inadequacy in the feedback to the complainants in the matters which they had raised.

[57.] They also made a number of recommendations with regard to the enhancement of partnerships and the fighting and prevention of crime between the police and the community and the management of perceptions created by the media and NGO's regarding the services of police in specific areas.

[58.] It was common cause that the report of the task team had not been furnished to the 1st respondent or to any of the complainant organizations prior to the decision by the 1st respondent to establish the commission of inquiry. In fact it was only disclosed in the applicants founding papers for the first time. In his address before us, Mr Arendse submitted that there were two reasons why that did not occur; the first being that the 2nd applicant was not accountable to the 1st respondent and secondly that upon the receipt of the task team`s report the 2nd applicant had already become overwhelmed with the occurrences at Marikana in the North West Province in which a number of miners were apparently killed by members of the SAPS. While the second of the excuses raised a realistic practical constraint the first excuse did not accord with the attitude of co-operation that General Phiyega herself professed in her dealings with the 1st respondent.

[59.] A further phase of interaction between the parties related to correspondence and a meeting after the establishment of the commission of

inquiry between the 1st applicant and the 1st respondent in which he sought to persuade her to suspend the commission of inquiry and to consider an alternate proposal with regard to dealing with the complaints under consideration in the commission of inquiry.

[60.] It appeared from the correspondence that despite the parties having been amenable to engage one another the relationship broke down when the 1st applicant was unable to secure a commitment from the 1st respondent to suspend the work of the commission of inquiry while the 1st applicant provided the details of and the parties considered the alternate proposals. That breakdown appears to have precipitated the launching of these proceedings by the applicants and in particular those applicants (5th, 6th and 7th) who were placed under subpoena by the commission of inquiry. What is apparent though is that at stage the parties were already in a process in which they had committed themselves to an ongoing interaction but which was aborted when the applicants launched these proceedings.

[61.] As already indicated I am of the view that there are two central challenges to the appointment of the commission of inquiry by the 1st respondent. In the first instance the 1st , 2nd and 3rd applicants claims that the 1st respondent has failed to properly engage inter-governmentally so as to avoid a dispute and as such the appointment of the commission of inquiry was premature and secondly that with the appointment of the commission of inquiry the 1st respondent was in breach of the provisions of the Constitution by establishing the commission of inquiry in

terms of section 1 of the Western Cape Commissions Act which automatically gave the commission of inquiry coercive powers of subpoena over members of the South African Police Services.

[62] I propose to deal with the second of these challenges first as it underscores the importance of compliance with both the Constitutional and the statutory obligations under the Intergovernmental Relations Framework Act 13 of 2005 in respect of the inter-governmental relationships which is the very subject of the first challenge.

The National and Provincial competence with regard to policing.

[63.] The South African Police Services is structured at both national and provincial level in terms of section 205(1) of the Constitution. Under the Interim Constitution (IC) the police services functioned *"under the direction of the National Government as well as the various Provincial Governments."* (sections 214 (1) and 219(1) of the Interim Constitution). Under the Final Constitution ("FC") this power of the provinces was removed and substituted with monitoring, oversight and liaising functions contained in sections 206 of the Final Constitution. In this regard Mr Arendse referred to the decision of the Constitutional Court in *In Re Certification of the Constitution 1996 (4) SA 744 CC paragraphs 392 to 401.*

In particular paragraph 397 states:

"[397] The burden of the criticism was that the monitoring, oversight and liaising powers and functions provided for in the NT hardly make up for the loss of the powers referred to in IC 219. The new structure indeed requires that the provincial commissioner be directly accountable only to the national commissioner. This flows from the abandonment of the division in functions between the national and provincial spheres of government as prescribed in IC 218 and 219. The specific functions of the provincial commissioners are not enumerated in the NT; they are a matter for national legislation. We agree that the loss by the provinces of direct control over the provincial commissioners is a significant diminution. What has been substituted is a provincial power, among other things, to monitor all police conduct in the province, to exercise an oversight role in policing, including receiving reports on police service, and to liaise with the national minister with regard to crime and policing in the province. Although these are important functions and their effective exercise by the province could have a profound influence on the performance of the provincial commissioner's functions, the measure of control is less and is indirect."

