

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT13/13
WCHC case no: 21600/12

In the matter between:

MINISTER OF POLICE

First Applicant

and others

and

THE PREMIER OF THE WESTERN CAPE

First Respondent

and others

FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. On 24 August 2012¹ the First Respondent (“the Premier”) established a Commission of Inquiry – commonly referred to as the “*O’Regan Commission*” – into the parlous state of policing in the community of

¹ The Premier took the decision to establish the Commission on 22 August 2012. Affidavit of Zille - CCT Record, vol. 7, p 601, para 4. Her decision, and the reasons for the Commission, were made known in a press statement of the same day, annexure “AL 55” - CCT Record, vol. 4, p 348-349. The establishment of the Commission was formally promulgated in a proclamation in the Provincial Gazette (proclamation 9/2012, in Gazette 7026) on 24 August 2012, included in annexure “AL 74” CCT Record, vol. 4, p 410-412.

Khayelitsha.² In so doing the Premier acted pursuant to her discretionary powers under s206(3) and (5)³ of the Constitution – read with s127(2)(e) of the Constitution and s1(1) of the *Western Cape Provincial Commissions Act 10 of 1998* (“the WC Commissions Act”).

2. The Premier’s decision was premised on complaints received by civil society bodies active in Khayelitsha (including the Ninth Respondent – “the SJC”), which indicated a systemic failure in policing; and a plague of apparent vigilante killings, in which at least 13 alleged criminals were killed in the first half of 2012.
3. Based on the Province’s powers, and the abovementioned factors, the terms of reference of the Commission are:

3.1. To investigate complaints of the “*inefficiency*” of the South African Polices Service’s (“SAPS”) stations in Khayelitsha; and “a

² Khayelitsha is situated approximately 35km from the City bowl. It was established under apartheid (in 1985) as an area designated for black Africans. As a result of rapid urbanisation since 1994, the area grew rapidly and currently spans 43km² and is home to almost 750 000 people, the vast majority of whom are Xhosa-speaking black Africans. The community includes some areas of relative prosperity; areas of formalised low-cost housing; and significant areas which remain informal (i.e. areas which are not formally zoned or planned for residential use, and which are dominated by self-built structures). Affidavit of Zille - CCT Record, vol. 7, p 601, para 4.

³ Under s206(3) of the Constitution, each province is entitled:

- “(a) to monitor police conduct;
- (b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
- (c) to promote good relations between the police and the community;
- (d) to assess the effectiveness of visible policing; and
- (e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.”

Section 206(5) continues that in order to carry out these functions a province:

- “(a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and
- (b) must make recommendations to the Cabinet member responsible for policing” (emphasis added).

These powers are reflected in s66(1) and (2) *Constitution of the Western Cape 1 of 1998*.

breakdown in relations” between the community and SAPS. This wording mirrors that in s206(5)(a) of the Constitution. The investigation must include consideration of specific complaints, as well as a broader investigation into “*the reasons for, and causes of, the inefficiency and breakdown in relations, if found to exist*”; and

3.2. To compile a written report of findings and recommendations, relating to measures to “*alleviate or remedy*” any inefficiencies or any breakdown found to exist. The Commission’s recommendations will assist the Province in carrying out its duty, in terms of s206(5)(b) of the Constitution, to make recommendations to the First Applicant (“the Minister”).

4. The terms of reference of the O’Regan Commission reflect its role as a legitimate fact-finding body, which will inform the Provincial executive in the fulfilment of its constitutional functions. This accords with the finding in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 146-147 (“the SARFU case”) that:

“it is well established that the functions of a commission of inquiry are to determine facts and to advise the President [or Premier] through the making of recommendations. The President [or Premier] is bound neither to accept the Commission’s factual findings nor is he or she bound to follow

its recommendations. A commission of inquiry is an adjunct to the policy formation responsibility of the President [or Premier]. It is a mechanism whereby he or she can obtain information and advice.”

5. The Provincial and National Commissioners acknowledge that SAPS faces “*unique and complex*” challenges in Khayelitsha.⁴ The National Commissioner has gone so far as to propose an alternative process to conduct the same work as the Commission – including investigation of allegations of inefficiency and the relationship with the community.⁵ Internal documentation of the SAPS confirms inefficiencies in policing in Khayelitsha. In these circumstances the Commission can, with respect, only assist the SAPS in its function to “*prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants ... and their property, and to enforce the law*” (in terms of s205(3) of the Constitution).
6. Notwithstanding these facts, the Applicants brought proceedings in the Western Cape High Court (“the High Court”), in which they sought urgent interim relief⁶ designed to bring the Commission to an immediate halt. This interim relief was sought pending a hearing for final relief,⁷ the primary effect of which is primarily to set aside the “*appointment*” or “*establishment*” of the Commission.

⁴ Affidavit of Lamoer – CCT Record, vol. 2, p 88, para 31; Affidavit of Phiyega – CCT Record, vol. 1, p 62, para 7.

⁵ Annexure “AL 67” – CCT Record, vol 4, p 377-380 (letter from the Minister of 11 October 2012).

⁶ Part A of the Notice of Motion – CCT Record, vol. 1, p 2-4.

⁷ Part B of the Notice of Motion – CCT Record, vol. 1, p 4-9.

7. The application for interim relief served before a full bench of the High Court on 13 December 2012. In a judgment and order of 14 January 2013, the majority of the High Court (per Yekiso J, Traverso DJP concurring) dismissed the application with costs.
8. The Applicants have not pursued their application for final relief in the High Court. Instead, the Applicants seek leave to appeal to this Court (against the judgment and order of the majority in the High Court) or, in the alternative, direct access to this Court so as to challenge the establishment of the Commission.
9. The application for leave to appeal against the judgment of the High Court should be dismissed. That judgment quite correctly refused interim relief which would have the effect of interfering in a policy-laden executive determination (i.e. to establish the Commission). This finding accords with the now well-established principles in the cases of *SCAW*⁸ and *OUTA*.⁹
10. Based on pragmatic considerations (namely, the desire to avoid protracted litigation; and the Applicants' efforts to frustrate the workings of the Commission), the Premier indicated that the Province would not oppose the application for direct access, provided that: (a) this Court

⁸ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC)

⁹ *National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to intervene)* 2012 (6) SA 223 (CC)

was amenable to hear the matter; and (b) the case before this Court superseded the proceedings before the High Court.¹⁰ The Applicants have subsequently agreed that should this Court hear the current case, then the application for final relief in the High Court would fall away. Consequently, the First and Second Respondents support the contention that it is in the interests of justice this Court should hear and finally decide the issues raised by the Applicants.

THE REMAINING BASES OF THE APPLICANTS' CHALLENGE

11. The broad and extensive legal challenges outlined in the founding affidavits in the High Court appear to have now been narrowed to the following, which we deal with in order of convenience:

11.1. First, it is suggested that the Premier failed or refused to give effect to the principles of “*co-operative government and intergovernmental relations*” – contrary to s41(2) and (3) of the Constitution and the *Intergovernmental Relations Framework Act 13 of 2005* (“IGRFA”). This is based on the allegations that the Premier did not “*seriously engage*” with the Minister, the National Commissioner and the Provincial Commissioner in the periods before and after establishing the Commission; and failed to raise the matter in a range of other *fora*.

¹⁰ Affidavit of Zille – Leave to Appeal Record, vol. 11, p 1173, para 15ff.

- 11.2. Secondly, it is suggested that the Premier failed to recognise that provincial oversight over the SAPS was “*non intrusive*”. In particular, it is argued that the Premier erred in granting the Commission coercive powers of subpoena (at least in respect of SAPS officers), as this amounts to an attempt to direct and control policing – and as such oversteps the Province’s oversight powers under ss206(3) and (5) of the Constitution.
- 11.3. Thirdly, the rationality of the Premier’s decision to appoint the Commission is challenged, because the complainants’ problems do not merely indicate a breakdown between the community and the police, but “*were directed at the justice system as a whole*”. Furthermore, it is suggested that the link between the outburst of vigilantism, and a breakdown in policing, was one of the Premier’s own making.
- 11.4. Lastly, it is contended that the Commission’s terms of reference are “*undefined and unlimited*”.¹¹ This argument was not pertinently raised in the High Court, but has been introduced in these proceedings.

