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Investigative Reports

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Investigative Reports

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COMPLAINT NO: Eastern Cape/1213/0279

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Complaint No: EC/1213/0279

In the matter between:

DACRE HADDON, DEMOCRATIC ALLIANCE, EC

Complainant

(On behalf of Zolani and Phaphamani residents in Grahamstown)

and

MAKANA MUNICIPALITY

Respondent

REPORT

1. Introduction

- 1.1 The South African Human Rights Commission (hereinafter referred to as the '**Commission**') is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 1996 (hereinafter referred to as '**Constitution**').
- 1.2 The Commission is specifically required to, promote respect for human rights, promote the protection, development and attainment of human rights and Monitor and assess the observance of human rights in the Republic.
- 1.3 Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.4 The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.
- 1.5 Section 9(6) of the Human Rights Commission Act, determines the procedure to be followed in conducting an investigation regarding an alleged violation of/or threat to a fundamental right.

2. Parties

- 2.1. The Complainant is Mr Dacre Haddon, a Democratic Alliance member in the Eastern Cape Provincial Legislature, on behalf of Zolani and Phaphamani residents, informal settlements situated in Grahamstown, an area falling under the jurisdiction of Makana Municipality, Eastern Cape (hereinafter referred to as '**Complainant**')
- 2.2. The Respondent is Makana Municipality established in terms of the provisions of the Local Government Municipal Structures Act, 117 of 1998, with its Head Office situated at High Street, Grahamstown (hereinafter referred to as '**Respondent**')
- 2.3. The Respondent is cited as the local government authority with jurisdiction over Zolani and Phaphamani informal settlements responsible for the delivery of basic municipal services to its residents.

3. Background to the Complaint

- 3.1. On Tuesday, 22 January 2013, the Commission received a complaint from Mr Dacre Haddon, a Member of Parliament representing the Democratic Alliance in the Eastern Cape Provincial Legislature. The Complainant acts on behalf of Zolani and Phaphamani residents, informal settlements situated in Grahamstown.
- 3.2. In the complaint, the Complainant alleges the following:
 - 3.2.1. That there are no waterborne sanitation facilities in the area so the residents in these areas still use the pit toilets.
 - 3.2.2. That there is no provision of adequate water to the residents, they still rely on communal taps and some have to walk distances over 200 metres to get to these taps.
 - 3.2.3. That the Respondent has failed to provide residents of these areas with access to adequate housing as the residents still live in the mud houses as well as shacks.
 - 3.2.4. That the solid human waste spills out of the municipal sewer into the streets and is thus unhygienic to the residents.
 - 3.2.5. The Complainant further alleges that these residents have been residing in these areas for over 25 (twenty five) years and the municipality has ignored their plight for years.
 - 3.2.6. The Complainant alleges further that township developments have been erected around these settlements over time and these townships have been provided with adequate water and sanitation.

4. Preliminary Assessment and Issues for Determination

- 4.1. The Eastern Cape office made a preliminary assessment of the complaint and had to make determinations on the following issues:
 - 4.1.1. The Commission had to determine whether the municipality undertook its legislative responsibilities of providing basic municipal services to the residents.
 - 4.1.2. Whether failure by the municipality to provide these services constituted a *prima facie* violation of the rights of the residents in these areas as per chapter two of the Constitution of the Republic of South Africa (Bill of Rights).
- 4.2. The assessment determined that indeed the following rights have been violated:
 - 4.2.1. Section 10- Human Dignity;
 - 4.2.2. Section 14- Privacy;
 - 4.2.3. Section 24- Environment;
 - 4.2.4. Section 26- Housing; and
 - 4.2.5. Section 27- Access to water.
- 4.3. Determination had to be made further whether the alleged violation merited a full investigation in terms of the Complaints Handling Procedures of the Commission.

5. Steps Taken by the Commission

- 5.1. The Eastern Cape Provincial Office conducted the investigation in the following manner:
 - 5.1.1. Correspondence with the respondent.
 - 5.1.2. Site visit and inspection.
 - 5.1.3. Interviews with Residents.

Correspondence with the respondent

- 5.2. Following the receipt of the complaint, the Commission acknowledged receipt of the complaint and the allegations letter was dispatched to the Respondent on 6 February 2013.
- 5.3. The office of the Acting Municipal Manager “Mr Myalato”, confirmed receipt of the Commission’s letter.
- 5.4. Various communications were made to the office of Mr Myalato, on 14 February 2013 as well as a reminder letter on 22 April 2013 but the Commission has not received any form of response.
- 5.5. The Commission briefly met the newly appointed Municipal Manager (Dr Pravine Naidoo), on the 6 June 2013 and duly informed him of the allegations and provided him with the copies of the Commission’s correspondences. He promised response within 14 days. No response has been received by the Commission to date.

Site visit and Inspection

- 5.6. On Thursday, 6 June 2013, the Eastern Cape provincial office conducted an inspection in loco of the municipality under review and noted the following:
 - 5.6.1. The two informal settlements are surrounded by other townships like, i.e. Vergenoeg Location, which also fall within the jurisdiction of Makana Municipality.
 - 5.6.2. The residents also allege that the Vergenoeg, is better developed in that there is adequate water supply, adequate housing and proper sanitation.
 - 5.6.3. That indeed there is no adequate housing in that the majority of residents live in homes constructed out of mud and others in shacks, which are constructed out of corrugated iron and wood.
 - 5.6.4. That indeed there is no adequate water supply in that there are only 5 working communal taps that have to be shared by about 350 households in the Zolani settlement and about 40 households in Phaphamani settlement.
 - 5.6.5. That indeed there are residents who walk long distances about 500 metres to (1) kilometer to get to these taps.
 - 5.6.6. The problems observed are that most residents do not have formal education and thus displayed low levels of literacy.
 - 5.6.7. The investigators have also observed that the residents were using pit toilets that they had to dig in their yards as there is no water supply system to the respective yards or households.
 - 5.6.8. That these toilets are not safe for children, women and people living with disabilities.

- 5.6.9. The investigators have also observed with shock that there is a stream of sewage that runs right in the middle of the settlements and alongside the door steps of other households.
- 5.6.10. Children have to cross this stream of solid human waste from the municipal sewer as they go to and from school.
- 5.6.11. That the smell that the sewer emitted is so unbearable that no human being could be expected to live a normal and healthy life in that condition.
- 5.6.12. The team therefore generally observed that the Municipality does not provide any sanitation services to this community and it is indeed a neglected community.

Interviews with Residents

- 5.7. On 6 June 2013 the Eastern Cape Office further conducted interviews with the residents and the following were noted:
 - 5.7.1. Residents indicated that they had been staying in the area for over 25 years and had not been provided with housing and proper sanitation.
 - 5.7.2. The water supply is inadequate in that about 350 (three hundred and fifty) Zolani households have to share five Communal taps with Phaphamani residents, who are also estimated at about 40 (forty) households.
 - 5.7.3. That they have to walk long distances over 200 metres to get to the taps.
 - 5.7.4. There are no enclosed toilets for the use of these residents. They use pit toilets which are not safe for their children.
 - 5.7.5. Residents also told the investigators that several community meetings had been called by the Respondent to receive complaints regarding sanitation, but notwithstanding that, the situation had not been improved despite undertakings by the Respondent to address this problem.
 - 5.7.6. The interviewees lamented on the lack of community participation in the design and implementation of municipal projects, and that there is inadequate consultation on the municipal sanitation and Developments plans.

6. Legal Framework

6.1. The Constitution of the Republic of South Africa, 1996 (Chapter 2: Bill of Rights)

6.1.1. The Right to Human Dignity

Section 10 is the right to have the inherent dignity of everyone respected and protected. Lack of access to proper toilet facilities is inherently degrading, and undermines the human dignity of a human being.

6.1.2. The right to Privacy

Section 14 everyone has the right to privacy.

6.1.1.3. The Right to Environment

Section 24(a) of the Constitution provides that:

“Everyone has the right -

To an environment that is not harmful to their health or wellbeing.”

6.1.1.4. The Right to Housing

Section 26 of the Constitution refers to the right of access to adequate Housing and it provides that:

Everyone has the right to have access to adequate housing. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

6.1.1.5. The right to water

Section 27 provides for the right to have access to health care, food, water and social security.

7. Key International instruments

7.1. International Covenant on Economic Social & Cultural Rights (ICESCR)

Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living which includes accessibility and availability of adequate housing, food and clothing. The right to water falls under this article as it guarantees an adequate standard of living; water is one of the fundamental conditions for survival.

Although South Africa has not ratified the ICESCR, as a signatory state, the Government of South Africa cannot act in a manner that is contrary to the spirit of this Convention.

7.2. General Comment no. 15 (2003) of the UNESCR recommended that before any action that interferes with the right of access to water is carried out by the State or third party, the relevant authority must ensure that such actions are performed in a manner warranted by law.

7.3. United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation¹

The General Assembly adopted a resolution calling on all states to provide safe, clean, accessible and affordable drinking water and sanitation for all.

7.4. Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

Article 14 of the CEDAW requires that State parties that are signatories shall ensure that women have full enjoyment of the right to adequate standard of living particularly with regard to water supply.

8. Domestic Legislation

8.1. The Municipal Systems Act²

The definition of basic municipal services according to the Act³ is:

8.1.1. A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.

¹ Resolution 64/232

² 32 of 2000

³ Chapter 8 of the Municipal Systems Act

8.1.2. **Section 73(1)** of the Act states that a municipality must give effect to the provisions of the Constitution and:

8.1.2.1. Give priority to the basic needs of the local community;

8.1.2.2. Promote the development of the local community; and

8.1.2.3. Ensure that all members of the local community have access to at least the minimum level of basic municipal services.

8.2. The Water Services Act⁴

The Water Services Act defines basic sanitation as:

8.2.1. The prescribed minimum standard of service necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households.

8.2.2. **Section 3** states that:

8.2.2.1. Everyone has the right of access to basic water supply and basic sanitation.

8.2.2.2. Every water services institution must take reasonable measures to realise these rights.

8.2.2.3. Every water services authority must, in its water services development plan, provide for measures to realise these rights.

8.2.3. **Section 5** states that:

8.2.3.1. If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.

8.3. Municipal Finance Management Act⁵

8.3.1. In considering the obligations of the Respondent with regards to its budgeting and finance processes, the Commission paid close consideration to Chapter Four of the Municipal Finance Management Act (hereinafter referred to as the "MFMA").

8.3.2. **Section 28(1)** of the MFMA is of particular relevance in its directive that municipalities may revise and approve their annual budget through an adjustments budget. **Section 27(5)** is also relevant in that it permits provincial executives to intervene in terms of Section 139 of the Constitution if a municipality cannot or does not comply with the provisions of Chapter four of the MFMA.

⁴ 108 of 1997

⁵ 56 of 2003

8.4. The Housing Act⁶

- 8.4.1. **Section 9 of the Housing Act⁷** requires that every municipality must, part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy *inter alia* to:
- 8.4.1.1. Ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
 - 8.4.1.2. Ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are removed;
 - 8.4.1.3. Ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner that is economically efficient;
 - 8.4.1.4. Set housing delivery goals in respect of its area of jurisdiction; and
 - 8.4.1.5. Initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

9. Policy Framework

9.1. White Paper on Basic Household Sanitation⁸

- 9.1.1. According to the 2001 White Paper on Basic Household Sanitation, the Department of Water Affairs and Forestry had the following responsibilities, together with other national role-players include:
- 9.1.1.1. Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
 - 9.1.1.2. Co-ordinating the development by the municipalities of their Water Services Development Plans as a component of their Integrated Development Plan;
 - 9.1.1.3. Monitoring the outcome of such programmes and maintaining a database of sanitation requirements and interventions;
 - 9.1.1.4. Providing capacity building support to provinces and municipalities in matters relating to sanitation;
 - 9.1.1.5. Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
 - 9.1.1.6. Undertaking pilot projects in programmes of low cost sanitation.
- 9.1.2. Developing norms and standards for the provision of sanitation.
- 9.1.3. The Department of Local Government, now Cooperative Governance and Traditional Affairs, has the primary responsibility *inter alia* for promoting the development by the municipalities of the IDP and the coordination, together with

⁶ 107 of 1997

⁷ 107 of 1997

⁸ Department of Water Affairs and Forestry (2001)

the National Treasury, of the provincial and local governments Equitable Share⁹ ('ES') and Municipal Infrastructure Grant¹⁰ ('MIG') grants.

- 9.1.4. According to the 2003 Strategic Framework on Water Services, Provincial Government, together with the national government, has the constitutional responsibility to support and strengthen the capacity of local government in the fulfillment of its functions, and to regulate local government to ensure effective performance of its duties.
- 9.1.5. Provincial government departments may undertake or oversee the construction of water and sanitation infrastructure. In terms of housing delivery, which is closely linked to sanitation, provincial housing is responsible for developing housing projects across the country in terms of the Constitution and the Housing Act.

10. White Paper on Water Supply and Sanitation Policy¹¹

- 10.1. The White Paper on Water Supply and sanitation Policy defines adequate sanitation as follows:
 - 10.1.1. The immediate priority is to provide sanitation services to all which meet basic health and functional requirements including the protection of the quality of both surface and underground water. Higher levels of service will only be achievable if incomes in poor communities rise substantially. Conventional waterborne sanitation is in most cases not a realistic, viable and achievable minimum service standard in the short term due to its cost. The Ventilated Improved Pit (hereinafter referred to as '**VIP**'), if constructed to agreed standards and maintained properly, provides appropriate and adequate basic level of sanitation service.
 - 10.1.2. Adequate basic provision is therefore defined as one well-constructed VIP toilet (in various forms, to agreed standards) per household.¹²

11. National Sanitation Policy¹³

- 11.1. The National Sanitation Policy defines sanitation as "the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact on users, operators and the environment.
- 11.2. The policy lists the main types of sanitation systems used in South Africa:
 - 11.2.1. Traditional unimproved pits;
 - 11.2.2. Bucket toilets;
 - 11.2.3. Portable chemical toilets;

⁹ 'Equitable Share' refers to an unconditional grant meant to be used by municipalities to fund the operations and maintenance of water and sanitation infrastructure

¹⁰ 'Municipal Infrastructure Grant' refers to a ring-fenced, conditional grant administered by CoGTA to fund the capital cost of basic infrastructure for poor households

¹¹ Department of Water Affairs and Forestry (1994)

¹² White Paper on Water and Sanitation Policy (1994)

¹³ Department of Water Affairs and Forestry (1996)

- 11.2.4. Ventilated Improved Pit toilets;
- 11.2.5. Low flow on-site sanitation (LOFLOS);
- 11.2.6. Septic tanks and soakaways;
- 11.2.7. Septic tank effluent drainage (solids-free sewerage) systems; and
- 11.2.8. Full water-borne sewerage.

12. Codes

12.1 The National Housing Code

- 12.1.1. *The national Housing Code was adopted in terms of the Housing Act. In terms of section 4(6) of the Housing Act,¹⁴ the provisions of the National Housing Code are binding on all three spheres of government.*
- 12.1.2. *Included in the National Housing Code is the Upgrading of Informal Settlements Programme (hereinafter referred to as the “Programme”). The Programme provides that informal settlements are to be upgraded in situ in partnership with the residents thereof, in order to establish sustainable human settlements.*
- 12.1.3. *The Programme identifies the following characteristics of an ‘informal settlement’:*
 - 12.1.3.1. *Illegality and informality;*
 - 12.1.3.2. *Inappropriate locations;*
 - 12.1.3.3. *Restricted public and private sector investment;*
 - 12.1.3.4. *Poverty and vulnerability; and*
 - 12.1.3.5. *Social stress.*
- 12.1.4. *The Programme is therefore applicable to all settlements that demonstrate one or more of the above characteristics.*
- 12.1.5. *The Programme document states that:*
 - 12.1.5.1. *“Against the background of the Government’s objective to upgrade all informal settlements in the country by 2014/15, it is clear that the programme is one of the Government’s prime development initiatives and that upgrading projects should be dealt with on a priority basis.”*
- 12.1.6. *The Programme provides that informal settlements must be upgraded in situ. Where this is not possible, such as where the land is not suitable for residential development, then the Programme provides for “relocation in terms of a relocation strategy developed in collaboration with the community.”*
- 12.1.7. *The Programme recognises that many informal settlements are situated on privately owned land and that often the first step in an upgrading project will be the acquisition of such land. Thus the Programme provides that funding is available and may be obtained for “the acquisition of land, where the land to be developed is in private ownership, through negotiation or expropriation.”*

¹⁴ 107 of 1997

- 12.1.8. *Funding for the implementation of the Programme is allocated to Provincial Governments by the Minister for Human Settlements on an annual basis. Such funds are transferred to the Provinces in terms of the provisions of the Division of Revenue Act.*
- 12.1.9. *The Programme provides that “it will be the responsibility of a municipality to consider whether living conditions in a settlement in the area of jurisdiction merit the submission of an application for assistance under the Programme.” If so, the municipality is required to make the necessary application to the relevant Provincial Department of Housing.*
- 12.1.10. *The Programme makes provision for the installation of both interim services and permanent municipal engineering services. The Programme states that “where interim services are to be provided it must always be undertaken on the basis that such interim services constitute the first phase of the provision of permanent services.”*

13. Strategic Frameworks

13.1 The Strategic Framework for Water Services¹⁵

13.1.1. The Strategic Framework defines basic sanitation facility as:

13.1.1.1. *The infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases by facilitating the appropriate control of disease carrying flies and pests, and enables safe and appropriate treatment and/or removal of human waste and waste water in an environmentally sound manner.^{16/16}*

13.1.1.2. It further defines a basic sanitation service as:

13.1.1.2.1. The provision of a basic sanitation service facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices.

13.2. Free Basic Sanitation Implementation Strategy¹⁷

According to this policy, municipalities are required to ensure that every household has access to basic sanitation, as per the Constitution, Water Services Act and the Municipal Systems Act. It acknowledges that there is a “right of access to a basic level of sanitation service” enshrined in the Constitution.

¹⁵ Department of Water Affairs and Forestry (2003)

¹⁶ Ibid

¹⁷ Department of Water Affairs and Forestry (April 2009)

14. Regulatory Standards

- 14.1. **Regulation 2 of the Compulsory National Standard**¹⁸ states that the minimum standard for basic sanitation services is that the provision of appropriate sanitation includes:
- 14.1.1. *A toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against weather, well ventilated, keeps smells to a minimum and prevents entry and exit of flies and other disease carrying pests.*
- 14.2. **Regulation 3 of the Compulsory National Standards** states that the minimum standard for basic water supply services is -
- 14.2.1. *The provision of appropriate service in respect of effective water use; and*
- 14.2.2. *A minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month-*
- 14.2.2.1. *At a minimum flow rate of not less than 10 litres per minute;*
- 14.2.2.2. *Within 200 metres of a household; and*
- 14.2.2.3. *With effectiveness such no consumer is without a supply for more than seven full days in any year.*
- 14.2.3. *In terms of Regulation 3 of the recently amended national Regulations Defining the Scope of the Profession of Environment Health (General Notice 32334 of 26 July 2009), EHPs (Environmental Health Practitioners) are responsible for inter alia:*
- 14.2.3.1. *Sampling and analysing any waste product such as sewage or refuse.*
- 14.2.3.2. *Investigating and inspecting any activity relating to the waste stream or any product resulting there from.*
- 14.2.3.3. *Advocating proper sanitation*
- 14.2.3.4. *Ensuring safe usage of treated sewage sludge and ensuring that reclaimed waste is safe for health.*
- 14.2.3.5. *Ensuring waste management including auditing of waste management systems and adherence to the 'cradle-to-grave' approach.*

15. Case Law

- 15.1. The Constitution entreats the Commission to consider relevant case law in determining the nature and scope of a human right:
- 15.1.1. **In NM v Smith (Freedom of Expression Institute as Amicus Curiae)**¹⁹ the Court held”

A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality of freedom.

¹⁸ General Notice 22355 of 8 June 2001

¹⁹ 2007 (5) SA 250 (CC)

If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.'

The Court also dealt with interrelationship between privacy and dignity and concluded that:²⁰

"The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this anatomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life."

15.1.2. In **Government of the Republic of South Africa and Others v Grootboom and Others**²¹ it was held that section 26 requires the government to "establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means".

Further, that legislative measures adopted by the government must be supported by policies and programmes adopted and must be reasonable "both in their conception and implementation".²² The Court held that reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise and do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril.²³

The Court established that the right of access to "adequate housing" entails more than bricks and mortar. It extends and includes the provision of water and removal of sewerage and the financing of these, including the building of the house itself.

The requirements of privacy, protection against the elements and hygienic sanitation facilities are central features of any housing development in South Africa in that one of its aims is to secure basic human rights of the people who are meant to benefit from such housing developments.

Interpretation of the Bill of Rights requires that basic enquiries which seek to promote the rule of law, human dignity, equality and freedom be undertaken.

15.2. **Section 39 (1)(a) of the Constitution** states that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

²⁰ NM v Smith at para (131)

²¹ 2001 (1) SA 46 (CC)

²² Grootboom at para (42)

²³ Grootboom at para (44)

15.3. In **S v Makwanyane and Another**²⁴, this Court observed as follows:

'Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.'

15.4. In **Bernstein and Others v Bester and Others**²⁵ Ackermann J characterizes the right to privacy as lying along a continuum, where the more a person inter-relates with the world, the more the right to privacy becomes attenuated.

Moreover that:

"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a fine untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate sphere of privacy, no justifiable limitation thereof can take place.

*In relation to the duties of all levels of government the Court held in Grootboom*²⁶:

"All implementation mechanisms and all State action in relation to housing fall to be assessed against the requirements of s26 of the Constitution. Every step at every level of government must be consistent with the unconditional obligation to take reasonable measures to provide adequate housing".

Verah J went on to state that:

*"Section 26, read in the context of the Bill of Rights as a whole, must mean that the Respondents have the right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the council towards the occupiers must be seen."*²⁷

*In fact the Court has repeatedly held that the State, including municipalities is obliged to treat vulnerable people with care and concern.*²⁸

The role of local government, as stated in the Constitution is, among other things, "to ensure the provision of services to communities in a sustainable manner"²⁹ and to "promote a safe and healthy environment"³⁰. A municipality is obliged to try to achieve these objectives. Section 73(1) (c) of the Local Government: Municipal Systems Act³¹, echoes the constitutional precepts and obliges a municipality to provide all members of

²⁴ 1995 (3) SA 892

²⁵ NNO 1996 (2) SA 75 (CC)

²⁶ Grootboom at para (82)

²⁷ Grootboom at para (83)

²⁸ Joe Slovo at para (76)

²⁹ Section 152(1)(b) of the Constitution

³⁰ Section 152(1)(d) of the Constitution

³¹ Act 32 of 2000

communities with “the minimum level of basic municipal services”. Such minimum level of service would include the provision of sanitation and toilet services. Irrespective of whether it is built individually or on separate ever, or communally, it must provide for the safety and privacy of the users.

15.5. Ntombentsha Beja and Others v Premier of the Western Cape and Others.³²

In April 2011, the Western Cape High Court handed down judgment in this case, which provides more clarity on the provision of basic sanitation in informal settlements, as well as on the importance of meaningful consultation with communities in decision making around basic sanitation provision.

The former Constitutional Court judge, *Albie Sachs*, in arguing that the right to dignity is of central significance, states:

*“Respect for human dignity is the unifying constitutional principle that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not to simply ensure that the ‘haves’ continue to have but to help create conditions in which the basic dignity of the ‘have nots’ can be secured”.*³³

15.6. Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others³⁴

Only one case before the Constitutional Court has explicitly included the right of access to basic sanitation. In November 2009, judgment was handed down in this case, where the Constitutional Court declined to decide on the ratio of toilets per households or the type of sanitation appropriate for the Harry Gwala informal settlement.

This case is important as it highlights fault lines around the way the different spheres of government approach (or do not approach) informal settlements upgrading, the lack of access to interim basic services in informal settlements, and the lack of minimum standards for basic sanitation provision.

The Hary Gwala community argued that expecting ten households to share one communal toilet compromised their dignity, and that one toilet per household (or per two households) to replace their pit latrines, as opposed to the chemical toilets offered by the municipality, was appropriate. They relied on the section 26 right to adequate housing in their application, the National Housing Code, as well as the Water Services Act (including Regulation 2 of the Compulsory National Standards promulgated pursuant to the Act).

On 22 November 2000, Justice van der Westhuizen, handed down a unanimous judgment in the case, dismissing the occupiers’ appeal. The judgment found that the delay to make a decision around upgrading was unconstitutional, and ordered the MEC for Local Government and Housing to take a decision on the municipality’s application in terms of Chapter 13 of the Housing Code, to upgrade the settlement, within 14 months of the sphere. This was the time deemed necessary to commission a new feasibility study.

³² 2011 ZAWCHC 97 (Beja).

³³ Sachs, A. (2008) Oxford University Press

³⁴ 2009 ZACC 33

Constitutional Court took an extremely formalistic approach to the issues before it and started making any decision as to whether the normative content of section 26 (of the Constitution) includes basic sanitation. The inescapable conclusion seems to be that for some reason the court was attempting to use all the tools it had to avoid giving definitive content to socio-economic rights.

- 15.7. **City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others**,³⁵ *the Constitutional Court ruled that the powers to rezone land and to approve a township establishment are components of “municipal planning”, a function assigned to municipalities in terms of section 156(1) of the Constitution. The Court further found that Chapters V and VI of the Development Facilitation Act are unconstitutional, in that they assign parallel powers to the provincial sphere of government in the form of Development Tribunals.*

The Commission is also mindful however that no right is absolute and where reasonably justifiable may be limited in respect of a law of general application.

Section 26(2) of the Constitution dealing with the right to housing provides that “the State must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right”.

16. Legal Analysis

Water is one of the most important substances on earth, all living being must have water to survive,

- 16.1. *Water Services Act*,³⁶ *mandates national government to monitor the performance of the water sector, and specifically grants the Department of Water Affairs the mandate to monitor the performance of all water services institutions, including municipalities who perform the function of water services authorities.*
- 16.2. Access to water and sanitation is fundamental to the enjoyment of other rights such as right to health and environment that is not harmful to one’s health or wellbeing. As such lack of water and sanitation not only impedes access to other rights, but accelerate vulnerability of certain groups of people such as women, children and people with disabilities.
- 16.3. The Respondent is alleged to have violated the resident’s right to human dignity, privacy, clean environment, and access water of the residents by its failure to connect toilets to the water supply system thereby leaving residents with no alternative but to dig holes for use as pit toilets.
- 16.4. The Respondent has not furnished the Commission with its Integrated Development Plan (IDP), water and sanitation policy, project action plans and timeframes despite our repeated requests to do so.
- 16.5. ***In terms of Part B of Schedule 4 of the Constitution***, the primary responsibility for providing water and sanitation services lies with local government. These obligation are outlined in the Water Services Act and the Municipal Systems Act and the Strategic Framework for Water Services.

³⁵ 2010 ZACC 11

³⁶ 108 of 1997

- 16.6. Basic sanitation forms part of the right to basic municipal services outlined in **section 73 of the Municipal Systems Act**. In this regards the Municipality has failed to discharge this duty in that it failed to provide residents with minimum levels of services.
- 16.7. **Section 26** provides that everyone has the right to have access to adequate housing. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- 16.8. Housing deliver which is closely linked to sanitation, as such the provincial housing is responsible for developing housing projects across the country in terms of the Constitution and the Housing Act”.
- 16.9. In **NM and Other case**³⁷ it highlights the inter-relationship between privacy. Liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being.
- 16.10. **The Ngkotwana case**,³⁸ underlined the defective manner around the way the different spheres of government approach informal settlement upgrading, the lack of access to interim basic services in informal settlements, and the lack of minimum standards for basic sanitation provided.
- 16.11. The Respondent failed to provide the Commission with information regarding provision of interim basic services in informal settlements and imminent plans to upgrade them.

17. In analysing this complaint, the Commission reviewed the information gathered from the investigation to ascertain the following issues:

- 17.1. The nature and scope of human rights violations.
- 17.2. The reasonableness and/or adequacy of the steps taken by the Municipality to address the problem of sanitation in the Zolani/ Phaphamani informal settlement.
- 17.3. The danger that the circumstances poses to children and people with disabilities.

18. Nature and Scope of Human Rights Violations

- 18.1. **Section 36** of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account the following factors-
 - (a) The nature of the right;
 - (b) The importance of the purpose of the limitation;
 - (c) The nature and extent of the limitation;
 - (d) The relation between the limitation and its purpose; and
 - (e) Less restrictive means to achieve the purpose.

³⁷ 2007 (5) SA 250 (CC)

³⁸ Johnson Mstotoba Ngkotwana and Others v Ekurhuleni Metropolitan Municipality and Others [2009] ZACC

18.2. **Section 39(1)** of the Constitution provides that “When interpreting the Bill of Rights, “a court, tribunal or forum:-

- (a) Must promote values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) Must consider international law; and
- (c) May consider foreign law.”

18.2.1. The Right to Human Dignity

- a) Section 10 provides for the right to have the inherent dignity of everyone respected and protected.
- b) Lack of access to proper toilet facilities is inherently degrading, and undermines the human dignity of a human being.

18.2.2. The Right to Privacy

Section 14 entrenches the Right to Privacy.

18.2.3. The Right to Environment

- (a) Section 24(a) “Everyone has the right – to an environment that is not harmful to their wellbeing. The fact that there is a stream of sewage that runs right in the middle of the settlements and alongside the door steps of other households is a violation of this right.

18.2.4. The Right to Housing

- (a) Section 25 “Everyone has the right to have access to adequate housing.
- (b) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”
- (c) **In the Grootboom case**³⁹ the Court established that the right of access to “adequate housing” entails more than bricks and mortar. It extends and includes the provision of water and removal of sewerage and the financing of these, including the building of the house itself.

18.2.5. The right to water

- (a) **Section 27** provides for the right to have access to water.
- (b) It is also provided hereunder that the State must take reasonable legislative and other reasonable measures, within its available resources, to achieve the progressive realisation of this right.

19. The reasonableness and/or adequacy of the steps taken by the Municipality to address the problem of sanitation in Zolani/Phaphamani informal settlement

19.1. The Commission has not been able to assess or analyse any of the Municipality initiatives since there had not been any communication received from the Municipality regarding all the information requested on several occasions. As a result, it is difficult to conclude whether measures adopted by the Municipality to progressively realise the right to water and sanitation were reasonable or not. As such reasonable inferences shall be dealt.

³⁹ 2001 (1) SA 46 (CC)

- 19.2. The municipality has not provided these residents with the “minimum level of basic services”, which includes the provision of sanitation and toilet services, as provided in section 73(1) (c) of the Municipal Systems Act.
- 19.3. *Section 27* further provides that, the Municipality is required to progressively realise the supply of adequate water and sanitation to the community.
- 19.4. The onus rests on the Municipality to prove that the measures it took to progressively realise the supply of adequate water and sanitation to the community were reasonable.

20. The danger that the circumstances poses to women, children and people with disabilities

- 20.1. It became evident upon investigations that toilets structure is not adequate to assist people with disabilities as there is no form of measure to hold on to for assistance when using the toilet.
- 20.2. Due to a number of factors such as heavy rains and the fact that the toilets have not been properly installed, they might fall apart, creating difficulties for the children and disabled members of the community.
- 20.3. Access to water and sanitation is fundamental to the enjoyment of other rights such as right to health and environment that is not harmful to one’s health or wellbeing. As such lack of water and sanitation not only impedes access to other rights, but accelerate vulnerability of certain groups of people such as women, children and people with disabilities.
- 20.4. **Article 14 of the CEDAW** requires that State parties that are signatories shall ensure that women have full enjoyment of the right to adequate standard of living particularly with regard to water supply.
- 20.5. **The Strategic framework under Water services Act**, defines Basic sanitation facility as the infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases.

