IN THE EQUALITY COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: EC03/2016

In the application of:

SOCIAL JUSTICE COALITION	**First Applicant**
EQUAL EDUCATION	**Second Applicant**
NYANGA COMMUNITY POLICING FORUM	**Third Applicant**

and

MINISTER OF POLICE	**First Respondent**
NATIONAL COMMISSIONER OF POLICE	**Second Respondent**
WESTERN CAPE POLICE COMMISSIONER	**Third Respondent**
MINISTER FOR COMMUNITY SAFETY, WESTERN CAPE	**Fourth Respondent**

and

WOMEN'S LEGAL CENTRE TRUST	**Amicus Curiae**

CORAM: DOLAMO et BOQWANA JJ

JUDGMENT DELIVERED ON 14 DECEMBER 2018

DOLAMO, J

INTRODUCTION

[1] Part of the Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act[1] ('the Act' or 'Equality Act') states that '*the consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.*'[2]

[2] The applicants, intent on using the provisions of this Act to bring about social change in their community, brought this application in the Equality Court for an order in the following terms:

'*Declaring*

1. *Declaring that the allocation of police human resources in the Western Cape unfairly discriminates against Black and poor people on the basis of race and poverty.*
2. *Declaring that the system employed by the South African Police Service to determine the allocation of police human resources unfairly discriminates against Black and poor people on the basis of race and poverty.*
3. *Declaring that section 12(3) of the South African Police Service Act No 68 of 1995 grants Provincial Commissioners the power to determine the distribution of police resources between stations within their province,*

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[1] Act 4 of 2000.
[2] See first part of the Preamble to the Act 3 of 2000.

including the distribution of permanent posts under the fixed establishment and not merely on a temporary basis.

Western Cape Relief

4. *Compelling the Provincial Commissioner to:*

   4.1 Within three (3) months from the date of any order, prepare a plan (Provincial Plan) for the reallocation of resources within the Western Cape to address the most serious disparities in the allocation of police human resources in the province; and

   4.2 Submit the Provincial Plan to the court and advertise it for public comment in accordance with the directions to be issued by this Court.

5. *The applicants and any other interested person may, within (1) month of the date on which the Provincial Plan is submitted, make submissions to the Court on the contents of the Provincial Plan.*

6. *After hearing argument, the Court will either:*

   6.1 Approve the Provincial Plan;

   6.2 Approve an amended version of the Plan; or

   6.3 Call for the Provincial Commissioner to file an amended Plan and issue direction for the further conduct of the matter.

7. *Once the Provincial Plan is approved by the Court, the Provincial Commissioner shall:*

   7.1 Implement the Provincial Plan within six (6) months of the date on which it is approved by the Court.

   7.2 File monthly reports on the progress in implementing the Provincial Plan.

8. The Court will retain supervision of the process described in paragraphs 4-7 until it is complete. It will have the power mero motu, to call for additional evidence, set the matter down for hearing, or alter this order.

National Relief

9. Compelling the Minister and the National Commissioner to:

9.1 Re-evaluate the system that the South African Police Services uses to allocate and distribute its human resources;

9.2 Report to the Court on their progress in complying with paragraph 9.1 by:

9.2.1 Within three (3) months of the date of this order, submitting a plan that will guide the re-evaluation process (National Plan); and

9.2.2 Submitting reports to the Court every four (4) months on the progress they have made in implementing the National Plan.

9.3 Ensure that the re-evaluation process is open to public scrutiny, and institutional oversight by, amongst other bodies, the Civilian Secretariat for the Police Service and the National Assembly.

9.4 Complete the development and implementation of a new system for allocating and distributing police human resources within four (4) years.

10. The applicants and any other interested person may make submissions to the Court about the National Plan, or the National Commissioner and the Minister's compliance with that Plan, including asking Court to conduct further hearings, call for further evidence, or make additional orders.'

THE PARTIES

[3] The first applicant is the Social Justice Coalition ('SJC'), a non-governmental organisation ('NGO') based in Khayelitsha which is a public benefit movement whose majority membership is alleged to be working class and poor individuals, mostly living in the informal settlements of Khayelitsha, Cape Town in the Western Cape. It is a non-profit organisation registered with the Department of Social Development and authorised by its constitution to initiate litigation to promote its objectives.

[4] The second applicant is Equal Education ('EE'), an NGO, which is a membership based social movement of learners, parents, teachers and community leaders working for quality and equal education in South Africa. It strives to achieve this through analysis and activism.

[5] The third applicant is Nyanga Community Policing Forum (' Nyanga CPF'), which was established by the Minister for Safety and Security, Western Cape in terms of the South African Police Act 68 of 1995 ('SAPS Act'). Its objectives include establishment and maintenance of partnership between the community of Nyanga and the South African Police Service ('SAPS') and to improve services rendered to the Nyanga community.

[6] The first respondent is the Minister of Police who is cited herein in his official capacity as the person responsible for policing in South Africa in terms of sections 205 and 206 of the Constitution of the Republic of South Africa[3] (the 'Constitution').

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[3] Act 108 of 1996.

[7] The second respondent is the National Commissioner of Police cited in his official capacity as the person responsible for controlling and managing the police service in terms of section 207 of the Constitution as well as sections 6(1) and 11 of the South African Police Service Act[4] ("SAPS" Act).

[8] The third respondent is the Provincial Commissioner: Western Cape, who is cited in his official capacity in so far as he is the person responsible for policing in the Western Cape in terms of section 207(4) of the Constitution and sections 6(2) and 12 of the SAPS Act.

[9] The fourth respondent, against whom the applicants seek no relief, is the Provincial Minister who is said to be cited because of his role of providing oversight of SAPS in terms of section 206 of the Constitution.

[10] The Women Legal Centre Trust ('WLC') was joined as amicus curiae by agreement between the parties. The WLC is a non-profit law centre that seeks to achieve equality for women, particularly Black women through, amongst others, impact based litigation and provision of free legal advice.

[11] It was agreed with the parties that the Court was to first determine the issue of unfair discrimination and give judgment on that aspect. The parties would then converge

[4] Act 68 of 1995.

again, on a date to be determined for a hearing on the appropriate remedy, should the Court find in the favour of the applicants.

BACKGROUND

[12] It was as a result of the complaints[5] by the applicants, and other like-minded non-governmental organisations, that led to the Premier of the Western Cape, acting in terms of section 206(5) of the Constitution, to appoint the Khayelitsha Commission of Inquiry in August 2012 to investigate allegations of police inefficiency and the breakdown of relations between the community and the police.

[13] The Police Service, the object of which is to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law, is a competency of the National Government. In terms of section 205(1) of the Constitution, the National Police Service must be structured to function in the national, provincial and where appropriate, local spheres of government. Section 205(2) provides that National legislation must enable the police service to discharge its responsibility effectively, taking into account the requirements of the province. The Minister responsible for policing must determine

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[5] The complaints were summarised by the Constitutional Court in *Minister of Police v Premier Western Cape* 2014 (1) SA 1 (CC) at paragraph [4] as follows: '*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 Khayelitsha 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.".*'

national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.[6]

[14] Each province is entitled to monitor police conduct to oversee the effectiveness and efficiency of the police service; to promote good relations between the police and the community, to assess the effectiveness of visible policing and to liaise with the Minister with respect to crime and policing in the province.[7] To this end the province 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.[8] The Khayelitsha Commission was established pursuant to this provision of the Constitution. The terms of reference of this commission confined it to the Khayelitsha area and community.

