IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: **21600/12**

In the matter between:

THE MINISTER OF POLICE	1st Applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	2nd Applicant
THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE FOR THE WESTERN CAPE	3rd Applicant
THE CIVILIAN SECRETARIAT FOR THE POLICE SERVICE	4th Applicant
COLONEL M F REITZ	5th Applicant
BRIGADIER Z DLADLA	6th Applicant
COLONEL TSHATLEHO RABOLIBA	7th Applicant

And

THE PREMIER OF THE WESTERN CAPE	1st Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR COMMUNITY SAFETY, WESTERN CAPE	2nd Respondent
THE CITY OF CAPE TOWN	3rd Respondent
THE HON JUSTICE CATHERINE O'REGAN N.O.	4th Respondent
ADV VUSUMZI PATRICK PIKOLI N.O.	5th Respondent
THE SECRETARY TO THE COMMISSION	6th Respondent
ADV T SIDAKI	7th Respondent
WOMEN'S LEGAL CENTRE	8th Respondent
SOCIAL JUSTICE COALITION	9th Respondent

JUDGMENT DELIVERED ON 14 JANUARY 2013

YEKISO, J

[1] On 22 August 2012 and pursuant to her discretionary powers under section 206(5) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), read together with section 127(2)(e) of the Constitution and section 1(1) of the Western Cape Provincial Commissions Act, 10 of 1998 ("the Cape Commissions Act"), the Premier of the province of the Western Cape ("the Premier") established a commission of enquiry ("the commission").

[2] The decision to establish the commission was premised on complaints received by civil society bodies operating in Khayelitsha, including the Social Justice Coalition (the 9th Respondent), which suggested a systemic failure in policing and a plague of what appears to have been vigilante killings in which at least 13 alleged suspects were killed during the first half of the year 2012. The complaints were, in turn, delivered to the Premier on 28 November 2011.

[3] The decision to establish a commission was promulgated in the Provincial Gazette published on 24 August 2012. Schedule "A" to the proclamation noted that the members of the Commission are Justice Catherine O'Regan (a retired judge of the Constitutional Court) and Advocate Vusumzi Patrick Pikoli (who previously served as the National Director of Public Prosecutions). The Commission is chaired by Judge O'Regan and has since become known as the O'Regan Commission.

[4] Item 6 of Schedule "A" of the proclamation referred to in the preceding paragraph provides that the Commission has to perform the enquiry within its terms of reference and may exercise the powers and perform the functions of a commission as referred to in the Cape Commissions Act and in accordance with regulations in Schedule "B" thereof. The terms of reference are set out as follows in the proclamation:

> "To investigate complaints received by the Premier relating to allegations of –
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> (a) inefficiency of the South African Police Service stations at Site B, Bonga Drive, Khayelitsha; Steven Biko Road, Harare, Khayelitsha; and Makhabeni Street, Lingelethu West, Khayelitsha and any other units of the South African Police Service operating in Khayelitsha, Cape Town ("Khayelitsha"); and
>
> (b) a breakdown in relations between the Khayelitsha community and members of the South African Police Service stationed at the aforesaid police stations in Khayelitsha or operating in Khayelitsha."

[5] Once the Commission was established it commenced its work without delay. The chairperson had to submit the report of the Commission to the Premier within six (6) months of its establishment which meant that it had to conclude its work by 24 February 2013. Evidence suggests that the Commission established offices in Harare, Khayelitsha, which became operational from 11 September 2012.

[6] On 5 November 2012 the applicants issued a notice of motion out of this court in which the applicants seek several forms of interdictory relief under part A of the notice of motion pending determination, by way of judicial review, of the relief sought in part B of the notice of motion.

[7] Under part A of the notice of motion the applicants seek the following relief as against the fourth, the fifth, the sixth and the seventh respondent:

[7.1.] an order restraining the aforementioned respondents from giving effect to subpoenas issued in terms of section 3(1)(a) of the Cape Commissions Act and served on certain police officials pending the final determination of the relief sought under part B of the notice of motion;

[7.2.] an order restraining the aforementioned respondents from conducting the commission in any form whatsoever, pending the final determination of the relief sought under part B of the notice of motion; and

[7.3.] similarly, an order restraining the aforementioned respondents from issuing or causing to be issued any subpoenas to any member of the South African Police Service in terms of section 3(1)(a) of the Cape Commissions Act, pending the final determination of the relief sought under part B of the notice of motion.

[8] Under part B of the notice of motion, and on a date to be determined by the registrar, the applicants seek various forms of relief. These relate to an order reviewing and setting aside proclamation number 9/2012 published in the Provincial Gazette of 24 August 2012; an order reviewing and setting aside the first respondent's decision to establish the commission on the grounds of irrationality and inconsistency with the Constitution; an order setting aside first respondent's decision to establish the commission on the grounds of unlawfulness and unconstitutionality; an order to set

aside the first respondent's decision to establish a commission on the grounds of failure to give effect to the principles of co-operative government and inter-governmental relations as contemplated in section 41 of the Constitution; and several other forms of relief contemplated in part B of the notice of motion.

THE REQUIREMENTS FOR AN INTERIM INTERDICT

[9] The requirements for an interim interdict are well established in our law. In an application for an interim interdictory relief the applicant must establish a *prima facie* right to the relief sought even if such relief may be open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted: that the balance of convenience favour the granting of the interim relief; and the absence of any other satisfactory remedy available to the applicant.

[10] However, in the instance of this matter, the applicants make it clear in their submissions that several forms of relief sought in the notice of motion are sourced from the Constitution. These forms of relief are based on the alleged unlawfulness and unconstitutionality in the establishment of the Commission. In this regard the applicants submit that the test for the granting of an interim interdictory relief in authorities such as *Setlogelo v Setlogelo* 1914 AD 221 was initially designed for and ideally suited to disputes between private parties. The submission is that the test as formulated in *Setlogelo v Setlogelo, supra,* should now be applied cognisant of the normative scheme and democratic principles that underpin the Constitution. What this means, as the Constitutional Court aptly spells it out in *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (11) BCLR 1148 (CC) paragraph [45], is that

when a court considers whether to grant an interim interdict, it must do so in a way that promotes the objects, spirit and purport of the Constitution.

[11] The applicants go on to make a point in their submissions that in an instance where a right asserted in a claim for an interim interdict is sourced from the Constitution, it would be redundant to enquire whether that rights exists and that, similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought, relying as they do in their submissions, on *National Treasury & Others v Opposition to Urban Tolling Alliance & Others, supra* para's [45] and [46]. Thus, the applicants submit that their claims for the interdictory relief derive from the Constitution.

