 27-28 : 39.
[56] SAPS's AA (CC Bundle) 594 : 64.9.
[57] Above n 29 contains the relevant portion of the transcription of the proceedings before the Equality Court and the exchange between the bench and counsel for the Applicants during replying argument.
[58] SAPS's AA 566-567 : 25.
[59] SAPS's AA 567 : 25.
[60] See below n 201.

Commissioner will require detailed, up-to-date evidence. (SAPS provided a summary of the fixed establishment as at 2019 of Khayelitsha, Delft and Cape Town Central, among others, as annexure "AA2",[61] with which the Applicants have not taken issue.)

36. Therefore, we submit that any delay in determining remedy has not caused '*substantial prejudice*' to the Applicants. At most, it is perceived prejudice. The suggestion that SAPS has not been transparent with the Applicants about its efforts to give best effect to the merits judgment is without foundation; the Applicants raised their own drawbridge.

37. Far from SAPS having sat supine since the recommendations of the Commission or indeed the merits judgment, the evidence before the Equality Court as well as the evidence before this Court demonstrates quite the contrary. Given the complexity of the task at hand, an overnight solution could not be found. Yet, despite the absence of an Order in respect of remedy, SAPS has diligently pursued its best endeavours in respect of the amendments and revisions to the THRR.

38. Eighth, as regards the remaining issues that the Applicants rely on in support of the application for leave to appeal premised on a constructive refusal, *viz*: (a) the objects of the Equality Act; (b) the vulnerability of the rights holders; and (c) the importance of the rights, none of those contentions justify this Court granting leave to appeal on account of a constructive refusal to grant a remedy. All of these issues dominate the jurisprudence of this Court, yet, despite that they have never been used as a basis on which to short circuit the appeal process. Indeed, these are the very factors that justify this Court having the benefit of the Equality Court (and possibly the SCA) prior to its

[61] "AA2" to SAPS's AA (CC Bundle) 658. SAPS's AA (CC Bundle) 568-569 : 27.

determination of the question of remedy. Notably, they have not been identified as relevant factors in *New Clicks*.

III APPLICANTS' ABANDONMENT OF THE CHALLENGE TO PARAGRAPH 2 OF THE MERITS ORDER AND PEREMPTION

39. The Applicants regard their intended appeal against paragraph 2 of the merits order to be moot.[62] Paragraph 2 of the merits order provides:

> '*It is declared that the system employed by the South African Police Service to determine the allocation of Police Human Resources, in so far as it has been shown to be the case in the Western Cape Province, unfairly discriminates against Black and poor people on the basis of race and poverty.*'[63]

40. The Applicants initially sought a substitutive order, removing the territorial qualification (i.e. limiting the declaration to the Western Cape).[64] If granted, it would have declared the SAPS system for allocating police human resources invalid across the country, thereby overturning the Equality Court's finding that the Applicants had not proved a case to that effect.[65]

41. However, the Applicants have abandoned the challenge to paragraph 2 of the merits order. This is evident from their draft order and their submission that that relief has become moot,[66] in the light of SAPS's AA and the '*welcome*' fact that SAPS is engaging meaningfully with the problems identified by the Equality Court.

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[62] Applicants' HoA 5 : 6.
[63] Merits order (Record, vol 8) 768 : 2, quoted in above n 10.
[64] NOM (CC Bundle) 5 : 3.
[65] Merits judgment (Record, vol 8) 761 : 77. Merits order (Record, vol 8) 768 : 94.1-2. SAPS's AA (CC Bundle)
[66] Applicants' HoA 5 : 6.

42. Given the Applicants' abandonment of the challenge to the circumscribed nature of the Equality Court's declaration of invalidity, it is not necessary to address why an appeal on that issue has, in any event, been perempted.

43. However, should it become necessary to address this Court on peremption, reference will be made to the averments in SAPS's AA[67] and to this Court's decisions in *SARS v CCMA*[68] and *Zuma v Judicial Commission of Inquiry*.[69]

IV LEAVE TO APPEAL DIRECTLY TO THIS COURT SHOULD BE REFUSED

44. In order for this Court to grant leave to appeal directly to it, it must first find that the Equality Court has constructively refused to hear and determine the issue of remedy. For reasons addressed, there is no basis for a finding of a constructive refusal. It follows that there is no basis for a direct appeal to this Court.

45. However, if notwithstanding our submissions, this Court finds that there has been a constructive refusal, we submit that the threshold test for granting leave to appeal directly to this Court has not been met, particularly when regard is had to the following guiding principles:

    45.1. A direct appeal is not merely available for the asking, *exceptional circumstances* must exist before this Court can condone the bypassing of the channels of appeal in the lower courts.[70]

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[67] SAPS's AA (CC Bundle) 586-588 : 49-52.
[68] *SARS v CCMA* 2017 (1) SA 549 (CC) at para 26.
[69] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others (Council for the Advancement of the South African Constitution and another as Amici Curiae)* [2021] JOL 51107 (CC) ('*State Capture Inquiry*') at para 101
[70] *Economic Freedom Fighters And Another v Minister of Justice And Correctional Services And Another* 2021 (2) SA 1 (CC) at par 72. See too: *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC) at par 23.

45.2. Where the lower courts have been bypassed, the interests of justice considerations weigh heavily in the determination of whether or not leave to appeal ought to be granted. [71]

45.3. It is ordinarily beneficial and preferable for this Court to digest the considerations of the Supreme Court of Appeal. However, this court can be persuaded by *compelling reasons* that it is in the interests of justice to deviate from the normal appeal procedure and grant a direct appeal.[72]

45.4. In the exercise of its discretion, this Court has referred to the following factors: (a) whether there are only constitutional issues involved; (b) the importance of the constitutional issues; (c) the saving in time and costs; (d) the urgency, if any, in having a final determination of the matters in issue; and (e) the prospects of success. These must be balanced against the disadvantages to the management of this Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal is bypassed. [73]

46. We submit that leave to appeal should be refused as it is not in the interests of justice to hear the matter at this stage and/or because there are limited prospects of the Applicants succeeding in their claim for the supervisory orders.[74]

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[71] *Economic Freedom Fighters and Another v Minister Of Justice And Correctional Services And Another* 2021 (2) SA 1 (CC) at par 72.
[72] *Nandutu v Minister of Home Affairs* 2019 (5) SA 325 (CC) at par 27.
[73] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at par 21.
[74] SAPS's AA (CC Bundle) 601 : 93.

47. First, as submitted, the Equality Court has not constructively refused a remedy. The consequence of this is that there is no appealable decision in respect of which this Court may competently exercise appellate jurisdiction.

