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Equitable allocation of police human resources

Social Justice Coalition and Others v Minister of Police and Others

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At the end of 2018, the Western Cape High Court handed down a ground-breaking judgment in the case of Social Justice Coalition and Others v Minister of Police and Others*. The court held that the distribution of police personnel in the Western Cape unfairly discriminated against black and poor people on the basis of race and poverty. As the first case in South Africa recognising poverty as a discrete ground of discrimination, the judgment marks a significant development in the country's equality rights jurisprudence. In addition, the court's recognition that police distribution in the Western Cape is unfairly discriminatory has profound implications for the system of allocating police resources in that province, and potentially across the country.*

In this case note I summarise the key issues in the case and offer an analysis of the court's approach, arguing that while the case is to be lauded for its recognition of poverty as a ground of discrimination there are also some missed opportunities. Most significantly, the practical impact of the judgment has yet to be determined as the court limited its order to declaratory relief, requiring the parties to return to argue on the further practical remedy that should follow.

At the end of 2018, the Western Cape High Court, sitting as the Equality Court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act ('the Equality Act'),[2] handed down a ground-breaking judgment in the case of *Social Justice Coalition and Others v Minister of Police and Others* [the 'SJC case'].[3] The court held that the distribution of police personnel in the Western Cape unfairly discriminated against black and poor people on the basis of race and poverty.

This is the first case in South Africa where a court has recognised poverty as a discrete ground of discrimination. This marks a significant development in equality rights jurisprudence for South Africa. In addition, the court's recognition that police distribution in the Western Cape is unfairly discriminatory has profound implications for the system of allocating police resources in that province, and potentially across the country.

In this case note, I set out the background leading up to the case, followed by a description of the key issues before the court. I then detail the parties' submissions and discuss how the court approached the core question at hand.

While I welcome the court's trailblazing approach to the question of poverty as a discrete ground of discrimination, there are some aspects of the judgment that are not entirely satisfying. In particular, the court limited its findings to the Western Cape, although I argue that the court's determination nevertheless has the potential to impact on the national system of police resourcing allocation. Moreover, the practical impact of the judgment has yet to be determined as the court only granted declaratory relief, requiring the parties to return to argue on the further practical remedy that should follow.

The Khayelitsha Commission of Inquiry

For almost a decade, the Social Justice Coalition and other organisations campaigned around safety and policing concerns in the informal settlement of Khayelitsha, located in the Western Cape.

In November 2011, a number of these organisations lodged a formal complaint[4] with the Premier of the Western Cape, calling for a commission of inquiry into the operation of police services in Khayelitsha.[5]

In August 2012, the Premier of the Western Cape officially appointed a commission of inquiry, chaired by Justice Catherine O'Regan and Advocate Vusumzi Pikoli, to investigate the allegations of police inefficiency and a breakdown of relations between the community and police in Khayelitsha.

As commentators have noted, the commission 'clearly placed the quality of policing in the Western Cape on the political agenda'[6] and its report provided significant insight into some of the key issues impacting on police resourcing in Khayelitsha and across the country.[7]

In particular, the commission found that two decades into democracy the poorest areas in Cape Town (which 'bore the brunt of apartheid')[8] recorded the highest levels of serious crime and remained severely under-policed. The commission was clear that '[t]his pattern needs to change as a matter of urgency.'[9] A number of recommendations were made by the commission, including that the system of police allocation used by the South African Police Services (SAPS) should be investigated on an urgent basis.

Despite efforts to engage relevant officials, the Social Justice Coalition and other organisations experienced growing frustration as, two years after the finalisation of the commission's work, little had been done to implement its commission's recommendations. As a result, the Social Justice Coalition,[10] Equal Education[11] and Nyanga Community Policing Forum[12] ('the applicants') launched an application against the Minister of Police, the Western Cape Police Commissioner and Western Cape Community Safety ('the respondents'). The Women's Legal Centre Trust[13] made submissions as a Friend of the Court.

Issues before the court

The applicants sought a tiered relief in their application before the Equality Court.

