

The Khayelitsha Commission of Inquiry¹

Challenging the scope of provincial policing powers

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On 24 August 2012, the Premier of the Western Cape appointed a commission of inquiry, in terms of section 206(5) of the Constitution, to probe complaints of police inefficiency and a breakdown of relations between the community and the police in Khayelitsha, a township in the Western Cape. The Minister of Police and the National Police Commissioner challenged this decision and lodged an urgent application with the High Court of the Western Cape. The adjudication of this matter by the High Court and, subsequently, by the Constitutional Court, presented an opportunity for the courts to clarify the scope of provincial policing powers. This article analyses the courts' interpretation of the scope of provincial policing powers and argues that the adjudication of this matter has clarified the powers of provinces with regard to policing. The article also examines impediments to the exercise of provincial executives' policing powers.

For many years, the accountability of the South African Police Service (SAPS) to provincial governments has been a subject of debate.² The Constitutional Court case between the Minister of Police and the Premier of the Western Cape bears testimony to the contestation in this area. The uncertainty was as a result of section 206 of the Constitution, which states that policing is a national competency but, at the same time, confers oversight powers to provinces.³ These constitutional provisions have caused confusion regarding where responsibility actually lies. The formulation of section 206 was the product of fierce debate during negotiations preceding the ushering in of democracy in South

Africa and deals mainly with the allocation of policing powers to the national and provincial governments. The question before negotiators at the time was whether police should be controlled at national or provincial levels.⁴

This article seeks to analyse the case of the commission of inquiry in Khayelitsha in the Western Cape and considers the implications for SAPS accountability to provincial governments in the future. Because the matter was heard by the Western Cape High Court before it was adjudicated by the Constitutional Court, the analysis considers the judgement of the Western Cape High Court in the matter.⁵ The minority judgement of the Western Cape High Court is also considered.⁶ Even though minority judgements have no binding effect on lower courts, they do have persuasive force on future cases and therefore cannot be underestimated. Furthermore,

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minority decisions can contribute to the development of our jurisprudence of constitutional interpretation.⁷

This case concerns the appointment of a commission of inquiry to probe allegations of police inefficiency and the breakdown of trust between the community and the police in the Western Cape. The Premier of the Western Cape had received complaints from the Women's Legal Centre on behalf of various civil society organisations, including the Social Justice Coalition. The allegations mainly concerned the area of Khayelitsha, a township in Cape Town under the jurisdiction of the City of Cape Town. The complaints included, among others, allegations of 'widespread inefficiencies, apathy, incompetence and systemic failure of policing routinely experienced by Khayelitsha residents'.⁸ The Premier appointed a commission of inquiry in terms of section 206 (3) and (5), to be read with section 127(2) (e) of the Constitution,⁹ and section 1(1) of the Western Cape Provincial Commissions Act,¹⁰ to investigate these allegations. The establishment of this commission was widely acknowledged as being a good first step towards addressing the unacceptably high crime rate in Khayelitsha.¹¹

However, the Minister of Police challenged the Premier and questioned her authority to appoint this commission of inquiry. He contended that the Premier did not have the power to appoint a commission with coercive powers against members of the SAPS and with powers to subpoena witnesses. He maintained that the Premier had failed to comply with her constitutional obligations with regard to the requirements of cooperative governance and that the terms of reference of the commission were vague and overly broad.¹²

The Court, therefore, had the task of interpreting the powers of provinces with regard to policing, including that of appointing commissions of inquiry to investigate the SAPS.¹³ The Court also had to determine the extent of the duty of both the Premier and the Minister with regard to the principles of cooperative governance and inter-governmental relations, in the event of a dispute between two or more different spheres of government.¹⁴

This article seeks to contribute to the clarification of the role of provincial governments in policing matters.