¹¹ Applicants’ heads of argument, para 12(5), p 6.

12. Several other arguments raised in the High Court are expressly abandoned¹² or do not appear to be pursued, and are accordingly not dealt with.¹³

INTERGOVERNMENTAL RELATIONS

13. It is not disputed that the Premier was obliged to take “*every reasonable effort*” to avoid a dispute with other organs of state – in accordance with s40(1)(a) of IGRFA. The Premier’s conduct illustrates that she accepted that she was bound by this requirement, and that she anticipated that the proposed commission was likely to be contested by the SAPS or the Minister.¹⁴ She accordingly went to great lengths to elicit the views of the SAPS and the Minister.
14. In *City of Cape Town v Premier, Western Cape* 2008 (6) SA 345 (C) (“the *Erasmus Commission* case”), the Court found that the

¹² Attacks on the appointment of the Commissioners, being Judge O’Regan and Adv. Pikoli, are explicitly abandoned. Affidavit of Mthetwa – Leave to Appeal Record, vol. 1, p 14, para 13-14. An attack on the appointment of one of the evidence leaders, Adv. Sidaki was originally persisted in, but was subsequently abandoned – Annexure “AD 2” – Leave to Appeal Record, vol. 11, p 1252. In any event, the argument is weak. It is suggested – in attenuated terms – that it is “*prudent*” that Adv. Sidaki recuse himself, because he was previously a Senior Public Prosecutor in Khayelitsha from 2002 to 2004 – i.e. 8 years ago. Adv. Sidaki is now a practicing advocate. There can be no *a priori* objection to Adv. Sidaki’s appointment based on the notional possibility that a conflict could arise in some matters before the Commission. At best the Applicants contend that “*depending on further information, it is not inconceivable that [he] is implicated in his role as a Senior Public Prosecutor while the complaints were pending*” – Affidavit of Mthetwa, CCT Record, vol. 1, p 20-21 at para 14

¹³ These include the contradictory arguments that the Premier acted under the “*dictation*” of the WLC, and simultaneously that she acted based on a “*naked political purpose*” (i.e. that she applied her mind, but based on improper considerations); the argument that the Commission is inappropriately usurps the SAPS’ investigatory powers; and a broader rationality attack (i.e. that the Commission was not objectively required).

¹⁴ Affidavit of Zille – CCT Record, vol. 7, p 628 at para 67.3. In this regard the case is distinguishable from that in the *Erasmus Commission* case, in which then Premier Rasool stated that, as a matter of fact, he did not anticipate that a politically-charged commission would be contested by the City (at para 25-29)

requirements of intergovernmental co-operation meant that the before the Premier resorted to the “*drastic step*” of establishing a Commission into the affairs of the City, he should have sought the co-operation of those affected by the information before him (at para 126 and 159). In that case the Premier completely failed to seek the elucidation of the City before establishing a commission, in a highly charged, acrimonious atmosphere of mutual mistrust, in which “*the battle lines*” had been clearly drawn (at para 161).

15. The current case is different. The Premier’s actions in appointing the O’Regan Commission must be assessed on the facts available to her at that time.¹⁵ These facts indicate that the Premier actively and repeatedly sought the views of the SAPS and the Minister, over a period of 9 months. They provided no meaningful input, and raised no principled objection to the proposed Commission. In the circumstances, the information available to the Premier at the time that she appointed the O’Regan Commission gave no indication of any “*intergovernmental dispute*” which could, or should, be resolved in terms of the principles in IGRFA.

16. The Minister’s subsequent, belated interest in the matter cannot be employed to challenge the Premier’s anterior decision to establish the

¹⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 44.

Commission.¹⁶ In any event, the only dispute which arose at this time flowed from the Minister's demand that the Commission should be suspended while discussions continued regarding the establishment of a similar, but internally managed, process. The Minister is the author of any dispute at this stage. He approached this Court without utilising any of the mandatory dispute-resolution mechanisms under the IGRFA.

(a) Consultation before the Commission was established

17. Civil society organisations had called for a commission of inquiry into the failings of the criminal justice system in Khayelitsha for a considerable period.¹⁷ On 28 November 2011 the Eighth Respondent ("the WLC"), which was acting on behalf of the SJC and other civil society groups, delivered a lengthy complaint regarding alleged inefficiencies in the SAPS and the Cape Town Municipal Police Department ("the Metro Police"). This detailed several cases which were emblematic of systemic failures.¹⁸

¹⁶ The distinction between an anterior policy decision and later implementing decisions was highlighted in *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) at para 18. The Constitutional Court explained that an executive policy choice must be distinguished from later decisions and actions designed to properly implement a governmental choice. Such implementing decisions necessarily post-date, and expand upon, an earlier policy choice. Similarly, in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at para 59-60 the Court held that an anterior executive policy decision cannot be impugned on the basis of the manner in which it was subsequently implemented

¹⁷ Affidavit of Zille – CCT Record, vol. 7, p 621-623 at para 47-54.

¹⁸ Annexure "AL 38" – CCT Record, vol. 3, p 204ff.

18. The Premier recognised that the evidence in the complaint was not sufficient to establish a Commission, and that it had to be taken up with the SAPS and the Metro Police. The Premier forwarded the complaint to the Metro Police and the Provincial Commissioner on 8 and 9 December 2011 respectively.¹⁹ The Provincial Commissioner was addressed as he was the Premier's counterpart and most appropriately placed to deal with the issues. The letter was copied to the Minister and National Commissioner of the SAPS.²⁰ Comments were sought by 30 January 2012.
19. The City responded substantively, indicating that none of the cases in the complaint involved Metro Police officers, and explaining the role and procedures of the Metro Police.²¹ The Minister's office responded that the matter was receiving his utmost attention, and promised further correspondence.²² The Provincial Commission held internal meetings²³, but did not respond to the Premier at all.
20. On 14 February 2012 the Premier again sought comments from the Minister and the National and Provincial Commissioners.²⁴ This extended the period for comment to 28 February 2012, failing which the Premier would proceed to make a decision by herself.

¹⁹ Affidavit of Zille – CCT Record, vol. 7, p 627-628 at para 67-68.

²⁰ Affidavit of Zille – CCT Record, vol. 7, p 627-628 at para 67-68.

²¹ Annexure "HZ 12" – CCT Record, vol. 9, p 784-785.

²² Annexure "HZ 13" – CCT Record, vol. 16, p. 1493

²³ Affidavit of Lamoer – CCT Record, vol. 2, p 98 at para 55.

²⁴ Annexure "AL 39" – CCT Record, vol. 3, p 251.

21. On 27 February 2012 the Provincial Commissioner merely noted that he had referred the matter to his Head Office and was awaiting “*instructions*”,²⁵ even though it was clear that the then Acting National Commissioner took the view that it was “*not for SAPS to comment*”.²⁶
22. In the face of apparent disinterest from the Minister and SAPS, the Premier met with the WLC and the Metro Police. The Premier indicated that the WLC would have to supplement its complaints. (The WLC apparently understood that such supplementation need only deal with the Metro Police.²⁷)
23. In March 2012, news reports also indicated the brutal killing of 8 suspected criminals by community members.²⁸ The provincial MEC for Community Safety, Mr. Plato, sought an explanation from the Provincial Commissioner.²⁹ The Provincial Commissioner did not address this, even though he met the Minister in Khayelitsha on 29 March 2012. (The Premier and MEC Plato were not invited).³⁰
24. The WLC provided a supplementary complaint on 4 April 2012, dealing with allegations against the Metro Police.³¹ This was forwarded to the

²⁵ Annexure “AL 40” – CCT Record, vol. 3, p 254.