48. Second, it is contradictory for the Applicants to accept that the developments since the judgment on the merits, canvassed in SAPS's AA, '*will naturally affect the Court's assessment of the appropriate remedy*',[75] on the one hand, while also submitting that the issue of remedy has been fully pleaded before the Equality Court, on the other.[76]

49. As submitted, unlike in *New Clicks*, the evolving factual situation is directly relevant to remedy. Those facts are not before this Court, and the Applicants accept that, at least in respect of the Western Cape, '*determining whether a new provincial allocation or a revised THRR will cure the discrimination or not is itself an issue on which expert evidence will be required.*'[77] Accordingly, the real issues have not been fully pleaded.

50. Third, it is agreed that SAPS has undertaken a *process* of revising the THRR.[78] It is dynamic and continuing. Further evidence regarding these developments will need to be produced before the Equality Court for an appropriate remedy to be determined.[79]

51. As before, the Applicants may present conflicting expert opinions or dispute facts in SAPS's further affidavits. This Court is not well-suited to resolve disputes of that kind,

[75] Applicants' HoA 45 : 64.
[76] Applicants' HoA 16-17 : 20.
[77] Applicants' HoA 44 : 63.
[78] SAPS's AA (CC Bundle) 565-570 : 21-28; 591 : 58.1.
[79] SAPS's AA (CC Bundle) 570 : 29.

particularly involving highly technical, statistical evidence,[80] whereas the Equality Court is.

52. Fourth, given the complexity of the new issues that may arise from the evidence, this Court would benefit from the views of the Equality Court (and potentially the SCA).[81] Entertaining an appeal would prevent the Equality Court from exercising a true remedial discretion,[82] under section 21 of the Equality Act,[83] based on the new evidence. This would result in this Court sitting as a court of first and last instance.[84]

53. Fifth, while this Court has previously admitted evidence of facts arising *after* a decision being appealed against,[85] it has done so only where the evidence is irrefutable and there is no opposition or prejudice.

54. Here, the additional information would not only include new raw data, but also evidence of the altered statistical formulae and computational models, evidence of their outcomes, an evaluation of their efficacy and the policies based on them. This evidence falls outside Rule 31.

55. Sixth, for the reasons given below, we submit that the Applicants cannot satisfy the test for exceptionality to justify the grant of a supervisory order.

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[80] *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others* (No 3) (CCT19/11) [2016] ZACC 20; 2016 (10) BCLR 1308 (CC) ('*Pheko III*') at para 29. At para 36 this Court held:

> 'It follows that the issues are incapable of being resolved on the papers by this Court. The referral will allow this Court to avoid sitting as a court of first and final instance in the resolution, at an interlocutory stage of litigation, of conflicting expert evidence on affidavits. It will ensure that evidence is brought before the High Court regarding the disputed facts.'

[81] Id at para 29. SAPS's AA (CC Bundle) 595 : 66-67.

[82] For true discretion see *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC) 82-92.

[83] In *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC) at para 194, this Court held that section 21 of the Equality Act (as well as section 38 of the Constitution), empowered it to order '*any appropriate relief*', which signifies a true discretion.

[84] *Pheko III* above n 80 at para 36.

[85] *Falke and Another n National Director of Public Prosecutions* 2011 (11) BCLR 1134 (CC) at paras 51-52. In that case it was evidence of the outcome of proceedings in Germany.

56. Seventh, there is no urgency that warrants by-passing the Equality Court or SCA.[86] Had the Applicants accepted SAPS's invitation to meet with the JP, it is likely that the Equality Court would have received evidence and heard argument on remedy by now.

V ALTERNATIVE APPLICATION FOR DIRECT ACCESS SHOULD BE REFUSED

57. The grant of direct access is a discretionary power to be exercised judicially.[87]

58. If this Court finds that the Equality Court did not constructively refuse a remedy, we submit that the application for direct access should be refused on the same grounds advanced in paragraphs 48 and 56 above (i.e. there are no prospects of success and it would not be in the interests of justice to grant direct access).

59. Additionally, we submit that the Applicants have not presented '*compelling*' reasons to meet the test for direct access.[88] Unlike the *State Capture Inquiry* case, on which the Applicants' rely,[89] there is no comparable degree of urgency and none is pleaded.[90]

60. This Court observed in *Bruce v Fleecytex*: '*Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised.*'[91] Here the indispensability of the views of lower courts is accentuated by the complexity of the matter.[92]

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[86] Cf. *Minister of Home Affairs and Others v Tsebe and Others* 2012 (5) SA 467 (CC) at para 23, where there were no disputes of fact and the respondent faced imminent deportation and the risk of facing the death penalty in the receiving state.
[87] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture v Zuma and others (Helen Suzman Foundation as Amicus Curiae)* 2021 (5) SA 1 (CC) ('*State Capture Inquiry*') at para 53.
[88] *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) at para 9.
[89] Applicants' HoA 23 : 32.
[90] *State Capture Inquiry* above n 69 at para 55. There, the overriding consideration was the limited lifespan of the Commission and the importance of receiving Mr Zuma's evidence before its term expired.
[91] Id at para 7. See also *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC) at para 18.
[92] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) at para 11 and *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC) at para 19.

61. This Court in *Hekpoort*[93] found that it would not be in the interests of justice to grant direct access where proceedings were still pending in the High Court.[94] There, the applicant faced interlocutory obstacles in the High Court and had not exhausted avenues for overcoming them, to have the main application heard. Regardless of its noble intentions, acting in the public interest, the applicant '*could not rely on its own failure to invoke remedies available to it.*'[95]

62. We reiterate that a joint approach to the JP was a viable alternative to seeking direct access.

63. This Court in *Hekpoort* was also unpersuaded that the alleged irreversible pollution of underground water met the test for exceptionality.[96] The need for factual disputes to be resolved also disinclined this Court from granting direct access.[97]

64. We submit that these authoritative views outweigh any savings of resources to the Applicants, a point raised in their FA,[98] but not pursued in argument.

65. Accordingly, we submit that the application for direct access should be refused. The appropriate order, in our submission, would allow the Equality Court to discharge its function by adjudicating on remedy, having regard to all relevant facts.

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[93] *Hekpoort Environmental Preservation Society and Another v Minister of Land Affairs and Others* (CCT21/97) [1997] ZACC 13; 1997 (11) BCLR 1537; 1998 (1) SA 349 (CC).

[94] Id at para 11:

> 'the High Court application is still pending before that Court. The orders made in those proceedings stand, until they have been set aside by a competent court having jurisdiction to do so. What the Society is in effect asking this Court to do, is to ignore the fact that the High Court is seized of the matter and to take it over and dispose of it as though it were the court of first instance. This Court does not have the power to do so.'

[95] Id at para 8.

[96] Id at para 10.

[97] Id.