History of SAPS accountability at provincial level

The advent of democracy in South Africa brought with it a plethora of changes to the structure and form of the country, including that of police accountability. Some of these changes were required by the first interim constitution of the Republic of South Africa. In the interim constitution, police services fell under the direction of national government as well as various provincial governments.¹⁵ It is clear that under the interim constitution, provincial governments had powers to control the police in their respective provinces.¹⁶

However, when the final Constitution (hereinafter referred to as the Constitution) was adopted by the Constitutional Assembly in 1996, the provisions of the interim constitution were drastically changed. Under the Constitution, the powers of provinces were curtailed and they were left with only monitoring, oversight and liaison functions.¹⁷ This curtailment of provincial powers in policing was considered by the Constitutional Court in the 1996 case of the certification of the Constitution.¹⁸

The question considered by the Constitutional Court in the 1996 certification case was whether the new powers of monitoring, oversight and liaison equalled the powers contained in the interim constitution relating to control of the police. The Constitutional Court agreed that provinces' loss of direct control over the provincial commissioner was a significant diminution.¹⁹ The Court further agreed that the provincial functions of oversight, monitoring and liaison were important functions and that their effective exercise by the province could have a profound influence on the performance of the provincial commissioner's functions, although the measure of control was reduced and indirect.²⁰

To compensate for the provinces' loss of direct control of the police, the provinces were given powers to establish commissions of inquiry to probe allegations of police inefficiency and dysfunctional relations with the police.²¹ It was these powers that became the subject of contestation in the case under review.

Current legal position

Under the Constitution, the powers to control and manage the police service in accordance with national policy, set by the national Minister of Police, are vested in the National Commissioner.²² In terms of Part A of schedule 4, the Constitution provides that the province and national government have concurrent competency over policing. However, the powers of the province are qualified in that the powers of the provincial executive are, to an extent, set out in chapter 11 of the Constitution. In terms of the Constitution, provinces are entitled to:

- Monitor police conduct
- Oversee the effectiveness and efficiency of the police service, including receiving reports on the police service
- Promote good relations between the police and the community
- Assess the effectiveness of visible policing
- Liaise with the cabinet member responsible for policing with respect to crime and policing in the province²³

These provisions are characterised by high levels of ambiguity. For instance, there is no clarity regarding the parameters of authority to 'promote good relations between the police and the community'.²⁴

In order to perform the above-mentioned functions, the province is given powers to:

- Investigate, or appoint a commission of inquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community
- Make recommendations to the cabinet member responsible for policing²⁵

The Constitution provides that:

- A member of the cabinet must be responsible for policing and must determine national policing policy after consulting the provincial executive and taking into account the policing needs and priorities of the provinces as determined by the provincial executive

- The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.²⁶

The Constitution further provides for the following:

- Provincial commissioners are responsible for policing their respective provinces in accordance with national legislation and subject to the control of the National Commissioner
- Annually, provincial commissioners must report on policing in the province to the provincial legislature and submit a copy of the report to the National Commissioner
- If the provincial commissioner loses the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of the commissioner or take disciplinary action against him/her in accordance with national legislation²⁷

Provincial policing powers

The Constitutional Court, in the judgement delivered by Moseneke DCJ, affirmed that the Premier and the province had a duty to respect, protect and promote the fundamental rights of people within the province.²⁸ The court stated that the Premier was obliged to take reasonable steps to shield the residents of Khayelitsha from an unrelenting invasion of their fundamental rights because of continued police inefficiency in combating crime and the breakdown of relations between the police and the community.²⁹

The Constitutional Court confirmed that the role of the provincial executive in relation to policing was limited to monitoring, overseeing and liaison functions as set out in section 206 (3) of the Constitution. To give more teeth to the monitoring and oversight functions that the province enjoyed, section 206(5) was included in the Constitution to allow provinces to set up commissions of inquiry to investigate complaints of police inefficiency or a breakdown of relations between the police and a community, and to make recommendations to the Minister.³⁰

