



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case No:21600/2012**

In the matter between:

<b>MINISTER OF POLICE</b>	First Applicant
<b>NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE</b>	Second Applicant
<b>THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE FOR THE WESTERN CAPE</b>	Third Applicant
<b>THE CIVILIAN SECRETARIAT FOR THE POLICE SERVICE</b>	Fourth Applicant
<b>COLONEL MF REITZ</b>	Fifth Applicant
<b>BRIGADIER Z DLADLA</b>	Sixth Applicant
<b>COLONEL TSHATLEHO RABOLIBA</b>	Seventh Applicant
<b>and</b>	
<b>THE PREMIER OF THE WESTERN CAPE</b>	First Respondent
<b>THE MEMBER OF THE EXECUTIVE COUNCIL FOR COMMUNITY SAFETY AND SECURITY, WESTERN CAPE</b>	Second Respondent
<b>THE CITY OF CAPE TOWN</b>	Third Respondent
<b>THE HON. JUSTICE CATHERINE O'REGAN N.O.</b>	Fourth Respondent
<b>ADV VUSUMZI PATRICK PIKOLI N.O.</b>	Fifth Respondent

---

THE SECRETARY TO THE COMMISSION  
ADV T SIDAKI

Sixth Respondent  
Seventh Respondent

WOMEN'S LEGAL CENTRE

Eighth Respondent

SOCIAL JUSTICE COALITION

Ninth Respondent

---

MINORITY JUDGMENT DELIVERED 14 JANUARY 2013

---

**SALDANHA, J**

[1.] Since drafting the judgment and order that I would have proposed in the matter I have had the advantage of reading the judgment of my brother Yekiso J and agreed to by my sister Traverso DJP. I am regrettably unable to agree with the decision reached therein. This is my dissenting judgment;

**Introduction**

[2.] Mr Mandla Majola an adult male resident of Vukuzenzele, Philippi East, Cape Town and the campaign coordinator of the Social Justice Coalition deposed to the answering affidavit on behalf of the ninth respondent. He specifically drew the attention of the court to the following:

*"19. At the outset, I request this Court and the parties not to overlook the most important issue raised by this application. This issue does not relate to the principles of co-operative governance or to whether the Premier's decision to establish the Commission was rational or even to the political sniping and barbs exchanged between the Premier and the First Applicant ("the Minister"). Ultimately, this case is about the appalling level of crime experienced by residents of Khayelitsha on a daily basis. This is context against which this application must be viewed.*

20. *The SJC submits that this case must in the first instance address the state's duty to respect, protect, promote and fulfil, among others, the rights to life and dignity, freedom and security of the person, equality, privacy and the best interest of children. A criminal minority terrorises people living and working in Khayelitsha day and night, but we believe that this case must also take into account the constitutional rights of arrested, detained and accused persons.*

21. *While I and the other deponents on behalf of the SJC are often critical of the Applicants, we would far prefer to be working together with them, and the other parties, in addressing the circumstances of people living in informal settlements in Khayelitsha who are too scared to go out to the toilet at night or residents who are struggling to come to terms with the shock of having been robbed or raped without the benefit of counselling or institutional support.*

22. *In particular, I wish to commend the Second Applicant ("the National Commissioner") for the attempts she made to address the issues raised in the complaint after she was appointed to her position in June this year. The proposal formulated by her office in July 2012, as set out in annexure "AL67\_A", for an independent policing panel reflects a clear understanding of what is required to address the negative perception of the South African Police Services ("SAPS") in Khayelitsha and could have provided an invaluable model for policing throughout the country. If this proposal had been tabled and presented to the complainant organisations in early August this year, I have little doubt that there would have been no need for the Commission to be established."*

[3.] In the prelude to his address, Mr Hathorn who appeared on behalf of the 9<sup>th</sup> respondent likewise emphasised the above context and considerations that the court should take into account.

[4.] While I, and no doubt my colleagues, are acutely mindful of the desperate conditions that the community of Khayelitsha live in, with extreme levels of crime, poverty and inequality as in many other townships in South Africa, this application in the context of the interim relief sought, does however, in my view raise very important constitutional principles such as that contained in chapter 3 of the Constitution of the Republic of South Africa with regard to co-operative governance and inter-governmental relations and the foundational principle of legality that executive organs of state are required to observe in the exercise of both their Constitutional and statutory powers.