²⁶ Affidavit of Lamoer – CCT Record, vol. 2, p 99 at para 58.

²⁷ Affidavit of Zille – CCT Record, vol. 7, p 633-4 at para 85-86.

²⁸ Affidavit of Zille – CCT Record, vol. 7, p 634-5 at para 87.

²⁹ Affidavit of Zille – CCT Record, vol. 7, p 635 at para 88.

³⁰ Lamoer, para 59, p 87; Zille, para 89, p 1162.

³¹ Annexure “HZ 18” – CCT Record, vol. 16, p 1503.

City.³² The City provided a substantive response to the Premier on 6 June 2012.³³

25. In the face of a further vigilante killing,³⁴ the Premier again sought input from the Minister, and the National and Provincial Commissioners on 22 May 2012.³⁵ She indicated that the attacks lent “*credence to the alleged breakdown of trust*”. The lack of response suggested that Khayelitsha residents were correct in their view that the area did not receive SAP’s attention. A response was sought within 10 days. The Provincial Commissioner said the matter was “*receiving attention*” and that “*feedback will be forwarded in due course*”.³⁶ Nothing further was forthcoming.
26. The WLC also provided a second supplementary complaint.³⁷ The Premier again forwarded relevant documentation to the Provincial Commissioner (copied to the Minister and the National Commissioner).³⁸ Comments were sought by 20 June 2012.
27. In the interim a further vigilante killing was reported³⁹ (bringing the reported death toll to 10 in a matter of months). In an open letter of

³² Annexure “HZ 21” – CCT Record, vol. 16, p 1525.

³³ Annexure “HZ 24” – CCT Record, vol. 16, p 1531.

³⁴ Affidavit of Zille – CCT Record, vol. 7, p 637 at para 95.

³⁵ Annexure “AL 42” – CCT Record, vol. 3, p 256.

³⁶ Annexure “AL 43” – CCT Record, vol. 3, p 258.

³⁷ Included in annexure “AL 46” – CCT Record, vol. 3, p 264.

³⁸ Annexure “AL 46” – CCT Record, vol. 3, p 261.

³⁹ Affidavit of Zille – CCT Record, vol. 7, p 642 at para 107.

14 June 2012, the SJC directly linked vigilante killings to the failure of policing in Khayelitsha.⁴⁰ The SJC memo was sent to the then National Commissioner on 22 June 2012.⁴¹ The Applicants are quite wrong in their repeated assertion that this link between vigilantism and a breakdown in policing was one concocted by the Premier.

28. The response from the Provincial Commissioner (on 18 June 2012) formally repeated that he was awaiting Head Office instructions.⁴² The Minister's office repeated that the matter was receiving his attention, and promised further correspondence.⁴³

29. The National Commissioner's office responded on 21 June 2012 by requesting time until 29 June 2012. This was necessary as the current Commissioner, General Phiyega, had just been appointed.⁴⁴ The Premier agreed and provided a copy of the SJC's latest open letter (regarding vigilantism).⁴⁵ Complaints from the community continued, which again suggested a link between vigilante action and police failings.⁴⁶

⁴⁰ Annexure "HZ 27" – CCT Record, vol. 9, 787.

⁴¹ See letter at "HZ 30" – CCT Record, vol. 9, p 790.

⁴² Annexure "AL 47" – CCT Record, vol. 4, p 329.

⁴³ Annexure "HZ 28" – CCT Record, vol. 16, p 1536.

⁴⁴ Annexure "HZ 29" – CCT Record, vol. 9, p 789.

⁴⁵ Annexure "HZ 30" – CCT Record, vol. 9, p 790.

⁴⁶ Annexure "HZ 32" – CCT Record, vol. 9, p 795. This is a hand-written petition from community members in Makhaza, Khayelitsha.

30. On 29 June 2012 the National Commissioner responded indicating that she had been briefed and her response would be aided by the SAPS Inspectorate. In this regard she indicated she intended a “*qualitative assessment*”, which realistically could only be completed by 20 July 2012.⁴⁷ The briefing reports to the National Commissioner were not provided to the Premier.⁴⁸
31. The Premier agreed to this final extension, but noted that the vigilante killings gave rise to an “*untenable situation*”. The Premier expressed the hope that if cooperation was received, the financial cost of a Commission could be saved.⁴⁹ This correspondence was again copied to the Minister and the Provincial Commissioner.
32. It appears that representatives of the SAPS Inspectorate (later known as “*the Task Team*”) met with the WLC and its clients in early July 2012. The Premier and MEC Plato were not invited, and were not provided any report from the Task Team.⁵⁰
33. With the extended 20 July 2012 deadline looming, the WLC intervened

⁴⁷ Annexure “AL 48” – CCT Record, vol. 4, p 331.

⁴⁸ These briefings appear to have been from Major General Jephta on 6 June 2012 (annexure “AL 48A”) and the Provincial Commissioner (annexure “AL 48B”).

⁴⁹ Annexure “AL 49” – CCT Record, vol. 4, 333 (press statement of 1 July 2012); and annexure “AL 50” – CCT Record, vol. 4, p 334 (letter of 3 July 2012). This is confirmed by the fact that the Premier did not include the City in the Commission, based on the fact that it co-operated with her request.

⁵⁰ Affidavit of Zille – CCT Record, vol. 7, p 651 at para 136. The Minister suggests that the Premier was not entitled to this report (Affidavit of Mthetwa (reply) – CCT Record, vol. 12, p 1033-1034). Yet he still criticises the Province for not making internal documents available to him – such as the recommendation to the Cabinet in August 2012 (Affidavit of Mthetwa (reply) – CCT Record, vol. 12, p 1119-1120 at para 153).

and indicated that its clients would agree to allow the National Commissioner additional time – until 31 July 2012 – to respond to the Premier.⁵¹ In light of the delays, and continuing vigilante action, the Premier required a “*motivated request*” for this extension from the National Commissioner.⁵²

34. The Premier and the National Commissioner held an introductory meeting on 18 July 2012.⁵³ The content of this meeting is disputed. The National Commissioner suggests that she asked for an extension, and that the Premier acknowledged that she knew that the Minister was opposed to the Commission. The Premier states that she had to raise the issue of the Commission, and indicated only that she knew the Minister would be “*uncomfortable*” with the suggestion but that it may assist the police. She thus hoped that the proposed commission would not be seen as a hostile act which she would have to defend.
35. Any suggestion that the National Commissioner sought or was granted an extension is contradicted by her admission that the deadline for her comments expired on 20 July 2012. The Premier still waited until 31 July 2012, but nothing further was received.⁵⁴

⁵¹ Annexure “AL 51” – CCT Record, vol 4, p 337; and annexure “AL 53” – CCT Record, vol. 4, p 343.

⁵² Annexure “AL 52” – CCT Record, vol. 4, p 340.

⁵³ Affidavit of Lamoer – CCT Record, vol. 2, p 110-111 at para 85, p 98; Affidavit of Zille – CCT Record, vol. 7, p 652-653 at para 141.

⁵⁴ Affidavit of Zille – CCT Record, vol. 7, p 655 at para 147.

36. The Premier met with the WLC, whose clients confirmed that they had heard nothing from the SAPS Inspectorate after their single meeting. They confirmed their desire for the Commission to be established.⁵⁵
37. On 7 August 2012 a general and somewhat vague response was eventually received from the National Commissioner. Tellingly, the National Commissioner's letter fails to pertinently note any objection to the establishment of a Commission in this letter.
38. This letter gave no update on the supposed "*qualitative assessment*" promised by 20 July 2012. The National Commissioner must at least have been aware that the Task Team's report was imminent.⁵⁶
39. The National Commissioner's letter only suggests that meetings were arranged with "*complainants*", which would be followed by an announcement "*on the nature of co-ordination and development*". The Province would not be involved but would be "*informed of developments and progress*". The news of these meetings contradicted the information from the WLC, which the Premier's office again confirmed with the WLC.⁵⁷ The Applicants now suggest that the Premier bore the onus to "*clarify the position*" with the National

⁵⁵ Affidavit of Zille – CCT Record, vol. 7, p 655 at para 148.

