CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 13/13
[2013] ZACC 33

In the matter between:

MINISTER OF POLICE	First Applicant
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Second Applicant
PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE FOR THE WESTERN CAPE	Third Applicant
CIVILIAN SECRETARIAT FOR THE POLICE SERVICE	Fourth Applicant
COLONEL M F REITZ	Fifth Applicant
BRIGADIER Z DLADLA	Sixth Applicant
COLONEL TSHATLEHO RABOLIBA	Seventh Applicant

and

PREMIER OF THE WESTERN CAPE	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR COMMUNITY SAFETY, WESTERN CAPE	Second Respondent
CITY OF CAPE TOWN	Third Respondent
HON. JUSTICE CATHERINE O’REGAN N.O.	Fourth Respondent
ADV. VUSUMUZI PATRICK PIKOLI N.O.	Fifth Respondent

SECRETARY TO THE COMMISSION	Sixth Respondent
ADV. T SIDAKI	Seventh Respondent
WOMEN’S LEGAL CENTRE	Eighth Respondent
SOCIAL JUSTICE COALITION	Ninth Respondent

Heard on : 6 August 2013

Decided on : 1 October 2013

JUDGMENT

MOSENEKE DCJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This case concerns a dispute between organs of state in the national and provincial spheres. The Minister of Police (Minister) and the National Commissioner of the South African Police Service (Commissioner) contest the power of the Premier of the Western Cape province (Premier) to appoint a provincial commission of inquiry with powers to subpoena[1] members of the South African Police Service (Police Service) to appear before it over allegations of police inefficiency. In turn, the Premier asserts that she derives the power from the Constitution and related provincial legislation.

[1] A subpoena is a court order commanding the presence of a witness under a penalty of fine for failure.

Background

[2] This matter has its origins in the township of Khayelitsha, located in the Western Cape province. Khayelitsha is one of the largest and fastest-growing townships in South Africa, forming part of the city of Cape Town.[2] It is a densely-populated settlement, carrying approximately 750 000 residents. The rights and interests of these residents lie at the heart of this dispute.

[3] On 28 November 2011, the eighth respondent (Women's Legal Centre), acting on its own and on behalf of various civil society organisations, including the ninth respondent (Social Justice Coalition),[3] delivered a complaint to the Premier regarding alleged inefficiencies in the performance of the Police Service and the City of Cape Town Municipal Police Department (Metro Police) operating in the community of Khayelitsha. The complaint cited "widespread inefficiencies, apathy, incompetence and systemic failures of policing routinely experienced by Khayelitsha residents."

[4] The complaint contained statistics showing high and escalating crime rates, with particular concern over figures relating to homicides, assaults and sexual crimes. Various and serious inefficiencies in policing were claimed, including insufficient visible policing in the community, lack of witness protection, lack of co-ordination between the police and prosecuting services and poor treatment of victims of crimes. The complaint described the routine violation of the rights of the residents of

[2] Khayelitsha is situated approximately 35km from the city bowl.

[3] The Women's Legal Centre is a non-profit, independently funded law centre. In this matter it was acting for the Social Justice Coalition, the Treatment Action Campaign, Equal Education, Free Gender, Triangle Project and Ndifuna Ukwazi.

Khayelitsha[4] and highlighted the impact of high crime rates on residents including children and people vulnerable to discrimination. It added that "the [Khayelitsha] community has lost confidence in the ability of the police to protect them from crime, and to investigate crimes once they have occurred." The civil society organisations concerned proposed that the Premier appoint a commission of inquiry into the Police Service and Metro Police operating in Khayelitsha.

[5] Within two weeks of receiving the complaint, the Premier forwarded it to the Provincial Commissioner of Police for the Western Cape (Provincial Commissioner) and copied the correspondence to the Minister and the Acting National Commissioner.[5] She requested comment, by 30 January 2012, on the substance of the complaint as well as the method that had been proposed to deal with the issues raised. Over a period of approximately nine months correspondence was exchanged between the parties. The details of the exchanges are not pertinent at this stage. Suffice it to say, over nine months the Premier sought the response of the Provincial Commissioner over the complaints and how they could be addressed. In this correspondence the Minister and the Acting National Commissioner were copied. During that time, the Premier received further evidence and complaints over a "breakdown in the rule of law" in Khayelitsha and its adverse impact on residents.

[4] These include rights to equality, dignity, life, freedom from public and private violence, privacy, movement, property, housing and the rights of accused and detained persons.

[5] Until June 2012, Commissioner Mkhwanazi was the Acting National Commissioner. On 12 June 2012 the current National Police Commissioner, Commissioner Phiyega, was appointed.

[6] In early July 2012, seven months after the original complaint, the Commissioner requested a task team to investigate the issues raised in the complaint. The Provincial Commissioner requested the task team to broaden the scope of its investigation and to investigate "any other aspects they may consider helpful in improving the overall quality of service delivery in Khayelitsha." It appears that neither the Premier nor the complainant organisations were informed of further steps that the Police Service would undertake as a result of the task team investigation.