[64.] Unlike the Interim Constitution the Final Constitution does not prescribe any powers or functions to be exercised by the Province independent of the National Minister and National Commissioner. Political accountability in relation to the provinces has been reduced by removing what was a more direct relationship between the provincial commissioner and the provincial executive to an indirect one.

[65.] In schedule 4 Part 1 of the Constitution headed *"Functional areas of concurrent National and Provincial Legislative competence" provides that;*

The legislative power over the police in the provinces is tabulated as a concurrent power *"to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence".* In this regard Mr Arendse remarked that no specific provincial legislation was enacted to give effect to the power of the province to appoint a commission of inquiry (as contemplated by section 206(5) in order to perform the functions set out in sections 206(3)). Mr Arendse submitted further that the powers of such commission would have to be, (a) limited to carrying out of the monitoring, oversight and liaising functions set out in section 206(3);(b) confined to the areas set out in sections 219(1) of the Interim Constitution which also remains subject to national legislation; (c) not be inconsistent, with such legislation and in this regard referred to the **Certification case** (above); paragraph 399 at page 890 and paragraph 396 at page 889);

"NT sch 4 part A grants legislative power over policing to provinces 'to the extent that the provisions of chap 11 of the Constitution confer upon the provincial legislature legislative competence'. This pertains to legislation which might be found necessary to carry out the monitoring, oversight and liaising functions set out in NT 206(2). Apart from this, there is no express provision for provincial legislative power in the NT."

[66.] The Western Cape Provincial Commissions Act 10 of 1998 which is not the subject of challenge in this matter, Mr. Rosenberg submitted was however not limited by these requirements because it was not specifically enacted for the purposes of investigating policing. Mr Arendse on the other hand submitted that the Constitutional provisions however prohibited the use of the Western Cape Commissions Act for such purpose and in this regard relied on the provisions of sections 207(1) of the Constitution which vested the National Commissioner with the power to control and manage the police services. The South African Police Services Act 68 of 1995 and Regulations thereunder are national legislation made in terms of section 205(2) that enabled the police services to discharge its responsibilities effectively and under a chain of command that excluded the provinces. The province, the applicants claimed may not through the 1st respondent employ the provisions of the Western Cape Commissions Act to vest the commission of inquiry with powers of coercion that neither the province nor the 1st respondent enjoyed under the Constitution.

[67.] Sections 3 and 4 of The Western Cape Provincial Commissions Act deals with the powers of a commission of inquiry to coerce witnesses to comply with a subpoena and to attend and testify before it on pain of committing an offence if he/she refuses or fails to do so unless *"sufficient cause"* is established. Mr Arendse submitted that such provisions may not be applied to control members of the SAPS and added that by coercing them to appear, produce documents and testify at the behest of the Commission would be, (a) removing them from the control of the National Commissioner; (b) placing them under the direct

legislative power and control of the 1st respondent, and (c) subjecting them to the "*coercive control by her surrogate (commission).*" Such powers he contended were not conferred upon the provincial legislature by Chapter 11 of the Constitution. In this regard Mr Arendse also pointed out that the police officers would also be at risk of breaching regulations 58(24) and 58(32) which provides that;

"*58 Offences against duty and discipline*

(24) Without the permission of the Commissioner, directly or indirectly discloses or otherwise and in the discharge of his functions, any information gained by or communicated because of his employment in the force or uses such information for any purposes other than the discharge of his functions or official duties, whether or not he discloses such information" and

"(32) Comments unfavourably in public upon the administration of the Force or any other government department"

[68.] Mr Arendse submitted that the provisions of these regulations conflict directly with the provisions of the Western Cape Commissions Act with regard to the power of subpoena and the compulsion of witnesses to attend such proceedings.

[69.] However Mr Arendse's position loses sight of the provisions of section 207(4), (5)and (6) which provides that the Provincial Commissioner must report to the Provincial Legislature annually on policing in the province and must send a copy of the report to the National Commissioner and in terms of section 207(6)

and if the Provincial Commissioner has lost the confidence of the Provincial Executive the Executive may institute appropriate proceedings for the removal or transfer of or disciplinary action against that Commissioner in accordance with National legislation.

[70.] Although the Provincial Commissioner is subject to the control and management of the National Commissioner for policing in the province (section 207(4) the Provincial Commissioner is at the very least accountable to the Provincial Executive on an annual basis on policing in the province and also subject to its disciplinary power in accordance with national legislation.