BACKGROUND TOWARDS ESTABLISHMENT OF THE COMMISSION

[12] As has already been pointed out in paragraph [2] above, on 28 November 2011 the Women's Legal Centre, acting for several non-governmental organisations, delivered a lengthy complaint to the Premier of the province of the Western Cape regarding alleged inefficiencies in the S A Police Service and the City of Cape Town Municipal Police Service (the Metro Police) operating in Khayelitsha. The complaint sought to detail several cases which were emblematic of alleged systemic failures. According to the Premier, she recognised at that stage that the evidence in the complaint was not sufficient in itself for purposes of assessment of the merit of the complaint and that same had to be taken up with the S A Police Service as well as the Metro Police. The premier forwarded the complaint to the Metro Police and the Provincial Commissioner of Police, Western Cape ("the Provincial Commissioner"),

respectively, on 8 and 9 December 2011. The Premier states in her answering affidavit that the complaint was addressed to the Provincial Commissioner as the latter functionary was the Premier's counterpart in the province and most appropriately placed to deal with the issues. The complaint received from the Women's Legal Centre was enclosed in both letters addressed to the Metro Police as well as the Provincial Commissioner. The letter requested the Provincial Commissioner to provide the Premier with his comment on the substance of the complaint and the method proposed to be the most appropriate to deal with the complaint. The letter to the Provincial Commissioner, under cover whereof was enclosed the complaint, was copied to the Minister of Police as well as the National Commissioner of Police ("the National Commissioner") per letters dated 9 December 2011. The Premier sought comments on the complaints lodged from those functionaries by no later than 30 January 2012.

[13] The response from the City of Cape Town merely indicated that none of the cases referred to in the complaint involved the Metro Police officers, simultaneously explaining the role and procedures of the Metro Police in their policing operations in Khayelitsha. The office of the Minister responded by way of a letter dated 12 December 2011 which states as follows:

> "On behalf of the Minister of Police, Mr E N Mtetwa, MP, we hereby acknowledge receipt of your correspondence dated the 9th December 2011.
>
> The matter is receiving our utmost attention and further correspondence will be directed to you in due course.

With kind regards."

The letter was signed off by a Mr Simon Chabangu, the Minister's administrative secretary. No response was received from the Provincial Commissioner or the office of the National Commissioner.

[14] As at 30 January 2012 the Premier had neither received a response from either the Provincial Commissioner or the office of the Minister and, for that matter, from the office of the National Commissioner. On 14 February 2012 the Premier once again addressed a letter to the Provincial Commissioner referring to earlier correspondence of 9 December 2011. The Premier noted that she had not had a response from the Provincial Commissioner by 30 January 2012 as suggested in her earlier correspondence. This letter was, once again, copied both to the National Commissioner as well as the office of the Minister. On this occasion the Premier requested for a comment from the Provincial Commissioner by no later than 28 February 2012, failing which, so the Premier pointed out in her letter, she would be forced to assume that the Provincial Commissioner has no interest in the matter in which event the Premier would proceed to deal with the matter without further reference to the office of the Provincial Commissioner.

[15] The Provincial Commissioner responded by way of a letter dated 27 February 2012 informing the Premier that the matter had since been referred to the S A Police Service head office for instructions. Evidence tends to suggest that the Provincial Commissioner had, in the interim, contacted the S A Police Service Executive Legal Officer for guidance. It would appear that the Executive Legal Officer advised that the

then acting National Commissioner was of the view that, to the extent that the Premier has the authority to appoint a commission of enquiry, it is not for the S A Police Service to comment on how she should exercise those powers.

[16] It would appear that on 29 March 2012 the Minister met with the community leadership of Khayelitsha regarding the disturbing incidents of violence against foreign nationals in that community. Following the Minister's request, the Provincial Commissioner ensured that the S A Police Service provincial leadership, the cluster commander and the station commanders were in attendance to meet with the members of the community and listen to their concerns. It appears that the office of the Premier had no knowledge of the Minister's meeting with the community leadership of Khayelitsha nor was the Premier's office and the MEC for Community Safety invited to attend that meeting. It is not quite apparent on the basis of the evidence whether the meeting with the community leadership of Khayelitsha was a sequel to the correspondence by the Premier addressed to the Provincial Commissioner and copied to the National Commissioner and the Minister.

[17] On 4 April 2012 the Premier received a supplementary complaint from the Women's Legal Centre dealing with allegations against the Metro Police. Evidence tends to suggest that the Premier met the Women's Legal Centre on 6 March 2012 and at which meeting the Premier indicated that she needed more detail regarding the complaint lodged with her. It would appear that there was a misunderstanding arising from the meeting of 6 March 2012 as regards the further detail required by the Premier. It would appear that the Women's Legal Centre was of the view that the further detail and supplement required was designed to determine whether, in the event of a

commission of enquiry being established, its terms of reference should include the conduct of the Metro Police. The Premier states in her answering affidavit that such an impression is not correct. She states that her actual intention had actually been to indicate the need for more detail generally and not a supplement to address a question whether the conduct of the Metro Police should be included in the terms of reference of the proposed commission. This supplementary complaint was forwarded to the City and the latter provided a substantive response thereto to the Premier on 6 June 2012.

[18] On 22 May 2012 a further letter was addressed to the Provincial Commissioner, a copy whereof was forwarded to the Minister and to the then acting National Commissioner. In this letter a view was expressed that the on-going acts of vigilantism in the Khayelitsha area appeared to give credence to the alleged breakdown of trust as contained in the complaint lodged with the Premier on 28 November 2011. The Premier referred to earlier correspondence of 9 December 2011 and 14 February 2012 eliciting comment on the complaints lodged and the method most appropriate to deal with the complaints. The Premier expressed her disappointment for lack of response from the office of the Provincial Commissioner. The Premier further advised that she was then compelled to consider the establishment of the commission without the benefit of the input from the Provincial Commissioner in relation to the veracity of the complaint. In this letter the Premier indicated that she intended making a decision within the following ten (10) days.

[19] On 14 June 2012 the Premier once again addressed a letter to the Provincial Commissioner indicating that, notwithstanding an acknowledgement of receipt of her letters dated 9 December 2011, 14 February 2012 and 22 May 2012, she had heard

nothing further from his office regarding the complaints lodged with her and forwarded to the Provincial Commissioner under cover of her letter dated 9 December 2011. In the same letter, the Premier indicated that she had received another set of additional supplementary facts from several of the original complainant organisations, stating in her letter that those facts provide further evidence of the allegation of inefficiency and a breakdown in the relationship between the community and the S A Police Service serving the Khayelitsha community. The additional supplementary facts were annexed to the letter. The letter, together with the annexure thereto, was copied to the Minister as well as the office of the National Commissioner. The Premier requested a response to the enclosed additional facts by no later than Wednesday, 20 June 2012. The Premier threatened to deal with the matter without further reference to that office should she not receive a response by Wednesday, 20 June 2012.

[20] The office of the Provincial Commissioner responded to the letter referred to in the preceding paragraph stating that he was still awaiting instructions from his head office. The Minister's office responded, by way of a letter dated 21 June 2012, a day after the deadline set in the Premier's letter dated 14 June 2012, once again advising that the matter is receiving utmost attention and that further correspondence will be directed to the office of the Premier in due course.