[5.] Central to the determination as to what in my view is the dispute between the principle antagonists namely the first, second and third applicants on the one side and the 1<sup>st</sup> respondent (and the 2<sup>nd</sup> respondent to a limited extent) on the other, is whether the 1<sup>st</sup> respondent in appointing the commission of inquiry complied with the relevant provisions of the Constitution that delineates the powers, functions and responsibilities of the South African Police Services in chapter 11 of the Constitution and whether the antagonists have properly complied with their obligations under chapter 3 thereof that prescribes the principles of co-operative governance and inter-governmental relations.

Section 205(1) under chapter 11 of the Constitution provides;

*“(1) The national police service must be structured to function in the national, provincial and where appropriate, local sphere of government”*

Section 206(3) provides;

*“(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.”*

Section 206(4) provides:

*“A provincial executive is responsible for policing functions-*

*(a) vested in it by this Chapter*

*(b) assigned to it in terms of national legislation; and*

*(c) allocated to it in the national policing policy.”*

Section 206(5) provides:

*“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."*

Section 207 provides:

*"National legislation must provide a framework for the establishment, powers, functions and control of municipal police services."*

Section 41(1) of Chapter 3 under the heading CO-OPERATIVE GOVERNMENT provides;

*"All spheres of government and all organs of state within each sphere must*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) ...*

*(e) Respect the constitutional status, institutions, powers and functions of government in the other spheres;*

*(f) not assume any power or function except those conferred on them in terms of the Constitution;*

*(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in other spheres; and*

*(h) co-operate with one another in mutual trust and good faith by-*

*(i) fostering friendly relations;*

*(ii) assisting and supporting one another;*

- (iii) *informing one another of, and consulting one another on, matters of common interest;*
- (iv) *co-ordinating their actions and legislation with one another;*
- (v) *adhering to agreed procedures; and*
- (iv) *avoiding legal proceedings against one another.”*

[6.] This matter unfortunately exemplifies a breakdown in the relationship between two spheres of government; national and provincial through the conduct of the antagonists and their failure to have adhered to the Constitutional discipline and restraint required of them.

**The test for the grant of an Interim Interdict.**

[7.] The requirements for the grant of an interim interdict and the appropriateness for such relief has in recent months received the attention of the Constitutional Court in **International Trade Administration Commission v Scaw South Africa (Pty) Ltd 2012 (4) SA 618 CC:2010 (5) BCLR 457 (CC)** (“the ITAC case”) and **National Treasury and others v Opposition to Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene) 2012 (11) BCLR 1148 (CC)** (“the OUTA case”).

[8.] The test developed historically through the oft quoted decisions of **Setlagelo v Setlagelo 1914 AD 221** and **Webster v Mitchell 1948 (1) SA 1186 (W)** which held that an applicant who claims an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable

apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy. Inasmuch as these requirements were initially fashioned and suited for interdicts between private parties the full bench in **Gool v Minister of Justice and Another 1955 (2) SA 682 (C)** was required to consider an interdict restraining the Minister from exercising certain powers in him by statute. Ogilvy-Thompson J, having considered the requirements for an interim interdict set out in **Setlagelo** (above) stated the following:

*"The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of mala fides, the court does not readily grant such an interdict".*

[9.] In the **ITAC** case the Constitutional Court accepted that it was and as a general proposition competent for a court to grant interim relief and stated that to the extent that this involves *"entering the exclusive terrain of the executive and the legislative branches of government, the intrusion is mandated by the Constitution itself."* The Constitutional Court considered cases in which it was found appropriate to grant such relief taking into account the Constitutional requirement of the separation of powers which it described as a *"delicate balance"* between the role of the courts as *"ultimate guardians of the*



*Constitution*” and the importance of empowering democratically elected executive organs of state to effectively exercise their powers.

[10.] In the context of the ITAC case Moseneke DCJ at paragraph 44 stated:

*“[44] Third, the restraining order brings to the fore important issues related to the separation of powers between the courts and the national executive, and the issue of the potential breach of the state’s international obligations in relation to international trade. The setting, changing or removal of an anti-dumping duty is a policy-laden executive decision that flows from the power to formulate and implement domestic and international trade policy. That power resides in the heartland of national executive authority. Separation of powers and the closely allied question whether courts should observe any level of ‘deference’ in making orders that perpetuate anti-dumping duties beyond their normal life span is a constitutional matter of considerable importance. Fourth, ...”*

[11.] In reference to the decision in **Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416(CC) (2006) (12) BCLR 1399; [2006] ZACC 11**) the Constitutional Court recorded its view on the separation of powers as:

*“Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.”*

[12.] The Constitutional Court held that where the Constitution or legislation entrusts a specific power and functions to particular branches of government the courts *"may not usurp that power or function by making a decision of their preference that would frustrate the balance of power implied in the principle of separation of powers. The principle responsibility of a court is not to make decisions reserved for or within the domain of each branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*[para 95 page 654 ,**ITAC** matter]

[13.] Of particular concern to the court in **ITAC** was the failure of the court *a quo* to have appreciated *"the role of executive power and policy formulation"* in what the Constitutional Court regarded as clearly a policy laden matter.