21. Findings

- 21.1. Based on the investigation conducted by the Commission and the analysis of applicable Constitutional, legislative, policy and regulatory frameworks, the Commission reaches the following findings;
 - 21.1.1. The Respondent have violated rights to human dignity, privacy, clean environment, access to housing and access to adequate water of the residents of Zolani and Phaphamani Information Settlements.
 - 21.1.2. Sewage flowing through the settlement, non provision of adequate water supply and access to housing give credence to the allegation that the Respondent has violated the rights of residents to water, and to a clean environment.
 - 21.1.3. The Commission also finds that the toilet structure is inadequate to assist people with disabilities as there is no form of measure to hold on to for assistance when using the toilet.

- 21.1.4. Factors like heavy rains as well as these pit toilets have not been properly installed or structured pose a danger a women, children and people with disabilities.
- 21.1.5. The inspection *in loco* conducted by the Commission revealed that the Complainant's allegations were indeed accurate. Interviews conducted with residents further shed light and corroborated the Complaint.
- 21.1.6. The Respondent has clearly not complied with the *Water Services Act* in that their actions or lack thereof fall short of the provisions of the Water Service and in that they have failed to provide the minimum standards of basic sanitation, in that residents walk distances more than 200 metres to get to the communal taps to access water.
- 21.1.7. The Water Services Act is explicit that the prescribed minimum standard of basic sanitation services is for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewerage from households, including informal settlements.
- 21.1.8. Consequently, the Commission finds that the complaint of violations to the rights of human dignity, privacy, a clean environment, and housing in this regard is substantial.

22. Recommendations

- 22.1. In terms of the Human Rights Commission Act, the Commission is entitled to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.
- 22.2. In view of the findings set out above, the Commission recommends the following:
- 22.2.1. The Respondent to ensure that there is provision of adequate water in the area within (2) two weeks of receipts of this recommendation.
- 22.2.2. That the connection or supply of water is such that there is no resident who will walk a distance more than 200 metres to access the water.
- 22.2.3. The Respondent is requested to ensure that the sewage flowing with the settlement is attended to with 24 hours of receipt of this recommendation.
- 22.2.4. In this respect, the Respondent is requested to, furnish the Commission with a phased Plan on how it intends to progressively remedy this problems. This Plan should be submitted to the Commission within 6 (six) weeks from the date of this finding; thereafter,
- 22.2.5. The Respondent to furnish the Commission with a progress report at least every month in respect of the progressive realisation of the right to water and sanitation services in ***Zolani and Phaphamani informal settlements in Grahamstown.***
- 22.3. **The report to the Commission should demonstrate the following:**
- 22.3.1. Interim measures to be taken for the provision of clean water and sanitation (toilets).

- 22.3.2. Effective structures and platforms to ensure improved consultation and dissemination of information from the Municipality and the Residents on the issue of water and sanitation.
- 22.3.3. To further provide the Commission with a detailed plan with (3) three weeks on how it intends to address the housing challenges in this area.
- 22.3.4. Make an assessment of water and sanitation challenges, identify strategies to deal with those challenges, identify resources necessary to implement these strategies and set out clear timeframes for capacity shortcomings of the Municipality to be addressed.
- 22.3.5. Furnish the Commission with a detailed Plan on how it intends to address operational shortcomings of the Municipality, within a month from date of this recommendation.

23. APPEAL

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of receipt of this finding**, by writing to:

Private Bag X2700
Houghton
2041

South African Human Rights Commission



COMPLAINT NO: Free State/1213/0324

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/1213/0324

In the matter between:

**South African Human Rights Commission
(On Behalf of Henneman Residents)**

Complainant

and

Matjhabeng Local Municipality

Respondent

REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as the “Commission”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “Constitution”).
- 1.2. The Commission is specifically required to:
 - 1.2.1. Promote respect for human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights; and
 - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Section 184(2) of the Constitution empowers the Commission to Investigate and report on the observance of human rights in the country.
- 1.4. The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.
- 1.5. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. Parties

- 2.1. The Complainant in this matter is the South African Human Rights Commission (hereinafter referred to as “Complainant”).
- 2.2. The Respondent is Matjhabeng Local Municipality, a municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated at One Reinet Street, Welkom (hereinafter referred to as “Respondent”).
- 2.3. The Respondent is cited as the local government authority with jurisdiction over Henneman responsible for the delivery of basic municipal services to its residents.

3. Background to the Complaint

- 3.1. On Monday, 21 January 2013, the attention of the Commission was drawn to a news broadcast by the South African Broadcasting Corporation (hereinafter referred to as the

“SASC”) which highlighted violent service delivery protests in Phomolong, Henneman, in the Free State Province.

- 3.2. The SABC news broadcast highlighted the plight of the residents of Phomolong and finally, their desperation in relation to service delivery in Phomolong.

4. Preliminary Assessment

The Provincial Office of the Free State made a preliminary assessment of the complaint.

- 4.1. The Commission found that the Respondent's conduct amounted to a *prima facie violation* of the rights to dignity, a clean environment, the right to housing, access to health care services and access to information, contained in sections 10, 24 and 26, 27 and 32 of the Constitution.
- 4.2. The Commission further determined that the alleged violations fell within the mandate and jurisdiction of the Commission.
- 4.3. The Commission further determined that a full investigation be conducted by the Commission in terms of the Complaints Handling Procedures of the Commission.

5. Steps taken by the Commission

5.1. Request for written response to allegations

- 5.1.1. On Monday, 11 March 2013, the Commission sent an allegation letter to the Respondent setting out the observations of the Commission in regard to the media reports, the preliminary assessment of the Commission and an invitation for the Respondent to respond in writing to the allegations within 21 (twenty-one) days from date of same letter.
- 5.1.2. The Commission has to date not received any response from the Respondent.

5.2. Interviews conducted during the inspection *in loco*

- 5.2.1. On 20 February 2013, the Commission dispatched an investigator to conduct an inspection-in-loco of the municipality under review.
- 5.2.2. The Commission conducted interviews with members of the local police station in Henneman, the organisers of the protests and a random sample of residents of the Municipality to verify the accuracy of media reports.

5.2.3. Interview with residents

The residents of Henneman confirmed that they raised the following issues in the memorandum to the Mayor of Matjhabeng Local Municipality:

- a) **Poor state of roads** – the roads in the area are in a very bad state and become inaccessible when it rains;
- b) **Lack of decent sanitation & functioning sewer network** – residents alleged that pipes burst constantly and that the sewers have faeces in them which badly affect the health of the community. A senior citizen allegedly fell into the sewer and died. There are still over **1500** (one thousand five hundred) **bucket toilets** in Henneman. They further indicated that there is a very high level of tuberculosis in Phomolong which they attribute to the sewer and its unbearable smell.

- c) Lack of access to healthcare services** – There is no hospital in Henneman and this is a grave infringement on the community’s right to access health care services. Residents have to use one clinic which is only operational until four o’clock in the afternoon.
- d) Lack of access to adequate housing** – Residents indicated that the Municipality had not allocated sites since around 1997 and there was congestion. To this end, people had placed themselves in an informal settlement to ease up the congestion that was in Phomolong. They also indicated that there was land that could be developed but that the Municipality had indicated that the land is used by a certain individual as a gliding site for his aeroplanes.
- e) Vulnerable groups (Children)** – One of the residents who runs a Day Care Centre (crèche) of about 60 (sixty) children in Extension One in Phomolong, stated that the lack of decent sanitation in the area has resulted in the children at the crèche having to use only two bucket toilets. These toilets have no privacy and are not conducive for use by children. They are also not safe as a child can easily fall into the bucket, hence a teacher always has to accompany and supervise a child who visits the toilet.

The crèche has a big hole into which the buckets are emptied because they cannot wait for the Municipality to empty them as they become full very quickly. They have employed a care taker who assists in emptying the buckets and ensuring that they are dean. There are toilets that have been built for the crèche but the Municipality never finished the project. Further, there is no water connection and so the toilets cannot be used.

They have complained to the Municipality about the problems they encounter with the bucket toilets and the Municipality has made promises on several occasions to come and try to fix the problem.

- f) Vulnerable groups (Older persons& Women)** – An elderly woman born in 1938 and who has resided in Phomolong all her life alleged that she has never had a flushing tenet: she uses a bucket toilet with a makeshift enclosure of dilapidated corrugated iron sheets. In around 2007, she had hopes that this unsanitary form of sanitation would end when the Municipality began a project of installing flushing toilets.

However, the project was never completed. The enclosures and the toilet were built and installed but the toilet was not connected to any pipes or sewer network, hence it cannot be used and she cannot afford to complete the project herself. The toilet enclosure can now only be used as a store room. She indicated that their roads are also very bad and when it rains they become completely inaccessible. For this reason, when it rains the Municipality does not collect the buckets and the residents have to dig holes in their yards in order to empty the buckets.

She further indicated that they also have a problem with sewerage and that the streets are always full of sewerage from burst pipes and it smells horrible. When it rains and the buckets are full, the smell from both is unbearable.

g) Ill-health – Residents stated that they are constantly ill because of the smell of the sewerage and some have been diagnosed with tuberculosis due to the spillage and the stench from the sewer network.

h) Informal settlement dweller (Indigent) - Residents stated that the municipality has failed to provide their informal settlement with basic municipal services since they occupied the area in 2005. To date, the area has not been formalized and they do not have any basic municipal services like refuse removal or sanitation notwithstanding their indigent status.

5.2.4. Interview with Healthcare workers at Phomolong Clinic

A professional nurse who works at Phomolong Clinic, stated that since her tenure in June 2012, she has witnessed a high prevalence of tuberculosis and HIV infections despite awareness campaigns conducted by the Clinic. She attributes this to a high level of substance abuse in the community and socio-economic conditions in the area particularly those relating to lack of decent sanitation and clean environment.

She also highlighted the fact that the Clinic is extremely busy as there is no hospital in the area and stated that nurses are overworked as even people from the neighbouring farms use that clinic, which closes at four in the afternoon.

5.3. Physical Inspection

5.3.1. On 20 February 2013, the Free State Office dispatched an investigator to conduct an inspection *in loco* in Phomolong, Henneman.

5.4. Evidence collected during investigation

Response of the Municipality's Unit Manager, Mr Atolo, during an interview conducted during the inspection *in loco*

During the Inspection *in loco*, the Commission's investigator managed to interview the Unit Manager of the Municipality, Mr Atolo, and he addressed some of the allegations as follows:

5.4.1. **Sites & Housing allocation** – The municipality allocated sites to residents of Phomolong in 2005 when the Municipality bought the land called 'Bokamoso' for residential sites. The Municipality is waiting for the Provincial Office to allocate funds for a survey to be conducted and to establish the area as a township, which establishment is the prerogative of the Department of Cooperative Government and Traditional Affairs (COGTA). The Municipality still awaits funding so that they can engage service providers to begin work.

5.4.2. **Roads** – Mr Atolo conceded that the roads are not in good condition because the soil is clay soil, and therefore whenever it rains the roads become inaccessible. He also agrees that the Municipality is unable to collect buckets when it rains due to the inaccessibility of the roads.

He stated that the challenge is that all six (6) towns falling under the Matjhabeng Municipality share resources, hence when there is a problem in Henneman, they have to wait for the town that has the resources to complete what they are doing.

He indicated however, that the Municipality has completed 75% of its work on roads and that they are embarking on a project of paving roads in Phomolong.

- 5.4.3. **Sanitation** - In around 2005/6, the bucket eradication programme began in Henneman, but it encountered problems at various levels because contractors did not do a proper job. The enclosures were completed and some tenets were connected but the problem is that whenever someone flushes the sewerage within the township and there is no proper outflow, hence the pipes constantly burst. This is the primary reason why there is a sewerage problem in Phomolong.
- 5.4.4. The Programme Management Unit (PMU) was responsible for this project and they indicated that the problem was due to lack of an outfall sewer that goes to the pump station, when people flush their toilets it goes through the township and has no way of reaching the pump station.
- 5.4.5. The Municipality has employed an interim solution to this problem in that they use a honey sucker which sucks the spillage in the township. This is, however, only a provisional measure.
- 5.4.6. The PMU has indicated that they applied for additional funding in 2010 which application was only approved in early 2013. A contractor has already been chosen, and once funds have been allocated and approved the contractor will begin work. The PMU also endeavours to eradicate the bucket toilets.
- 5.4.7. **Healthcare services** - Mr Atolo confirmed that there is no hospital in Henneman, with the nearest hospitals being in Virginia and Welkom, and yet the Clinic in Henneman closes at four in the afternoon, hence the residents request that the Clinic at the very least be a twenty four hour clinic. Mr. Atolo however, indicated that this was the prerogative of the Department of Health.
- 5.4.8. **Schools** - Mr. Atolo indicated that he could not respond to this as schools are the prerogative of the Department of Education.
- 5.4.9. **Public Participation** - Mr. Atolo indicated that there are ward councillors who call monthly community meetings. He also indicated that they had recommended the establishment of the Henneman Community Development Forum which would comprise of various government departments, other stakeholders and non-governmental organizations. The purpose of this forum will be to have structured interaction to ensure a relationship with various government departments, non-governmental organizations, the municipality and the community in an effort to foster good communication practices, and find amicable solutions to the challenges facing Henneman.

5.5. Evidence collected during the Inspection in Loco

- 5.5.1. There are patent levels of unemployment in the area, with many residents living off social grants.
- 5.5.2. Many residents are infected with tuberculosis.
- 5.5.3. The roads are in a very bad state and it is clear that they are not being properly maintained.
- 5.5.4. People who have settled themselves in the informal settlement do not have any basic municipal services.

5.5.5. There are times when the buckets are not collected on time and this consequently leads to the residents having to dig holes in their yards to dispose of the faeces, this is demeaning, an insult to their dignity and unsanitary and unhealthy.

(Photographs taken from the Inspection in Loco are attached below)



IMAGE 1: Photographed at Phomolong on 20 February 2013.

Residents of Phomolong are still subjected to the Indignity of using bucket system toilets which is very unsanitary and unhealthy.



IMAGE 2: Photographed at Phomolong on 20 February 2013.

This project was never completed; toilet enclosures were built, the toilet fixtures were installed but the toilets were never connected to water pipes, hence these enclosures are just used as storage rooms.



IMAGE 3: Photographed at Phomolong on 20 February 2013.

Residents are forced to dig holes in their own yards to dispose of the contents of the buckets when the Municipality is unable to collect the buckets.

IMAGE 4: Photographed at Phomolong on 20 February 2013.



The sewer smells horrible and it keeps on getting worse, people fall into the filth and a member of the community has died from falling into one such sewer.

6. Applicable Legal Framework

International instruments

International Covenant on Economic, Social and Cultural Rights¹

Article 2(1) explains the nature of the obligation resting on states parties with regard to the provision of socio-economic rights, highlighting that minimum core and progressive realisation are hallmarks of this obligation, while provision of the rights is subject to the state's available resources.

Article 11 enshrines the right of everyone to an adequate standard of living, which includes accessibility and availability of adequate housing, food and clothing. The rights to water and sanitation - being vital aspects of an 'adequate standard of living' - are dearly governed by this Article.

¹ 16 December 1966. United Nations, Treaty Series. vol. 993, p. 3. available at: <http://www.refworld.org/docid/3ae-c6b36c0.html> [accessed 18 June 2013];

Article 12 recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. For such a right to be achieved, it is apparent that access to health care services is of primary importance.

While South Africa has not ratified the Covenant it is a Signatory State, and the Government of South Africa can therefore not act in a manner that is contrary to spirit of this Covenant.

United Nations Committee on Economic, Social and Cultural Rights: General Comment No.4 – The right to adequate housing (1991)

The right to housing applies to everyone, incorporating both an individual right and that of the family. The right must be interpreted broadly so as to cover a form of shelter which provides for security, peace and dignity rather than a simple cover over one's head. This is consistent with both the general principles of the Covenant – including the right to dignity – and the centrality of the attainment of the right to housing for the provision of other rights.

The requirement that the housing be *adequate* gives content to the right to housing, in providing for a minimum standard which includes legal security of tenure over one's shelter which protects against forced eviction, harassment and other threats; availability of services, materials, facilities and infrastructure; affordability of the housing so as not to compromise the satisfaction of other basic needs and rights; habitability; and accessibility (including adequate access for disabled persons).

The States parties' duty to provide for this right includes ensuring that housing policies and resources are directed towards disadvantaged and impoverished, and thus vulnerable, communities.

United Nations Declaration on Human Settlements²

The United Nations Declaration on Human Settlements entreats signatories thereto to commit themselves to:

- a) Ensuring adequate shelter for all and making sustainable human settlements safer, healthier and more liveable/ equitable/ sustainable and productive;
- b) Recognising the particular needs of women/ children and youth for safe, healthy and secure living conditions;
- c) Intensifying efforts to eradicate poverty and discrimination, promoting and protecting human rights and fundamental freedoms for all and providing for basic needs, such as education, nutrition and life-span health care services and adequate shelter for all;
- d) Improving the living conditions in human settlements in ways that are consonant with local needs and realities, and ensuring full and equal participation of all women and men and the effective participation of youth in political, economic and social life; and
- e) Promoting full accessibility for people with disabilities, as well as gender equality in policies, programmes and projects for shelter and sustainable human settlement development.

² Istanbul Declaration on Human Settlements, available online at www.unhabitat.org [accessed 18 June 2013].

United Nations Committee on Economic, Social and Cultural Rights: General Comment No. 15 – The right to water (2003)

The Committee gave content to the right to water in the following manner:

“The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”³

Moreover, it was held that the right “contains both freedoms and entitlements”, The freedoms include “the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference”, while the entitlements refer to “the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.”⁴

The Committee recommended that before any action that interferes with the right of access to water is carried out by the State or any third party, the relevant authority must ensure that such actions are performed in a manner warranted by law.

The Committee highlighted the fact that this right is enjoyed without discrimination⁵, and that States parties must specifically ensure that traditionally disadvantaged and marginalised persons are empowered to exercise their right to water.⁶

United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation.⁷

The General Assembly adopted a resolution calling on all states to provide safe, clean, accessible and affordable drinking water and sanitation for all.

Convention on the Rights of the Child⁸

Article 24(1) of the Convention recognises “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”, and compels States parties to ensure access to such services and facilities.

Article 24(2) obliges States parties to “combat disease and malnutrition ... through the provision of adequate nutritious foods and clean drinking-water.”

More generally I Article 27 enshrines “the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.” This encompasses the necessary living conditions for the child’s development, as well as State support programmes with regard, *inter alia*, to housing.

³ Para 2

⁴ Para 10.

⁵ At para 13

⁶ At para 16

⁷ Resolution 64/292.

⁸ 20 November 1989. United Nations. Treaty Series. vol. 1577. P. 3, available at: <http://www.refworld.org/docid/3a6c6b38f0.html> [accessed 18 June 2013]

The Rio Declaration on Environment and Development⁹

The Rio Declaration states that in order to protect the environment, states must first fulfil the basic needs of their people and improve living standards.

The World Summit on Sustainable Development: Plan of Implementation.¹⁰

This Plan directs States to prevent and minimise waste and maximise re-use, recycling and use of environmentally friendly alternative materials, with the participation of all stakeholders. This must be done to minimise adverse effects on the environment and improve resource efficiency.

The Plan also states that in order for States to reverse the current trend in natural resource degradation, states must implement strategies, including targets, to protect ecosystems and to achieve integrated management of natural resources. To achieve this:

- a) States must launch a programme of action to achieve the Millennium Development Goals on safe drinking water, with a view to halving, by 2015, the proportion of people who are unable to reach or to afford safe drinking water and the proportion of people without access to basic sanitation; and
- b) States must facilitate access to public information and participation – including women – at all levels, in support of policy and decision-making related to water resource management and project implementation.

Regional instruments

The African Charter on Human and People's Rights¹¹

Article 16 enshrines the right of every individual to the best attainable state of physical and mental health, which compels States parties to ensure both the protection of one's health as well as access to medical attention when sick.

Article 24 recognises the right of all peoples to a general satisfactory environment favourable to their development.

African Children's Charter (1990)

Article 14 comprehensively sets out the right of all children to the enjoyment of the best attainable state of physical, mental and spiritual health, which includes the provision of necessary medical assistance and health care; adequate nutrition; safe drinking water; and the integration of basic health service programmes into national development plans.

South African Development Community Protocol on Health (1999)

A particularly relevant provision of this Protocol is Article 23, which states as follows:

“State parties shall collaborate, co-operate and assist each other in a cross-sectoral approach in addressing regional environmental health issues and other concerns, including toxic waste, waste management, port health services, pollution of air, land and water, and the degradation of natural resources.”

⁹ UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

¹⁰ 2002.

¹¹ 27 June 1981. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 18 June 2013].

Constitutional framework

The preliminary assessment of the Free State Provincial Office of the Commission indicated that the rights alleged to have been violated are **sections 10 (right to dignity), 24 (right to an environment that is not harmful), 26 (right to housing), 27 (right of access to health care services) and 32 (right of access to information) of the Constitution of the Republic of South Africa**. Each of these rights is discussed hereunder, in turn.

Constitution s 1(a) - Foundational values

Section 1(a) of the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and thereby forming the bedrock upon which the Constitution is based.

Constitution s 7(2) - Obligation on the State

This section requires the State, in this matter the Respondent, to respect, protect, promote and fulfil all fundamental rights enshrined in the Bill of Rights.

Constitution s 10 - The right to human dignity

Section 10 recognises the right of everyone to have their inherent dignity respected and protected. A lack of access to decent sanitation is inherently degrading, and undermines one's human dignity.

Constitution s 24 - Environmental rights

Section 24(a) provides that '[e]veryone has the right to an environment that is not harmful to their health or well-being', while s 24(b) recognises the right to have one's environmental protected through reasonable legislative and other measures, including those that prevent pollution and ecological degradation.

Constitution s 26 - The right to housing

Section 26(1) enshrines the right of an individual's to have access to adequate housing, with 5 26(2) compelling the State to "take reasonable legislative and other measures, within its available resources/ to achieve the progressive realisation of this right."

Constitution s 27 - The right to health care

This provision recognises the right of everyone to have access to, *inter alia*, health care services, with the State required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation thereof.

Constitution s 32 - The right of access to information

Section 32 provides that everyone has the right of access to information, both that which is held by the State and that held by another person which is required for the exercise or protection of any rights.

Constitution s 139 – Duties of the municipality

Section 139(1) provides that “[w]hen a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation including-

- (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary –
 - (i) to maintain essential national standards or meet established minimum standards for the rendering of a service;
 - (ii) to prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
 - (iii) maintain economic unity ...”

Part B Schedule 4 of the Constitution – Local government responsibilities

This provision mandates that local government is responsible for “water and sanitation services limited to portable water supply systems and domestic waste- water and sewerage disposal.”

Legislative framework

Housing Act 107 of 1997

The definition of ‘housing development’ as included in Section 1 of the Act refers to access of the following two key elements on a progressive basis:

- a) “[P]ermanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- b) portable water, adequate sanitary facilities and domestic energy supply.”

Section 2 of the Act sets out the general principles applicable to housing development. They provide that national, provincial and local spheres of government must *inter alia*:

- a) Give priority to the needs of the poor in respect of housing development; and
- b) Promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions.

Section 9 of the Act requires that every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy *inter alia* to:

- a) Ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- b) Ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are removed;

- c) Ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner that is economically efficient;
- d) Set housing delivery goals in respect of its area of jurisdiction;
- e) Initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

The Development Facilitation Act 67 of 1995

This Act was introduced to fast track low-income housing developments. It is one of a few routes available for land use planning and development in South Africa. The Act creates two separate bodies responsible for land use planning in the same area.

The Less Formal Township Establishment Act 113 of 1991

This Act provides for shortened procedures for land development and township establishment. In terms of the Act, the decision-making authority lies with the Provincial government.

Water Services Act 108 of 1997

The Act defines *basic sanitation* as “[t]he prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households.”

Basic water supply is defined as the “prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.”

Section 3 of the Act provides that everyone has a right of access to basic water supply and basic sanitation. The provision establishes, *inter alia*, the following rights and obligations in respect of access to basic water supply and basic sanitation:

- a) Everyone has a right of access to basic water supply and basic sanitation.
- b) Every water services institution must take reasonable measures to realise these rights.

This is, however, qualified by Regulation 2 of the Regulations relating to Compulsory National Standards and Measures to Conserve Water.¹²

Section 5 of the Act states that:

“If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.”

The National Health Act 61 of 2003

The Act came into force in May 2005 and is the most important piece of legislation that helps to implement the constitutional right to health, giving clear and overall direction on such rights. Some of the aims of the National Health Act are to:

- a) Make effective health services available to the population, equitably and efficiently;
- b) Protect, respect and fulfil the rights of the people of South Africa to progressively realize their constitutional right to health;

¹² Published under GN R509 in GG 22355 of 8 June 2001

- c) Establish a national health system that will provide people with the best possible health services that available resources can afford.

The National Environmental Act 107 of 1998

The Act states that the interpretation of any law concerned with protecting and managing the environment must be guided by its principles, at the heart of which is the principle of sustainable development. Consequently, organs of state must evaluate the social, economic and environmental Impact of activities that may significantly affect the environment.

The Act also seeks to protect the environment by:

- a) Creating a set of environmental principles that show the Government how it should act; and
- b) Making the Government consider all the effects that a development can have before it is allowed to go ahead.

Local Government: Municipal Systems Act 32 of 2000

The Act defines basic municipal services as:

“A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.”

Section 73(1) of the Act states that a municipality must give effect to the provisions of the Constitution and:

- a) Give priority to the basic needs of the local community;
- b) Promote the development of the local community; and
- c) Ensure that all members of the local community have access to at least the minimum level of basic municipal services.

Sections 106 and 107 are relevant to the extent that they deal with provincial and national monitoring.

Section 106 provides that if an MEC has reason to believe that a municipality in the province cannot or does not perform a statutory obligation binding on that municipality, or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must

- a) “By written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice: or
- b) If the MEC considers it necessary, designate a person or persons to investigate the matter.”

Section 107 states that “[t]he Minister, by notice in the Gazette, may require municipalities of any category or type specified in the notice, or of any other kind described in the notice, to submit to a specified national organ of state such information concerning their affairs as may be required in the notice, either at regular intervals or within a period as may be specified.”

Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)

Section 28(1) of the Act directs that municipalities may revise and approve their annual budget through an adjustments budget.

Section 27(5) is also relevant to the extent that it permits provincial executives to intervene in terms of Section 139 of the Constitution if a municipality cannot or does not comply with the provisions of Chapter four of the Act.

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South African Human Rights Commission



COMPLAINT NO: Free State/1213/0283

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/1213/0283

In the matter between:

Patricia Kopane MP, DA Provincial Leader
Freestate

Complainant

and

Kopanong Local Municipality

Respondent

REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as the “Commission”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “Constitution”).
- 1.2. The Commission is specifically required to:
 - 1.2.1. Promote respect for human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights; and
 - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Section 184(2) of the Constitution empowers the Commission to *investigate and report on the observance of human rights* in the country.
- 1.4. The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.
- 1.5. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. Parties

- 2.1. The Complainant in this matter is Patricia Kopane, a Member of Parliament, acting on behalf of Residents of Frayville, Ipopeng, Fauresmith and Jagersfontein, cited in her official capacity as the leader of the Democratic Alliance in the Free State (hereinafter referred to as “Complainant”).
- 2.2. The Respondent is Kopanong Local Municipality, a Municipality established in terms of the provisions of the Local Government Municipal Structures Act, 117 of 1998 located in the Xhariep district in the southern Free State Province with its administrative head office situated at 20 Louw Street, Trompsburg (hereinafter referred to as “Respondent”).
- 2.3. The Respondent is cited as the local government authority with jurisdiction over Frayville, Ipopeng, Fauresmith and Jagersfontein responsible for the delivery of basic municipal services to its residents.

3. Background to the Complaint

- 3.1. On Thursday, 29 November 2012, the Commission received a complaint from the Free State Provincial Leader of the Democratic Alliance, Patricia Kopane.
- 3.2. In the complaint, the Complainant alleges that the Respondent failed in its constitutional and statutory obligations to do the following:
 - 3.2.1. To provide residents with adequate basic water supply;
 - 3.2.2. To provide residents with access to clean water; and
 - 3.2.3. To administer measures aimed at ensuring that the right to water is realised.
- 3.3. The Complainant alleges that residents in the aforesaid areas have been experiencing prolonged and/or frequent water shortages. In some Instances, residents have been left without water since the beginning of October 2012.
- 3.4. According to the complainant, it is apparent from the findings of the Auditor General's 2010/2011 report that poor municipal management is resulting in the resident's right of access to water being violated.
- 3.5. The Complainant further alleges that the scarcity and shortage of water adversely impacts on the provision of health care services to residents of the affected areas.

4. Preliminary Assessment

The Provincial Office of the Free State made a preliminary assessment of the complaint. The preliminary assessment of the Provincial Office was:

- 4.1. That the alleged incident constituted a *prima facie violation* of the human rights of the residents of Frayville, Ipopeng, Fauresmith and Jagersfontein. In particular, the assessment determined that sections 10, 24, 27 and 32 of the Constitution had *prima facie* been violated;
- 4.2. That the alleged violation fell within the mandate and jurisdiction of the Commission; and
- 4.3. That the alleged violation merited a full Investigation in terms of the Complaints Handling Procedures of the Commission.

5. Steps Taken by the Commission

In investigating the alleged violation, the methodology used by the Free State Office in conducting the investigation, involved a combination of *interview* and *physical inspection* techniques, namely:

- i. Interview with Residents;
- ii. Interview with Respondent;
- iii. *Inspection in loco* of the area;

- 5.1. Interview with Residents

Jagersfontein

- 5.1.1. On Wednesday, 22 May 2013, the Commission conducted interviews with residents of Jagersfontein to verify whether they had been receiving reliable and adequate water supply from the municipality.

Interviews with Patients & Nursing Staff - Itumeleng Clinic

- 5.1.2. The investigating team paid a visit to a local clinic in Jagersfontein to verify the correctness of allegations made in the complaint and assess the impact of the alleged water shortages and unreliable water supply on health care services.
- 5.1.3. Several patients at the clinic were interviewed to obtain factual account of their experiences and to understand whether the alleged shortage of water or constant water cuts had a debilitating impact on their general health and well-being.
- 5.1.4. During the interviews with the patients, they stated that the lack of safe and reliable water supply is severely detrimental to their health because some of them are people living with HIV and AIDS.
- 5.1.5. Some interviewees stated that they suffer from diarrhoea which is attributable to supply of contaminated water by the municipality and frequent water shortages. Apart from health problems, the women and children that were interviewed stated that they spent too much time having to look for water.
- 5.1.6. The investigating team interviewed a senior professional nurse who expressed her concerns over acute water shortage in the area and in particular, at the clinic. These concerns were similarly shared by other nursing staff as persistent water cuts and shortages have been ongoing for four years.
- 5.1.7. She stated that the clinic sometimes goes without water for days. Patients and nursing personnel cannot use sanitation facilities when there is no water. When water is cut, no prior notice is given by the municipality. Health workers at the clinic are for example unable to conduct urine tests because of lack of water. The municipality has never visited the clinic to assess the impact of constant water cuts and shortages.
- 5.1.8. She further stated that general health services at the clinic are affected as a consequence of unreliable water supply and this poses a serious health risk to patients and health workers. Health workers were sometimes forced to bring their own water to be able to drink and wash their hands. She stated that disease outbreak is imminent if the situation is not rectified.

Interview with the School Principal - Boaramelo Combined School

- 5.1.9. The School Principal stated that the water situation in the area has impacted negatively on the education of children at the school. The school has on occasion, had to release learners early from school as they could not use the toilet facilities due to lack of water.
- 5.1.10. At some stage the school had to stop its nutrition programme meant to assist learners from impoverished households as there was no water for cooking. This was detrimental to children who solely relied on the school for a meal.
- 5.1.11. He stated that sometimes when there is a water cut, the municipality does not notify them in advance or at all. On two occasions, he approached the municipality regarding this, who in response to the situation provided the school with water tanks (Jojo'S). He further stated that staff members at the school bring their own bottled water to drink as the water from the municipality is not safe and somewhat contaminated.