[7] The Premier claims that in the light of delays in securing substantive responses to the complaints and the failure to reach consensus with the Minister and the Commissioner on the way forward, she approached the provincial cabinet. The provincial cabinet approved the proposed appointment of a commission of inquiry. On 22 August 2012, the Premier conveyed to the public her decision to appoint a commission. On 24 August 2012, almost nine months after the original complaint had been received, the Premier appointed a commission of inquiry (Commission) into allegations of police inefficiency in Khayelitsha and of a breakdown in relations between the community and police in Khayelitsha.[6] It appears from the Proclamation that the Commission was appointed in terms of section 206(3) and (5) read with

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[6] In terms of Proclamation No. 9/2012, Provincial Gazette 7026 dated 24 August 2012 (Proclamation), the Premier appointed the Commission as set out in Schedule A of the Proclamation "under section 1 of the Western Cape Provincial Commission Act, 1998" and, further, in Schedule A to the Proclamation made reference to section 206(3) and (5) of the Constitution. The terms of reference of the Commission are stated as follows—

> "To investigate complaints received by the Premier relating to allegations of:
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> (a) inefficiency of the [SAPS stations in Khayelitsha specifically named] and any other units of the [SAPS] operating in Khayelitsha, Cape Town . . .; and
>
> (b) a breakdown in relations between the Khayelitsha community and members of the [SAPS] stationed at the aforesaid police stations in Khayelitsha, or operating in Khayelitsha."

section 127(2)(e) of the Constitution and section 1(1) of the Western Cape Provincial Commissions Act[7] (WC Commissions Act).

[8] The Minister was not pleased. He sent a letter to the Premier stating that the Commission was appointed "without either discussing the matter with [him] or notifying [him] of [her] intended actions" and that the appointment of the Commission was "premature and may impact on other initiatives currently underway". He further requested the postponement of the Commission's work so as to discuss the matter. The Premier replied that she was open to further discussion but declined to postpone the work of the Commission at that stage. On 6 September 2012 the Commission published a notice of its provisional working methods.

[9] Between September and October 2012, the Premier and the Minister exchanged letters and met. It is unnecessary to delve into the details. The critical point is that by the end of October 2012 it was clear that the Minister had a variety of concerns regarding the appointment of the Commission, including the ambit of the Commission's terms of reference and the subpoena powers of the Commission. It was also apparent that the Premier was unwilling to accede at that stage to the request for the postponement of the Commission's work.

[10] On 30 October 2012, the Commission issued a subpoena to the Provincial Commissioner requiring the production of certain evidence. The following day

[7] 10 of 1998.

subpoenas were issued to three station commanders. Within a week, the applicants brought an urgent application in the Western Cape High Court (High Court) for an order restraining the Commission from issuing and giving effect to the subpoenas and directing it to suspend its activities pending a decision on the final review application to set aside the Premier's decision to appoint the Commission. The appointment was challenged on the basis that it was inconsistent with the Constitution, invalid, irrational or unlawful.

In the High Court

[11] The temporary interdict application was heard by a full court of the High Court. The majority (per Yekiso J, Traverso DJP concurring) held that the power of the Premier to appoint a commission was an original and discretionary power derived from the Constitution. It held that the Premier was entitled to exercise the power by appointing a commission in terms of the WC Commissions Act in the manner she did. The provisions of that Act, the majority reasoned, conferred powers of subpoena upon the Commission. Therefore, in the absence of a challenge to the constitutionality of those provisions, the Commission's subpoena powers were held to be constitutionally compliant. Further, the majority dismissed the contention of the Minister that the Premier had violated the principles of co-operative governance and inter-governmental relations as set out in section 41 of the Constitution.[8] It concluded that in setting up the Commission, the Premier did not act irrationally or unlawfully and dismissed the urgent application.

[8] Section 41 is further discussed at [58] to [63] below.

[12] In a minority judgment, Saldanha J took the view that although the Premier had the power to appoint the Commission, the parties had not exhausted their obligations under section 41 to engage with one another to explore appropriate means of avoiding or resolving the dispute between them in relation to policing in Khayelitsha. He concluded that he would have granted the interdict and ordered the parties to take steps to resolve the conflict.

In this Court

Leave to appeal

[13] The Minister and the Commissioner approached this court seeking: first, leave to appeal against the decision of the High Court;[9] and, second, direct access on new and additional grounds.[10] However, in oral argument applicants conceded that it would be neither necessary nor in the interests of justice to deal with the application for leave to appeal if their direct access application were granted.

[14] That concession was properly made. The appeal was directed against the High Court's refusal to grant an urgent temporary interdict. However, that dispute has been superseded by the substantive relief that the applicants ask for in the direct access application. Moreover, the urgent relief they sought then would have no practical value now. Accordingly, leave to appeal falls to be refused.

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[9] Under Rule 19(2) of this Court's Rules.

[10] Under Rule 18 of this Court's Rules.

Direct Access

[15] The applicants seek direct access under Rule 18. They ask this Court to declare the appointment of the Commission inconsistent with the Constitution and invalid, and that the subpoenas it had issued against members of the Police Service be set aside. This they contend for four principal reasons:

(a) The nature and extent of the complaints made to the Premier did not amount to jurisdictional facts that entitled her to appoint a commission.

(b) Section 206(3) and (5) read with section 127(2)(e) of the Constitution does not authorise the Premier to appoint a commission with coercive powers against members of the Police Service.

(c) Before establishing the Commission, the Premier did not comply with her constitutional obligations under Chapter 3 of the Constitution and the Intergovernmental Framework Relations Act 13 of 2005 (Framework Act). and

(d) The terms of reference of the Commission are vague and overbroad.