⁵⁶ Annexure "AL 87" – CCT Record, vol. 5, p 485.

⁵⁷ Affidavit of Zille – CCT Record, vol. 7, p 657 at para 154.

Commissioner. Why this is so is not clear.⁵⁸ The National Commissioner had been given several extensions and had failed to respond with any meaningful contribution.

40. The reason that the Task Team's report was withheld is evident: namely that it confirms a range of serious problems in policing in Khayelitsha,⁵⁹ and the unreliable crime statistics.⁶⁰ These include a poor detective work, inefficient procedures when receiving complaints, non-functional community *fora*, and rampant vigilante killings.
41. The provincial Department of Community Safety produced a report on 14 August 2012 recommending the establishment of a commission of inquiry.⁶¹ The provincial Cabinet had previously indicated its "*in principle*" support for a commission (on 13 June 2012).⁶² On 15 August 2012 it confirmed its unanimous approval of the proposed commission.⁶³ The Premier made her decision to appoint the Commission on 22 August 2012, which was publicly conveyed on the same day.⁶⁴ In September and October 2012 vigilante killings continued – bring the death toll to 13.⁶⁵

⁵⁸ Applicants' heads of argument, para 42, p 20.

⁵⁹ Summarised in Affidavit of Zille – CCT Record, vol. 7, p 612-617 at para 42.

⁶⁰ Annexure "AL 87" – CCT Record, vol. 5, p 485 at para 8.2.3; para 8.3.2; and para 8.7.

⁶¹ Annexure "HZ 38" – CCT Record, vol. 9, p 807.

⁶² Annexure "HZ 26" – CCT Record, vol. 9, p 786.

⁶³ Affidavit of Zille – CCT Record, vol. 7, p 660 at para 160.

⁶⁴ Annexure "AL 55" – CCT Record, vol. 4, p 348.

⁶⁵ Zille, para 161, p 1187.

42. In light of the above it is clear that the Premier went to great lengths to receive input from the Minister and the Commissioners. The reality is however that:

42.1. The Provincial Commissioner failed to respond substantively at any time, even though he was the primary recipient of correspondence from the Premier. He satisfied himself with formal responses (of 27 February 2012, May 2012 and 18 June 2012)⁶⁶, which indicated only that he would take no action himself and would await Head Office instructions.

42.2. The National Commissioner's only substantive response was received out of time (on 7 August 2012).⁶⁷ She resorted to platitudes, failing to indicate any action she had taken, or detailing any promised "*qualitative assessment*". She also did not indicate any principled objection to a Commission.

42.3. The Minister failed to respond meaningfully at any time. His only excuse in this regard is that it was insufficient to merely copy him in on correspondence. He misconceives his own role and significance. The letters were addressed to the Provincial Commissioner, in his capacity as the Premier's provincial

⁶⁶ Annexure "AL 40" – CCT Record, vol 3, p 254; "AL 43" – CCT Record, vol. 3, 258; and "AL 47" – CCT Record, vol. 4, p 329 respectively.

⁶⁷ Annexure "AL 87" – CCT Record, vol. 5, p 485.

counterpart. This was appropriate in that the proposed commission would directly affect the SAPS. The SAPS are independent from the Minister. He does not control, or speak for the SAPS. His interest was more limited, in that he exercises national executive oversight over the SAPS; while the Premier exercises provincial executive oversight. Furthermore, the Minister does not suggest that he (or his office) was confused by the letters, or thought that his response was unnecessary. On the contrary, the Minister's office (in letters of 12 December 2011 and 21 June 2012)⁶⁸ made it clear that he received the Premier's letters and understood that his substantive response was required.

43. At the time that the Premier established the Commission there was thus no "*dispute*" – either in terms of the definition of that term in IGRFA,⁶⁹ or in terms of its ordinary meaning.⁷⁰ There was thus at that

⁶⁸ Annexure "HZ 13" – CCT Record, vol. 16, p 1493, and "HZ 28" – CCT Record, vol. 16, p 1536.

⁶⁹ IGRFA defines an "*intergovernmental dispute*" – rather circularly – as:

"a dispute between different governments or between organs of state from different governments concerning a matter-

(a) arising from-

(i) a statutory power or function assigned to any of the parties; or

(ii) an agreement between the parties regarding the implementation of a statutory power or function; and

(b) which is justiciable in a court of law,

and includes any dispute between the parties regarding a related matter for that purpose".

⁷⁰ In *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) at para 11 to 12, a "*dispute*" for the purposes of the Arbitration Act was defined as "*one in relation to which opposing contentions are or can be advanced.*" This requires "*competing contentions*" which can be properly formulated at the time. A party who can only formulate an imprecise dissatisfaction does not raise a dispute. In *National Union of Metalworkers of SA and others v Driveline Technologies (Pty) Ltd and others* (2000) 21 ILJ 142 (LAC) at para 36 it was stated that it "*has been accepted by our courts that a dispute postulates, as a minimum, the notion of expression by the parties opposing each other of conflicting views, claims or contentions.*" See also *Durban City*

stage simply nothing which could have been referred for resolution by any of the structures envisaged under IGRFA.

44. The Applicants now suggest that the Premier nonetheless bore the duty to follow the process in terms of IGRFA as an intergovernmental dispute automatically arose “*when one sphere of government contemplated intruding upon the powers of another*”.⁷¹ This is, with respect, obviously wrong. The Premier was not intruding on the powers of the Minister. She was exercising her own powers, granted by the Constitution, in order to fulfil her obligation to report to the Minister. She did not require the Minister’s permission or consent to exercise her own powers.
45. The Applicants also contradict themselves on this aspect. On the one hand, they appear to suggest that the Premier bore a duty to extract a response from the SAPS before establishing a Commission. On the other, they later argue that the Premier was “*not authorised*” to demand a response on any issue from the provincial Commissioner or anyone else in the SAPS.⁷² The upshot of these arguments would be that the Premier could not demand a response from SAPS, but also could not act unless and until SAPS decided to answer her letters. This is

Council v Minister of Labour 1953 (3) SA 708 (D) at 712A, and *Williams v Benoni Town Council* 1949 (1) SA 501 (W) at 507.

⁷¹ Applicants’ heads of argument, para 67, p 30.

⁷² Applicants’ heads of argument, para 84, p 36.

untenable, and would make a nonsense of the Provincial powers in s206(5) of the Constitution. If SAPS choose not to respond to a Premier, or to produce only a perfunctory response, it cannot thereafter complain that the outcome is not to its liking.⁷³

(b) Consultation after the Commission was established

46. Contact between the Premier, the Minister and the Commissioner after the Commission was established is irrelevant to relief challenging the anterior decision to establish the Commission itself.
47. Also, any dispute at this stage was wholly raised by the Minister's assertion that the Commission should halt in favour of an alternative, internal process favoured by him and the National Commissioner.
48. On 27 August 2012 the Minister wrote to the Premier acknowledging her right to establish the Commission, but expressing his view that it was inappropriate to do so without "*discussing*" or "*notifying me of your intentions*". He also expressed the view that the Commission was premature.⁷⁴ The Premier responded by indicating an "*exhaustive process of intergovernmental correspondence*". Nonetheless, she

⁷³ Fairness entails giving affected persons the opportunity have their voice heard. If they choose not to take up this opportunity, they cannot thereafter complain. See *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA) at para 8.