- 5.1.12. Furthermore, the Principal stated that while he accepts that the constant water shortages are due to poor infrastructure, the water problems in the area are also caused by a huge supply of water to a nearby mine in Jagersfontein.

Interview with Residents of Jagersfontein

- 5.1.13. Residents of Jagersfontein that were interviewed by the Commission's investigating team confirmed that there was indeed constant water shortages and scarcity in the area which subsequently led to a decision by the municipality to supply residents with Jojo water tanks to alleviate the water crisis.
- 5.1.14. Some of the Interviewees lamented the continued usage of water tanks alleging that the water from these tanks is unsafe for human consumption as vermin and other substances are emitted from them. Residents who mostly rely on social grants state that they have resorted to boiling water before drinking it and this has had serious cost implications as they have to use their limited resources to buy paraffin and more electricity to boil water.

Interview with Residents of Fauresmith

- 5.1.15. Residents of this area informed the Commission that they have regularly gone without water for days without prior notice from the municipality.
- 5.1.16. They complained that water stored in the water tanks is not clean as it is kept inside for a long time. Not all houses in the area have water tanks.
- 5.1.17. They stated that the municipality has failed to provide them with access to sufficient water to meet their household needs.

Interview with Residents of Ipopeng

- 5.1.18. The Commission paid a visit to Masakhane Crèche and interviewed the owner and her employees.
- 5.1.19. They stated that they were now used to the water shortage as it happened recurrently without any notice from the municipality.
- 5.1.20. They informed the Commission that toilets cannot be flushed when there is no water and this has an adverse effect on the children. They cannot cook for the children as well.
- 5.1.21. The municipality provided the crèche with a water tank but failed to fill it with water as promised.
- 5.1.22. Another resident in the area stated that the frequent water cuts and supply of contaminated water has negatively affected residents in the area. Some residents have had to resort to bucket toilets as a result of persistent water cuts or shortage.

Interview with Residents of Frayville

- 5.1.23. Residents of this area similarly shared experiences of regular water shortages and their plight relating to unclean water from water tanks. They stated that sometimes when there is a shortage of water, the water tanks are opened to enable residents to access water for household use.
- 5.1.24. The following was noted in the areas visited:

(a) General Introduction

- 5.1.25. Jagersfontein is South Africa's oldest diamond-mining town located in the south western part of the Free State province.
- 5.1.26. This town is well known for the high quality diamonds that were produced from the now decommissioned mine in the 1870s to 1900s.
- 5.1.27. The diamond mine was first worked from an open pit because the presence of a dolerite sheet made the walls much more stable, underground mining commenced in the 1900s. It is now known as the deepest hand excavated hole in the world.
- 5.1.28. Water from this open pit (mine shaft) is being supplied to the community but the water quality has always been a call for concern because of its high concentration of arsenic¹. The presence of arsenic in drinking water has adverse effects on health² of residents.
- 5.1.29. Arsenic toxicity has no known effective medicine for treatment, but drinking of arsenic free water helps the arsenic affected people to get rid of symptoms of the arsenic toxicity.

(b) General Observations

- 5.1.30. Jagersfontein, Frayville, Ipopeng and Fauresmith are located in the south western part of the Free State province.
- 5.1.31. The vast majority of residents live in RDP houses constructed of bricks and there is electricity connection to most households.
- 5.1.32. Water shortages and supply of contaminated water poses serious health risks for residents.
- 5.1.33. Most residents of these areas are impoverished and rely on social grants from government and levels of unemployment are very high.
- 5.1.34. The residents of these areas predominantly speak Sesotho, Setswana, Afrikaans, and isiXhosa.
- 5.1.35. There is a decommissioned mine near the community and the water from this mine is being consumed by the residents and this is detrimental to their health because of the high levels of arsenic in the water.
- 5.1.36. Water from Kalkfontein dam is being treated in a bigger treatment plant which went operational in July 2012 and mixed with treated mine water. This has reduced the arsenic concentration of water to an acceptable level before it is finally supplied to the community.
- 5.1.37. Residents in the area mostly rely on water from the tanks.
- 5.1.38. During the inspection period, the investigation team witnessed the infrastructure in the area. (**see Photos 1-7**)

¹ Arsenic is a metalloid found in the environment and earth's crust. Its presence in groundwater is as a result of natural processes (weathering and dissolution of minerals from rock materials in the aquifer) or artificial or anthropogenic processes (mining activities, use of arsenic containing pesticides and herbicides),

² The long-term exposure to arsenic in drinking water causes skin lesions, lung, bladder, and kidney cancers, neurological disorder, muscular weakness, loss of appetite and nausea.



“PHOTO 1” (PHOTO REFLECTING EMPTY WATER TANKS WHICH HAVE NOT BEEN FILLED WITH WATER)



“PHOTO 2” (A HOUSE THAT HAS A WATER TANK NEXT TO IT)



“PHOTO 3” (ANOTHER WATER TANK)



“PHOTO 4” (Construction at Jagersfontein of water pipes from Kalkfontein Dam)



“PHOTO 5” (Construction at Jagersfontein of water pipes from Kalkfontein Dam)



Mine shaft



Mixing Reservoir



balancing Reservoir



Pressure Filters



Storage Reservoir

“Photo 6” (Package plant)

“Photo 7” Treatment Plant



Catchment for Kalkfontein dam water



Pre-mixing Chamber



Flocculation Chamber



Rapid mixing Chamber



Water dividing Chamber



Clarification Chamber



Filters (racks of sand and nozzles)



Water dividing Chamber

5.2. *Visit to Respondent Municipal Offices - Trompsburg*

- 5.2.1. On the same day of the investigation, the investigating team paid a courtesy visit to the municipal offices of the Respondent with the intention of inform the Municipal Manager that the Commission had conducted investigations into areas under the jurisdiction of the municipality.
- 5.2.2. The Municipal Manager was unavailable. The investigating team dispatched by the Commission met with the Chief Financial Officer, Mr Mekgoe who was acting as the Municipal Manager.
- 5.2.3. He acknowledged our visit but stated that he wouldn't like to comment on the allegations but would instead await an allegation letter from the Commission.

5.3. *Respondent's response to allegations*

- 5.3.1. On Thursday, 23 May 2013, the Free State Provincial Office sent an allegation letter providing full details regarding the alleged violation to the Respondent and requested a response thereto within a period of 21 days.
- 5.3.2. In the letter, the following Information was requested:
 - i. Background to water supply;
 - ii. Current status and delivery pertaining to supply of water;
 - iii. Assessment on municipality's water and sanitation delivery;
 - iv. Water supply and infrastructure development plans;
 - v. Copy of the blue and green status report from the Department of Water Affairs;
 - vi. The impact of mining on water resources;
 - vii. Environmental and health Impact studies on the supply of water;
 - viii. Water and sanitation policy;
 - ix. Capacity (technical and institutional expertise) and budget constraints; and
 - x. IDP 2013/14
- 5.3.3. On Wednesday, 17 July 2013, the Free State Provincial Office received a response from the Respondent.
- 5.3.4. In its response the Respondent stated the following in respect to prolonged water shortage in Jagersfontein and Fauresmith.
 - (a) **Jagersfontein** - The residents have been experiencing shortage of water supply during the previous years, due to the fact that the municipality depended on water from the Mine Shaft as a source. The water from the shaft was constantly drying out, as a result residents struggled to get water, however the municipality had provided Jojo tanks as a contingency measure. Immediately after the completion of Phase 1 Bulk Water Supply Scheme project in October 2012, the problem was resolved. The residents were informed about these challenges as much as they are currently informed and notified of any water supply failure which is sometimes caused by power failure and maintenance.

(b) **Fauresmith** - The residents of this area have also been experiencing shortage of water supply during the previous years due to the municipality's dependence on water from the mine shaft in Jagersfontein and five (5) boreholes in Fauresmith. Residents are currently relying on boreholes for water supply. The water supply challenges include low water pressure which is caused by the following:

- i. There are only two boreholes that are operational out of five that supply the community with water;
- ii. The two boreholes that are operational are not supplying efficiently as they are beyond their supply capacity; and
- iii. The reservoirs do not have sufficient water to supply the entire community.

5.3.5. The Municipality has introduced Jojo water tanks as a contingency measure. Contractors were appointed in November 2012 for the construction of the reservoir and the pipeline from Jagersfontein to Fauresmith as part of Phase 2 of the water supply scheme project. After completion of the project in 2013, Fauresmith, Frayville and Ipopeng residents will no longer experience regular water shortage.

5.3.6. According to the municipality, residents of Fauresmith, Frayville and Ipopeng are informed about these water supply challenges.

6. Applicable Legal Framework:

6.1. Key International instruments

6.1.1. International Covenant on Economic Social It Cultural Rights (ICESCR)

Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living which includes accessibility and availability of adequate housing, food and clothing. The right to water falls under this article as it guarantees an adequate standard of living; water is one of the fundamental conditions for survival.

Article 12 of the ICESCR provides for the "enjoyment of the highest attainable standard of physical and mental health conducive to living a life of dignity". This means that health care facilities, goods and services have to be available in sufficient quantity; must be physically and economically accessible to everyone, must be ethically and culturally acceptable, and must be of a medically appropriate quality.

Although South Africa has not ratified the ICESER, as a Signatory State, the Government of South Africa cannot act In a manner that is contrary to the spirit of this Convention.

6.1.2. General Comment no.15 (2002) of the UNESCR³ recommended that before any action that interferes with the right of access to water is carried out by the State or third party, the relevant authority must ensure that such actions are performed in a manner warranted by law.

³ The Right to Water; UN Committee on Economic, Social and Cultural Rights, November 2010

The international right to water can be said to be ‘gendered’ as the General Comment 15 states in paragraph 13: ‘obligation of States parties to guarantee that the right to water is enjoyed without discrimination.

It further states in paragraph 16 that:

“Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women ... States parties should take steps to ensure that (a) Women are not excluded from decision-making processes concerning water resources and entitlements.”

Human rights In international environmental law

Stockholm principle 1 states that:

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

The Rio Declaration states that human beings are “entitled to a healthy and productive life in harmony with nature”. Principle 10 states that:

“Individuals shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

6.1.3. United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation⁴

The General Assembly adopted a resolution calling on all states to provide safe, clean, accessible and affordable drinking water and sanitation for all.

6.1.4. Convention on the Elimination of All Forms of Discrimination Against Women⁵

In relation to obligations towards rural women, article 14(2) (h) of CEDAW compels states parties to ‘ensure the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...’.

⁴ Resolution 64/292

⁵ CEDAW 1979

6.1.5. Convention on the Rights of the Child⁶

Article 24(2) of the Convention obliges states parties to 'combat disease and malnutrition ... through ... the provision of adequate nutritious foods and clean drinking-water ...'.

Regional Instruments**6.1.6. African Charter on the Rights and Welfare of the Child⁷**

Article 14(2) (c) of this Charter provides that states parties must ensure 'the provision of adequate nutrition and safe drinking water' to children.

6.2. Constitutional Rights

The preliminary assessment of the Free State Provincial Office indicated that the rights alleged to have been violated according to the media report are sections 10, 24, 27 and 32 of the Constitution. Each of these rights are discussed hereunder, in turn:

6.2.1. The Right to Human Dignity

Section 10 is the right to have the inherent dignity of everyone respected and protected. Lack of access to sufficient water and supply of contaminated water is inherently degrading, and undermines the human dignity of a human being.

6.2.2. The Right to Environment

Section 24 of the Constitution proclaims the right of everyone -

- “(a) to an environment that is not harmful to their health or wellbeing;*
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
- (i) prevent pollution and ecological degradation;*
 - (ii) promote conservation; and*
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”*

6.2.3. The Right to Health care, water and social security

Section 27 provides for the right to have access to water and the right to health which is fundamental to the physical and mental well-being of all individuals and is a necessary condition for the exercise of other human rights.

6.2.4. Local Government Responsibilities

Part B Schedule 4 of the Constitution mandates local government responsible for *“water and sanitation services limited to portable water supply systems and domestic waste-water and sewerage disposal”*

6.2.5. The Right to Access Information

Section 32 provides that everyone has the right of access to -

- a) any information held by the state; and
- b) any information that is held by another person and that is required for the exercise or protection of any rights.

⁶ 1989

⁷ 1990

6.3. Domestic Legislation

6.3.1. The Water Services Act⁸

Section 3 of the Water Services Act establishes the following rights and obligations in respect of access to basic water supply and basic sanitation:

- (1) *Everyone has a right of access to basic water supply and basic sanitation.*
- (2) *Every water services institution must take reasonable measures to realise these rights.*

Section 5 of the Water Services Act states that:

“If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.”

The Water services Act defines basic sanitation as:

“The prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households.”

Section 1 of the Water Services Act defines “Basic Water Supply” as:

“The prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quality and quantity of water to households, including informal households to support life and personal hygiene.”

The minimum standard of basic water supply and basic sanitation for the purposes of the Water Services Act is set out in the Regulations.

Regulations relating to Compulsory National Standards & Measures to Conserve Water⁹ (“the Regulations”)

In terms of Regulation 3, a municipality is obliged to provide each of the residents with access to at least 25 litres per day at a water user connection within 200 metres of each of the residents’ households.

6.3.2. The National Water Act¹⁰

Chapter 3 of the Water Act titled ‘Protection of Water Resources’, provides for pollution prevention in Part 4 and for emergency incidents in Part 5.

The term ‘water resource’ is defined as ‘... a watercourse, surface water, estuary, or aquifer ... thus subjecting both the water and the medium in which it is located to water quality control.’

Pollution is defined in the Act as the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it-

⁸ 108 of 1997

⁹ GN R509 in Government Gazette 22355 of 8 June 2001

¹⁰ 36 of 1998

- i. Less fit for any beneficial purpose for which it is or may reasonably be expected to be used; or
- ii. Harmful or potentially harmful to the welfare, health or safety of human beings; and to the resource quality.

6.3.3. The National Health Act¹¹

This Act provides that municipalities are obliged to ensure that appropriate 'municipal health services', which for purposes of the Act includes water quality monitoring and environmental pollution control I are effectively and equitably provided.

6.3.4 The Housing Act¹²

6.3.4.1. The Housing Act defines housing development as:

"The establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which al/ citizens and permanent residents of the Republic will, on a progressive basis have access to-

- (a) *A permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and*
- (b) *Potable water, adequate sanitary facilities and domestic energy supply.*¹³

6.3.4.2. Section 9 of the Housing Act¹⁴ requires that every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy *inter alia* to:

- i. Ensure that the Inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- ii. Ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are removed;
- iii. Ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner that is economically efficient;
- iv. Set housing delivery goals in respect of its area of jurisdiction; and
- v. Initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

¹¹ 61 of 2003

¹² 107 of 1997

¹³ Section 1 (vi) of the Housing Act 107 of 1997

¹⁴ 107 of 1997

6.3.4.3. Section 2 of the Housing Act sets out the general principles applicable to housing development. They provide that national, provincial and local spheres of government must *inter alia*:

- i. Give priority to the needs of the poor in respect of housing development; and
- ii. Promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions.

6.3.5. The Municipal Systems Act¹⁵

The definition of basic municipal services according to the Act¹⁶ is:

“A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.”

Section 73(1) of the Act states that a municipality must give effect to the provisions of the Constitution and:

- (a) Give priority to the basic needs of the local community;
- (b) Promote the development of the local community; and
- (c) Ensure that all members of the local community have access to at least the minimum level of basic municipal services.

6.3.6. Municipal Finance Management Act¹⁷

In considering the obligations of the Respondent with regard to its budgeting and finance processes, the Commission paid close consideration to Chapter Four of the Municipal Finance Management Act (hereinafter referred to as the “MFMA”). Section 28(1) of the MFMA is of particular relevance in its directive that municipalities may revise and approve their annual budget through an adjustments budget.

Section 27(5) is also relevant in that it permits provincial executives to intervene in terms of section 139 of the Constitution if a municipality cannot or does not comply with the provisions of Chapter four of the MFMA.

6.3.7. The National Environmental Management Act 107 of 1998 (NEMA)

NEMA defines the environment as:

“The surroundings within which humans exist and that are made up of-

- i) The land, water and atmosphere of the earth;*
- ii) Micro-organisms, plant and animal life;*
- iii) Any part or combination of (i) and (ii) and the interrelationships among and between them; and*

¹⁵ 32 of 2000

¹⁶ Chapter 8 of the Municipal Systems Act

¹⁷ Act 56 of 2003

iv) *The physical chemical aesthetic and cultural properties and conditions of the foregoing that influences human health and well-being.*¹⁸

6.3.8. Promotion of Access to Information Act¹⁹

This Act protects and upholds the rights of people to access to information. It protects the right to access to information and seeks to enhance the transparency, accountability and effectiveness of government.

Public bodies are obliged to give information needed to exercise rights enshrined in the Constitution.

6.4. Policy Framework

6.4.1. White Paper on Water Supply and Sanitation Policy²⁰

The White Paper on Water Supply and sanitation Policy defines adequate sanitation as follows:

“The immediate priority is to provide sanitation services to all which meet basic health and functional requirements including the protection of the quality of both surface and underground water.”

6.5. Case Law

The Constitution entreats the Commission to consider relevant case law in determining the nature and scope of a human right:

6.5.1. In *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* the Constitutional Court defined the parameters of what constitutes “reasonable measures”, Further, that legislative measures adopted by the government must be supported by policies and programmes adopted must be reasonable *“both in their conception and implementation”*.²¹ The Court held that reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise and do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril.²² The Court concluded that measures that do not include meeting the needs of the most vulnerable groups in society, were unreasonable.

Furthermore, it was stated that implementation plans that failed to be “reasonable” would not meet the State’s obligations in terms of section 7(2) of the Constitution.

6.5.2. In *Soobramoney v Minister of Health, Kwa-Zulu Natal, 1997 (12) BCLR 1696 (CC)*, the Constitutional Court opined that the scarcity of resources available to the State were constraints to the enjoyment of the right by the appellants, given the socio-historical context of South Africa.

¹⁸ Section 1

¹⁹ Act 2 of 2000

²⁰ Department of Water Affairs and Forestry (1994)

²¹ Grootboom at para [42]

²² Grootboom at para [44]

- 6.5.3. In *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC)²³ the Court held:

"[49] A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid - the restoration of human dignity, equality and freedom.

*[50] If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. As this Court held in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; mamas and Another v Minister of Home Affairs and Others*:*

'The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has a/ready acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justifiable and enforceable right that must be respected and protected.'"

- 6.5.4. The High Court In **Beja and others v Premier of the Western Cape and others. case no. 21332/2010** Erasmus J held at paragraph 142-143 that section 73(l)(c) of the Municipal Systems Act requires a municipality to provide "the minimum level of basic services", which includes the provision of sanitation and toilet services. He found that there was a violation of rights in terms of sections 10 (human dignity), 12 (freedom and security of person), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution.
- 6.5.5. In the *Joseph case*,²⁴ the Constitutional Court read sections 152 and 153 of the Constitution together with provisions contained in the Municipal Systems Act and the Housing Act, creating a public law "right to basic municipal services" and outlining the duty on local government to provide these services.
- 6.5.6. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) 54 4 (CC), the court stated the following:

²³ at paragraph [49]-[51]

²⁴ See *Leon Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30

44 *What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable “economic and social development”. Economic and social development is essential to the well-being of human beings.³⁸ This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution.³⁹ But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. And as has been observed-*

45 *The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b) (iii) which provides that the environment will be protected by securing “ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment*

b. Regulatory Standards

Regulation 3 of the Compulsory National Standards states that the minimum standard for basic water supply services is –

- (a) *the provision of appropriate service in respect of effective water use; and*
- (b) *a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month-*
 - (i) *at a minimum flow rate of not less than 10 litres per minute;*
 - (ii) *within 200 metres of a household; and*
 - (iii) *with an effectiveness such no consumer is without a supply for more than seven full days in any year.*

7. ANALYSIS

Factual and Legal analysis of the investigators are reported hereunder in respect of each human right violated:

7.1. Human Rights Violations

- 7.1.1. The Respondent Is alleged to have violated the right to human dignity, clean environment, access to sufficient water and health and access to information of the residents by its failure to provide residents with adequate basic water supply; access to clean water; and to administer measures aimed at ensuring that the right to water is realised.

- 7.1.2. The inspection *in loco* of the areas undertaken by the Commission gave credence to allegations made by the Complainant. Interviews conducted with residents confirmed allegations of provision of contaminated drinking water, regular water shortages and lack of dissemination of Information relating to irregular water supply.

The Right to Human Dignity

- 7.1.3. It is widely recognized that a minimum supply of potable water is a vital prerequisite for life, health, dignity and the realization of other human rights. The right to water is indispensable for leading a life in human dignity.

The Right to Clean Environment

- 7.1.4. The Constitution proclaims the right of everyone to a clean environment that is not harmful to their health or well-being. This includes the constant supply of clean, safe drinking water. The role of local government, as stated in the Constitution is, among other things, “to ensure the provision of services to communities in a sustainable manner”²⁵ and “to promote a safe and healthy environment”.²⁶
- 7.1.5. Residents of Jagersfontein, Frayville, Ipopeng and Fauresmith still have to rely on boreholes for water supply which is insufficient to meet their household needs. Water from boreholes is untreated and usage of such untreated water exposes communities to a variety of water and air-borne contaminants with a potential to lead to serious health problems.
- 7.1.6. It is therefore clear from the information gleaned from the investigation that residents are exposed to water that is potentially harmful to their health and well-being and the milieu of the aforesaid areas.

The Right to Water

- 7.1.7. In the South African Constitution, water is recognised as a basic human right, a consequence of the perception that water is the origin of all things - the giver of life. The right of access to sufficient water is essential for dignified existence.
- 7.1.8. The interdependence of access to water and other rights is evident. In fact, access to water is often a precondition for the fulfilment and enjoyment of most of the other rights in the Constitution.
- 7.1.9. Recognition of the right to water requires the State to respect, protect and fulfil the right.
- 7.1.10. According to section 7(2) of the Constitution, the State has a duty to *protect, promote, and fulfil* all the rights in the Bill of Rights and that includes the right of access to sufficient water. The duty to protect requires that the state prevent the violations of the right to access water by third parties. The duty to *promote* the right of access to sufficient water involves, *inter alia*, the provision of educational and informational programmes aimed at generating awareness and understanding of the right of access to sufficient water.

²⁵ Section 152(1)(1:1) of the Constitution

²⁶ Section 152(1)(d) of the Constitution

- 7.1.11. Finally, the obligation to *fulfil* the rights in the Bill of Rights necessitates that the state take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of the right. An important component of the obligation to fulfil the right is that the state must facilitate and provide access to water. Despite such guarantees, this obligation is not being met in the areas under jurisdiction of the Respondent. In this context, it is also vital to note that access to water is a precondition for the fulfilment and enjoyment of most other human rights (such as sanitation and health) as enshrined in the Constitution.
- 7.1.12. In line with the need to ensure the realisation of the right of access to water and sanitation, the South African Parliament enacted the *Water Services Act 108* of 1997. The preamble to the Act identifies the “rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-being.” In the same way, Section 3(1) provides that “everyone has a right of access to basic water supply and basic sanitation.” Moreover, Section 3(2) states that every water institution must take reasonable steps to realise these rights.
- 7.1.13. Drinking water usually comes from two sources: surface water (rainfall and its runoff to rivers or dams) and groundwater (water that has collected in underground stores or aquifers). The Constitution notes that the “state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right to water, finding a way to use the natural sources from which water originates.
- 7.1.14. Despite the efforts of the Respondent to achieve the progressive realisation of the right to water, drinking water in the areas visited continues to be of poor quality and is in general considered unsafe by the residents.
- 7.1.15. The Respondent further acknowledged in their response letter that the reservoirs do not have sufficient water to supply the entire community. Only two boreholes are operational out of five that supply the community with water.
- 7.1.16. The Commission finds the measures taken by the Respondent inadequate to ameliorate the acute water shortage in the areas under its jurisdiction.
- 7.1.17. The primary responsibility for the provision of safe drinking water rests with the Water Services Authority (Local or District Municipality). Water Services Authorities have a legal responsibility to:
- i. Monitor the quality of drinking water provided to consumers;
 - ii. Compare the results to national drinking water standards, and
 - iii. Communicate any health risks to consumers and appropriate authorities
- 7.1.18. Nothing was gleaned from the investigation to indicate that the quality of drinking water provided to residents was constantly monitored. There is further no evidence that any health risks pertaining to provision of water was communicated adequately, if at all, to residents.
- 7.1.19. The Department of Health is responsible for coordinating incidents of water-related diseases in South Africa and also providing interventions under emergency drinking water conditions. The Environmental Health Officers within the Water

Services Authorities, are responsible for empowering the community through the provision of health and hygiene education, as well as undertaking drinking water quality monitoring at the point-of-use.

- 7.1.20. No environmental officers were dispatched to the local clinic to assess the impact of acute water shortage on provision of healthcare services.

The Right to Health

- 7.1.21. Contaminated water jeopardizes both the physical and social health of all. Health practitioners interviewed indicated that they had to deal with health incidents attributable to contaminated water or water not fit for human consumption.

- 7.1.22. In the case of Jagersfontein, arsenic contamination is presumed to be as a result of mining activities. The presence of arsenic in drinking water has adverse effects on health.

- 7.1.23. The studies conducted by the Institute for Groundwater Studies and University of the Free State in 2012 indicate that there is arsenic contamination in the water supplied to residents. According to the study, treated mine water is usually mixed with water from the Kalkfontein dam to reduce the arsenic concentration of water to an acceptable level before supply to residents.

- 7.1.24. The Commission found that residents were dissatisfied with the colour and taste of the water. Most residents had resorted to boiling water which created a scum after boiling, tasted sour and smelt of chlorine.

- 7.1.25. Improved access to clean water supply would reduce ill health and disease in communities and vulnerable groups around Jagersfontein and Fauresmith.

Access to Information

- 7.1.26. Residents were unanimous in their submission that irregularity of water supply and the failure to be informed of such has adversely affected them. These submissions point to the importance of adequate communication between the water supplier (Respondent) and its customers (Residents) which apparently lacked in this case.

- 7.1.27. Whilst the municipality submitted evidence of notices of water interruptions displayed at public institutions to the Commission, none of the residents interviewed were aware of such notifications.

- 7.1.28. It is further important to highlight the fact that the Respondent has not complied with its obligations in terms of section 32 for more than three (3) years. The Respondent has not complied with section 14 obligations as well.

8. FINDINGS

On the basis of the analysis in the preceding section, the Commission makes the following findings:

- 8.1. The Respondent has violated the right of residents to human dignity by its failure to provide safe and sustainable water supply fundamental for a healthy, productive and dignified life.
- 8.2. The Respondent has violated the rights of residents to both water and health by its failure to provide access to sufficient water fit for human consumption.

- 8.3. The SAHRC finds that in failing to adequately notify residents about the possible contamination of water, possible health risks, persistent water shortages and maintenance challenges, and the inability to disseminate information about plans to ameliorate their access to basic water services and general lack of information upholds the complaint of violations of both the right to clean environment and access to Information.

9. Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to *“make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.”*

In view of the findings set out in Section 8 above, the Commission recommends the following:

- 9.1. The Respondent is required to provide basic services to the complainants, which includes but not limited to water within 48 hours and proper sanitation within a reasonable time not exceeding three (3) month from the date of this report as a temporary measure;
- 9.2. The Respondent is directed to furnish the Commission with an operations and maintenance plan required to run water supply in an efficient, effective and sustainable manner to address access to basic water challenges facing residents of the Municipality, especially women, children and other vulnerable groups within a period of three (3) months from the date of this finding;
- 9.3. The Respondent is further directed to do the following:
 - i. Upgrade its package plant and employ modern technology to remove arsenic more efficiently;
 - ii. Perform pump test of boreholes in Jagersfontein and Fauresmith in order to determine the sustainable yield of each borehole;
 - iii. Continue to monitor boreholes to have knowledge of how arsenic concentration in water varies and what influences it;

This should be done within a period of eighteen (18) months from the date of this finding.

- 9.4. The Respondent is required to enhance community participation and demonstrate some level of transparency in its governance by convening regular feedback sessions every three (3) months relating to the supply of water to residents, A copy of the minutes to be submitted to the Commission.
- 9.5. The Free State Department of Water Affairs is required to provide the Commission with a Plan on how they intend to verify the water quality within a period of three (3) months. The Department is directed to continue to monitor the water supply and Infrastructural improvement programmes of the Respondent and to take regular water samples for testing to ensure supply of safe and clean water.
- 9.6. The Free State Department of Water Affairs is required to conduct an investigation into the extent, if any, of the liability of the mining company for the water pollution and/or failure to rehabilitate or seal the open mine shaft from which water was drawn for the community. The Department is required to provide the Commission with a report on the outcome of its investigations and findings within a period of twelve (12) months.

10. Appeal

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

Private Bag X2700
Houghton
2041

South African Human Rights Commission



COMPLAINT NO: Gauteng/1213/0384

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: GP/1213/0384

In the matter between:

Sundrika Madurai

Complainant

and

Gauteng Provincial Department of Education

1st Respondent

Parkdene Primary School

2nd Respondent

School Governing Body of Parkdene Primary School

3rd Respondent

INVESTIGATIVE REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as “state institutions supporting constitutional democracy”.
- 1.3. In terms of section 184 (1) of the Constitution, the Commission is specifically mandated to:
 - 1.3.1. Promote respect for human rights and a culture of human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Furthermore, section 184(2) provides the Commission authority to undertake research and education activities together with the duty to investigate and report on the observance of human rights. These duties contribute and enhance the exercise of its authority in terms of section 184(2)(b) to take appropriate steps to secure redress where human rights have been violated.
- 1.5. The Human Rights Commission Act, 54 of 1994 (the HRC Act), further supplements the powers of the Commission to fulfil its constitutional mandate.

2. Nature of Complaint

- 2.1. On the 13th of September 2012, the Commission received a complaint from Ms Sundrika Madurai (the Complainant), alleging the following:
 - 2.1.1. During 2012, her minor child, who was 9 years old at the time, had been victimised by an educator as well as the Principal at the Parkdene Primary School (the School), on the basis of his religion. The alleged victimisation included the following:
 - a) Being chased out of class by the educator as a result of wearing a holy string;
 - b) Being forced to wear a jersey at all times to cover up the holy string;
 - c) Being called a “coolie” by the educator.

- 2.1.2. That the victimisation had a traumatic effect on the minor child to the extent that he began to exhibit signs of depression and wanting to avoid school. In this regard the child had intentionally hurt his hand to avoid attending school.

3. The Parties

- 3.1. The Complainant is a major South African female, currently residing at 21 Commissioner Street, Boksburg Cemetery, Boksburg, 1459; acting on behalf of her minor boy child, aged 9 years at the time of the alleged incident.
- 3.2. The Respondents are the Member of the Executive Council for Education in Gauteng, Parkdene Primary School as well as the School Governing Body of Parkdene Primary School. At the commencement of its assessment of this matter, the Commission was referred to the Gauteng Provincial Department of Education (the Department) for all engagement, and henceforth, refers to the Department as the Respondent.

4. Preliminary Assessment

- 4.1. A preliminary assessment on receipt of the complaint was informed by a consideration of the legal framework detailed below. A consideration of the rights which are alleged to have been violated in terms of the framework are governed largely by the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) indicated a *prima facie* violation of the right to dignity and equality.
- 4.2. Section 9 of the Constitution, which entrenches the right to equality, provides that:
- 3) *“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, **religion**, conscience, **belief**, **culture**, language and birth.*
 - 4) *No person [our emphasis] may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).*
 - 5) *National legislation must be enacted to prevent or prohibit unfair discrimination.”*
- 4.3. PEPUDA provides the framework for the protection of the right to equality as entrenched in the Constitution. PEPUDA defines “prohibited grounds” and includes the following:
- “Prohibited grounds are –*
- a) *race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;”*
- 4.4. As a result of the aforesaid, the Commission accepted the complaint as constituting a *prima facie* violation of the right to equality, which required closer investigation.
- 4.5. The Commission’s decision to investigate the matter is informed by its Complaints Handling Procedures (CHP) as gazetted¹. A further decision to treat the matter as one of priority requiring urgent attention is supported by the vulnerability of minor children and the need to ensure that section 28(2) of the Constitution, which stipulates that a child’s best interests are of paramount importance in every matter concerning the child, is respected.