[15] The National Legislation which was envisaged in section 205(2) of the Constitution is the SAPS Act. This Act provides for the establishment, organisation, regulation and control of the SAPS. At the helm of the SAPS is the National Commissioner, who exercises control over and manages the police service in accordance with section 207(2) of the Constitution. The National Commissioner, in particular, develops a plan before the end of each financial year, setting out the priorities and objectives of policing for the following financial year; determines the fixed establishment of the Police Service and the number and grading of posts; determines the distribution of the numerical strength of the Service after consultation with the Board of Commissioners, established

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[6] See section 206(1) of the Constitution.
[7] See section 206(3) of the Constitution.
[8] See section 206(5) of the Constitution.

in terms of section 10 of the SAPS Act; organises or reorganises the service at national level into various components, units or groups; establishes and maintains training institutions, bureaus, depots, quarters, workshops or any other institution of any nature whatsoever which may be expedient for the general management control and maintenance of the Service; and shall perform any legal act in any capacity on behalf of the Service.[9]

[16] The National Commissioner, in turn, appoints a Provincial Commissioner for each province. The latter shall have command of and control over the service under his or her jurisdiction and shall perform the duties and functions necessary to give effect to section 219 of the Constitution.[10] The Provincial Commissioner may delimit any area in the province and determine the boundaries thereof; establish and maintain police stations and units in the provinces.[11] The Provincial Commissioner must also report annually to the provincial legislature on policing in the province, and copy the National Commissioner. The Provincial Commission has furthermore the power and authority to determine the distribution of the strength of the service under his or her jurisdiction in the province amongst the different station areas, office and units. In this respect section 12(3), which is implicated in this proceedings, provides that:

> '*A Provincial Commissioner shall determine the distribution of the strength of the Service under his or her jurisdiction in the province among the different areas, station areas, offices and units.*'

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[9] Section 11(2) of the SAPS Act.
[10] Section 12(1) of the SAPS Act.
[11] Section 12(2) of the SAPS Act.

[17] The applicants alleged that there is tension between the provisions of sections 11 and 12(3) of the SAPS Act in that section 11 seems to afford the National Commissioner the primary role in determining the human resources allocation, while section 12(3) allocates a similar vital role to the Provincial Commissioner. In my view, this tension is imaginary rather than real. Section 11(2)(c), in so far as the distribution of human resources is concerned, gives the National Commissioner the power to determine the distribution of the numerical strength and the number and grading of posts. This he does at National level. Section 12(3), on the other hand, gives the Provincial Commissioner the power to do the same but only with the strength of the Service in the province under his or her jurisdiction and amongst the different policing areas. Whereas the National Commissioner, after consultation with the Board, determines the allocation of human resources to all the nine provinces, a Provincial Commissioner can only determine the distribution of the human resources as has been allocated to his or her province. There is no overlapping of the powers of the National with that of the Provincial Commissioner and this can hardly be said to be part of the reason for the current allocation disparities.

[18] To discharge its mandate, as set out in the Constitution and the SAPS Act, SAPS relies, for its crime statistics, on data stored on a system called '*Crime Administration System*' ('CAS'). This is a computer programme which is used to register, manage, control and keep record of every case docket. The process starts when a docket is opened and its information is recorded on CAS. This process includes the allocation of codes for each category of crime. Once opened and registered the management of these dockets then progresses according to prescribed procedures, details of which are not apposite for purposes of this judgment.

[19] While acknowledging that crime is a social phenomenon and that it is challenging to forecast it with accuracy, the SAPS nevertheless use the crime statistics to formulate policy and for the allocation of resources.[12] Since 2011 SAPS has been working in collaboration with Stats SA[13] to improve the quality of their processes used to record data for crime statistics purposes. To ensure statistical accuracy SAPS uses official statistics, such as the population of a particular area and only counts recorded crimes,[14] i.e. either crimes which have been reported to SAPS or detected by SAPS.

[20] The Statistics used by SAPS are based on what it calls '*Counting Rules on Crime of the South African Police Service*' which represents the number of crime charges or crime counts, and not the number of registered dockets. This means that where, for example, multiple offences were committed during a single crime incident, each offence would be recorded, in addition to the primary offence. These additional counts would form part of the crime statistics. These statistics, which would be stored on the CAS system and accessible at national and provincial level, would normally be used for operational and special intervention purposes. In particular, they would be used for theoretical and actual allocation of SAPS members and resources to provinces. I now turn attention to look at the policy and process of the allocation of human resources, developed by the SAPS, and which policy is at the centre of the dispute in this matter.

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[12] See paras 1 and 4 of Major General Thulare Sekhukhune's affidavit on pages 2243 – 2245.
[13] See Statistics Act 6 of 1999 which provides for the appointment of a Statistician–General as head of the Statistics South Africa (('Stats SASA') who is responsible for the collection and dissemination of official and other statistics.
[14] See Sekhukhune's affidavit at paragraph 13 on page 2243 – 2247.

[21] SAPS submitted that it has developed and maintained a procedure to calculate its human resource requirements. The allocation process is governed by a policy called 'THRR', short for 'the theoretical human resource requirement'. At its simplest the system is said to have been developed to calculate the number of posts per level required to perform the duties associated with police stations. It presents the ideal number of employees to be placed at a specific police station. The THRR is projected as dynamic and evolving as well as being multi-faceted. In terms of the THRR provision has to be made for: (a) community service centres; (b) crime prevention/sector teams; (c) custody management; (d) additional service points; (e) operational support, which includes court services, exhibit management and general enquiries such as firearms (licence enquiries); and second hand goods and firearms; liquor and second hand goods ('FLASH'); (f) investigation of crime; and (g) support services, including general administration, financial / human and supply chain management.

[22] With regard to crime prevention and crime investigation, the SAPS submitted that they operated on the basis that:

22.1 The allocation is first done on the basis of a theoretical requirement; i.e. an ideal requirement as if there were no budgetary constraints. For this reason every year, from January to March, information on all 1143 police stations across South Africa is gathered. The information gathered includes a wide range of determinants, such as an analysis of all reported crime over a period of four years at a particular station (averaged, with the most recent carrying the highest weighting). Thereafter, a ratio is applied to determine

the theoretical crime prevention requirements (i.e. the number of police officer requirements);

22.2 As far as crime prevention (i.e. sector teams is concerned), one post is allocated for 20 (on average per month) contact crimes (i.e. crimes against a person) which have been reported; 25 crimes against property (i.e. property related crime); 30 for contact related crimes; 35 for other serious crimes; and 50 for less serious crime;

22.3 The result of these calculations is that a baseline figure is determined. This figure is then factored into a demographic analysis. SAPS uses 79 demographic determinants. These are factors which have an impact on crime prevention.[15]

22.4 Each of the demographic determinants is weighted, with the higher weighting being given to under-developed areas, and correlatively lower weighting being given to relatively developed/advantaged areas. SAPS submitted that the higher weighting was ultimately geared to ensure higher policing numbers for crime prevention in under-developed areas.

22.5 The following are amongst the demographic determinants used by SARS:

22.5.1 Registered facilities which include: (a) population size that is serviced by a particular police station (This information would be obtained from Stats SA); (b) the size of the area to be policed; (c) the unemployment rate in the area; (d) the percentage of informal population; (e) the daily influx of commuters (i.e. people

[15] The demographic determinants include reference to areas that SAPS is statutorily obliged to patrol; factors that complicate SAPS' response time in addressing crime (for instance a lack of lighting, street names and informal settlements).

who do not live in the area but come in every day, for example for work purposes as obtained from the local municipality); (f) the facilities and venues that host sporting, festival and religious events and the frequency of these events per year; (g) seasonal influx, such as holiday makers, who migrate to a particular holiday spot; (h) the topography, such as mountains, rivers or dams of an area which may have a bearing on police's accessibility and therefore reaction time.