⁷⁴ Annexure "AL 59" – CCT Record, vol. 4, p 351.

remained open to discussions regarding possible alternatives.⁷⁵

49. The Minister reverted on 30 August 2012 in legalistic terms, but did not deny the litany of correspondence emanating from the Premier's office. He reiterated his view that the Commission was "*premature and unnecessary*", but was not prepared to commit himself to any reasons for this statement. The Minister indicated at this stage already that he would explore "*legal options*" if the Commission was not stopped immediately.⁷⁶ In a response of 3 September 2012, the Premier declined to go along with what the Minister required of her.⁷⁷
50. A meeting was planned for 9 October 2012. In anticipation of this the Minister asked the Premier to consider various issues – including the suggestion that the Commission was improperly investigating crime; and that it was inappropriate that it be headed by a retired judge.⁷⁸ At this stage the Minister accepted that there was no "*intergovernmental dispute*", and that he would be required to formally declare a dispute in writing under s41 of IGRFA before approaching this Court.
51. The Premier responded indicating that the Commission was not tasked with investigating crime, it would not violate the independence of the SAPS, and the objection to Judge O'Regan was invalid. She was thus

⁷⁵ Annexure "AL 60" – CCT Record, vol. 4, p 353.

⁷⁶ Annexure "AL 61" – omitted from record.

⁷⁷ Annexure "AL 62" – CCT Record, vol. 4, p 366.

⁷⁸ Annexure "AL 64" – CCT Record, vol. 4, p 369.

still not convinced any reason had been provided to halt the Commission.⁷⁹

52. The meeting on 9 October 2012 is dealt with by the Provincial Commissioner and the Premier. Most significantly, it is agreed that the Minister and the Commissioners raised their preference for an alternative, internal process managed by the SAPS. Details of this process could not be supplied but would follow in a later letter. The Premier agreed to consider the alternative proposal, and confirmed that if it represented a genuine and transparent attempt to deal with the problems in Khayelitsha, she would agree to suspend the Commission.⁸⁰

53. In a letter of 11 October 2012 the Premier confirmed the meeting, and that she was "*heartened*" by a new spirit of co-operation. In particular the Premier confirmed that she was awaiting details of the proposed alternative process.⁸¹

54. The details were provided in a letter from the Minister of 12 October 2012.⁸² This suggested process would be controlled by a "*panel*" of police personnel, who would report within a month or longer if deemed

⁷⁹ Annexure "AL 65" – CCT Record, vol. 4, p 372.

⁸⁰ Affidavit of Zille – CCT Record, vol. 7, p 673 at para 190-191.

⁸¹ Annexure "AL 66" – CCT Record, vol. 4, p 375.

⁸² Annexure "HZ 45" – CCT Record, vol. 16, p 1542. The version at "AL 67" – CCT Record, vol. 4, p 377, is a draft which does not track the final version in all respects.

necessary by the Commissioner. The SAPS Inspectorate would then make recommendations.

55. The Premier conveyed this plan to the WLC, who required time to take it up with its clients.⁸³ In the interim the Premier wrote to the Minister raising “*preliminary questions and/or concerns*”. These related to, *inter alia*, issues of transparency, unrealistic time-frames, duplication of functions, and that a mechanism had to be created to include evidence from the O’Regan Commission.⁸⁴
56. The WLC also reverted with feedback, which largely coincided with the concerns raised by the Premier.⁸⁵
57. The Minister responded on 24 October 2012,⁸⁶ informing the Premier of his legal views. Based on the Premier’s refusal to halt the Commission, the Minister adopted the view that he was not going to deal with the Premier’s concerns. If the Premier did not concede, he would bring an “*immediate application*” to set aside the Commission. The Premier took this unfortunate approach as confirmation that the Minister had no answers to her questions; and had no intention of co-operatively negotiating the outlines of any alternative process which

⁸³ Annexures “HZ 46” – CCT Record, vol. 16, p 1546 and “HZ 47” – CCT Record, vol. 16, p 1549.

⁸⁴ Annexure “AL 68” – CCT Record, vol. 4, p 386.

⁸⁵ Annexure “AL 70” – CCT Record, vol. 4, p 392.

⁸⁶ Annexure “AL 71” – CCT Record, vol. 4, p 396.

would replace the Commission.⁸⁷

58. The Premier responded that she would not suspend the Commission until she was convinced that the alternative presented a “*better option*”. She remained open to discussion and reconsideration if her questions were answered.⁸⁸ Despite this clear impasse, the State Attorney (on behalf of the Minister) attempted at the same time to convince the Commission to voluntarily halt its proceedings based on supposed continuing intergovernmental negotiations which the Minister hoped would “*yield amicable and enduring solutions*”.⁸⁹
59. The Minister adopted a more amicable tone in a response of 30 October 2012. He did not attempt to answer the Premier’s concerns, but stated he would attempt to do so in consultation with the National Commissioner – provided that, “*as a sign of good faith*”, the Commission was postponed or suspended.⁹⁰ This notwithstanding, a media statement the next day indicated that proceedings would be launched in the High Court that same week.⁹¹
60. As noted above, the Applicants are aiming at the wrong target. The facts indicate that the Applicants’ true dispute is that the Premier

⁸⁷ Affidavit of Zille – CCT Record, vol. 7 p 683 at para 213.

⁸⁸ Annexure “AL 72” – CCT Record, vol. 4, p 400.

⁸⁹ Affidavit of Dissel – CCT Record, vol. 6, p 541 at para 71.

⁹⁰ Annexure “HZ 48” – CCT Record, vol. 9, p 840

⁹¹ Annexure “HZ 49” – CCT Record, vol. 16, p 1550.

declined to concede the Minister's demand that the Commission should halt. The Applicants however only challenge the anterior (executive) decision to establish the Commission, and do not challenge the subsequent refusal to stop the Commission.

61. In any event, the Premier's decision not to suspend the Commission cannot be challenged. We submit that this Court cannot, and should not, involve itself in any determination whether the proposed alternative process is "*better*" than, or preferable to, the Commission. This Court is also not placed to decide the political standoff between the Premier and the Minister (i.e. in which the Minister refused to provide information until the Commission stopped; and the Premier refused to stop the Commission until she received information).
62. Furthermore, the Minister is the creator of any dispute regarding the continuation of the Commission. In terms of s41(2) of the IGRFA, the duty lay on him to "*make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary*" (s41(2)).
63. The responsibility does not however end there. Section s41(1) provides that the Minister "*may declare*" any remaining dispute as "*a formal intergovernmental dispute by notifying the other party of such declaration in writing*" (s41(1)). Importantly, an organ of state cannot

institute legal proceedings unless a dispute is declared and settlement procedures exhausted (s45(1)).

64. In the *Erasmus Commission* case it was held (at para 17) that, while these requirements are couched in peremptory terms, the provisions as a whole (read with s34 of the Constitution) indicate that a court retains “*a discretion to hear a matter even if it is not satisfied that the parties have made every reasonable effort to settle the dispute*”. The exercise of that discretion must however be based on the “*particular facts*” of a case. In that case, for instance, the Court was swayed (at paras 22-24) by the fact that the then Premier had failed to consult with the City before establishing a commission of inquiry into the City’s affairs. In the current case there are no similar countervailing considerations.
65. In any event, the Applicants’ reliance on the principles of co-operative governance are undermined by the intemperate and emotive attacks on the Premier, which run throughout several hundred pages in the Minister’s replying affidavit in the High Court. This indicates that the Minister’s objection is to the Premier on a political level, and that he has turned his face against any proactive initiative undertaken by the Premier.

(c) Raising the province's concerns in other *fora*

66. The Applicants further suggest that the Premier's insistence that she engaged "*ring hollow*", because she didn't respect other "readily available oversight and monitoring mechanisms"⁹²

67. There is no basis for the assertion that the Premier was required to utilise various other avenues as a pre-requisite before exercising her powers under s206(3) and (5) of the Constitution. Significantly the Applicants themselves fail to point to a single statutory or constitutional provision to sustain their argument. In addition, in the period leading up to the establishment of the Commission, the Minister and the National and Provincial Commissioners never suggested to the Premier that the issue should be vetted by these other *fora*.

