

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CCT NO: 121/21

In the matter between:

**SOCIAL JUSTICE COALITION**

First Applicant

**EQUAL EDUCATION**

Second Applicant

**NYANGA CPF**

Third Applicant

**and**

**MINISTER OF POLICE**

First Respondent

**NATIONAL COMMISSIONER OF POLICE**

Second Respondent

**WESTERN CAPE POLICE COMMISSIONER**

Third Respondent

**MINISTER OF COMMUNITY SAFETY, WESTERN  
CAPE**

Fourth Respondent

**WOMEN'S LEGAL CENTRE TRUST**

Fifth Respondent

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**FILING SHEET**

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**KINDLY TAKE NOTICE THAT** the Fifth Respondent herewith files the following document:

1. Fifth Respondent's Notice of Application to file affidavit and to adduce the further evidence contained and referred to therein.

DATED AT **CAPE TOWN** ON THIS **18th** DAY OF **MAY 2021**.



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**WOMEN'S LEGAL CENTRE**

**Fifth Respondent's Attorneys**

2<sup>nd</sup> Floor, 5 St Georges Mall

St Georges Mall

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Tel: 021 4245660

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**c/o BOWMAN GILFILLAN as correspondent attorneys**

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Sandton

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TO: **THE REGISTRAR of the CONSTITUTIONAL COURT**

Constitutional Hill Human Rights Precinct

Constitutional Hill  
1 Hospital Street  
BRAAMFONTEIN  
Email: [registrar@concourt.org.za](mailto:registrar@concourt.org.za)

**TO: THE REGISTRAR OF THE EQUALITY COURT**

Western Cape Division  
High Court  
Cape Town  
Email: [Space@judiciary.org.za](mailto:Space@judiciary.org.za)

**AND TO: LEGAL RESOURCES CENTRE**

**First Applicant's Attorneys**

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Doncaster Road and Loch Road  
Kenilworth  
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(Ref: A Payne) (Service by email)  
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**c/o LEGAL RESOURCES CENTRE**

Second Floor, West Wing, Women's Jail  
Constitution Hill  
1 Kotze Street  
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AND TO: **WEBBER WENTZEL**

**Second and Third Applicant's Attorney**

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Email: [Odette.Geldenhuys@webberwentzel.com](mailto:Odette.Geldenhuys@webberwentzel.com)

AND TO: **THE STATE ATTORNEY, CAPE TOWN**

**First to Third Respondent's Attorneys**

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Ref: L Manual/1128/16/P12 (Service by email)

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Email: [TLombard@justice.gov.za](mailto:TLombard@justice.gov.za)

**Aretha**

---

**From:** postmaster@lrc.org.za  
**To:** Amy-Leigh Payne  
**Sent:** Tuesday, 18 May 2021 14:51  
**Subject:** Delivered: SJC & OTHERS v MINISTER OF POLICE & OTHERS: CCT 21/2021

**Your message has been delivered to the following recipients:**

[Amy-Leigh Payne \(amyleigh@lrc.org.za\)](mailto:amyleigh@lrc.org.za)

Subject: SJC & OTHERS v MINISTER OF POLICE & OTHERS: CCT 21/2021

## Aretha

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**From:** Microsoft Outlook  
**To:** Odette Geldenhuys  
**Sent:** Tuesday, 18 May 2021 14:51  
**Subject:** Relayed: SJC & OTHERS v MINISTER OF POLICE & OTHERS: CCT 21/2021

**Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:**

[Odette Geldenhuys \(Odette.Geldenhuys@webberwentzel.com\)](mailto:Odette.Geldenhuys@webberwentzel.com)

Subject: SJC & OTHERS v MINISTER OF POLICE & OTHERS: CCT 21/2021

## Aretha

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**From:** Microsoft Outlook  
**To:** LManuel@justice.gov.za; TLombard@justice.gov.za  
**Sent:** Tuesday, 18 May 2021 14:51  
**Subject:** Relayed: SJC & OTHERS v MINISTER OF POLICE & OTHERS: CCT 21/2021

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[LManuel@justice.gov.za](mailto:LManuel@justice.gov.za) (LManuel@justice.gov.za)

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**WOMEN'S LEGAL CENTRE TRUST**

Fifth Respondent

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**FIFTH RESPONDENT'S NOTICE OF APPLICATION**

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**PLEASE TAKE NOTICE** that the above-mentioned Fifth Respondent, in addition to supporting the relief sought by the Applicants, intends to make application to this Court for the following further orders:

1. Granting the Fifth Respondent leave to file this affidavit and to adduce the further evidence contained and referred to therein.



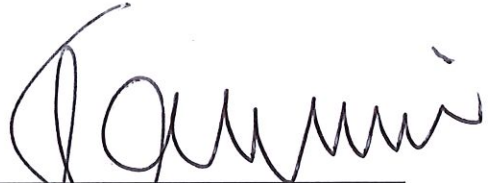
2. Following paragraphs 2.1.1 to 2.2.4 of the Applicants' proposed order with regards to remedy:

*2.2.5. Whether sufficient weight is given to the proliferation of violent crimes against women in the allocation of police resources.*

3. Further and/or alternative relief.

**TAKE NOTICE FURTHER** that the affidavit of **SEEHAAM SAMAAI** shall be used in support hereof.

DATED AT **CAPE TOWN** ON THIS **18th** DAY OF **MAY 2021**.



**WOMEN'S LEGAL CENTRE**

**Fifth Respondent's Attorneys**

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**TO: THE REGISTRAR of the CONSTITUTIONAL COURT**

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Email: [Space@judiciary.org.za](mailto:Space@judiciary.org.za)

**AND TO: LEGAL RESOURCES CENTRE**

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Ref: Odette Geldenhuys

Email: [Odette.Gelhenhuys@webberwentzel.com](mailto:Odette.Gelhenhuys@webberwentzel.com)

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Email: [LManual@justice.gov.za](mailto:LManual@justice.gov.za)

AND TO: **THE STATE ATTORNEY, CAPE TOWN**

**Fourth Respondent's Attorneys**

22 Long Street

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**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

**WOMEN'S LEGAL CENTRE**

Fifth Respondent

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**ANSWERING AFFIDAVIT**

I, the undersigned,

**SEEHAAM SAMAAI**

do hereby make oath and state:

**I. INTRODUCTION**

1. I am the Director of the Women's Legal Centre Trust ("**WLC Trust**"), situated at 2<sup>nd</sup> Floor, 5 St George's Mall, Cape Town.
2. The WLC Trust is a registered non-profit organisation with registration number 032-685-NPO and a registered public benefit organisation with tax exemption number 930-00-242. To avoid overburdening the Court with too much paper, the WLC Trust's Deed can be made available to the Court or any of the parties in the matter. I have, however, attached a copy of the Master of the High Court's Certificate authorising the present Trustees to act on behalf of the Trust as "**SS1**".
3. I am duly authorised to act on behalf of the WLC Trust in these proceedings and to depose to this affidavit on its behalf. I attach a resolution adopted by the WLC Trust Board of Trustees on 10 May 2021 as annexure '**SS2**'.
4. The facts contained herein are to the best of my knowledge both true and correct and, unless otherwise indicated by statement or context, fall within my personal knowledge.

5. Briefly, the matter which has been brought by the first, second and third Applicants ("the Applicants") seeks to remedy the manner in which the South African Police Service ("SAPS") allocates police human resources to police stations. The Applicants allege that the current arrangement is irrational and discriminatory insofar as it (a) provides more police officers to stations servicing rich, predominantly white populations with low rates of contact crime and (b) fewer police officers to stations serving poor, Black communities with high rates of contact crime.
6. In its judgment in December 2018, the Western Cape High Court sitting as the Equality Court ("the Equality Court") agreed that the system employed by SAPS in allocating police human resources in the Western Cape unfairly discriminates against Black and poor people on the basis of race and poverty, but stopped short of providing relief aimed at addressing the discriminatory effect of the resource allocation employed by the SAPS. The questions regarding what further relief should be granted to remedy the identified unfair discrimination identified, as well as the matter of costs, was postponed to a date which was to be arranged by the parties. For the various reasons set out in the Applicants' papers in this Court, no date was set for a hearing on remedy.
7. The Applicants have now approached this Honourable Court seeking, *inter alia*, a remedy to address the discriminatory impact of the method adopted by SAPS in allocating police human resources. The WLC Trust supports the relief proposed by the Applicants and further urges this Court to also focus on the experiences of women in regards to poverty, racial discrimination and contact crimes in South Africa.