[71.] In the context of the powers of the National Commissioner, the 1st applicant submitted that there were two distinct legal decisions of the 1st respondent under challenge. Firstly, the decision to appoint the commission of inquiry and secondly the decision to make the powers of subpoena afforded by the Western Cape Commissions Act applicable to the commission of inquiry. Each involved an exercise of a specific power namely, the power to appoint a commission of inquiry in terms of the Constitution and the 1st respondent's power to make the provisions of the Western Cape Commissions Act applicable. In this regard Mr Arendse relied on the decision of **President of the Republic of South Africa and SARFU 2000(1) SA (1) CC;**

"[34] In part C of this judgment, at paras [126]-[222] below, we consider whether SARFU and the other respondents were entitled to a hearing prior to the President deciding to appoint a commission of inquiry.

(a) We conclude that there are two distinct legal decisions under challenge: the decision to appoint a commission of inquiry in terms of the Constitution; and the decision to make the powers of subpoena afforded by the Commissions Act applicable to that commission. We consider whether each of these decisions constitute 'administrative action' as contemplated by s 33 of the Constitution….

[131] But that is wrong. It does not follow that, once a commission of inquiry has been appointed, the commission will automatically be vested with powers under the Commissions Act. Indeed, it is only competent to vest such powers in a commission if the commission is investigating a matter of public concern. There is no similar limitation on the power to appoint commissions in terms of s 84(2)(f). Accordingly, a commission may be appointed to investigate a matter which is not of public concern and to which the provisions of the Commissions Act do not apply. Equally, the President may decide not to make the provisions of the Commissions Act applicable even to a commission of inquiry investigating a matter of public concern. The question of procedural fairness needs to be considered in relation to three different acts, each of which involves the exercise of a specific power or powers: the President's decision to appoint a commission in terms of the power conferred upon him by s 84(2)(f); the President's decision to make the provisions of the Commissions Act applicable; and the exercise of the commission's powers by the commission itself. The third question does not arise in this case as the commission has not commenced its work. If it ever does, considerations of procedural fairness may well arise at that stage, as the Supreme Court of Appeal has recently held. The first two issues are relevant in

the current proceedings. Although they are technically separate legal acts, they are, of course, closely related..."

[72.] Mr Arendse submitted that the appointment of a commission of inquiry in terms of the Constitution is a separate legal act distinct from that which vests the powers contained in the Western Cape Commissions Act. The source of the 1st respondents power to appoint a commission of inquiry is provided for in the Constitution under Section 174 (2)(e). The two decisions arise from different sources and are therefore subject to different regulation. Mr Arendse submitted that the 1st respondent was entitled to appoint a commission of inquiry in terms of section 206(5) of the Constitution but without employing her power under section 127(2)(e) and thereby invoking the powers of coercion contained in the Western Cape Provincial Commissions Act. In effect, the applicant's submission boils down to the notion that the 1st respondent was entitled to appoint a commission of inquiry but without coercive powers over members of the police services. However, such powers could be obtained with the consent of the 1st or 2nd applicants and which should have been secured through the use of the provisions of Section 41 of the Constitution. In the absence of such *agreement the* applicants claimed that the first respondent could not invoke the provisions of Western Cape Provincial Commissions Act to automatically clothe the commission of inquiry with coercive powers.

[73.] Mr Rosenberg on behalf of the 1st respondent submitted that the applicant's contentions in this regard were without substance and failed for

several reasons. In the first place he argued that the applicants failed to recognize that the coercive powers enjoyed by the commission of inquiry did not arise from the Proclamation that established it or the regulations promulgated thereunder as clause 6 of the Schedule to the Proclamation merely noted that:

"The Commission must perform the inquiry within its terms of reference and may exercise the powers and perform the functions of the Commission as referred to in the Western Cape Commissions Act..."