[16] The parties are in agreement that direct access to this Court should be granted. Let it suffice to record that the applicants assured the Court that if direct access were to be granted, the decision of this Court would be dispositive of their claim and they would not pursue any of the claims against the first and other respondents pending in the High Court. As it turned out, it is not necessary to grant the direct access application.

[17] The Social Justice Coalition submitted that the direct access application is redundant because section 167(4)(a) requires that only this Court decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state. Is this a case of that kind?

[18] In *Doctors for Life*[11] this Court explained the rationale behind exclusive jurisdiction in these terms:

> "The purpose of giving this Court exclusive jurisdiction to decide issues that have important political consequences is 'to preserve the comity between the judicial branch of government' and the other branches of government 'by ensuring that only the highest court in constitutional matters intrudes into the domain' of the other branches of government."[12] (Footnote omitted.)

[19] In addition, exclusive jurisdiction provisions have an important practical justification. Disputes between organs of state, branches of government, the executive and the legislature have the potential to interrupt the smooth functioning of the political system and one may add, of the public administration. Exclusive jurisdiction makes allowance for expeditious and final resolution to disputes of that genre.

[20] The language of section 167(4)(a) is broad and its ambit is seemingly wide. However, this Court has often warned that the category of cases falling under

[11] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

[12] Id at para 23.

section 167(4) should be narrowly construed.[13] This is because exclusive jurisdiction ousts the jurisdiction of other competent courts – a result that would deviate from the general rule that the judicial authority is vested in the courts.[14] Ordinarily, it is preferable for this Court to have the benefit of the opinion of other courts before deciding a matter definitively. In this way, other competent courts, which are ordinarily more accessible than this Court, would help safeguard constitutional promises and join in shaping our budding constitutional jurisprudence.

[21] In *National Gambling Board*,[15] the Court reined in the ambit of section 167(4)(a). It made a distinction between powers or functions provided for in terms of any legislation, as opposed to those "explicitly or by implication provided for in terms of the Constitution".[16] In other words, the Court said that the term "constitutional status, powers or functions" in section 167(4)(a) means status, powers or functions derived directly from the Constitution.[17]

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[13] *Women's Legal Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC) at para 11; *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 33; *Doctors for Life* above n 11 at para 20; and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) (*SARFU I*) at para 25.

[14] Section 165(1) of the Constitution.

[15] *National Gambling Board v Premier, KwaZulu-Natal and Others* [2001] ZACC 8; 2002 (2) SA 715 (CC) 2002 (2) BCLR 156 (CC). The Court characterised the dispute as one related to the interpretation of national and provincial legislation rather than the power to enact such legislation. As such, the Court at para 26 held: "The dispute is about the effect of the legislation and not the power to make it. It is accordingly not a dispute envisaged by section 167(4)(a) of the Constitution and therefore does not fall within this Court's exclusive jurisdiction."

[16] Id at para 24.

[17] Id.

[22] In *Premier, Western Cape*[18] the Court decided the matter as one falling within its exclusive jurisdiction under section 167(4)(a). The issue at stake was whether Parliament had, in terms of section 197 of the Constitution, the competence to prescribe to provinces how to structure their administrations. The Court held that the Constitution does confer on Parliament the power to regulate the structure of the public service for the national and the provincial spheres and that no implied provincial executive power was infringed.[19]

[23] Here we are certainly faced with a dispute between organs of state in the national and provincial sphere.[20] The interim relief sought in the High Court as well as the relief sought in this Court essentially concern whether the Premier has the power, in terms of the Constitution, to appoint a commission of inquiry with subpoena powers over the Police Service. The dispute is therefore patently about the extent and scope of the competence of the Premier to appoint a commission of inquiry in terms of sections 127(2)(e) and 206(5) of the Constitution.

[24] It is so that a part of this matter, in the High Court and before this Court, related to whether the respective organs of state had met their Chapter 3 co-operative governance obligations. This makes it necessary to caution that not every dispute

[18] *Premier of the Western Cape v President of South Africa and Another* [1999] ZACC 2; 1999 (3) SA 657 (CC); 1999 (4) BCLR 382 (CC).

[19] Id at para 45.

[20] Section 239(a) of the Constitution provides—

> "'organ of state' means any department of state or administration in the national, provincial or local sphere of government."

concerning Chapter 3 obligations between organs of state in the national and provincial sphere would be a dispute within the exclusive jurisdiction of this Court. For instance, if a dispute between organs of state related to powers or functions provided for in any legislation, as opposed to those explicitly or impliedly provided for in the Constitution, it would not fall within the exclusive jurisdiction of this Court. That would be so even if co-operative governance obligations are in issue because the obligations could arise even where the powers and functions in issue originate from legislation. Of course, this does not mean that when the Court exercises exclusive jurisdiction under section 167(4)(a) over a particular dispute, a Chapter 3 co-operative governance obligation may not be raised as a valid defence to the merits of that matter.

[25] The dispute before us concerns a contestation between organs of state in the national and provincial sphere over the competence or power of a provincial organ of state provided for in the Constitution. In my judgement it falls within the ambit of section 167(4)(a). To say so, meets the purposes of the exclusive jurisdiction given to this Court. The challenge to the Premier’s exercise of an original constitutional power has weighty political and institutional implications. Speedy and definitive resolution is required. This dispute between national and provincial organs of state over the constitutionally-sourced competence of the Premier is a matter that should have come directly to this Court.