8. At the outset however, it bears mentioning that it has been two and a half years since the Equality Court handed down its judgment. In that period, there has been an increased acknowledgment and emphasis on the need to address violent crimes committed against women across South Africa. In order to properly consider the issues raised in these proceedings – i.e. the allocation of police human resources – the WLC Trust believes it is necessary for this Court to be pertinently apprised of these developments.
9. The purpose of this affidavit, therefore, is to provide an overview of how the rights of and discrimination experienced by women must play a role in this Court's determination of the issues. To that end, the WLC Trust respectfully requests that this Court permit it to amplify the evidence presented in the Equality Court insofar as it addresses the development of the State's attitude to violent crimes committed against women and why, despite the acknowledgment by the State the prevalence of such crimes has reached epidemic proportions, it remains necessary to address the issue of indirect gender discrimination in these proceedings.
10. The WLC Trust also prays that, when granting the declaratory relief sought by the Applicants, this Court expressly recognises the unfair discrimination on the basis of gender that arises from the existing method of allocating police human resources.
11. The WLC Trust also prays for a fifth consideration to be added to "*the four considerations*" proposed under paragraph 2.2 of the Applicants' Notice of Motion, viz:



*2.2.5. Whether sufficient weight is given to the proliferation of violent crimes against women in the allocation of police resources.*

12. Before concluding this introductory section, it is necessary to clarify some of the concepts and terminology used in this affidavit to ensure that the WLC Trust's position before this Court is properly understood and viewed within the correct context.

- 12.1 Discrimination based on gender and/or gender identity experienced by women is complex and diverse as it is inextricably linked to other identities and contexts that women navigate and which affect their lives. Reference to women in this case must therefore ensure that certain stigmas and prejudices of womanhood are dismantled and responded to. To this end, reference to women/gender includes women in all their diversity.

- 12.2 Gender based violence is violence directed against a person because of their gender. Women, men, transgender persons, and gender diverse persons all experience gender-based violence but the majority of victims are women and girls.

- 12.3 Article 1 of the Declaration on the Elimination of Violence against Women Proclaimed by General Assembly resolution 48/104 of 20 December 1993 states that, for the purposes of the Declaration, the term "*violence against women*" means any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.


- 12.4 Article 2 states that violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.
- 12.5 Many sectors and organisations use the term 'violence against women' and 'gender based violence' interchangeably and ascribe the same meaning to the terms. However, the term 'gender based violence' is also used to more broadly include other forms of violence which are specifically directed at marginalised and vulnerable groups because of their gender (other than women), such as gay men, or young boys/men who are targeted for forced recruitment into fighting armed forces. It may include other forms of gendered and sexualised violence, for example, based on sexual identity.
- 12.6 The Women's Legal Centre, while recognising that violence perpetrated against any group on the basis of gender is unacceptable, focusses its resources and expertise on violence against women in all their diversity.

- 12.7 In the context of this matter, therefore, the WLC Trust's focus is on SAPS' resource allocation to address the proliferation of crimes committed specifically against women.
13. In setting out the position of the WLC Trust in this case, this affidavit is structured as follows:
- 13.1 **Part II** will introduce the WLC and its interest in the matter, and Submissions made in the Equality Court; and
- 13.2 **Part III** will detail the submissions to be made by the WLC to this Honourable Court. Part IV of the affidavit is divided into parts A, B, C and D.

## **II. THE WLC TRUST, ITS INTEREST IN THE MATTER AND SUBMISSIONS MADE IN THE EQUALITY COURT**

14. The WLC Trust was established on 3 August 1998. The detailed objectives of the Trust are set out in clause 4 of its Trust Deed. A core objective of the Trust is to advance and protect the human rights of all women and girls in South Africa, particularly women who suffer many intersecting forms of disadvantage. In so doing the Trust seeks to contribute to redressing the systemic discrimination and disadvantage that women face.
15. The Trust fulfils its main object by giving legal assistance to women litigants free of charge, and by making *amicus curiae* submissions to assist Courts in constitutional and public interest matters that concern women's rights and gender equality.

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16. To this end the Trust established the Women's Legal Centre ("WLC") to conduct public interest litigation including constitutional litigation to advance the human rights of women. Since its inception, the WLC has participated in numerous cases concerning the rights of women. The WLC's litigation over the years has covered issues such as sexual and domestic violence, child abuse, vicarious liability of police officers in relation to sexual and domestic violence; as well as women's property rights on divorce or death of their partners and the rights of farm women to occupy housing in their own right. I attach a list of some of the cases litigated by the WLC as Annexure "SS3".
17. I submit that considering the WLC Trust's and WLC's history of assisting, advising and representing women in cases concerning discrimination based on their race, sex and gender or the intersection thereof, the WLC Trust is well placed to participate and represent the interests of women in these proceedings.
18. As stated above, the WLC Trust participated as an *amicus curiae* in the Equality Court. During the Equality Court proceedings, the WLC Trust made submissions on the gendered impact of the inadequate allocation of human resources and the resultant inefficient policing in Khayelitsha and specifically advanced submissions on broadly the following issues and how they were affected by the relief sought:
- 18.1 The link between allocation of human resources and violence against women.
- 18.2 The obligation of the state to protect, promote and respect women's rights within the context of violence and safety.

18.3 The socio-economic context: women in informal settlements.

19. The WLC Trust presented an expert affidavit from Dr Genine Josias whose affidavit dealt with:

19.1 First, the government's legal and policy framework in regard to crime prevention strategies, with a particular focus on violence against women; and

19.2 Second, the interface between

19.2.1 Khayelitsha police and Khayelitsha Family Violence, Child Protection and Sexual Offences Unit ("**the FCS Unit**"), on the one hand; and

19.2.2 the Khayelitsha community, generally, and women and children, in particular, who are victims/survivors of crime.

20. In its judgment, the Equality Court did not engage with the submissions made by the WLC Trust. The Equality Court's stated reason for not engaging with the submissions of the WLC Trust was that *'[w]hile 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 in particular, which is highly appreciated by this Court, the unfair discrimination challenged in these proceedings on the basis of race and poverty, not gender.'*<sup>1</sup>

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<sup>1</sup> Social Justice Coalition and Others v Minister of Police and Others 2019 (4) SA 82 (WCC), at paragraph 92.

21. For reasons which will become clear below, the WLC Trust's view is that the Equality Court was wrong not to consider the particularly harsh effects inadequate policing has on women.
22. The WLC's participation in this honourable Court is therefore aimed at, among other things, highlighting:
- 22.1 The interconnection between race, poverty, crime and gender in South Africa and the implications of this relationship in the discrimination arguments made in the case.
- 22.2 The automatic implication of gender given that the declarations made by the Equality Court indirectly impact gender as a result of this interconnection.
- 22.3 Accordingly, the relief that the Court considers and grants must ensure that the gendered aspects of the discrimination sought to be addressed are not ignored, but are considered and reflected in the order granted by this Court.

### **III. SUBMISSIONS TO BE MADE BY WLC TRUST**

23. The submissions to be made by the WLC Trust in this honourable court can be divided into four interconnected parts namely:
- 23.1 Part A, which will discuss gender within the context of intersectional discrimination based on poverty and race within the crime prevention focus of the case;

- 23.2 Part B, which will focus on the state's obligations to prevent violence against women in South Africa;
- 23.3 Part C, which will provide the general context of violence against women in South Africa; and
- 23.4 Part D, which will discuss the appropriate remedy if it is found that the THRR is discriminatory.

**A. GENDER WITHIN THE CONTEXT OF INTERSECTIONAL DISCRIMINATION  
IN THIS CASE**

24. In this section, the WLC Trust seeks to highlight the interconnection between race, poverty, crime and gender. The aim here is to show that whether or not gender was listed by the Applicants as a further ground for discrimination, it is an unavoidable adjunct to the identified discrimination on the basis of race and poverty.
25. The WLC Trust's and the WLC's experience in working for the advancement of women's rights in South Africa for over 20 years has indicated that oppression, discrimination and exclusion are interlinked. This is commonly referred to as intersectionality.
26. Intersectionality was acknowledged in *Mahlangu and Another v Minister of Labour and Another* when this Court confirmed that intersectional discrimination means "acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics

at play”<sup>2</sup> and that when there is discrimination on the intersecting grounds of race, sex and gender, then “*not only is the discrimination presumptively unfair but the level of discrimination is aggravated*”<sup>3</sup>.

27. In paragraph 85 of the same judgment, this Honorable Court explained that:

*“Intersectionality aims to evaluate how intersecting and overlapping forms of oppression result in certain groups being subject to distinct and compounded forms of discrimination, vulnerability and subordination. As such, at times Black women may experience compounded forms of discrimination as compared to Black men or White women. In other cases, they may experience forms of discrimination and vulnerability that are qualitatively different from both these groups. The power of an intersectional approach lies in its capacity to shed light on the experiences and vulnerabilities of certain groups that have been erased or rendered invisible.”*<sup>4</sup> (emphasis added)

28. In the circumstances, the Equality Court was wrong not to confront and apply the full range of intersectionality of the discrimination in this matter simply on the basis that gender discrimination was not specifically raised by the Applicants. The High Court’s approach is illustrative of Catherine Albertyn’s observation as long ago as 2007<sup>5</sup> that ‘*the capacity and willingness of judges to recognize and address the multiple systemic inequalities that still pervade our society as well as their ability to develop a consistently transformative jurisprudence that applies*

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<sup>2</sup> *Mahlangu and Another v Minister of Labour and Another* 2021 (2) SA 54 (CC) at paragraph 76.