[74.] In this regard the commission's power of subpoena arose from the provisions of section 3(1) and (2) of the Western Cape Commissions Act. This Act automatically applied to all commissions of inquiry established by the Premier and in all cases automatically vested such commissions with the power of compulsion. The commission thus exercised a statutory power enjoyed by all provincial commissions of inquiry and not simply powers which the 1st respondent elected to give it. In this regard he again highlighted the significance of the fact that the applicants had not sought to challenge the Western Cape Commissions Act in support of their contentions. Furthermore Mr Rosenberg submitted that the applicants had fundamentally misconceived the provisions of section 127(2)(e) and 206(5)(a) of the Constitution insofar as they do not envisage or create separate commissions of inquiry making powers. Sections 206(5)(a) merely envisaged the type of commission of inquiry by the province in respect of policing while sections 127(2)(e) of the Constitution provided such provincial commission of inquiry with the power of coercion through the exercise of the 1st respondent's powers.

[75.] The 1st respondent also claimed that the 1st applicant was inconsistent in its approach as the Farlam Commission(a judicial commission of inquiry) which had been established to investigate the Marikana incident of the 16th August 2012 also enjoyed subpoena powers. Moreover that commission of inquiry has express investigative powers into the conduct of the police and in particular the responsibility for the violent deaths of striking mineworkers. In that regard the 1st respondent noted that the 1st applicant had no problem with that commission of inquiry exercising powers of coercion. Further the 1st respondent contends that the applicants have failed to recognize that the *"intrusion"* by the commission of inquiry into the affairs of the South African Police Services is constitutionally mandated by the provisions of section 206(5) insofar as it provided that provincial oversight functions over the police services could be exercised either through an investigation or a commission of inquiry. In this regard Mr Rosenberg submitted that if the commission of inquiry did not have powers to compel witnesses it would be indistinguishable from a mere investigation. He referred to the decision of **Minister of Local Government, Housing and Traditional Affairs, Kwazulu Natal Umlambo Trading 29 CC and Others 2008 (1) SA 396 (SCA)** where it was held that section 206(2) of the Constitution meant that once provincial legislation existed regulating commissions, the powers of compulsion could only be granted in terms of that legislation. In that case, provincial legislation (similarly to the WC Commissions Act) required the establishment of a commission by the Premier. The upshot was that an MEC could appoint an

investigation but once the powers of compulsion were required the Premier alone had the power to appoint a commission of inquiry under the provincial Act.

[76.] Further, in reference to the decision in **The City of Cape Town v Premier, Western Cape, and Others 2008 (6) SA 345 CPD** the Premier appointed a commission of inquiry into the affairs of the City. The appointment was not done in terms of section 106 of the Municipal Systems Act which provides for a provincial MEC to authorize an investigation into the affairs of a municipality if the MEC believes that it was necessary and had reason to believe that the Municipality was failing in its statutory obligations and was besieged with serious malpractices. The Premier in that matter purported to act under the residual power to appoint a commission of inquiry. The court held at paragraph 70-74 that it was not open to the Premier to establish a commission of inquiry outside the circumstances provided for in s106 of the Systems Act. Mr Rosenberg submitted further that the investigation under section 106 could have been transformed into a commission of inquiry, in terms of the Western Cape Commissions Act, and that it would then have had the power to compel evidence.

[77.] Mr Rosenberg submitted also that the appointment of a commission of inquiry rationally required the power of subpoena to deal with potentially hostile or un-co-operative witnesses and institutions such as that but not limited to members of the SAPS. Further the power of subpoena by the commission of inquiry would only be used where members of the police refused to cooperate.

In this regard if members of the police under subpoena wanted to challenge the breadth of a subpoena they could bring such issue before a court but more importantly they would first be required to attend at the commission of inquiry and there raise their complaint about the subpoena.

[78.] Mr Arendse submitted that in appointing the commission of inquiry the 1st respondent employed the unlimited powers under section 127(2)(e) of the Constitution and had failed to take into account that the powers and functions of the provinces and that of Premiers are limited to monitoring, oversight and liaising over the police and that direct control over the police services is vested by virtue of section 207 of the Constitution in the National Commissioner.

[79.] I am of the view that the significance of the limit of the 1st respondents powers of appointing a commission of inquiry in terms of Section 206(5) and more so a commission of inquiry with coercive powers must be considered within the context of the Constitution itself which, (a) defines very specifically the authority and powers over the police by the National Commissioner and (b) that the appointment of the commission of inquiry under section 206(5) or for that matter any other commission of inquiry by the Premier in terms of section 127(2)(e) with regard to policing must be exercised with proper regard to the provisions of the Constitution in respect of the powers and functions over the police services and must occur within the context of Section 41 of the Constitution. On such basis while the exercise of the power of the appointment of a commissioner of inquiry under section 206(5) must not offend the principle of

legality in the Constitution the exercise of the power must also be consonant with the principles enunciated section 41 of the Constitution.