[21] The office of the National Commissioner responded to the latest letter from the office of the Premier dated 14 June 2012 by way of a letter dated 21 June 2012. In this letter the National Commissioner requested time until 29 June 2012. This was necessitated by the fact that the current National Commissioner, in the person of General Phiyega, had just been appointed. In her response the National Commissioner

stated that she required time to consult with provincial management and other role players at provincial and national level for purposes of conducting an investigation. She simultaneously advised that the feedback from the Provincial Commissioner was before her for consideration and that the complaints were being investigated with the assistance of the National Inspectorate. By way of a letter dated 22 June 2012 the Premier agreed to the extension requested, simultaneously enclosing in her letter to the National Commissioner an open letter from the Social Justice Coalition which the Premier had in the interim received.

[22] On 29 June 2012 the National Commissioner addressed yet a further letter to the Premier indicating that she had been briefed and that her response would be aided by the S A Police Service Inspectorate. The National Commissioner simultaneously indicated that she had intended to undertake a qualitative assessment for which a realistic time frame would be 20 July 2012. It would appear that the briefing referred to in the letter by the National Commissioner was not provided to the Premier. The Premier responded to the latest letter from the National Commissioner by way of her letter dated 3 July 2012. The Premier acceded to the extension requested. Paragraph of the letter from the Premier reads:

> "The volatile situation in Khayelitsha makes it imperative that all organs of state are now seen to be taken swift and resolutive action in this regard. To date SAPS have failed to take any action whatsoever. Thus, whilst I am agreeable to one final extension of time, I am not prepared to agree to this time period extending past the end of this month, that is some seven months after the initial complaint was sent to your predecessor's office; and

I accordingly await to hear from you in this matter on or before close of business on 20 July 2012."

[23] It would appear that, in the interim, the National Commissioner had appointed the task team to investigate the allegations made by the non-governmental organisations and to investigate the reasons, relationships and quality of service delivery with the view to briefing the National Commissioner as to the most effective and appropriate action required arising therefrom. It further appears, on the basis of evidence on record, that the task team met with the Women's Legal Centre together with its clients on 11 July 2012. The Premier makes a point in her answering affidavit that she, together with the MEC for Community Safety, was not informed of this meeting; were not invited to attend; nor were they provided with any report from the task team. As a matter of fact the Premier states in her answering affidavit that she was not advised of the progress of the work being undertaken by the task team; that she was not approached by the task team; and that she was never provided with any report generated by the task team.

[24] Arising from the meeting of 11 July 2012 the Women's Legal Centre requested the Premier to postpone her decision as to whether or not to establish a commission of enquiry until 31 July 2012. The Premier responded to the request by the Women's Legal Centre by way of a letter dated 16 July 2012. In this letter the Premier stated that she is not prepared to consider agreeing to an extension of time past 20 July 2012 without, at the very least, being in receipt of a motivated request from General Phiyega in that regard, setting out what would have been done to date and what her plan was with regards to the issues raised in the complaint. The Premier thus persisted with her

attitude that she was awaiting a response from the office of the National Commissioner by no later than 20 July.2012.

[25] Evidence tends to suggest that the Premier and the National Commissioner had an introductory meeting on 18 July 2012. 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 establishment of a commission. The Premier, on the other hand, suggests in her replying affidavit that she did indeed raise the issue of the commission with the National Commissioner but merely indicated that she knew the Minister would be uncomfortable with the suggestion of a commission but that, in any event, such a commission would be of assistance to the police. The Premier thus denies in her answering affidavit that she had agreed to the deadline being extended until 31 July 2012. The Premier had, in any event, not heard any further from the National Commissioner until her letter addressed to the Premier dated 7 August 2012.

[26] On 6 August 2012 the Premier met with the representatives of the Women's Legal Centre and the relevant civil society organisations. It is not clear on the basis of the evidence on record what the purpose of this meeting was but what is clear, though, is that neither the Provincial Commissioner, nor the National Commissioner, nor the Minister was present at such a meeting. At this meeting the Women's Legal Centre and their clients confirmed their request for the establishment of a commission. They also confirmed that they had heard nothing further from the task team since their last meeting on 11 July 2012. The representatives of the civil society organisations had apparently advised that in their view it was imperative that a commission be established

on the basis of the facts of the complaints so that the root causes of the on-going acts of vigilantism in the area could be addressed.

[27] The next communication from the office of the National Commissioner to the Premier was by way of a letter dated 7 August 2012. In this letter, the National Commissioner indicates what efforts had been made with regards to the resolution of the issues since 29 June 2012. These included visits to the province, meeting with stakeholders and engaging SAPS leadership in the province regarding the challenges. According to the view of the Premier this letter from the National Commissioner was largely in general terms and did not indicate with any measure of specificity with regards to the issues raised in the complaints lodged with her, did not address the substance of the complaint nor any appropriate method to deal with the complaint.

[28] In the interim, the Provincial Department of Community Safety produced a report dated 14 August 2012 recommending the establishment of a commission of enquiry. The Provincial Cabinet had previously indicated its “in principle” support for a commission of enquiry. On 15 August 2012 it confirmed its unanimous approval of the proposed commission. The Premier made her decision to appoint the commission on 22 August 2012 which was conveyed to the public on the same day. The establishment of the commission was promulgated in the Provincial Gazette published on 24 August 2012.

EVENTS SUBSEQUENT TO ESTABLISHMENT OF THE COMMISSION

[29] There are some few events which occurred subsequent to the establishment of the Commission and the institution of these proceedings out of this court on 5

November 2012. These events include a letter by the Minister of Police addressed to the Premier dated 27 August 2012. The second paragraph of this letter reads:

> "I write to you in the spirit of co-operative governance and co-operative inter-governmental relations. I sincerely hope that you will view my letter in this light as well. I also desire that by writing to you we shall avert an inter-governmental dispute. This is necessary as organs of state are constitutionally bound to co-operate with each other in mutual trust, good faith, to assist and support each other."

[30] Further in the letter the Minister indicates that he was deeply concerned by media reports that on 24 August 2012 the Premier appointed a Commission of Enquiry into allegations of police inefficiency in Khayelitsha and of a breakdown in relation between the community and the police in Khayelitsha. The Minister goes on to say that the Commission was established without the Premier either discussing the matter with him or notifying him of her intended actions. The letter concludes by the Minister requesting the Premier to postpone the Commission from commencing its work in order that the issues raised by the Minister in his letter of 27 August 2012 be resolved amicably.

[31] The Premier responded by way of a lengthy letter dated 28 August 2012. Apart from responding to some of the issues raised in the Minister's letter, the Premier's response was that, whilst she was happy to meet with the Minister, she nonetheless was not agreeable that the commission postpones its work as requested. After exchange of further correspondence the Minister ultimately issued a notice of motion out of this court in which the Minister, together with several other applicants, seek various forms of relief as set out in part A and part B of the notice of motion.