68. In the High Court the Premier dealt with these other *fora*.⁹³ The suggestion that she acted improperly or unilaterally cannot be sustained. In particular, we note that the Premier was not required to seek the imprimatur of the Civilian Secretariat for Police ("the Civilian Secretariat"). The Civilian Secretariat is an organ of state in the national sphere of government and its existence cannot be interpreted as imposing a limitation upon the exercise of a provincial oversight

⁹² Applicants' heads of argument, para 45 and n73, p22; para 55, p 26; and para 61, p 28.

⁹³ Affidavit of Zille – CCT Record, vol. 8, p 698-728 at para 247-363.

power. Further, the powers granted to the Premier under s206(5) do not create any conflict with the Civilian Secretariat.

COERCIVE POWERS OF THE COMMISSION

69. The Applicants' argument in this regard appears to be premised on, *inter alia*, the following assertions:

69.1. The Province's oversight powers in respect of the SAPS are weak and non-intrusive, and do not include the power to directly or indirectly control or direct police officers to do anything.⁹⁴

The powers of control and direction are those of the National Commissioner and the Minister respectively.

69.2. The Premier and the Province do not, in the exercise of their oversight functions in s206(3), ever have the power to instruct police officers to provide information to them.⁹⁵ The reason for this assertion appears to be that demanding information from SAPS' officers would amount to an attempt to usurp control over those officers, or to direct policing.

69.3. As the Premier and the Province do not have the power to demand information from SAPS' officers, they cannot delegate a

⁹⁴ Applicants' heads of argument, para 89, p 38.

⁹⁵ Applicants' heads of argument, para 84, p 36. Save for an annual report from the Provincial Commissioner in terms of s207(5) of the Constitution.

power to demand information to an investigation or a Commission established under s206(5) of the Constitution.

69.4. The Premier chose to grant the O'Regan Commission coercive powers.⁹⁶ In so doing, she misconceived (and overstated) her powers under s206(3) and (5) of the Constitution.

70. The Applicants' argument fails at several levels. In the first place, the Premier did not make a separate decision to grant the Commission coercive powers. The Commission's subpoena power arises from s3(1) and (2) of the WC Commissions Act. This Act necessarily applies to all commissions of inquiry established by the Premier, and in all cases grants such commissions powers of compulsion.⁹⁷

71. The Applicants fail to recognise that the coercive powers enjoyed by the Commission do not arise from the establishing Proclamation, or the Regulations promulgated for the Commission. Clause 6 of schedule A to the Proclamation instead merely notes that –

“The Commission must perform the inquiry within its terms of reference and may exercise the powers and perform the functions of a commission as referred to in the [WC Commissions Act] ...”

⁹⁶ Applicants' heads of argument, para 93, p 39.

⁹⁷ The *Erasmus Commission* case at para 89. In that case the Court also noted (at para 60) that this position may be contrasted with that regulation commissions appointed by the President under the national Commissions Act. In that Act the President may order that powers of compulsion apply only if the commission is one that relates to a matter of “*public concern*”.

72. The Commission is thus exercising a statutory power enjoyed by all provincial commissions of inquiry under the WC Commissions Act, and not powers which the Premier elected to give it. This is significant as the Applicants have not challenged the WC Commissions Act.
73. In this regard the WC Commissions Act must be distinguished from the national *Commissions Act* 8 of 1947. The national Act, which was dealt with in the *SARFU* case, explicitly distinguishes the power to establish a commission of inquiry, and the separate decision to grant it coercive powers. This distinction does not appear in the WC Commissions Act, and as such the Applicants' reliance on the *SARFU* case⁹⁸ is inapposite. Under the WC Commissions Act, once a commission is established, it has coercive powers.⁹⁹ In the absence of an attack on the WC Commissions Act, the argument falters.
74. The Applicants attempt to escape this flaw by arguing that the WC Commissions Act only applies to commissions established by the Premier under s127(2)(e) of the Constitution – and not to a commission established by the Province under s206(5)(a). This is however based on an artificial distinction between ss127(2)(e) and s206(5)(a).

⁹⁸ Applicants' heads of argument, para 93-96, p 39-40.

⁹⁹ *Minister of Local Government, Housing and Traditional Affairs, Kwazulu-Natal v Umlambo Trading 29 CC and Others* 2008 (1) SA 396 (SCA); and the *Erasmus Commission* case at para 70-74.

75. There are no textual pointers that the two provisions envisage different types of commissions. This would essentially mean that the words “*commission of inquiry*” mean different things in s127(2)(e) and 206(5)(a), which would be an unusual consequence, unless this appeared clearly from the text. It does not.
76. The Premier’s power under s127(2)(e) is limited to matters in respect of which the Province has a lawful power. The Premier could not, for instance, institute a commission into the National Prosecuting Authority (“NPA”). She has no power over the NPA, and could do nothing with the information presented by the commission. Similarly, in the absence of s206(5), the Province’s power to establish a commission into policing may be doubtful. Section 206(5) thus enhances the provincial commission-making power under s127(2)(e). It does not create a parallel or separate commission-making power.
77. The Applicants overstate the significance of the reference to “*the premier*” in s127(2)(e), and “*the province*” in s206(5). The executive authority of the Province is always vested in the Premier (s125(1) of the Constitution). In some cases, the Premier exercises that power together with her provincial cabinet (s125(2)), while in others she exercises executive power alone (s127(1) and (2)). The provincial commission-making power is one of those which the Premier exercises

alone. Importantly though, when she establishes a commission, she does so on behalf of the Province.

78. When s206(5) refers to the power of 'the Province' to establish a commission, the question naturally arises how, and by whom, that power is exercised. Based on s127(2)(e), it is plain that this power is exercised by the Premier. The attempt to drive a stake between s127(2)(e) and s206(5)(a) is thus artificial. The provisions must be understood, and operate, in unison. In any event, as a matter of fact, the Premier in this case applied her mind and obtained the endorsement of her provincial cabinet.
79. The second flaw in the Applicants' argument is that they incorrectly assume that a subpoena power equates to an attempt to control or direct policing, or that the Minister and National Commissioner somehow lose control of policing when individual officers are subpoenaed to appear before the Commission.
80. The power of compulsion is limited to ensuring that witnesses called before the Commission (who may be individual police officers) appear, present documentation lawfully requested, and answer questions which are lawfully asked of them. The Commission cannot dictate to police officers how they must answer questions. The Commission also cannot dictate policing priorities in future, or require changes in

operational methods. The Commission just makes recommendations to the Premier. The Premier is not bound by the Commission's findings, but may use them to inform her approach when reporting to the Minister. The Minister is not bound by either the Commission or the Premier's recommendations or findings.

81. There can be no objection based on the possibility that inappropriate questions may be asked, or that officers may be placed under pressure to provide information which they cannot lawfully divulge.¹⁰⁰ SAPS can employ its own representatives to be present at the Commission, to object to improper questioning or requests for documentation. There cannot, however, be an in principle objection to police officers being sworn in and questioned at all. This is especially so when the Regulations for the Commission contain several provisions designed to protect the confidentiality of information.¹⁰¹ The Applicants do not explain why these measures are inadequate.¹⁰²

¹⁰⁰ In this vein the Minister suggested that particular subpoenas amount to an attack on the independence of the SAPS, are "*demeaning, undignified and designed to impugn the integrity*" of individual officers (Affidavit of Mthetwa – CCT Record, vol. 1, p 25 at para 18.6). He also continued that subpoenas coerce SAPS officers "*to act in a manner beyond their statutory and constitutional mandate*" (Affidavit of Mthetwa – CCT Record, vol. 1, p 25 at para 18.5). This appears to be linked to an argument that the subpoenas pose a threat in that officers will be called on to reveal confidential or sensitive information which could affect the rights of suspects and witnesses (Affidavit of Mthetwa – CCT Record, vol. 1, p 26 at para 18. 7).