[80.] This leads me to the second substantive challenge by the 1st, 2nd and 3rd applicants against the appointment of the commission of inquiry by the 1st respondent.

[81.] In the matter **Premier, Western Cape v President of the Republic of South Africa 1993 (3) SA 657 (CC)**

"[50.] The principle of co-operative government is established in s 40 where all spheres of government are described as being 'distinctive,' inter-dependent and inter-related'. This is consistent with the way powers have been allocated between difference spheres of government. Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is 'one sovereign, democratic State, and a constitutional structure which makes provision for framework provisions to be set by the national spheres of government. These provisions to be set by the national sphere of government. These provisions vest concurrent legislative competences in respect of important matters in the national and provincial spheres of government, and contemplate that provincial executives will have responsibility for implementing certain national laws as well as provincial laws.

[51.] Local governments have legislative and executive authority in respect of certain matters but national and provincial legislatures both have competences in respect of structuring of local government, and for overseeing its functioning…

[53] The national government is also given overall responsibility for ensuring that other spheres of government carry out their obligations under the Constitution."

[82.] It is common cause that the 1st and 2nd respondents on the one side were enjoined by the Constitution to reasonably engage with the 1st , 2nd and 3rd applicants on the other side as a precursor to the establishment of a commission of inquiry by the 1st respondent into the functioning of the police in Khayelitsha. However in argument Mr Arendse sought to suggest that this burden rested only on the shoulders of 1st respondent. I do not agree with that view as it is clear from the provisions of the Constitution that the responsibility lies on both the national and provincial spheres of government. As apparent from the second phase in the background (above), the 1st applicant, 2nd applicant through the then Acting Commissioner of Police and the 3rd applicant had simply not reciprocated the engagement initiated by the 1st respondent. The request for their comments on the complaints received about policing by the 1st respondent and the request about the appointment of commission of inquiry by the complainant organizations appeared from the correspondence which was placed before the court to have fallen on deaf ears and without any substantive response to the 1st respondent. Although the 1st applicant claimed that he had met with the Khayelitsha community and the 3rd applicant claimed that he had also interacted with the

community on an ongoing basis it was clear that they had not properly communicated such interactions timeously or fully to the 1st respondent. Nor did it appear that they bothered to invite her or the 2nd respondent to the meetings with the community. The then Acting National Commissioner of Police (the unfortunate recipient of the poor advice from his legal officer) for his part displayed no initiative in responding to the very serious complaints raised about policing and vigilante activity in the Khayalitsha community. The 1st respondents compliant about the conduct of the 1st , 2nd and 3rd applicants was therefore not without merit and indeed contributed not only to her frustration but also to that of the complainant organizations who increasingly felt that the plight and desperate situation of the people of Khayelitsha was not being given proper or serious consideration and attention at a national level. Moreover, the 1st respondent became increasingly anxious by the ever increasing incidents of vigilantism that strengthened her view of a breakdown in the confidence of the police by certain sections of the Khayalitsha community. The phenomenon of vigilantism is in my view far more complex than a simplistic view of a breakdown of confidence in the police as reflected in the very insightful article by Benjamin Haefele "**Vigilantism in the Western Cape**" sourced from the Department of Community Safety, Provincial Government of the Western Cape. Nonetheless the growing incidents of vigilantism required the urgent and concerted response by all the relevant role-players and the applicants were undoubtedly central to such a process.