[14.] In the matter of **OUTA** the Constitutional Court considered an appeal against an interim order which prevented the implementation of the *"E-tolling"* system on the highway network in Gauteng and noted that;  
*"A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review.*

*This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully. .”[para 26, page 231]*

[15.] In its consideration of the common law in **Setlagelo v Setlagelo** (above) and **Gool v Minister of Justice** (above) the Constitutional Court remarked that *“Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself.” [para 44, page 236]*

[16.] The Constitutional Court was however of the view that the Constitution did not require that a new test be fashioned and held that:

*“However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means 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. [para 45, page 236]*

*A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define ‘clearest of cases.’ However, one important consideration would be whether the harm apprehended*

*by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.*"[para 47, page 237]

[17.] Mr Rosenberg SC who appeared on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the applicants in this matter were inviting the court to make the very same mistake as the courts *a quo* in both the ITAC and OUTA cases. He submitted that the 1<sup>st</sup> respondent's decision to establish the commission of inquiry involved an executive power in terms of the Constitution which was reserved to her as the democratically elected executive leader in the Province. He submitted that in making the decision the 1<sup>st</sup> respondent had exercised a discretion that involved the weighing up of policy-laden issues. For that reason, he submitted this court should be reluctant to interfere with what he regarded as a policy-laden decision of the 1<sup>st</sup> respondent. Mr Arendse SC who appeared on behalf of the applicants, submitted to the contrary that the establishment of a commission of inquiry in terms of section 206(5) of the Constitution did not involve issues of policy or a polycentric decision and in this regard pointed to the media statement on the 2<sup>nd</sup> August 2012 by the 1<sup>st</sup> respondent on the appointment of the commission of inquiry in which she stated that the appointment of the commission of inquiry "*...is the first step in a process that I hope will ultimately result in recommendations being implemented which give rise to more effective and efficient policing being applied by SAPS in Khayelitsha so as to eliminate the scourge of vigilantism and restore the affected residents respect for the application of the rule of law. The appointment of the Commission aims to contribute to the realization of that positive change. I have every hope*

*that SAPs will support and co-operate with the Commission's investigation given that the main purpose of this process is to assist the police in fulfilling their mandate."(my emphasis)*

[18.] In this regard Mr Arendse submitted that the Premier's decision did not fall in the same category as the ITAC and OUTA matters. This court, he urged should in fact apply the principles as stated in both those matters but in this instance by granting an interdict otherwise the court would fall foul of allowing an intrusion on the principles of the separation of powers in the context of protecting the Constitutional mandate of the different spheres of government. The grant of interim relief, Mr Arendse submitted, would in fact be promoting "*the objects, spirit and purport of the Constitution,*" in particular, the provisions relating to inter-governmental co-operation and the power of control over the police services as contained in section 207 of the Constitution.

[19.] Mr Arendse further submitted that where the right asserted in the claim for an interdict is sourced from the Constitution itself it was redundant to enquire whether the right existed and in the weighing up where the balance of convenience rested the Constitutional Court remarked that a court "*may not fail to consider the probable impact of the restraining order on the Constitution and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.*" In respect of the balance of convenience requirement the Constitutional Court at paragraph 47 in the OUTA matter remarked that "*The balance of convenience enquiry must now carefully probe*

*whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must alongside other relevant harm have a proper regard to what may be called separation of powers harm. The court must keep in mind the temporary restraint against the exercise of statutory power well ahead of the final adjudication of the claimants case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.”*

[20.] It is in the context of these requirements for an interim interdict that the central challenges of the applicants to the appointment of the commission of inquiry by the 1<sup>st</sup> respondent are to be considered and the respective party's compliance with their inter-governmental obligations.

### **Background**

[21.] In providing the background to the establishment of the commission of inquiry, all the parties in their respective affidavits set out in detail the interaction between themselves and relied amongst others on records of meetings (in some instances agenda's and in others minutes) various letters of correspondence, emails, media releases, investigative reports, crime statistics and an academic article etc. In considering the background I have discerned three phases or stages in the interaction between the parties prior to the 22<sup>nd</sup> August 2012, the date of the proclamation of the commission of inquiry.