[98] Applicants' FA (CC Bundle) 73-74 : 147-149.

VI FURTHER ALTERNATIVE APPLICATION FOR DIRECT ACCESS SHOULD BE REFUSED

66. If this Court finds that the Equality Court did not constructively refuse a remedy, in the further alternative to seeking direct access for a determination on remedy, the Applicants seek direct access for this Court to issue '*directions*' to the Equality Court.

67. When a Court issues directions it does so in the exercise of its inherent jurisdiction to regulate its own procedures, under section 173 of the Constitution.[99] First, the power does not extend to regulating the procedures of other courts.[100] Second, exercising that power presupposes that the Court is seized of a substantive matter.

68. It is noteworthy that in terms of section 171 of the Constitution '*all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation*'. We know of no procedure in terms of the rules or in terms of national legislation that that permits this Court to interfere in the workings of the High Court by issuing directions absent findings of unconstitutionality.

69. The distinction was illustrated by this Court's decision in *S v Thunzi*,[101] where the majority granted both a substantive order in respect of the confirmation proceedings and directions setting down the matter for a further hearing and calling on parties to address this Court on certain issues by a deadline.[102]

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[99] Section 173 of the Constitution provides:

> 'The Constitutional Court, the Supreme Court of Appeal and the high Court of South Africa each has the inherent power to protect and regulate its own process, and to develop the common law, taking into account the interests of justice.'

[100] Even in *S v Thunzi and Others* 2010 (10) BCLR 983 (CC), where this Court used the power in section 173 to amend an order of the High Court in confirmation proceedings where an ancillary order would perpetuate injustice, it recognised the exceptionality of those circumstances.

[101] Id.

[102] Id at paras 71 and 72.

70. If the Applicants intend that this Court remain seized of this application while the Equality Court determines remedy, we submit that the unsuitability of such a mechanism was already identified by this Court in *Pheko III*,[103] which eschewed a bifurcated process.

71. However, if the Applicants mean that this Court should refer the matter to the Equality Court for a determination of remedy, then that would be a final *order* of court, in terms of section 172(1) of the Constitution. The making of such an order would not permit of bifurcation of processes.

72. We submit that it would be neither necessary nor competent (for the reasons given in paragraphs 57 to 65 above) to grant direct access for that purpose. Accordingly, we submit that the further alternative claim for direct access should be refused.

VII SUPERVISORY RELIEF INAPPROPRIATE

73. We address the reasons for refusing the supervisory remedy first in respect of the '*National Relief*' and then in respect of the '*Western Cape relief*'.[104]

74. At the outset however, we set out the well-established legal principles governing orders of this nature:

    74.1. 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 the Courts should exercise those powers depends on the circumstances of each particular case, with due regard being given to the roles

[103] *Pheko III* above n 80at para 29.
[104] Paragraphs 4 and 4 of the draft order respectively. NOM (CC Bundle) 5 : 4.

of the Legislature and the Executive in a democracy. 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.[105]

74.2. Court orders concerning policy choices made by the Executive should not be formulated in ways that preclude the Executive from making such legitimate choices.[106]

74.3. Generally, the grant of a structural interdict is a remedial power vesting in courts in order to retain judicial supervision after a remedy has been granted to ensure satisfactory compliance with their orders.[107]

74.4. Supervisory orders will not be granted willy-nilly. Ordinarily courts proceed on the assumption that parties against whom an order has been granted will ensure that such an order is scrupulously complied with. Should this not be the case, the applicant would not be without a remedy.[108]

74.5. Where developments clearly demonstrate (as in the present case) that there is the requisite political will to respond to a Court Order, supervisory interdicts are not appropriate.[109]

Supervisory order for the 'National Relief' should be refused

75. Our argument is structured in three tiers: First, the Applicants' acceptance of paragraph 2 of the merits order disentitles them to the supervisory relief; second, the supervisory

[105] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para 113.
[106] Id at para 114.
[107] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para 96; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para 28; *Mzalisi NO v Ochogwu* 2020 (3) SA 83 (SCA) at para 13.
[108] *Mzalisi NO v Ochogwu* 2020 (3) SA 83 (SCA) at para 13.
[109] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para 119.

relief is, in any event, inappropriate on these facts; and third, even if supervisory relief were appropriate, the Equality Court should oversee its implementation.

Effect of accepting paragraph 2 of the merits order on the supervisory order in respect of the 'National relief'

76. The Applicants accept that '*SAPS has provided evidence that it is squarely addressing the Commission's findings in its draft revision of the THRR.*'[110] They say further that SAPS has—

> '*engaged meaningfully with the redistribution of resources required to remedy the unfair discrimination identified by the Equality Court. . . . it is in fact taking steps to remedy the unfair discrimination in the Western Cape and nationally. . . . Those amendments seem to be a real attempt to cure the discriminatory allocation of police resources. . . . the Applicants welcome this effort and believe that it could cure the unfair discrimination.*'[111]

77. Accordingly, the Applicants submit that the appeal against paragraph 2 of the merits order has become moot.[112] And, as per the draft order, the Applicants have abandoned the following paragraphs of the NOM: 2(ii), 3, 5(ii) and 6 (to the extent that it refers to paragraph 3).[113]

78. We submit that the Applicants' abandonment of the appeal against paragraph 2 of the merits order is an unequivocal acceptance of the *correctness* of its contents. Being an order of court, its correctness may be challenged only by way of an appeal.[114]

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[110] Applicants' HoA 10 : 12.
[111] Applicants' HoA 26 : 38. See also Applicants' HoA 45 : 64.
[112] Applicants' HoA 5 : 6.
[113] Applicants' NOM (CC Bundle) 5-7 : 2, 3, 5, 6.
[114] *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* (CCT257/17) [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) ('*ACSA v Big Five*') at para 96.

79. Paragraph 2 limited the declaration of unlawful discrimination of SAPS's allocation of human resources to the *Western Cape*.[115] The Equality Court found that the Applicants had failed to prove unfair discrimination at a national level.[116]

80. Despite the abandonment of the appeal in respect of paragraph 2 of the merits order, the Applicants seek (in paragraph 4 of the Draft Order) consequential relief on a national scale.

81. However, it is no longer open to the Applicants to persist with such relief because the supervisory remedy is *consequential* relief, that can only be predicated on this Court overturning the Equality Court's finding that unfair discrimination had <u>not</u> been proved outside the Western Cape. Indeed, this was recognised by the Applicants in their framing of the relief as originally sought in the Notice of Motion.