¹ Gazetted January 2012

5. Steps taken by the Commission

- 5.1. On the basis of its preliminary assessment, the Commission noted further subjective factors that influenced its approach to the matter; in particular, the need to protect the best interests of the minor child and potentially the rights of other learners who were not the direct subject of the complaint lodged but who would potentially be affected had the *prima facie* violations been fully established to have indeed occurred.

An assessment of the relevant frameworks was undertaken based on desktop research. Together with this preliminary research, further information furnished by the Complainant and a consideration of **the School's Code of Conduct**, the Commission accepted the complaint for investigation. The acceptance was communicated to the Complainant on the 27th of September 2012.

- 5.2. On that same date, the Commission issued a correspondence **to the principal of the School requesting responses** to the allegations raised by the Complainant.
- 5.3. On the 10th of October 2012, a response was received from the principal requesting that the Commission communicate directly with the School's District Director, Mr Jerry Bhagaloo, or Mr Vaughan Holmes at the head office of the Respondent regarding this matter.
- 5.4. Due to the nature of the complaint, the Commission arranged a meeting with Mr Vaughan Holmes as well as Mrs Karima Naidoo from the office of the Respondent on the 24th of October 2012. The Commission also invited the Complainant and the father of the minor child to the meeting held with the abovementioned officials.
- 5.5. The Commission was informed during the meeting that the **Respondent had already taken steps against the educator and that pursuant thereto, the educator had been provisionally suspended pending the conclusion of disciplinary processes being undertaken by the Respondent**. The Commission was advised of the recommendation that disciplinary steps also be taken against the principal and district inspector. The Commission recommended **urgent counseling for the minor child** as the child had clearly suffered trauma as a result of the experience, which recommendation officials of the Respondent undertook to provide.
- 5.6. On the 30th of October 2012, the Commission issued a letter to the Respondent requesting the following information by the end of November 2012:
- 5.6.1. The timelines applicable in relation to the disciplinary hearing of the educator;
 - 5.6.2. The formal steps taken in relation to the principal and district inspector; and
 - 5.6.3. Anticipated date of conclusion of processes.
- 5.7. The Commission indicated its availability to form part of the Disciplinary Panel **as an independent observer**² as the matter related to the alleged infringement of human rights.

² The Commission liaised with the legal department of South African Council for Educator (SACE) to determine the latter's role and mandate. SACE confirmed that it does not form part of the Respondent's disciplinary hearings. Section 26 of the South African Council for Educator's Act states the following:

"In each case where disciplinary steps are taken against any educator by the employer resulting in a sanction other than a caution or reprimand a certified summary of the record of the proceedings at the hearing and of the sanction imposed must be forwarded to the council by such employer."

SACE indicated that it therefore has the **discretion to conduct its own investigations** based on the professional conduct of an educator, upon receiving record of the hearing which resulted in, for instance, a dismissal. The Respondent is mandated to establishing the facts of the allegation and the sanction, and SACE would determine whether the educator is in fact a fit and proper person to hold a position to educate once a finding has been made by the Respondent. If a positive finding is made by SACE, the educator will be deregistered.

The Commission has received confirmation that both educators, their union representatives, the employer's representative as well as the presiding officer were present during the disciplinary hearing.

- 5.8. In January 2013, the Commission contacted the office of the Respondent as no response had been received to its request dated the 30th of October 2013. The Respondent advised that it had no record of the letter and requested that the Commission resend same.
- 5.9. On the 21st of January 2013, the Respondent indicated that the disciplinary hearings of both the principal and the educator were to be concluded by the 28th of February 2013. The response also indicated that the **Disciplinary Code and Procedures for educators did not provide for a third party such as the Commission to join** the disciplinary proceedings. While an independent observer is arguably not a party to the proceedings, the Commission elects not to address this argument further in the context of this investigation.
- 5.10. On the 6th of March 2013, the Commission contacted the Respondent regarding the fact that the outcomes of the disciplinary hearings were yet to be provided to it. On the 26th of March 2013, the Respondent indicated that the proceedings had not yet been concluded but would be before the 12th of April 2013.
- 5.11. On the 12th of April 2013, when the Commission again contacted the Respondent, it was advised that the proceedings had been concluded and that a report on the matter was en route to the offices of the Commission.
- 5.12. On the **15th of April 2013, the outcome of the educator's disciplinary hearing** was communicated to the Commission, namely that the **educator had been found guilty on the charge of misconduct** in respect of the complaint and as a sanction, had been suspended for three (3) months without pay. However, the outcome of the hearing for the principal was yet to be received.
- 5.13. Throughout the **period awaiting feedback from the Respondent**, the Commission was regularly contacted by the Complainant for updates in the matter. A meeting was scheduled with the Complainant to discuss the outcome of the disciplinary hearings for Saturday, the 20th of April 2013. However, the meeting was cancelled by the Complainant on the morning of the 20th due to unforeseen circumstances. The meeting was rescheduled for the 9th of May 2013.
- 5.14. On the 22nd of April 2013, the Commission issued a further letter to the Respondent requesting minutes of the disciplinary hearings of both the educator and the principal.
- 5.15. On the 9th of May 2013, the Commission met with the Complainant and the father of the minor child. During this meeting, the Complainant highlighted numerous occurrences that had allegedly taken place since the suspension of the educator indicating continued alleged victimisation by other educators and the principal of the minor child as a result of the educator's suspension. The Complainant and her husband indicated that they were **not satisfied with the findings** of the Respondent and were seeking dismissal of the educator to ensure that the victimisation did not continue.
- 5.16. On the 13th of May 2013, the Commission wrote to the Respondent once again requesting the minutes of the disciplinary meeting and also requesting information regarding processes for appeal against the Respondent's finding.
- 5.17. On the 10th of June 2013, the Commission received a response from the Respondent indicating the following:

- 5.17.1. That the Principal had received a sanction of a final written warning;
- 5.17.2. That there was **no provision for the Complainant to appeal** the decision of the presiding officer as this fell outside the employer/employee relationship; and
- 5.17.3. That the presiding officer's report was to be furnished to the Commission but that such report was to be dealt with confidentially.
- 5.18. On the 29th of July 2013, the Commission met with an official of the Respondent, Mr Vaughan Holmes, to further discuss allegations made by the Complainant and to determine a way forward on the matter. During this meeting, Mr Holmes indicated the following:
- 5.18.1. That there was agreement on the **presumption** that there could be a **systemic problem** at the School that needed to be addressed in the context of increasing awareness of the responsibility to respect human rights;
- 5.18.2. That the Complainant had been in contact with the Respondent on numerous occasions reporting various incidents requiring urgent intervention **after the initial complaint**. These included matters relating to the fact that the minor child had been left off the rugby team and that he was given a test despite being absent from school etc;
- 5.18.3. The Respondent indicated that it **had attempted to facilitate a mediation process** between the family and the educator as the Complainant was adamant that they were **not amenable to a transfer of the minor child** to another school despite the allegations of ongoing victimisation by a number of other educators. The proposed mediation was an attempt to mend the relationship between the parties. However, the father of the minor child indicated no interest in participating in a reconciliatory process;
- 5.18.4. The Respondent also indicated that despite the undertaking from the Complainant to take the minor **child for counseling, which was to be provided by the Respondent**, the child had not yet attended such counseling;
- 5.18.5. The imminent return of the educator to the school was also discussed. On the request of the Commission, it was agreed that both the Respondent and Commission would meet with the principal and the School Governing Body of the School;
- 5.19. On the 31st of July 2013, the presiding officer's report was furnished to the Commission. **Once again the confidentiality of the report was highlighted.**³
- 5.20. On the 5th of August 2013, the Commission met with the Principal of the School, as well as the School Governing Body. The meeting was attended by various units of the Respondent, including the employee health and wellness branch, the circuit manager of the area, a social worker working with the Respondent and the Social Work Manager from the Department of Social Development and the school management team. The School Governing Body and executive members of the School were also represented.

³ In respect of the confidentiality of the documents and evidence provided to the Commission, the Commission accepts that the evidence led before the presiding officer during the disciplinary hearings of both educators are true and correct insofar as it affects this finding. The Commission is guided by its CHP in this regard and therefore accepts the decision of that forum.

- 5.20.1. During the meeting, Mr Holmes indicated that the educator had since rejoined the school after her suspension and that **she was willing to undergo counseling** in relation to the incident.
- 5.20.2. Mr Holmes also confirmed that it was a **priority that the minor child be protected** and that the educator be supported in order to **normalise the situation** at the School.
- 5.20.3. The Commission then proceeded to discuss its involvement in the matter as well as the importance of **creating awareness relating to the mandatory duty to respect human rights** in the public service. It was further pointed out that some of the subsequent allegations made against the principal of the School were of particular concern. In this respect, it was confirmed **that a situation where fellow educators could potentially victimise the minor child as an act of solidarity** with the sanctioned educator had to be addressed and prevented. The Commission stressed that this form of intervention presented an opportunity to strengthen development, reform and to address the issues relevant to this particular school in order to **achieve broader objectives and impact throughout the school community.**
- 5.20.4. The meeting was then expanded to include the School Governing Body, educators and the principal of the School.
- 5.20.5. The principal and members of the School Governing Body pointed out that the body of educators at the School had been affected and traumatised by the event, subsequent disciplinary proceedings and outcomes. They indicated that they were **hesitant to act in any environment involving the particular learner** as the Complainant and the father of the minor child were approaching the Respondent with every matter they felt unhappy about. The principal cited an incident where the father of the minor child used foul and unacceptable language during a sporting event and that because of the history of the complaint in issue, the educators were too afraid to reprimand him out of concern of being reported to the Respondent.
- 5.20.6. The meeting was concluded with commitments that:
- 5.20.6.1. The **Respondent provide counseling for educators** through the Employee Wellness programme as a result of this incident;
 - 5.20.6.2. The Deputy District Director **coordinate all further interventions in the School**, including social cohesion programmes;
 - 5.20.6.3. The Respondent **facilitate the counseling of the minor child** upon receiving permission from the Complainant and the father of the minor child; and
 - 5.20.6.4. The Commission would **issue a report in respect of its investigation and findings** and facilitate a mediatory process between the family and the educator/principal should the need arise and if such request was received from the Respondent. The Commission further undertook to provide support to the Respondent in its awareness raising endeavours.

6. Legal Analysis

6.1. International Law

6.1.1. International Instruments

6.1.1.1. International Convention on Economic, Social and Cultural Rights (ICESCR)

The United Nations (UN) has described the right to education in Article 13 as follows:

“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”⁴

6.1.1.2. International Covenant on Civil and Political Rights (ICCPR)

The ICCPR provides in Article 18(1) that:

“Everyone shall have the right to freedom of thought conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

Article 27 of the ICCPR provides -

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

6.1.1.3. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Declaration on Religion and Belief)⁵

The Declaration on Religion and Belief reaffirmed that freedom of thought, conscience, religion and belief is a human right derived from the inherent dignity of the human person and guaranteed to all without discrimination.⁶

6.1.1.4. Declaration on the Rights of Persons Belonging to National or Ethnic Religions and Linguistic Minorities (Declaration on National⁷

The Declaration reaffirmed that one of the main purposes of the UN, as proclaimed in the Charter of the UN, is to achieve international

⁴ General Comment No. 13 on the Right to Education - UN Document p6

⁵ Adopted by the United Nations General Assembly on 25 November 1981

⁶ Resolution Adopted by the United Nations General Assembly A/Res/55/97

⁷ Declaration approved by the United Nations General Assembly on 20 July 1992

cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.⁸

6.1.1.5. UN Human Rights Council Resolution Combating Defamation of Religions⁹

The UN Human Rights Council (UNHRC) expressed **deep concern at the stereotyping and defamation of religions and manifestations of intolerance and discrimination in matters of religion or belief** still evident in the world, which have led to intolerance against the followers of these religions. The UNHRC also reaffirmed the pledge made by all states under the Charter of UN to promote and encourage universal respect for and of human rights and fundamental freedoms for all, without distinction as to race, sex, language and religion.

6.1.1.6. Moreover, South Africa ratified the UN Convention on the Rights of the Child (UNCRC) on 16 June 1995. It was the **first international treaty that the new democratic government ratified**. The UNCRC became the first legally binding international convention to affirm human rights for all children. Article 3 of the UNCRC deals specifically with the principle of non-discrimination by stating that:

*“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, **religion**, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

*2. States Parties shall **take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.**”*

6.1.2. Regional Human Rights Instruments

6.1.2.1. African Charter on Human and People’s Rights (ACHPR)

Article two of the ACHPR states as follows:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

⁸ Resolution Adopted by the United Nations General Assembly A/Res/47/135

⁹ Adopted as Resolution 13/16 on 15 April 2010

6.1.2.2. African Charter on the Rights and Welfare of the Child (ACRWC)

South Africa is in addition a signatory to the **ACRWC**, a regional commitment advancing the rights of children in Africa. Article 3 states the following:

“Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”

6.2. Constitutional Rights

Section 1 of the Constitution determines that South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality, the advancement of human rights and freedoms, supremacy of the Constitution and the rule of law and a system of democratic government that is accountable, responsive and open.¹⁰

6.2.1. The Right to Equality

Section 9 (3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on the basis of religion. Subsection 4 provides that, no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

6.2.2. The Right to Human Dignity

Section 10 entrenches the right of everyone to have their dignity respected and protected. Given the facts of this matter and the inherent value the right, it has central significance to the complaint at hand.

6.2.3. Freedom of Religion, Belief and Opinion

Section 15(1), entrenches the right to freedom of religion. Section 15(2)(b) provides that **religious observances may be conducted at state or state aided institutions**, provided that they are conducted on an equitable basis.

6.2.4. Children’s Rights

Section 28 states that every child has the right to be protected from maltreatment, neglect, abuse or degradation. Section 28 also enshrines the best interest of the child principle.

6.2.5. The Right to Education

Section 29 (1)(a) of the Constitution guarantees the right to a basic education. It provides in the relevant part that:

*“(1) Everyone has –
a) the right to a basic education, including adult basic education.”*

In terms of Schedule 4 to the Constitution, basic education is an area of concurrent national and provincial competence. Both organs of state are responsible for the protection, respect, promotion and fulfilment of the right to a basic education.

¹⁰ Section 1 of the Constitution of the Republic of South Africa, 1996

6.3. Domestic Legislation

6.3.1. South African Schools Act (the Act)¹¹

The legislative framework relevant to this complaint is to be found, amongst others, in the Act. In terms of **Section 7 of the Act**, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted **on an equitable basis and attendance at them by learners and members of the staff is free and voluntary.**

Section 8 of the Act provides that the governing body of a public must **adopt a Code of Conduct for the learners after consultation with the learners, parents and educators** of the school. The purpose of a School's Code of Conduct is to establish a *"disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process."* In terms of subsection 3, the Minister may, after consultation with the Council of Education Ministers, determine guidelines for the consideration of governing bodies in adopting a Code of Conduct for the learners. The Ministerial guidelines are for the "consideration" of schools and not mandatory.

6.3.2. The Children's Act¹²

In terms of the Children's Act, "abuse" in relation to a child means **any form of harm or ill-treatment deliberately inflicted on a child, and includes exposing or subjecting a child to behavior that may harm the child psychologically or emotionally;**

6.3.3. PEPUDA

Section 1 of PEPUDA defines "discrimination" as:

"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly -

- (a) **Imposes burdens, obligations or disadvantage** on; or
- (b) *Withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds".*

Section 6 of PEPUDA reiterates the Constitution's specific prohibitions relating to unfair discrimination by both the state and private parties on listed grounds which includes religion. The prohibited grounds provided in the definitions section are *"race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, **religion, conscience, belief, culture, language and birth.**"* PEPUDA also provides guidance for the determination of unfairness. Section 14 of the Act provides that -

- (1) *It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups of categories of persons.*
- (2) *In determining whether the Respondent has proved that the discrimination is fair, the following must be taken into account:*

¹¹ 84 of 1996

¹² 38 of 2005

- (a) *The context;*
 - (b) *the factors referred to in subsection (3);*
 - (c) *whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.*
- (3) The factors referred to in subsection (2)(b) include the following:
- (a) *Whether the discrimination impairs or is likely to impair human dignity;*
 - (b) the impact or likely impact of the discrimination on the Complainant;**
 - (c) *the position of the Complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;*
 - (d) the nature and extent of the discrimination;**
 - (e) *whether the discrimination is systemic in nature;*
 - (f) *whether the discrimination has a legitimate purpose;*
 - (g) *whether and to what extent the discrimination achieves its purpose;*
 - (h) *whether there are **less restrictive and less disadvantageous** means to achieve the purpose;*
 - (i) *whether and to what extent the Respondent has taken such steps as being reasonable in the circumstances to –*
 - (i) *address the disadvantage which arises from or is related to one or more of the prohibited grounds; or*
 - (ii) **accommodate diversity.**

6.4. Case Law

In considering this matter, the Commission is guided by relevant jurisprudence in determining the nature and scope of a human right:

6.4.1. In ***NM v Smith (Freedom of Expression Institute as Amicus Curiae)***¹³ the Court held:

*“[49] A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it **cannot be gainsaid that dignity occupies a central position.** After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom.*

*[50] If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it **must be jealously guarded and protected.** As this Court held in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others*:*

¹³ 2007 (5) SA 250 (CC) at paras 49 - 51

*'The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict out past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore **informs constitutional adjudication and interpretation at a range of levels.** It is a value that informs the interpretation of many, possibly all, other rights. This **Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life.** Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.'*

- 6.4.2. In ***Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others***, the Court held that:¹⁴

"The acknowledgment and acceptance of difference** is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an **active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation."

- 6.4.3. In ***S v Lawrence***,¹⁵ the Constitutional Court has accepted that the right to freedom of religion at the very minimum includes:

*"The right to entertain such religious beliefs **as a person chooses** the right to **declare religious beliefs openly and without fear of hindrance or reprisal**, and the right to manifest religious belief by worship and practice or by teaching and dissemination."*

The Constitutional Court also noted in the above case that, in terms of the Constitution, **no religion should be favoured above another** as part of what is called religious neutrality, but that it is also no expected of the state to be completely secular.

- 6.4.4. In ***Christian Education***,¹⁶ in the context of **accommodating religious belief** in society, a unanimous court identified the underlying motivation of the concept as follows:

*"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and **religious freedom***

¹⁴ 2000 (2) SA 1 (CC)

¹⁵ 1997 (4) SA 1176 (CC). See also Currie I and De Waal J *The Bill of Rights Handbook* (Juta, Cape Town 2005) 338

¹⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)

has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not (own emphasis). Such a society can cohere only if all its participants accept that **certain basic norms and standards are binding**. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid **putting believers to extremely painful and intensely burdensome** choices of either being true to their faith or else respectful of the law.”

This Court further held:

*“It is true that **to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community**. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views.”*

- 6.4.5. In **MEC for Education: KwaZulu Natal v Pillay**,¹⁷ the court ordered that the Governing Body of Durban Girls’ High School, in consultation with the learners, parents and educators of the school, within a reasonable time, effect amendments to the **School’s Code of Conduct** to provide for **the reasonable accommodation of deviations** from the code on religious or cultural grounds and a procedure according to which such exemptions from the code can be sought and granted.

7. Application

In its analysis of the complaint, the Commission focused primarily on the basic human rights of the minor child made vulnerable by the actions of the educator and apparent lack of action by the principal. On the facts of the case, there can therefore be little argument that the conduct of the education and principal adversely infringed the learner’s rights to equality, dignity, freedom of religion, as well as his right to be protected from abuse.

- 7.1. Freedom of religion or belief within the school-based education environment manifests in nuanced complexities between rights and has far-reaching implications and challenges. This environment is the primary formal institution for the realization of the right to education for most learners. It provides a place of learning, social development and social encounter for children from various ethnicities, religions and backgrounds.
- 7.2. Simultaneously, the school is also a place in which authority is exercised and some persons, including members of religious minorities, may find themselves in situations of vulnerability. In this regard, the principles of basic human rights, especially the right to dignity and the best interests of the child, **stretches like a thread throughout any interaction or response in relation to the child’s religion or beliefs**.
- 7.3. Given these dynamics in the education environment, **strong safeguards** to protect the child’s right to freedom of religion or belief are indispensable. Special attention must therefore be accorded to freedom of religion or belief which enjoys the status of

¹⁷ 2008 (1) SA 474 (CC). Hereafter referred to as the Pillay matter.

a guarantee under international human rights and domestic law to **limit prejudice to these rights without compromising the core objective of providing formal education in the public education system.**

- 7.4. The safeguards referred to above must ensure that the freedom to manifest one's religion or belief include the freedom **not to be exposed to any pressure**, especially from state authorities or in a state institution, to refrain from practicing one's religious or belief activities. This obligation is mandatory in terms of the duty to refrain from unfair discrimination and to respect the diverse religions and faiths which constitute our society.
- 7.5. The Constitutional Court's judgment in the Pillay matter is apposite in this instance where it held that the rule prohibiting the wearing of jewelry had the potential for indirect discrimination because it **allowed certain groups of learners to express their religious and cultural identity freely, while denying that right to other learners.** The evidence before the court in that case showed that what was relevant was not whether the practice was characterized as religious or cultural, **but the importance it held for the individual** in question.
- 7.6. Also significant was the Court's reasoning that it was insufficient to state that the student could attend another school. The court found that our Constitution **requires the community to affirm and reasonably accommodate difference**, not merely to tolerate it as a last resort. Langa CJ observed that there was no evidence that permitting this particular exemption would imperil uniformity or school discipline in general. He noted further that granting an exemption to the student might encourage more learners to express their religious or **culture and that this was to be celebrated, not feared.** Accordingly, the Chief Justice concluded that the School's discrimination against the student was unfair.
- 7.7. In this matter, it is clear from the facts that both the educator as well as the principal's conduct may be attributed to not mere ignorance of the need to respect the rights of the minor child, his dignity and religious belief, but is indicative of intolerance as well. This is evident from the fact, for instance, that once the educator was informed that the red string formed part of the minor child's religion, she requested that the **string be hidden underneath the school uniform.** The action of the educator and principal evidences a disregard for religious practices different from their own and a disregard of diversity which in many instances **constitute key elements of a child's identity.** The conduct of the educator over a period of time did little or nothing to protect the best interests of the learner in her care. In *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*,¹⁸ the court, interpreting the Constitution, confirmed that the best interests of the child principle is 'of paramount importance **in every matter**' concerning children, applying with equal force to education.
- 7.8. The late Chief Justice Langa's observation in the Pillay judgment supports the view that children and South Africans in general should be **proud of their religion, culture and heritage.** Conduct by **persons in authority over a learner which causes the child to feel**

¹⁸ [2013] ZACC 25 (10 July 2013) para 116

guilty or embarrassed in respect of the religion he or she practices not only affects the child's dignity, but may also create intolerance within the child for religions different from their own. Such fears and prejudices **become embedded and deep seated and may affect such a child negatively in the long term.** It is not possible to predict with any certainty the full impact of the conduct complained about on the child in question, but it would be reasonable to accept that some impact has occurred and is likely to occur given the nature of the incidence described by the Complainant and admitted to some extent by the educator. An inference of negative impact is also reasonable given the subsequent allegations of continued violations.

- 7.9. The Commission has also considered **progressive measures on the part of the Respondent to regularise conduct at schools in the form of the School Code of Conduct.** The School Code of Conduct is an important mechanism through which to create a learning environment consonant with constitutional values. It is trite in terms of our legal framework and applicable case law that a **School's Code of Conduct must cater for the reasonable accommodation** of deviations from the Code of Conduct on religious or cultural grounds, and a procedure must be implemented according to which exemptions from the School's Code of Conduct may be considered. During **an examination of the School's Code of Conduct** however, the Commission found that the **school prohibits any deviation from the school uniform based on cultural and religious grounds.** Paragraph 4 of the School's Code of Conduct states the following:

"a. No traditional / cultural decorations or visible tokens are allowed." (our emphasis)

- 7.10. In terms of the Act,¹⁹ it is the mandate of the School Governing Body to develop a school's Code of Conduct, and therefore, to take steps to include the abovementioned measures to address reasonable accommodation.
- 7.11. The Commission **does not proceed in this matter to establish culpability.** This exercise has already been completed by the Respondent and there is therefore no need to further pursue such a consideration.²⁰ In our view, a lack of awareness and thereafter, willfulness, has already been established. In particular the fact that the victimisation of the minor child stretched over a period of time highlights prevailing levels of wilful ignorance as the educator had ample time to research, investigate and acquaint herself with the need to respect cultural and religious diversity in her sector. More significantly, it highlights the **sustained trauma** this little child has had to endure from **a person in authority and in direct control** of him during his time at school. It is possible that the educator was merely enforcing the School Code of Conduct, but this approach and the means for such enforcement is startling and leaves much to be desired.

The Commission is of the view that a clear obligation exists on state bodies like schools to **adopt reasonable measures to avoid painful psychological and sometimes traumatic impact** on minor learners as has been emphasized by our courts in the past. In an open and democratic society based on human dignity, equality and freedom, special pains must be taken by all actors in the education sector to ensure these values and rights are protected.

¹⁹ South African Schools Act 84 of 1996

²⁰ The Commission notes however, that the finding and sanction by the Respondent, and indeed its own findings, do not preclude the Complainant from further ventilating this complaint before the appropriate courts.

- 7.12. The right to freedom of religion includes the **right not to be coerced or restrained from acting in a manner contrary to ones religious beliefs, on the pain or threat of sanction, including forms of indirect pressure to inhibit manifestation of religious belief.** Implicit in the right to freedom of religion is the absence of coercion or restraint. Thus as a broad principle, freedom of religion may be impaired by any measure that **forces people to act or refrain from acting in a manner contrary to their religious beliefs on the pain or threat of sanction.**
- 7.13. While a sanction has been brought to bear on the relevant employees by the Respondent, the **process was determined within the confines of the employer/employee relationship.** The type and degree of sanction, and levels of accountability in the chain of mechanisms operating to prevent such deviations from the Constitution themselves warrant consideration, but are not addressed in this finding. They remain however, areas in great need for review to strengthen existing frameworks. The punitive approach confined within the employer employee relationship significantly also does not adequately address the need for **broader sensitization around respect for the rights of the child, diversity, developing a culture of respect for the rights of the child, and the urgent review and development of the School's Code of Conduct.**
- 7.14. The Commission finds no evidence justifying a defense that the conduct complained of was informed by a duty to reduce a **negative impact on discipline at the school or on the quality of the education provided.** It is important to note that educators should not be deprived of the authority to restrict practices that will be disruptive to the school process. Such restraint must however be based on something more than a fear of disruption. In this case, it **can hardly be inferred that by wearing a red string on his wrist, the 9 year old child would have posed a threat** of disrupting the educational process.
- 7.15. The School's Code of Conduct remains one of the central bases of the Commission's consideration of this complaint. It is clear that neither the School nor its governing body provided for the accommodation of the different cultural and religious practices of its learners when it drew up the School Code. The School Code of Conduct requires more than mere tolerance of "other" religious practices and beliefs. In the dissenting judgment of Sachs J in the case of *Prince v President of the Law Society of the Good Hope*,²¹ the Court stated that the test for tolerance as envisaged by the Bill of Rights "*comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is 'unusual, bizarre or even threatening'*".
- 7.16. Ideally, in a democratic and open society, School Codes of Conduct should **enable the exercise of diversity** to the greatest possible extent. Such School Codes of Conduct should preferably include provisions which recognize our diverse religious beliefs and allow for the exercise of all religions, without **limiting recognition to those considered to be in the majority and mainstream.** The School Code of Conduct, which remains the first point of reference to the school community, requires review and alignment with constitutional principles.

²¹ CCT36/00 [2002] (2) SA 794

- 7.17. As the Constitutional Court noted in Pillay, “our Constitution does not tolerate diversity as a necessary evil, **but affirms it as one of the primary treasures of our nation.**”²² Public schools need to caution against ignoring the **bona fide religious cultural practices of South Africa’s public school learners.** The Court, in recognising learners’ protected rights to human dignity, equality and freedom, has **created and provided an important benchmark in requiring that learners must be permitted to apply for exemptions from school policies that interfere with their religious or cultural practices.**
- 7.18. The actual conduct complained of cannot be viewed in isolation. In numerous countries and on every continent, religious intolerance results in widespread violations of basic rights, manifesting in conflict and loss of life. Unfortunately, children are too often the victims of such conflict. The Commission considers it **most urgent and necessary that tolerance for diversity** be actively promoted and encouraged in children from a very young age. This can only be achieved if **those who guide children throughout the developmental phase of childhood** are themselves committed to such a culture of respect to be in a position to create a healthy basis for this growth through example. Such interventions have notably not occurred at the School in the present circumstances.
- 7.19. In addition, the Commission noted that the complaint elicited strong reactions from the parents of the minor child at an **emotive level.** This has caused what could possibly be unrelated decisions and actions by the school to be interpreted in the context of what their minor child has had to endure in the context of the primary complaint.
- 7.20. Significantly, **the body of educators have also been adversely impacted** by the incident. It was apparent from the engagements with the teacher body that educators felt far more restricted and expressed the view that **“they were walking on eggshells”** on every occasion they had to engage with the particular learner. The consequences of the violation therefore have had and will continue to have **a wide reaching impact on those directly affected and the broader body of learners and educators at the school.**

8. Findings

On the basis of the analysis in the preceding section, as well as the numerous interactions with the Complainant and Respondent, the Commission hereby makes the following findings:

- 8.1. The educator and principal’s conduct constitutes **an unreasonable limitation, and a violation** of the minor child’s **right to practice his religion.**
- 8.2. The directive of the educator to the minor child to **remove the red string and cutting it off** herself constitutes **a physical intrusion** to the person of the child and a **violation of the minor child’s right to religion and human dignity** and an abuse of authority.
- 8.3. The **Respondent acted with due diligence** in addressing the matter through available labour dispute mechanisms. The Commission will however not comment on the adequacy of the sanctions imposed on the parties. The appropriateness of sanctions correctly falls to be determined by the Respondent insofar as the contract of employment is concerned and may be subject to review by a court of law. It remained for the Commission to **consider reforms aimed at protecting and preventing** the impugned conduct in the future. It has done so by bringing to bear a focus on the human rights of the Complainant’s child and

²² Note 17 above at paras 92 & 108

addressing opportunities to allow for reform of the particular school environment. A **consideration of the School's Code of Conduct has provided one such opportunity to protect basic rights of learners, deepen understanding and increase tolerance, respect and protection for all** in the school community.

- 8.4. As with parents and learners, **educators must be equally informed of measures relating to reasonable accommodation** to empower them to safeguard the basic constitutional rights of the children under their care and subject to their authority at school. In the matter at hand, the Commission is of the view that it is incumbent on the **educator and principal**, along with the **School Governing Body** to provide **leadership in developing a culture of respect for basic rights and values** at the School.
- 8.5. In respect of the **broader impact this incident has had on those directly affected as well as the wider body of learners and educators** at the School, the Commission also finds that **counselling is imperative** not only for the minor child, but also for those affected indirectly to mitigate the harmful impact this incident has wrecked on those involved.
- 8.6. The Commission further recommends that an **assessment of the child's best interests** be undertaken to establish what actions if any are necessary in his best interests, including the possibility of a transfer of the educator in question, particularly in light of relationship to the School principal, a consideration of the wider school environment given current levels of trust between some educators, the parents and the child himself.