At a national level, the applicants sought to have the *system* utilised by SAPS to determine the allocation of police human resources declared as unfairly discriminatory against black and poor people on the basis of race and poverty.

At a provincial level, the applicants sought an order declaring that the allocation of human police resources in the Western Cape unfairly discriminates against black and poor people on the basis of race and poverty.

The applicants also sought a supervisory order, requiring the respondents to remedy the unfair discrimination at both national and provincial levels within a particular timeframe and providing regular reports to the court on progress.

In addition, the applicants sought a declaratory relief confirming that section 12(3) of the South African Police Service Act, 1995 ('SAPS Act') empowers provincial police commissioners to determine police resource distribution, including the distribution of permanent posts, between stations within their province.

In what follows, I summarise the submissions of the parties and approach of the court in respect of the claim that the allocation of police resources was irrational and unfairly discriminatory.

The allocation of police human resources and unfair discrimination

The challenge to police resourcing

The applicants' case centred on a challenge to the system by which police human resource allocations are determined. This allocation is determined through various stages. At the first stage, a theoretical determination is made based on a model or formula known as the Theoretical Human Resource Requirement ('the THRR'). The THRR is based on a 'myriad'[14] of factors, which ultimately informs the distribution of police officials to police stations. These factors include, among others, population size, reported crime up to four years, environmental and demographic factors.[15] At the second stage, the allocations made according to the formula are adjusted based on available resources. Finally, actual allocations are made in relation to each province, at which stage the provincial commissioner may exercise discretion to adjust final determinations.

The applicants' complaint was that 'at both the theoretical and the actual stages, the results unfairly discriminate against poor, black communities, in favour of rich, white communities'.[16] Relying on the evidence of Jean Redpath,[17] the applicants detailed various concerns with the THRR formula. One of the most significant concerns was the formula's reliance on reported crime statistics. Redpath argued that poor and black informal areas demonstrated low levels of reporting of crime when compared to richer and white formal areas.[18] This was attributed to the breakdown of trust between residents in poor, black townships and police.[19] As a result, Redpath argued that the reliance on reported crime rates resulted in systemic under-allocation of resources to poor, predominantly black, informal areas.[20] Instead, it was submitted that murder rates would be a more accurate indicator of actual crime rates since murder does not suffer from the extent of underreporting as less serious crime.[21]

The applicants also argued that the weighting of various crimes as used by the formula was relatively arbitrarily determined, with insufficient weight being given to violent crime. For example, murder was weighted two and a half times more than less serious crimes, whereas in some other countries murder is weighted a thousand times higher.[22] The applicants argued that such weighting skews resources in favour of wealthier, predominantly white areas where non-contact crimes (such as property-related crimes) make up a significant proportion of reported incidents.[23]

The applicants also pointed out that while many of the environmental, social and economic factors used by the formula were seemingly based on neutral factors, the majority of these were 'far more likely to occur in rich, developed areas'.[24] The result, they argued, was that informal areas, with already low levels of service provision, were systematically disadvantaged by the formula.

The applicants argued that the combined effect of flaws in the THRR model resulted in police stations in poor, black communities with high levels of serious violent crime having the least allocation of police human resources.[25] The applicants demonstrated this startling disparity in the Western Cape using evidence that showed that police stations in the seven areas with the most murders were also the stations with the least allocation of police human resources. Thus, areas such as Nyanga and Khayelitsha with more than 100 murders a year were allocated less than half the police resources of Rondebosch, despite that suburb having no reported murders in a year.[26]

Limited statistics on police resource distribution in other provinces was available to the applicants at the time of launching the case. Nonetheless, on the information available, they argued that the discriminatory and irrational allocation of resources was also evident in KwaZulu-Natal and reflected the inherent skewing effect of the THRR formula nationally.[27]

Defending the allocation of police resources

The respondents raised various objections to the applicants' case. The essence of the respondents' substantive arguments, however, was that the number of police officials and stations that exist in a particular community is not necessarily of primary import, but rather the core issue to consider is the *effectiveness* of police resource allocation within each community's specific context.[28]