Merits

Nature and extent of the complaints

[26] During the hearing the applicants abandoned the contention that the nature and extent of the complaints did not justify the appointment of a commission under section 206(5). Again, the concession was properly made. The empowering section provides that the complaints must point to "police inefficiency or a breakdown in relations between the police and any community". Even a cursory reading of the complaints establishes the required jurisdictional facts. Whether the complaints are true is another matter and the core area of enquiry of the Commission.

The power of the province to appoint a commission of inquiry

[27] The Premier appointed the Commission acting under section 1 of the WC Commissions Act[21] read with sections 127(2)(e), 206(3) and 206(5) of the Constitution. Originally, the applicants impugned the appointment of the Commission on several grounds. In this Court, the applicants narrowed their attack. They accepted

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[21] Section 1 of the WC Commissions Act in relevant provides:

> "The Premier may by proclamation in the official gazette of the Province—
>
> (a) appoint a commission of inquiry;
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> (b) define the matter to be investigated by the commission and its other terms of reference;
>
> (c) make regulations—
>
> (i) providing for the procedure to be followed at the investigation for the reservation of confidentiality;
>
> (ii) providing generally for all matters which he or she considers necessary or expedient for the proper performance by a commission of its functions;
>
> (d) appoint a secretary to the commission, and such other officials as he or she may deem necessary to assist the commission; and
>
> (e) designate any member of the commission as the chairperson of that commission."

that the Premier had the power to appoint, as envisaged by section 206(5), the Commission with subpoena powers over members of the public. However, that competence, they contended, does not extend to members of the Police Service. Compelling members of the Police Service to abandon their normal duties in order to appear and testify or produce documents before the Commission amounts to an exercise of control over the Police Service, a power which neither the province nor the Commission has.

[28] The applicants were emphatic that the power to control and manage the Police Service resides with the Commissioner. The exercise of this power is subject only to national policing policy under the direction of the Minister. The Premier and provincial executive and, by extension, a commission appointed by the Premier, are excluded from exercising this control.

[29] In order to understand the authority of the Premier to appoint a commission of inquiry we must look first at the Constitution. Chapter 11 regulates the structure, conduct, powers, and functions of our security services. Thereafter it prescribes principles that govern national security. Security forces are described as a single defence force, a single police service and any intelligence services established under the Constitution and which must be structured and regulated by national legislation.[22] Objects of the police service are to prevent, combat and investigate crime, to maintain

[22] Section 199(1) and (4) of the Constitution.

public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.[23]

[30] The Constitution makes it plain that policing is a national competence. The political responsibility for policing vests in the Minister who must set the national policing policy after hearing out provincial governments on the policing needs and priorities of provinces.[24] The President appoints the Commissioner.[25] In the Commissioner lies the power to "control and manage the police service in accordance with the national policing policy" and the directions of the Minister responsible.[26]

[31] However, in Part A of Schedule 4, the Constitution provides for concurrent national and provincial legislative competence over the policing function. The Schedule makes it clear that the provincial legislature has legislative competence over policing only to the extent conferred on it by Chapter 11.[27] In turn, that chapter explains that a provincial executive is entrusted with the policing function as set out in the chapter or given to the provincial executive in national legislation or the national policing policy.[28] Chapter 11 carves out the concurrent competence of a province in relation to policing. For now the important provisions are section 206(3) and (5).

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[23] Section 205(3) of the Constitution.

[24] Section 206(1) of the Constitution.

[25] Section 207(1) of the Constitution. See also *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 130.

[26] Section 207(2) of the Constitution. See also *Glenister II* above n 25 at para 130.

[27] Part A of Schedule 4 to the Constitution in relevant part provides:

> "Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence."

[28] Section 206(4) of the Constitution.

[32] Section 206(3) provides:

> "Each province is entitled—
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> (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."

[33] In turn, section 206(5) stipulates:

> "In order to perform the functions set out in subsection (3), 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."

[34] This Court in the *First Certification Case*[29] said the following about this concurrent legislative competence:

> "This pertains to legislation which might be found necessary to carry out the monitoring, oversight and liaising functions set out in [section 206(2)]. Apart from this, there is no express provision for provincial legislative power in the NT."[30]

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[29] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification Case*).

[30] Id at para 399. NT means New Text of the Constitution of the Republic of South Africa.

[35] Under the interim Constitution the Police Service functioned "under the direction of the national government as well as the various provincial governments."[31] Under the 1996 Constitution the power of direction by various provincial governments and the relevant MECs was removed. It was replaced with the particular entitlements set out in section 206(3). This meant, as this Court observed in the *First Certification Case,* the new text did "not prescribe any powers or functions to be exercised by the province independent of the National Minister and [National Commissioner]."[32]

[36] Therefore, as far as the contention of the applicants goes, it is correct. The scheme of Chapter 11 and the *First Certification Case* and *Second Certification Case*[33]make it plain that the role of a provincial executive in relation to policing has been diminished and is now limited to the monitoring, overseeing and liaising functions set out in section 206(3).

[37] That however is not the end of the enquiry. The entitlements in section 206(3) are a recognition that, whilst a province has no control over the policing function, it has a legitimate interest that its residents are shielded from crime and that they enjoy the protection of effective, efficient and visible policing. That explains why the province has the authority and duty to raise its concerns on policing in the province

[31] Section 214(1) of the interim Constitution.

[32] *First Certification Case* above n 29 at para 398.