¹⁰¹ These include:

- A requirement that all people involved in the Commission must "*preserve the confidentiality of any matter or information*" which has come to their knowledge in the Commission, except where publication is necessary or incidental to the Commission's report (regulation 3). Contravention is a crime (regulation 9);
- A general requirement that people in the Commission may not directly or indirectly communicate information which has come to their knowledge through the Commission (regulation 4). Contravention is a crime (regulation 9);

82. In the third place, the Applicants mischaracterise the oversight powers of the Province as being weak and ineffectual. This is not borne out by the Constitutional text, or the *Certification* judgments of this Court.
83. The *First Certification* judgment¹⁰³ dealt with the diminution of the provincial powers over policing from the Interim Constitution to the new text of the proposed Final Constitution (“NT”). This arose in consideration of Constitutional Principle XVIII.2, which stated that “*the powers and functions of the provinces*” in the NT “*shall not be substantially less than or substantially inferior to those*” in the IC.
84. This entailed a global assessment, but one issue which the Court noted was that the powers of policing in the suggested NT were substantially less than those in the IC. The direct control of the Province in the IC was replaced by a provision substantially similar to that which is now contained in s206(3). The Court found these powers to be less substantial than those in the IC (para 448), although it noted that they “*are important functions and their effective exercise by the province could have a profound influence on the performance of the provincial*

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- The public can be excluded from a hearing (s2(2) of the WC Commissions Act and regulation 5), and measures can be taken to protect the identity of witnesses;
 - Evidence in the Commission is not admissible in civil and criminal proceedings, save for criminal proceedings for giving untrue evidence (regulation 7); and
 - Any report cannot be published before it is approved by the Premier (regulation 8). Contravention is a crime (regulation 9).

¹⁰² It is also clear that the Commission cannot lawfully be requested to provide a preliminary report to the Premier. *Erasmus Commission* case, at para 136-138.

¹⁰³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para 395ff.

commissioner's functions" (para 397). This diminution in power was one of the factors which led this Court to conclude that the CP had not been met, and that the NT could not be certified (para 471-481).

85. In the *Second Certification* judgment¹⁰⁴ the Court again commented that the powers in the revised text were still substantially less than those in the IC. There were however "*important differences*" (para 167). One of these related to the power of appointing provincial commissions. "*The monitoring and overseeing functions of the provinces in the AT are also given more teeth by the power given to the provinces to investigate or to appoint a commission of enquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community*" (para 168). While the powers were still less than the IC, "*there is nevertheless a significantly greater degree of power and control which vests in the provinces in this area in the AT compared with the corresponding powers of provinces contained in the NT*" (para 169).

86. In other words, the power to establish a commission of inquiry is a vital component of the Province's power over policing. The approach suggested by the Applicants in this case would roll back provincial

¹⁰⁴ *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) at para 167ff.

power to that which was found to be unacceptable in the *First Certification* judgment.

87. The Constitutional text also does not attest to the weak role attributed to the Province by the Applicants. Under s206(3) the province is entitled “*to monitor police conduct*”; “*to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service*”; and “*to assess the effectiveness of visible policing*”. The exercise of these powers does not intrude onto the domain of the police, or at least, any such intrusion “*is mandated by the Constitution itself.*”¹⁰⁵

88. The exercise of these powers assumes that information is available to the province. These powers would be stripped of any meaning if the Province was not permitted to oblige the police to provide information or answer questions; or if the police could simply not answer when they didn’t wish to do so. This would mean that a dysfunctional police station could effectively avoid being exposed, and frustrate an investigation or a commission under s206(5), through the simple expedient of non-cooperation.

¹⁰⁵ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para 99.

89. It is further notable that the provincial legislature and its committees may require the Provincial Commissioner to answer questions (s206(9)); and the provincial executive may have a power to remove the Provincial Commissioner if it loses faith in him (s207(6)). In the light of these provisions, the Applicants suggestion (i.e. that a Commission established under s206(5) cannot compel information from SAPS and its officers) must, with respect, be rejected.
90. In addition, it is notable that the subpoena power of the Commission only arises if/when SAPS refuse to cooperate with the Commission. The obvious alternative is to cooperate for mutual benefit. The Commission sought to foster such co-operation prior to issuing subpoenas.¹⁰⁶ If a disagreement arises or if the SAPS are uncooperative and intransigent, then the Commission must be able to determine whether a subpoena is required. If the SAPS dispute the breadth of the subpoena, they can bring that issue before the Commission or a court. The SAPS cannot, however, suggest as an absolute principle that the Commission should never be able to compel any evidence, regardless of the relevance of information, and regardless of an obstructionist failure to cooperate.

¹⁰⁶ Affidavit of Dissel – CCT Record, vol. 6, p 528 at para 29.2; and p 536 at para 54ff.

91. The Applicants' approach is also inconsistent. The so-called Farlam Commission (into the events leading up to the police action at Marikana on 16 August 2012) has subpoena powers. The Minister appears to have no problem that Commission. In the circumstances, it is submitted that the attack on the Commission's powers of coercion, must fail.

THE RATIONALITY OF THE COMMISSION'S ESTABLISHMENT

92. In the High Court the Applicants brought a wide-ranging attack on the substantive rationality of the Premier's decision to establish the Commission. This only appears to be pursued in two limited respects:¹⁰⁷

92.1. First, it is argued that the complaints which gave rise to the Commission do not indicate a failing in policing alone, but "*systemic failures of the criminal justice system as a whole*".

92.2. Secondly, it is argued that the issue of vigilantism, which played an important role in the Premier's thinking, could not be linked to a breakdown in policing on the information before the Premier.

93. It is clear from the *SARFU* case that the Premier's decision to establish the Commission constituted "*executive*" (and not "*administrative*")

¹⁰⁷ Applicants' heads of argument, para 35-37, p 16.

action.¹⁰⁸ As such, the Premier's decision to establish the Commission must be rational, but is not subject to review on the more far-reaching requirements of reasonableness in PAJA.¹⁰⁹ Rationality imposes a less onerous, threshold requirement.¹¹⁰

94. In the *Democratic Alliance*¹¹¹ case this Court stated that that:

“rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional” (emphasis added).

95. This does not mean that every step in a process must be independently found to be rational, but that, taken as a whole, all the

¹⁰⁸ *SARFU*, at para 147. The *SARFU* case applied to Presidential Commissions. The same however would apply to provincial Commissions initiated by the Premier. *Nephawe v Premier, Limpopo Province, and Another* 2003 (5) SA 245 (T). The Premier's executive powers to institute Commissions under section 127(2) of the Constitution are also specifically excluded from the definition of “administrative action” in section 1 of PAJA.

¹⁰⁹ In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (TAC as Amici Curiae)* 2006 (2) SA 311 (CC) at para 109, the Court held that reasonableness poses a “variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions”. But even in this context the Constitutional Court has warned against “judicial overzealousness” in setting aside “decisions that do not coincide with the judge's own opinion.” *Bato Star*, at para 45 states as follows: “The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

¹¹⁰ *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at para 46; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) at para 67.

¹¹¹ *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at para 32.

steps leading up to a decision illustrate a link to a legislative purpose.¹¹²

96. The O'Regan Commission is clearly linked to the legitimate purposes of s206 of the Constitution. The terms of reference for the Commission mirror the language of the Constitution, and the Commission is tasked to investigate complaints which indicate inefficiency and a breakdown in the relationship between SAPS and the Khayelitsha community.
97. The fact that complaints are not solely aimed at the SAPS (but also involve other actors in the criminal justice system), cannot strip the Province of its powers to hold a Commission into those aspects which indicate that policing play a major, contributory role. The reason for the exclusion of other role-players in the criminal justice system, such as the NPA and the judiciary, is obvious. The Premier does not have the power to investigate these bodies. Any inclusion of these bodies in the Commission's terms of reference would have been *ultra vires*. Oddly, while the Applicants criticise the Premier's exclusion of these other role-players, they also criticise the Commission for contacting them to seek their voluntary participation on the Commission's work.¹¹³

¹¹² At para 37.