[83.] In my view it was apparent that there was a significant change in the response of the 2nd applicant with the appointment of General Phiyega to the

post in June 2012. In fact, the 1st respondent and the complainant organizations themselves claimed that they were initially optimistic with her response to the complaints and the 9th respondent in particular claimed that they were encouraged with the commitment of General Phiyega by having set up the qualitative assessment of the police services in respect of the complaints. It was therefore not surprising that Mr Majola remarked that the 9th respondent was impressed with the endeavours of General Phiyega and her commitment to establishing an investigation into the complaints and generally into the systemic problems faced by the police. However, what appeared to be a serious difference of opinion between the parties on the papers and in argument was whether the 2nd applicant had in fact remained consistent and committed to dealing with the complaints and in her engagement with the 1st respondent. In this regard the 1st respondent pointed to the repeated failure to comply with extensions that the 2nd applicant had given and both the 1st respondent and complainant organizations relied much on the contents of the letter of the 7th August 2012 and dismissed it as no more than a generalized and cursory response to the complaints and request for a commission of inquiry. I do not share that view. It is apparent that when the 2nd applicant addressed the letter to the 1st respondent she herself had not been in receipt of the report of the task team. In the letter she specifically refers to the interactions that she had and that which were in the process of taking place. She had visited the province of the Western Cape more than once and held meetings with several stakeholders. She had also visited some of the areas in Cape Town. Moreover she emphasized that it appeared to her that the problems were *"complex"* and required an *"integrated*

response". That in my view was neither a glib nor superficial response nor an indication that General Phiyega lacked an appreciation of the problems and the seriousness of the complaints raised by the complainants, or the systemic nature and complexity of the underlying causes of crime and vigilantism. If there was any doubt as to the seriousness or commitment of the 2nd applicant to deal inclusively and more comprehensively with the problems there was nothing that prevented the 1st respondent or the complainant organizations from responding directly to the letter of the 7th August 2012 before insisting on the appointment of a commission of inquiry. After all, they, for the first time in several months of correspondence had at long last received a positive and substantive commitment from the 2nd applicant to deal with the complaints that were raised. Moreover the complainant organizations had in fact met with the task team and they appeared by all accounts to have had a fruitful engagement with them. Although neither the 1st respondent nor the complainants were at that stage furnished with a copy of the report of the task team it was not disputed that the task team had also met with a number of other stakeholders and the task team would have been in the process of drafting a report at the very least by the end of July early August 2012.

[84.] The very appointment of the task team by General Phiyega in fact demonstrated the seriousness with which she considered the complaints and the lack of proper service by members at the three police stations concerned. The report itself indicates a serious diagnosis on the part of the task team in considering the conditions at the three police stations and to some extent the

individual complaints although Mr Majola was of the view that most if not all of the complaints had not been dealt with adequately by the task team. Further it appeared that for the first time it seemed that the police had made a serious attempt at looking at each of the complaints unlike the vain attempts by both Japhta and the office of the 3rd applicant in their dismissive attitude to the complaints.

[85.] It appears that the 1st respondent was decidedly of the view that the letter of the 7th August 2012 from the 2nd applicant was a hopelessly inadequate response to the repeated requests that she had made to the 1st , 2nd and 3rd applicants about the complaints and the establishment of a commission of inquiry for over a period of nine months. Both the 1st respondent and the complainant organizations accepted though that the appointment of the commission of inquiry was a drastic step and would have been a last resort as it also involved a considerable amount of limited state resources. Moreover the first respondent on her own version was aware that the first applicant was against the establishment of a commission of inquiry and apparently of her own accord expressed the hope that she would not have to defend the appointment of a commission of inquiry in a court. That was all the more reason for her to have enquired directly from 2nd applicant who she regarded as more receptive to working with about what exactly she had been doing about the complaints, or when the report of the qualitative assessment would be at hand or what exactly the 2nd applicant had meant in her letter of the 7 August 2012 insofar as the 1st respondent regarded it as inadequate and superficial. In my view the decision taken by the 1st respondent

at that stage to have appointed the commission of inquiry was premature and precipitous of this application and by thereafter not agreeing to suspending its operation pending the outcome of the then ongoing interactions with the 1st and 2nd applicants and to have exhausted her obligation under the Constitution of inter-governmental co-operation and by averting a dispute which at that stage was clearly imminent with the appointment of the commission of inquiry.

[86.] Moreover in invoking the provisions of the Western Cape Commissions Act with its coercive powers over the police services 1st respondent must in all probability have been aware that the issuing of subpoenas and the compelling of the police to testify before the commission of inquiry would have raised the very dispute which this court is presently confronted with.