22.5.2 Socio-economic factors which include: (a) lack of street lights; (b) lack of roads; (c) social degradation; (d) lack of telecommunications; (e) whether or not there is formal or informal housing and if there is no formal housing, whether access routes, lack of street names, lack of house numbers are present or absent, all of which affects accessibility and; (f) the number of identified gangs in the precinct.

22.5.3 Areas where people converge. These will include (a) all transport hubs and routes, for example, airports, bus terminals, train stations; (b) overnight accommodation; (c) number of shopping malls, (the bigger the shopping malls the greater the number of people); (d) places where people consume and buy liquor, whether registered or unregistered outlets; (e) all educational facilities (such as schools, universities and colleges); (f) firearm sales (requires a specific designated firearm official).

22.5.4 Places that SAPS bears particular statutory obligations to police and which includes: national key points; feed lots; abattoirs; pounds; smallholdings; and farms.

22.6 Factored into all of the above would be crime investigation analysis. SAPS allege that it is impossible to determine the precise times (standard time) associated with investigating different types of crime and therefore engages experts to provide opinion on how many investigations of a specific crime (for example murder) one detective would be able to deal with on a monthly basis.

22.7 Thereafter, crime specific ratios are applied to determine the theoretical detective requirement. By way of example, for murder there is a ratio of 1:4 (one investigator allocated for an average of every four murder charges per month); for attempted murder there is a ratio of 1:5; for common robbery there is a ratio of 1:10.

22.8 SAPS further stated that the demographic determinants at this stage of the process will again be weighted in favour of under developed areas. These will include primarily the distances that police need to travel to entities involved in the investigation process, for example, correctional services, Department of Health and forensic service laboratories.

22.9 Thereafter, the contingency allowance would be applied to cater for unavoidable contingencies for the daily working routine of every member / official. Examples of these contingencies will include reporting for and off duty, station lectures, meetings, reading/studying governance, instructions and policies, hygiene needs, procurement, interaction with other officers

etc. These contingencies relate to the human resources located at police stations. So too, these contingencies may also apply to the police operational support services such as the flying squad, the canine unit, the sexual offences unit etc. The contingency allowance also takes into account the personal needs and recovery from fatigue of members. Another item is compulsory vacation leave.

22.10 The result of the aforegoing analysis is a theoretical or ideal allocation; i.e. the allocation that would be made to each police station in an ideal world with no budgetary constraints.

[23] It is common cause that the second stage of allocation involves the actual assessment and related to the allocation of posts. This is budget motivated, for if budgetary provision was not made, the ideal will be unachievable. The third stage of the human allocation process is the placement at police stations. Once a station has been determined as being disadvantaged, in light of the factors enumerated *supra*, it would receive one post for every 2500 members of the community instead of one post for every 5000 members of the community in non-disadvantaged areas. The respondents submitted that this weighting has been specifically determined so as to ensure that police stations in lower economically resourced areas have a higher ratio of police officers to serve them. According to the respondents the weighting runs contrary to the Applicants' allegations that poor areas were disadvantaged by the THRR policy of allocation.

[24] Once the national allocation has been done, provinces would have the responsibility of distributing the allocated funded posts. The distribution of police resources within police stations would be done by the Provincial Commissioner in terms of section 12(3) of the SAPS Act, with due consideration to the THRR and other important considerations such as crime trends and patterns. Such distribution of resources is described as being a dynamic and flexible process, and by no means rigid.

[25] According to the respondents the powers of the Provincial Commissioner are statutorily regulated in clear and unambiguous terms and that therefore was no need to grant the applicants any relief in this regard. Indeed section 12(3) is self-explanatory and requires no order to clarify its terms. A Court would not grant a declaratory order where the legal position has been clearly laid down by statute.[16] The fact that the then Provincial Commissioner, who testified at the Khayelitsha Commission that he was not aware of the powers of a Provincial Commission to determine the distribution of the strength of the service in the Western Cape amongst the different areas and stations, does not affect the fact that section 12(3) gave him this power. A declaratory order therefore is unnecessary in this respect.

THE KHAYELITSHA COMMISSION

[26] Reverting back to the Khayelitsha Commission, after hearing evidence from various stakeholders and experts it concluded that there were inefficiencies in policing and a breakdown in relationships between the police and the community of Khayelitsha.[17] Part of the problem affecting effective policing, the commission found,

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[16] See *Ex Parte Noriskin* 1962 (1) SA 856 (N).

[17] See Record, at page 338: "*According to the Proclamation published in the Western Cape Provincial*

was the allocation of human resources. It found that the system used by SAPS for determining the THRR was highly complex; was neither publicly available or debated, even within SAPS or by the key oversight bodies, such as the National Parliament and the Provincial Legislature; that data provided by police stations and used to calculate the THRR was not necessarily accurate; and that the weighting attached to different environmental factors may result in over- or under-estimation of the policing implications of these factors to Khayelitsha and other areas which are occupied predominantly by Black and poor people.

[27] With regards to the allocation of human resources, the Khayelitsha Commission, whose report was released on the 25 August 2014, made the following recommendations:[18]

> '*59.1 The Minister of Police requests the National Commissioner of SAPS to appoint a task team to investigate the system of human resource allocation within SAPS as a matter of urgency.*
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> *59.2 the new mechanism to be adopted by SAPS should "be subject to oversight by the key oversight agencies, notably the Civilian Secretariat and, in relation to provincial resource allocations, the provincial governments". The allocation system should also be disclosed in the SAPS annual report to Parliament as well as to provincial legislatures.*
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> *59.3 If the system produced "any significant departure from an allocation based on population figures and reported crimes rates, [it] should be explained.'"*

Gazette on 24 August 2012, the Premier made the decision in terms of s 1 of the Western Cape Provincial Commissions Act, 1998 read together with ss 206(3) and (5) of the Constitution of the Republic of South Africa, 1996."

[18] See Record at page 28, para 59.

[28] After the release of the Khayelitsha Commission's report, the applicants campaigned for the implementation of its key recommendations. This campaign included directly engaging with SAPS and policy makers at a local; provincial and national level. The applicants were focusing, particularly, on the implementation of the following recommendations:[19]

> *"61.1 The urgent and equitable allocation of policing resources, in order to ensure that the poorest areas with the highest levels of crime have sufficient numbers to competent and experienced police personnel, who can properly prevent and investigate crime;*
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> *61.2 The urgent development of guidelines for visible policing in informal settlements; and*
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> *61.3 The development of a plan by the South African Police Service (SAPS) at a national level to address vigilantism."*

[29] The applicants were engaging with the SAPS through the SAPS Khayelitsha Cluster Joint Forum, which was established in 2014 by the Cluster Commander of The SAPS. The aim of the Joint Forum, according to the applicants, was to bring together all stakeholders so as to develop and implement safety interventions for Khayelitsha. The applicants further submitted that despite the good intentions of the Joint Forum, its objectives had never been effectively implemented. The applicants have since been seeking to engage with the SAPS to implement some of the critical recommendations of the Commission, but without any measure of success, the applicants submitted. The

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[19] See Record at page 29, para 61.1; 61.2; 61.3.

applicants further submitted that it was after all efforts to engage with the respondents had failed that the applicants resorted to bringing this application.

[30] It is convenient at this stage to look into the provisions of the Equality Act: the legal framework within which this application was brought. The Equality Act has its origin in section 9 of the Constitution which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Subsection (4) requires that National Legislation be enacted to prevent or prohibit unfair discrimination. It is pursuant to this prescript that the Equality Act was promulgated.