The Constitutional Court viewed the powers of a province to investigate or appoint a commission

of inquiry for complaints against police inefficiency and compromised police-community relations as a constitutionally mandated function. According to the Court, provinces were entitled to monitor and oversee the police function,³¹ as this was one of the mechanisms of accountability and oversight available to a province. Therefore, a commission of inquiry established for this purpose must be effective and capable of giving reasonable effect to the entitlement of a province over police function.³² The Court furthermore rejected the position of the SAPS – namely that provinces can only perform such oversight via the structure of the Civilian Secretariat for Police³³ established in terms of the Civilian Secretariat for Police Act.³⁴

However, what needed to be established was whether a commission established for this purpose with the powers to subpoena witnesses was tantamount to usurping the control of the police service. The Minister of Police and the National Commissioner of Police contended that a commission of inquiry with powers to subpoena was tantamount to controlling the police, which was the constitutionally reserved function of the National Commissioner. The Constitutional Court dismissed this argument. It stated that to appoint a commission of inquiry with powers to subpoena witnesses did not give the province competence to control and direct the police service and, further, that a commission without powers to subpoena would be unable to fulfil its mandate.³⁵ It said that provincial functions of monitoring, overseeing and promoting community-police relations would never be achieved if police were immune from being called upon to testify or produce documents on their policing functions.³⁶ The Court further acknowledged the provisions dealing with inter-governmental cooperation and found that the Premier fully complied with her obligations in this regard.³⁷

The minority judgement of the Western Cape High Court, delivered by Justice Vincent Saldanha, elaborated on the exercise of these powers by the provincial executive within the context of the principles of co-operative governance in terms of chapter 3 of the Constitution. The minority judgement held that ‘the appointment of the commission of inquiry by the Premier under section 206 (5) with

regard to policing must be exercised with proper regard to the provisions of the Constitution in respect of the powers and functions over police services and must occur within the context of Section 41 of the Constitution.’³⁸

Saldanha stated that the Premier and the MEC for Safety, on one side, were enjoined by the Constitution to engage with the Minister of Police and the National Commissioner of Police, on the other side, as a precursor to the establishment of the commission of inquiry. The minority judgement, applying the terms of the Constitution, held that the duty to engage was vested in both the national and provincial spheres of government.³⁹ The latter judgement concluded that the decision to appoint the commission of inquiry was premature because, importantly, the Premier had failed to continue engaging with the Minister and the National Commissioner. She thereby failed to exhaust her obligations in terms of constitutional provisions on inter-governmental cooperation. The minority judgement in this matter emphasised the strict adherence to the principles of inter-governmental cooperation in resolving disputes between different spheres of government and/or organs of state. The minority judgement found that the Premier of the Western Cape had not exhausted her obligations under the Constitution in terms of inter-governmental cooperation.⁴⁰

Impediments to the exercise of provincial powers

The Constitutional Court made it clear that the powers of provinces with regard to policing were confined to monitoring, oversight and liaison. The Court also affirmed that these powers should be exercised with regard to the principles of co-operative governance as espoused in chapter 3 of the Constitution. However, it is the view of this writer that there are certain notable impediments to the exercise of these powers. These include, inter alia:

- Non-recognition of provincial executive powers, as entrenched in section 206 of the Constitution, by provincial management of the SAPS.⁴¹ The provincial management of the SAPS in certain provinces objects to provincial executives exercising these powers.⁴²

- The limited role of provinces in the formulation and determination of a national policing policy. The authority to do this is vested in the Minister of Police, who must establish policy after consultation with the provincial government and taking into account the policing needs and priorities of the province.⁴³ In essence, the provinces are at the mercy of the Minister in the determination of policing policy, especially those aspects that affect the provinces.⁴⁴
- Complaints from the public are the precursor to the appointment of a commission of inquiry or investigation. The provincial executive cannot *ex mero motu* set up a commission of inquiry or investigation.⁴⁵ To do so would be viewed as usurping the powers of control of the SAPS, which are vested in the National Commissioner.
- After the work of a commission of inquiry has been completed, the recommendations are sent to the Minister.⁴⁶ The Minister may decide not to take action or may frustrate the process if he/she was against the appointment of the commission in the first place.
- Weak provincial legislature will compromise police accountability at the provincial level; more so if the legislature does not exercise the powers vested in it by the Constitution. This includes calling the provincial commissioner to answer questions put to him/her and to consider the provincial SAPS's annual report. One of the primary ways in which the legislature contributes to the oversight of the police is through holding the provincial executive and Department of Community Safety accountable for fulfilling its mandate.⁴⁷
- The requirements for strict adherence to the principles of cooperative governance can frustrate the province in exercising its policing powers, especially if national government does not cooperate with the province.⁴⁸