<sup>3</sup> *Mahlangu* at paragraph 73

<sup>4</sup> *Mahlangu and Another v Minister of Labour and Another* 2021 (2) SA 54 (CC) at paragraph 85.

<sup>5</sup> Albertyn C “*Substantive Equality and Transformation in South Africa*” (2007) SAJHR 253



*the ideas of substantive equality'* is one of the constraints on true transformation in South Africa.

29. The reality is that, as a result of SAPS' resource allocation system, the discrimination faced by Black women living in townships is compounded because of the intersection between race, class (poverty), high levels of crime (particularly violence against women) **and** gender.
30. Within this context, an intersectional approach is a tool to achieve substantive equality. Again, Albertyn aptly described that '*[a] transformative approach would locate an understanding of women's disadvantage within these systemic inequalities, and then seek to dismantle them...*'<sup>6</sup>
31. Discrimination and oppression against women is, quite literally, a system of inequality as old as time. In South Africa, Apartheid's legacy of inequality and violence has placed poor Black women in a particularly vulnerable position.
32. In *Brink v Kitshoff NO*<sup>7</sup>, Justice O'Regan noted that, "*Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap.*"<sup>8</sup>
33. During the 2012 State of the Nation Address, nearly two decades into the country's constitutional democracy, former President Zuma highlighted what he

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<sup>6</sup> Albertyn, C "*Substantive Equality and Transformation in South Africa*" (2007) SAJHR 253 at 256

<sup>7</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

<sup>8</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at para 44.

referred to as the “triple challenge” faced by South Africa: that of unemployment, poverty and inequality, *“which persists in spite of the progress made”*.<sup>9</sup> He emphasized that *“Africans, women, and the youth continue to suffer most from this challenge”*.<sup>10</sup>

34. Two years later, Carol Bower also noted that, despite the dawn of a constitutional democracy, Black women in South Africa continue to be burdened by, and are disproportionately affected by oppressive systems such as racism, sexism and patriarchy which significantly contributes to the high levels of sexual violence that characterizes their lives.<sup>11</sup>
35. Thus, while the THRR may appear, at face value, to be a gender neutral method of applying police resources, the fact that it does not recognize and address the systemic foundations of the prevalence of violence against women underlies its failure to achieve substantive equality for Black women in South Africa.
36. Relevant to these proceedings are three main areas where women experience intersecting forms discrimination, namely:
  - 36.1 Intersection between Race and Gender;
  - 36.2 Intersection between Poverty and Gender; and
  - 36.3 Intersection between crime, race, poverty and gender.
37. I deal with each of these in turn.

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<sup>9</sup> <https://www.gov.za/node/538324>.

<sup>10</sup> <https://www.gov.za/node/538324>

<sup>11</sup> Bower, C “The Plight of Women and Children: Advancing South Africa's Least Privileged” *The Annals of the American Academy of Political and Social Science* 652 (2014) 106 at 108.

### ***Intersection between Race and Gender***

38. The particular vulnerability of Black women to violence has already been illustrated above.
39. In addition to the indirect discrimination on the basis of gender, the current resource allocation mechanism that SAPS uses also discriminates against Black women who live in townships by disproportionately catering to and favouring historically white, affluent areas. This is in contravention of Section 7(d) of PEPUDA which stipulates that no person may be unfairly discriminated against *“on the ground of race including the provision or continued provision of inferior services to any racial group, compared to those of another racial group”*. Viewed against the objective of attaining substantive equality, the provision requires that any system of service delivery aimed at serving the public must take into account the various ways in which Black women are systemically denied the benefits of said service in comparison to their White counterparts.

### ***Intersection between Poverty and Gender***

40. Poverty is commonly measured by levels of income and a person's ability to holistically take care of themselves using those means.
41. In 2017, Statistics South Africa released a report titled *'Poverty Trends In South Africa: An Examination of absolute poverty between 2006 and 2015'*<sup>12</sup>. The report noted that *'women bear a disproportionate burden of unemployment, constitute*

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<sup>12</sup> Available at <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> accessed on 17 May 2021

*the majority of casual or contract workers, generally occupy low-wage job positions, and are poorly represented in senior and top management positions.*<sup>13</sup>

42. In the circumstances, any discrimination on the basis of poverty – as was found by the Equality Court to exist – will necessarily affect women more than it does men.
43. When one considers the judgment of this Court in *Mahlangu*, in particular, the need to consider the rights of women when allocating police resources in the Townships cannot be ignored. In that judgment, when considering the rights of domestic workers to social security benefits, it was observed that:
- 43.1 Women who are employed as domestic workers are also often the financial heads of their families;
- 43.2 Domestic workers are amongst the most indigent and vulnerable members of society; and
- 43.3 The working hours of domestic workers are long and unpredictable.
44. The relevance for present purposes is this: policing involves more than the investigation of crime – it also involves the employment of resources and strategies aimed at crime prevention. In *Carmichele v Minister of Safety and Security*<sup>14</sup> Ackermann and Goldstone JJ emphasized that SAPS is one of the primary state agencies mandated to protect the public generally from violent crime and that the state had a particular responsibility to women and children to

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<sup>13</sup> *Ibid.* p 41

<sup>14</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

keep them safe from the invasion of their fundamental rights by perpetrators of violent crime.<sup>15</sup> A necessary corollary of SAPS effectively carrying out this mandate would be to consider the most vulnerable women - namely poor and Black women - and how its resources may be deployed to efficiently and effectively provide such services.

45. Viewed against the observations made in *Mahlangu* and highlighted in paragraphs 43 to 43.3 above, the protection of vulnerable women – like those who are employed as domestic workers, for example - must include mechanisms aimed at ensuring that such women can safely travel to and from work no matter the length and unpredictability of their working hours.
46. Moreover, in the context of informal settlements more generally, women are more vulnerable to assault, robbery and sexual violence, often targeted on their way to school, work, walking to and using toilet facilities, or in poorly lit and bushy areas.
47. In the '*Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa*'<sup>16</sup>, the Rapporteur notes that:
- 47.1 South African violence inherited from apartheid still resonates in today's society dominated by deeply entrenched patriarchal norms and attitudes towards the role of women, and which makes violence against women

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<sup>15</sup> Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) at paragraph 62.

<sup>16</sup> UN A/HRC/32/42/Add.2, June 2016.

and children, especially in rural areas and in informal settlements, a way of life and an accepted social phenomenon.<sup>17</sup>

47.2 South African government officials have pointed out that the roots of many forms of violence against women lie in poverty in which most of the population lives.<sup>18</sup>

48. The Rapporteur further notes that police in Diepsloot, an informal settlement, often do not intervene in cases of violence against women and children due to lack of human resources, vehicles and volatile security.<sup>19</sup> Victims are left unprotected and unable to access any service providers in the settlement beyond an NGO. This lack of infrastructure was similarly identified by the Khayelitsha Commission, which also identified inadequate sanitation and poor street lighting as issues that negatively affect policing.<sup>20</sup>

### ***Intersection between crime, race, poverty and gender***

49. In its 2019 research brief titled '*What Drives Violence in South Africa*', the Centre for the Study of Violence and Reconciliation (CSV) found that "[in] South Africa's patriarchal society, where men are generally expected to be unconditionally powerful providers, not having the resources to play this role creates the conditions for violence. Poverty increases the likelihood of being both

<sup>17</sup> 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/32/42/Add.2, June 2016 at page 3.

<sup>18</sup> Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/32/42/Add.2, June 2016 at page 13.

<sup>19</sup> Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/32/42/Add.2, June 2016 at page 8.