[31] The object of the Act, *inter alia*, is to give effect to the letter and spirit of the Constitution [in promoting equality] and eradicating the injustices of the past to establish a society based on democratic values, social justice and fundamental human rights. Section 3 of the Act prescribes that any person applying the Act must interpret its provisions to give effect to the Constitution. Such interpretation must take into account the context of any dispute and the purpose of the Act.[20] For purposes of the Act every Division of the High Court or the local seat thereof is an equality court for the area of its jurisdiction and any Judge may be designated a presiding officer of the equality court of the area in respect of which he or she is a Judge.[21]

[32] Proceedings in terms of or under the Act may be instituted *by 'any person acting (a) in their own interest; (b) on behalf of another person who cannot act in his or her own*

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[20] Section 3(3) of the Act: '*Any person applying or interpreting this Act must take into account the context of the dispute and the purpose of this Act.*'
[21] Section 16 of the Equality Act.

name; (c) as a member of, or in the interests of, a group or class of persons; (d) in the public interest; (e) by any association acting in the interests of its members'.[22] Chapter 9 institutions, such as the South African Human Rights Commission, or the Commission for Gender Equality, may also institute proceedings in the Equality Court.[23] In these proceedings the applicants act in their own interest as organisations committed to equality and improving the lives of the most vulnerable. They also act on behalf of their members and in the public interest.

[33] The Equality Act is binding on individuals as well as on the State. Section 6 provides that neither the State nor any person may unfairly discriminate against any person. Given the past history of this country, where racial discrimination was government policy and given the stated objectives of the Equality Act, it is no surprising that race, as the most notorious form of discrimination, was at the top of those singled out in the Act for special attention: section 7 provides that no person may unfairly discriminate against any person on the ground of race.

[34] What is discrimination? In terms of the Equality Act discrimination '*means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds*'.[24] The prohibited grounds on the other hand, are defined as:

> '*(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour,*

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[22] Section 20(1)(a)-(e) of the Act.
[23] Section 20(1)(f) of the Act.
[24] Section 1 of the Act.

sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or

(b) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)'[25]

[35] The Equality Act recognises that legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by past unfair discrimination, may be taken. For this reason section 14(1) of the Act provides that it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons. These means that the Equality Act only deals with unfair discrimination.

[36] Unfair discrimination may be both direct or indirect. Direct discrimination, in my view may be easy to prove: and occurs where a provision specifically differentiates on the basis of a listed or unlisted ground. Indirect discrimination, on the other hand, occurs were differentiation appears to be neutral but has the effect of discriminating on a

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[25] *Ibid.*

prohibited ground, whether listed or unlisted.[26] As would be pointed out *infra* the applicants only allege indirect discrimination. Indirect discrimination is best illustrated by the facts of the *Pretoria City Council v Walker.*[27] In that matter, the applicant had charged the residents of the former municipal area of Pretoria on the basis of a tariff for the actual consumption of water and electricity supplied which was measured by means of meters installed on each property, whereas it had charged residents in the former Mamelodi and Atteridgeville municipal areas (where no meters had been installed) a flat rate based on the amount of water and electricity supplied to such areas divided by the number of residences therein. The respondent alleged that the applicant's uniform or flat rate for water and electricity charges in the former municipal areas of Mamelodi and Atteridgeville was lower than the metered rate charged to the respondent and other persons in the former municipal area of Pretoria and that this meant that the latter were subsidising the former; and the imposition of differential rates was a contravention of section 178(2) of the Constitution.

[37] The High Court held that the applicant's conduct constituted a breach of section 178(2) of the Constitution. The conduct of which the respondent complained, which differentiated between the treatment of residents of townships which were historically Black areas and whose residents were still overwhelmingly Black and residents in municipalities which were historically White areas and whose residents are still overwhelmingly White, constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race might mean that the discrimination was not direct

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[26] See *Constitutional Law of South Africa* (2nd Ed.) Vol.3, chapter 35 at page 47.
[27] 1998 (2) SA 363 (CC).

but it did not alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race.

[38] To be actionable, discrimination must be unfair. The test for unfair discrimination was first set out in *Harksen supra*[28] where it was summarised it as follows:

> *'Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*
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> *(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
>
> *(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.'*

[39] Final comments on the question of *prima facie* proof: once the complainant has made out a *prima face* case of discrimination, it falls on the respondent to prove, on the facts before the Court, either that the discrimination did not take place as alleged, or that

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[28] *Harksen supra* at para 54(b).

the conduct was not based on one or more of the prohibited grounds or if the discrimination did take place that such discrimination was fair.[29] The respondent therefor bears the *onus* of proving that the impugned discrimination was fair. In determining whether the respondent has proved that the discrimination was fair the factors enumerated in 14(2)[30] of the Equality Act must be taken into consideration.

[40] Discrimination, when it occurs, can only be saved from declaration of unlawfulness if it is benign discrimination aimed at protecting or advancing people who were disadvantaged by unfair discrimination in the past. Section 14(2) sets out what a respondent who claims that discrimination was fair has to prove.[31]

[41] To complete the genesis of this application, I revert back to the report of the Khayelitsha Commission. In this regard the Commission found, *inter alia*, that the unequal distribution of resources led to insufficient allocation of human resources to Khayelitsha Police Stations. The Commission concluded that the structural understaffing of the Khayelitsha Police Stations, resulting from the application of the biased THRR, was one of the reasons for many of the inefficiencies. For this conclusion the Commission relied *inter alia* on the evidence of Jean Redpath who held the view that the application of the THRR led to a skewed allocation of human resources and that this affected effective policing in the Khayelitsha and other Black areas in the Western

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[29] Section 13 of the Act.
[30] Section 14(2) provides that: '*In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account: (a) The context; (b) the factors referred to in subsection (3); (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.*'
[31] Section 14(2) provides that: '*In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account: (a) The context; (b) the factors referred to in subsection (3); (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.*'

Cape. The applicants too mounted the challenge against the THRR in this Court relying heavily on this statistical evidence by Redpath. I now turn my attention to her evidence.

[42] Redpath's evidence was to the effect that crime was significantly under-reported in Khayelitsha; and that this affected the allocation of police personnel to the area. For purposes of her statistical analysis she obtained population estimates for nine police stations, namely, Camps Bay, Durbanville, Grassy Park, Kensington, Mitchells Plain, Muizenberg, Nyanga, Phillipi and Sea Point, as well as the three Khayelitsha policing areas, which were calculated using census 2011 population figures. These were close to the SAPS estimates for these nine areas, save in the case of Lingelethu-West and Mitchell's Plain. On the other hand, the Secretary of the Khayelitsha Commission obtained data, from SAPS, on the number of operational personnel, the total population, and the ratio for all policing areas in the Western Cape. Using the number of personnel for each policing area from the data supplied by the SAPS, in their letter of 22 October 2013, she calculated the number of police personnel for every 100 000 of the population in each policing area in the Western Cape.

[43] Redpath found that the average was 283 police personnel per 100 000 of the population. According to her the most resourced was 2636 per 100 000, being Table Bay Habour, and the least resourced being Harare, with 111 per 100 000. According to her all three Khayelitsha policing areas demonstrated less than average allocations; with Khayelitsha at 190 per 100 000 and Lingelethu-West at 275 per 100 000. She also noticed that a number of areas which, to her knowledge, were similar to Khayelitsha in

that they have large informal settlements and/or serious violent crime, also demonstrated figures which were much lower than the average.