THE APPLICANTS' CHALLENGE TO THE LEGALITY OF THE COMMISSION

[32] The applicants' complaints on the legality of the Commission appears to be based on a contention that the complaint, on the basis of which the Commission was established, is improper and does not warrant the appointment of the Commission; that the appointment of the Commission was irrational; that the Premier failed to comply with her obligations with regards to co-operative governance before taking the decision to establish the Commission; that the decision was made without the Premier first complying with her obligation to engage with other constitutional and statutory bodies; that the Premier usurped the statutory and constitutional powers of the police by authorising the Commission to issue subpoenas against certain officials of the S A Police Service; that the decision was made under dictation and for an ulterior motive; that the Commission is unlawful as it entails the investigation of criminal offences, thereby usurping the constitutional and statutory functions of the police; and that the appointment of a judge to chair the Commission results in judicial entanglement in matters of political controversy.

[33] The legality of the Commission is further challenged on the basis of the Commission's coercive powers, it being contended on behalf of the applicants that to cloak the Commission with such coercive powers is invalid, unlawful and, accordingly, unconstitutional. In this regard it submitted on behalf of the applicants that the Premier and/or the executive council of the province did not have the power under section 207 of the Constitution, read in the context of chapter 11 of the Constitution (and more particularly with reference to a power of "a province" under section 206(5) thereof) to appoint a commission with a power of control over members of the SA Police Service,

whether by way of a subpoena or otherwise. It is thus contended on behalf of the applicants that the establishment of the Commission virtually usurped the powers of control of the SA Police Service vested in the President, the Minister of Police and the National Commissioner of Police.

[34] The further basis of an attack on the constitutionality or otherwise lawfulness of the establishment of the Commission is based on a contention that the Premier, in establishing the Commission in the manner she did, misconstrued her powers in terms of section 127(2)(e) and 206(5) of the Constitution. In this regard it is submitted on behalf of the applicants that the equation of the power of a province to appoint a Commission over policing in terms of section 206(5) of the Constitution with the powers of the Premier in terms of section 127 of the Constitution is bad in law as the Premier acted under a misconception as to the powers and duties of the province and of her own powers. Arising from the basis of all these challenges the issue that first has to be determined is, in my view, whether the Premier had the power to establish the Commission in the manner she did.

THE PREMIER'S POWER TO APPOINT THE COMMISSION

[35] The Commission was established by the Premier in terms of the powers conferred upon her under section 206(5) of the Constitution. The relevant provisions in section 206 dealing with the province's entitlement and the power of the Premier to appoint a Commission read as follows:

> "206 (3) 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."

[36] On the other hand, the competence of "the Province" to appoint a Commission is derived from section 206(5) which reads as follows:

"(5) In order to perform the functions set out in subsection (3), a province –

(a) may investigate, or appoint a commission of enquiry 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."

It is worth noting that the executive authority of a province vests in the Premier and that the Premier exercises executive authority together with the other members of the Executive Council.

[37] In order to appreciate the power of the province to appoint a Commission in terms of section 206(5) of the Constitution it is necessary, in my view, to trace the brief history and background of the inclusion in the Constitution of sub-section (3) to sub-section (9) to section 206 of the Constitution. After the adoption of the Final Constitution by the Constitutional Assembly that text of the Constitution was forwarded to the Constitutional Court for the required certification as contemplated in section 71 of the

Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). In terms of that section the constitutional text which would be adopted by the Constitutional Assembly had to comply with the constitutional principles contained in Schedule 4 of the Interim Constitution. Section 71(2) of the Interim Constitution provided at the time that the new constitutional text that would be adopted by the Constitutional Assembly, or any provision thereof, would not be of any force unless the Constitutional Court would have certified that all the provisions of such text comply with the constitutional principles referred to in sub-section (1) paragraph (a) thereof. The constitutional principles referred to in section (1) are those principles agreed to between the parties who were involved in negotiations at Kempton Park, commonly referred to as the *"Solemn Pact"* at the time, from which the new constitutional text would not deviate or derogate.

[38] Paragraph XVIII (2) of the said constitutional principles provided as follows:

> "The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a Constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution."

When the new text was referred to the Constitutional Court for the required certification in terms of section 71 of the Interim Constitution the Constitutional Court refused to certify the text on the basis that the powers and functions of the provinces, as defined in the Interim Constitution, in the text to be certified, were significantly reduced to those provided for in the Interim Constitution. (In re: *Certification of the Constitution of the Republic of South Africa,* 1996 1996 (10) BCLR 1253 (CC) p1378 para 401). The new constitutional text was referred back to the Constitutional Assembly for reconsideration.

[39] When the new text was referred back to the Constitutional Assembly for reconsideration section 206 in the new text comprised only two sub-sections, these being sub-section (1) dealing with the member of the Cabinet responsible for policing and sub-section (2) dealing with each province's entitlement. Seven additional sub-sections were added to section 206 after reconsideration of the new text by the Constitutional Assembly. Amongst the sub-sections included in section 206 is sub-section (5) which deals with the powers conferred on the province in the performance of those functions set out in section 206(3).

[40] When the amended text was referred back to the Constitutional Court seven further sub-sections were added to section 206 over and above the only two sub-sections which were provided for in the new text. The further sub-section added to section 206, over and above the other sub-sections, was sub-section (5), which confers on the Province power to investigate or appoint a Commission of enquiry into any complaints of police inefficiency or breakdown in relations between the police and any community. In its second certification judgment the Constitutional Court observed that the monitoring and overseeing functions of the provinces in the amended text were 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 breakdown in relations between the police and any community. (See *Certification of the amended text of the Constitution of the Republic of South Africa,* 1996 1997 (1) BCLR 1 (CC) page 50 para [68]). It is, in my view, in the light of this constitutional background, that the powers of the province and, ultimately, the power of the Premier to appoint a Commission in terms of section 206(5), has to be assessed.

[41] It is thus on the basis of this background, that the Constitutional Assembly, over and above the power conferred on the Premier in terms of section 127(2)(e) of the Constitution, conferred on the Province a power to investigate and appoint a Commission as contemplated in section 206(5)(a) of the Constitution.

[42] It is clear in terms of section 206(5) of the Constitution that the existence of a complaint or complaints is a jurisdictional pre-requisite for the exercise of the powers conferred on the Premier by this provision. The only requirement specified for a complaint is that it must relate to police inefficiency or a breakdown in police/community relations. If a complaint is to be acted on, it may either be investigated or a Commission may be appointed. The purpose of a Commission to conduct an investigation contemplated in section 206(5) is thus directed towards the performance by the police of the five functions listed in section 206(3) of Constitution. Section 206(5) confers the power to appoint a Commission to conduct an investigation on "a province". A Premier is the only provincial official or body that is authorised by the Constitution to appoint a Commission. By way of contrast, the power to conduct an investigation in terms of section 206(5) of the Constitution may be performed by the province acting through the member of the provincial executive responsible for policing functions referred to in section 206(4) of the Constitution or possibly any other official or body that has the power to authorise an investigation.