<sup>20</sup> *Towards a Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha* (the Khayelitsha Commission Report) (available at [https://www.westerncape.gov.za/police-ombudsman/files/atoms/files/khayelitsha\\_commission\\_report\\_0.pdf](https://www.westerncape.gov.za/police-ombudsman/files/atoms/files/khayelitsha_commission_report_0.pdf)) p 39 para [33] and [34]



a perpetrator and a victim of gender-based violence, and especially intimate partner violence".<sup>21</sup>

50. This gendered aspect to contact crimes was also recently recognised by this Court in *Tshabalala v The State; Ntuli v The State* where it was found that:

*"Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions."*<sup>22</sup>

51. The concurring judgment of Khamepe J also expressly recognised the intersection of crime, race and poverty by acknowledging that:

*"Rape is a scourge that affects women of all races, classes and sexual orientations, but we know that in South Africa rape has a pernicious effect on black women specifically. To erase the racial element in this epidemic is to erase the experiences of the women of that horrendous night. **This "intersectional erasure" is a rhetorical gesture that not only negates the lived experience of women at these intersections of oppressed identities but also means that our response to the crisis will always be deficient and under-inclusive. Speaking of rape on these terms is not a preoccupation with***

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<sup>21</sup>'What Drives Violence in South Africa', Centre for the Study of Violence and Reconciliation's (CSV) 2019 at page 3.

<sup>22</sup> *Tshabalala v The State; Ntuli v The State* [2019] ZACC 48 (11 December 2019) at paragraph 61.

*personal identity but an analysis of the ways in which power impacts particular women.*"<sup>23</sup>

52. This case presents this Court – and the State – with an opportunity to be more efficient and more inclusive in addressing the allocation of police resources in areas where women's safety are constantly at high risk.

**B. THE STATE'S OBLIGATIONS TO PREVENT VIOLENCE AGAINST WOMEN IN SOUTH AFRICA**

53. In what follows, I identify in broad terms the various sources of the State and SAPS obligations to protect the rights of women, including:

53.1 Constitutional obligations;

53.2 International obligations; and

53.3 Domestic legislative and policy frameworks.

**Constitutional obligations of the state**

54. Section 205(3) of the Constitution of South Africa provides that "*the objects of the police service are 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.*"

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<sup>23</sup> *Tshabalala v The State; Ntuli v The State* [2019] ZACC 48 (11 December 2019) at footnote 38.



55. Section 7(2) of the Constitution requires the State, which includes SAPS, to protect, promote and fulfil the rights in the Bill of Rights. In the context of violence against women, the rights implicated are:

55.1 Section 9(1) and 9(2): *the right to equal protection and benefit of the law, including substantive;*

55.2 Section 10: the right to inherent dignity and the right to have one's dignity respected and protected;

55.3 Section 11: the right to life;

55.4 Section 12(1)(c): the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.

56. Section 12(2)(b): Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.

57. Reading the above sections together, therefore, imposes both a negative obligation on the State not to interfere with rights, but also a positive obligation to take steps to respect, promote and fulfil rights.<sup>24</sup> There are several specific aspects of the state's duty that are now well-entrenched in our constitutional jurisprudence:

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<sup>24</sup> *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) at para 11; *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 47; *Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC) at paras 44 to 45; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 20.

57.1 The state is obliged "*directly to protect the right of everyone to be free from private or domestic violence*";<sup>25</sup>

57.2 The state is obliged to "*take appropriate steps to reduce violence in public and private life*";<sup>26</sup>

58. The state is also obliged in certain circumstances "*to provide appropriate protection to everyone through laws and structures designed to afford such protection*" which may imply "*a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual*".<sup>27</sup>

59. Yet, violence against women is rife in South Africa, making it one of the primary focusses of policing in recent times – at least on paper and in media addresses. This has been a stated commitment which SAPS and the government of South Africa have acknowledged and which has been reflected in numerous public statements, policy documents and legislation.

60. However, if the THRR continues to drive the allocation of police human resources, it is hard to imagine how these public pronouncements will translate into meaningful results. On the other hand, if the THRR is to be revised in accordance with this Court's directions, then it is vitally important that the interests of women are expressly identified to avoid the possibility that a new system of allocation, founded on the back this Court's judgment, will focus only

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<sup>25</sup> *Baloyi* 2000 at para 11.

<sup>26</sup> *Christian Education* at para 47.

<sup>27</sup> *Carmichele* at paras 44 to 45, citing with approval, *Osman v United Kingdom* 29 EHHR 245 at 305, para 115.

on addressing discrimination on the grounds of race and poverty, as raised by the Applicants, at the expense of the already identified prevalence of violence against women.

### **International law obligations**

61. The Constitutional Court has recognised South Africa's international law duty to ensure the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent a violation of those rights.<sup>28</sup>

#### *Convention on the Elimination of All Forms of Discrimination Against Women*

62. South Africa is a signatory to a few international human rights instruments, the most notable of which is the Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**").
63. CEDAW has been described as the definitive international legal instrument requiring respect for and observance of the human rights of women.<sup>29</sup> It is said to be "*universal in reach, comprehensive in scope and legally binding in character*".<sup>30</sup>
64. The South African Government ratified CEDAW on 15 December 1995 and is therefore bound by the obligations created by it.

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<sup>28</sup> *Baloyi* para 13; *Carmichele* at para 62; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 15.

<sup>29</sup> Kathree F 'Convention on the Elimination of all forms of discrimination against women' *SAJHR* (1995) 421 at 421.

<sup>30</sup> Cook R 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 *Virginia Journal of International Law* 643 at 643.

65. CEDAW itself contains no less than six articles that indirectly relate to violence against women.<sup>31</sup> General Recommendation No. 19<sup>32</sup> explicitly states that the general prohibition of gender discrimination includes "*gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately*".<sup>33</sup>
66. General Recommendation No. 19 further recommends that in order to fulfil their duties under the Convention, states must take all measures necessary to provide effective protection to women, including comprehensive legal, preventative and other measures.<sup>34</sup>
67. The principles underpinning CEDAW are also evident in the preamble to the Universal Declaration of Human Rights and article 4(d) of the Declaration on the Elimination of Violence Against Women.<sup>35</sup>

*African Charter on the Rights of Women*

68. The South African Government ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("**the African Charter on the Rights of Women**") on 17 December 2004.
69. Article 3 of the African Charter on the Rights of Women guarantees that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights and requires state

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<sup>31</sup> Articles 2,3,6,11,12 and 16.

<sup>32</sup> U.N. Doc. HRI/GEN/1/Rev.1 at 84 (1994).

<sup>33</sup> Para 6.

<sup>34</sup> Para 24 (t).

<sup>35</sup> U.N. GAOR, 48<sup>th</sup> Sess., art. 1 UN.doc. A/Res/ 48/104 (1994).

parties to *"adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence."*

70. Article 4 states that "[e]very woman shall be entitled to respect for her life and the integrity and security of her person" and article 4(2) obliges the state to *"enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public"*.<sup>36</sup>

71. In the event of violation of women's rights in this Protocol, Article 25 provides that parties:

*"undertake to provide for appropriate remedies to any woman whose rights or freedoms, have been violated and ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law."*

#### SADC Protocol on Gender and Development

72. Part six of the SADC Protocol on Gender and Development<sup>37</sup> addresses gender based violence and it creates an obligation on state parties to enact and enforce legislation prohibiting all forms of gender based violence.<sup>38</sup>

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<sup>36</sup> Article 4 (a).

<sup>37</sup> South Africa has signed but not yet ratified the SADC Protocol on Gender and Development.

<sup>38</sup> Article 1 of SADC Protocol on Gender and Development.

### Domestic legislation

73. The preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2017 recognises the prevalence of sexual offences in South Africa and the vulnerability of women and children in particular to these offences. It acknowledges South Africa's international and constitutional obligations, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children and other vulnerable persons to have their best interests considered of paramount importance. Section 2 of the Act commits to affording complainants of sexual offences the maximum and least traumatising protection that the law can provide.
74. The preamble to the Domestic Violence Act 116 of 1998 recognises domestic violence as a serious social evil, the high incidence of domestic violence in South Africa and that the victims of domestic violence are among the most vulnerable in society. The purpose of the Act is to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide.
75. Of significance, both Acts seek to *"introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act"*. The legislation crafted specifically to address the high levels of violence against women in South Africa provide the legal obligations on the state to introduce measures, such as sufficient resources, to enable state organs like SAPS to implement and give effect to the objects of these Acts.

## **South African Policy Frameworks to address crime**

### **National Crime Prevention Strategy<sup>39</sup>**

76. The National Crime Prevention Strategy, which was adopted in 1996, came about due to the following conditions: high levels of violent crime leading to injury, loss of life, possessions and livelihood, resulting in the deprivation of citizens' rights and dignity, and in citizens experiencing the inhibiting consequences of crime and fear of crime.
77. Crime became a national priority because it threatened the rights and freedoms of citizens entrenched in the constitution. The strategy applied to all national departments that were able to contribute to the reduction of crime levels. A shift of emphasis was required in order to move from reactive 'crime control' towards 'crime prevention'. It cited gender violence and crimes against children as being highly prevalent and having a profoundly negative impact on the rights and well-being of women and children. It also cited the establishment of specialised police units to investigate crimes against children and the creation of victim aid centres offering interdisciplinary services, as interventions that were already in progress. The National Crime Prevention Strategy was developed from the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which is based upon the philosophy that victims are entitled to access to mechanisms of justice, and to prompt redress for harm and loss suffered.