[44] She sought to understand how SAPS arrived at these figures and whether there was a rational basis for these figures. She thereafter calculated the number of police personnel per 100 reported crimes. I pause here to point out that SAPS published, on a yearly basis, the number of crimes reported per policing area for 20 crimes.[32] When police personnel was calculated per 100 of the 20 crimes published she found that the range was from 1.9 police officials per 100 reported crimes to 37 police per 100 reported crimes, with an average of 3.4 police per 100 crimes per year. Redpath goes on to argue that:

> '27. *Furthermore areas already over-supplied with human resources will continue to be over-resourced as they are likely to have better reporting rates. In other words the skewed allocation leads to skewed reporting trends which in turn leads to further skewed allocations.*
>
> 28. *Indeed on the reported crime measure, many areas where it is known significant under-reporting occurs, on the per 100 total reported crime measure, emerge with more police per 100 reported crimes than average.*
>
> 29. *However, some of the policing areas less-resourced than average on the per 100 000 population basis are still less resourced than average on the per 100 reported crimes basis. Thus reported crime and the phenomenon*

[32] The crime categories reported by SAPS were murder, sexual crimes, attempted murder, assault GBH, common assault, robbery, robbery with aggravating circumstances, arson, malicious damage to property, burglary at non-residential and residential premises, theft of or out of a motor vehicle, stock theft, illegal possession of firearms and ammunition, drug related crime, driving under the influence of alcohol or drugs, shoplifting, culpable homicide, *crimen injuria*, neglect or ill treatment of the children, kidnapping, and commercial crime. See Record, para 23 on page 658.

of under-reported crime does not explain all the anomalies in human resource allocation observed.'

[45] She concluded that the problem with a resource allocation based solely on reported crime was that areas where there was significant under-reporting of crime would be under-resourced in respect of the true crime rate. She, however, acknowledged that reported crime was nevertheless a rational basis on which to base allocations in relation to one component of SAPS, namely, the detective service, as SAPS detective can only investigate reported crime. She further argued that in relation to other components of the SAPS, such as visible policing and crime intelligence, the total population and the actual violent crime rate are better guides to resource needs because, according to her, the burden of work faced by, for example, sector teams and crime prevention officials was not determined primarily by reports of crime but by the size of the population they were required to patrol and the actual level of violence and crime occurring within the population they were required to patrol.

[46] Redpath regarded murder as a robust crime indicator which was not susceptible to reporting trends. She submitted that this crime, checked against morgue data, appeared not to be suffering from any significant under-reporting; that in areas where there were high reporting rates, murder tended to track serious violent crimes such as aggravated robbery[33] and could be considered to be a proxy for such crime. Murder was therefore frequently used as a proxy indicator for violent crime. She initially used the number of murders and culpable homicide as proxy indicators of the actual violent crime

[33] I assumed she meant robbery with aggravating circumstances.

rate in an area. She later, however, changed to using murder alone as culpable homicide tended to refer to motor-vehicle related incidents. She nevertheless submitted that her analysis had not been significantly altered. She found that when the number of police personnel was calculated per murder, there was a high degree of similarity between the areas which were under-resourced on this measure, and those which were under-resourced on a per 100 000 people measure. The range was from 1 to 146 police personnel for each murder in an area (excluding those areas which reported no murders). In particular Nyanga, Harare, Gugulethu, Khayelitsha and Mfuleni have two or fewer police persons per murder per year and occupying the bottom rungs of the rankings rank from most to least resourced per murder homicide.

[47] Redpath took issues with the way resources were allocated using the THRR. She found that this allocation was based on a theoretical requirement, calculated on the total time taken for all tasks done at a particular station, as affected by a range of factors, such as the presence of gangs or daily influx of commuters which SAPS recorded on the "*Impact Management Sheet*". Summing up the THRR for every police station gave the National requirement for police stations in terms of numbers and rank levels. But the THRR was larger than what the budget allocated per unit resulting in only 68% being available for each police station. This fixed establishment was not the same as the THRR as it only reflected the number of posts which could be established in terms of the SAPS budget and medium term expenditure framework.

[48] The THRR, according to her, appeared to prejudice township areas to an even greater extent than the actual figures do and leaves these Black township areas at the

bottom of the allocation of resources. According to her, the THRR which underpinned the budget-dependent actual allocation, led to perverse outcomes. These were not caused by any event or deliberate inclusion of factors which were obviously discriminatory in nature but was due to shortcomings in the method which resulted in unintentional, but nevertheless severe discrimination on the grounds of race and poverty.

[49] Apart from the problem caused by budget constraints, the THRR, according to Redpath, has a number of flaws. The main shortcoming in the THRR which she identified was that this method of allocation failed to take into account that there was a wide variation in under reporting of less serious crime from one area to another: In this respect she argued that it failed to take into account that poor, Black, more informal areas demonstrated low levels of reporting of crime when compared to richer, White, more formal areas. She submitted that the extent to which that allocation of resources was calculated on the basis of reported crime, will continue to be skewed against areas which had high levels of under-reporting. According to Redpath:[34]

> '*The insidiousness of the primary under-reporting problem lies in the fact that low allocations of police resources in turn tend to inhibit reporting of crime, resulting in areas with low resources continuing to show artificially low levels of total reported crime, which in turn keeps their allocation of resources low. The opposite happens in better resourced areas, where more resourcing encourages high reporting which in turn results in large allocation of resources.*'

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[34] See record page 3766, paragraph 16.

[50] She also identified as a problem of the THRR, the failure to give sufficient weight to violent crime. According to SAPS, to calculate the crime prevention component, murder was equated with robbery with aggravating circumstances as they are both classified as contact crimes; contact crime was worth 2.5 less serious crime in terms of posts. According to her this ratio appeared to have been relatively arbitrarily determined and bore no relation to the relative burden of policing and investigating murder.

[51] Another problematic area which she identified was that the majority of ostensibly neutral weightings which were used tended to skew the allocation towards formal areas. Of the 56 "*environmental, social and economic*" factors listed, only 15 were highly likely to be present in informal areas. In this regard Redpath's conclusion was that formal areas potentially have an additional 205% weighting on these facts, while informal areas have a potential 75% weighting relating to informal areas that can be taken into account. In other words, factors relating to formal areas are taken into account to a far greater extent than informal areas.

[52] On the question of poverty, Redpath testified that the Khayelitsha Commission, requested her to compare police allocation to indicators of poverty and informal housing. She did this by combining the data on actual numbers obtained for the Western Cape and KwaZulu-Natal. Although data relating to housing and racial composition of the population was available only at ward level, which could not be adequately mapped to the boundaries of police precincts, she was able to determine that areas with a high percentage of electricity and piped water availability per household usually had a high percentage of formal housing. The converse, according to her was also true: informal

housing or rural housing was, in turn, indicated by lower levels of electricity and water provision.

[53] It is a well-known fact that for historical reasons poorer Black people tend to live in informal settlement characterised by lower levels of service provision. Using this data, Redpath concluded that service provision levels were a reliable indicator of the racial demographics of an area. She further found that when comparing the trends relating to provision of police resources per 100 000 people to levels of service provision (percentage piped water and electricity) there was a statistically significant relationship between the variables. The p-value associated with the observed correlations was close to zero i.e. there was a close to 100% probability that there was a relationship between the variables. This data, according to Redpath, showed that lower levels of service provisions were associated with lower levels of police resourcing.

[54] The question for determination is whether the system of allocation of human resources, used by SAPS, discriminates against Black and poor people.