9. Recommendations

In terms of the HRC Act, the Commission is entitled to:

"...make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."

The Commission accordingly recommends that:

- 9.1. The School Governing Body **consult, review and amend the School's Code of Conduct** within a **period of three (3) months** from date of this finding. The reviewed School Code of Conduct is to be provided to the Commission on completion, together with records indicating level of consultation and compliance with policy and statutes. The amendments to the Code should include the following:
 - a) reasonable accommodation of religious and culturally based deviations;
 - b) criteria and processes relating to the application for and granting of exemptions
- 9.2. Amendments to the School Code of Conduct are to be developed through **broad consultation** and are to be informed by current **jurisprudence and legislation**.
- 9.3. The amended School Code of Conduct must furthermore be made **accessible and widely communicated** to all within the school community i.e. the teacher body as well as members of the School Governing Body, to receive sustained training on its application.
- 9.4. The Respondent to **conduct an audit and review of the School Codes of Conduct of other public schools in the Gauteng province, within twelve (12) months** from date of this finding, to determine whether there is reasonable flexibility and accommodation of religious and cultural deviations from mainstream religious practices;

- 9.5. The Respondent to **take steps and guide the inclusion of religious diversity in all public schools** in the Gauteng province **within a period of eighteen (18) months from date of this finding;**
- 9.6. The Respondent to conduct a **social cohesion workshop for educators** at the School, specifically focusing on principles of equality and the best interest of the child.
- 9.7. The Respondent to **monitor the wellbeing of the minor child over a period of six (6) months** and to thereafter provide the Commission with a report from the date of this finding, listing any reported incidences and progress in relation to the minor child, and any other learner emanating from the School involving discrimination against learners.
- 9.8. The Respondent to consider whether, in the best interests of the child and other learners at the School, the educator in question be transferred, or any other such option, to fully uphold the learners' best interests in this instance. In respect of alleged continued violations to the rights of the learner in question, the Commission finds that the district office should closely assess such alleged continued violations and that the assessment be provided both to the Respondent and the Commission **within six (6) months** hereof.

10. Appeal

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

Private Bag X2700
Houghton
2041

South African Human Rights Commission



COMPLAINT NO: Gauteng/1213/0412

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: GP/1213/0412

VIOLET MFOBO

Complainant

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Respondent

REPORT

1. INTRODUCTION

- 1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as “state institutions supporting constitutional democracy”.
- 1.3. In terms of Section 184(1) of the Constitution, the Commission is specifically mandated to:
 - 1.3.1. Promote respect for human rights and a culture of human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Section 184 (2) (a) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.5. The Human Rights Commission Act 54 of 1994 (the HRC Act)¹, further supplements the powers of the Commission. In addition to other powers, duties and functions, the HRC Act confers powers on the Commission to conduct or cause to be conducted any investigation necessary for the exercise of its broad powers under the Constitution.

2. THE COMPLAINANT

- 2.1. The Complainant is Violet Mfobo, an adult female currently residing at Helen Joseph Women’s Hostel (the Hostel), situated at the corner of Richard Baloyi Street and Fourth Avenue, Alexandra, Johannesburg.

3. THE RESPONDENT

- 3.1. The Respondent is the City of Johannesburg Metropolitan Municipality, an urban municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998, with its head office situated at 158 Loveday Street Braamfontein, Johannesburg.

¹ These powers are not materially affected by the Human Rights Commission Act 40 of 2013.

- 3.2. The Respondent is cited in its capacity as the local government authority which owns and manages the Hostel.

4. THE COMPLAINT

- 4.1. On 3 October 2012, the Commission received a complaint from the Complainant relating to the conditions and access to services at the Hostel. The areas of concern on which the complaint is premised and which informed the bases of the Commission's investigation are listed below:
 - 4.1.1. Ongoing lack of proper water, sanitation and sewerage;
 - 4.1.2. Lack of electricity supply;
 - 4.1.3. Removal of male children aged seven years and older from their mothers;
 - 4.1.4. Lack of transparency and consultation;
 - 4.1.5. Issues around the redevelopment of the Hostel; and
 - 4.1.6. General issues, including but not limited to concerns about rentals, management of the cleaning contract, gender discrimination in respect of access to the Hostel and occupancy levels.

Due to the complexity and wide ranging issues forming the basis of the complaint before the Commission, the detail surrounding the abovementioned aspects are limited to those which are material to the complaint, and are addressed separately in this report.

5. RIGHTS ALLEGEDLY VIOLATED

- 5.1. Section 9 - Equality;
- 5.2. Section 10 - Dignity;
- 5.3. Section 24 - Environment;
- 5.4. Section 26 - Housing;
- 5.5. Section 27 - Access to health care, food, water and social security;
- 5.6. Section 28(1(c) and Section 28(2) - Children;
- 5.7. Section 32 - Access to information; and
- 5.8. Section 33 - Just Administrative Action

6. STEPS TAKEN BY THE COMMISSION

Inspections *in loco*, consultations and information provided

- 6.1. The complaint was administered in terms of the Commission's Complaints Handling Procedures, as gazetted.² During its investigation, the Commission undertook two inspections of the Hostel, held a number of consultative meetings with the Complainant and the Respondent and exchanged numerous correspondence with relevant parties:

² Gazetted January 2012.

- 6.1.1. During October 2012 and June 2013, inspections in loco were undertaken at the hostel. The outcomes of these inspections are summarised below;³
- 6.1.2. In February 2013, following the Commission's first inspection of the Hostel where *prima facie* violations of a number of human rights were established, an allegations letter was forwarded to the Respondent, the Mayoral Committee of Health and Human Development, and the Municipal Manager;⁴
- 6.1.3. On 22 February 2013, a brief response was provided to the Commission's allegations letter by the Respondent;
- 6.1.4. On 19 March 2013, the Commission consulted with the Complainant;
- 6.1.5. On 22 April 2013, in light of the brief response received from the Respondent to its allegations letter, the Commission forwarded further correspondence to the Respondent emphasizing responses still outstanding in respect of its allegations letter;
- 6.1.6. On 16 and 24 May 2013, further responses were received from the Respondent;
- 6.1.7. On 20 August 2013, the Commission consulted with the Respondent; and
- 6.1.8. On 29 August 2013, the Respondent provided further information to the Commission on the basis of further requests arising from the contact based consultation on 20 August 2013.

6.2. Water, sanitation and sewerage

In assessing levels of access to water, sanitation and sewerage, the information below was noted:

- 6.2.1. All toilets, bathrooms and the communal kitchen rely on continuous water supply. However, it was observed that water supply appeared to be sporadic. As a result, containers of water were filled to serve interim needs until water supply is restored.
- 6.2.2. Irregular water supply and the poor state of plumbing in the Hostel impacts on sanitation at the Hostel.
- 6.2.3. Geysers frequently did not work properly and only cold water is accessible (when water was available). Residents were therefore required to heat water on the stoves in the communal kitchens.
- 6.2.4. Numerous water pipes were leaking from the upper levels of the building, causing damage to ceilings below and residents' movable property. As a result, pools of stagnant water could be found inside and outside the building, causing a foul smell and posing a health risk to the women and children who reside at the Hostel.
- 6.2.5. Laundry areas inside the buildings could not be utilised due to lack of water supply and leaking pipes which cause pools of stagnant water to accumulate. As the washing areas do not have doors, the stench from the stagnant water infiltrates the residential blocks of the Hostel.

³ Photographic images depicting conditions at the Hostel are annexed to this report marked "A".

⁴ The Gauteng Department of Health and Gauteng Department of Local Government, Traditional Affairs and Housing were also copied.

- 6.2.6. The poor sewerage infrastructure causes constant blockages, which results in sewer waste being pumped onto the grounds of the Hostel. This causes a foul smell throughout the Hostel, an infestation of rodents and insects and potentially poses a severe health risk to the residents.
- 6.2.7. The Hostel was surrounded by informal dwellings. Make shift toilets had been installed by the Respondent against an outside wall of the Hostel to accommodate the informal dwellers. As a result, occupants of rooms situated in the vicinity were unable to leave open their windows due to the stench, raw sewerage and the infestation of rodents and flies which infiltrated the rooms. A storm water drain situated outside the Hostel also posed a problem in that it was noticeably blocked by the accumulation of rubbish from the nearby informal settlement.
- 6.2.8. The Commission was advised that although continuous contact had been made with the Johannesburg Roads Agency with a view to resolving the issue with the storm water drain, the issue has remained unresolved. To prevent sewerage from seeping into those Hostel rooms closest to the informal settlement, the Respondent intended to build a concrete slab against the wall of the Hostel. Although the Councillor initially agreed to this proposal (as per consultation with representative from the Respondent on 20 August 2013), she later retracted her approval and advised that the construction was not a viable use of funds. Notwithstanding such objection, the Respondent confirmed that it would be proceeding with the construction of the slab and that a contractor had already been appointed.
- 6.2.9. Plumbing networks and capacity volumes appear to have become increasingly compromised due to the demand on the system, which results in **regular blockages**. This necessitated the appointment of a full time plumber stationed at the Hostel. Although this contract had expired, processes had been put in place to appoint a new contractor (this was confirmed by residents who had seen plumbers on site at the Hostel). The Respondent further confirmed that a process was underway to appoint an engineer to divert some of the dysfunctional sewer links. However, residents were of the view that because the infrastructure itself was outdated, problems with the plumbing and sewerage system would continue notwithstanding any repairs undertaken.
- 6.2.10. Continuous blockages in the external **sewer lines also resulted in spillover** on the Hostel grounds. Although Johannesburg Water (JW) was contacted regularly to attend to such blockages, their response was not always prompt. JW however advised that it had not received any complaints from the Hostel and that while it **supplied water up to ground level**, the **Housing Department was responsible for internal water reticulation** (including the water tank at the Hostel).
- 6.2.11. With regard to the sewer lines, the Respondent advised that a contractor had assessed the condition of the infrastructure and found that one of the internal **lines ran under the building**, other were blocked and some were broken. JW was contacted but was unable to provide specialist contractors nor did JW have pre-approved contractors to assist. The contractor eventually appointed found the **scope of work to be vague as no proper site investigation report had been provided**, save for the brief report from the jetting contractor. A tender process

was also unsuccessful due to the limited number of bidders and the discrepancy in quote rates. It was therefore resolved that a consulting engineer would be appointed to conduct a proper investigation and to prepare a detailed scope of work. Although processes for the appointment of a contractor had allegedly been implemented, the Respondent provided no further information regarding this, the work already completed etc.

- 6.2.12. It was acknowledged that, generally, low water pressure was experienced throughout the Alexandra area and JW was therefore in the process of **refurbishing old infrastructure across Alexandra**. However, JW later confirmed that the water pressure problem in Alexandra does not necessarily affect the Hostel **as the supply to the Hostel comes from the Randjieslaagte Reservoir** supply zone.
- 6.2.13. Water is received from water tanks situated at the Hostel itself. However, as these **water tanks were worn out**, severe leakages occurred throughout the Hostel and water supply was therefore problematic. Gushing water from the ceiling was observed in certain blocks of the Hostel, which appeared to originate from the water tanker situated directly above the affected areas. The Commission was informed by residents that this problem had **commenced approximately three years ago**. The Commission was also advised that a resident, with her children, occupied the room next to the area with a severe leakage. The Commission was able to enter the room and noted that it was musty and that most if not all of the **resident's movable property was damp**. The Commission was advised that a new water tank had been installed at the Hostel in January 2013 (a copy of the purchase order was provided to Commission by the Respondent, dated 24 January 2013). However, it was alleged that the **new tank was not being used as it was not working properly** and a new contractor was therefore appointed during May 2013. In addition, two of the remaining tanks were apparently leaking.
- 6.2.14. It was submitted that during April 2010, a comprehensive assessment was done by **JW appointed consultants** of all water and sanitation problems at the Hostel and a project plan to implement all necessary repairs was effected. However, **due to poor workmanship**, the **plumbing and sewer situation deteriorated**. The condition of the sewerage system was alleged to be further compromised by ongoing vandalism and theft of saleable items. A continuous repairs and maintenance programme was therefore put in place to remedy the situation.⁵
- 6.2.15. The Respondent acknowledged that repairs were of a temporary nature, resulting in a recurrence of the problems, but noted that **no funding was available to fully and properly upgrade** the entire sewer system.
- 6.2.16. Children subjected to the conditions detailed above, and who are additionally vulnerable, experience not only the direct challenges posed by their living conditions, but significant adverse impacts to interrelated rights as well. In particular, their immature immune systems are particularly susceptible to the risks posed by their environment.

⁵ As per project plans for the development of the Hostel and Extension 52 and an updated status report prepared by the Section 79 Housing Portfolio Committee provided to the Commission.

6.3. Electricity

Electricity was raised in the complaint on the basis that there **has not been reliable electricity supply to many sections of the Hostel since 2006**. In general, detailed discussions and investigations are summarised below which relate to the safety concerns around current conditions in use and supply, fairness of billing and consultation and measures which are purported to be taken by the Respondent.

Inspections revealed that many residents had **illegal electricity connections** to their rooms for the purpose of using their appliances; light fittings were broken and had not been repaired; there was no lighting in the hallways and in some instances, illegal electricity connections were located in those areas of the Hostel most affected by leaking water pipes; all of which pose a risk to the residents.

6.3.1. The Respondent alleged that the supply of electricity was affected by continued **recourse to illegal electricity connections and increasing demand** on systems, which resulted in strain and outages. In this respect, residents alleged that illegal electricity connections were resorted to because of the absence of electricity supply for appliances.

6.3.2. The installation of an electric metering box system to limit illegal connections was prevented when City Power contractors were turned away by residents who were unhappy that they had not been consulted about the installation. The residents petitioned the MMC for Housing in the Mayoral Committee, Mr D Bovu, about the lack of consultation. This was on the basis that, according to residents, the proposed metering box would not allow for the measuring of individual consumption as rooms are occupied by four women, each with differing levels of electricity consumption. An equal division of costs per room would therefore not be proportionate with the actual electricity usage of each resident.

As an alternative, the Complainant suggested that a suitably capacitated distribution board be installed and maintained (it was alleged that the **distribution board had not been repaired since October 2012**). Discussions were also held with City Power to devise alternative arrangements for maintaining a functional electricity system. Although there was an indication that the residents wished to further consult regarding the matter, this does not appear to have taken place and the **allocated project budget was then used for purposes unrelated to the Hostel**. From the information provided, it is unclear what resolutions, if any, were taken in respect of the provision of electricity to the Hostel.⁶

6.3.3. Extensive electrical repair work undertaken and verified by an electrical engineer did not provide a permanent solution to the problem.

6.3.4. Special meetings of participating electricians, an electrical engineer, the Councillor and housing officials were held to assess the cause of the continuous outages and it was **determined that the illegal electricity connections were central to the problem**. Also, as a result of the linkage between circuit breakers in the block, entire blocks were affected by outages. On that basis, it was proposed that the circuit breakers between rooms be separated while electricity meters were being installed.

⁶ Note 4 above.

- 6.3.5. On 29 August 2013, the Respondent provided the Commission with an engineer's report (dated March 2011) which confirmed that Geontsi Consulting Engineers had been commissioned by the Housing Department of the Respondent to assess the electrical power supply capacity, need for upgrades, inspect work done and sign off on work completed by contractors. The engineer's report does not appear to have been disputed by the Respondent. The engineer's report set out the following findings and recommendations:
- 6.3.5.1. The substation room was untidy and the excessive amount of water in the cable trenches posed a serious danger;
 - 6.3.5.2. The main distribution board was not in good condition;
 - 6.3.5.3. There was an imbalance in the currents;
 - 6.3.5.4. The work done by the contractors presented a safety hazard in most blocks of the Hostel;
 - 6.3.5.5. Surfex cables had not been installed in conduits and some connection boxes were not covered, leaving live wires exposed and posing a danger;
 - 6.3.5.6. Based on the above, the engineer recommended, amongst others, that:
 - a) The water in the substation be pumped out and that the Respondent solve the water problem on site; and
 - b) That the main distribution board be replaced.

6.4. Children

- 6.4.1. Notably, a number of children of varying ages were residing at the Hostel.
- 6.4.2. During or about December 2007, the residents allegedly held a meeting to discuss the possible violation of their **right to privacy** arising out of rooms being shared, especially with those **women who had male children aged 7 (seven) years and older**. The Respondent alleged that pursuant thereto, a decision was made that male children aged 7 (seven) years and older would vacate the Hostel. A non-profit organisation approached the Respondent to advise of the potential human rights violations that could arise if such a decision was implemented. As a result, the **Respondent provided temporary shelter for affected families for approximately 1½ years**. At that time, emergency shelter was in the process of being constructed but the construction was stopped due to ongoing vandalism. During or about May 2009, **affected families were relocated to Municipal owned flats**.
- 6.4.3. At the time of the inspection, the Complainant advised that their Councillor had threatened further removals of male children in the near future. Although no such removals have taken place since the complaint was lodged with the Commission, the threat thereof remains of serious concern to some residents.
- 6.4.4. The Respondent advised that **uncertainty regarding the status of mothers with male children would continue** as women in the Hostel were always **having children** and **no clear measures were in place** to address the concerns around the privacy rights of residents *vis-à-vis* the rights of the mothers and children.⁷

⁷ As per consultation with representative from the Respondent on 20 August 2013.

6.5. Transparency and consultation

- 6.5.1. During the inspection, the Complainant indicated that she was aware that a certain amount of money had been allocated to the Respondent for the development and general upkeep of the Hostel. However, residents had **not been informed** about **how the allocated funds had been utilised**. Various attempts to obtain a response from the Respondent and other government departments in respect of the spending had been met with non-responsiveness.
- 6.5.2. In addition, the Complainant alleged that the residents had not been consulted regarding the prioritisation of the ward for urban management and service delivery, as alleged by the Respondent.
- 6.5.3. Regarding the consultation process, the Complainant submitted that although the Ward Councillor held **meetings, these were not conducted in a fair and transparent manner** and that as a result, decisions affecting the ward were made in the absence of input from the residents themselves. Numerous complaints had allegedly been lodged against the Councillor, who also resided at the Hostel, regarding various issues, such as her public statement that only the views of those residents affiliated to a specific political party would be considered. However, according to the Complainant, none of those complaints had been attended to. Mr Ndlovu confirmed that he was aware of the **existence of certain factions within the Hostel, which in his view, contributed to tensions and problems** being experienced by residents.

6.6. Redevelopment of the Hostel

- 6.6.1. The Complainant advised that the **Respondent had made numerous undertakings since 1994 that the Hostel would be renovated and upgraded**. However, it was alleged that none of these undertakings had been met and that since being informed about the proposed redevelopment, no updates had been provided to residents by stakeholders and/or the Councillor.
- 6.6.2. The Complainant confirmed that the residents had lodged complaints with MMC Bovu, Pennual Ndlovu, the Regional manager of Hostels owned by the Respondent, and the Councillor. However, such attempts had for the most part, been fruitless.
- 6.6.3. The Respondent submitted that processes relating to the redevelopment of the hostel were underway. In this respect, the Respondent confirmed that a decanting site situated at Extension 52 in Alexandra had been acquired and fully paid for, and that **approval for the site development plan for the Hostel was allegedly at an advanced stage**. It was also submitted that a presentation had been made to the Councillor regarding these developments and she in turn was expected to provide feedback to the greater community.
- 6.6.4. After undertaking an inspection of the Hostel during November 2012, MMC Bovu advised residents that an audit would be done to establish which residents qualified for Reconstruction and Development Programme (RDP) (and other forms of social) housing. However, **such audit had to date not taken place**, which the Complainant alleged was as a result of the Councillor failing and / or refusing to facilitate the process.

6.6.5. A report received from the Respondent acknowledged that no meaningful repairs and maintenance could be affected on a structure with such massive defects as that of the Hostel. The report stated further that a lasting solution would entail a complete redevelopment of the Hostel, which would require an adequate budget (it was confirmed that in the previous financial year, a minimal budget had been allocated to the Hostel for preparatory work needed for the redevelopment of both the Hostel and Extension 52). According to a report received from the Respondent, the estimated cost of the redevelopment of the Hostel (together with the so-called M1 Hostel), would be approximately R 615 million (six hundred and fifteen million rand), over a period of 4 years, subject to sufficient funding being sourced. The report therefore recommended that the Respondent make a concerted effort to approach the Department of Human Settlements and Gauteng Department of Local Government and Housing for funding and that the **repairs and maintenance budget for Housing Region E be increased to enable effective maintenance interventions for the periods before and during the hostel redevelopment and upgrading programmes.**

6.6.6. As part of the redevelopment, the Hostel was to **be demolished** and while the site was being developed, residents were to be temporarily relocated. In addition, privately owned land adjoining Extension 52 had been purchase and approval for the consolidation of the three pieces of land in Extension 52 was at its final stages. The Respondent acknowledged that residents at the Hostel were living in **“traumatic conditions”** and that it was essential that the Hostel be made an **urgent priority**. However, at the same time, it was acknowledged that it would not be logical, practical or advisable to treat the Hostel separately from other hostels in the area (Madala M1 and Nobuhle M2 hostels), as the redevelopment of hostels was entrenched in national policy that would be implemented in a staggered manner by ascertaining the needs of each hostel. In this respect, it was alleged that no discriminatory practices were taking place in respect of redevelopment.

6.7. Other⁸

6.7.1. Management of the cleaning contract

6.7.1.1. The residents confirmed that short term cleaning contracts were usually in place. However, this meant that there were **periods of time when no contractors were on site** and that as a result, dirt and rubbish accumulated throughout the Hostel. Lapses in the presence of contractors on site were attributed to the periods between procurement of new contractors. In this respect, the Respondent confirmed that this had since been resolved and that an onsite, long term, cleaning contractor had been appointed during 2013 on a three year contract.

6.7.1.2. The Respondent submitted that in general, the ward has been identified as a priority in respect of urban management and service delivery. In

⁸ Other issues briefly dealt with during the investigation included the provision of security at the Hostel. In this respect, the Commission was advised that security personnel were on site on a 24 hour basis. The security services were supplied by the Johannesburg Metropolitan Police Department (JMPD), which had in turn outsourced the services to a private company. There was general dissatisfaction with the services that were being rendered. However, Complainants were advised that due to budgetary constraints, additional personnel could not be appointed.

this regard, continuous clean up operations and **education campaigns** were taking place in the area. In addition, external cleaning of the hostel took place through the Community Workers Programme (the Complainant alleged that **residents were unaware of such campaigns** and/or the prioritisation of the ward).

6.7.2. Rental

- 6.7.2.1. Women who wished to reside in the Hostel applied at a central office where a central database was managed. Upon acceptance, and as an access control measure, a lease agreement was signed by each resident and a rental account was created for the person (rental payments are to be paid into an allocated bank account).
- 6.7.2.2. Each occupant is required to pay R50.00 by way of monthly rental in terms of their individual lease agreements. On 20 September 2013, the Respondent forwarded the Commission a document setting out the amendment of tariff charges in respect of rentals and charges for council owned residential stock administered by the Housing Department for the 2012/13 financial year. The document confirmed that in terms of public hostels, the proposed tariff for a single bed for the annual financial year 2012/2013 was R50.00.
- 6.7.2.3. With regard to allegations of **disproportionate rentals** being imposed on male and females residing at their respective hostels, it was alleged that no discrimination was taking place and that any rental differentiation between hostels arose from the application of the promulgated tariff designed to differentiate between hostel types.
- 6.7.2.4. The Complainant advised that the residents at the men's hostels were not paying rental as Councillors were afraid of them. For the same reason, men were permitted to stay with their families, set up spaza shops and keep animals in clear contravention of the rules of the hostels without any action being taken against them by the relevant authorities. As a result, the Complainant was of the view that female residents who are not accorded these privileges at their Hostel were being discriminated against.
- 6.7.2.5. While the Respondent refuted allegations of discriminatory practices favouring male hostels, it was **conceded that in general, both rent collection and enforcement of payment was poor in both types of residences.**

6.7.3. Gender discrimination / access

- 6.7.3.1. The Complainant advised that **no male persons were allowed into the Hostel without prior authorisation.** In this respect, examples of various situations where the prohibition applied to the detriment of residents were cited. For instance, the Complainant advised that if furniture was delivered by a male person, the recipient resident would be required to transport the furniture over the remaining distance from the gate to her room as the male delivery person would not be permitted entry onto

the premises itself. Similarly, male paramedics were not allowed onto the premises, which it is alleged, had previously led to the death of a resident. However, restricted access of emergency medical personnel to the Hostel was denied by the Respondent.

6.7.4. Occupancy levels

- 6.7.4.1. The Hostel was built to accommodate migrant women during 1972 and was designed to accommodate 2825 beds in 727 rooms averaging about four single women per room.⁹
- 6.7.4.2. The Commission was however advised that there were as estimated 3000 residents in the Hostel; excluding children (a precise figure could not be provided). Over the years, the occupancy levels had substantially increased for various reasons, including the birth of children and relatives of residents illegally sharing rooms.
- 6.7.4.3. The hostel is physically divided into blocks, each of which is occupied by approximately 64 residents, excluding their children. Respective blocks are serviced by 5(five) toilets, 3 (three) bathrooms and 1 (one) communal kitchen each.
- 6.7.4.4. Although the women hail from different ethnic backgrounds, they are **not allowed the freedom to choose which rooms they occupy or the individuals with whom they would prefer to share their living space.** Upon registering at reception, women are allocated a room and no objections to allocations are entertained.
- 6.7.4.5. As a result of the **increased occupancy levels, the internal infrastructure had been severely compromised and additional pressure was placed on the water and electricity supply and the sewerage system.** The condition of the site, although considered solid, was therefore gradually being compromised by over-wet ground conditions caused by continuous water and sewer spillages, excessive overcrowding and general overload on the internal infrastructure.
- 6.7.4.6. The Respondent submitted that audits were conducted on an ongoing basis to control overcrowding (usually over weekends as not all residents stay at the Hostel during the week). However, according to the Respondent, residents had not been fully cooperative. Mr Ndlovu confirmed that the **lack of proper control systems contributed to overcrowding in the Hostel.**

7. APPLICABLE LEGAL FRAMEWORK

The Commission is cognisant of the interrelated nature of rights. On this basis, it has elected to broadly consider those rights most relevant to the present complaint. The related legal frameworks referred to below are those containing normative frameworks at international level, more specific domestic frameworks and where appropriate, judicial precedent. These frameworks address the right of women and children, in the context of the rights to, amongst others, basic services, housing, and meaningful consultation.

⁹ According to the Respondent, the total number of residents at the Hostel as at July 2011 was 2116.

7.1. Women

Globally, women suffer disproportionate impact insofar as political, socio-economic and cultural conditions affect their lives. These hardships, apart from being disproportionate, are exacerbated by social factors including their social and cultural status, assumed family responsibilities and reproductive roles. Women and children, such as those living in the conditions described in this report, suffer these hardships on a daily basis with very limited recourse to the means through which to alleviate these conditions.

International and regional legal framework

At the international level, a number of recognised conventions and Charters explicitly assert the rights of women and the concomitant obligations of states party to these international agreements. Key amongst these is the Convention on Elimination of All Forms of Discrimination against Women¹⁰ (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹¹ (the Protocol).

7.1.1. Article 3 of CEDAW states the following:

*"States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."*¹²

7.1.2. Article 3 of the Protocol talks to the right to dignity and states the following:

*"States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women; States Parties shall 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."*¹³

7.1.3. Article 9 of the Protocol, which relates to the right to participation in the political and decision-making process, states that:

"1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that...

c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.

*2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making."*¹⁴

¹⁰ 18 December 1979.

¹¹ 11 July 2003.

¹² [http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article 3.](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article%203)

¹³ [http://www.archpr.org/instruments/women-protocol.](http://www.archpr.org/instruments/women-protocol)

¹⁴ Note 10 above.

7.2. Basic Services

Water, sanitation and sewerage

Internationally, it is recognized by United Nations (UN) treaty bodies that access to water is a human right which is inextricably linked to the realisation of other rights. Specific obligations have therefore been developed regarding quality of and access to water. Closely linked to the right to water is sanitation. Although the right to sanitation does not exist as a stand-alone right in the international context, it has been interpreted by UN bodies as being part of a number of other social rights e.g. right to housing and health.¹⁵ The **General Assembly** recognises the “*right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights*”¹⁶ and the **Committee on Economic Social & Cultural Rights (CESCR)** has confirmed that access to sanitation is “*fundamental for human dignity and privacy.*”¹⁷ Related thereto are **Articles 16 and 24 of the African Charter on Human and People’s Rights (ACHPR)**,¹⁸ which South African has ratified. These articles confirm the right of every individual to the best attainable state of physical and mental health and compel states to ensure the protection of health. They also specifically recognise the right of all peoples to a general satisfactory environment favourable to their development.

International and regional legal framework

7.2.1. The UN Human Rights Council (UNHRC) resolution of 30 September 2010, affirmed that water and sanitation are human rights inextricably linked to the realisation of other rights –

“right to safe drinking water and sanitation is derived from right to an adequate standard of living and inextricably related to the right to the highest attainable of physical and mental health, as well as the right to life and human dignity.”

7.2.2. The resolution was preceded by the findings of the the **Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation.**¹⁹ The Special Rapporteur demonstrated that inadequate water and sanitation facilities impacts on and is intrinsically connected to the realisation of other rights such as education, health, work and dignity, amongst others.²⁰ Similarly in its **General Comment 15**²¹, the **CESCR**²² clarified that the content to

¹⁵ The rights associated with sanitation were also emphasised during the 2002 International Conference on Water and Environment where one of the four identified guidelines confirmed that “*it is vital to recognize the basic right of all human beings to have access to clean water and sanitation...*” The 2002 Johannesburg Declaration, although not expressly stating that there was a right to sanitation, noted the connection between sanitation and human dignity.

¹⁶ General Assembly Resolution on the human right to water and sanitation: A/Res/64/292 (2010).

¹⁷ http://www.escr-net.org/usr_doc/chap56B.pdf.

¹⁸ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁹ The Independent Expert (renamed in 2011 to the Special Rapporteur on the human right to safe drinking water and sanitation) proposed the following definition of sanitation (endorsed by the CESCR in 2010): “*a system for the collection, transport, treatment and disposal of re-use of human excreta and associated hygiene...which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.*” (http://www.escr-net.org/usr_doc/chap56B.pdf).

²⁰ Catarina de Albuquerque, “Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation”, Human Rights Council A/HRC/6/3, 16 August 2007.

²¹ 2002.

²² Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003).

the right to water must be seen as an entitlement of “everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”²³

- 7.2.3. South African is a signatory to the **International Covenant on Economic Social & Cultural Rights²⁴ (ICESCR)**. On this basis, South Africa must promote the right of everyone to an adequate standard of living, which includes accessibility and availability of adequate housing, food and clothing. The right to water under Article 11 recognises that water is one of the fundamental conditions for survival, an essential component to an adequate standard of living.²⁵ The legally binding nature of a state’s obligations in this regard is articulated in the **UN General Assembly Resolution Recognizing Access to Clean Water and Sanitation.**²⁶

Domestic legal framework

There are a number of legal, policy frameworks and mechanisms in place at domestic level which affirm the right of access to water and sanitation. Sector specific frameworks and guidelines have also been developed integrating the right to water and sanitation as a critical component for the realisation of other human rights. These have been provided at length in a number of findings by the Commission.²⁷

Constitution

Relevant provisions of the Constitution include:

- 7.2.4. Section 24 which states that “Everyone has the right to an environment that is not harmful to their health or wellbeing”;
- 7.2.5. Section 27 which states that “Everyone has the right to have access to ...sufficient water...”
- 7.2.6. Section 152 states that:
- “(1) The objects of local government are...
- (b) To ensure the provision of services to communities in a sustainable manner...
- (d) To promote a safe and healthy environment...”

²³ Note 18 above at Article 2

²⁴ 16 December 1966.

²⁵ International Covenant on Economic Social and Cultural Rights (1966), Article 11.