Conclusion

The adjudication of this matter by the High Court and the subsequent appeal to the Constitutional Court has brought some clarity on the powers of provinces with regard to policing. The Constitution makes it clear that policing is a national competency.⁴⁹

However, this does not mean that provinces have no role in policing, in particular in holding the provincial police management to account.

The provincial executive also has a responsibility to promote good police-community relations. The exercise of these powers is not without challenges, but the challenges can be minimised if provincial executives understand the parameters of their powers. The ruling party, in its discussion paper, has advocated that the roles and responsibilities of provinces must be legislated so as to remove any uncertainty and possibility of disputes. Furthermore, the discussion document advocates the strengthening of the powers and functions of provinces.⁵⁰ Equally, SAPS provincial management must accept and embrace the constitutional responsibility of the provincial executive to hold police in the province accountable for their actions.



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Notes

- 1 The views expressed in this article are solely those of the author and do not reflect the views of his employer or any other individual associated with the Eastern Cape Provincial Legislature.
- 2 See David Bruce, Unfinished business: the architecture of police accountability in South Africa, African Policing Civilian Oversight Forum, Policy Paper 2, November 2011; Milicent Maroga, *Community policing and accountability at station level*, Centre for Study of Violence and Reconciliation, 2005; Gareth Newman and David Bruce, Provincial government oversight of the police, Centre for the Study of Violence and Reconciliation, April 2004. The latter paper was commissioned by the Gauteng Provincial Legislature to assist in answering, among others, the question: 'To what extent can legislature exercise control in respect of policing matters?' This was as a result of the questions that have been raised as to how best provincial governments can exercise oversight of the police agencies operating in their field of jurisdiction.
- 3 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), Pretoria: Government Printer.
- 4 David Bruce, Policing powers, politics, pragmatism and the provinces, *SA Crime Quarterly*, 40, 2012, 3.
- 5 *Minister of Police and 6 others v Premier of the Western Cape and 8 others*, 21600/2012, Western Cape High Court, unreported judgement. The applicants in this case were the Minister of Police (Former Minister Nathi Mthethwa), National Commissioner of the South African Police Service (Commissioner Riah Phiyega), the Provincial Commissioner of the South African Police Service for the Western Cape (Gen. Arno Lamoer), the Civilian Secretariat for the police service and three other police officials. The respondents were