[55] There are a number of cases in which the Constitutional Court found that unfair racial discrimination has taken place on the ground of race. The applicants relied on these judgments to support their claim that the THRR discriminated against Black poeple. In *Moseneke v Master of the High Court*[35] the Constitutional Court commenting of the sections of the Black Administration Act applicable to the administration of estates of deceased Blacks found that: "*... the concepts in which it was based, the memories it*

[35] 2001 (2) SA 18 (CC).

envokes, the language it continues to employ and the decision it still enforces are antithetical to the society envisaged by the Constitution. It was an affront to all of us that people are still treated as 'blacks' rather ordinary persons ... in conflict with the establishment of a non-racial society...". The THRR, when applied in the Western Cape and if it were to be found that the concepts on which it was based were antithetical to the society which is free of racial discrimination as envisaged by the Constitution, would suffer the same fate as the impugned sections of the Black Administration Act in *Moseneke supra.*

[56] Not only do the applicants rely upon the prohibited ground of race but they also rely on the overlapping ground of poverty for the contention that the THRR unfairly discriminates against Black people in the Western Cape. In other words, they rely on intersectional discrimination on the grounds of both race and poverty. There is no difficulty in determining whether discrimination has taken place on the ground of race as it is a listed prohibited ground in terms of paragraph (a) of the definition of "*prohibited ground*".

[57] It is with poverty that it must be established whether it qualifies as an unlisted ground in terms of paragraph (b) of the definition of prohibited ground. Since poverty is an unspecified ground the first leg of the inquiry requires considering whether differentiation on this ground constitutes discrimination.[36] Whether poverty qualifies as an unlisted ground of unfair discrimination would have to be tested against what the Act contemplates as '*any other ground*'. To qualify as such, poverty must result in

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[36] See *Larbi-Osam and Others v MEC for Education (North-West Province) and Another* 1998 (1) SA 745 at para [19].

undesirable consequences which (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyments of a person's rights and freedoms in a serious manner that is comparable to discrimination on any of the prohibited grounds.

[58] The applicants submitted that though there was no occasion on which a Court had considered whether poverty was a ground of discrimination, there is a wealth of decisions which have applied analogous grounds to find that there was discrimination on an unlisted ground. Again applicants found support for their submission that poverty qualifies as an unlisted ground of discrimination in a number of decisions emanating from the Constitutional Court. Such a finding would be made if the discrimination occurred on a prohibited ground which is either in paragraph (a) of the definition or one which qualified on one of the criteria in paragraph (b) of the definition.

[59] One of the judgments in which the Constitutional Court found unfair discrimination based on unlisted grounds was in *Harksen v Lane N.O. and Others*[37]. Although these judgment was before the promulgation of the Equality Court if it still finds application post the Act. In *Harksen supra* it was emphasised that grounds of discrimination can often intersect with one another. Goldston J articulated this intersection of grounds of discrimination thus[38]: "*There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious*

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[37] 1998 (1) SA 300 (CC).
[38] *Harksen supra* at para [50].

dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted".

[60] The applicants' case is that poverty constitutes an unlisted ground of discrimination. They found support for this submission from two sources: the first is section 34(1) of the Equality Act which provides that:

> *"'Directive principle on HIV/AIDS, nationality, socio-economic status and family responsibility and status*
>
> *(1) In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status-*
>
> *(a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of 'prohibited grounds' by the Minister;*
>
> *(b) the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister.'*

Socio-economic status, on the other hand is defined in the Equality Act as follows: *"includes a socio or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level education qualification*".

[61] The question therefore is whether poverty is a ground of discrimination which causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of the rights and freedoms of the people of Khayelitsha, in

particular, or the people of the other areas covered by Redpath's statistical analysis, in general, in a serious manner that was comparable to the discrimination on any of the grounds listed in paragraph (a) of the definition of prohibited grounds in section 1 of the Equality Act.

[62] They further argued that section 34(2)[39] makes it clear that action under section 34(1) does not affect the ability of the Court to assess a claim that socio-economic status constitute a prohibited ground under either paragraphs (a) or (b) of the definition. Secondly, they found support for their contention in several academic writings which have supported the claim that poverty constitutes a prohibited ground of discrimination, either as an analogous ground or within the concept of "*social origin*". Notable amongst the academic writers referred to by the applicants are S Woolman's & M Bishop's *Constitutional Law of South Africa*,[40] where they quoted the judgment in Khossa and Others v Minister of Social Development and Others[41] and pointed out that: '*Although Khosa concerned the rights of non-citizens living in poverty to state support, Mokgoro J linked the ground of citizenship to poverty by pointing out the need for the poor to be treated as equal members of society.*'

[63] The applicants submitted that the Equality Act, and the academic authorities referred to *supra* unequivocally supported the submission that poverty qualified as a

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[39] Section 34(2) reads: '*Nothing in this section- (a) affects the ordinary jurisdiction of the courts to determine disputes that may be resolved by the application of law on these grounds; (b) prevents a complainant from instituting proceedings on any of these grounds in a court of law; (c) prevents a court from making a determination that any of these grounds are grounds in terms of paragraph (b) of the definition of 'prohibited grounds' or are included within one or more of the grounds listed in paragraph (a) of the definition of 'prohibited grounds'.*'

[40] (2nd Ed.), vol 3, Chapter 35 at page 63.

[41] 2004 (6) SA 505 (CC).

ground of discrimination. The applicants submitted that poverty was a systemic problem, the result of our history and economic system that result in people living in poverty and rendering them vulnerable and marginalised. They found support in the obiter-dictum in *Soobramoney v Minister of Health (KwaZulu- Natal)*[42] which was to the effect that millions of people were living in deplorable conditions and in great poverty but that the demand to receive medical treatment at State hospital had to be determined in accordance with the provision of sections 27(1) and (2) of the Constitution.

[64] The applicants further submitted that poverty undermine human dignity because it is an immutable characteristic of a person or that treating someone differently on that basis was inconsistent with the ideas of equal concern and equal respect. For support the applicants called on the judgment of the Constitutional Court in *Minister of Health and Another v New Clicks Sought Africa (Pty) Ltd and Others*[43] where Moseneke DCJ explained how poverty was at odds with the well-earned and lofty thrust of our Constitution and wrenched dignity out of any life.

[65] According to the applicants discrimination on the basis of poverty clearly imparts on the social and economic rights protected in the Constitution as this adversely affects the equal enjoyment of a person's right and freedom in a serious manner that is comparable to discrimination on a listed ground. Discrimination on the ground of poverty, in my view, and as the applicants have shown, amounts to unfair discrimination.

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[42] 1998 (1) SA 765 (CC).
[43] 2006 (2) SA 311 (CC) at para 705.

[66] Section 13(1) of the Equality Act provides that:

'If the complainant makes out a prima facie case of discrimination-

(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds."

[67] The next question for determination is what constitutes *prima facie* proof of discrimination? There was a suggestion that *prima facie* proof, for purposes of section 13(1) of the Equality Act, was a less stringent test than the normal balance of probabilities. This, it was submitted, was to lighten the burden on the complainant. In my view, and in the context of section 13(1) *prima facie* proof attracts something less than proof on a balance of probabilities. This is evident from the scheme of section 13(1) where it is clear that the test was not aimed at a final relief. This sub-section is used to determine whether the complainant has established on a "*prima facie*" basis the existence of discrimination. Once that has been proved the burden shifts, from the complainant to the respondent, who then must show that there was no discrimination at all or that the discrimination complained about was fair. The shifting of the onus to the respondent occurs immediately when the complainant makes out a *prima facie* case of discrimination and even before the kind of discrimination is established. Proof of discrimination at this stage does not require the complainant to prove that it was unfair. Final relief will only be granted if the respondent fails to prove that no discrimination took place or, if it took place, that it was one which was not unfair. I am fortified in my conclusion by the fact that section 13(1)(a) requires the complainant to merely make out

a *prima facie* case whereas the respondent must prove, on the facts before Court, that discrimination did not take place as alleged or if it did, was not unfair. The *onus*, in my view, is heavier on the respondent to prove either that no discrimination has taken place or, if it did, that it was not unfair. This being akin to civil proceedings, the *onus* may be discharged on a balance of probabilities.