[43] Section 127(2)(e) of the Constitution is the source of the Premier's power to appoint a Commission of Enquiry. The provision, in part, provides that the Premier of a province shall be responsible for appointing Commissions of Enquiry. *Mr* Hathorn (with

him *Ms Mayosi*) makes a point in his submissions that the powers of the Premier in terms of section 127(2) of the Constitution are the equivalent, at the provincial sphere of government, of the more extensive powers exercised by the President in terms of section 84(2) of the Constitution which confers on the President the power to appoint of a Commission of Enquiry. I am in perfect agreement with this submission.

[44] The power of the province to appoint a commission in terms of section 206(5)(a) of the Constitution, such power having been specifically conferred on the province by the Constitutional Assembly, is to be exercised by the Premier and his or her Executive Council.

[45] As has already been pointed out elsewhere in this judgment, the Premier made a decision to appoint the Commission on the 22nd August 2012. The proclamation establishing the Commission was published in the Provincial Gazette of the 24th August 2012. The Commission is established in terms of section 1 of the Cape Provincial Commissions Act. In terms of this provision, the Premier may, by proclamation, appoint a Commission of Enquiry, define the matter to be investigated and the Commission's terms of reference and make regulations providing for the procedure to be followed by the Commission. The terms of reference of the Commission are cited in paragraph [4] of this judgment.

[46] Sections 3 and 4 of the Cape Commissions Act confer on the Commission the coercive powers to subpoena witnesses, call for provision of documents and may call on witness to be sworn in and answer questions. Any Commission appointed by the Premier in terms of the Cape Provincial Commission is automatically clothed with

coercive powers. The applicants do not include, in their challenge to the legality of the Commission, a challenge to the constitutionality of the provisions of the Cape Commissions Act. Thus, the power of the Premier to appoint a Commission is an original constitutional power of a discretionary nature which can be limited only by the Constitution (*City of Cape Town v Premier, Western Cape & Others* 2008 (6) SA 345 (C) para 57.2).

[47] The primary constraint on the Premier's decision to establish a Commission of Enquiry is the requirement that the appointment comply with the principle of legality (see *City of Cape Town v Premier, Western Cape & Others, supra, para 98*). The principle of legality would entail that the Premier's conduct must be consistent with the Constitution and should be within the law; that she must not misconstrue her powers and that the decision to establish a Commission must be rationally related to the purpose for which the power to appoint a Commission was conferred (see *Masetlha v The President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC) at paras 79 to 81). As the establishment of the Commission was promulgated by way of a proclamation in the Provincial Government Gazette of the 24th August 2012, the Premier's decision to establish the Commission ought and should be assessed as at the time the act of establishing the Commission was promulgated.

[48] Thus, the Premier's power to appoint a Commission of Enquiry is derived from section 127(2)(e) of the Constitution. The competency of the province to investigate complaints of police inefficiency or breakdown in relations between the police and any community is derived from section 206(5) of the Constitution. The Premier is the only provincial official authorised by the Constitution to appoint a Commission of Enquiry.

The Commission was established pursuant to the Cape Commissions Act which automatically applies to all Commissions established in the province. It is within the constitutional and the statutory matrix referred to in preceding paragraphs that the legality of the establishment of the Commission has to be assessed.

[49] In paragraph [32] of this judgment, I listed several grounds on the bass of which the constitutionality of the establishment of the Commission is challenged. I shall now deal with those several basis of constitutional challenges with a view to determining the merits thereof and, ultimately, the legality of the establishment of the Commission. The first such basis of a challenge is the contention that the Premier, in establishing the Commission in the manner she did, failed to comply with her obligations with regards to co-operative governance and inter-governmental relations.

CO-OPERATIVE GOVERNANCE

[50] The applicants' contend in the their notice of motion as well as in their founding affidavits that the Premier, in establishing the Commission in the manner she did, failed to comply with the constitutional and statutory obligations relating to principles of co-operative governance and intergovernmental relations. The principles of co-operative governance apply to the national, provincial and local spheres of government; the legislative and executive branches within each sphere of government; the public administration, which includes the public service; organs of state and other public entities (see Yvonne Burns: *Administrative Law under the 1996 Constitution* Butterworths 1998 p72).

[51] The office of the Premier; the office of the Provincial Commissioner; the office of the National Commissioner; and the office of the Minister are all organs of state as contemplated in section 239 of the Constitution. In terms of that section, "organ of state", in part, means any department of state or administration in the National, Provincial or Local sphere of government. To the extent that the office of the Premier; the office of the Provincial Commissioner; the office of the National Commissioner as well as the office of the Minister fall within the public administration, those institutions are subject to the high standard of professional ethics which must be promoted and maintained as envisaged in section 195(1)(a) of the Constitution. The Constitution enjoins the aforementioned institutions to co-operate with one another in mutual trust and good faith in those aspects listed under paragraph (h)(i) to (vi) of the Constitution.

[52] As indicated in the preceding paragraph, the organs of state at play in the determination of whether the Premier failed to comply with the constitutional and statutory obligations relating to principles of co-operative governance and inter-governmental relations, are the office of the Premier; the office of the Provincial Commissioner; the office of the National Commissioner; and the office of the Minister. The office of the Premier is an organ of state within the provincial sphere of government. The office of the Provincial Commissioner, although operating within a province, is essentially an organ of state within the national sphere of government. That the office of the National Commissioner and the office of the Minister are organs of state within the national sphere of government does not need any elaboration.

[53] As has already been pointed out, the office of the Premier, being an organ of state within the provincial sphere of government, was served with a lengthy complaint

by the Women's Legal Centre acting for several non-governmental organisations operating within Khayelitsha regarding the alleged inefficiencies in the S A Police Service and Metro Police operating in Khayelitsha. The complaint purports to be lodged in terms of section 206(5)(a) of the Constitution read with section 66(2)(a) of the Constitution of the Western Cape. The complaint is addressed to the Premier of the Western Cape. The complaint urges the Premier to establish a Commission of Enquiry in terms of section 127(2)(a) of the Constitution, read with section 37(2)(e) of the Constitution of the Western Cape.

[54] Once the complaint was received the Premier thought it prudent to involve the Provincial Commissioner as the latter functionary was the Premier's counterpart in the province and most appropriately placed to deal with the issues raised in the complaint.

INTER-GOVERNMENTAL COMMUNICATION: PROVINCIAL COMMISSIONER

[55] After receipt of the complaint, and by way of a letter dated 9 December 2011, the Premier addressed a letter to the Provincial Commissioner enclosing a copy of the complaint. The letter requested the Provincial Commissioner to provide the Premier with his comment on the substance of the complaint and the method proposed to be the most appropriate to deal with the complaint. The letter requested the Provincial Commissioner to let the Premier have his comments by no later than 30 January 2012.