[87.] Mr Arendse further submitted that the principles set out in the final Constitution in section 41(4) stand for two basic propositions; The first of cooperative governance which do not diminish the autonomy of any given sphere of government. **(Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)** at para 292. (The principles set out in FC s41 *'are not invasive of the autonomy of the province in a system of co-operative.')* It simply recognizes the place of each within the whole and the need for coordination in order to make the whole work. Secondly, sections 40(1) and 41(2)(e), (g) and (h) re-enforce the notion that each sphere of government is

distinct. **(Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development & Others 1999 (11) BCLR 1229** (T) at para 34,

[88.] However as already indicated, I am of the view that the responsibilities under section 41 of the Constitution burdened the parties concerned equally. The 1st applicant, save for meeting with the 1st respondent and his interactions with the community was hopelessly unresponsive to the direct request of the 1st respondent and the complainant organizations. So too was the 3rd applicant. The response of 2nd applicant in the person of General Phiyega however in my view requires to be considered differently more so in the light of the fact that she had at that stage only recently been appointed to the position and more importantly because she had proactively taken steps in investigate the complaints of the clients of the 8th respondent through the appointment of the task team.

[89.] During the course of argument and in the 9th respondent's answering papers, counsel for the 1st respondent and that of the 9th respondent suggested that the real reason why the task teams report had not been furnished to the 1st respondent was because the 1st applicant was at odds with the views adopted by the 2nd applicant in respect of having an open inquiry as part of the recommendations of taking the investigation forward. That view however appears to be contradicted by a letter dated 11 October 2012 from the 1st applicant to the 1st respondent in which he referred to the very issue and stated *that "the National Commissioner reasoned that a full police investigation is needed and that at a later stage if necessary a more formal inquiry in which the*

police will be assisted by persons outside the South African Police Services appointed by the National Commissioner will be conducted. I concur with the National Commissioner."

[90.] In this regard it was apparent that there was no difference of opinion between the 1st and 2nd applicant's with regard to the course of action that they proposed and the suggestion to the contrary was nothing more than mere speculation.

[91.] Mr Majola had also submitted that the proposal of the 2nd applicant had found favour with the complainants and had they been in receipt of the proposal at the beginning of August 2012 and the recommendations of the task team they were confident that there would have been no need for this litigation.

[92.] In the circumstances I am not satisfied that the parties, in particular the 1st, 2nd and 3rd applicants on the one side and the 1st and 2nd respondent on the other have exhausted their obligations to engage one another to explore appropriate means of avoiding or resolving the dispute between them and in respect of the complaints and the apparent breakdown in the relationship between the community of Khayelitsha and the police services. During the course of argument there was much debate about whether the applicants should have first declared a dispute in terms of the Framework Act before approaching court Mr Rosenberg submitted also that there was no dispute between the parties as the 1st applicant had repeatedly stated that he sought to "*avoid a dispute." However it was*

patently clear that the dispute between the parties arose by virtue of the very appointment of the commission of inquiry by the first respondent which incidentally the first respondent herself acknowledged in the meeting with the second applicant would occur if she appointed a commission of inquiry. It was therefore incumbent on all the parties concerned (described earlier as the antagonists) to have made an attempt of resolving the dispute by way of further negotiations and interaction between them.

[93.] The applicants have also raised a number of other grounds in which they sought and based their claim for interim relief. In the light of my findings with regard to the non-compliance with the principles of inter-governmental relationships as contained in the Constitution I do not deem it necessary to deal with each of the other grounds. Moreover there appears to some dispute of fact with regard to a number of issues in particular as to whether the 1st and 2nd respondents exhausted all the other statutory institutions and mechanisms to both raised and dealt with the complaints. It is not necessary to resolve such disputes on the papers at this stage. Further the applicants very sensibly and appropriately did not persist with their challenge for the recusal of the Chairperson of the commission of inquiry retired Judge O' Regan, commission member Mr Vusi Pikoli and evidence leader Mr Sidaki which in my view was fully dealt with by them in their respective answering affidavits.

[94.] I am also mindful of what appears to be deterioration in the relationship between the 1st applicant and the 1st respondent from the tone of language used

in their affidavits. I have no doubt that their commitment to the principles of co-operative government will remain the guiding principle in their official responsibilities of inter-governmental relations and in their further conduct in this matter.

[95.] Further I do not deem it necessary to deal with the complaints of over breadth of the subpoenas as a basis for the challenge for seeking interim relief as the 6th respondent correctly pointed out such challenge could and should more appropriately be raised before the commission of inquiry.