[33] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24; 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) *(Second Certification Case).*

with the Minister. Thus the entitlements accord with the province's duty to respect, protect and promote fundamental rights of its residents.[34]

[38] The object of section 206(5) is to safeguard these entitlements over policing within a province. It may undertake an investigation or resort to a commission of inquiry into complaints of police inefficiency or of compromised relations between the police and a community and must make recommendations, in that regard, to the Minister.

[39] In the words of the *Second Certification Case*, the power to appoint a commission of inquiry gives "more teeth" to the monitoring and overseeing functions that the province enjoys by virtue of section 206(3).[35] The Court explained that this was to ensure adherence to the Constitutional Principle that the power and functions of the provinces defined in the Constitution shall not be substantially inferior to those provided in the interim Constitution.[36]

[40] The functions of a province must also be understood in the light of the role afforded to a province in section 207(5) and (6) of the Constitution. In plain language, the provincial commissioner is required to account to the provincial legislature on an annual basis on the state of policing in the province. The provincial executive has

[34] Section 7(2) of the Constitution provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[35] *Second Certification Case* above n 33 at para 168.

[36] Constitutional Principle XVIII.2 of the interim Constitution. See also *Second Certification Case* above n 34 at para2.

further recourse in keeping the provincial commissioner accountable to it. Its concurrence is required when the Commissioner appoints a provincial commissioner.[37] In turn, should the provincial executive lose confidence in her or him, it may seek "the removal or transfer of, or disciplinary action against, that commissioner".[38]

[41] The pertinent question before us is whether, once constituted, a provincial commission of inquiry may require members of the Police Service to appear before it under subpoena. In my view, the competence to appoint a provincial commission of inquiry into police inefficiency and its alleged dysfunctional relations with any community is part of a constitutionally- mandated scheme through which provinces are entitled to monitor and oversee the police function within their area of remit. Section 206(5) targets a commission of inquiry as one of the mechanisms of accountability and oversight available to a province. A commission brought into being for this purpose must be effective and capable of giving reasonable effect to the entitlements of a province over the policing function.

[42] As we have seen, the applicants have conceded the authority of the Premier to appoint a commission under section 206(5). Even so, they make two broad submissions. The first is that the province may not enact legislation that entitles it to appoint a commission with coercive power over the Police Service. It follows, they contend, the Premier's reliance on the WC Commissions Act – provincial legislation

[37] Section 207(3) of the Constitution.

[38] Section 207(6) of the Constitution.

enacted under section 127(2)(e) of the Constitution – was misplaced. Second, the entitlement to oversee and monitor police functions and for that purpose to appoint a commission of inquiry, does not give the province the competence to control and direct the Police Service. I look at each of these contentions in turn.

Relationship between section 206(5) and section 127(2)(e)

[43] Section 127(2)(e) is located in Chapter 6 which regulates the powers and functions of a province. The section lists executive powers and functions of the Premier. These include the authority to appoint a commission of inquiry. The section echoes section 84(2)(f) of the Constitution which has entrusted the President with the power to appoint "commissions of inquiry".

[44] In *SARFU III*[39] this Court explained, in relation to section 84(2)(f),[40] that the President has the original power to appoint a commission in his or her sole discretion as long as the discretion is exercised within the constraints of legality.[41] The decision is executive action and not administrative action because it does not relate to implementing legislation. The President is not bound by the recommendations of the commission and may implement only those he or she chooses.[42] The Court further held that "[a] commission of inquiry is an adjunct to the policy formation

[39] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU III*).

[40] Section 84(2)(f) of the Constitution provides:

> "The President is responsible for appointing commissions of inquiry".

[41] *SARFU III* above n 39 at paras 144-8.

[42] Id at para 146.

responsibility of the President."[43] It is a mechanism available to the President "whereby he or she can obtain information and advice."[44] These observations apply with equal force to the powers of the Premier under section 127(2)(e) of the Constitution. An additional and obvious constraint on the Premier is that the commission she appoints must concern a matter over which the province enjoys competence.

[45] In addition to advising the executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent. In the words of Cory J of the Canadian Supreme Court in *Phillips v Nova Scotia*:[45]

> "One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover 'the truth'. . . . In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public."[46]

[46] In *SARFU III* the Court further explained that the President's power to appoint a commission is a distinct juristic act derived from the Constitution and not from

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[43] Id at para 147.

[44] Id. See also *S v Mulder* 1980 (1) SA 113 (T) at 120E cited in *SARFU III* above n 39 at fn 113.

[45] [1995] 2 SCR 97.

[46] Id at 137-8.

legislation,[47] namely the Commissions Act.[48] However, a commission so appointed does not automatically have coercive powers because "[c]oercive powers of subpoena are generally reserved for courts."[49] The Court further noted that the powers of the President needed to be limited to afford a commission those powers in situations "where, viewed objectively, the matter to be investigated by the commission is one of public concern."[50] It also explained that, when appointing a commission under the Commissions Act, the President must specify in the terms of reference whether it has the authority to subpoena witnesses. In short, under the Commissions Act, national legislation has chosen to allow an option. A commission may be appointed with or without powers of investigation and subpoena.

[47] Here, the Premier relied, in part, on the WC Commissions Act and denies that her reliance on the provincial legislation is misguided. The Minister and Commissioner see matters differently. They contend that the powers to appoint a commission of inquiry in section 127(2)(e) and in section 206(5) are distinct, independent and operationally severed from each other. They add that the Premier is not permitted to use section 127(2)(e) and provincial legislation in order to set up a commission of inquiry into policing with coercive powers over the Police Service.