¹¹³ Affidavit of Dissel – CCT Record, vol. 6, p 575 at para 144.

98. On the second aspect, the Premier explicitly states that in forming her decision to establish the Commission she relied on both the complaints from the WLC's clients, and the plague of vigilante killings in Khayelitsha.¹¹⁴ These factors cannot be analysed disjunctively. The complaints referred to by the WLC's clients in their several complaints stood uncontroverted. When seen together with the vigilante killings, the need for action was compelling.

99. The Minister initially suggested that there was no proof of vigilante attacks at all.¹¹⁵ This is patently not correct. The Task Team report (which was made available to him) identifies 78 "*Bundu court executions*" between April 2011 and June 2012.¹¹⁶ He later acknowledges a "*spate of vigilante killings*", but denies that they result from a breakdown in relations with the police.¹¹⁷ He avers that the Premier's link between vigilantism and a breakdown in respect for the police "*is completely irrational and beggars belief.*"¹¹⁸

100. News reports¹¹⁹ and the SJC¹²⁰ all suggested an intuitive link between these acts and a loss of faith in the police. The Premier and MEC Plato also raised this issue with the Provincial Commissioner. This is

¹¹⁴ Affidavit of Zille – CCT Record, vol. 7, p 607 at para 26.

¹¹⁵ Affidavit of Mthetwa – CCT Record, vol. 1, p 24 at para 18.4.

¹¹⁶ Annexure "AL 87" – CCT Record, vol. 5, p 498 at para 8.6.

¹¹⁷ Affidavit of Mthetwa – CCT Record, vol. 1, p 35, para 22.6.

¹¹⁸ Affidavit of Mthetwa – CCT Record, vol. 1, p 44-45 at para 40.10.

¹¹⁹ Annexures "HZ 14" to "HZ 17" – CCT Record, vol. 16 p 1494-1350; Annexure "HZ 20" to "HZ 21" – CCT Record, vol. 16, p 1371-1374; and "HZ 39" – CCT Record, vol. 9, p 814.

¹²⁰ In the open letter of 14 June 2012, annexure "HZ 27" – CCT Record, vol. 9, p 787.

not to suggest that vigilantism can be wholly attributed to poor policing. It is however no more than common sense that resort to vigilantism will be exacerbated when policing is dysfunctional. Any suggestion that the Premier acted irrationally must accordingly fail.

THE TERMS OF REFERENCE OF THE COMMISSION

101. The Applicants introduce an argument that the terms of reference of the Commission are impermissibly vague, in that it was left to the Commission to determine the matter of the inquiry. The terms of reference are summarised in paragraph 3 above, and largely trace the wording of s206(5) of the Constitution.

102. The Applicants rely on the English case of *Bethel v Douglas*.¹²¹ That case does not support their argument. In that case a commission was empowered to investigate “*any and all allegations of fraud, corruption, breach of trust, conflict of interest or any wrongdoing whatsoever made by anyone against any person whatsoever arising out of and in connection with any or all of the affairs of [three companies].*” Reluctant witnesses complained that, based on the authority of an older case, *Ratnagopal v A-G* [1970] AC 974, this left the scope of inquiry to the commissioners. The Privy Council disagreed, and held that the Governor General sufficiently defined the scope of the

¹²¹ [1995] 3 AllER 801 (PC)

commission “*by confining the matters to those arising out of or in connection with the affairs of three named companies*”.

103. In the current case, the Commission was similarly confined by the complaints received by the Premier (which were known to the SAPS, and can be easily determined); and to inefficiencies at three named police stations in Khayelitsha.

104. The fact that it was left to the discretion of the Commission to determine the nature of the inefficiencies at the police stations, cannot be criticised. As a matter of principle, this Court recognised in the *Dawood case*¹²² that –

*“Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance.”*¹²³

105. As a practical matter, this case is one in which the Premier could not be expected to satisfy herself – in anticipation of a Commission – that there were inefficiencies in policing in Khayelitsha, or that the relationship for the community had (as a fact) broken down. She also could not be sensibly expected to have delineated the inefficiencies

¹²² *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 53.

¹²³ *Armbruster v Minister of Finance* 2007 (6) SA 550 (CC) at para 78.

which the Commission had to investigate. If the Premier could establish these facts, then there would be no need for an investigation or inquiry. It may have been inadequate if the Premier acted based on a “*blind suspicion*”,¹²⁴ but at the same time she was not required to have personal knowledge of the situation in Khayelitsha,¹²⁵ or to guide the Commissioners to particular conclusions or lines of inquiry.

106. The Applicants true complaint does not, in any event, appear to be that the Commission’s terms of reference were impossible to understand. Rather, the complaint appears to be that the terms of reference impermissibly permit a “*systemic investigation*”, and a general investigation of vigilantism, instead of limiting itself to “*specified complaints*”.¹²⁶

107. Why such a systemic investigation is problematic is hard to follow. The power in s206(5)(a) pertinently permits a commission of inquiry into “*complaints of inefficiency or a breakdown in relations between the police and any community.*” A breakdown of relations is unlikely to arise from a limited pool of complaints. It suggests a systemic failure. Similarly, inefficiency does not just relate to failings in a single

¹²⁴ This arises in cases in which a statutory formulation requires a decision-maker to have “*reason to believe*” a factual situation exists as a jurisdictional fact for further action. Such a formulation is found as a prerequisite for an investigation by a Province into a municipality under s106 of the Systems Act. In *Democratic Alliance Western Cape and Others v Minister of Local Government, Western Cape, and Another* 2005 (3) SA 576 (C) at para 25, the Court found that this required more than a blind suspicion. See too *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at para 111.

¹²⁵ *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007 (4) SA 135 (LC).

¹²⁶ Applicants’ heads of argument, para 109, p 46.

investigation, but is more likely to relate to the efficiency of existing systems. This appears from the current case, in which the complaints filed on behalf of the WLC's clients note that case studies are provided as illustrative examples of a broader problem.

108. The Applicants' attack on a systemic investigation is also contradictory:

108.1. As noted above (at paragraph 92.1), the Applicants earlier argue that the Premier acted unreasonably by failing to recognise that "*many of these case studies concerned systemic failures*". They now appear to argue the opposite: namely that the Premier should have closed her eyes to systemic problems, and limited the Commission to specific complaints against the police alone.

108.2. The Applicants previously argued¹²⁷ that the Commission could not investigate individual complaints, as to do so would usurp the police's powers to investigate crime.¹²⁸ The Premier responded that this was plainly wrong.¹²⁹ The Commission has

¹²⁷ Annexure "AL 64" – CCT Record, vol. 4, p 369.

¹²⁸ In the Erasmus Commission case it was held, quite correctly, that a "*commission-appointing power of the Premier can only be used for legitimate purposes, which does not include the investigation of crime*" (at para 84). This did not mean that a commission could never consider potentially criminal conduct. It merely meant that the investigation of this conduct had to relate to a legitimate purpose of the commission, and relate to some demonstrable outcome (at para 91). In that case, the commission's only function was to investigate allegedly criminal conduct. The findings could not be linked to any other legitimate provincial function. That was impermissible.

¹²⁹ Annexure "AL 65" – CCT Record, vol. 4, p 372.

also confirmed that it is not its task or intention to investigate crime.¹³⁰

CONCLUSION

109. In the circumstances it is submitted that:

109.1. The Applicants' application for leave to appeal against the decision of the High Court (refusing to grant the Applicants' interim relief) should be dismissed with costs; and

109.2. The Court should hear the Applicants' application for direct access, but dismiss the relief sought, with costs. Such costs should include the costs attendant on the employment of three counsel.

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29 April 2013

¹³⁰ Affidavit of Dissel – CCT Record, vol. 6, p 530, 531 and 535 at paras 31, 34 and para 48.