[68] This much was confirmed in the decision of *Manong and Associates (Pty) Ltd v City Manager, City of Cape Town, and Others*[44] where Moosa J observed that '*[i]n terms of s 13 of PEPUDA all complainant is required to do in order to discharge its onus is to make out a prima facie case of discrimination based on race. In that event the burden of proof shifts to the respondents who must show either discrimination did not take place or that the impugned conduct is not based on race… ….[t]he rebuttable presumption of unfair discrimination which is an evidential burden assists complainant to cross the hurdle from prima facie proof to proof on the balance of probabilities.*' [45]

[69] The respondents submitted that, with the exception of *Manong v City of Cape Town and Another* most of the jurisprudence on the test for discrimination predated the promulgation of the Equality Act. They however, accepted the correctness of the first leg of the test set out in *Harsken supra*, save that this Court would have to interrogate what would be the comparator. The respondents also argued that this case was unique in the sense that there was no comparator (i.e. the differentiation aspect), unlike in the

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[44] 2009 (1) SA 644 (EqC) at para 12.
[45] See also *Osman v Minister of Safety and Security and Others* [2010] ZAEQC 1; 2011 JDR 0228 (WCC) at 24 where the Court held that: '*The phrase prima facie case employed in section 13 of the Act, presumably is used in its generally accepted meaning of 'in the absence of further evidence from the other side, that which is prima facie now becomes conclusive proof.*'

Walker case (*supra)* where the differentiation was between wealthier areas versus less wealthier areas.

[70] The applicant submitted that the evidence of Redpath stands uncontradicted. The applicant emphasised that nowhere in SAPS' answering affidavits, including that of General Sekhukhune, a qualified statistician, did the respondents' question the accuracy of her statistical analysis of the data; the oral submissions of Counsel for the SAPS, questioning her expertise and accordingly the reliability of her evidence was misdirected; and the skewed allocation of resources in terms of the THRR resulted in Black and Coloured areas being heavily under-resourced and that this was irrational and discriminatory.

[71] The respondents' challenge to the evidence of Redpath can be summarised as follows: she is not an expert nor does she have any experience in policing; she relied on outdated statistics and had not sufficiently considered the variables; and her theory of allocation took only a few variables into account and this rendered it unworkable and unresponsive to the complexities of proper policing. The other criticism against Redpath's theory of allocation was that she did not consider budgetary constraints. According to the respondents, Redpath's theory will impact negatively on the operations of SAPS: it ignored the fact that the SAPS does not police people but polices crime, its primary objective being to assemble a policing structure and deploy resources that make it possible to discharge its constitutional mandate and the human resources requirement associated with police stations cannot be calculated on population and crime alone. The

applicants, in response, submitted that these criticisms of Redpath were misdirected, mainly because the applicants were not challenging the THRR in isolation.

[72] Apart from being critical of Redpath's expertise and evidence, the respondent's case in essence is that the THRR does not discriminate against poor and Black communities on the basis of race and poverty. On the contrary, they submitted that the system of resource allocation was weighted in favour of poor communities which are predominantly Black and results in greater police resources being directed at the communities where crime rates were the highest. Secondly, they argued that the Provincial Commissioner has exercised his statutory powers in terms of section 12 (3) of the SAPS Act to supplement and increase policing resources in poor and predominantly Black areas. Lastly, the respondent submitted that the application was both premature, inappropriate and would impermissibly violate the doctrine of separation of powers.

[73] The respondents disagreed with Redpath's use of murder as a proxy to determine the extent of violent crime where there was under-reporting they argued that this was inflated by the applicants. Otherwise, so the respondents' argued, how do you actually factor in under-reporting?; that it was unrealistic to expect anyone to determine allocation from unreported cases; and that there was no rational principle on which police resources may be allocated on the basis of poverty.

[74] The respondents cautioned against the adoption of a technical approach of population *vis à vis* human resources. Allocation of police officers, they argued, must be

placed in context, the guiding principle being the effectiveness in utilising police resources given to a community, such as Khayelitsha. They allege that police stations operate in different social, economic, political and geographical environments. These socio-economic and political scenarios present different policing needs that cannot be resolved through equal allocation of resources premised upon race and socio-economic considerations. Accordingly, the burden of policing differs between, for example, Rondebosch and Khayelitsha, ultimately allocation of resources must be directed at providing effective and efficient service in communities regardless of the social status and race.

[75] Redpath's analysis showed that the demographics, such as environmental, social and economic factors present in informal areas, which were taken into account when allocations were made in terms of the THRR and which were ostensibly intended to benefit these areas actually resulted in allocations which were skewed and in favour of privileged and historically White areas. In my view this is discrimination. The question is whether this discrimination is one based on any of the prohibited grounds or on unlisted grounds.

[76] Although the THRR is geared at allocating resources on a racially neutral basis it is evident from the analysis by Redpath that predominantly Black areas receive inferior policing services as compared to the so-called White areas. That this was a result of a racially neutral system of allocation does not change the fact that it is discriminatory. Nor does it make any difference that there were contributory causes, such as the standard of living to which Black communities are exposed.

[77] I have no doubt that the evidence of Redpath has established a *prima facie* case of discrimination, in so far as the Western Cape and Kwa-Zulu Natal were concerned. There is however, no evidence as to how the THRR affects other parts of the country. It is not enough to conclude, as the applicants have argued, that since there are similarities between the Western Cape and Kwa-Zulu Natal, that the pattern of discriminatory distribution of resources are replicated in the other seven provinces as well. This kind of reasoning requires making assumptions where no evidentiary proof exists. Secondly, only in reply did Redpath deal specifically with the other provinces. An applicant must make out its case in the founding papers and not in reply.

[78] In view of my finding that there is *prima facie* proof of discrimination on the basis of race and poverty, the respondent must show that such discrimination is fair. In this regard, factors that have to be considered are: (a) the position of the complainants in the society, (b) the impact of the discrimination and (c) the systemic nature of the discrimination.

[79] The respondent argued that should the Court find that the applicants have made out a *prima facie* case of discrimination that the section 14 fairness inquiry would kick in. At the outset the respondents were at pains to state that the allocation system did not fall under section 14(1) but was a section 14(2) type of case. In this respect they submitted the factors which must be taken into account were first context. The respondent submitted that the context in terms of the factors that went into the THRR included the provision of section 12(3) of the SAPS Act assessment.

[80] The respondents deny that there is any discrimination at all. Alternatively that, if this Court were to find that there was some discrimination brought about by the THRR that such discrimination was not unfair discrimination. As regards the claim of unfair discrimination the SAPS submitted that, at its simplest, the allocation system was geared at responding on an "*extent of crime basis*"; that it followed from this that stations with the highest incidence of crime were provided with a priority allocation of personnel resulting in stations, irrespective of where they were situated, being allocated personnel based on the demand as generated by the prevalence of crime. The SAPS concluded that when approached on this basis there was no evidence of direct or indirect discrimination. This bold statement by the SAPS, in my view, is not supported by the analytical evidence of Redpath.