82. While this Court held in *Höerskool Ermelo*[117] that a declaration of invalidity under section 172(1)(a) is not a *precondition* for making a just and equitable order under section 172(1)(b) (including a supervisory order),[118] we submit that it does not follow that, *absent*

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[115] Merits order (Record, vol 8) 768 : 2 provides:

> 'It is declared that the system employed by the South African Police Service to determine the allocation of Police Human Resources, in so far as it has been shown to be the case in the Western Cape Province, unfairly discriminates against Black and poor people on the basis of race and poverty.'

[116] Merits judgment (Record, vol 8) 761 : 77 provides in relevant part:

> 'There is, however, no evidence as to how the THRR affects other parts of the country. It is not good enough to conclude, as the applicants have argued, that since there are similarities between the Western Cape and KwaZulu-Natal, that the pattern of discriminatory distribution of resources are replicated in the seven other provinces as well. This kind of reasoning requires making assumptions where no evidentiary proof exists. Secondly, only in reply did Redpath deal specifically with the other provinces. An applicant must make out its case in the founding papers and not in reply.'

[117] *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) ('*Hoerskool Ermelo*'), to which the Applicants refer in FA *Mlungwana* (CC Bundle) 77 : 158.

[118] Id at para 97.

In *Höerskool Ermelo*, this Court found that it would be just and equitable to require a school to reconsider its language policy, even though its validity had not been impugned directly. At issue was whether the Head of Department's decision to revoke the function of the governing body to determine the language policy, and to appoint an interim committee for that purpose, was lawful. (Id at para 97)

In its reasoning, this Court expressed doubts about the constitutionality of the language policy. Because the dispute about the choice of language policy underpinned the dispute regarding the HoD's decisions, this Court required the governing body to report it on the steps taken to revise the policy.

an appeal against a lower court's *refusal* to declare law or conduct invalid, a supervisory order would nevertheless be competent.

83. As this Court held subsequently in *Print Media*:[119]

> *'In its remedy, however, the High Court also severed words from section 24A(2) without declaring that section unconstitutional and invalid, to the extent of its erroneous reference to section 16(1). It is axiomatic that constitutional remedies may not be applied to constitutionally valid laws or conduct.'*[120]

84. Since paragraph 2 of the merits order now stands unchallenged, it remains binding and cannot be ignored. That is the import of this Court's more recent decision in *ACSA v Big Five*.[121]

85. The Applicants' acceptance that they had not proven unfair discrimination nationally has significantly curtailed the issues in dispute. The system employed by SAPS to determine the allocation of police human resources outside the Western Cape must thus be treated as presumptively valid.[122]

86. In *Hoerskool Ermelo* where the policy in respect of which this Court granted a remedy under section 172(1)(b) occurred without an antecedent declaration of invalidity, this occurred because that policy had *not* been directly challenged. By contrast, in this matter, the supervisory relief would be irreconcilable with paragraph 2 of the merits order, which is not challenged.

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[119] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC).
[120] Id at para 87, own underlining. Ultimately, this Court declared section 24A(2) of the Films and Publications Act 65 of 1996 invalid because it had been frontally attacked in the High Court, but that court omitted to declare the section invalid before severing words from it. This Court, therefore, regarded the provision as presumptively valid until it had declared it to be otherwise.
[121] *ACSA v Big Five* above n 114 at para 96.
[122] That the revised THRR will have national application, is irrelevant to the Applicants' acquiescence in the circumscribed nature of the Equality Court's declaratory relief. Nor is it a concession by SAPS that the Applicants had, in fact, proved unfair discrimination nationally. In any event, even if the parties were agreed that the Applicants had proved unfair discrimination at a national level, that would not overcome the fact that prayer 2 of the merits order stands unchallenged. That was the ratio of this Court in *ACSA v Big Five*.

87. Accordingly, we submit that, given the Applicants' abandonment of the appeal against paragraph 2 of the merits order, it would be neither competent nor just and equitable to grant the supervisory remedy in respect of the '*National relief*'.[123]

Overview: insufficient factual basis for supervisory relief

88. Alternatively, if the Court finds that the Applicants' withdrawal of the appeal against prayer 2 of the merits order is not dispositive of the '*National relief*' sought, we submit that there is, in any event, an insufficient factual basis to justify a supervisory order.

89. According to the Applicants, three criteria may justify a supervisory order: (i) a vulnerable class of persons; (ii) a complex problem; and (iii) '*doubt about the state's ability to rectify the wrong unsupervised.*'[124]

90. SAPS agrees that Black and poor people have been historically marginalised. It is beyond doubt that they are a vulnerable sector in society. This fact however, does not justify a supervisory order.

91. SAPS also agrees that rectifying the unfairly discriminatory allocation of police human resources in the Western Cape is a complex task. This fact too does not justify a supervisory order. Expert affidavits exchanged in the Equality Court regarding the statistical model and methodology underpinning the now overtaken THRR bear out the highly technical nature of the problem.[125] And the evidence in this Court about the revision of the THRR demonstrates the complexity of that task.[126]

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[123] Paragraph 4 of the draft order, a modified form of NOM 5 : 3.
[124] Applicants' HoA 35: 52.
[125] Merits judgment, Record 765 : 86, 766 : 89. The evidence of Redpath and Voskuil (Record, vol 1) 69-99; (Record, vol 5) 404-487; (Record, vol 7) 641-687; 688-705; 706-693.
[126] SAPS's AA (CC Bundle) 565-570 : 21-29.

92. SAPS, however, denies that the the third criterion, '*doubt about the state's ability to rectify the wrong unsupervised*',[127] is satisfied on the facts, especially the facts that are now common cause.

93. As to the legal test for supervisory relief, the Applicants say that the following circumstances have met the threshold in past cases: repeated non-compliance with legal obligations; a refusal to act on recommendations; some other reason to believe that the respondents '*may not fully and promptly comply with the court's order*' absent supervision; intransigence, apathy or incapacity.[128]

94. The Applicants accept that evidence *must* demonstrate *future* non-compliance with a court order.[129] This is the correct position in law.

95. However, as detailed below, there is *every* indication that SAPS *will* comply – and *is* complying – with the orders of court. SAPS is doing so even in the absence of a Court Order directing it to do so. Indeed, the Applicants have conceded as much in their HoA.[130]

96. Having commended SAPS for taking meaningful steps to redress the problem,[131] the Applicants' basis for claiming the supervisory relief has now shifted: it is now predicated on the *speculative* basis that SAPS *might* not follow through with the revision and

[127] Applicants' HoA 35 : 52.
[128] Applicants' HoA 37 : 54.
[129] Applicants' HoA 37 : 54. Although the Applicants use the phrase 'may not', as we submit below, mere possibility will not suffice.
[130] Applicants' HoA 5 : 6; 26 : 38; 45 : 64.
[131] Applicants' HoA 5 : 6; 45 : 64.

implementation of the THRR.[132] They seek the supervisory order out of an abundance of caution, not clear proof of intransigence, apathy or incapacity.