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<sup>39</sup> See Josias Expert Affidavit : paras 15-23

#### White Paper on Safety and Security<sup>40</sup>

78. The Minister of Safety and Security noted that the focus of the White Paper on Safety and Security is limited to areas which will have maximum impact in improving the quality of service to the public. It advocates a dual approach to safety and security: effective and efficient law enforcement and the provision of crime prevention programmes.
79. In order to ensure greater accountability for improved service delivery, the White Paper promotes policy formulation to remain the responsibility of government, and policy implementation to remain the responsibility of police. The institutional reform outlined in the White Paper requires the development of human resources.

#### Victim Empowerment Programme<sup>41</sup>

80. The National Victim Empowerment Programme was adopted in 1999. It recognised the varying needs of victims of crime depending on who they are and the nature of the crime. Additionally, it recognised that the role of SAPS includes attending to the reporting and investigation of crime scenes, and the investigation of crime through Detective Services and other specialist units. A number of target groups are prioritised in terms of the programme, including victims of domestic violence, and victims of sexual assaults and rape. The National Policy Guidelines for Victim Empowerment places a number of duties upon SAPS, including professional and sensitive treatment of victims and witnesses, informing victims

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<sup>40</sup> See Josias Expert Affidavit : para 24

<sup>41</sup> See Josias Expert Affidavit : paras 25-28



of their rights, taking statements in private, referral of victims to support systems, and providing victims with feedback regarding the status of their case.

#### Victims Charter<sup>42</sup>

81. The Service Charter for Victims of Crime in South Africa ("the Victim's Charter") was adopted in 2004 and draws upon the spirit of the Constitution and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (GA/RES/40/34). The Charter committed government to a victim-centred criminal justice process which seeks to eliminate secondary victimisation, and sets service standards to be accorded to victims, making provisions for recourse in cases where these standards are not met. The Charter includes seven rights of victims including: the right to receive information, the right to protection, and the right to be treated with fairness and respect for dignity and privacy.

#### Minimum Service Standard<sup>43</sup>

82. A Minimum Service Standard for Victims of Crime was adopted in 2004 to define what services victims were entitled to in terms of the seven rights listed in the Victim's Charter. The Minimum Service Standard sets out the responsibilities of government departments including SAPS.

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<sup>42</sup> See Josias Expert Affidavit : paras 29-32

<sup>43</sup> See Josias Expert Affidavit : paras 33-36

### Public Service Regulations on Human Resources

83. Resolution 7 of 2002 of the Public Service Regulations requires every department (including SAPS) to develop a strategic plan, determine the organisational structure, define the posts necessary to perform its function, and develop a human resource plan. The human resource plan must include, among other things, post requirements and employee profiles. Every department must also develop an implementation plan which includes steps to implement its strategic and human resource plans, and time frames for the implementation of these plans<sup>44</sup>.

### SAPS Commitments

84. The South African government has committed itself to addressing violence against women, providing services and to allocating resources to achieve these commitments through a variety of international obligations, domestic legislation, and government policies and programmes.
85. According to the SAPS website, SAPS undertakes to provide specialised services to victims of sexual offences.<sup>45</sup>

### Family Violence, Child Protection, and Sexual Offences Unit ("FCS" Unit)

86. The focus of the FCS Units in the SAPS is to provide:

*'a sensitive, professional service endearing to the victims of FCS-related crimes.*

*The FCS mandate is for the investigation of Family Violence (intra-familial crimes*

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<sup>44</sup> See Josias Expert Affidavit : para 46

<sup>45</sup> [https://www.saps.gov.za/services/report\\_sexual\\_offence.php](https://www.saps.gov.za/services/report_sexual_offence.php)

*when the victim is 18 years of age and older: assault with the intention to do grievous bodily harm; attempted murder; the non-compliance of protection orders in terms of the Domestic Violence Act 1998 only when it forms part of an assault with the intention to do grievous bodily harm, or attempted murder cases), Child Protection (crimes where the victim is a child under the age of 18 years: rape; incest; indecent assault; attempted murder; assault with the intention to do grievous bodily harm; intra-familial assault; kidnapping; abduction; Domestic Violence Act related offences but only if the Unit is already dealing with the original criminal case of assault, attempted murder etc; crimes related to child pornography; missing children under the age of 12 years), Sexual Offences (crimes where the victim is 18 years of age or older: rape; incest; indecent assault; offences in terms of the Sexual Offences Act 1957 where an adult is a victim of a sexual offence; offences in terms of Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007; offences in terms of the Domestic Violence Act only if the Unit is already dealing with the original criminal case (sexual offence)).'*

#### The Thuthuzela Care Centres

87. In 2000 Cabinet instructed the Heads of the Departments of Social Development and Health to develop the Anti Rape Strategy as a response to the alarming rape statistics. In 2002 this process was transferred to the Department of Justice and Constitutional Development.
88. The Interdepartmental Management Team (IDMT) was formed under the leadership of the Department of Justice and Constitutional Development and comprised of representatives of the following national departments: Justice and

Constitutional Development (as it then was), Health, Social Development, Safety and Security (as it then was), Correctional Services (as it then was), Education Treasury and Government Communication and Information System (GCIS).

89. As one of the initiatives to address rape care management the IDMT developed the Thuthuzela Centre model. In isiXhosa Thuthuzela means "to comfort".
90. The Thuthuzela Centre model represents a radical approach to rape care management, with its intended strength being a multi-disciplinary model comprising of several government and non - governmental partners providing the necessary services
91. The aim of the Thuthuzela Care Centre is to provide survivors of sexual offences with immediate medical care, reduce secondary trauma for the survivor, improve perpetrator conviction rates and reduce turnaround time for finalising cases
92. The Thuthuzela Centre model aims to work in such a manner that survivors of sexual offences in its various forms are able to receive specialised care from police officers who record their statements, collect exhibits, and follow up on initial investigation leads.
93. It is important to stress that the model can work well if there is full and complete commitment and participation by all stakeholders, including the SAPS. Unfortunately, to date, this is largely not the case.
94. The current operation and roll-out of TCC's nationally requires the continued commitment and involvement of SAPS, including the allocation of adequate resources.

### Victim Empowerment Services in SAPS

95. In a document called 'Victim Empowerment Service in the SAPS'<sup>46</sup>, SAPS acknowledges that it is responsible for ensuring victims of crime, especially sexual offences and other serious and violent crimes, are provided with a victim-friendly service. SAPS describes victim-friendly service as service that protects the dignity and rights of victims, empowers victims, and ensures that they are not subjected to secondary victimization by inefficient members of the criminal justice system. The four elements of victim empowerment are listed as: emotional and practical support, providing information, and referral to professional support services.

### National Instructions on Sexual Offences

96. The SAPS National Instruction 3/2008 on Sexual Offences were published in August 2008 in accordance with section 66(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007). The purpose of the National Instruction is to ensure that members of SAPS render a professional service to victims of sexual offences when investigating such offences. The National Instruction sets out the procedure to be followed by, and the obligations of, members of SAPS when handling sexual offences cases. These include victim assistance, steps to be taken to safeguard a crime scene, execution of an order for HIV testing of an offender, preventing contamination of exhibits, taking in-depth statements from victims, and assisting victims during court proceedings.

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<sup>46</sup>[https://www.saps.gov.za/resource\\_centre/women\\_children/amended\\_victim\\_empowerment\\_service.pdf](https://www.saps.gov.za/resource_centre/women_children/amended_victim_empowerment_service.pdf)

## The National Policy Framework Management of Sexual Offences Matters

97. The NPF Management of Sexual Offence Matters was first tabled in Parliament in June 2011, and the amended edition gazetted in June 2012. It was adopted in terms of section 62 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") to ensure a uniform and coordinated approach by all government departments and institutions dealing with matters relating to sexual offences. Member departments of the Justice, Crime Prevention and Safety and Security Cluster participated in the drafting process, all represented on the Directors General Inter-sectoral Committee (DG ISC) which is responsible for the NPF. The DG ISC consists of the DG's of the DOJ&CD, the Department of Social Development (DSD), the Department of Health (DOH); the National Commissioners of Correctional Services (DCS) and the South African Police Services (SAPS); as well as the National Prosecuting Authority (NPA). The Department of Women, Children and Persons with Disabilities (DWCPD), Department of Basic Education (DBE), Legal Aid of South Africa (Legal Aid South Africa) and National House of Traditional Leaders (NHTL) were later added to the committee.
98. Principle 3 of the NPF, Provision of Specialised Services to the Victims of Sexual Offences, states that SORMA *"itself requires the introduction of "certain services to certain victims of sexual offences" which is read to mean "specialised services". Government departments have established specialized units, divisions or structures that are capacitated by specialist personnel and special resources to deal with sexual offences matters. Examples of these include specialized services offered by Clinical Forensic Medicine Centres (CFMC) in the DOH;*

*Family, Child and Sexual Offences (FCS) Units within SAPS; Thuthuzela Care Centres (TCCs) established by the NPA; Court Preparation Officers provided by NPA; as well as the Sexual Offences Courts that are capacitated with Witness Testifying Rooms, One-Way Mirrors, Anatomical Dolls and Intermediaries provided in courts*<sup>47</sup>

99. In Chapter 2 of the NPF, a table sets out the detailed specific roles and responsibilities of the various role players. One of the responsibilities accepted by SAPS is to 'provide specialist services to victims' and to 'improve the numerical establishment of the Dedicated Family, Child and Sexual Offences Family Violence, Child Protection (sic) and Sexual Offences (FCS) Units and personnel'<sup>48</sup>

100. The NPF is a clear indication of the commitment of SAPS to resource the policing of sexual offences. The acknowledgement of improving the numerical establishment of the FCS shows that the SAPS are aware of the lack of adequate resources and that they were intending to increase those resources at the time of the gazetting of the NPF.