[48] The tenor of the WC Commissions Act is different from the Commissions Act. It was passed by the provincial legislature in 1998 in order "[t]o make provision for

[47] *SARFU III* above n 39 at para 155.

[48] 8 of 1947.

[49] *SARFU III* above n 39 at para 176.

[50] Id.

the functioning of commissions of inquiry appointed by the Premier", as envisaged by section 127(2)(e) of the Constitution. Unlike section 206(5) which entrusts the authority to appoint a commission to the province, section 127(2)(e) says it is the Premier, and no other functionary of the province, who is responsible for appointing a commission of inquiry.[51] As we know, the Premier appointed the Commission. In doing so she had the support of the provincial executive and she explicitly invoked section 206(5) alongside the WC Commissions Act. Given the view I take on the power of a province to convene a commission of inquiry under section 206(5), I need not resolve the interpretive difference between the parties over section 127(2)(e) and the WC Commissions Act. It may stand over for another day.

[49] Section 206(5) accords a province a clear power to establish a commission of inquiry into policing function. The provision allows a province, as a first option, to "investigate". This would be an inquiry initiated and managed by the provincial executive and without coercive powers. However, a commission of inquiry may only be set up following "complaints of police inefficiency or a breakdown in relations between the police and any community". We must understand a commission to be an inquiry different from and more than a mere investigation.

[50] In this context, a commission without coercive powers would indeed be unable to fulfil its mandate. It would be no different from an investigation. The objects envisaged in section 206(3) would never be achieved if police enjoyed immunity from

[51] Also reflected in sections 1 and 3 of the WC Commissions Act.

being called upon to testify or produce documents on their policing functions. When the target of the investigation is the police and how they fulfil their duties in relation to a particular community, they are obliged to account to a lawfully appointed commission as envisaged by section 206(5). If they were to be shielded from the coercive power of subpoena, the effectiveness of the Commission would falter. The entitlements in section 206(3) would be rendered nugatory as they would depend on whether members of the Police Service are willing to cooperate with the Commission.

[51] A commission under section 206(5) must have coercive powers for another reason. A premier and the province bear the duty to respect, protect and promote the fundamental rights of people within the province. In this case, the Premier is obliged to take reasonable steps to shield the residents of Khayelitsha from an unrelenting invasion of their fundamental rights because of continued police inefficiency in combating crime and the breakdown of relations between the police and the community. The burden of crime in Khayelitsha was confirmed and documented by the Police Services' own task team.[52]

[52] The details of incessant crime emerging from the complaint are unsettling. There is much to worry about when the institutions that are meant to protect vulnerable residents fail, or are perceived to be failing. The police service has been entrusted with the duty to protect the inhabitants of South Africa and to uphold and

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[52] Task Team Report compiled by Major General (Dr) CP de Kock on 3 August 2012, titled "Serious Crime in Khayelitsha and Surrounding Areas". The Report revealed that social contact crime in Khayelitsha increased by 16,1% in 2011/2012 and 17.5% during the first quarter of 2012/2013. Furthermore, the four other stations used in comparison to Khayelitsha presented in the report (namely Harare, Lingelethu West, Mfuleni and Mitchells Plain) mostly recorded small decreases, except Mitchells Plain with a 7,1% increase.

enforce the law.[53] The Constitution requires accountability and transparency in governance.[54] And it establishes both a general framework for oversight as well as specific mechanisms through which a province may exact accountability. The complainants sought to invoke these oversight mechanisms, which will be best served by a commission entrusted with powers of subpoena over members of the Police Service.

The Commission and the power of subpoena

[53] The applicants sought to persuade us that the subpoena power of the Commission amounts to control or management of members of the Police Service. The control of the Police Service, they correctly pointed out, vests not in the provinces but rather in the Commissioner. Since the Premier does not have powers to control the Police Service, the argument goes; the Premier cannot delegate the powers to a commission.

[54] The suggestion that the subpoena power amounts to "control of the police service" as envisaged by section 207 is an unwarranted overstatement that has no merit. A subpoena may not always demand physical presence, but may be only to obtain specified documents or material to be produced by the subpoenaed witness (*duces tecum*). Even if a police witness were to appear in person, ordinarily it would be over a limited time. Secondly, the mere attendance of the police at a hearing cannot possibly usurp the general management and control of the Police Service and

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[53] Section 205(3) of the Constitution. See also Preamble to the South African Police Service Act 68 of 1995.

[54] Section 1(d) of the Constitution.

their day-to-day activities. When required to testify before a commission, a police officer may raise any lawful objection to the production of particular evidence. It is trite that, a subpoena issued by a commission must be lawful. It may not travel beyond the mandate of the commission or be otherwise defective. If it were so, it would be open to the Police Service to have it set aside.

Civilian Secretariat

[55] The applicants submitted an additional contention why this Court should not understand section 206(3) and (5) as authorising a commission of inquiry to subpoena members of the Police Service. The contention runs as follows: A commission of inquiry without coercive powers does not leave members of the Police Service unaccountable. The Civilian Secretariat for Police Service Act[55] (Civilian Secretariat Act) empowers a civilian secretariat to exercise civilian oversight over the Police Service. To that end it may conduct a systemic inquiry into police services and may compel members of the Police Service to provide information in order to advance the investigation.