[22.] The first phase is set out in detail by the 9<sup>th</sup> respondent which covers a period of more than ten years that they campaigned around the ever deteriorating and despairing conditions of criminal activity and impunity in the greater Khayelitsha area. In this regard the campaign of the 9<sup>th</sup> respondent and other complainant organisations highlighted the extent to which there appeared to be serious challenges in not only policing services in Khayelitsha but in the broader criminal justice system. These campaigns highlighted and what appeared to be common cause between all the parties was that the problems of policing and in the criminal justice system had to be understood within the broader socio economic conditions of poverty, high unemployment, and social disaffection, all of which were compounded by the sprawling and ever growing population of the under resourced community of Khayelitsha. In that context the parties were in agreement that policing was just one of the factors that required urgent attention and that other state institutions such as social welfare, housing, roads and infrastructure, the National Prosecuting Authority and the Department of Justice should be part of an overall and integrated process of dealing with the scourge of unlawfulness, marginalisation and the on-going violations of the most basic and fundamental rights of human dignity, equality and safety of all the people of Khayelitsha. In this context the parties were also in agreement that the conditions in Khayelitsha were no more than a microcosm of the sprawling townships of not only the Western Cape but that which existed throughout most of the country.

[23.] The second phase in the background relates to the submission of the substantive complaint by the 8<sup>th</sup> respondent on behalf of the 9<sup>th</sup> respondent and the other complainant organisations, in which eight case studies were used as exemplars of the systemic problems that faced not only the policing services in Khayalitsha but that of the broader criminal justice system as well. These complaints were raised with the 1<sup>st</sup> respondent in December 2011 and in which the complainant organisations requested that the 1<sup>st</sup> respondent exercise her power in terms of Section 206(5) of the Constitution and appoint a commission of inquiry into police inefficiency and a breakdown in the relationship between the police and the community of Khayelitsha. The 1<sup>st</sup> respondent referred the complaint and the request for a commission of inquiry to the 3<sup>rd</sup> applicant, the Provincial Commissioner of Police in the Western Cape for comment and response and copied, "cc ed" it to both the 1<sup>st</sup> and 2<sup>nd</sup> applicants. The 3<sup>rd</sup> applicant simply acknowledged receipt of the complaint and advised that he had referred it to his national headquarters for a response.

[24.] It is apparent though that throughout the entire process the 3<sup>rd</sup> applicant failed to furnish the 1<sup>st</sup> respondent with any substantive response to both the complaints and to the issue of the appointment of a commission of inquiry. The 1<sup>st</sup> applicant had also merely acknowledged receipt of the complaint. The 1<sup>st</sup> respondent was forced to send repeated reminders to the 3<sup>rd</sup> applicant (which were copied to the 1<sup>st</sup> and 2<sup>nd</sup> applicants) for a full response.



[25.] It appears that at that stage the office of the 2<sup>nd</sup> applicant had been occupied by an Acting National Commissioner of Police who by all accounts had simply done nothing about the complaint. In this regard Mr Arendse urged the court to take judicial notice of what could only be described as the notorious dysfunctional state of the office of the Acting National Commissioner of Police at the time. Moreover it appears that the office of the Acting National Commissioner of Police had been ill served by its legal advisor who simply stated that the police had no business in involving itself with a decision of the 1<sup>st</sup> respondent to appoint a commission of inquiry.

[26.] The substantive complaint dealt with inefficiencies in both the SAPS and the Cape Town Municipal Police Department (the Metro Police) in the Khayelitsha area. The City in its response claimed that none of the cases referred to in the complaints involved the Metro Police and for its part explained the role of and procedures used by the Metro Police.

[27.] The 1<sup>st</sup> respondent had also noted that during March 2012 there were news reports with regard to the brutal killing of eight suspected criminals by community members. The 2<sup>nd</sup> respondent apparently raised the issue directly with the 3<sup>rd</sup> applicant and claimed that the 3<sup>rd</sup> applicant again failed to provide any substantive response. The 3<sup>rd</sup> applicant claimed though that he together with the 1<sup>st</sup> applicant met with the community of Khayelitsha in March 2012 where they discussed a number of problems relating to policing in the area. They claimed that the issue of vigilantism was not raised with them by the community.