Specialisation of Services for Victims of Sexual Offences – Draft Policy  
Department of Justice and Constitutional Development

101. This policy, while led by the DOJ&CD, is the product of an inter-sectoral team, including SAPS. The policy recognises that the police play an essential role in the gathering of evidence in sexual offences matters, and that the investigation

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<sup>47</sup> National Policy Framework Management of Sexual Offences Matters Amended 1<sup>st</sup> Edition June 2012 p18

<sup>48</sup> Ibid p33

of matters determines whether a case will be prosecuted or not. It goes further in stating that there is evidence that specialised units are more responsible and effective in dealing with cases of sexual violence and *'their establishment facilitates the development of expertise in the area which may result in an increase in the number of cases investigated....'*<sup>49</sup>

102. The policy dictates the details of specialisation of services by special investigating units in SAPS. These include dedicated units for investigating sexual offences units, specialised training, victim-friendly facilities, effective resources to perform their functions, namely access to vehicles, computers, offices and telephones<sup>50</sup>.

103. This policy is another indication of the knowledge and commitment of SAPS to the need of specialised SAPS units and the concomitant need to adequately resource them.

### **Nature and extent of violence against women in South Africa**

104. In what follows I discuss the reality that, despite all the theoretical acknowledgments discussed above, violence against women remains pervasive across South Africa

105. In June 2020, the 2020 Global Peace Index (GPI) was released by the Institute for Economics & Peace (IEP) and ranked South Africa 123 out of 163 countries in terms of safety. The report tracks and ranks the status of peace in 163

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<sup>49</sup> Specialisation of Services for Victims of Sexual Offences – Draft Policy Department of Justice and Constitutional Development p5

<sup>50</sup> Ibid p10



independent states and territories across the world, noting where conflict is rising and falling, and the factors that are influencing change. South Africa performs particularly poorly on the murder rate which is the sixth highest in the world and the second highest in sub-Saharan Africa, with only Lesotho performing worse<sup>51</sup>.

106. The 2019/2020 Victims of Crime Survey reveals that there has been no significant changes in the prevalence of sexual offences over the period from 2015 to 2020.<sup>52</sup>

107. In a report released by Shukumisa in 2016<sup>53</sup>, an evaluation of the Thuthuzela Care Centres ("TCC's") assessed compliance and conducted a gap analysis of services offered at TCC's, found a widespread lack of victim friendliness which contributed to secondary victimisation, specifically on the part of insensitive emergency medical staff and police officers.

108. The historical context of violence generally in South Africa also finds expression in specific violence perpetrated against women by men. This context, 'a culture of violence', where violence is normative as a means to resolve conflict finds its roots in the apartheid legacy, where inequality, poverty, lack of access to services and opportunities, marginalisation and militarisation of men were contributing factors, as well as the institutionalisation of violence during the apartheid era.<sup>54</sup>

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<sup>51</sup> Institute for Economics & Peace. Global Peace Index 2020: Measuring Peace in a Complex World, Sydney, June 2020. Available from: <http://visionofhumanity.org/reports> at p21

<sup>52</sup> [http://www.statssa.gov.za/publications/P0341/P03412019\[='.pdf](http://www.statssa.gov.za/publications/P0341/P03412019[='.pdf) p 10

<sup>53</sup> Shukumisa (2016): Thuthuzela Care Centres Compliance Audit and Gap Analysis <http://shukumisa.org.za/wp-content/uploads/2018/02/PA00MQJ6-1.pdf>

<sup>54</sup> The National Strategic Plan on Gender Based Violence and Femicide 11 March 2020 at p25 (available at <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf>)

109. Violence against women continues to be the primary barrier to the achievement of substantive equality as envisaged by our Constitution. It fundamentally interferes with women's social and economic development by preventing their equal participation in society.

### **Underreporting of sexual and domestic violence**

110. In her report, the Special Rapporteur notes the phenomenon of under reporting of violence against women in South Africa. She states that SAPS statistics, released annually, are in no way conclusive of the real prevalence of violence against women as it is '*an unchallenged fact that there is massive under reporting of all forms of gender-based violence crimes*'<sup>55</sup>. She referred to several studies which reveal this trend<sup>56</sup>, one of which found that more than half of the women participating in the study had experienced gender-based violence. She also noted that the Medical Research Council estimated that 1 in 9 rapes are reported to the police<sup>57</sup>, and in a 2010 study in Gauteng conducted by Gender Links, only 1 in 13 raped by a non-partner reported the matter to the police, and only 1 in 25 raped by their partners reported the offence to the police<sup>58</sup>. In its OPTIMUS study on crimes and abuses, the University of Cape Town showed that 1 out of 5 children report being abused by the age of 17 years, a likely underestimation<sup>59</sup>.

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<sup>55</sup> 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/32/42/Add.2 14 June 2016 at p4

<sup>56</sup> <http://www.mrc.ac.za/gender/gbvthewar.pdf>.

<sup>57</sup> R Jewkes and N Abrahams, The epidemiology of rape and sexual coercion in South Africa: an overview, *Social Science and Medicine*, 55:7, 2002, 1231–1244.

<sup>58</sup> M. Machisa et al, The War at home. GBV indicator projects, Gender links, 2010.

<sup>59</sup> 2015 University of Cape Town OPTIMUS Study.

111. The Special Rapporteur also identified that many victims lack easy access to police stations<sup>60</sup>.

112. The issue of underreporting of sexual violence related cases and underreporting in general was dealt with during the Khayelitsha Commission proceedings. Dr C De Kock, Independent Consultant and Analyst: Crime, Violence and Crowd Behaviour, submitted a report to the Khayelitsha Commission and testified. When dealing with underreporting he stated in his report that,

"there is a whole range of factors which determine reporting behaviour including: public perceptions of and trust in the police; the current socio-economic situation; gender equality; family pressure etc."<sup>61</sup>

113. Dr De Kock went on to state the following:

*"The Mthente research report also identified significantly different underreporting levels for the three precincts which make up Greater Khayelitsha. For example, for common robbery the under-reporting levels for Harare is 52.5%, Khayelitsha is 36.7%, and for Lingeletu West 20.0%. But then for a related but more serious crime, namely armed robbery, the underreporting for Harare is 32.5% and for Khayelitsha it is 48.2%. This illustrates the point made above that it makes the task of the crime analyst very complex and difficult."*<sup>62</sup>

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<sup>60</sup> Ibid 'Report of the Special Rapporteur on Violence Against Women at p 16.

<sup>61</sup> Is Crime Combating Intelligence led and is it effective in Greater Khayelitsha, Dr. Chris Paul De Kock at para 70 p 39.

<sup>62</sup> Is Crime Combating Intelligence led and is it effective in Greater Khayelitsha, Dr. Chris Paul De Kock at para 71 p 39.

## **Presidential Summit on Gender-Based Violence and Femicide**

114. In 2018, in response to several high-profile rapes and murders of women, members of the public from many communities across the country held a number of protest marches and called on the national government to take urgent action to address the high levels of violence against women in South Africa. The protests, organised largely by civil society, resulted in the first Presidential Summit on Gender-Based Violence and Femicide in November 2018. The Summit was attended by all government departments and a wide representation of civil society organisations and individuals and resulted in the identification of several key interventions to realise the constitutional rights of women in a society where the manifestations of patriarchy remain prevalent. The Summit concluded with the signing of a Declaration by government, business, labour, and civil society, with one of its main objectives the development of a plan with concrete measures to address violence against women.