[56] No response was received from the Provincial Commissioner by 30 January 2012 as requested in the Premier's letter dated 9 December 2011. By way of a further letter dated 14 February 2012 the Premier once again addressed a letter to the Provincial Commissioner referring to earlier correspondence of 9 December 2011. On

this occasion the Premier requested a response from the Provincial Commissioner by no later than 28 February 2012 and that, in the absence of a response from that office, the Premier advised that she would assume that the Provincial Commissioner has no interest in the matter, in which event, the Premier would proceed to deal with the matter without further reference to that institution. The response from the office of the Provincial Commissioner, on the occasion of this communication, was by way of a letter dated 27 February 2012. In this letter the Provincial Commissioner merely advised that earlier communication, by way of the Premier's letter of 9 December 2011, had since been forwarded to the office of the National Commissioner for instructions.

[57] As at 22 May 2012 no response had been received from the office of the Provincial Commissioner. On this occasion the Premier expressed her disappointment for lack of substantive response to her earlier communication by way of letters dated 9 December 2011 and 14 February 2012. In the light of lack of response from the office of the Provincial Commissioner the Premier advised, on this latest communication to the Provincial Commissioner, that she was, under the circumstances, compelled to consider the establishment of the Commission without the benefit of an input from the office of the Provincial Commissioner in relation to the veracity of the complaints lodged with her. The Premier further indicated that she had intended to take a decision with regards to the matter within the following ten(10) days. The office of the Provincial Commissioner once again acknowledged receipt of this latest correspondence and still maintained that he was still awaiting instructions from the head office. Despite all the aforementioned communications addressed to the Provincial Commissioner, the Premier did not receive any response from that office with regards to the veracity of the complaints lodged with

the Premier or an input with regards to the method best thought to be appropriate to deal with the complaints concerned.

[58] The last communication by the Premier to the office of the Provincial Commissioner was by way of a letter dated 14 June 2012. Once again the Premier expressed her disappointment for lack of any substantive response from the office of the Provincial Commissioner to her earlier correspondence of 9 December 2011, 14 February 2012 as well as 22 May 2012. In this letter the Premier indicated that she had since received another set of additional supplementary facts from several of the original complainant organisations. The Premier states in this letter that the facts contained in the latest set of additional supplementary facts from these organisations tend to provide evidence of allegations of inefficiency and a breakdown in the relations between the community and the S A Police Service serving the Khayelitsha community. On this occasion, the Premier requested a response from the office of the Provincial Commissioner by no later than Wednesday, 20 June 2012. Once again, on this occasion, the Premier threatened to deal further with the matter without further reference to that office should she not receive any response from that office by Wednesday, 20 June 2012. Once again, the Provincial Commissioner responded by merely stating that the latest communication by way of a letter of 14 June 2012, had been referred to the Head Office. Ultimately, the Commission was established without any input from the office of the Provincial Commissioner.

THE NATIONAL COMMISSIONER

[59] All the correspondence addressed to the Provincial Commissioner was copied to the National Commissioner including the last letter addressed to the Provincial

Commissioner dated 14 June 2012. On this occasion the office of the National Commissioner responded to the Premier's earlier letter of 14 June 2012 by way of her letter dated 21 June 2012. The National Commissioner noted that her office was "in a situation of transition" with the appointment of the new National Commissioner. In this letter the National Commissioner requested time until 29 June 2012 in order to afford her an opportunity to deal with the issues raised in earlier correspondence. The National Commissioner further stated that she required time to consult with provincial management and other role players at provincial and national level for purposes of conducting an investigation. The Premier acceded to the requested extension.

[60] On 29 June 2012 the National Commissioner addressed yet a further letter to the Premier on this occasion advising that she had been briefed and that her response would be aided by the S A Police Service Inspectorate. She simultaneously indicated that she had intended to undertake a qualitative assessment for which a realistic time frame would be 20 July 2012 and requested an extension of time until the aforementioned date. The Premier acceded to this request simultaneously advising that the volatile situation in Khayelitsha makes it imperative that all organs of state be seen to take swift and relative action with regards to the complaints raised.

[61] It appeared that the National Commissioner had, in the interim, appointed a task team which subsequently met with the Women's Legal Centre together with its clients on 11 July 2012. Arising from the meeting with the task team the Women's Legal Centre addressed a letter to the Premier requesting that more time be afforded to the National Commissioner to deal with the matter simultaneously requesting that she be afforded an extension from 20 July 2012 until 31 July 2012. The attitude of the Premier was that she

would only be agreeable to an extension beyond 20 July 2012 on the basis of a motivated request from the National Commissioner in which it would be set out what would have been done to date and what her plan was with regards to the issues raised in the complaint. No direct request was received from the office of the National Commissioner with regards to the request for an extension beyond the deadline of 20 July 2012.

[62] The Premier had heard nothing further from the office of the National Commissioner until a letter received from that office dated 7 August 2012. In this letter the National Commissioner advised of efforts that had been made with regards to the resolution of the issues since her last letter addressed to the Premier dated 29 June 2012. These included visits to the province; meeting with stakeholders; engaging S A Police Service leadership in the province regarding the challenges and also pointed out that the issues raised in the complaint were intricate and complex and not capable of being addressed overnight. By this time it had almost been a period of nine months since the Premier first made contact with the Provincial Commissioner, the National Commissioner as well as the office of the Minister.

[63] In her letter of 7 August 2012 the National Commissioner does not refer to an extension of 20 July 2012 granted to her earlier and which, by all accounts, she failed to adhere to. She does not refer to the extension of 31 July 2012 which apparently was granted to her by the Premier but which extension is disputed by the Premier. Apart from raising the fact that the issues raised in the complaint were intricate and complex, the National Commission did not state what her plan of action was with regards to dealing with the matter nor the fact that she had, in the interim, established a task team

with a view to advising her on the most appropriate method to deal with the complaints. Also, with regards to the National Commissioner, the Premier ultimately established the Commission without any benefit of an input from that office.

THE MINISTER

[64] No substantive response was received from the office of the Minister other than acknowledgement of communication addressed to that office with an assurance that the matter was receiving utmost attention at that office. There is no evidence to suggest that the office of the Minister had, in the interim, been in contact with both the office of the National Commissioner and the Provincial Commissioner to ascertain how those institutions intended dealing with the complaints, coupled with a directive that the Minister be apprised of the developments with regards to how the complaint was being attended to. It would appear that the Minister elected to leave the matter of the complaints raised with the National and the Provincial Commissioner. In the meantime, the Premier had received a report from the Department of Community Safety. Once the Premier had received a report from the Department of Community Safety and the Executive having unanimously approved the establishment of a Commissioner of Enquiry, the Premier proceeded to establish the Commission which was duly proclaimed in the Provincial Gazette on 24 August 2012.