[56] This argument is without merit. The task at hand is to give meaning to section 206(3) and (5). The applicants are in effect inviting us to construe these constitutional provisions through the prism of national legislation, the Civilian Secretariat Act. Nothing in the scheme of Chapter 11 suggests that the oversight and monitoring role of the province as envisaged in section 206(3) and (5) should be

[55] 2 of 2011.

curtailed or supplanted by the role of a civilian secretariat under section 208 of the Constitution. Sections 206 and 208 serve different purposes which may not be unduly conflated.

[57] Having considered the contentions advanced by the Minister and the Commissioner, I conclude that a commission of inquiry appointed by a province under section 206(5) has the implied power to subpoena members of the police service to attend its hearings, testify before it and produce documents and other evidence that may be lawfully required of members of the Police Service. It follows that the commission of inquiry appointed by the Premier under section 206(5) on 24 August 2012, pursuant to a resolution of the provincial executive council to that effect, was lawfully appointed and has the power to subpoena members of the Police Service for the purposes envisaged in the section.

Chapter 3 obligations

[58] Chapter 3 of the Constitution has two parts. Section 40(1) affirms that the three spheres of government – national, provincial and local – are distinctive, inter-dependent and interrelated. On the other hand, section 40(2) requires organs of state to comply with the principles of co-operative government spelled out in section 41.[56] Section 41(3) requires an organ of state involved in an inter-governmental dispute to make every reasonable effort to settle the dispute using the mechanisms and procedures provided for. Also, the organ of state must exhaust all other remedies

[56] Section 41(1)(h) of the Constitution provides that "[a]ll spheres of government and all organs of state within each sphere must . . . co-operate with one another in mutual trust and good faith".

before it approaches a court to resolve a dispute. Another important provision is that the court has a discretion to refuse to hear a dispute if it is not satisfied that the parties have made every reasonable effort to settle the dispute.[57] However, a court is not thereby precluded from hearing the dispute.

[59] In *National Gambling Board* this Court observed that the duty of organs of state to avoid litigation is at the heart of Chapter 3 of the Constitution.[58] Parties are duty-bound to make a meaningful effort to comply with the requirements of co-operative government. The obligation to avoid litigation entails much more than an effort to settle a pending court case. A party to the dispute should not pay lip-service to this obligation. It "requires of each organ of state to re-evaluate its position fundamentally."[59]

[60] *Uthukela*[60] dealt with the use of the provisions of section 41(3) where a dispute resolution mechanism existed. The Court held that, apart from the general duty to avoid legal proceedings against one another, section 41(3) of the Constitution requires organs of state to make every reasonable effort to settle disputes through the existing mechanisms and procedures, and to exhaust other remedies before resorting to litigation.[61]

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[57] Section 41(4) of the Constitution.

[58] *National Gambling Board* above n 15 at para 33.

[59] Id at para 36.

[60] *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* [2002] ZACC 11; 2003 (1) SA 678 (CC); 2002 (11) BCLR 1220 (CC)(*Uthukela*).

[61] Id at para 19.

[61] The applicants seem to advance three bases for contending that the Premier breached her co-operative governance obligations. The first is that by appointing a commission she usurped the powers and functions of the Minister and the Commissioner, something not permitted by section 41(1)(e) of the Constitution.[62] There is no merit in this contention. As we have seen, the Premier, acting for and with the approval of the province, exercised the power given to the province by section 206(5) of the Constitution and in a manner permissible under the Constitution. Section 41 does not require of the Premier to declare a dispute before she exercises powers properly vested in her. The failure to declare a dispute affords a dilatory judicial mechanism to encourage inter-agency dialogue and dispute settlement. It is a basis upon which an application to court can be dismissed. But it is doubtful that an organ of state's failure to declare a dispute is a disabling impediment to the subsequent exercise of a constitutional power. In the present matter it can be safely concluded that, when the province appointed the Commission, it did not usurp the powers and functions of the Minister or the Commissioner. The power to appoint the Commission, as we have concluded, derives from section 206(5) of the Constitution.

[62] The second contention was that, although the Premier was acting within the powers given to a province, and did not have to declare a dispute, she was still obliged by section 41(1)(h)(iii) and (iv) to inform other organs of state and consult them on matters of common interest as well as to coordinate actions. She had to co-operate

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[62] Section 41(1)(e) of the Constitution provides:

> "All spheres of government and all organs of state within each sphere must respect the constitutional status, institutions, powers and functions of government in the other spheres".

adequately with other branches of government before appointing the Commission. There is no doubt that the Premier, acting for the province, had the obligation to consult the Minister and the Commissioner before the province appointed a commission into the policing function. However, the undisputed facts show that, over nine months from the time she received the first complaint, the Premier exchanged extensive correspondence with the Provincial Commissioner, which was copied to the Commissioner and the Minister, over the impending appointment of the Commission. On the facts before us, she certainly complied with these obligations.

[63] The third contention was that the Premier did not make every reasonable effort required by section 41(3) to settle the dispute before litigation and that the Minister and the Commissioner did make such efforts.[63] The difficulty with this line of argument is that all parties accept that at the time when the Commission was appointed by the Premier there was no dispute. A dispute only arose after the Commission had been appointed. Then the Minister made it clear that he opposed the further conduct of the Commission. In fact, matters came to a head only when the Commission served subpoenas on members of the Police Service and well after the Commission had been established. Even so, the Minister and the Commissioner did not declare a dispute as required by the Framework Act; instead they approached the High Court. There is no doubt that the Premier has an obligation to comply with the

[63] Section 41(3) of the Constitution provides:

> "[a]n organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

Constitution and the applicable Act. Here, it has not been shown that she had not done so. This contention too must fail.