97. We summarise the relevant jurisprudence below, to demonstrate that Applicants' newfound basis for the supervisory relief (*ex abundante cautela*), as per their draft order,[133] is not recognised in law.

Relevant law does not support the Applicants' claim for supervisory order

98. The Applicants submit that '*[s]upervisory relief is no longer an extraordinary or outlandish remedy. It is one of the ordinary tools that the courts employ to cure constitutional harms.*'[134] This suggests (incorrectly so) that supervisory relief was once considered '*extraordinary*', but now has the status of '*ordinary*' relief.

99. However, there is nothing quotidian about a supervisory order. It remains an exceptional remedy that Courts resort to only in extreme cases of demonstrable

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[132] Applicants' HoA 46-47 : 65.

[133] According to the draft order, the features of the supervisory order sought in respect of the '*National relief*' are:

1. Ordering the Minister and National Commissioner to complete the review of the THRR within one year.
2. Ordering them to take into account: whether the allocation system leads to poor, Black areas with high rates of contact crime and violent crime having lower police to population ratios than their wealthy counterparts; high levels of unreported crime in poor, Black areas; whether sufficient weight is given to violent crime in the allocation of police resources; and whether the cumulative effect of ostensibly neutrally weighted factors in the resource allocation model tends to skew allocations in favour of formal, wealthy (and often White) areas.
3. Ordering them to ensure that the review process and new system are open to public scrutiny and 'institutional oversight'.
4. Ordering them to report to this Court (it would seem – paragraph 5 of the draft order does not use the same demonstrative pronoun 'this' as 3.1 does) every two months on progress. The reports must state how the four considerations have been considered or explain why they were not.
5. Permitting the Applicants and any interested parties to comment on the reports and the process of amending the THRR within 10 days of lodgement of the reports.
6. Ordering the Minister and National Commissioner to complete the process of developing and implementing a new allocation system within two years.
7. Requiring the Court to supervise these processes until completion.
8. Apparently, declaring (for it is not clear) that the Court may mero motu call for additional evidence, set the matter down for hearing, appoint a panel of experts to aid it in its supervisory functions, or alter the supervisory order.

[134] Applicants' HoA 32-33 : 47. Emphasis added.
They further submit that the order sought here is merely supervision '*light*'. Applicants' HoA 41 : 60; 48 : 67.

governmental dysfunction. We submit that the Applicants reliance on a string of cases, summarised below, for their proposition is misplaced.

100. First, this Court in *Mwelase*[135] upheld the Land Claims Court's (LCC) order to appoint a Special Master to assist the LCC in its supervisory functions. This Court meticulously catalogued a history of breached court orders and undertakings,[136] to justify the supervisory remedy. We summarise the detail in the accompanying footnote.[137]

101. This Court found that the relevant Department had obstinately misapprehended its statutory duties,[138] was unresponsive and refused to account to those dependent on it for their constitutional rights,[139] repeatedly breached undertakings and court orders, and '*displayed a patent incapacity or inability to get the job done.*'[140] It failed to translate its promises '*into effective, rights-affirming practical action.*'[141] This posed '*a constitutional near-emergency*'.[142]

102. The facts indicated that '*crises in governmental delivery*',[143] '*where the bureaucracy has been shown to be unable to perform*' causing the most vulnerable and marginalised to suffer, may require

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[135] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* (CCT 232/18) [2019] ZACC 30; 2019 (11) BCLR 1358 (CC) ; 2019 (6) SA 597 (CC) ('*Mwelase*').

[136] By the Department of Rural Development and Land Reform.

[137] The relevant factual details of *Mwelase* are as follows (with paragraph references in parenthesis):
A labour tenant's right to acquire land depended on efficient departmental action in processing claims, in terms of the Labour Tenants Act (para 10). The Department, however, had for years refused to process labour tenant applications because it thought that '*it knew better than the Legislature*' (paras 19 and 20).
Despite the LCC's order by agreement obliging the Department to furnish data about the settlement of claims, it failed to do so. It later indicated that it would need two more years simply to capture the data. Thereafter, the Department's repeated undertakings to provide the data were not met. (para 21)
The claimants asked the LCC to appoint a Special Master, a '*more radical*' intervention (para 22), to ensure the implementation of the statute. The Department breached further undertakings to provide the information (para 23). It then agreed to a series of court orders to provide regular reports and an implementation plan, but breached those too (para 24).
The claimants renewed their entreaty for a Special Master (para 25). But the Department averted another court order by concluding a Memorandum of Understanding (para 25). The MOU was for good faith negotiations between the parties by establishing a national forum of NGOs to work with the Department. This agreement also failed (para 26). The claimants approached the LCC, the SCA and then this Court for relief.

[138] Id at para 40.

[139] Id at para 40.

[140] Id. Emphasis added.

[141] Id at para 42.

[142] Id at para 49.

[143] Id at para 48

supervised oversight by a court.[144] This Court found that the novel supervisory order was justified given the context of '*persistent institutional failings that repeatedly resulted in non-compliance with court orders.*'[145]

103. Second, in *Black Sash I*[146] SASSA assured this Court that it would be able to take over payment of social grants by the time its contract with Cash Paymaster terminated. This Court, therefore, discharged the supervisory order imposed in *AllPay II*.[147]

104. It later transpired that SASSA, in fact, knew that it could *not* comply with its undertaking, but neither SASSA nor the Minister took the Court into its confidence or sought to regularise their situation.[148] Yet, there was no reason for this Court to doubt SASSA's assurance.[149] SASSA's breach of its assurance and the threat of interruption of social assistance drove the Court to extend the unlawful contract and make a further supervisory order.[150]

105. In doing so, however, the Court sounded this caution:

> '*It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis.*'[151]

106. We, accordingly, submit that the Applicants are plainly wrong to contend that supervisory relief is unexceptional.[152]

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[144] Id at para 49. Emphasis added.
[145] Id at paras 70 and 80. Emphasis added.
[146] *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) ('*Black Sash I*').
[147] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC).
[148] *Black Sash I* above n 146 at para 6.
[149] Id at para 10.
[150] The further supervisory order included the appointment of the Auditor-General and a panel of independent legal and technical experts, to assist with monitoring compliance.
[151] Id at para 51. Emphasis added.
[152] Applicants' HoA 32-33 : 47.