While the respondents acknowledged that under-developed areas without proper infrastructure, housing and street lighting present particular policing demands, they argued that this alone does not necessarily mean that poor and under-developed areas should be provided with more police resources. In their view, 'it is not always the case that stations in poor areas have higher rates of crime'.[29]

In addition, the respondents argued that the THRR did, in fact, specifically include factors weighted in favour of disadvantaged communities, and that police stations generating the most crime (based on reported crime statistics) were given a priority in allocations.[30] Although they conceded that there is under-reporting of crime in poor, black townships,[31] their submission argued that there is no way of rationally determining resource allocation on the basis of unreported crime. They noted that 'SAPS has no way of knowing the extent of unreported crime and cannot therefore reasonably account for it'.[32] The respondents therefore disagreed with the applicants' view that murder rates are an accurate proxy for the actual rate of violent crime. They argued instead that murder rates have no correlation to overall crime rates and that basing the determination on a single crime would lead to its own skewing effects.[33]

The respondents also cautioned the court to have regard for the principle of separation of powers, particularly in cases where polycentric policy decisions are at issue.

Determining the issues in terms of the Equality Act

To appreciate the court's approach to the core issues raised in the case, it is important to note that the applicants had adopted the novel and innovative step of relying on the Equality Act to argue that police resourcing allocations were irrational and unfairly discriminatory. The Equality Act defines discrimination broadly as:

> any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.[34]

Prohibited grounds in terms of the Equality Act are defined to include specific listed grounds, such as race, colour, and ethnic or social origin, as well as any other ground which:

> (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a [listed ground].[35]

Significantly, the Equality Act provides two procedural advantages to applicants alleging unfair discrimination. The first is that the Act only requires that an applicant establish *prima facie* proof of discrimination.[36] The High Court confirmed that the threshold of *prima facie* proof 'attracts something less than proof on a balance of probabilities'.[37] The onus then shifts to the respondent to demonstrate that the differentiation at issue does not amount to discrimination (either because the discrimination did not take place as alleged or was not based on a prohibited ground).[38] The second advantage is that once an applicant has established *prima facie* proof of discrimination on a prohibited ground, the discrimination is presumed to be unfair.[39] Thus, once again, the onus shifts on the respondent to demonstrate whether the alleged discrimination was fair. In this regard, the Equality Act provides certain factors that must be taken into account when determining whether discrimination was fair.[40]

In the light of this legal framework, Judge Dolamo (with Judge Boqwana concurring) held that the applicants had demonstrated that, in respect of the Western Cape, the THRR resulted in discriminatory allocations which were 'skewed and in favour of privileged and historically white areas'.[41] Having found that the allocations occurred in a discriminatory manner, the question turned to whether the discrimination was based on any prohibited grounds. The judge held that even though the THRR was based on a racially neutral system, the effect was that 'predominantly black areas receive inferior policing services as compared to the so-called white areas'[42] and therefore resulted in discrimination based on race. In addition, Judge Dolamo accepted the applicants' submissions that the allocations resulted in discrimination based on poverty. Judge Dolamo held that discrimination on the basis of poverty 'adversely affects the equal enjoyment of a person's right and freedom in a serious manner that is comparable to discrimination on a listed ground'.[43]

The court therefore held that the applicants had established *prima facie* proof of discrimination on prohibited grounds, which was presumed to be unfair. Ultimately, the respondents were unable to discharge the onus of demonstrating that there was no discrimination or that such discrimination was fair. As Judge Dolamo reasoned:

> In my view, the respondents have not been able to discharge their evidentiary burden of showing that no discrimination exists. First, the analytical evidence of Redpath and the data presented shows that police stations that serve poor, black areas have the lowest police to population ratios, relatively speaking, as compared to wealthier, rich areas which are predominantly white. This is not an adoption of a technical numbers game. Context shows that the poor, black areas also have the highest rates of contact and violent crime. Whilst, one cannot ignore other crimes, such as theft which appear to occur in greater numbers in commercial areas such as the CBD [central business district], it cannot be disputed that contact crime is more prevalent in poor and black areas.[44]