[81] The respondents further argued that since this is a case of unfair discrimination based on the grounds of race and poverty, an appropriate comparator has to be identified as was pointed out by O'Reagan J in *MEC for Education KwaZulu-Natal and Others v Pillay*[46]. In the quest to identity an appropriate comparator for purposes of determining whether a differentiation was based on unfair discrimination O'Reagan held that:

> *"[164] In answering this question, one of the issues that arises is whether the Equality Act, properly construed, requires a complainant to show that he or she has been treated differently to some comparably situated person. I agree with the Chief Justice that it is not necessary in this case to determine whether it is always necessary for a complainant to point to a comparator in order to establish*

[46] 2008 (1) SA 474 (CC) at para 164.

discrimination in terms of the Equality Act, as there is a comparator in this case. Langa CJ finds the comparator to be those learners whose sincere religious or cultural beliefs are not compromised by the code. In my view, the correct comparator is those learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied exemption, like the learner in this case. Those learners who are not afforded an exemption suffer a burden in that they are not permitted to pursue their cultural or religious practice, while those who are afforded an exemption may do so."

[82] I am of the same view, as Langa CJ in the Pillay judgment that it is not always necessary for a complainant to point to a comparator in order to establish discrimination when acting in terms of the Equality Act.

[83] The respondents argued that the doctrine of separation of powers requires of this Court to refrain from judicial overreach save in instances where the encroachment of unavoidable and constitutionally permissible[47]. The respondents also called upon this Court to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues and to be sensitive in general to the interests of legitimately pursued

[47] The respondent relied on the judgment of the Constitutional Court in Electronic Media Network Limited and Others v E.TV(Pty) Ltd and Other 2017 (9) BCLR 1108 (CC), especially para [2] where it was said: *"[2] Turning to the Executive, one of the core features of its authority is national policy development. For this reason any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the Executive".*

by administrative bodies and the practical and financial constrains under which they operate[48].

[84] The warning by the Constitutional Court to guard against judicial overreach and to defer to the administrative bodies with the necessary administrative expertise is a salutary one. It remains the duty of the Court, however, to protect the Constitutional rights and declare unlawful any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly, imposes burdens, obligations or disadvantages on or withholds benefits opportunities or advantages from any person on one or more of the prohibited grounds.

[85] The respondents have also raised the question of the application being premature. This argument is premised on the fact that the report of the Khayelitsha Commission which gave SAPS a period of 3 years within which to implement the remedial measures. The respondent argued that this application was brought less than 2 years after the release of the report in August 2014[49]. The respondents submitted that although the recommendations of the Commission were not binding SAPS took them seriously and had been implementing them in order to improve the system of allocation. There is no merit in this argument: The Commissions findings are not binding and there is no reason why the complainants should wait for the expiry of the 3 years period before bringing the application.

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[48] C Hoexter: "*The Future of Judicial Review in South Africa Administrative Law*" (2000) 117 SALJ 484 at 501 – 2.

[49] The proceedings were instituted during March 2016.

[86] The Redpath alternative method of allocation, which was heavily criticised by the respondents, was merely developed by her during the Khayelitsha Commission to demonstrate an alternative model and to show how that would affect allocations. She did not contend that this was the best method of determining the allocation of police resources but was her attempt to demonstrate that this could be what she referred to as a rational method of resources allocation. The criticism that she was not an expert nor has she any experience in policing is not justified.

[87] In my view, the respondents have not been able to discharge their evidentiary burden of showing that no discrimination exists. First, the analytical evidence of Redpath and the data presented shows that police stations that serve poor, Black areas have the lowest police to population ratios, relatively speaking, as compared to wealthier, rich areas which are predominantly White. This is not an adoption of a technical numbers game. Context shows that the poor, Black areas also have the highest rates of contact and violent crime. Whilst, one cannot ignore other crimes, such as theft which appear to occur in greater numbers in commercial areas such as the CBD, it cannot be disputed that contact crime is more prevalent in poor and Black areas.

[88] I accept that higher allocation of police officers may not necessarily by itself translate into reduction of crime but it is a factor that contributes. More resources and better policing may result in less actual crime. I did not understand the respondents to dispute that. The fact that there are socio-economic and infrastructural challenges which present difficulties to police efficiency and effectiveness in poor, Black areas cannot be a justification for inferior police services. Whilst Redpath is not an expert in

policing, the studies she presented shows the impact policing has on crime. Rabie on behalf of the respondents, had testified before the Khayelitsha Commission that weakening of visible policing might lead to an increase in crime levels. In his words '*you can expect an increase in crime immediately.*'

[89] While Redpath has succeeded in pointing out the most obvious shortcomings with the THRR by using statistics, she has not, in my view, shown that more policing in under-developed areas will result in the eradication of crime. Poverty, for example, which cannot be solved by more police in Khayelitsha without addressing the socio-economic factors associated with under-developed informal areas and which continues to generate more crime. More than just statistical evidence would be required to solve the problem associated with policing in poor Black areas. Such interventions, of necessity, would have to be by policing experts. For the police to improve on their policing duties there needs to be an improvement in the socio-economic conditions.

[90] 25 years into our democracy people, Black people in particular, still live under conditions which existed during the apartheid system of government. The dawn of democracy has not changed the lot of the people of Khayelitsha. They continue to live in informal settlements where the provisions of services are non-existent or at a minimum. This is more glaring where a comparison is made with the more affluent areas, mainly occupied by the privileged minority. Such a comparison brings to the fore the stark reality of abject poverty. The unfortunate reality is that the residences of Khayelitsha, who are predominantly Black, continue to receive inferior services, including services from the SAPS. The SAPS discriminates against this impoverished community by using a system of human resources allocation.

[91] What remains is to deal with the submissions of the amicus curiae and the respondent's argument on the separation of powers. The amicus is the Women's Legal Centre, whose core objective is to advance and protect the human rights of all woman and girls in South Africa, was admitted to this proceedings on an unopposed basis, made meaningful contributions towards the resolution of the issues in this proceedings. At the onset the amicus was mindful of its role in this proceedings, which is to draw the attention of the Court to relevant matters of law and fact to which attention would otherwise not have been drawn.

[92] Central to the amicus' submission is that women and girls in South Africa suffer man intersecting forms of disadvantage. In this respect the amicus drew the Court's attention that SAPS has committed itself to providing resources to address the high levels of violence against women through legislation and policies the evidence that was placed before the Khayelitsha Commission and before this Court show that this undertaking has not been met. While the focus of the amicus was to highlight the inadequacies of the SAPS' efforts to combat gender violence, in general, and in the community of Khayelitsha which is highly appreciated by this Court the unfair discrimination challenged in this proceedings on the basis of race and poverty and not gender.

[93] Lastly I wish to convey the Court's gratitude and appreciation for the hard work by Counsel on both sides in preparing the papers and arguing the matter, which was by no stretch of the imagination, an easy one.

[94] In the result the order is as follows:

1. It is declared that the allocation of Police Human Resources in the Western Cape unfairly discriminates against Black and poor people on the basis of race and poverty; and
2. It is declared that the system employed by the South African Police Service to determine the allocation of Police Human Resources, in so far as it has been shown to be the case in the Western Cape Province, unfairly discriminates against Black and poor people on the basis of race and poverty.
3. The hearing on remedy is postponed to a date which shall be arranged with the parties.
4. Costs shall stand over for later determination.

M J DOLAMO
JUDGE OF THE EQUALITY COURT

I agree.

N P BOQWANA
JUDGE OF THE EQUALITY COURT