[64] It must be added that spheres of government and organs of state are obliged to respect and arrange their activities in a manner that advances intergovernmental relations and bolsters co-operative governance. If they do not do so, they breach peremptory requirements of the Constitution. And yet, more and more disputes between or amongst spheres of government or organs of state end up in courts and in this Court, in particular.[64] The litigation is always at the expense of the public purse from which all derive their funding. That is true of the present dispute between the province, the Commissioner and the Minister. Often litigation of that order stands in the way or delays sorely needed services to the populace and other activities of government. Here too, effective policing in Khayelitsha and the functioning of the Commission may have to await the outcome of litigation. Courts must be astute to hold organs of state to account for the steps they have actually taken to honour their co-operative governance obligations well before resorting to litigation.

Terms of reference of the Commission

[65] The applicants contended that the Commission's terms of reference are vague and overbroad. The crux of this complaint appears to be that the terms of reference

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[64] *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC). See also *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC), *MEC for Health, KwaZulu-Natal v Premier, Kwazulu-Natal: In re Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 14; 2002 (10) BCLR 1023 (CC), *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC).

authorise "a systematic investigation of policing in Khayelitsha" and that they allow the Commission to investigate vigilantism rather than the complaints made by the Social Justice Coalition.

[66] In *SARFU III*, this Court described the inquiry into the vagueness of terms of reference as—

> "[w]hether objectively the terms of reference are reasonably comprehensible to the commissioner and affected parties so as to determine the nature and the ambit of a commissions mandate with reasonable certainty."[65]

[67] In *Affordable Medicine*[66]*s* this Court re-stated the test for vagueness in similar terms—

> "[t]he ultimate question is whether, so construed, the regulation indicates with reasonable certainty to those bound by it what is required of them."[67]

[68] I think the terms do not suffer from overbreadth or vagueness. Their reach can be ascertained with reasonable certainty. First they reflect and track the wording of the empowering provisions of section 206(5) of the Constitution in that they require the Commission to investigate complaints received by the Premier relating to allegations of inefficiency of the Police Service stations in Khayelitsha or a breakdown in relations between the Khayelitsha community and members of the Police Service stationed at the named police stations. Thus, the inquiry relates to

[65] *SARFU III* above n 39 at para 229.

[66] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC)

[67] Id at para 109.

complaints that are geographically confined to only three police stations in Khayelitsha and other police units operating in the same neighbourhood. The terms of reference relate to the complaints made to the Premier. Their nature and extent are well documented and have been served on or made known to the Minister, Commissioner and other parties affected by the work of the Commission.

[69] There is nothing in the relevant constitutional scheme to propose that the complaints envisaged in section 206(5) must be limited to specific incidents and cannot permissibly raise broader and systemic concerns about policing function in the specific community. Even so, the terms of reference appear to be limited to an investigation of the functioning of the police service rather than the structural problem of crime in Khayelitsha.

[70] Lastly, it may be added that vigilante attacks in Khayelitsha have resulted in the deaths of at least nine people. The supplementary complaint submitted to the Premier reports on the vigilante deaths, and should form a legitimate part of the inquiry into the breakdown in relations between the police and the community of Khayelitsha.

Outcome

[71] I conclude that the claim of the Minister and the Commissioner of Police must fail. The application that this Court declare that the decision of the Premier of

24 August 2012 to establish a commission of inquiry is inconsistent with the Constitution and invalid is without merit and must be dismissed.

Costs

[72] The Social Justice Coalition is a civil society organisation acting in the public interest. It was one of the parties which lodged the complaints with the Premier. The complaints led to the appointment of the Commission and later to this dispute. It is now undisputed that the nature and scope of the complaints justified the appointment of the Commission. The correspondence between the Minister, Commissioner and Premier, as well as the report of the Police Service task team, show that the complaints are not frivolous and deserve to be tackled. The Social Justice Coalition should not be out of pocket for raising a matter of importance in favour of vulnerable people who are victims of pervasive crime. In my judgement, they are entitled to costs. In contrast, the costs of the Premier, the Minister and the Commissioner are ultimately sourced from the same public purse. A costs order between them is not warranted.

Order

[73] The following order is made:

1. Leave to appeal is refused.
2. The application for direct access is refused.
3. The application of the Minister of Police and of the National Commissioner of the South African Police Service, that this Court

declare the decision of the Premier of the Western Cape of 24 August 2012 to establish a commission of inquiry is inconsistent with the Constitution and invalid, is dismissed.

4. The Minister of Police and the National Commissioner of the South African Police Service are directed to pay the costs of the Social Justice Coalition in the High Court and in this Court, including the costs of two counsel, if applicable.

5. No further order as to costs is made.

For the Applicants:	Advocate N Arendse SC, Advocate M Donen SC, Advocate T Masuku and Advocate L Ferreira instructed by the State Attorney
For the First and Second Respondents:	Advocate S Rosenberg SC, Advocate D Borgström and Advocate M Adhikari instructed by Hayes Inc
For the Third Respondent:	Advocate A Katz SC instructed by Fairbridges Attorneys
For the Ninth Respondent:	Advocate P Hathorn, Advocate N Mayosi, Advocate T Ngcukaitobi and Advocate M Bishop instructed by Legal Resources Centre