Significantly, however, the court confined its order declaring that the allocation of police resourcing was unfairly discriminatory to the Western Cape. In this regard, Judge Dolamo held that the applicants had not adduced sufficient evidence to demonstrate that the pattern of discriminatory resource allocations was replicated in other provinces.[45] Thus, the court only granted two declaratory orders. The first was declaring that police resource allocation in the Western Cape unfairly discriminates against black and poor people on the basis of race and poverty. The second was declaring the *system* used to determine such allocation unfairly discriminatory on the basis of race and poverty, in so far as it was shown to be the case in the Western Cape. As I discuss further below, despite the court's order being limited to the Western Cape, the findings are arguably necessarily applicable to the national system of allocation.

Unpacking the judgment

Poverty as a ground of discrimination

This case has set a cutting-edge precedent as the first judgment in South Africa that specifically recognises poverty as a prohibited ground of discrimination. The recognition of the intersectional nature of discrimination is especially significant in the light of South Africa's history of racialised inequality under colonialism and apartheid.[46]

The Equality Act envisaged the possibility of socio-economic status being included as a prohibited ground. At the time of promulgation, section 34(1) of the Act provided that the Minister should give special consideration to whether socio-economic status should be included as a prohibited ground (among others). The Equality Review Committee, established in terms of the Act,[47] was tasked with making recommendations to the Minister on this question within one year of the Act's promulgation. While the Minister did not ultimately take action under this section, the Act was also clear that courts would not be prevented from making such a determination.[48]

Commentators anticipated almost a decade ago that '[t]he next ten years may witness cases being brought by people who feel that they have been left behind during South Africa's recent and significant economic expansion. Appropriate claims of discrimination on the grounds of poverty or socio-economic status should be considered by our courts.'[49] The SJC case presented exactly this opportunity for the court to develop existing jurisprudence on analogous grounds of discrimination.[50] The High Court's acknowledgement of this form of discrimination is long overdue and paves the way for future jurisprudence that can build on this development. This has particularly profound implications in a country such as South Africa, which ranks as the most unequal nation in the world and where more than half of the population live in poverty.[51]

Practical effect of the relief still to be determined: delayed justice

The applicants sought specific mandatory and supervisory relief in the event that the declaratory orders relating to unfair discrimination at the national and provincial levels were granted. However, the judgment indicates that the court and parties had come to an agreement that judgment would first be handed down in relation to the declaratory relief sought and thereafter a further hearing would be held on the appropriate remedy that should follow.[52] The order of the court thus specified that the hearing on remedy is postponed to a date arranged by the parties.[53]

At the time of writing this note, and more than a year after the judgment was handed down, there has not been resolution on the specific remedy that must flow as a result of the court's findings. This is disappointing as the rights of residents of communities like Khayelitsha that have been campaigning for over a decade for equitable resource allocation, are not fully vindicated until a remedy to redress the unfair discrimination is determined.

While they may well be prudent in seeking full submissions on the specifics of any further remedy, particularly having regard to the separation of powers in such a polycentric and policy-sensitive matter, the parties did ventilate these issues in the submissions already presented before the court. If the court was anxious to ensure that the remedy ultimately crafted was fully deliberated, it could have invited further submissions within a definite period of time following the handing down of the judgment. Instead, as it currently stands, the practical effect of the judgment remains uncertain.

The court's unwillingness to declare the national system unfairly discriminatory

In addition to declaring the allocation of police human resources in the Western Cape as unfairly discriminatory, the court also declared that the *system* used to determine police human resource allocations, in so far as it was shown to be the case in the Western Cape, as unfairly discriminatory. The court therefore explicitly declined to declare the system of allocation at a national level as unfairly discriminatory on the basis that it did not have sufficient evidence from other provinces.