²⁶ Note 13 above – “The human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity. This means that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding” [our emphasis] The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable.”

²⁷ The Commission has made findings against a number of municipalities with regard to the rights to water and sanitation, including Dihlabeng, Setsotso, Metsimaholo, Masilonyana local municipalities and the Mangaung metropolitan municipality. The Commission’s findings are accessible on <http://www.sahrc.org.za>.

7.2.7. Section 153 states that:

"A municipality must –

(a) Structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community..."

Legislation

7.2.8. Section 3 of the **Water Services Act**²⁸ states that:

- 1) *"Everyone has a right of access to basic water supply and basic sanitation.*
- 2) *Every water services institution must take reasonable measures to realise these rights.*
- 3) *Every water services authority must, in its water services development plan, provide for measures to realise these rights."*

The Act defines basic sanitation as:

*"The prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households."*²⁹

Section 5 of the same Act states that:

*"If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it **must give preference to the provision of basic water supply and basic sanitation** to them."*

7.2.9. The White Paper on Water Supply and Sanitation Policy³⁰ confirms that the *"immediate priority is to provide sanitation services to all which meet basic health and functional requirements."*³¹

Regional case law

7.2.10. Social and Economic Rights Action Centre (SERAC) and Another v Nigeria³² - The rights to health and an environment

In dealing with an alleged violation of the rights to health and environment contained in the African Charter, the ACHPR held that:

*"These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual ... The **right to a general satisfactory environment**, as guaranteed under article 24 of the*

²⁸ 108 of 1997.

²⁹ In *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality & Others* [2009] ZACC 33, the applicants relied on Section 27 of the Constitution, the provisions of the Water Services Act and the Constitutional Court case of *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) to enforce their right to sanitation.

³⁰ Department of Water Affairs and Forestry (1994).

³¹ White Paper on Water and Sanitation Policy (1994).

³² (2001) AHRLR 60 (ACHPR 2001)

*African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures... Article 12 of the ICESCR...requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a generally satisfactory environment favourable to development (article [24]) already noted, obligate governments to **desist from directly threatening the health and environment of their citizens.**"³³*

7.2.11. Purohit and Another v The Gambia³⁴ - The right to health and health care

In this decision, the ACHPR gave content to the right to health in the following manner:

"Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind."³⁵

The ACHPR applied this right in the broader context of African states, and accordingly made the following qualification:

*"The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because **African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources** that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into article 16 [of the African Charter] the obligation on part of states party to the African Charter to **take concrete and targeted steps**, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind."³⁶*

³³ Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) para 52.

³⁴ (2003) AHRLR 96 (ACHPR 2003)

³⁵ Purohit and Another v The Gambia (2003) AHRLR 96 (ACHPR 2003) para 80.

³⁶ Note 28 above, 84.

Domestic case law³⁷**7.2.12. City of Cape Town v Strumpher³⁸**

The City of Cape Town argued that the supply of water was “*nothing more than the enforcement of contractual rights under an agreement...*” However, the Court in that matter held that:

“the fact that a contract must be concluded does not, however, relegate the consumer’s right to water to a mere personal right flowing from that contractual relationship. It does not relieve the City of its constitutional and statutory obligation to supply water to users... the right to water is a basic rights.”³⁹

7.3. Electricity

Although South Africa’s Constitution does not envisage an explicit right to electricity, it does speak to a right of access to adequate housing, which entails accommodation with appropriate basic services, such as “*water, sewage, electricity and roads*”.⁴⁰ A strong body of regional and international precedent exists which supports this approach and is briefly referred to in the paragraphs below.

The provision of electricity must also be considered in light of the rights to life, human dignity and a clean and healthy environment. In this respect, the Constitutional Court concluded that “*the availability and consumption of electricity is ‘closely interrelated’ with the right to private property*”.⁴¹ In addition, local government is obliged to provide community services ‘in a sustainable manner’ to enable socio-economic development and a healthy environment and must ensure that “*all members of the local community have access to at least the minimum level of basic municipal services*”.⁴²

Electricity is therefore considered a component relevant to the realisation of several interrelated human rights.⁴³

International and regional legal framework**7.3.1. Article 14.2 (h) of CEDAW states that:**

“States Parties shall undertake all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right... (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications” (own emphasis).

³⁷ See also *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) where the City of Johannesburg was held to be under a continuing obligation to take progressive measures to achieve the right of access to sufficient water. The Constitutional Court referred to the Free Basic Water Policy and confirmed that it was not in a position to quantify the concept of “sufficient water” as this fell within the domain of the government. In this respect, it was noted that government had adopted regulations which stipulated that a basic water supply constitutes 25 litres per person daily, or 6 kilolitres per household per month.

³⁸ 2012 (4) SA 207 (SCA)

³⁹ *City of Cape Town v Strumpher* 2012 (4) SA 207 (SCA), para 9.

⁴⁰ S Tulley, ‘Access to Electricity as a Human Right’ (2006) 24 *NethQHumRts* 557, 583 – 584.

⁴¹ Note 32 above, 584.

⁴² Local Government: Municipal Systems Act 32 of 2000, Section 73(1)(c).

⁴³ Note 32 above, 587.

- 7.3.2. The **Committee on the Elimination of Discrimination against Women** receives reports from state parties. Part of such reporting includes the measures taken to ensure the following:

“adequate living conditions, particularly housing, sanitation, electricity and water supply, transport and communications, all of which are critical for the prevention of disease and the promotion of good health care.” (own emphasis)

Despite the differing contextual references to electricity in CEDAW and the Committee respectively, it is clear that **both references accept the need for electricity as a condition of health and an adequate standard of living.**⁴⁴

- 7.3.3. In a report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living and on the Right to Non-discrimination (Miloon Kothari) (2002),⁴⁵ it was emphasized that the broad interpretation of his mandate included issues of access to *“potable water, electricity, sanitation”* (own emphasis).⁴⁶ This supports the notion that adequate housing is deemed to include the provision of electricity.

- 7.3.4. In the preamble to the **Draft Principles and Guidelines on Economic, Social and Cultural Rights in the ACHPR**, reference is made to the *“deep conditions of poverty, inequality and insecurity that continue to prevail on the African continent, and the many obstacles that exist to the full enjoyment of economic, social and cultural rights in Africa,”* one such obstacle being the lack of access to basic services⁴⁷, including electricity.⁴⁸

Regional case law

- 7.3.5. The linkages between access to electricity, right to health and adequate standards of living have been considered in more developed countries as well. The **Baja California Human Rights Commission** in Mexico considered electricity access in the context of the rights to health and adequate living where poor families had been struggling for approximately 30 years to obtain fair electricity tariffs, particularly because of the high electricity consumption caused by excessive summer temperatures.⁴⁹
- 7.3.6. In **Free Legal Assistance Group and Others v Zaire**, the failure of the Government to provide basic services such as safe drinking water and electricity (and the

⁴⁴ Note 32 above, 559.

⁴⁵ E/CN.4/2003/5/Add.3 (presented in the Economic and Social Council of the United Nations).

⁴⁶ Note 37 above.

⁴⁷ In a statement by the Community Law Centre to the African Commission on Human and Peoples' Rights at the 51th Ordinary Session (April 2012).

⁴⁸ In the following recommendation to Cameroon in its 2nd Periodic Report to the ACHPR for the period 2003 to 2005, the African Commission on Human and Peoples' Rights appears to have recognized the inclusion of electricity as a basic right in the group of rights necessary for the realisation of socio economic rights when it made the following statement: *“Provide reliable statistics and strengthen the policies and plans that promote the enjoyment of economic, social and cultural rights, in particular the right to food, access to clean drinking water, to housing and to electricity”*. The recommendations were adopted at the 47th Ordinary Session of the African Commission on Human and Peoples' Rights held from 12 to 26 May 2010, Banjul, The Gambia (can be accessed on <http://www.achpr.org/states/cameroon/reports/2nd-2003-2005/>).

⁴⁹ Note 37 above.

shortage of medicine) was found to constitute a violation of Article 16 of the ACHPR.⁵⁰

Domestic case law

7.3.7. In *Josephs v City of Johannesburg*,⁵¹ the Constitutional Court considered whether tenants were entitled to procedural fairness before their electricity was disconnected. In that case, the Constitutional Court recognized electricity as an important basic municipal service and local government was held to have a constitutional and statutory obligation to provide this so-called ‘public law right’. This case created precedent obliging service providers to act reasonably when disconnecting electricity supply and in doing so, recognized the nature of the need for and daily reliance on electricity.

7.3.8. More telling was the judgement in *Strydom v. Minister of Correctional Services & Others*⁵². In this case, the High Court held that **prisoners should enjoy access to functioning power sockets**. Although electricity access was recognised as being a privilege and not a necessity, the Court concluded that the **denial of electricity in that instance would violate the right to lead a dignified life**.⁵³

7.4. Housing

Housing is a basic human need that profoundly impacts on other aspects of life, such as health, welfare and dignity. The significance of housing is recognised both internationally and domestically. From a South African perspective, **insecurity in respect of housing is fuelled by a number of factors, including historical dispossession and unequal land distribution, inequitable urbanization and poorly planned urban growth.**

International and regional legal framework⁵⁴

7.4.1. **Article 25(1) of the Universal Declaration of Human Rights**⁵⁵ states that:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

7.4.2. **Article 11 (1) of the ICESCR** indicates that States parties must:

“recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions... The States Parties will take appropriate steps to ensure the realisation of this right.”⁵⁶

⁵⁰ African Commission on Human and Peoples’ Rights, Comm. No. 25/89, 47/901, 56/91, 100/93 (1995).

⁵¹ 2010 (4) SA 55 (CC)

⁵² (1999) (3) BCLR 342 (W)

⁵³ Note 32 above, 579.

⁵⁴ <http://www.unhabitat.org/downloads/docs/Int/InstrumentsonHousingRights.pdf>: UN declarations have affirmed the right including United Nations Declaration on Social Progress and Development (1969), and the United Nations Vancouver Declaration on Human Settlements (1976).

⁵⁵ 16 December 1949

⁵⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

Under the ICESCR, states have an obligation to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to progressively realise the right to adequate housing. While the resource constraints of State parties are recognised, there are certain steps that can immediately be taken, such as prioritizing “*those social groups living in unfavourable conditions by giving them particular consideration*”.⁵⁷

7.4.3. Characteristics of the right to adequate housing are discussed in **General Comment 4⁵⁸ on the right to adequate housing.**⁵⁹ It confirms that the right to housing should not be interpreted in a narrow or restrictive sense i.e. not simply a roof over ones head. Instead, it should be defined as, “*the right of every women, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity*”.⁶⁰ Applying this broad interpretation, a number of conditions must therefore be met before shelter can be considered to constitute adequate housing, such as:

7.4.3.1. Availability of services, materials, facilities and infrastructure⁶¹;

7.4.3.2. The inclusion of certain facilities essential for health, security, comfort and nutrition such as **safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage** and emergency services⁶²;

7.4.3.3. Adequate space and protection from **cold, damp, heat, rain,** wind or other threats to health etc.⁶³

7.4.3.4. Accessibility, **especially for disadvantaged and vulnerable** groups.⁶⁴

7.4.4. Article 16 of the Protocol⁶⁵ to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa talks to the right to adequate housing. It states that:

*“Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.”*⁶⁶

⁵⁷ <http://www.unhabitat.org/downloads/docs/IntlInstrumentsonHousingRights.pdf>.

⁵⁸ 1991

⁵⁹ Also see General Comment No. 7 (1997) on forced evictions of the UN Committee of Economic, Social and Cultural Rights.

⁶⁰ The right to adequate housing (Art.11 (1)): 1991/12/13. CESCR General comment 4. (General Comments) ([http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument)).

⁶¹ Para 8(b)

⁶² Para 8(b)

⁶³ Para 8(d)

⁶⁴ Para 8(e). Note 48 above.

⁶⁵ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

⁶⁶ <http://www.achpr.org/instruments/women-protocol/#3>.

Domestic legal framework

Constitution

7.4.5. Section 26 (1) of the Constitution states that:

"1) Everyone has the right to have access to adequate housing...

2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

7.4.6. Connected with this right are sections 152(1)(b) and 152(1)(d) of the Constitution which confirm the role of local government to *"ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment."*

National Legislation

A number of housing related frameworks at the domestic level confirm a national commitment to the realisation of the right of access to adequate housing and the interrelatedness of this right with other basic human rights. These frameworks also acknowledge the need to progressively realise the right of access to adequate housing through appropriate housing programmes and policies.

7.4.7. The purpose of the Housing Act 107 of 1997 (HA) is

"to provide for the facilitation of a sustainable housing development process... to lay down general principles applicable to housing development in all spheres of government, to define the functions of national, provincial and local governments in respect of housing development."

Section 2(1) of the HA states that national, provincial and local spheres of government must, amongst others:

"(a) give priority to the needs of the poor in respect of housing development";

*(b) **consult meaningfully** with individuals and communities affected by housing development;*

...

(e) "promote -

...

*iii. the establishment, development and maintenance of socially and economically viable communities and of **safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions,***

...

*x. **promote... the housing needs of marginalised women and other groups disadvantaged by unfair discrimination**; "respect, protect, promote and fulfill the rights in the Bill of Rights in Chapter 2 of the Constitution..."*

Section 9(1) of the HA confirms that:

“[e]very municipality must...take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to... ensure that...

i. the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

ii. conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

*iii. services in respect of **water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient...**”*

7.4.8. Relating to these municipal obligations is the HA on the one hand, which requires municipalities to prepare ‘Housing Development Plans,’ and on the other hand, the Local Government: Municipal Systems Act 32 of 2000⁶⁷ (MSA) which requires all municipalities to prepare ‘Integrated Development Plans’ (IDPs)⁶⁸ with a view to ensuring social and economic development within their jurisdictions.

7.4.9. Section 2(1) of the Social Housing Act 16 of 2008(SHA)⁶⁹ enjoins all spheres of government to prioritise the needs of low and medium income households and to:

*“a) ensure their respective housing programmes are responsive to local housing demands, and **special priority must be given to the needs of women, children, child-headed households, persons with disabilities and the elderly...**”*

And

“c) afford residents the necessary dignity and privacy by providing the residents with a clean, healthy and safe environment...”

7.4.10. The National Housing Code (2009) (NHC) refers to a Community Residential Unit (CRU) Programme⁷⁰ that targets low-income individuals (and households). This programme covers public hostels owned by provincial housing departments and municipalities.⁷¹ In respect of hostels specifically, the NHC talks to the conversion of single sex dormitory accommodation into family units⁷² and improving site utilization through selective demolition, rebuilding and refurbishment.⁷³

⁶⁷ See also Local Government: Municipal Structures Act 117 of 1998.

⁶⁸ Local municipalities in South Africa use “integrated development planning” as a method to plan future development in their areas to remedy the results of Apartheid era planning. Integrated Development Planning is an approach to planning that involves the entire municipality and its citizens in finding the best solutions to achieve long-term development...” (<http://www.etu.org.za/toolbox/docs/localgov/webidp.html>).

⁶⁹ Reference is made to Section 26(1) of the Constitution and Section 2 of the HA. Both of these provisions confirm that national, provincial and local spheres of government must give priority to the needs of the poor in respect of housing development and must promote the establishment, development and maintenance of socially and economically viable communities and safe and healthy living conditions.

⁷⁰ The CRU Programme replaced the National Hostel Redevelopment Programme and the proposed Affordable Rental Housing Programme.

⁷¹ http://www.gov.za/aboutgovt/programmes/breaking_new_ground/community_residential_units.htm.

⁷² National Housing Code (2009), Social and Rental Interventions, Community Residential Units, Volume 6, page 67.

⁷³ Note 57 above, 47.

Domestic case law⁷⁴

The Commission has consistently placed reliance on the Constitutional Court housing related case of **Government of the Republic of South Africa and Others v Grootboom and Others**⁷⁵ as a guiding authority insofar as considerations of the progressive realisation of rights and standards of reasonableness apply to the interpretation of socio-economic rights.

In this case, it was held that section 26 requires the government to “*establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State’s available means*”.⁷⁶ In addition, legislative measures adopted by the government must be supported by policies and programmes that are *reasonable* “**both in their conception and implementation**”.⁷⁷ The Court held that reasonable measures are those that take into account the **degree and extent of the denial of the right** they endeavour to realise and do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights is most in peril.⁷⁸

While limitation of resources has been recognised and acknowledged on the continent and domestically, the **Grootboom** case nonetheless reconfirms the importance of “*taking full advantage of available resources*” with a view to implementing policies which are reasonable. In the present matter, a consideration of this element of reasonableness in conception and implementation of measures must be viewed in the context of the provision of interim relief. In this regard, the response of relevant authorities pending a more permanent solution to the condition in which the residents of the Hostel find themselves is relevant.

7.5. Children

Children are considered one of the most vulnerable groups in society. It is of central importance that the rights of the child be carefully evaluated in the context of the complaint before the Commission. In the present matter, the rights of the child are affected generally, **in respect of the living conditions** described above, and more specifically, in respect of the allegation that women with male children aged 7 (seven) years and older are requested to vacate the Hostel.

International legal framework

While international and domestic precedent abound insofar as the various facets of the rights of the child are concerned, for the purposes of brevity, only primary reference points are included in this report.

⁷⁴ Also refer to Abahlali baseMjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu-Natal and Others [2009] ZACC 31; Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others [2009] ZACC 16; Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others [2008] ZACC 1; Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7.

⁷⁵ 2001 (1) SA 46 (CC)

⁷⁶ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC), 41.

⁷⁷ Note 60 above, 42.

⁷⁸ Note 60 above, 44.

7.5.1. United Nations Convention on the Rights of the Child (UNCRC)

The “best interest principle” is articulated in international instruments, most notably Article 3(1) of the UNCRC, which states:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 27 of the UNCRC states the following:

1. *“States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development;*
2. *The parent(2) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development;*
3. *States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”*

7.5.2. Article 4 of the African Charter on the Rights and Welfare of the Child⁷⁹ (ACRWC) takes this a step further by citing that *“in all actions concerning the child undertaken by any person or authority the best interests of the child **shall be the primary consideration.**”*

7.5.3. Article 14 of the ACRWC comprehensively sets out the right of all children to the enjoyment of the best attainable state of physical, mental and spiritual health, which includes the provision of necessary medical assistance and health care; adequate nutrition; safe drinking water; and the integration of basic health service programmes into national development plans.⁸⁰

Domestic legal framework

Constitution

- 7.5.4. Section 28(1)(c) of the Constitution states that *“every child has the right to basic nutrition, shelter, basic health care services and social services”*.
- 7.5.5. Section 28(2) of the Constitution states that *“a child’s best interests are of paramount importance in every matter concerning the child.”*

National Legislation

- 7.5.6. The principle relating to the best interests of the child is confirmed in **Section 9 of the Children’s Act 38 of 2005**. This Act states that *“in all matters concerning the care, protection and well-being of a child, the standard that the child’s best interests are of paramount importance, must be applied.”* (Section 7 of the same Act explains the content of this principle).

⁷⁹ 1990

⁸⁰ <http://acerwc.org/wp-content/uploads/2011/04/ACRWC-EN.pdf>.

Domestic case law

- 7.5.7. In **S v M (Centre for Child Law as Amicus Curiae)**⁸¹, the Court provided interpretive content to the ‘best interests principle’ as:

*“...never been given exhaustive content”, but that [it] is necessary that the standard should be flexible as **individual circumstances** will determine which factors secure the best interests of the child.”*

Furthermore *“[t]he list of factors competing for the core of the best interests [of the child] is almost endless and will depend on **each particular factual situation**”.*

- 7.5.8. It is necessary to note that regardless of the conduct of any other party, or the outcome of any other proceeding, a best interests analysis remains necessary. In **Van Der Berg & Another v National Director of Public Prosecutions (Centre for Child Law as Amicus Curiae)**⁸², the court held that,

“(O)f course it is expected that parents must invoke the best interests of their children in proceedings like these and it is imperative that they do so. But state institutions bear a responsibility to address this issue, even when the parents have not raised it” (own emphasis).

On this basis, even if the parents and / or the Councillor are said to have elected of their own accord to have male children aged 7 (seven) years and older removed from the Hostel, the Respondent is nevertheless obligated to **consider the effect that such an action** will have on the families and children concerned and to act accordingly. Thus, while it may be in the children’s best interest **to increase both their own privacy rights and those of unknown third parties with whom they share spaces**, there remains **an obligation on the State to ensure these and other rights are protected in a manner that does not jeopardize the remaining related rights of the child.**

- 7.5.9. The case of **Centre for Child Law v MEC for Basic Education**⁸³ confirmed the following:

*“What is notable about children’s rights... is that section 28 [of the Constitution] contains **no internal limitation** subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, but the absence of any internal limitation **entrenches the rights as unqualified and immediate.**”*

These national and international provisions appear to vest a clear responsibility on the part of the state to provide for and protect children whose basic rights are rendered vulnerable, particularly **when the right to family life is violated.**

The inextricable link between the rights of children and those of their families also warrants consideration. It is important to note at this point that in matters concerning their living arrangements, children have **no control over where and how** they are situated, which renders them particularly vulnerable. For this reason,

⁸¹ 2008(3) SA 232

⁸² 2012 (2) SACR 331

⁸³ 2008 (1) SA 223

a particularly **careful weighing up of the circumstances is recommended** in the present circumstances.

7.6. Meaningful consultation

Chenwi and Tissington confirm that:

“Participatory democracy means democracy that is accountable, transparent, responsive and open. Participatory democracy means democracy that makes provision for individuals and communities to take part in service delivery processes and decisions.”⁸⁴

In this respect, ward committees are an important feature of local government that encourage greater public participation. However, concerns about the functioning and effectiveness of ward committees are to be noted. These include *“insufficient grassroots community participation in the affairs of local government,”⁸⁵ general ineffectiveness⁸⁶ and *“...bureaucratic elites of officials and Councillors [who] are determined to impose their own truncated version and understanding of ‘community participation’ on particular communities.”⁸⁷* In instances where obstacles such as these are allowed to prosper, true democracy suffers to the detriment of those most vulnerable.⁸⁸ There is therefore a clear need to ensure a true sense and culture of community participation and to harness the power that ward committees can offer in this respect.⁸⁹*

In respect of the present matter, the importance of decision making is clear when one considers the method employed by the Respondent in respect of the proposed installation of electricity meter boxes. Proper engagement with the residents in this instance would have highlighted the problems and practical concerns of the residents prior to any costs being incurred by the Respondent. In fact, it is only through the **residents actively demonstrating their dissatisfaction with the unjustness of the proposed reform that its limitations became apparent to the authorities.**

International legal framework

7.6.1. As a signatory to the **ICESCR**, South Africa is obligated to consider recommendations flowing from that Convention, including the requirement relating to *“extensive genuine consultation in respect of right to adequate housing and in respect of proposed evictions and proposed resettlement.”* This includes considering representations from affected persons and communities (see above regarding **General comments 4**).

7.6.2. The Africa Commission on Human and People’s Rights, through the ACHPR, talks to the need for meaningful engagement and participation of individuals in development decisions that affect their communities.⁹⁰

⁸⁴ L Chenwi & K Tissington *Engaging meaningfully with government on socio-economic rights – A focus on the right to housing* (2010) 6.

⁸⁵ S Heleba *Perpetuating Apartheid Single Sex Hostels: The Implications of Public Participation for Service Delivery* (2008) 9.

⁸⁶ Note 65 above.

⁸⁷ Note 65 above.

⁸⁸ Note 65 above, 10.

⁸⁹ Note 65 above, 10.

⁹⁰ Note 64 above, 17.

Domestic legal framework

Constitution

A number of provisions in the Constitution entrench fairness in administrative decisions and the relevancy of such decisions through public consultation and participation.

7.6.3. Sections 33(1) and (2) of the Constitution confirms that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. This principle is reaffirmed in Sections 3 and 4 of **Promotion of Administrative Justice Act 3 of 2000 (PAJA)**.

7.6.4. Closely related to the rights of just administrative action is the enabling right to access information. **Section 32 of the Constitution** states the following:

"1. Everyone has the right of access to:

a. any information held by the state..."

In this respect, access to information empowers communities to fully and constructively participate in decisions which affect it. This intent is embodied in the enabling legislation, the Promotion of Access to Information Act 2 of 2000.

7.6.5. Section 152(1)(e) of the Constitution states that one of the objects of local government is to encourage the involvement of communities and community organisations in the matters of local government.⁹¹ Similarly, **Section 195 of the Constitution** sets out the basic values and principles governing public administration, which includes transparency and *"timely, accessible and accurate information"*.

National legislation

7.6.6. Section 2 of the HA sets out general principles applicable to all three spheres of government that must be adhered to when developing housing. The provision requires that national, provincial and local spheres of government must facilitate active participation of all relevant stakeholders in housing development and must *"consult meaningfully with individuals and communities affected by housing development; and make it possible for all relevant stakeholders to participate in housing development."*⁹² The phrase "all relevant stakeholders" must be interpreted to include communities as the target recipients of social housing programmes.⁹³

7.6.7. The **MSA**⁹⁴ is perhaps the most comprehensive statutory framework on community participation at local government level. The preamble to the MSA states that:

"... a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning, [and] service delivery..."

⁹¹ Note 65 above, 7.

⁹² See also section 9(2)(a), Section 2(1)(j) and Section 2(1)(l).

⁹³ Note 65 above, 9 – 10.

⁹⁴ Local Government: Municipal Systems Act 32 of 2000 (referred to above in paragraph 7.4.8.); see also the Local Government: Municipal Structures Act 117 of 1998.

7.6.8. Section 4(2) of the MSA states that a municipality has a duty to, among others, encourage the involvement of the local community; **consult the local community about the level, quality, range and impact of municipal services** provided by the municipality, either directly or through another service provider; and the available options for service delivery. **Section 5(1)** states that members of the community have a right to contribute to the decision-making processes of the municipality; submit written or oral recommendations, representations and complaints to the municipal council; and to be informed of the decisions of the municipal council affecting their rights.

Domestic case law

7.6.9. Various cases confirm the importance of meaningful engagement and the benefits thereof. The seminal **Grootboom** case was one of the first Constitutional Court cases to refer to the importance of meaningful engagement in the context of housing and referred to the state's obligations in respect thereof by making reference to provisions of the HA.⁹⁵ This trend was carried through in other Constitutional Court cases such as **Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others**.⁹⁶ In that case, the Constitutional Court suspended an eviction order to allow for engagement between the parties and it was through such engagement that flaws in respect of the housing project were identified. In the **Abahlali baseMjondolo Movement of SA and Another v Premier of the Province of KwaZulu Natal and Others**,⁹⁷ the KwaZulu Natal Elimination and Prevention of Re-Emergence of Slums Act was challenged on the basis that the opportunity for meaningful engagement had not been incorporated in the legislation. The relevant section of the Act was subsequently declared unconstitutional. In **Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others**⁹⁸ where occupiers were being evicted from what the City of Johannesburg (COJ) deemed to be an unsafe building, the Constitutional Court ordered the parties to meaningfully engage with each other. Pursuant thereto, the parties reached a decision, which was endorsed by Court and subsequently implemented.⁹⁹

⁹⁵ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC), paragraph 84.

⁹⁶ Note 59 above.

⁹⁷ Note 59 above.

⁹⁸ Note 59 above.

⁹⁹ Note 64 above, 21.

8. ANALYSIS

The NHC¹⁰⁰ confirms that as at 2009, there were an estimated 2 000 public hostels comprising more than 1 000 000 beds, most of which accommodated single-sex occupants. These hostels were identified as being overcrowded, dilapidated, in a serious state of disrepair and neglected. This state of affairs was attributed to mismanagement and lack of preventative maintenance.¹⁰¹

Present living conditions at hostels in South Africa are best considered in the context of their history and continuing levels of poverty. Public hostels were the result of a large number of black South Africans being restricted to allocated areas during Apartheid. When apartheid homelands where blacks were forced to live could no longer support families, males moved into urban towns in search of employment. At this time, settlement of black persons in the urban city centres was prohibited in terms of legislation. For this reason, it was envisaged that black individuals would only be in the cities on a temporary basis.¹⁰² These population flows led to the creation and development of hostels as means of affordable temporary accommodation by the Apartheid State. Later, when laws were relaxed and women also came to the cities, some with their children, the drastic increase in the number of people in the cities resulted in over-occupied hostels and living conditions that were far from adequate for family life, which was further exacerbated by the poor upkeep of the hostels themselves. These public hostels inevitably fell short of the basic requirements for adequate housing in many respects¹⁰³ as posited by the CESC.¹⁰⁴

A brief consideration of the history of Alexandra is also important when considering the phenomenon of single sex hostels. In 1912, Alexandra was proclaimed a “native township” which, because of the political climate at the time, was faced with a severe lack of resources and proper management. This status of the area led to slum conditions in many parts of the township which to some extent, continue today.¹⁰⁵

After the tragic killings in Sharpeville of 1960, government clamped down on opposition parties and it was decided to remove Alexandra altogether and rebuild the area as a “**hostel city**”. Twenty-five hostels were to be built, each housing 2 500 people, for single men and women. Although there was widespread resistance to this proposal, construction went ahead even after it was acknowledged that it was not feasible and would lead to the destruction of family life.¹⁰⁶

Subsequent to the fall of Apartheid and as part of a package of reforms, the new democratic government developed **the Gauteng Hostels Eradication Programme¹⁰⁷ implemented during or about 2007** in response to the problematic old hostel system and to integrate hostels into township communities. The development of this Programme highlights the fact that hostels of

¹⁰⁰ Note 57 above, 9.

¹⁰¹ Note 57 above, 9.

¹⁰² Note 65 above, 4.

¹⁰³ Note 65 above, 5 – In this respect, both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 stated that: “*Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.*”

¹⁰⁴ The right to adequate housing {Art.11 (1)}: 1991/12/13. CESC General comment 4. (General Comments) (<http://www.unhcr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e>).

¹⁰⁵ <http://showme.co.za/lifestyle/the-history-of-alexandra-township-johannesburg-gauteng/>.

¹⁰⁶ Note 85 above.

¹⁰⁷ <http://www.dlgh.gpg.gov.za/Documents/Brochures/Housing%20Delivery.pdf>. The Hostel Eradication Programme is a partnership between the Respondent and the Gauteng provincial government.

this nature are no longer appropriate in a democratic society in South Africa, particularly when viewed in the context of the historical establishment of the hostels during the Apartheid era. The Programme intends to incorporate persons living in hostels into the broader communities and will see the eradication of old hostels to be replaced by new family housing units, known as Community Residential Units¹⁰⁸ (or complexes), thereby offering affordable rental to both existing hostel residents and members of the neighbouring communities.¹⁰⁹

The current complaint is located in the context of the historical legacy attaching to hostels and slow progress in implementation and delivery to address these conditions.

8.1. Nature and scope of human rights violations

While noting the interrelatedness of rights, the Commission has in the present matter elected to consider rights central to its analysis of the complaint; these include the right of access to adequate housing, water (and sanitation) and the rights of children. These rights were analysed in terms of the international, regional and domestic frameworks and jurisprudence set out above.

8.2. Interpretation

8.2.1. Section 39 of the Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum –

- a) *“Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- b) *Must consider international law; and*
- c) *May consider foreign law.”*

8.2.2. Section 39(2) of the Constitution makes it clear that the Act must be interpreted in light of the *“spirit, purport and objects of the Bill of Rights.”*

8.2.3. Against the background of Section 39 of the Constitution, the Commission's investigation into the conditions at the Hostel **confirmed that violations of the abovementioned rights had taken place**, none of which may be deemed to have been justifiable in terms of Section 36 the Constitution.