107. Third, in the trio of *Pheko* cases[153] this Court was confronted with an errant municipality.

108. In *Pheko I*,[154] the municipality effectively evicted a community and demolished their homes without a court order under the guise of the Disaster Management Act.[155] The municipality acted *ultra vires* the statute and contrary to section 26(3) of the Constitution.[156]

109. Because it did not regard the relocation of the community as urgent,[157] and had not identified land for relocation or stated how long that process would take,[158] this Court imposed a supervisory order. The municipality did not oppose (and partly consented to) the order.[159]

110. In *Pheko II*,[160] the municipality faced contempt proceedings for failing to report to this Court on how it had discharged its duty to provide adequate housing for a section of the community.[161] It failed to comply with court directions and with a further court order to report on its progress.[162]

111. This Court remarked that, where an organ of state fails to give effect to the Constitution and a court order, the court '*must assume an "invidious position of having to oversee state action",*

[153] *Pheko and Others v Ekurhuleni Metropolitan Municipality* (CCT 19/11) [2011] ZACC 34; 2012 (2) SA 598 (CC) ('*Pheko I*'); *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) (CCT19/11) [2015] ZACC 10 ('*Pheko II*'); 2015 (5) SA 600 (CC); and *Pheko III* above n 80.
[154] *Pheko I* above n 153.
[155] 57 of 2002.
[156] Id at para 45.
[157] Id at para 41.
[158] Id at para 50.
[159] Id at para 51.
[160] Pheko II above n 153.
[161] Id at para 8.
[162] Id at paras 10-12.

to address and correct the failures.'[163] We, therefore, submit that the Applicants' suggestion that a supervisory order has been normalised is to be rejected.

112. In *Pheko III*,[164] this Court received conflicting geotechnical expert reports, in terms of its supervisory order. It acceded to the request to discharge its supervisory order and transfer the matter to the High Court for the full ventilation of the disputed issues, through leading of oral evidence[165] and potentially further evidence.[166]

113. This Court cautioned that it would be undesirable for it to become '*enmeshed in disputes on technical issues that are best suited to be determined by the High Court.*'[167] It was better to give the High Court full authority to do so,[168] to avoid sitting as a court of first and final instance.

114. We submit that *Pheko III* is clear authority for refusing the Applicants' supervisory relief.

115. Fourth, *Nyathi* concerned the State Attorney's failure to make good its promises of, and ultimately a court order for, an interim payment for delictual damages, liability having been admitted.[169] This Court found that the procedure for approaching the State Attorney for an interim payment was '*not effective*',[170] '*convoluted and difficult*'[171] and further impeded by '*bureaucratic bungling*'.[172] Despite raising the concern over a year previously,

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[163] Id at para 61. Emphasis added. Footnote omitted.
[164] *Pheko III* above n 80.
[165] Id at paras 14 and 15.
[166] Id at paras 16 and 35.
[167] Id at para 29.
[168] Id at para 30.
[169] *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* (CCT 19/07) [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC)at paras 64 and 65. The State Attorney did so after a long delay and only a few months before the claimant's demise, only *after* this Court requested that payment be made.
[170] Id at para 66.
[171] Id.
[172] Id at paras 67.

the State Attorney had ignored this Court's alarm.[173] This Court, therefore, ordered the state institutions to furnish reports on rectifying the problems.[174]

116. Sixth, this Court in *Sibiya*[175] found that the extreme delay in substituting death sentences,[176] following its order in *Makwanyane*, and the enormity of the task *yet* to be undertaken, made it inadvisable to accept the government's assurance that it would effect all substitutions within three-and-a-half months.[177] This Court found the time period unrealistic and imposed a supervisory order, which was not opposed.[178]

117. Seventh, in *DPP Transvaal*[179] this Court declined to confirm an order of legislative invalidity, but required reports to be submitted on how the state would commit resources to protecting child complainants in sexual offences matters when testifying in court as the '*first step in the supervisory process*'.[180] The Court's order was informed by the cumulative impact of the following: (a) the constitutional issues at stake concern children who are complainants of sexual offences[181]; (b) they are some of the most vulnerable members of society[182]; (c) they are not parties to the proceedings, but they have constitutional rights, making them doubly vulnerable[183]; (d) constitutional issues at stake are important and affect the administration of justice[184]; (e) the matter will have a

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[173] Id at para 69.
[174] Id at para 69.
[175] *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* (CCT45/04) [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC).
[176] Id at para 60. More than a decade since *Makwanyane*, which rendered the substitution of death sentences necessary.
[177] Id at para 61.
[178] Id at para 62.
[179] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC).
[180] Id at paras 204 and 205. In that case, there was no information as to whether the envisaged policy framework with address the concerns raised and what the stage of the drafting process of the policy was.
[181] Id at para 200.
[182] Id at para 200.
[183] Id at para 200.
[184] Id at para 200.

wide impact on many pending cases [185]; and (f) the record showed a disturbing inconsistency between the promises that the laws make and the implementation of the laws.[186]

118. In sum, the case law demonstrates that, absent a *clear* evidentiary basis that an organ of state is incompetent, inattentive or intransigent[187] or incapable of doing the job, supervisory relief would not be appropriate. The Court should assume that government will comply with court orders,[188] unless there are facts that indicate the contrary.[189] This flows from the separation of powers and the comity owed to other arms of state.[190]

119. A history of breaching court orders, promises and contractual obligations would strongly indicate an inability or unwillingness to comply with a declaratory or mandatory order, possibly justifying supervisory relief. That does not apply to SAPS.

120. SAPS has no history of non-compliance with court orders or promises made in respect of the THRR. On the contrary, in the absence of a Court Order, any promises or contractual obligations, SAPS has embarked on a process of revising the THRR. In so doing, it has gone beyond the merits order (which was limited to the Western Cape).

121. There is also no authority for the proposition that supervisory relief is appropriate merely to '*guarantee*' compliance in circumstances where it is undisputed that the relevant organ of state has been complying and has demonstrated an intention and ability to

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[185] Id at para 200.
[186] Id at para 201.
[187] Budlender and Roach 'Mandatory Relief and Supervisory Jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325 at 345, cited by this Court with approval in *Mwelase* above n 135 at fn 139.
[188] *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at para 27.
[189] *Minister of Water and Environmental Affairs v Kloof Conservancy* [2016] 1 All SA 676 (SCA) ('*Kloof Conservancy*') at para 23.
[190] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 109.

comply in future. On the contrary, the point of departure is that Court Orders will be adhered to unless the evidence demonstrates otherwise. For this reason too, we submit that a supervisory order would be inappropriate.

Allegations in the FA regarding inability or unwillingness to comply are incorrect and/or abandoned

122. The Applicants submit that a supervisory order is '*default*' relief '*in cases like this*'.[191] But the present case is <u>not</u> akin to those discussed above: there is no dispute that SAPS *is* taking steps attendant on the merits judgment and in the absence of any order directing it to do so. There is no evidence to show that SAPS is incapacitated, incompetent or intransigent, casting serious doubt on its ability or willingness to reform the THRR and implement it. The Applicants accept SAPS's commitment to revising the THRR.