The court's approach on this score is not entirely satisfactory for two reasons. First, since the *system* used to determine allocations in the Western Cape is based on the same system utilised nationally (using the THRR formula), it would appear that any finding regarding the Western Cape system necessarily implicates the national system. In light of the court's deliberate view that it would not draw conclusions about the effect of the formula in other provinces, it is difficult to understand why the court chose to grant the second declaratory order when the first order would have sufficiently recognised that allocations in the Western Cape are unfairly discriminatory. As a result, the applicants may well obtain the relief they originally sought at the national level since, in seeking to remedy the provincial system, it seems logical that the respondents will also need to review the national system.

Second, to the extent that the court wanted to undertake the proper and full determination of the issues before it, one option available to it was to specifically direct the parties to provide further evidence showing the practical effects of the THRR formula in other provinces. The court had already acknowledged that Redpath's evidence in relation to KwaZulu-Natal had established a *prima facie* case of discrimination.[54] Courts must ensure that respondents are not prejudiced as a result of new evidence being introduced, but there is also scope to ensure that matters, particularly in the public interest, are dealt with holistically. The applicants explained that their ability to adduce the relevant evidence was limited by the respondents' failure to make the necessary information publicly available.[55] A directive that required the parties to provide further evidence from other provinces would have gone a long way to enable the court to decide the matter holistically, and would have eliminated any potential confusion and legal uncertainty.

Conclusion

The case of *Social Justice Coalition and Others v Minister of Police and Others* marks a significant development in equality jurisprudence in South Africa. The court's finding that police resource allocation in the Western Cape unfairly discriminates against black and poor will impact police resourcing in that province and holds the potential to do so nationally as well. However, the practical effect of this declarator is yet to be finalised as the court postponed a determination on further relief. The final remedy granted by the court will hopefully ensure that legal victories translate into tangible outcomes for community members who have campaigned and mobilised around these issues for almost a decade.

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Notes

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1 Sipho Mzakwe is an admitted attorney and currently works as a law clerk at the Constitutional Court of South Africa. He has experience in education law, particularly on issues relating to school admission, school infrastructure and discrimination in schools.

2 Promotion of Equality and Prevention of Unfair Discrimination (Act 4 of 2000).

3 *Social Justice Coalition and Others v Minister of Police and Others* [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) ('High Court judgment').

4 The complaint was lodged by the Women's Legal Centre (a non-profit law clinic) on behalf of the Social Justice Coalition, the Treatment Action Campaign, Equal Education, Free Gender, Triangle Project and Ndifuna Ukwazi.

5 The complainants sought the establishment of a commission in terms of section 206(3) of the Constitution of the Republic of South Africa, 1996.

6 L Muntingh, Modest beginnings, high hopes: The Western Cape police ombudsman, *South African Crime Quarterly*, No. 64, 2018, 19, https://doi.org/10.17159/2413-3108/2018/v0n64a4884.

7 C O'Regan and V Pikoli, *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*, August 2014, www.saflii.org/khayelitshacommissionreport.pdf (accessed 9 September 2019).

8 Ibid., 449.

9 Ibid.

10 The Social Justice Coalition is a membership-based social movement that 'works to advance the constitutional rights to life, dignity, equality, freedom and safety in the lives of all people, but especially those living in informal settlements in South Africa' http://sjc.org.za/about (accessed 9 September 2019) . The organisation's main office is based in Khayelitsha, Cape Town.

11 Equal Education is a membership-based social movement of 'learners, post-school youth, parents and community members striving for quality and equality in South African education, through activism and analysis' https://equaleducation.org.za/our-movement/ (accessed 9 September 2019).

12 The Nyanga Community Policing Forum is a community police forum was established by the Western Cape Minister of Safety and Security in terms of the South African Police Act 68 of 1995. The community policing forum consists of community organisations and institutions working in partnership with the police to 'create and maintain a safe and secure environment for citizens living in the CPF's area' www.westerncape.gov.za/facility/nyanga-community-policing-forum (accessed 9 September 2019).

13 The Women's Legal Centre is 'an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy and partnerships'. www.wlce.co.za/about-us/#what-we-do (accessed 9 September 2019).

14 J Redpath and F Nagia-Luddy, 'Unconscionable and irrational': SAPS human resource allocation, *South African Crime Quarterly*, 53, 2015, 18, https://doi.org/10.4314/sacq.v53i1.2.