115. The Summit Declaration called for the development of a National Strategic Plan on Gender Based Violence and Femicide ("NSP" or "NSPGBVF") by an established Interim Steering Committee. In addition, as an immediate, short term intervention, an Emergency Response Action Plan ("ERAP")<sup>63</sup> was also developed which was approved by Parliament in September 2019 to cover 6 months activities to end March 2020. All government departments were signatory to and participated in the development of the NSP as well as the ERAP, with an

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<sup>63</sup> See media summary at <https://www.gcis.gov.za/newsroom/media-releases/government-identifies-key-actions-gender-based-violence-and-femicide>



allocation of R1.6 billion sourced through budget reprioritisation for the implementation of the ERAP.

116. SAPS are signatory to both the NSP and the ERAP. As will be discussed below, both plans include numerous performance areas and activities to which SAPS has committed. All these activities have budget implications and require the use of the system (THRR) in terms of which the budget allocation must be made. All departments have indicated that a necessary reprioritisation of budgets was required for them to comply with both the NSP and ERAP.
117. While the NSP centres its work around both government and civil society interventions, for the purposes of this matter, I will focus on its broad principles and strategic pillars as they specifically pertain to the roles and responsibilities of SAPS. It is important to note that the NSP is based on and informed by previous government plans and policies, including those committed to by SAPS, and so cannot be seen in isolation.
118. The purpose of the NSP is *'to provide for a multi-sectoral, coherent strategic policy and programming framework to ensure a coordinated national response to the crisis of gender-based violence and femicide by the government of South Africa and the country as a whole'*.<sup>64</sup> The plan was guided and informed by the 24 Demands by civil society groups at the Presidential Summit, and incorporates principles including a multi-sectoral approach which harnesses the roles,

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<sup>64</sup> The National Strategic Plan on Gender Based Violence and Femicide 11 March 2020 p16

responsibilities, resources and commitment across government departments and different tiers of government.<sup>65</sup>

119. The NSP centres around six pillars: (1) Accountability, Coordination and Leadership; (2) Prevention and Rebuilding the Social Cohesion; (3) Justice, Safety and Protection; (4) Response, Care and Support and Healing; (5) Economic Power; and (6) Research and Information Management.<sup>66</sup>

120. To highlight the implications of the NSP on policing and this matter, I will focus on Pillars 3 and 4 as they pertain to the allocation of police resources.

121. The NSP's strategies focus importantly on strengthening state and societal accountability at all levels and defines the roles and responsibilities of various stakeholders to accelerate, advance and realise the vision and outcome of the plan.<sup>67</sup>

122. The plan specifically indicates that government departments will align related outputs within their respective five-year strategic plan.<sup>68</sup> This has direct implications for SAPS allocation of resourcing to effectively police gender-based crimes and the manner and method by which they do so.

123. The NSP's focus is to collectively respond to what is perceived as a 'chronic crisis of gender-based violence and femicide'<sup>69</sup>. It focusses on addressing the alarming lack of accountability for those who perpetrate violence against women –

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<sup>65</sup> NSP at p16

<sup>66</sup> NSP. at pp 18 - 19

<sup>67</sup> NSP pp 19-20

<sup>68</sup> NSP p21

<sup>69</sup> NSP p37

individuals, the state and society overall. The NSP undertakes to address systemic inadequacies that result in levels of vulnerability and the lack of safety, as well as a focus on the widespread ineffective and insensitive response to the needs to victims by many state role players.

124. All the strategic commitments and concomitant activities undertaken by SAPS have serious budget implications. The method (THRR) used by SAPS to allocate the necessary resources to implement these commitments will have implications for women in the various national geographical areas; the continued use of the current THRR will result in women who live in poor, black areas receiving fewer resources to combat violence than those women who live in wealthier, white areas. This is discriminatory.

125. The strategic areas of intervention (key interventions) in Pillar 3 aim to achieve the following in the next five years<sup>70</sup>:

125.1 All GBV survivors are able to access efficient and sensitive criminal justice that is quick, accessible, responsive and gender-inclusive;

125.2 Strengthened capacity within the Criminal Justice System (CJS) to address all impunity, effectively respond to femicide and facilitate justice for GBV survivors;

125.3 Amended legislation related to GBV areas that build on legislative reforms initiated under the Emergency Response Action Plan.

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<sup>70</sup> NSP p48

126. The NSP works on the premise that effective implementation of laws and policies can make a difference on facilitating social change, and that adequate resourcing will be made available by government departments over the next five to ten years to facilitate systemic changes.<sup>71</sup>

127. Pillar 3 has a detailed implementation plan with key activities, indicators, targets, and identification of accountability by lead departments for each of the three key interventions. The detail in the plan reveals the commitments that SAPS have made in implementing the NSP and the budgetary implications of said commitments.

128. For example, the first key intervention deals with 'GBV' survivors and their *access to efficient and sensitive criminal justice that is quick, accessible, responsive and gender-inclusive* through victim centric criminal justice services that are sensitive to and meets their needs. SAPS is identified as a lead department for the implementation of this intervention, which will require wholesale training of police and which will have significant budgetary and resource implications.

129. The relevant activities for SAPS as the lead department for implementation in the second key intervention area ( dealing with '*Strengthened capacity within the Criminal Justice System (CJS) to address all impunity, effectively respond to femicide and facilitate justice for GBV survivors*') are:

129.1 firstly, resourcing of infrastructure and human capacity to facilitate effective service delivery – including detective, forensic, investigation

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<sup>71</sup>NSP p 49



and prosecution at FCS units, Thuthuzela Care Centres and Sexual Offences Courts; and

129.2 secondly, clearing of the backlog of cases related to GBV'.<sup>72</sup>

130. The fact that SAPS are again identified as a lead department for these outcomes is an indication of the legal obligations it has towards victims of gendered offences, and the necessary resources required for implementation. A continued reliance on the THRR with its discriminatory results of unequal resource allocation will see women in poor and black areas receive disproportionately less resources for these activities than women in wealthy and white areas.

131. Pillar 4 of the NSP, dealing with *Response, Care, Support and Healing*, also has implications for SAPS and has budgetary consequences. One of the short-term outcomes of this pillar is that police officers and stations are capacitated and supported to provide victim friendly support services to victims: implementation and monitoring of key policies relating to police duties in relation to domestic violence and sexual offences are fast-tracked. The outputs connected to this outcome require the implementation of the Ministerial Six Point Plan, that police officials are trained, that a policy to reduce barriers to the reporting of domestic violence and sexual offences is developed and implemented, and that a policy on investigation and management of serial rape and serial murder is developed and institutionalised.<sup>73</sup>

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<sup>72</sup> NSP p72

<sup>73</sup> NSP p100

132. A further five-year outcome of Pillar 4 is the operational research conducted to better understand the drivers of secondary victimisation and to develop appropriate responses thereto. The output linked to this outcome is the development of a policy in SAPS informed by research on secondary victimisation.<sup>74</sup> These outputs have resource implications for SAPS.

**C. THE APPROPRIATE REMEDIES TO ADDRESS THE DISCRIMINATORY  
IMPACT OF POLICE HUMAN RESOURCE ALLOCATION**

133. The Applicants in their application to this Court have already set out the remedial powers of this Court. The WLC Trust aligns itself with the submissions made in paragraphs 110 to 116 of the founding affidavit in this Court and will therefore not repeat those submissions.

134. In this section I discuss the position of the WLC Trust to the relief sought by the Applicants and its proposed additions.

135. The relief sought by the Applicants from this honourable court is multi-faceted as they have set out in their application. In submitting our position on the relief sought, we focus only the relief that we believe is impacted by the submissions we have made in part A and B above.

136. We propose some adjustments/additions to the relief proposed by the Applicants specifically in light of the gender considerations we have set in Part A and Part B above.

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<sup>74</sup> NSP

**The declarator that the THRR is discriminatory without qualification of the Western Cape and KZN [Prayer 3 of the Notice of Motion]**

137. The system adopted by the SAPS to allocate resources has two stages, firstly, the theoretical, and secondly, the actual allocations.

137.1 The theoretical allocation is the first stage in the allocation of human resources which determines the theoretical resources needed by each police station. This is done entirely at a national level by the Organisational Development within the Division: Human Resource Management.<sup>75</sup> We also note that section 11(2)(b) of the SAPS Act 68 of 1995 among other things grants the National Police Commissioner powers to determine the fixed establishment of SAPS and the number and grading of posts at these establishments.

137.2 In the second stage of human resource allocation, the National SAPS determines the number of posts that each station will in fact receive and the Provincial Commissioners are then meant to distribute the allocated resources amongst the stations to give effect to the province's priorities.