[28.] In the light of further vigilante killings the 1<sup>st</sup> respondent in May 2012 again raised the matter with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants. She claimed that the vigilante attacks had lent "*credence to the alleged breakdown of trust*" between the residents of Khayelitsha and the police. No response was received from any of them. The first respondent noted a further increase in vigilante killings. On the 14 June 2012 the ninth respondent in an open letter to the first respondent directly linked the vigilante killings to a failure of policing in Khayelitsha. In this regard they noted "*violent crime continued to plague the Khayelitsha community... victims are turned away or treated badly by police officers, and investigations are not followed up. The Metro Police and the ALIU are seen as evicting people and destroying their homes... in the light of the crisis it is no surprise that communities have taken the law into their own hands because angry residence no longer believe the police or the courts will keep them safe or respond appropriately.*"

[29.] On the 5 June 2012 a public participation programme was held in Khayelitsha which was attended by members of senior provincial SAPS officers, the commanders of the various police stations in the Khayelitsha cluster, community leaders from the community policing forums (CPF'S) and members of the community. On the 5 June 2012 the Cape Argus also reported that the 1<sup>st</sup> respondent was consulting lawyers with regard to setting up of a commission of inquiry into the apparent breakdown in the relationship between SAPS and the community of Khayelitsha.

[30.] The 9<sup>th</sup> respondent and the other complainants supplemented their initial complaint with a number of statements from victims of crime in the Khayelitsha area and set out in detail the extent to which the matters had not been properly dealt with by the police and what they perceived to have also been the conduct of prosecutors and the failures of the courts.

[31.] During the course of this phase of interaction it is clear from the papers that the 1<sup>st</sup> and 2<sup>nd</sup> applicant the then Acting National Commissioner as well as the 3<sup>rd</sup> applicant were remiss in providing any substantive response to the 1<sup>st</sup> respondent. The applicants however claimed though that the 2<sup>nd</sup> respondent in particular had failed to raise the complaints and the issue of vigilantism in the statutory forums and in meetings with the 3<sup>rd</sup> applicant which were apparently held on a regular basis between the two of them during this period.

[32.] The third phase commenced on the 12<sup>th</sup> June 2012 with the appointment of the present National Commissioner of Police, General Mangwashi Victoria Phiyega into office.

[33.] General Phiyega introduced herself formally to the 1<sup>st</sup> respondent and requested time within which to familiarise herself with the conditions that related to policing not only in Khayelitsha but elsewhere in the country and committed herself to a formal response to the complaints and the request by the complainants for a commission of inquiry. She also requested an extension of

time by which to respond to the 1<sup>st</sup> respondent. The request was granted. In a letter dated the 29<sup>th</sup> June 2012 General Phiyega acknowledged to the 1<sup>st</sup> respondent her gratitude for the indulgence given to her and confirmed that she had since been briefed on the matter. She also advised that she had received feedback from the 3<sup>rd</sup> respondent and *“assistance and advice of my National Inspectorate, the latter being the office responsible for investigation of complaints.”* She also informed that in order for her to do justice to the matter she needed to consult with the provincial management of the police and other role players at both provincial and national level. She advised that she regarded it as important to obtain full clarification before she assumed a particular position on the matter and that it was *“her duty and desire that citizens be the beneficiaries of services that the police were bound by law to deliver and that any allegations that suggested the lapse in that regard needed to be addressed seriously.”* She informed the 1<sup>st</sup> respondent that she was to conduct a *“qualitative assessment”* of the implicated police stations, the outcome of which she believed *“would resolve the issues without necessarily resorting to the process of a commission of inquiry”*. She therefore requested a realistic time frame to give the matter careful consideration and to produce a report that would hopefully be of assistance to those concerned. She also claimed that she was seriously committed to looking at the issues and *“to respond in a meaningful way in due course”*. She had hoped that realistically she would have been able to respond with a report by the 20 July 2012.

[34.] On the 7th June 2012, Major-General SJ Japhta on behalf of the 3<sup>rd</sup> applicant addressed a letter to the office of the 2<sup>nd</sup> applicant in which he responded to the various complaints received from the 9<sup>th</sup> respondent and others. The response however is of little assistance as Japhta appeared to have adopted the attitude that because the complainants had not been "*forthcoming*" at the Community Policing Forums the police were not able to have dealt with the complaints. Japhta further commented that it did not appear that there was a breakdown between the community and the police and in particular the Khayelitsha cluster. So too did it appear from a document marked "*Information Note*" from the 3<sup>rd</sup> applicant and dated the 26 June 2012 that the complaints of the 9<sup>th</sup> and other complainants were dealt with rather cursorily and in which it was also concluded that because the 9<sup>th</sup> respondent and others had not reported the complaints to the police, the ICD or the Secretariat for investigation the complaints were regarded as been unfounded. The 3<sup>rd</sup> applicant was of the view that the complaints did not warrant "*a board of enquiry in terms of the Constitution of the Republic of South Africa.*"