8.2.4. In this respect, the Respondent is alleged to have violated the rights mentioned above by failing to ensure that the Hostel constituted adequate accommodation as per international and domestic standards. The **reasonableness of steps** taken by the Respondent must be considered against the **particular vulnerability of those affected by the conditions at the Hostel, being women and children from poor economic backgrounds, often with little or no support systems.**

¹⁰⁸ MH Mothotoana *Implementation of the hostel redevelopment project within the City of Johannesburg Metropolitan Municipality* (2011), 25 – 26: The Hostel Redevelopment Programme was replaced in 2009 by the Community Residential Unit (CRU) Programme contained in the National Housing Code. This Programme was aimed at achieving six policy objectives: firstly, to promote humane living conditions for hostel residents; secondly, to include hostel residents, neighbouring communities and other stakeholders affected by the redevelopment in decision-making processes; thirdly, to promote social integration within hostel communities and also among hostels and the neighbouring communities; fourthly, to include plans for accommodating those who will be displaced by the project; fifthly, to initiate local institutions and administrative procedures into the system in order to sustain improvements and undertake socio-economic development; and sixthly, it embodies a development orientated towards empowerment, participation and the promotion of economic opportunities. Hostel redevelopment was to include converting the single rooms into family accommodation and providing infrastructure such as basic water, roads, electricity, and sanitation.

¹⁰⁹ <http://www.dlgh.gpg.gov.za/Documents/Brochures/Housing%20Delivery.pdf>.

8.3. Obligations and Responsibilities of National and Provincial Government

- 8.3.1. Important to the Commission's analysis is a consideration of the **roles of the different spheres of government** and whether the Respondent complied with its constitutional (and legislative) mandate in (progressively) realising the rights of the residents of the Hostel.
- 8.3.2. It is incumbent upon both provincial and national departments to monitor and intervene, where necessary, in the work of local government structures, as envisaged in Section 41 of the Constitution. This cooperation is, in the current service delivery context at local government level, also true of the planning and budgeting undertaken by municipalities. The municipality, given its awareness of the scarce resources at its disposal and knowledge/awareness of the conditions at the various hostels, **ought to have engaged national and provincial departments more closely** and indeed, more vigorously. Such engagements would have alerted the relevant public bodies of the need for urgent interventions and budgetary reprioritisation. In this respect, recommendations were made by the Respondent to obtain necessary funding from the national and provincial departments. However, it is **not clear whether the various spheres of government properly engaged with each other in this respect and what progress**, if any, has been made in obtaining the funding referred to, which would allow the redevelopment of the Hostel **to proceed in a more cohesive and expeditious manner**.

8.4. The reasonableness and/or adequacy of the steps taken by the Respondent

It accepted that the State has a **positive obligation** to achieve the progressive realisation of socio-economic rights. Although it is acknowledged that the State has substantial discretion in this respect, the legislative and other measures it takes cannot be prejudicial in themselves. The **positive obligation on the State must therefore be taken to mean reasonableness in terms of planning, design and implementation**. In assessing such 'reasonableness', reference must therefore be made to applicable policies etc. to **assess whether they are framed in a manner that takes into account the needs of the most vulnerable and desperate**.

In the *Grootboom* case, the Court stated that:

*"[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. **If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test**" (our emphasis).*

These considerations and standards of reasonableness as set out in the *Grootboom* case were considered throughout the Commission's analysis. In particular, the Commission considered the **reasonableness and adequacy of interim steps** taken by the Respondent pending the finalisation of the redevelopment of the Hostel. In its assessment reasonableness is assessed firstly, with regard to the interim measures and

conditions at the Hostel **as it currently is** and secondly, steps related to the pending redevelopment, including but **not limited to the period of time that has elapsed** since redevelopment plans were first conceived, budgetary issues and the **impact of delays in implementation**. In this respect, the Commission also considered the violations which are alleged to have taken place and which may potentially be exacerbated instead of being mitigated as is required for progressive realisation.

8.4.1. Water, sanitation and sewerage at the Hostel

From the ongoing engagements with the Complainant and through the Commission's own observations, the following is recorded:

- 8.4.1.1. The **Respondent's response that certain steps have been taken to address problems experienced at the Hostel is noted**. However, from the Commission's last inspection of the Hostel, it appeared that severe issues around water supply, leakages and sewer blockages **persisted in a manner that severely impacts** the residents.
- 8.4.1.2. In this regard, the **Commission accepts the engineer's report that the entire system impacting on water supply and sanitation requires an overhaul**.
- 8.4.1.3. It is clear from the information provided to the Commission that firstly, inordinately **long periods elapsed between the reporting of problems and steps being taken to address same** and secondly, **similar problems recur with a frequency that indicates the inadequacy of steps taken**.
- 8.4.1.4. The Respondents response to problems appears to have been largely of an ad-hoc and fragmented nature. By way of example, it was recognised that the scope of work related to the pipes was too vague to properly proceed with work. However, the issue of storm water drainage was then dealt with separately. It is **clear that a comprehensive assessment and cohesive plan is therefore required** to properly address the problem as opposed to a fragmented approach which does more harm to the planning, allocation and utilisation of resources.

8.4.2. Electricity supply

- 8.4.2.1. The Respondent has taken a number of steps with a view to addressing the problem of electricity supply to the Hostel. However, the proposal relating to the installation of electric metering boxes was rejected by the residents on the basis of firstly, lack of sufficient consultation and secondly, the impracticality of the proposal and the daily prejudice that would be experienced by the residents as a result thereof.
- 8.4.2.2. The Commission notes in the first instance that reference was made to a further consultation being conducted with the residents on the issue and secondly, discussions with City Power to devise alternative arrangements for maintaining a functional electricity system at the Hostel. However, it is not apparent from the information provided whether **such further consultation has taken place** with the residents and / or whether City Power has prepared **a report proposing**

alternative arrangements for the Hostel. It would therefore appear that the Respondent has failed to take adequate further steps towards resolving the electricity problem faced by the residents.

- 8.4.2.3. Although there is technically no denial of the right to electricity, the inadequacy and dangerous conditions under which it is available, renders its **accessibility of no practical and safe value, thereby substantively prejudicing the residents.** The right in this sense did not constitute a denial, but instead assumed a negating character.

8.4.3. Removal of male children

- 8.4.3.1. An analysis of the information provided points to certain steps having been taken by the Respondent upon threat of litigation. However, subsequent thereto, **no further measures appear to have been put in place** to ensure a longer term solution to the problem. As such, the affected mothers and possibly their children, **live with under an undetermined and continuing threat to their family lives.** The threat therefore remains that the best interests of male children and the rights of their mothers residing at the Hostel may be violated in the future.

- 8.4.3.2. In line with the Van Der Berg case, even if the parents and / or Councillor are said to have elected of their own accord to have male children aged 7 (seven) years and older removed from the Hostel, the Respondent is nevertheless **obliged to consider the effect that such an action will have on the children concerned and to act accordingly.** In this respect, it does not assist the Respondent to justify such conduct in the interests of privacy of other individuals **without applying the same consideration to the rights of the children and their mothers.** In doing so, the Respondent must fully **consider all available options that would result in the least possible impact on the rights of the child.** This would necessarily entail a consideration of the importance of the maintenance of the family unit insofar as it is related to the best interests of the child.

- 8.4.3.3. A consideration of less intrusive alternatives includes an assessment of **other measures that may be implemented that would lessen the possible violation of rights of both the affected residents and children.** This may include improved monitoring of the number of persons currently residing at the hostel, better control over illegal residency, the specific allocation of rooms and / or blocks for women with children and clearer communication to residents about the conditions of their stay at the Hostel.

8.4.4. Lack of transparency and consultation

- 8.4.4.1. The need for effective consultation is supported internationally and domestically as one of the cornerstones of a participatory democracy. Meaningful consultation remains a critical means to ensure that decision-making and service delivery is relevant, fair and equitable.

8.4.4.2. From the information provided to the Commission, it appears that some of the residents are of the view that **insufficient consultation** has occurred in respect of matters affecting them and that **suitable processes are not in place to ensure sufficient consultation in the future**. In this respect, concerns about the Councillor's alleged failure and/or refusal to properly engage with the residents and to include them in decision-making processes appears to have **contributed to wasted expenditure and delays** in suitable measures being implemented to resolve matters affecting the Hostel. In addition, the Respondent appears to have **failed to sufficiently monitor and investigate the complaints lodged with it by the residents about the Councillor** and has failed to communicate with Complainants about the matter.

8.4.5. Issues around the redevelopment of the Hostel

- 8.4.5.1. A number of the problems experienced by the residents on a daily basis may be directly or indirectly linked to the proposed redevelopment of the Hostel (and development of Extension 52), and delays in the implementation thereof.
- 8.4.5.2. In respect of the above, residents have voiced concerns about not being sufficiently updated regarding the progress of the redevelopment. They therefore remain uninformed about the status of their future accommodation and living conditions. This **lack of sustained and meaningful information sharing** has no doubt exacerbated the frustration and discontent experienced by the residents regarding their current living conditions.
- 8.4.5.3. In addition, **it is apparent, and in fact not disputed by the Respondent, that the Hostel in its current state is not able to adequately service the needs of the residents due to failing infrastructure and an inability to permanently resolve some of the problems** experienced by the residents as a result thereof. The question currently before the Commission is therefore **whether interim measures adequately address ongoing violations in an acceptable manner** and the impact of issues related to the anticipated redevelopment, such as undue delays in implementation. Against this background, it is important to note that our courts have found that **an inordinate delay** in making a decision is considered "*an infringement of the fundamental right to just administrative action*"¹¹⁰ in terms of Section 33 of the Constitution and PAJA.

8.4.6. Miscellaneous issues

- 8.4.6.1. Rental - The Complainant and other residents are of the view that not all hostels are treated equally in respect of the payment of rental. In this respect, it would appear that residents are not aware of the **promulgated tariffs**, as advised by the Respondent, which **creates perceptions of**

¹¹⁰ Intertrade Two (Pty) Ltd v MEC for Road and Public Works, Eastern Cape and Another 2007 (6) SA 442 (Ck) para 34. See also sections 6(2)(g) read with section 8(3)(a) of the Promotion of Administrative Justice Act 3 of 2000.

inconsistency in the application of rules. This perception in itself lends credence to residents' calls for consultation and information sharing.

8.4.6.2. Management of the cleaning contract - The Commission notes that a cleaning contract is currently in place for a three year period. As such, no interruption in cleaning services should arise in the short term as was the case in the past.

8.4.6.3. Gender discrimination in respect of access to the Hostel - The Commission is cognisant of the contradictory views provided to it by the Respondent and the Complainant. A lack of understanding regarding applicable processes, procedures and conditions of entry once again appears to contribute to misinformation as is the case with applicable rentals.

8.4.6.4. Occupancy levels - Lack of adequate control measures have resulted in the Hostel being over-occupied. This has to varying degrees, contributed to the conditions at the Hostel.

- 8.5. In analysing the steps taken by the Respondent as set out above, the Commission took into account the vulnerability of those individuals affected by the conditions at the Hostel, namely women and children, many of whom would be considered indigent. An important consideration is that **a number of these individuals are not provided with many options in respect of their housing** in the city and surrounding areas. Their **primary needs are at present dictated by income**, proximity to the city, employment and **basic survival**.
- 8.6. In addition, it is to be borne in mind that due to the circumstances of most of the residents, their only means to access justice and relief was through their Ward Councillor and local authority. Therefore, their **inability to secure appropriate relief through consultation and their local authority** has rendered the residents even more frustrated and disillusioned.
- 8.7. The Commission is **equally cognisant of financial and other burdens imposed on the various spheres of government** in their attempts to progressively realise the socio-economic rights enshrined in the Bill of Rights. The Commission is therefore aware of the **balancing of interests** required in its consideration of this complaint.
- 8.8. Having considered international and domestic legal frameworks and jurisprudence, the Commission is of the view that **while the Respondent has taken steps to address some of the problems faced by the residents, it has fallen short in some respects**. The Commission is therefore tasked with considering the adequacy and reasonableness of the interim measures put in place by the Respondent pending the proper implementation of the redevelopment of the Hostel (as many of the internationally accepted requirements relating to adequate housing will not be properly met until such time) and certain steps related to the pending redevelopment in the context of the alleged violations to basic human rights.

9. FINDINGS

A number of the issues dealt with in this report relate, both directly or indirectly, to the yet to be completed redevelopment of the Hostel (and development of the new site in Extension 52). However, the failure of ill conceived interim and ad hoc measures, the reasonableness of steps already taken and still to be taken and **unreasonably long period of time that has elapsed since plans for redevelopment were first conceived** has led to and will continue to lead to, the violation of a number of human rights of the residents at the Hostel.

Consequently, the Commission's finding in this matter is that the Respondent has violated the following human rights of the Residents of the Hostel:

- 9.1. Section 10 - Dignity
- 9.2. Section 26 - Housing
- 9.3. Section 27 - Access to health care, food, water and social security
- 9.4. Section 28(1)(c) and Section 28(2) - Children
- 9.5. Section 24 - Environment
- 9.6. Section 33 - Just Administrative Action (and by implication, Section 32 - Access to information)

10. RECOMMENDATIONS

The Commission emphasises the need for full and meaningful consultation and active participation throughout the implementation of its recommendations by the Respondent. Against this background and based on the above findings, the Commission has developed its recommendations along four key areas; namely, consultation and information sharing, audits, violation specific recommendations and the redevelopment of the Hostel. The recommendations are as follows:

10.1. Consultation and information sharing

10.1.1. The Respondent is to conduct meaningful consultations with residents in respect of the following matters, (but shall not on account of these recommendations limit the scope of consultations), as soon as possible but not more than **3 (three) months** from date hereof. Such consultations are to inform further steps taken by the Respondent in terms of the recommendations set out hereunder:

10.1.1.1. Residents are to be consulted broadly regarding complaints about living conditions, including but not limited to issues relating to electricity supply and lack of proper water, sanitation and sewerage. All complaints and input from residents are to be reported on and steps for response to the complaints and timelines for responses are to be communicated to both the Commission and residents **within 3 (three) months** from date of completion of the consultation process with residents.

10.1.1.2. Processes for placement of residents are to be developed in consultation with residents to ensure that some measure of choice regarding the occupation of rooms is provided to residents;

- 10.1.1.3. Urgent and **immediate steps** must be taken to consult with residents regarding the status of accommodation of children at the Hostel and particularly, the allegation that male children aged 7 (seven) years and older are forced to vacate the Hostel;
- 10.1.1.4. Residents are to be consulted with regarding the issue of access control measures. Consultation should include conditions for entry into the Hostel, roles of security personnel and grievance processes. This consultative process must inform the formulation of access control measures to be implemented by the Respondent;
- 10.1.1.5. Based on the uncertainty regarding consultation processes and concerns about the Councillor's failure and/or refusal to properly consult with residents and/or to allow active participation in decision-making processes that affects the Hostel, it is recommended as follows:
 - 10.1.1.5.1. That the Respondent take steps to ensure that all complaints by residents and relating to the Councillor are formally tabled with the Office of the Speaker of the Respondent **within 2 (two) months from date of this report;**
 - 10.1.1.5.2. In line with the Office of the Speaker's duties to assess the needs of the councillors, arrange suitable training to develop political governance capacity and individual skills of councillors, to enforce the Council's Code of Conduct and to manage complaints relating to councillors, the Commission recommends that **within 1 (one) month from date of referral to that office,** the Office of the Speaker investigate and provide responses as deemed appropriate to address the complaints so tabled.
- 10.1.2. The Respondent is to provide the following information, and where available, written supporting documents, to all residents in the Hostel within **1 (one) month** from date hereof:
 - 10.1.2.1. Full disclosure of the allocated budget and expenditure** thereof insofar as the budget and expenditure relate to the Hostel;
 - 10.1.2.2. In order to ensure openness and transparency, the Commission recommends that the **official gazette tariffs** and applicable rental fees be distributed to all residents in the Hostel. Any changes to rental are to be communicated to the residents within a reasonable time before the implementation of any rental increases.

10.2. Audits

The Commission recognises the need as well as the potential benefits of conducting general audits at the Hostel as a comprehensive understanding of key needs and priorities will assist in mitigating current violations and encouraging long term reforms. Against this background, the Commission recommends that the Respondent formulate **processes and procedures for regular audits and communicate same** to residents to ensure that accurate information is available at reasonable intervals. Such processes and procedures are to be

formally communicated to all residents **within 3 (three) months from date hereof**. In this respect, audit processes on the specific key areas below are to be completed within **3 (three) months from date hereof**:

10.2.1. All complaint and dispute resolution policies and processes. This audit must be undertaken with a view to developing and implementing a suitable monitoring and dispute resolution process which includes **clear safeguards that ensures independence and impartiality** in respect of all processes, oversight and escalation of complaints of whatsoever nature;

10.2.2. The Commission is of the view that **regular audits of occupancy levels** will assist the Respondent in developing plans relating to the Hostel and the upgrade of the current infrastructure as an interim measure pending the redevelopment of the Hostel. In addition, such information will assist in ensuring **appropriate contingency measures** are in place to avoid a recurrence of the violations currently occurring at the Hostel. On this basis, the Commission recommends that the Respondent undertake an audit of all residents in the Hostel, including but not limited to, the following areas:

10.2.2.1. Infrastructure and delivery needs of the Hostel and the residents of the Hostel; and

10.2.2.2. Details of all residents who have already applied for RDP and / or other forms of social housing and the progress of each application already lodged with the Respondent;

10.2.2.3. Details of all families who would be affected if the threatened practice of removal of male children / mothers with male children is implemented;

10.2.2.4. All placement processes, guidelines and criteria for the purposes of allocating living areas to respective residents;

10.2.3. The findings of such audit must be communicated to residents, and, in respect of those findings which relate to individual residents who have already applied for social housing, must be communicated to those affected individuals specifically, within **1 (one) month from date of completion of the audit**.

10.3. Violation Specific Recommendations

Based on specific violations noted by the Commission, it is further recommended that:

10.3.1. Removal of male children aged seven years and older

10.3.1.1. That the Respondent desists with **immediate effect** from any intended action which would result in the removal of women with male children from the Hostel;

10.3.1.2. Pending a longer term solution, that the Respondent take steps to ensure that any families who may be required to vacate the premises for the reasons set out above are provided with suitable alternative accommodation; and

10.3.1.3. That **within 1 (one) month from date of completion of the audit process referred to in paragraph 10.2.2.3 above**, the Respondent consults with the Department of Women Children and Persons with Disabilities

(DWCPD) around viable alternative options and interim measures that can be implemented with a view to ensuring that affected families are not forced to vacate the Hostel but are instead, for example, accommodated with their mothers in specifically allocated areas of the Hostel.

10.3.2. Lack of proper water, sanitation and sewerage at the Hostel

Erratic, poor water supply and problematic water supply infrastructure over a protracted period of time presents a severe and negative impact on various aspects of the residents' lives, including but not limited to health, environment, sanitation and generally, accessibility. On this basis, the Commission recommends that:

- 10.3.2.1. A health inspector from the Department of Health undertake an inspection of the Hostel **within 3 (three) months from date hereof** and provide the Commission and the Respondent with a report of its findings;
- 10.3.2.2. The Respondent ensure that adequate measures are put in place to ensure that pending the finalisation of the redevelopment of the Hostel, appropriate interim relief is **immediately** provided in respect of the upkeep and maintenance of the water, sanitation, sewerage supply to the Hostel. A report in this respect is to be provided to the Commission **within 1 (one) month from date hereof**;
- 10.3.2.3. The Commission recommends that the defective water tanker situated in Block G of the Hostel be **immediately attended to, but not later than 1 (one) month from date hereof**, whether repaired or replaced; and
- 10.3.2.4. That the residents most affected by the leaking defective water tanker are relocated to alternative rooms in the Hostel or other suitable accommodation **with immediate effect**.

10.3.3. Lack of electricity supply

- 10.3.3.1. That **immediate measures** are put in place to monitor the safety of residents and to remove immediate threats to the safety of the women and children;
- 10.3.3.2. That a report on the electricity needs of the residents is provided to the Commission **within 1 (one) month from date hereof**;
- 10.3.3.3. That **within 1 (one) month from date hereof**, the Respondent, in consultation with relevant authorities including but not limited to City Power, develop alternative arrangements for maintaining a safe and functional electricity system that is most viable in the short term pending redevelopment of the Hostel. Such alternative measures are to be clearly communicated to the residents **within 1 (one) month from date of conclusion of meetings with the relevant authorities**;
- 10.3.3.4. That pending the above, the Respondent ensures that immediate measures are put in place to ensure that electricity supply to the Hostel is not unnecessarily interrupted.

10.3.4. Gender based discrimination

- 10.3.4.1. Proper access control measures together with conditions for entry into the Hostel must be formulated (in line with the outcome of the consultation

process referred to in paragraph 10.1.1.4) and must be communicated to all residents **within 4 (four) months from date hereof**. In this respect, access limitations are to be in keeping with the law and clearly displayed outside the Hostel to avoid misunderstandings regarding applicable procedures and processes;

- 10.3.4.2. The Commission recommends that security personnel applying access control measures be fully trained regarding rights of access **within 1 (one) month from date of finalising the measures referred to in paragraph 10.3.4.1**.

10.4. Redevelopment of the Hostel

Viewed against the international standards discussed above, it is clear that the Commission is tasked with considering the adequacy and reasonableness of the interim measures put in place by the Respondent pending the proper implementation of plans relating to the redevelopment of the Hostel. The basis for such approach is that many of the internationally accepted requirements of adequate housing will not be satisfactorily met until the redevelopment of the Hostel (and Extension 52) is properly implemented and finalised. However, the Commission can and has assessed the reasonableness or otherwise of the steps taken towards implementation of the redevelopment of the Hostel. On this basis, the Commission recommends as follows:

- 10.4.1. The Commission's recommendation for the prioritisation of the women's hostel is supported by the ICESCR¹¹¹ and Section 2(1) of the SHA.¹¹² While it is acknowledged that the redevelopment of hostels in terms of a national policy is in place, the Commission recommends that special consideration be given to women's hostels due to the specific vulnerability of women. In this respect, the Commission recommends that **within 2 (two) months from date hereof**, the Respondent assess this recommendation and provide it with a report setting out the viability or otherwise of such recommendation taking into account applicable international standards as against the provisions of the national policy.
- 10.4.2. That **within 3 (three) months from date hereof**, a report setting out the comprehensive objectives, statements of intent, processes and timeframes in respect of the proposed redevelopment of the Hostel (and development of Extension 52) is prepared. In this respect, the Commission notes that while **precise outcomes and solutions may not be a reasonable expectation at this stage of the process** in respect of all aspects of the redevelopment, a sequential detailing of the process is necessary in order for the residents of the Hostel to fully and practically engage with the plan, analyze its impact and anticipate and engage in the implementation thereof:
- 10.4.2.1. In respect of the recommendations made by the Respondent to obtain necessary funding from the national and provincial departments, the Commission recommends that **within 2 (two) months from date hereof**, the Respondent engage with both the provincial and national governments regarding the issue of funding specifically for the redevelopment of the Hostel; and

¹¹¹ As cited in paragraph 7.4.3. of this report.

¹¹² As cited in paragraph 7.4.9. of this report.

- 10.4.2.2. The report referred to in 10.4.2 and the outcome of engagements as referred to in 10.4.2.1 is to be completed and communicated to the Commission and residents **within 6 (six) months from date of receipt of this report**. In respect of the residents, the Respondent is to ensure that the contents of the report are widely and properly understood by all residents.

10.5. General

- 10.5.1. The Commission recommends that **within 9 (nine) months from date hereof**, a consolidated report of the action plan, implementation timeframes, outcomes and findings of the Respondent in respect of all of the Commission's recommendations as mentioned above, be submitted to the Commission and **to the Respondent's Section 79 Committee on Housing** in light of this committee's oversight role and mandate to monitor the delivery and outputs of the executive.
- 10.5.2. The Commission recommends, within a reasonable period of time but not longer than six (6) months from the date of this finding, that the Minister of Human Settlements establish a task team to investigate the reform of hostels of this nature on a nationwide basis and that the Commission is provided with regular progress reports on the investigation undertaken by the task team;

11. APPEAL

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

Private Bag X2700
Houghton
2041

Signed on this 6th day of June 2014
South African Human Rights Commission

Annexure A

Rubbish in hostel grounds
Flooded laundry rooms
Flooded hostel grounds caused by blocked sewer lines
Old electricity connections
Leaking water from defective water tanker (through ceiling)
Flooded kitchen caused by defective water tanker
Flooded bathroom caused by leaking water tanker
Water damaged ceiling and electricity connection
Rubbish and raw sewerage (from portable toilets installed for informal settlement) accumulating against outside wall of hostel



**COMPLAINT NO: Gauteng/2011/0303
Gauteng/1213/0851**

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Ref No: GP/2011/0303

Ref No: GP/1213/0851

JOHANNES THEUNIS KOTZE & ANOTHER

Complainants

and

AVALON ASSOCIATION

Respondent

REPORT

1. INTRODUCTION

- 1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (the Constitution).
- 1.2. The Commission is specifically mandated to:
 - 1.2.1. Promote respect for human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights; and
 - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Section 184 (2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country and to take steps to secure appropriate redress where human rights have been violated. The Human Rights Commission Act, 54 of 1994 (the Act), provides the enabling framework for the exercise of the Commissions powers and imposes a mandatory duty on both public bodies and private individuals a duty of cooperation with the Commission.
- 1.4. Section 9 (6) of the Act determines the procedure to be followed in conducting an investigation regarding an alleged violation of or threat to a fundamental right and Article 3 (b) of the South African Human Rights Commission's Complaints Handling Procedures (CHP), provides that the Commission has the jurisdiction to conduct or cause to be conducted any investigation on its own accord or upon receipt of a complaint, into any alleged violation of or a threat to a fundamental right after assessing a complaint for this purpose.

2. THE PARTIES

- 2.1. During 2011, the Commission received an anonymous complaint on behalf of certain residents at the Respondent.
- 2.2. During 2013, the Commission received a further complaint from Johannes Theunis Kotze, an adult male currently resident at Avalon Association. (Collectively referred to as the Complainants).
- 2.3. The Respondent is Avalon Association, a residential care facility for people with disabilities, registered with the Department of Social Development (the Department)

under registration number 00 597 NPO. The Respondent is situated at 113 10th Avenue, Dewetshof, Kensington, Johannesburg. As at June 2013, 41 residents were accommodated at the Respondent.

3. BACKGROUND TO THE COMPLAINT

- 3.1. During 2011, the Commission received an anonymous complaint from an external third party on behalf of certain residents at the Respondent. The anonymous complainant alleged that residents were being victimised by the management of the Respondent and that they were being threatened with eviction because of arrear rentals owed to the Respondent. In addition, it was alleged that white residents received preferential treatment from the management of the Respondent in that only black residents were threatened with eviction.
- 3.2. During February 2013, the Commission received a further complaint from Johannes Theunis Kotze, a resident at the Respondent. Mr Kotze alleged that he was being victimised by the management of the Respondent, and that certain conditions at the Respondent fell below an acceptable standard, thereby violating his right to live a dignified life.

4. PRELIMINARY ASSESSMENT

- 4.1. The Commission consolidated the abovementioned complaints on the basis that they related to fundamentally the same issues with regard to the same Respondent. The consolidation was undertaken on the basis of Chapter 8 of the Commission's Complaints Handling Procedures, which states the following:

“38. (1) The Provincial manager may, on his or her own accord or on written application by a party to the proceedings, consolidate two or more complaints and deal with these complaints in the same proceedings...

(2) The Provincial Manager may, in consultation with any relevant stakeholders, determine that a class of complaints be handled together.”
- 4.2. In deciding to consolidate these complaints, the Provincial Manager took into account various applicable factors, including reasons of efficacy, the fundamental similarities between the complaints in question and the need for a consistent response to all complaints raising the same issue.
- 4.3. In its preliminary assessment of the complaints, the Commission noted that certain aspects of the complaints before it did not fall squarely within the scope of its Constitutional mandate, such as the payment of rentals, consequences of non-payment and resultant contractual breaches, such disputes being of a contractual and civil law nature.
- 4.4. However, the Commission accepted the other allegations made by the Complainants, the Commission confirmed acceptance of the complaints in terms of its CHP on the basis of a *prima facie* violation of human rights. On that basis, the Commission instituted an investigation of the complaints.
- 4.5. In its assessment of the complaints, the Commission took into account the following factors:
 - 4.5.1. Applicable Constitutional and statutory prescripts;

- 4.5.2. The particular facts of the complaints;
- 4.5.3. The number of individuals potentially affected by the complaints; and
- 4.5.4. The vulnerability of the affected individuals.

5. RIGHTS ALLEGEDLY VIOLATED

From its preliminary assessment of the complaints, the Commission identified a *prima facie* violation of the following human rights as enshrined in the Bill of Rights of the Constitution:

- Section 9 [Equality]
- Section 10 [The right to human dignity]
- Section 27 [Health care, food, water and social security]

6. STEPS TAKEN BY THE COMMISSION

- 6.1. In respect of the anonymous complaint the Commission, on 12 January 2012, met with the manager of the Respondent, Ms Rose-Marie Storey and a social worker appointed at that time.
- 6.2. The social worker was questioned about her responsibilities at the Respondent, rental issues affecting residents, the manner in which the residents were engaged including the admissions procedure, policies and conduct rules. A further consultation then took place with Ms Storey regarding the complaints related to the payment of rental and other operational issues related to the Respondent.
- 6.3. Pursuant to its inspection of the Respondent, the Commission prepared an internal preliminary investigation report confirming the following:
 - 6.3.1. That one of the main sources of strain at the Respondent appeared to be the payment of rental and related financial issues. In this respect, and taking into account the racial disparity in the general population, it appeared that those who were unable to afford their rent tended to be African;
 - 6.3.2. In light of the dire need to collect sufficient funds to maintain the Respondent and closely related thereto, the need to collect rental from residents, the possibility existed that the level of care and sensitivity required with and towards residents, especially people with disabilities, could have been overshadowed;
 - 6.3.3. In addition, perceptions of racism appeared to be further fuelled through the staffing composition at the Respondent. Most of the Respondent's key positions comprised of white employees, while most of the unskilled positions were filled by Africans; and
 - 6.3.4. The need for of a social worker within the environment at the Respondent was emphasised.
- 6.4. Taking into account Mr Kotze's physical condition and his lack of full mobility, representative from the Commission attended at the respondent on 6 June 2013 to consult with Mr Kotze regarding his complaint. During the consultation, Mr Kotze confirmed the following:
 - 6.4.1. That he had been assaulted and victimised by the manager of the facility, Ms Storey;

- 6.4.2. That although he is diabetic, his specific dietary requirements were not being met;
 - 6.4.3. That residents who fell ill or who were injured on the premises were not attended to properly and were not taken to the hospital promptly enough;
 - 6.4.4. That one of the previous social workers, a Ms Nel, was forced to leave the Respondent after a disagreement with the management of the Respondent and that her absence had had a negative impact on a number of the residents;
 - 6.4.5. That the rental that he was charged in relation to his income was unaffordable and that as a result, he had fallen into arrears with his rental payments and was constantly threatened with eviction;
 - 6.4.6. That Ms Storey was rude to residents and unhelpful;
 - 6.4.7. That the Respondent imposed unreasonable sanctions on residents, such as locking them up in their room and prohibiting them from leaving the premises;
 - 6.4.8. That donations and funds allocated to the Respondent were not utilised for its intended purpose and that there was a lack of transparency in respect of the financial status and expenditure of the Respondent;
 - 6.4.9. That residents were dispensing medication to other residents instead of this being done by appropriately qualified medical personnel; and
 - 6.4.10. That information divulged to social workers by residents was being communicated to the management of the Respondent in breach of confidentiality and their privacy.
- 6.5. On the same day as the inspection, the chairperson of the board of the Respondent, Mr Mike Morgan, contacted the Commission to enquire about the reason for the Commission's visit to the Respondent. During that discussion, reference was made to the Commission's previous visit to the Respondent during January 2012 when issues such as rental and treatment of residents had been discussed.
- 6.6. On 7 August 2013, a meeting was held at the Respondent between the Provincial Manager and Senior Legal Officer of the Gauteng Provincial office of the Commission and various representatives from the Respondent, including Ms Storey, Mr Morgan, a newly appointed social worker and the accounting consultant, Mr Fairhurst. The salient excerpts of that meeting are as follows:
- 6.6.1. Mr Morgan indicated that, in his view, the actions of a few residents were negatively affecting the facility as a whole. He did however confirm that the Respondent wished to fully cooperate with the Commission in its investigations.