138. In our view an analysis of the effect and outcomes of the human resource allocation system is an indictment of the formula and national system of the human resources allocation by the SAPS. As such the exercise of analysing the discriminatory effect of the human resource allocation when not focused entirely on the allocation made by Provincial Commissioners, as is the case here, is a national discussion and can therefore not be limited to two provinces. Equally,

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<sup>75</sup> Khayelitsha Commission Report, para 58.

remedying the discriminatory outcomes as found by the Equality Court is also a national exercise regardless of the evidence placed before Court.

139. Accordingly, the WLC Trust aligns itself with the arguments made by the Applicants and agrees that the declaratory relief on the discriminatory nature of the system utilised by the SAPS to allocate human resources must not be limited to the Western Cape and KZN.

#### **Remedial orders in Prayer 4**

##### ***Western Cape Relief:***

140. In relation to the Western Cape relief, the WLC Trust aligns itself with the relief as set out in the Applicants papers.

141. We however wish to add that the plan must take into consideration the specific policing resources required to police gendered crimes including sexual offences, domestic violence, intimate partner violence and femicide.

142. Further, as the relief suggests, the plan must address the most serious disparities which, in our view, must include consideration of the resources allocated to both specialist units, such as the FCS units dealing with sexual offences, as well as station based resources to specifically address domestic violence, femicide and other crimes that target women in their diversity. The reallocation must be analysed to compare the actual allocation of those resources between geographical areas which are traditionally Black and poor compared to areas which are traditionally White and wealthy.

143. With regard to the aspect of the relief where 'interested parties' may comment on the plan, we emphasise the need for the SAPS Western Cape process to actively engage with residents and organisations who have expertise in gender-based crimes to ensure that they give input on the allocation of resources to police those specific crimes.

***National Relief***

144. The Applicants have asked the Court to order the Minister and National Commissioner to review the allocation of police human resources within a year of the date of the order (should it be granted). In their review of the allocation of police human resources, the applicants request this Court to order the Minister and the National Commissioner to take into account four considerations.

145. In light of the submissions made in Part A and B above, the WLC Trust submits that it is necessary for this Court to explicitly identify the need to consider the impact of police human resource allocation on the discrimination faced by women. To that end, it must be emphasised that each of the four considerations proposed by the Applicants must also take into account the prevalence of violent crimes against women.

146. A specific focus on violence against women is justified by the following *dicta* by this Court **Carmichele**:

*"The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime."*<sup>76</sup>

#### *The WLC Trust's proposed Consideration 5*

147. For all the reasons discussed above, the WLC Trust also proposes a following fifth consideration that brings the prevalence of violent crimes committed against women at the forefront of the inquiry:

*2.2.5. Whether sufficient weight is given to the proliferation of violent crimes against women in the allocation of police resources.*

#### *Proposed Appointment of a Panel of Experts*

148. In addition to the proposed four considerations, the applicants also are requesting that a panel of experts be appointed to assist Court in supervisory functions.

149. Given the submissions we have made in this affidavit on the issue of violence against women and how it is connected to the intersectional discrimination based on race and poverty, the panel should also include at least one individual who has expertise in the area of violence against women.

#### **IV. CONCLUSION**

150. In the discussions above, the WLC Trust hopes to have illustrated that, in order to achieve transformative and substantive equality in the allocation of police

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<sup>76</sup> *Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC) at para 62.

human resources, discrimination on the grounds of race and poverty inextricably includes discrimination on the grounds of gender.

151. I have also shown that the SAPS and the government of South Africa have committed to prioritising violence against women in its response to ensuring that women's rights are realised, women are safe and are not needlessly dying in the country. There is, therefore, no reason why this Court should not confront those commitments and include remedial orders to ensure that those commitments are realised.

152. In the circumstances, the WLC Trust respectfully asks that the content of this affidavit be accepted by this Court and for the further orders sought in the accompanying Notice of Application.



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SEEHAAM SAMAAI

I certify that the above affidavit was signed and sworn to at Cape Town.

before me on this the **17<sup>th</sup>** day of **MAY 2021** by the deponent after she declared that she knew and understood the contents of this affidavit, that she had no objection to taking the prescribed oath which she regarded as binding on her conscience, and after she uttered the words: "I swear that the contents of this affidavit are true, so help me God".



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COMMISSIONER OF OATHS

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REPUBLIC OF SOUTH AFRICA  
**MAGTIGINGSBRIEF**  
**LETTERS OF AUTHORITY**

Ingevolge Artikel 6(1) van die Wet op Beheer oor Trustgoed, 1988 (Wet 57 van 1988)  
In terms of Section 6(1) of the Trust Property Control Act, 1988 (Act 57 of 1988)

No: IT 3486/98

Hiermee word gesertifiseer dat /

This is to certify that

**SIPHOKAZI MTHATHI**

(Identiteitsnommer / Identity Number: 740325 0704 08 6),

**BUHLE DESIREE LEKOKOTLA**

(Identiteitsnommer / Identity Number: 851217 0750 08 3),

**ANIEKAH GAMIET**

(Identiteitsnommer / Identity Number: 800705 0049 08 6),

**THULISILE MHLUNGU**

(Identiteitsnommer / Identity Number: 720316 1041 08 5),

**DEIRDRE LOUISE SMYTHE**

(Identiteitsnommer / Identity Number: 701122 0210 08 2),

**PUMLA DINEO GQOLA**

(Identiteitsnommer / Identity Number: 721203 0259 08 3),

**NOZIZWE SILINDILE VUNDLA**

(Identiteitsnommer / Identity Number: 760314 0300 08 2),

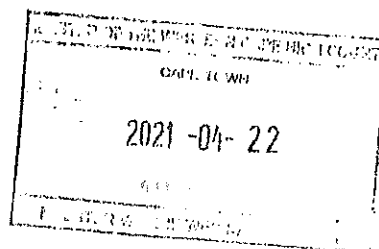
gemagtig word om op te tree as trustee(s) van /  
is/are hereby authorized to act as trustee(s) of

**WOMEN'S LEGAL CENTRE TRUST**

GEGEE onder my hand te KAAPSTAD op hede die      dag van April 2021  
GIVEN under my hand at CAPE TOWN this      22      day of April 2021

  
\_\_\_\_\_  
Signature  
**ASSISTENT MEESTER**  
**ASSISTANT MASTER**

T/E  
JSA/21.17



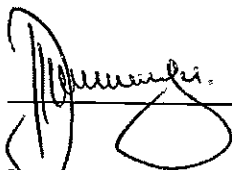


**RESOLUTION OF THE WOMEN'S LEGAL CENTRE TRUST**

The Trustees of the Women's Legal Centre ("Trust") resolve that:

1. The Trustees on behalf of the Trust will participate as the Fifth Respondent in the Constitutional Court case of **Social Justice Coalition & two others // Minister of Police & four others (Case number CTT 121/21)** in order to make submissions on the gendered implications and impact on women of the THRR system employed by the South African Police Services to determine the allocation of police human resources.
2. The Trustees hereby delegate authority to **SEEHAAM SAMAAI**, an admitted attorney employed as such as the Women's Legal Centre, Cape Town:
  - a. To take all necessary steps to sign papers and pleadings in order to participate as the Fifth Respondent on behalf of the Trust.
  - b. To brief counsel to argue the matter in the Constitutional Court.
  - c. To take all necessary steps on behalf of the Trust to advance arguments in the case.

Dated at Durban on this 10<sup>th</sup> day of MAY 2021

  
Thulisile Mhlungu

(Chairperson of the Women's Legal Centre Trust)



25. Christian Lawyers Association of SA and others v Minister of Health and others 1998 (4) SA 1113 (T);
26. Ferreira and Others v The State SCA Case Number 245/03
27. Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC) (14 June 2018)
28. Qwelane v South African Human Rights Commission and Another (686/2018) [2019] ZASCA 167; [2020] 1 All SA 325 (SCA); 2020 (2) SA 124 (SCA); 2020 (3) BCLR 334 (SCA) (29 November 2019); (WLC intervening as *amicus curiae*(CCT13/2020)) Constitutional judgement pending.
29. Voice of the Unborn Baby NPC and another v Minister of Home Affairs and others (16402/17) 2021 ZAGPPH 161 (26 March 2021)
30. Mahlangu and Another v Minister of Labour and Another 2021 (2) SA 54 (CC) (Women's Legal Centre Trust as *amicus curiae*)
31. Bwanya v Master of the High Court 2021 (1) SA 138 (WCC); Constitutional Court judgement pending CCT 241/20 (WLC as *amicus curiae*)
32. President of Republic of South Africa and another v WLC Trust and others; Minister of Justice and Constitutional Development v Faro and others; Minister of Justice and Constitutional Development v Esau and others [2021] (1) All SA 802 (SCA); Constitutional Court judgement pending.
33. City of Cape Town // South African Human Rights Commission Western Cape High Court (5633/2020) (WLC intervening as *amicus curiae*) (unreported).