[35.] On the 3<sup>rd</sup> July 2012 the 1<sup>st</sup> respondent replied to General Phiyega in which she granted an extension until the 20<sup>th</sup> July 2012, and also stated that "*given our own oversight and monitoring role vis-à-vis the SAPS in the Western Cape by way of our co-operative governance obligations towards your office against inter alia the rights of the complainants to redress with respect to the complaints they have laid including a timeous and appropriate response thereto. My own response has already been severely delayed as a result of the lack of*

*response from SAPS to my communications in this regard to date.*" The 1<sup>st</sup> respondent also pointed out that she regarded the situation in Khayelitsha as volatile with regard to the vigilantism and the failure of the police to have taken *"any action whatsoever."* She also informed that she would be advising the complainants of the contents of the letter from General Phiyega to ensure that the process remained *"transparent."*

[36.] It appeared that General Phiyega had immediately requested the National Inspectorate to investigate the complaints. The Divisional Commissioner of the Inspectorate, Lieutenant General Tshabalala in turn appointed a task team under the leadership of Major General Rapodi to conduct a qualitative assessment of the issues raised in the complaint.

[37.] On the 2<sup>nd</sup> July 2012 the 1<sup>st</sup> respondent issued a press statement in which she informed the public of the National Commissioners request and her decision to hold in abeyance for three weeks any process towards the establishment of the commission of inquiry pending investigation into the complaints. She also pointed out that in the seven month period that she had corresponded with the Provincial and National Commissioners *"the crisis of vigilante killings continued to escalate and the death toll currently stood at eleven known murders."* The 1<sup>st</sup> respondent decried what she regarded as a completely untenable situation and bemoaned what she regarded as the provinces Constitutional role in policing matters as confined to oversight and stressed that *"the consistent delay in response by SAPS had made it difficult for us to fulfil this function. We have*

*been patient in our engagement with SAPS but this patience is finite and in fact the patience of the residents of Khayelitsha has already run out.”* The 1<sup>st</sup> respondent also indicated that the extension until the 20<sup>th</sup> July 2012 would be the last and she informed the complainant organisations and encouraged them to engage directly with the 2<sup>nd</sup> applicant’s office, *“regarding any further complaints they have and on the progress of the investigation over the next three weeks.”*

[38.] On the 5<sup>th</sup> July 2012 the 3<sup>rd</sup> applicant met with the task team to discuss the complaints. The task team informed him that they were mandated to investigate the allegations made by the complainants and to investigate the reasons, relationships and quality of service delivery with a view briefing the second applicant on the most effective and appropriate action. Between the 9<sup>th</sup> and 13<sup>th</sup> July 2012 the task team also conducted inspections at the three police stations that had formed the subject matter of the November 2011 complaint and considered a number of other issues of concern which had not been raised expressly in the complaints. On 11<sup>th</sup> July 2012 the task team met with the complainant organisations and the 8<sup>th</sup> respondent. The team also met with the chairpersons of the Community Policing Forums for the respective police stations and met with the Khayelitsha Development Forum and other community based organisations.

[39.] On the 13<sup>th</sup> July 2012 the 1<sup>st</sup> applicant requested a meeting with the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the Executive Mayor of Cape Town and the Police Chief of the Cape Metro Police. The meeting was held on the 18<sup>th</sup> June 2012 for the

purposes of discussing what the 1<sup>st</sup> applicant termed a framework for partnership policing.

[40.] On the 13<sup>th</sup> July 2012 the 8<sup>th</sup> respondent in a letter to the 2<sup>nd</sup> applicant which was copied to the 1<sup>st</sup> respondent confirmed that they had met with the investigative team set up by General Phiyega and that the team had offered an undertaking to not simply intervene in the individual cases but to view the emerging problems in a proper systemic light and to keep an open mind into the establishment of a commission of inquiry, where all role players can be brought together under one objective as a *“solution to the systemic problems”*.

[41.] The 8<sup>th</sup> respondent also directed correspondence to the 1<sup>st</sup> respondent on behalf of the 9<sup>th</sup> respondent and the other complainants and requested that the 1<sup>st</sup> respondent hold over her decision with regard to the establishment of a commission of inquiry until the 31<sup>st</sup> July 2012 as a result of the efforts by the 2<sup>nd</sup> applicant to deal with the complaints. The 1<sup>st</sup> respondent rejected the request and expressed surprise at the clients of the 8<sup>th</sup> respondents *“about turn”* and informed them that their clients were not the only *“complainants about the police services.”* The 1<sup>st</sup> respondent again raised her concern about vigilante action which she claimed arose out of a lack of confidence of the community of Khayelitsha in the police.