- the Premier of the Western Cape (Premier Helen Zille), the Member of the Executive Council for Community Safety and Security, Western Cape (MEC Dan Plato), the City of Cape Town, Justice Catherine O' Regan, Adv. Vusumzi Patrick Pikoli, the Secretary to the Commission, Adv. T Sidaki, the Women's Legal Centre and the Social Justice Coalition.
- 6 At the Western Cape High Court, Justice Vincent Saldanha delivered a minority judgement and could not agree with the majority. The judgement was delivered by Justice James Yekiso with Justice Jeanette Traverso DPJ (Deputy Judge President) concurring.
 - 7 Silas Mthupi, The value of minority judgements in the development of constitutional interpretation in South Africa, *Codicillus*, 46, 2005.
 - 8 *Minister of Police and 6 others v Premier of the Western Cape and 8 others* 2013 (12) BCLR 1365 (CC), para 3. The parties in this case are similar to those in the Western Cape High Court. See *Minister of Police and 6 others v Premier of the Western Cape and 8 others* 21600/2012.
 - 9 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), Pretoria: Government Printer.
 - 10 Western Cape Provincial Commissions Act 1998 (Act 10 of 1998), Pretoria: Government Printer.
 - 11 See Pierre De Vos, Why is Mthethwa trying to stop inquiry into police incompetence, Constitutionally Speaking, <http://constitutionallyspeaking.co.za/why-is-mthethwa-trying-to-stop-inquiry-into-police-incompetence/> (accessed 25 June 2014). See also Russel Bothman and Max Price, Statement from the University of Cape Town and Stellenbosch University on the breakdown in relations between the police and Khayelitsha community, University of Cape Town, www.savi.uct.ac.za/wp-content/uploads/2012/11/UCT_US_statement_Khayelitsha.pdf (accessed 24 October 2014).
 - 12 *Minister of Police v Premier of the Western Cape* 2013 (12) BCLR, 1365 (CC), para 15.
 - 13 Constitution, section 206 (5).
 - 14 *Ibid.*, chapter 3.
 - 15 Interim Constitution 1993 (Act 200 of 1993), Pretoria: Government Printer, sections 214 and 219.
 - 16 The provisions in the Interim Constitution gave the Member of the Executive Council powers and responsibilities to issue directions to the Provincial Commissioner in his or her performance functions, as set out in section 219(1). The functions in respect of which the members of the Executive Council may issue directions to the Provincial Commissioner include:
 - The investigation and prevention of crime
 - The development of community-policing services
 - Maintenance of public order
 - Provision in general of all visible policing services; including:
 - The establishment and maintenance of police stations
 - Crime reaction units
 - Patrolling services
 - Protection services in regard to provincial institutions and personnel
 - Transfers within the province of members of the service
 - The promotion, up to rank of lieutenant-colonel, of members of the service
 - 17 Constitution, section 206.
 - 18 *Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 CC*, heard on 1–5 and 8–11 July 1996 and decided on 6 September 1996.
 - 19 *Ibid.*, para 392–401.
 - 20 *Ibid.*
 - 21 Constitution, section 206 (5).
 - 22 *Ibid.*, section 207 (2).
 - 23 *Ibid.*, section 206 (3) (a)–(e).
 - 24 Bruce, Policing powers, politics, pragmatism and the provinces, 3.
 - 25 Constitution, section 206 (5).
 - 26 *Ibid.*, section 206(1) and (2).
 - 27 *Ibid.*, section 207 (4) (a)–(b), 207(5) and 207 (6).
 - 28 *Minister of Police v Premier of the Western Cape* 2013 (12) BCLR, 1365 (CC).
 - 29 *Ibid.*
 - 30 *Ibid.*, para 38–39.
 - 31 *Ibid.*, para 41.
 - 32 *Ibid.*
 - 33 *Ibid.*, para 56.
 - 34 Civilian Secretariat for Police Act 2011 (Act 2 of 2011), Pretoria: Government Printer.
 - 35 *Minister of Police v Premier of the Western Cape* 2013 (12) BCLR 1365 (CC), para 50.
 - 36 *Ibid.*, para 54.
 - 37 *Ibid.*, para 62.
 - 38 *Minister of Police v Premier of the Western Cape*, Case No 21600/2012, Western Cape High Court, unreported judgement, para 79.
 - 39 *Ibid.*, para 82.
 - 40 *Ibid.*, para 98.
 - 41 Section 206 (3) of the Constitution provides for powers of provinces with regard to policing.
 - 42 Duxita Mistry and Judy Klipin, Strengthening civilian oversight over the police in South Africa: the national and provincial secretariats for safety and security, Institute for Security Studies, Paper 91, 2004, 18.
 - 43 Constitution, section 206 (1) and (2).
 - 44 Bruce, Unfinished business.
 - 45 *Minister of Police and Premier of the Western Cape* 2013 (12) BCLR 1365 (CC), para 38.
 - 46 Constitution, section 206 (5) (b).
 - 47 Newham and Bruce, Provincial government oversight of the police.
 - 48 Constitution, chapter 3.
 - 49 *Ibid.*, sections 206 and 207.
 - 50 African National Congress, Legislature and governance – policy discussion document, March 2012, 13.