123. The allegations in the FA to the contrary effect are unsupportable (and are in any event manifestly irreconcilable with the stance taken in the Applicants' HoA):

123.1. <u>First</u>, '*SAPS' conduct since the judgment on the merits confirms beyond doubt that the declaratory orders made by this Court in its December 2018 judgment will not, on their own, provide the applicants and the poor communities they represent, with an effective remedy.*'[192]

123.2. '*It has been 28 months since the judgment declaring that SAPS is discriminating unfairly in the allocation of its resources. Yet it has done <u>nothing</u> to remedy that discrimination.*'[193]

123.3. However, the Applicants now accept SAPS started the process of redressing the proved unfair discrimination in the Western Cape and improving the allocation

[191] Applicants' HoA 25 : 37.
[192] Applicants' FA (CC Bundle) 71 : 137. We assume that the intended reference was to the merits judgment and not a judgment of this Court.
[193] Applicants' FA (CC Bundle) 71 : 138.

system nationally after Minister Cele publicly accepted the Equality Court judgment on the merits.[194] The task team, steering committee and technical task team commenced their work in March 2019.[195]

123.4. Second, the Applicants criticise the sufficiency of the IRS, which SAPS produced in the Equality Court. They say that the IRS was a '*meaningless document*'.[196]

123.5. However, the IRS merely identified the revision of the THRR as *one* of the deliverables for appropriate resources planning.[197] The IRS did not purport to be a revision of the THRR itself (the current revision of the latter, the Applicants support).

123.6. Third, the Applicants aver that SAPS's conduct demonstrates that it is *unwilling* to cure the proven unconstitutionality.[198] They have, correctly, abandoned this assertion in their HoA.

123.7. Fourth, the Applicants claim that SAPS is *unable* to effect reform, concluding that '*nothing will change*'. They go on to say: '*SAPS has permitted the racially discriminatory allocation of police resources, which troubled the Khayelitsha Commission in 2014, to continue for a further six and a half years. It's failure to engage with the issue in*

[194] SAPS's AA (CC Bundle) 566 : 22.
[195] SAPS's AA (CC Bundle) 566 : 23. In the intervening period, SAPS had applied for leave to appeal to the SCA and the Applicants had launched a cross-appeal. These were both abandoned, as recorded in the deed of settlement, dated 14 March 2019. Annex "MD7" to the Applicants' FA (CC Bundle) 174 – 175.
[196] Applicants' FA (CC Bundle) 71 : 138.
[197] SAPS's AA (CC Bundle) 566 : 24-25.
[198] Applicants' FA (CC Bundle) 71 : 139.

any meaningful fashion makes it imperative that the applicants are granted a remedy which ensures a speedy end to this situation.'[199]

123.8. But this, too, is untrue.[200] We identify in the accompanying footnote the counter-indicative evidence that served before the Equality Court, illustrating the changes that had already been made as at 2017, in line with the Khayelitsha Commission's recommendations.[201]

124. On these facts, it cannot be contended that SAPS is obstinately refusing to reform the system for allocating police human resources to eradicate unfair discrimination (the only outstanding recommendation of the Khayelitsha Commission), is unwilling to do so, or

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[199] Applicants' FA (CC Bundle) 72 : 143.

[200] SAPS's AA (CC Bundle) 614 : 154-156.

[201] The Record of the proceedings before the Equality Court contain affidavits from senior SAPS officers, which canvass the steps that SAPS had taken in this regard (References to the appeal record are in parenthesis):

1. Major General Brand's evidence before the Equality Court was that SAPS had indeed been implementing the Khayelitsha Commission's recommendations before the expiration of the recommended three-year period:
   1.1. by January 2017, the three stations in Khayelitsha had received significant increases in the number of recruits (AA Brand (Record, vol 4) 332 : 15);
   1.2. SAPS had been interacting regularly with the Western Cape Government on the status of implementing the Commission's recommendations (AA Brand (Record, vol 4) 332-333 : 16);
   1.3. by August 2016, the Provincial Commissioner had placed additional operating staff at the Khayelitsha stations (AA Brand (Record, vol 4) 333 : 16);
   1.4. the National Commissioner met with Premier Zille, together with senior representatives from SAPS, to set up a task team comprising community organisations (These included SJC, Khayelitsha Development Forum, the Religious Fraternity, CODETA and the Community Police Forum. The Task Team was established in line with the Commission's recommendation – AA Rabie (Record, vol 3) 228 : 16), five members of SAPS and five members of the Western Cape Government from the Department of Community Safety (AA Brand (Record, vol 4) 334 : 19);
   1.5. a Priority Committee, comprising five sub-priority committees, was established (AA Brand (Record, vol 4) 334-335 : 20). These sub-priority committees respectively focused on substance abuse, youth (violence, bullying and youth at risk at schools and in the community), economic sub-forum (focusing on business and transport issues), gender-based violence (to protect women, children, elderly and LGBTI persons), community intolerance (to counter vigilantism);
   1.6. by February 2017 '*[m]any of the concerns raised at the Commission and reported upon [were] addressed*' (AA Brand (Record, vol 4) 335 : 22). He explains:
      'There is a much improved relationship and community interaction with the police. Contact between the various stakeholders is ongoing and occurs at fixed and regular intervals. The SJC enjoys representation on the Task Team but has not once complained that the Commission's findings were not being implemented. The minutes and other relevant documents pertaining to these meetings held by the Task Team and the Priority Committee area appended marked "JJB4". These documents bear out the improvements at the Khayelitsha police stations.'
2. Major General Rabie, the Head of Strategic Management, said in his affidavit: '*Many of the concerns raised by the Commission were already in the process of being attended to by the time the Commission issued its report in August 2014.*' (AA Rabie (Record, vol 3) 226 : 17).

is incapable of doing so. The Applicants accept this to be the case. Their concession should be the end of the matter.

125. What the Applicants seek is a '*guarantee*'[202] that SAPS will continue in this vein. But, in these circumstances, that is not a valid basis for any relief before this Court.

126. In *Kloof Conservancy*,[203] the SCA overturned the High Court's wide-ranging mandatory relief, intended to *ensure* that the Minister of Water and Environmental Affairs implements the list of alien and invasive species and regulations that she failed to publish almost 8 years prior.[204] Before the High Court made its order, that Minister published the required list, albeit belatedly.