[42.] The 18 July 2012 General Phiyega and the 3<sup>rd</sup> applicant attended a meeting with the 1<sup>st</sup> respondent at the offices of the 1<sup>st</sup> respondent in Cape



Town. It appears from the affidavits filed by both the 2<sup>nd</sup> applicant and 1<sup>st</sup> respondent that there is a dispute about what exactly was discussed at this meeting and in particular whether the 2<sup>nd</sup> applicant had requested a further extension within which to respond to the 1<sup>st</sup> respondent. However, it appears from the version of the 1<sup>st</sup> respondent that she confirmed that she informed the 2<sup>nd</sup> applicant that she was aware that the 1<sup>st</sup> applicant was opposed to the appointment of a commission of inquiry but that she, the 1<sup>st</sup> respondent, was willing to defend such a decision (to appoint a commission of inquiry) in court if necessary.

[43.] On the 20<sup>th</sup> July 2012 the 1<sup>st</sup> respondent's second deadline expired and so too did the deadline of the 31<sup>st</sup> July 2012 which had been proposed by the 8<sup>th</sup> respondent. On the 6 August 2012 the 1<sup>st</sup> respondent met with representatives of the complainant organisations and the 8<sup>th</sup> respondent at her instance. The complainant organisations confirmed their request for the establishment of a commission of inquiry and also confirmed that they had not heard anything further from the SAPS task team after they had furnished further information to them.

[44.] On the 7<sup>th</sup> August 2012 the 1<sup>st</sup> respondent received a letter from the 2<sup>nd</sup> applicant under the heading: *"Complaints regarding alleged police inefficiency and a breakdown in police-community relations Khayelitsha, Cape Town,"* in which she advised as follows:

(i) That since the 29 June 2012, as the newly appointed National Commissioner of Police she had visited the Province and Cape Town, in particular, on more than one occasion, and met with several stakeholders. She claimed that these visits were aimed at familiarizing herself with the work of SAPS in the Province and to gain an insight into the challenges faced by SAPS with the delivery of services. The 2<sup>nd</sup> applicant claimed that the *"The findings are intricate and complex. Factors observed cannot be addressed overnight but rather require a progressive long-term turnaround strategy."* She also claimed that the SAPS team in the Western Cape enjoyed *"solid and robust leadership focused on deliberate turnaround strategies"* and assured the 1<sup>st</sup> respondent of her *"continued full support"*. She also informed the 1<sup>st</sup> respondent that her office *"received communication from the complainants"* and are *"arranging to meet and discuss these issues they raised"*. She further advised that after meeting with the stakeholders her office would *"announce our agreement on the nature of co-ordination and collaboration"*. 2<sup>nd</sup> Applicant emphasised that her office sought to achieve integrated interventions and hoped to involve the City of Cape Town in this regard, since they indicated an interest to participate in the proposed integrated interventions her office would be advancing. She undertook to *"keep the Province informed of developments and progress and remained committed to the course"*.

[45.] The 1<sup>st</sup> respondent's office thereafter checked with the complainant's offices with regard to whether any further meetings had been arranged to which

they were advised that none had been arranged and that they had not heard from the task team since their meeting in July 2012.

[46.] On the 15 August 2012, the 1<sup>st</sup> respondent and her Cabinet "*resolved to institute a Commission of Inquiry into alleged police inefficiency and a breakdown in police-community relations*".

[47.] On the 22 August 2012 the 1<sup>st</sup> respondent issued a media statement announcing her appointment of the commission of inquiry into policing in Khayelitsha. In the media statement the 1<sup>st</sup> respondent highlighted the lack of any progress and proper responses from the South African Police Services and the fact that they had missed successive deadlines. In the light thereof the 1<sup>st</sup> respondent claimed that she "*decided to accede to the complainants' request.*"

[48.] In response to the 1<sup>st</sup> respondent's media statement the 9<sup>th</sup> respondent and the other complainants welcomed the appointment of the commission of inquiry but were critical of its terms of reference inasmuch as it did not include the City of Cape Town's Metro Services which they regarded as an integral part of policing in Khayelitsha.

[49.] On the 24 August 2012, the 1<sup>st</sup> respondent issued a Proclamation, in terms of section 1 of the Western Cape Provincial Commissions Act 10 of 1998 with regard to the establishment of the commission of inquiry into allegations of

police inefficiency in Khayelitsha and a breakdown in the relationship between the community and the police in Khayelitsha.