15 Applicants' Heads of Argument, at paragraphs 100–103. See also Redpath and Nagia-Luddy, Unconscionable and irrational.

16 Applicants' Heads of Argument, at paragraph 7.

17 Jean Redpath filed an affidavit, as an expert, in support of the Applicants' challenge. At the time of filing the affidavit, Redpath was a researcher at the Dullah Omar Institute and had worked as a researcher in criminal justice since 1999.

18 J Redpath, Replying Affidavit at paragraph 15.

19 Applicants' Heads of Argument at paragraph 187.

20 According to Redpath: 'The insidiousness of the primary under-reporting problem lies in the fact that low allocations

of police resources in turn tend to inhibit reporting of crime, resulting in areas with low resources continuing to show artificially low levels of total reported crime, which in turn keeps their allocation of resources low. The opposite happens in better resourced areas, where more resourcing encourages high reporting which in turn results in large a/location of resources.' Redpath, Replying Affidavit at paragraph 16.

21 Ibid at paragraph 15.

22 The applicants, for example, noted in their heads of argument at paragraph 188: 'Canada weighs a murder 1000 times more than possession of cannabis, while in the UK murder is given 2700 times more weight'.

23 The applicants stated at paragraph 189: 'While the rich white areas may appear to have a large crime burden, it is made up almost entirely of non-contact crime.'

24 Ibid, paragraph 192.1.

25 Ibid, paragraph 117.

26 Ibid, paragraph 118.

27 Applicants' Founding Affidavit at paragraphs 95 to 98.

28 Respondents' Heads of Argument at paragraphs 9 & 10.

29 Ibid, paragraph 38.2.2.

30 Ibid, paragraph 10.1.

31 Ibid, paragraph 40.

32 Ibid, paragraph 40.2.

33 Ibid, paragraphs 41.1 and 56.1.1.

34 Section 1 of the Equality Act.

35 Ibid.

36 Section 13(1) of the Equality Act.

37 High Court judgment at paragraph 67.

38 Section 13(1) of the Equality Act.

39 Ibid, section 13(2).

40 Ibid, sections 14(2) and (3).

41 High Court judgment at paragraph 75.

42 Ibid, paragraph 76.

43 Ibid, paragraph 65.

44 Ibid, paragraph 87.

45 Ibid, paragraph 77. Significantly, the court does recognise that the applicants had established a *prima facie* case of discrimination in KwaZulu-Natal and that they had adduced evidence regarding this province in their founding papers. However, the court did not extend its declaratory orders to KwaZulu-Natal.

46 The Women's Legal Centre Trust (WLC), as a friend of the court, made submissions on the inability of the current system of police allocation to 'take into account the needs of policing violence against women and children' (WLC Heads of Argument at paragraph 76). While Judge Dolamo noted appreciation for the WLC's submissions, the court ultimately took the view that 'unfair discrimination challenged in this proceedings on the basis of race and poverty and not gender' (High Court judgment at paragraph 92). This was arguably a missed opportunity by the court to include a gendered lens in its analysis of the discriminatory effect of the current system of police resourcing.

47 Section 32 of the Equality Act.

48 Ibid, section 34(2).

49 C Albertyn and B Goldblatt, Equality in S Woolman and M Bishop (eds), *Constitutional Law of South Africa*, 2nd edition, 2013, 51.

50 In *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1998 (1) SA 745 (CC), the Constitutional Court recognised citizenship as an analogous ground of discrimination. In *Hoffmann v South African Airways 2001* (1) SA 1 (CC) the Constitutional Court recognised HIV status as a ground of discrimination.

51 K Scott, South Africa is the world's most unequal country: 25 years of freedom have failed to bridge the divide, *CNN*, 10 May 2019, https://edition.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html (accessed 5 May 2020).

52 High Court judgment at paragraph 11.

53 Ibid, paragraph 94.

54 Ibid, paragraph 77.

55 Applicants' Replying Affidavit at paragraph 20.