127. The SCA found that the publication of the list and regulations rendered the matter moot. Because the matter raised issues of public importance and constitutional principle, the declaratory relief may have been warranted, '*but the consequential relief was hardly justified, particularly absent a finding by the court (still less any evidence) that the Executive would not observe the law.*'[205]

128. We submit that *Kloof Conservancy* sounds a clear warning against Courts exercising their powers beyond what is necessary to achieve in a constitutional end. Courts should steer clear from a '*jurisprudence of exasperation*'.[206] Despite initial resistance, SAPS accepted the merits judgment and has not hesitated to act on it. It is, in fact, doing the job on a

[202] Applicants' HoA 40 : 58.
[203] Above n 189.
[204] The primary relief was to require that Minister to publish the list and regulations.
[205] Id at para 23.
[206] *Kloof Conservancy* above n 189 at para 22, quoting Justice O'Regan's Helen Suzman Memorial Lecture titled 'The role of the ConCourt in our democracy' delivered on 20 November 2011.

national level in circumstances where the national relief was dismissed by the Equality Court.

129. While the Applicants argue that appropriate relief must be effective relief,[207] they fail to consider whether all effective relief is necessarily appropriate. Their entreaty for the supervisory order is unfounded on the facts of this matter and should be refused, if leave or direct access is granted.

Vagueness in the remedy sought in respect of 'National Relief'

130. Paragraph 4.3 of the draft order seeks to oblige the Minister and Provincial Commissioner to ensure that the review process is, among other things, open to '*institutional oversight*'.

131. It is unclear what '*institutional oversight*' means in this context. If it means oversight by the Minister, National Commissioner and senior members of SAPS, then it is redundant. If it means oversight by an institution other than SAPS and the Ministry, then it is vague.[208] In either event, it is inappropriate for inclusion in the court order.

Supervisory order for the 'Western Cape relief' should be refused

132. The Equality Court rejected the Applicants' claim that there was an overlap between the Provincial Commissioner's powers to distribute the strength of the Service intra-provincially, under section 12(3) of the SAPS Act, and the National Commissioner's power to determine human resources nationally.[209] The Applicants accept that holding.

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[207] Applicants' HoA 25 : 37; 33 : 48-49; 34 : 50; 42 : 60. They rely on *Mwelase* above n 135 at para 48 and *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69.
[208] *Kloof Conservancy* above n 189 at paras 13-14.
[209] Merits judgment (Record 727, vol 8) : 16-17. The National Commissioner's power to this end is contained in section 11.

133. The Applicants evidently also accept that further expert evidence is required to determine whether the provincial allocation of police human resources is no longer unfairly discriminatory.[210] Implicit in this is an acceptance that the factual position since 2017 has changed.

134. Yet, despite this acceptance, the Applicants nonetheless contend that the only effective relief is a supervisory order overseen by this Court. We submit that such relief would be a disproportional response that is supplanted by their own concession that SAPS has made strident advances in the right direction.

135. Accordingly, we submit that the supervisory order in respect of the '*Western Cape relief*' should be refused.

136. Of relevance is the evidence regarding the Provincial Commissioner's exercise of the power in section 12(3), in light of the Khayelitsha Commission's recommendations, which we summarise in the accompanying footnote.[211]

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[210] Applicants' HoA 44 : 63. They elaborate at fn 110:

> 'The Commission and the Equality Court relief on expert evidence to determine that the existing system was unfairly discriminatory. That shows the complexity of the task, and the need for supervision to determine whether the new system meets the constitutional standard.'

[211] We refer to the Record references in parenthesis:

3. Major General Voskuil stated in his affidavit, dated 13 March 2017, that the Provincial Commissioner was implementing a four-pillar approach to reducing crime, which was producing results (AA Voskuil (Record, vol 5) 427 : 59-60).
4. The Provincial Commissioner had, by that stage, strengthened the stabilisation capacity by deploying new recruits (AA Voskuil (Record, vol 5) 427 : 60). These were ongoing managerial interventions aimed at enhancing policing in the Western Cape (AA Voskuil (Record, vol 5) 427-428 : 61. They included: opening a service point in Browns Farm near Nyanga with an officer in command and a dedicated capacity of 60 visible policing members; capacitating the broader Nyanga policing precinct with a total of 101 visible policing members in the previous 7 months; commencing a first stage of the stabilization process in Nyanga, Gugulethu and Khayelitsha (in June 2016) and in Kraaifontein, Delft and Harare (in August 2016); distributing 41 operational members in Harare in August 2016 and 51 in January 2017, 37 in Khayelitsha in August 2016 and 7 in January 2017, 41 in Nyanga in August 2016 and 60 in January 2017; moving members performing court duties in Lingelethu-West to strengthen capacity at Khayelitsha; negotiating the acquisition of land to build a police station in Samora Machel/Weltevreden Valley in Nyanga; additional operational deployments aimed at stabilizing crime hotspots in gang-prevalent areas. Human resources were redistributed for operations for combatting gangs.
5. During phase 2, which commenced in August 2016, 1269 new constables graduated from Police College. During phase 3, which commenced in January 2017, 839 constables graduated. They were deployed across the province (AA Voskuil (Record, vol 5) 439 : 91) Phase 3, which commenced in January, involved resourcing stations and further strengthening stabilisation capacity (AA Voskuil (Record, vol 5) 439-440 : 94).
6. During the period April 2016 to December 2016, the Western Cape achieved the Cabinet-set target of reducing reported crimes by 2% (AA Voskuil (Record, vol 5) 444-445 : 108-109). By March 2017, statistics showed that in the Western Cape

Order stipulating this Court's inherent powers is gratuitous

137. Paragraph 5 of the draft order seeks a declaration as to the discretionary powers that this Court may exercise in the future under its supervisory jurisdiction.

138. We submit that this is not only superfluous but also but also inappropriate given that it potentially constrains the jurisdiction of this Court in the future.

Further alternative: Equality Court best suited to exercise supervisory jurisdiction

139. In the further alternative, if this Court finds that it would be just and equitable to require a court to oversee the completion and implementation of the revised THRR, we submit that it would not be appropriate for this Court to do so – rather, the matter should be remitted to the Equality Court for reasons already addressed.

VIII CONDONATION, CONCLUSION AND COSTS

Condonation

140. The Applicants do not oppose SAPS's application for condonation for the late delivery of its AA. The delay was of short duration, is fully explained and there is no prejudice occasioned by the delay.

141. Accordingly, we submit that condonation should be granted.

Conclusion and costs

142. We submit that it would be just and equitable for this Court to make an order—

    142.1. Condoning the late delivery of SAPS's AA.

contact crime had reduced by 5.3%, contact-related crime by 5.4%, property-related crime by 2.2% and other serious crimes by 5.3% (AA Voskuil (Record, vol 5) 445 : 109).

142.2. Dismissing the application for direct leave to appeal.

142.3. Dismissing the application for direct access.

142.4. Ordering that the matter be remitted to the Equality Court for a determination on remedy.

142.5. No order as to costs.

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7 December 2021
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