### **The Report of the Task Team**

[50.] The 2<sup>nd</sup> applicant claimed that it was during the period towards the end of July 2012 and early August 2012 that the task team completed their investigation and compiled their report. It appears that the 2<sup>nd</sup> applicant only received the report on or about the 8<sup>th</sup> August 2012 and claimed that before she could consider the report and formulate a response the 1<sup>st</sup> respondent announced the appointment of the commission of inquiry.

### **The contents of the Report.**

[51.] Lt Gen Tshabalala submitted a substantive report to the 2<sup>nd</sup> applicant and although the date on the report itself is illegible it appeared that the report was received by the office of the 2<sup>nd</sup> applicant on the 8<sup>th</sup> August 2012. I briefly record the contents of the report of the task team because it provides a useful insight into the nature of the problems of policing at the different police stations in Khayelitsha and with the police services in general and what appeared to be a substantive and serious effort on the part of the 2<sup>nd</sup> applicant to respond to the complaints of the complainant organizations.

[52.] The Introduction to the report records that complaints were received by the 1<sup>st</sup> respondent on the 9<sup>th</sup> December 2011 and the 13 June 2012 from the 8<sup>th</sup> respondent on behalf of a number of complainant organizations. It also recorded

that on the 29<sup>th</sup> June 2012 the National Commissioner, General Phiyega acknowledged receipt of the complaints to the 1<sup>st</sup> respondent and confirmed that she had been briefed in the matter and that she initiated a task team to conduct a qualitative assessment of policing in the affected area in response to the complaints. The report records the methodology adopted by the task team and the various meetings it held with a number of role players in both the police services and civil society. It also contains an overview of the complaints made and sets out an overview of the crime situation in the Khayelitsha area. The task team consulted with the Community Police Forums in Khayelitsha and apart from the CPF that covered the Lingalethu West Police Station the other two CPF's appeared not to be fully functional. The team also considered the prevention and combating of crime strategies employed, the use of sector policing and crime prevention awareness strategies in the area. The team made various findings with regard to the lack of proper statement taking at the police stations, the failure to apprehend suspects and the lack of feedback to complainants with regard to specific cases. The team recorded that suspects were generally not charged within 48 hours and that the quality of investigations by detectives did not result in *"any extraordinary achievements of success."* It found that very little impact was made on serious crimes such as armed robberies and housebreaking and the team also found that the crime information officers at police stations did not assist the investigating officers with providing positive information and feedback.

[53.] In order to determine the quality of investigations they randomly selected a number of case dockets from the archives and found, *inter alia*; that witness statements were not obtained before case dockets was sent to court with the result that the cases were withdrawn, case dockets were also closed without stolen property with serial numbers been circulated, closed case dockets were also found in the archives with exhibits still on hand and without being disposed of, case dockets were also withdrawn in court because of statements by the arresting officers were not filed in, case dockets were also withdrawn because witnesses had not been summoned, crime scene experts were not always summoned to attend crime scenes and case dockets were found in the archives for which SAPS 69 (fingerprints) were not completed and were sent back to the Local Criminal Record Centre.

[54.] The task team also considered each of the complaints referred to by the complainants. They found that the Cluster Commander's Office Khayelitsha had also made a study of cases that were referred to as "*Bundu Court Executions*" and that for the period April 2011 to June 2012, seventy eight incidents were reported at the three police stations for which murder dockets had been opened and were being investigated. They also considered the performance of the police at the various police stations with regard to the Performance Chart and with regard to discipline and found that there were large numbers of members at the three police stations who were the subject of disciplinary proceedings. They also found that a large number of police officers suffered from work related stress and that there were also a large numbers of vacancies in senior positions.

[55.] At each of the police stations they also considered the number of complaints received at both a Provincial and Cluster level and noted an increase of complaints that pertained to the Khayelitsha police stations. They made findings with regard to victim support centres and considered the need for training at the various police stations and the need for the appointment of legal advisors at each of the centres. They also considered the management of absenteeism at the police stations.

[56.] In conclusion the task teams found that it was evident from reports that the South African Police Services *"cannot claim that the services they are rendering to the community in Khayelitsha area is of such a standard that the community does not have any reason for complaining."* On the other-hand the task team claimed that it was unreasonable for non-governmental organizations to make statements that *"there's a total breakdown in police community relations."* The report noted that despite the challenges facing the South African Police Services they were in fact executing *"its core functions and had noted the extent to which the police members have become truncated by the circumstances of the heavy workload that they are continuously facing."* However they noted that what was required was co-operation with the community to develop *"a new approach which the SAPS could embark upon to prevent crime and to attend to complaints in the Khayelitsha area."* It recommended a number of remedial measures with regard to interventions at the various police stations and also a need for psychological services to enhance organization and employee wellness and also recorded the