FAILURE TO ENGAGE WITH OTHER BODIES

[65] Ancillary to the complaint that the Premier, in establishing the Commission in the manner she did, failed to comply with the constitutional and statutory obligations relating to the principles of co-operative governance and inter-governmental relations, is the complaint that the Premier took the decision to establish the Commission without

engaging with a range of constitutional and statutory bodies prior to making her decision. These complaints relate to failure to raise a matter of the complaint at the meetings of the Executive; failure to raise the matter with the office of the National Minister prior to establishing the Commission; failure to engage the MinMec structures; the Civilian Secretariat for Police; failure to raise the issues relating to the complaints with the standing meetings between the MEC and the Provincial Commissioner; failure to utilise information requesting channels within the S A Police Service and the Provincial Commissioner; and Community Policing Forums, amongst other structures that the applicants contend that the Premier ought to have consulted prior to making a decision to establish a Commission of Enquiry.

[66] Apart from the Civilian Secretariat for Police and the Independent Police Investigate Directorate, both of which organisations are organs of state within the national sphere of government, none of the organisations referred to in the applicants' complaint can be construed as organs of state contemplated in section 41(1) of the Constitution. The applicants' complaints boil down thereto that the Premier was obliged to deal with the complaints about policing in Khayelitsha by consulting a variety of bodies, ostensibly as a pre-requisite before she could lawfully establish a Commission in terms of section 206(5) of the Constitution. However, in doing so, the applicants fail to point out a single statutory or constitutional provision to sustain this basis of a complaint. There appears to be no textual or other indicators in the Constitution or in the Cape Commissions Act which suggest the kind of limitation that the applicants seek to impose on the Premier's oversight powers inclusive of the power to establish a Commission of Enquiry in terms of section 206(5) of the Constitution.

[67] As has already been pointed out in the preceding paragraph only two of the organisations and/or structures which the applicants contend the Premier ought to have consulted prior to establishing a Commission are organs of state. These are the Civilian Secretariat for Police and the Independent Police Investigative Directorate. The Civilian Secretariat is an organ of state in the national sphere of government. Its functions are set out in section 6 of the Civilian Secretariat Police Service Act, 2 of 2011 ("the Civilian Secretariat Act"). *Mr Rosenberg* SC (with him *David Borgström* and *Mushahida Adhikari*) makes a point in his submissions that the Civilian Secretariat at the national sphere does not have a complaints mechanism through which the complaints of the nature and substance of those submitted by the civil society organisations could have been dealt with. The submission goes further to suggest that such complaints, in any event, fall outside of the functions of the Civilian Secretariat as set out in its governing legislation. I am in perfect agreement with this submission.

[68] The mandate of the Civilian Secretariat, as set out in section 6 of the Civilian Secretariat Act, does not make provision for the investigation of complaints against the police. As has already been pointed out, the Civilian Secretariat is an organ of state in the national sphere of government. Its existence cannot be interpreted as imposing a limitation upon the exercise of a provincial oversight power. As for the Independent Police Investigative Directorate, its mandate is primarily to investigate complaints against members of the S A Police Service. Its mandate does not include complaints of the nature and substance of those submitted by the civil society organisations to the Premier. It is not an appropriate body to deal with a complaint in regard to the breakdown of relations between the police and the communities.

[69] The Inter-Governmental Relations Frameworks Act, 13 of 2005 ("the Framework Act") envisages the creation of several inter-governmental forums some of whom are mandatory and some optional. Such forums are designed to increase the flow of information to various affected actors and to thereby better enable them to co-ordinate their activities in areas of either shared competence or devolved administration (Stu Woolman & Theunis Roux: *Constitutional Law of South Africa* 2nd Edition Vol 1 at 14-37). The obligatory or mandatory forums referred to in the Act are the President's Co-ordinating Council, the Premier's Inter-Governmental Forums and the District Inter-Governmental Forums. These are about the only the obligatory forums referred to in the Frameworks Act. All those bodies and structures referred to in the applicants' complaints would either be optional forums or the kind of structures in respect of which it would not be obligatory for the Premier to consult prior to making her decision to establish the Commission. In my view, it neither was obligatory on the part of the Premier to have consulted those bodies and/or structures referred to in the applicants' complaints nor could the Premier be faulted for having proceeded to establish the Commission without prior consultation to such bodies/forums/structures.

RATIONALITY

[70] This category of a complaint is based on a contention that the Premier's decision to appoint the Commission was irrational. In authorities such as *Bel Porto School Governing Body v The Premier, Western cape & Another* 2002 (3) SA 265 (CC) at paragraph 46, the Constitutional Court held that the threshold for rationality is low, particularly in circumstances where the functionary is exercising an original constitutional power of a discretionary nature. This court, in *City of Cape Town v*

Premier, Western Cape & Others, supra, describes such original constitutional power as "almost untrammelled".

[71] In *Pharmaceutical Manufacturers Association of SA & another: in re ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) the Constitutional Court made the following observation with regards to the test for rationality:

> "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."

[72] The rationality of the Premier's decision in establishing the Commission is to be determined on the facts known to her at the time at which the establishment of the Commission was promulgated on 24 August 2012. As has already been pointed out elsewhere in this judgment, the Premier made her decision without the benefit of any substantive input from the S A Police Service despite repeatedly having requested the Provincial Commissioner to provide comment on the complaint and having granted the

National Commissioner no less than two extensions of time within which to provide their responses and comments. Thus, the applicants in the instances of the Provincial Commissioner and the National Commissioner failed to provide the comment requested either on the complaints or the best method thought appropriate to deal with the complaints.

[73] In a letter addressed by the Minister to the Premier dated 11 October 2012, the Minister makes the following observation:

> "The National Commissioner had met with you and had taken note of your concerns and the complaints lodged with you. She had also taken note of your correspondence to her and the National Commissioner concluded that it was necessary to address those concerns.
>
> In order to do so, the National Commissioner issued standing instructions to the police to investigate and to consider the issues. The National Commissioner reason that a full police investigation is needed and that at a later stage, if necessary, a more formal enquiry in which the police will be assisted by persons outside of the S A Police Service appointed by the National Commissioner, will be conducted. I concur with the National Commissioner."

In this letter the Minister clearly states that the National Commissioner acknowledges that a full police investigation is needed into the complaint lodged.

[74] It needs to be noted that the Premier based her decision to establish the Commission on the complaints received from the complainant organisations together

with reports and complaints and in media at the time, which attributed the outbreak of vigilante killings in Khayelitsha to the perception that policing in the area had failed. The Premier subsequently explained that the reports of the vigilante attacks lent credence to the complaint that there had been a breakdown in police-community relations in Khayelitsha.

[75] The Premier explicitly states in her answering affidavit that in forming her decision to establish the Commission she relied on both the complaints from the complaint organisations and the plague of vigilante killings in Khayelitsha. News reports, community activists and the Social Justice Coalition all suggested an intuitive link between these acts and the loss of faith in the police. Obviously, these factors cannot be analysed disjunctively. As at the time of the establishment of the Commission, the cases referred to by the complainant organisations in their several complaints involving the alleged inefficiency on the part of the S A Police Service in Khayelitsha stood uncontroverted. Based on these observations, in my view, the need for action to be taken, in the form of the established Commission of Enquiry, was compelling. The information before the Premier at the time provided a rational basis for her decision to establish the Commission. Thus, in my view, the applicants' challenge on the legality of the Commission, on the basis of rationality, is untenable.