[96.] In consideration of the issues of irreparable harm and the balance of convenience the Constitutional Court has in the context of the **OUTA** matter raised the question of separation of powers harm and against which the balance of convenience must also be considered.

[97.] Section 41 (4) of the Constitution provides:

"If the court is not satisfied that the requirements of sub-section 3 had been met it may refer the dispute back to the organs of state involved."

Subsection 3 provides:

"An organ of state involved in a inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

[98.] Insofar as I am of the view the parties have not exhausted their Constitutional obligation to comply with Chapter 3 of the Constitution with regard to inter-governmental relations and in particular the principles referred to above I am of the view that it is necessary that I direct the parties to in fact do so, even at this stage because of the fundamental importance of the need for there to be co-operation between these two spheres of government in the investigation of the complaints and the apparent breakdown in the relationship between the community of Khayalitsha and the South African Police Services. The very concerns raised by Mr Majola on behalf of the 9th respondent and generally the people of Khayelitsha would be undermined if the 1st, 2nd and 3rd applicants and the 1st respondent are not able to co-operate with one another more especially given the complex nature of the underlying causes of crime and its socio economic dimension. In dealing with such issues it could only be in the best interests of all concerned and more importantly the community of Khayalitsha and in particular the victims of crime that there be the fullest possible cooperation between these two spheres of government and in their compliance with their Constitutional obligations. In the circumstances they should at the very least be given the opportunity for doing so pending the outcome of the substantive challenges under the relief sought in part B of the Notice of Motion. In this regard I have noted that the commission of inquiry had voluntarily suspended its proceedings subject to the determination of the interim relief. It is self-evident that the work of the commission would have been limited or affected by the end of year vacation break. Realistically the commission of inquiry would not have resumed at a fully functional pace by mid-January 2013.

[99.] I have also considered the role or assistance that could be provided by the 9th respondent, the other complainant organizations and the community based organizations such as the Khayelitsha Development Forum in the process of further inter -action between the relevant parties. Although I am not at liberty to order them to assist or participate in such process they are nevertheless urged to engage with the parties directly to arrive at a mutually suitable role that they could play. More importantly none of them should compromise their independence in doing so.

[100.] Mindful of all of the considerations referred to and that of practicality I would have proposed making the following structured order:

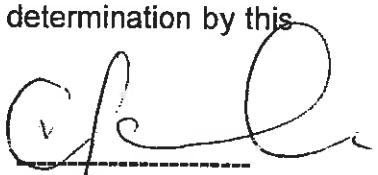
(i) The 1st , 2nd and 3rd applicants and the 1st and 2nd respondents are ordered to deal with the dispute between them by further engagement in accordance with the principles as set out section 41 of the Constitution and to report to this court by no later than the 31 January 2013 on the outcome thereof. Pending the steps described above.

(ii) That the 4th, 5th and 6th respondent, and any person or persons acting under their direct or control, be interdicted and restrained from giving effect to subpoenas purportedly issued in terms of section 3(1)(a) of the Western Cape Provincial Commissions Act 10 of 1998 on 30 October 2012 and served on Colonel MF Reitz, Brigadier Z Dladla, Colonel Tshatleho Rabolibela and Lieutentant General A H Lamoer, pending the outcome of (i) above and this courts further decision.

(iii) That the 4th, 5th and 6th respondents (and those acting under their direction and control) be interdicted and restrained from conducting the commission of inquiry into allegations of police inefficiency in Khayelitsha and a breakdown in relations between the community and the police in Khayelitsha (the inquiry) appointed under section 1 of the Western Cape Provincial Commissions Act, 1998 (Act 10 of 1998 and the regulations thereto pursuant to s206(5) of the Constitution of the Republic of South Africa, 1996 (the Constitution), in any form whatsoever, pending the outcome of the process directed in (i) above and the further decision of this court.

(iv) That the 4th, 5th and 6th respondents, and those acting under their direction and/or control be interdicted and restrained from issuing or cause to be issued any subpoenas to any member of the South African Police Services in terms of s3 (1)(a) of the Western Cape Provincial Commissions Act 10 of 1998, pending the outcome of the process directed in (i) above and the further decision of this court.

(v) That the cost of this application stands over for later determination by this court.



SALDANHA J