[76] There are several other complaints on the basis of which the applicants contend that the legality of the Commission is vulnerable to attack and, on that basis, an order setting aside the establishment of the Commission is justified in the circumstances of this matter. These complaints relate to alleged ulterior motives in the establishment of the Commission; that the terms of reference of the Commission are such that the work

of the Commission would either constitute investigation of crime or acts of vigilantism; that the pith and substance of the original complaint made by the complainant organisations during November/December 2011 does not warrant the appointment of a Commission of Enquiry and that the Commission, in the manner it is established, is designed to embark on criminal investigations and thereby encroach on the functional and operational terrain of the police.

[77] As for the complaint based on the contention that the original complaint, viewed objectively, does not warrant the appointment of the Commission of Enquiry, the applicants contend that the specific cases of alleged police inefficiency referred to in the complaint were properly investigated and prosecuted, and in relation to six of the eight complaints, subsequent convictions and effective jail sentences were imposed. In advancing this contention, the applicants do not refer to the supplementary additional facts lodged with the Premier on 4 April 2012 and 6 June 2012.

[78] In my view, this contention is untenable. The way I look at it, the complainant organisations did not make a number of individual complaints. The complaint was of an alleged systemic failure of the police in Khayelitsha to prevent, combat and investigate crime, take statements, open cases and apprehend criminals. Paragraph [49] of the complainants' complaint dossier at page 372 of the record refers to the systemic failure of the Khayelitsha police to prevent, combat and investigate crime, take statements, open case and apprehend criminals. The statement of complaint goes further to mention in paragraph [4] at page 356 of the record that the eight case studies annexed to the original complaint do not purport to be comprehensive and constitute only a small

sample of the widespread inefficiency, apathy, incompetence and systemic failures of policing routinely experienced by Khayelitsha residents.

[79] Section 206(5)(a) of the Constitution is not prescriptive with regards to the nature of the complaint or the manner in which such complaint has to be lodged. The complaint could well either be in writing as is the case in the circumstances of this matter or, for that matter, the complaint may be orally communicated. Based on the complaint as originally lodged, duly supplemented by further additional supplementary facts, it cannot be said that the complaint on the basis of which the Commission was established is not a proper complaint for the purpose of setting up a Commission of Enquiry.

[80] The applicants contend that the Commission, in the manner it was established, is designed to investigate vigilante attacks and that it is impermissible for the Premier to authorise investigation into criminal activities which can be abused for party political gain. In *City of Cape Town v Premier, Western Cape & Others* paragraph 154, supra, this court held that it is undesirable to vest a Commission of Enquiry with the primary task of investigating criminal conduct as this could lead to a blurring of the functions of the executive and the police. In the instance of that matter, the primary function of the Commission was to investigate an allegedly criminal conduct. It had no other purpose.

[81] Whereas in the *City of Cape Town v Premier, Western Cape & Others,* supra, the terms of reference required the Commission to investigate and determine whether the conduct of specified political office bearers was unlawful, the position, in the instance of this matter, is quite different. In the instance of this matter, the mandate of

the Commission is clearly set out in its terms of reference. The terms of reference of the Commission mirror the wording of the Constitution in section 206(5)(a). A Commission's terms of reference constitutes a mandate for the Commission and determine the scope of its investigation.

[82] Ms Dissel, the secretary of the Commission, points out in her answering affidavit that the Commission has stated repeatedly that it was not its task or intention to investigate crime; that the Commission was not investigating specific actions on the part of any particular police officer, but intended to focus on systemic issues; that the complainants were discouraged from providing the names of particular members of the S A Police Service in their complaints and, as per its first notice, issued by the Commission on 6 September 2012, the Commission made it clear that it is conducting an enquiry, not a trial, and it is not investigating whether anyone should face criminal prosecution or be held civilly liable. As for an example, in a letter dated 12 October 2012 addressed to Advocate Rodney De Kock, the Director of Public Prosecutions, the Commission clearly states that its mandate is confined to investigations defined in its terms of reference and to avoid any attempt to establish criminal or civil liability. In my view, the contention that the Commission is designed to investigate crime or acts of vigilantism is not sustainable.

[83] I have considered the several other contentions which the applicants contend constitute the basis for a challenge to the validity of the establishment of the Commission. These range from coercive powers seemingly granted to the Commission; the contention that the Commission was established on the basis of an unlawful dictation by the Women's Legal Centre coupled with an ulterior motive, which allegedly

is political. I have considered the merits of all these contentions on the basis of the evidence on record. In my view, no cogent evidence of such quantum as to justify the setting aside the establishment of the Commission, based on those contentions, has been adduced. Consequently, in my view, a claim by the applicants that the establishment of the Commission is liable to be set aside on the basis of those contentions, is similarly untenable.

[84] I have not considered the applicants' claims based on the alleged unlawfulness or alleged over-breadth of the subpoenas issued by the Commission. As correctly pointed out by *Mr Rosenberg* SC these are issues that can be dealt with by the Commission itself. It indeed is so that an attack on the subpoenas issued by the Commission cannot found a challenge to the anterior decision to establish the Commission itself.

CONCLUSION

[85] On the basis of the evaluation of the evidence on record, coupled with the consideration of the parties' submissions and oral argument at the hearing of the matter, I cannot find that a case has been made, at the interim relief stage of these proceedings, for the several forms of relief that the applicants seek. No case has been made, once again, at the interim relief stage of these proceedings, that the Premier, in establishing the Commission in the manner she did, violated any one of the provisions relating to the principles of co-operative governance and inter-governmental relations as set out in section 41 of the Constitution; that the Premier misconstrued her powers arising from the provisions of section 206(5)(a) of the Constitution; or that in the period prior to the establishment of the Commission and at the time she established the

Commission itself, the Premier violated any one of the provisions relating to the basic values and principles governing public administration as set out in section 195 of the Constitution. It therefore follows that the applicants' claims for interim relief, derived as they are from the Constitution, ought to fail.

[86] A claim relating to the recusal of the two Commissioners and Advocate Sidaki was not pursued at the hearing of this matter. Consequently, no determination is made on the applicants' claims based on recusal.

[87] In result I would propose the following order:

[87.1.] The applicants' claim for interim relief, based on part A of the notice of motion, is dismissed;

[87.2.] The applicants are ordered to pay the first, fourth to seventh and the ninth respondents' costs, jointly and severally, the one paying the other to be absolved.

[87.3.] In the instance of the first respondent such costs shall include costs consequent upon employment of three counsel.

[87.4.] In the instance of the fourth to the seventh, and the ninth respondents, such costs shall include costs consequent upon employment of two counsel.

_____
N J Yekiso, J

I agree.

_____
J H M Traverso, DJP