Department of Social Development

- 6.6.2. It was noted that the Department had previously visited the facility on more than one occasion. Flowing from this, in June 2013, the Department prepared a Departmental Quality Assessment (DQA). The Respondent confirmed that it was the first such visit by the Department in approximately two and a half years.

Rental and financial affairs

- 6.6.3. The Respondent is a private association and has been in operation for approximately 40 years. It is a registered non-profit organisation;

- 6.6.4. The total cost of running the Respondent is estimated at approximately R6000 per person per month. The Respondent receives an amount of approximately R1500 per resident per month from the Department by way of lump sum payments made on a quarterly basis. The balance of funds required to maintain the Respondent is obtained through donations and other forms of fundraising;
- 6.6.5. In respect of rental payments, residents who were employed or had some or other form of financial income and / or assistance from family members or friends were expected to pay more towards their rental. Rent was therefore individualised to suit the personal financial circumstances of each resident through the application of a means test;
- 6.6.6. In order to establish the financial means of each resident, suitable and relevant evidence of income was to be provided to the Respondent;
- 6.6.7. The state disability grant received by each resident is paid directly to the Respondent every month (save for those residents who insisted on directly receiving their own grants). In terms of departmentally accepted standards, 90% of each resident's grant was retained by the Respondent for accommodation, meals, laundry, cleaning, bedding, the service of care workers, transport to and from the hospital and basic medical assistance, such as first aid and dressings. The remaining 10% of the grant amount is then paid over to the resident for their own personal use:
- 6.6.8. In the event of any changes to the financial circumstances of a resident, the Respondent appears to have adopted a flexible approach in terms whereof residents are allowed to make submissions to the rental committee of the Respondent and provide evidence of their changed income status. In addition, payment arrangements could be made with the Respondent to settle arrear rental where appropriate;
- 6.6.9. Notwithstanding this flexible approach adopted by the Respondent, it was made clear that failure of residents to pay their rent would not be condoned and in extreme cases, appropriate legal action would be instituted against defaulting residents;
- 6.6.10. The Respondent's accountant confirmed that in his view, the financial affairs of residents was one of the main causes of conflict at the Respondent and that in some cases, had led to an irretrievable breakdown in the relationship between residents and the management of the Respondent;

Transparency

- 6.6.11. All donations received by the Respondent were recorded and displayed on a notice board that was easily accessible to all residents. Some donations, such as blankets, were distributed on a first come first serve basis. In this respect, the Commission recommended that a policy be developed, communicated and implemented to ensure a sufficient degree of transparency which at the same, did not compromise the dignity of individuals. The Commission advised that this would ensure that no perceptions of favouritism were created amongst residents.

Admission to Respondent, conduct rules and conditions of residence

- 6.6.12. Regarding admission to the Respondent, Ms Storey confirmed that an interview process was undergone by all prospective residents. The resident social worker, Ms Storey herself and an occupational therapist conduct these interviews;
- 6.6.13. Ms Storey acknowledged that their conditions of residence may not always be communicated in the most effective manner at admission state and that their admission processes could be clearer. Ms Storey also advised that the Respondent's policies were in the process of being reviewed but that any proposed amendments to the policies would take place only after consultation with residents through the resident's committees and thereafter, approval by the board of the Respondent;
- 6.6.14. All policies, including conduct rules, of the Respondent had to be signed by each resident upon commencement of their stay at the Respondent. When amendments to the policies or conduct rules were implemented, residents are requested to acknowledge those amendments by way of signature. In respect of those residents who refused to sign, an appropriate endorsement was made reflecting such refusal. Although residents were not evicted for refusing to sign amendments to policies, all policies and amendments thereto would be of full force and effect and would apply equally to all residents.

Social workers

- 6.6.15. The new social worker indicated an awareness of the complaints lodged with the Commission;
- 6.6.16. The social worker advised that although she had an open door policy, because she was new, she currently intervened at crisis level or through scheduled appointments. She also indicated that she was attempting to build a trust based relationship between herself and the residents;
- 6.6.17. The new social worker confirmed that she had not received many complaints since her arrival at the Respondent.

Complaints

- 6.6.18. Service delivery and other complaints were brought to the attention of the social worker through resident committee meetings, where each block of rooms was represented. All resolutions taken at those meetings were sent to the management of the Respondent for further intervention and appropriate action;
- 6.6.19. Complaints about the service tendered by caregivers were lodged with Ms Storey and / or the social worker on duty and were attended to by the management of the Respondent on a needs basis;
- 6.6.20. Anonymous complaints were possible through a recently implemented complaints box;
- 6.6.21. Ms Storey confirmed that after making a remark about the mental state of one of the residents, she had been reported to the Nursing Council of South Africa. In addition, criminal charges had been laid against her for assault. However, these charges were later withdrawn;

6.6.22. Similar complaints had also been lodged about the management of the Respondent with the media. However, that investigation was also withdrawn after further engagement with the chairperson of the board of the Respondent.

Medical services

6.6.23. Of the residents currently at the Respondent, seven required assistance with their medication and the remainder managed their own medication;

6.6.24. It is noted that at one stage, certain basic medical supplies were being donated to the Respondent by a private company for the benefit of a specific resident and this had been explained to the other residents. The specific resident was advised that once the donations were depleted, he would have to attend the nearest public hospital to consult with a doctor and to obtain his own dressings for his wounds;

6.6.25. There was apparently a common misperception amongst some residents that full nursing care was provided at the Respondent. However, Ms Storey confirmed that this was not the case and that residents received only basic nursing services in certain circumstances as the Respondent was a self assisted home;

6.6.26. It was essential that the medical condition of each resident was fully disclosed at the onset of his / her residence at the Respondent. In this respect, a nursing care plan was prepared and available for each resident, which process had been implemented by Ms Storey upon her arrival at the Respondent. However, some residents allegedly refused to provide this information, which created certain difficulties for the Respondent in the provision of its services to the residents;

6.6.27. Transport was provided to all residents who wished to attend hospital and / or other medical facilities.

Food

6.6.28. Diabetics were provided with a special meal plan at no extra cost. However, the Respondent confirmed that while current residents who were diabetic would be taken care of appropriately, no further diabetics would be admitted to the Respondent in the future;

6.6.29. A dietician was responsible for drawing up weekly menus for residents. Where residents had special dietary requirements as confirmed by a medical doctor in writing, residents were accommodated accordingly. However, personal preferences without any medical justification were not entertained;

6.6.30. Cultural and religious differences of residents were also taken into account and catered for;

6.6.31. With regard to supper, two meal choices were provided to residents, who were required to make their election in advance; and

Social dynamics

6.6.32. The social worker indicated that both group work and individual interventions were required to ensure greater social cohesion amongst residents as well as between residents and the management of the Respondent;

- 6.7. During the abovementioned meeting, representatives from the Respondent undertook to provide the Commission with various supporting documentation and additional information, including all internal policies, confirmation of the services provided by the Respondent and a copy of the latest DQA report from the Department.
- 6.8. During or about the beginning of September 2013, Ms Storey provided the following further information and records to the Commission:
- 6.8.1. A pamphlet confirming that the Respondent provides *“[n]ursing care and emotional support, 24 hours a day, seven days a week to people with disabilities from all races and backgrounds”* (own emphasis). In contrast, the Respondent’s website confirms that it provides *“[t]wenty four hours/seven days a week basic care-giving and emotional support to the residents”* (own emphasis);
- 6.8.2. The indemnity form signed by residents upon admission to the Respondent confirms that no medical doctor is employed at the Respondent and that any treatment prescribed by a resident’s personal doctor would be administered by the Respondent’s nursing staff;
- 6.8.3. The lease agreement confirms the following:
- 6.8.3.1. Rental is linked to the type of room allocated and according to the resident’s income;
- 6.8.3.2. Any changes in income are to be disclosed to the management of the Respondent in order for necessary rental adjustments to be made by the Executive Committee;
- 6.8.3.3. Fees include *“care giving and limited nursing (at the discretion of the Registered Nurse) when required”*;
- 6.8.3.4. Pensions and government grants are paid into the Respondent’s account and administered accordingly;
- 6.8.3.5. Residents are responsible for the following: *“All pharmaceutical, assistive and living devices, i.e. nappies, gauze, linen savers, catheters, urostomy bags etc.”*; and
- 6.8.3.6. Residents are required to sign the rules and code of conduct.
- 6.8.4. Correspondence and supporting documents from the catering company confirmed the breakdown of nutrients and food groups in the different weekly meal plans, including the diabetic menu;
- 6.8.5. A copy of the DQA report prepared by the Department during their visit to the Respondent during 5 to 7 June 2013 was provided to the Commission. Overall, the DQA report confirmed that quality services were being rendered to the beneficiaries. The salient excerpts of the report are set out below:
- 6.8.5.1. Limited or no social work intervention had been recorded since 2010;
- 6.8.5.2. It was recommended that members of the residents committee meetings be represented in staff meetings;
- 6.8.5.3. It was recommended that counselling services be made available to residents to enable residents to correct any negative behavior;

- 6.8.5.4. A complaints box was to be made readily available for the anonymous reporting of complaints;
 - 6.8.5.5. A professional nurse was on duty daily to monitor health issues of the residents and to render assistance when needed. In addition, medication was administered to a few beneficiaries who, because of their physical condition, were unable to do so themselves;
 - 6.8.5.6. A care plan was compiled for each resident by a professional nurse. However, an annual review of the care plan was required;
 - 6.8.5.7. Residents were allowed to make input regarding their menus with dietary guidance from a dietician;
 - 6.8.5.8. To assist the Department with its assessment, the Respondent submitted a report to the Department setting out its own certain observations, which included the following:
 - a) Rules and regulations, as well as the code of conduct, were considered to be harsh. The Department had therefore offered to assist the Respondent in the review of its policies together with the Respondent's legal representative;
 - b) Resident's committee meetings could be held more regularly. In addition, as from 2013, the social worker would be attending those meetings;
 - c) Non-disclosure of medical records and medical conditions by residents made caring for them difficult. Only specific medical care and not routine nursing was documented in residents' files;
 - d) Complainants do not always follow the complaints procedures available to them and instead, sought redress through external forums, such as the police.
- 6.9. On 7 November 2013, the Commission undertook a further inspection of the facility. During that inspection, the Commission once again consulted with Mr Kotze but also conducted a general inspection of the facility and interviewed other residents unrelated to the complaints before the Commission:
- 6.9.1. Mr Kotze confirmed that he had the following concerns about the Respondent:
 - 6.9.1.1. Ms Storey's treatment of residents;
 - 6.9.1.2. He did not receive nursing services as, he alleged, he is entitled to in terms of his contract with the Respondent. In addition, those people who attended to his dressings were not properly trained;
 - 6.9.1.3. Residents were treated differently in that a certain degree of favouritism was displayed by the management of the Respondent towards certain residents;
 - 6.9.1.4. There were various incidents of breach of confidentiality where private information of residents as communicated to social workers was divulged to the management of the Respondent and in particular, Ms Storey;

- 6.9.1.5. The rental that was imposed on him, and some of the other residents, was not in line with their personal financial circumstances as alleged by the Respondent, and was therefore unaffordable. This inevitably led to residents falling into arrears with their payments and which in turn created conflict between residents and the management of the Respondent;
 - 6.9.1.6. There was lack of transparency in respect of the use of donations and funds received by the Respondent;
 - 6.9.1.7. The quality and quantity of the food served to residents was poor and did not meet the needs of the residents, especially those that had specific dietary requirements such as diabetics;
 - 6.9.1.8. Sub-contracted services, such as the laundry and cleaning services, were below standard;
 - 6.9.1.9. There were insufficient processes in place for the lodging of complaints and complaints that were lodged were not properly attended to.
- 6.9.2. To obtain objective data regarding the conditions at the Respondent, the Commission interviewed three residents unrelated to the complaints lodged with it:
- 6.9.2.1. The first resident interviewed by the Commission, who confirmed that she had been residing at the Respondent for many years, advised the Commission as follows:
 - a) She confirmed that overall, she was happy at the Respondent;
 - b) She was happy with the meals that she was receiving, although she acknowledged that the food may not always meet the personal taste and / or standards of all the residents;
 - c) The cleaning contractors provided satisfactory services and in those instances when her laundry was not cleaned properly, she was able to return those items without any hassles;
 - d) Although she did not regularly interact with the social workers, she had not experienced nor was she aware of any problems in respect of them breaching the confidentiality of residents;
 - e) As far as she was aware, many residents did not like the manner in which Ms Storey treated them and many residents also questioned her qualifications;
 - f) The resident confirmed that although she did not have much insight in respect of the quality of nursing services at the Respondent as she did not have bed sores and / or similar injuries that required regular attention, she was satisfied with the limited nursing services that were provided;
 - g) She had no concerns about the finances of the Respondent and / or the use of the money donated to the Respondent.

6.9.2.2. Two male residents who were interviewed together advised as follows:

- a) Although the quality of the food was not an issue, they were dissatisfied with the quantity of food that they were served. In addition, one of the diabetic residents confirmed that he had not previously been provided with a special meal plan and that a diabetic menu had only been introduced at the Respondent a day before the Commission's second inspection of the Respondent;
- b) Both interviewees were of the opinion that residents' right to privacy had been violated by social workers who divulged their private information to the management of the Respondent;
- c) No nursing services were provided to residents. In addition, they alleged that the care workers who did assist them were not properly trained, save for one;
- d) A general dissatisfaction was conveyed about the services rendered by Ms Storey and her treatment of residents;
- e) The residents pointed out their concerns about the lack of transparency exercised by the Respondent regarding the utilisation of donations received by the Respondent and generally, the financial affairs of the Respondent;
- f) Although neither of the residents received any form of additional income over and above their disability grants, the rent that they were required to pay was higher than their grant amount. As such, they were required to seek additional funds through alternative sources, such as family members and friends, to cover their rent. In addition, they confirmed that they did not receive 10% of their disability grant from the Respondent;
- g) The residents confirmed that they were not happy with the laundry services or with the services rendered by the on-site cleaning contractors;
- h) Although processes were in place for the lodging of complaints, they were of the opinion that their complaints were not appropriately attended to, if attended to at all; and
- i) Management of the Respondent was viewed as favouring and providing preferential treatment to certain residents.

6.9.2.3. Through its interview with the dietician and the catering manager of the company contracted to service the Respondent, the Commission was able to establish the following:

- a) Daily / weekly menus were analysed by the dietician to ensure that sufficient nutrients were present in every meal;
- b) Where possible, second helpings were handed out to residents who requested same;
- c) Various quality assurance mechanisms were in place, including the following:

- Samples of food were kept in the freezer for three days for testing purposes in the event that one of the residents fell ill;
 - The operations manager of the company played an oversight role over the quality of the food and the budget;
 - Hygiene auditors regularly visited the kitchen without notice;
 - Weekly orders were made for all perishable items of food;
 - Temperature control mechanisms were in place in respect of the cooking of the food, serving of the food, time of receipt, refrigeration, freezing and dish washing; and
 - The date of receipt was recorded on all food items.
- d) Fruit was provided to the residents twice a week (due to budgetary constraints) and vegetables were provided every day;
- e) At the beginning of each week, residents were provided with an opportunity to select their meals from two options for each day of the coming week; and
- f) A special diabetic menu was created for residents with diabetes.

7. LEGAL FRAMEWORK

The vulnerability of people with disabilities is recognised internationally, regionally and on a national level. The international (and regional) frameworks provide South Africa with a broad normative framework within which to develop national legislation and policies aimed at protecting the rights of people with disabilities.

International Law

7.1. The primary purpose of the **United Nations (UN) Convention on the Rights of Persons with Disability (2006) (UNCRPD)**¹ is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. It therefore creates the normative standard for state parties for the protection of the rights of persons with disabilities² by creating primary international guiding principles on the rights of persons with disabilities. By ratifying the **UNCRPD** in November 2007, South Africa accepted its legal obligations under the treaty to enact domestic legislation to ensure that the rights of persons with disabilities as enshrined in the **UNCRPD** are protected within the country.

While the **UNCRPD** has not been extensively incorporated into our legal framework in separate distinct legislation relating to people with disabilities, protection for the rights of persons with disabilities resides at a normative level firstly, within the framework created by the Constitution and secondly, through the equality legislation.³

Relevant to the present matter is **Article 28 (1) of the UNCRPD** which states that in respect of an Adequate Standard of Living and Social Protection:

¹ UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106.

² *Ibid*, Article 2.

³ Minutes of a meeting given by the University of the Western Cape Centre for Disability Law and Policy to the Parliamentary Monitoring Group, on compliance by South Africa with the ICRPD (01 March 2011), www.pmg.org.za.

“States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability...” (own emphasis).

7.2. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) reaffirms the provisions of Article 28 of UNCRPD:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent...” (own emphasis).

7.3. As a member country of the United Nations (UN), South Africa must promote and response the **UN Standard Rules on the Equalisation of Opportunities for People with Disabilities (1993)**.⁴ The introduction to the Rules confirms the difficulties faced by people with disabilities and calls for concerted efforts to ensure equality in all spheres for people with disabilities:

*“The purpose of the Rules is to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others. In all societies... there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to remove such obstacles... The equalization of opportunities for persons with disabilities is an essential contribution in the general and worldwide effort to mobilise human resources...”*⁵

7.4. A major outcome of the International Year of Disabled Persons held in 1981 was the formulation of the **World Programme of Action concerning Disabled Persons (WPA)**, which programme was adopted by the UN General Assembly on 3 December 1982 (resolution 37/52).⁶ The WPA is a global strategy aimed at enhancing disability prevention, rehabilitation and equalization of opportunities and the full participation of persons with disabilities in social life and national development. The WPA also emphasizes the need to approach disability from a human rights perspective.⁷

⁴ The political and moral foundations of the Rules lie in human rights instruments, such as the Universal Declaration of Human Rights (1948), the International Covenant of Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and the World Programme of Action Concerning Disabled Persons, amongst others.

⁵ <http://www.un.org/esa/socdev/enable/dissre01.html>
In August 2002, a UN ad hoc committee met for the first time to discuss the United Nations Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which initiative is supported by the South African government.

⁶ <http://www.un.org/disabilities/default.asp?id=23>

⁷ Ibid

Regional legal framework

7.5. The **African Charter on Human and Peoples' Rights**, adopted in 1981, confirms that:

"[e]very individual shall be entitled to the enjoyment of the rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status" (own emphasis).

The specification "or other status" clearly encompasses people with disabilities.

7.6. The **Africa Decade of Disabled People (ADDP)**⁸ is an initiative of the non-governmental community of Africa, in cooperation with member states and governments of the Organisation of African Unity (OAU) (currently known as the African Union (AU)). The ADDP was an initiative aimed at furtherance of the equalization of opportunities for persons with disabilities. The **Continental Plan of Action** that flowed from that initiative is aimed at implementing priority activities relating to disability. Some of the objectives of the Plan of Action include the formulation and implementation of national policies, the creation of programmes and legislation to promote the full and equal participation of persons with disabilities, enhancing support services for disabled persons and the promotion and protection of disability rights as human rights.⁹

From its commitments to international and regional frameworks, it is clear that South Africa is obliged to respect the obligations imposed by those frameworks in the interests of disabilities in South Africa.

Domestic legal framework

The South African Constitution¹⁰ is the benchmark for all legislation in South Africa. Its provisions are applicable to all persons, including juristic persons.¹¹ The democratic values of equality, human dignity and freedom form the basis of any constitutional analysis of the human rights protected in the Bill of Rights.¹² South African domestic laws therefore find form through the primary law as contained in the Constitution of the country.

7.7. Constitution

- Section 9 (Equality):

"(1) Everyone is equal before the law and the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

...

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in subsection (3)..."¹³

⁸ The goal of the African Decade of Persons with Disabilities is the full participation, equality and empowerment of people with disabilities in Africa.

⁹ <http://www.africa-union.org/child/Decade%20Plan%20of%20Action%20-Final.pdf>

¹⁰ The Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter referred to as the Constitution).

¹¹ Section 8 of the Constitution.

¹² Section 7 of the Constitution.

¹³ "9(3): The state may not unfairly discriminate, directly or indirectly against anyone on one or more grounds, including... disability..."

- Section 10 (The right to human dignity):

“(1) Everyone has inherent dignity and the right to have their dignity respected and protected”

- Section 27 (Health care, food, water and social security)

“(1) Everyone has the right to have access to –

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The State must take reasonable and other legislative measures, within its available resources, to achieve the progressive realization of these rights.

(3) No one may be refused emergency medical treatment.”

- 7.8. In terms of the **Non Profit Organisations Act**¹⁴ a non profit organisation (NPO) is described as:

“a trust, company or other association of person

(a) established for a public purpose; and

(b) the income and property of which may not be distributable to its members or office-bearers except as reasonable compensation for services rendered.”

NPO's are private, non-governmental organisations with self governing boards accountable to their owners or members. NPOs also need to account to their donors and to the general public since they operate in the public interest. NPOs do not form part of the state or government, although donors may include government departments.

Like any other juristic persons, NPOs have to adhere to domestic legislative frameworks and importantly, have to comply with the provisions and founding principles of the Constitution, including those set out above in paragraph 7.7. above.

- 7.9. **The Promotion of Equality and Prevention of Unfair Discrimination Act (2000) (PEPUDA)** is the national legislation enacted to prevent or prohibit unfair discrimination and to promote the achievement of equality. Provisions of PEPUDA also apply to people with disabilities. PEPUDA not only contains negative provisions prohibiting discriminatory conduct, but also positive measures aimed at eradicating systemic discrimination and promoting equality with regard to disability.

Chapter 5 of PEPUDA deals with the promotion of equality by the state and other actors, including those in the public and private spheres.

Section 9 of PEPUDA specifically deals with the prohibition of unfair discrimination on the ground of disability.

Key national policies

- 7.10. The **Integrated National Disability Strategy (1997) (the Strategy)** refers to a wide range of strategies designed to facilitate access by people with disabilities to mechanisms which enhance their ability to live independently. Social welfare services in this respect

¹⁴ Act 71 of 1997

include large institutions for people with severe disabilities, run either by subsidised welfare organisations, the private sector or the state. The Strategy recognises that while these institutions provide shelter and necessary care for people who would otherwise have struggled to meet their needs, these institutions are faced with a number of difficulties. Also, conditions at these institutions differ considerably and many fall short of acceptable minimum standards, which results in the violation of various human rights. The Strategy further acknowledges that people with disabilities find themselves in extremely weak and vulnerable positions and that their ability to obtain appropriate recourse is sometimes very limited.

A pertinent recommendation contained in the Strategy is **'Recommendation 12b'** relating to 'Social Welfare and Community Development' and specifically, residential facilities. The recommendations refers to the development of national guidelines for the residential facilities for people with disabilities who, as a result of the severity of their disabilities, require permanent residential care, including *"minimum standards and measures to ensure that the rights of people with disabilities are protected and their wishes taken into account"* (own emphasis).

7.11. Flowing from the Strategy, the aim of the **Policy Guidelines on Residential Facilities for People with Disabilities (the Policy)** is to provide basic information about the establishment and running of facilities for people with disabilities.¹⁵ This includes the development of a framework for good governance and management practices in order to protect and promote the rights of people with disabilities.¹⁶ Some of the principles contained in the policy include accessibility, accountability, Batho Pele, confidentiality, participation, individuality and human rights.

Importantly, the Policy acknowledges that there is currently no specific legislation in place relating to people with disabilities or relating to the functioning of residential facilities for people with disabilities. This legislative gap causes various difficulties, including those related to monitoring, compliance and securing appropriate redress.¹⁷

7.12. During 2011, **Minimum Standards on Residential Facilities for Persons with Disabilities (the Minimum Standards)** were finalised and integrated into the comprehensive national policy framework on disability, aligning it with the **UNCRPD**. The Minimum Standards, which were rolled out in all provinces,¹⁸ deals with a wide variety of issues and are applicable to all residential facilities for people with disabilities. Standards applicable to the present matter include:

7.12.1. Engagement / admission: People with disabilities are to be received and oriented in a dignified manner and in a climate which is caring and safe. This approach seeks to ensure that people with disabilities feel physically, emotionally and socially safe and cared for during the engagement / admission process and are given maximum appropriate choice and involvement in the decision-making processes related to their personal circumstances. Residents must also feel that their

¹⁵ Policy guidelines on residential facilities for people with disabilities confirms that the aim of the policy, pg 6

¹⁶ Ibid at 8 - 9

¹⁷ Ibid at 22 - 23

¹⁸ <http://www.pmg.org.za/report/20110125-annual-report-briefing-department-social-development>

service provider is respectful of their individuality, their strengths, their capacity and their cultural dimension.¹⁹

7.12.2. Individual Development Plan (IDP): Each disabled person should have an individual development plan which they must have participated developing and which they must fully understand. The IDP should be regularly reviewed and adapted to meet the changing needs of disabled persons, and must adequately reflect goals and expectations.²⁰

7.12.3. Rights of people with disabilities: People with disabilities should be given information about their rights and responsibilities in a manner and form which takes into account age, capacity and diversity.²¹

7.12.4. Complaints and grievance procedure: Opportunities should exist for people with disabilities to freely express dissatisfaction with the services provided to them, and their concerns and complaints should be addressed seriously and without delay or reprisal. People with disabilities should be provided with a description of applicable complaint procedures in a manner that is age and language appropriate.²²

7.12.5. Physical care and environment: People with disabilities must live in an accessible, safe, healthy, well-maintained environment which meets their needs in terms of privacy, safety and well-being. This standard refers to aspects such as safety, compliance with nutritional and dietary requirements, basic amenities that are consistently in good working order and are fixed timeously, the provision of individual private spaces and easy access to ablution facilities, all of which must be kept clean.²³

7.12.6. Privacy and confidentiality: The privacy and confidentiality of people with disabilities must be respected and protected. In this respect, personal information should be treated respectfully and confidentially.²⁴

7.12.7. Emotional and social care: Emotional and social care should be provided to enable quality interactions with peers and to promote positive sustained relationships. Specifically, people with disabilities should be encouraged to identify and express emotions appropriately; taught effective, positive ways to express and manage emotions and to relate to others, should experience interactions with service providers as positive and respectful and should be encouraged to build, and maintain appropriate relationships with service providers, friends, etc. In addition, they should receive adequate information on routines in a manner which facilitates their understanding and co-operation and they must be assisted to participate in those routines in a manner that supports their individual development.²⁵

¹⁹ Department of Social Development, Minimum standards on residential facilities for persons with disabilities at 21 - 22

²⁰ Ibid at 23 - 24

²¹ Ibid at 25 - 26

²² Ibid at 26 - 27

²³ Ibid at 27 - 29

²⁴ Ibid at 30 - 32

²⁵ Ibid at 32 - 33

7.12.8. Health care: People with disabilities should have access to and receive adequate health care. In this respect, their health needs should be met in a timely manner and they should be provided with medical attention when they show symptoms of serious illness or injury. When ill, they should be provided with caring support. Their health care issues should also be treated confidentially by service providers.²⁶

7.12.9. Behaviour management: Capacity and support which enables constructive and effective social behaviour should be provided. Residents should be made aware of the behaviour expected of them as well as any behaviour that is prohibited. A copy of any rule in writing and in a form and language that they understand must be provided to all residents and must be explained to them. Service providers should play a role in assisting people with disabilities to meet their behavioural expectations through teaching and developmental and / or therapeutic support.

Service providers should ensure that people with disabilities are given extensive opportunity and encouragement to demonstrate and practice positive behaviours. In this respect, residents should feel respected and physically, emotionally and socially safe when service providers manage their behaviour and provide support.²⁷

In respect of all of the standards mentioned in the Guidelines, it is recommended that service providers be given and assisted through appropriate policies and procedures and should be given suitable training, support and developmental supervision with regard to such policies and procedures.

7.13. Various provisions of the **Disability Rights Charter of South Africa** are applicable to the present matter. Of relevance is Article 2 relating to self-determination and which confirms that disabled people shall be entitled to represent themselves on all matters affecting them. Article 3 refers to the provision of health and rehabilitation services that are effective, accessible and affordable to all disabled people in South Africa.

8. ANALYSIS

Notwithstanding the broad normative principles protecting the rights of this particularly vulnerable group at international level and that disabled persons are recognised as a vulnerable group within society needing care and protection, the Commission notes that applicable legislation, both nationally and internationally, is relatively under developed. The Commission is therefore guided in its understanding of the special measures which must be put in place to protect the rights of this vulnerable group by the broad framework and principles found in the Constitution.

Although the principle of full participation in society, family and community is confirmed in the Universal Declaration of Human Rights and applies to all people, including those with disabilities, in reality, disabled persons are often denied this opportunity for various reasons, including ignorance, indifference and fear. Prejudicial societal attitudes and behaviour often lead to the exclusion of disabled persons, which has the possibility of producing adverse psychological and social consequences for them and the broader society as a whole. In addition to being marginalised and sometimes excluded from their communities, they can sometimes also feel confined and excluded within the very institutions where they live and which they regard as home.²⁸

²⁶ Ibid at 34 - 36

²⁷ Ibid at 36 - 38

²⁸ <http://www.un.org/disabilities/default.asp?id=23>

Taking into account this contextual background, some of the major challenges currently faced by residential facilities include the following:

- A lack of understanding of the specific and different needs of the various disabilities accommodated within the facility;
 - Overstretched, ill-equipped and under-capacitated service providers and employees. In this respect, it is important to note that staff members at a residential facility form a very important component of an efficient and effective service. Appropriately qualified and experienced personnel who are sensitive to the specific environment in which they work are therefore required to ensure good quality service which is responsive to the specific needs of the people with disabilities they serve;²⁹ and
 - A lack of a collective and coordinated effort to address disability issues within residential facilities.³⁰
- 8.1. As per its preliminary assessment, the Commission notes that some aspects forming the basis of the complaints lodged with the Commission falls outside its Constitutional mandate. In particular, those relating to the payment of rental, consequences in relation to arrear rental and resultant contractual breaches by residents, all of which are contractual and civil in nature. However, the Commission recognised that the following aspects of the complaints lodged with it required further investigation with a view to establishing whether the rights of people with disabilities were being violated and / or prejudiced in any way:
- 8.1.1. Alleged racism and discrimination;
 - 8.1.2. Policies and procedures relating to the admission of residents to the Respondent, including implementation of conduct rules;
 - 8.1.3. Lodging of complaints;
 - 8.1.4. Medical services rendered by the Respondent;
 - 8.1.5. Social dynamics;
 - 8.1.6. Breach of confidentiality;
 - 8.1.7. Physical care and environment; and
 - 8.1.8. Transparency.
- 8.2. In analysing the complaints before it, the Commission considered the allegations contained in the complaints lodged with it, interviews with complainants, interviews with other residents, meetings with representatives from the Respondent and facts gleaned from the Commission's own inspections of the Respondent.
- 8.3. Through the abovementioned, the Commission established the following:
- 8.3.1. The Commission did not establish that any form of racism was being practiced by the management of the Respondent. In this respect, the Commission noted that eviction proceedings had been instituted against both black and white residents who had fallen into arrears with their rental. Secondly, those white residents with whom the Commission consulted confirmed that they had also had unpleasant experiences in relation to their financial affairs and more particularly with regard to falling into arrears with their rental payments and the consequences thereof;

²⁹ Policy guidelines on residential facilities for people with disabilities confirms that the aim of the policy, pg 30

³⁰ Ibid at 18

- 8.3.2. The information provided on admission regarding services provided was not sufficiently clear. A lack of clarity at this stage fuels perceptions of non-delivery of services, favouritism and unfair and / or poor treatment. This specifically includes misperceptions and a lack of clarity regarding the extent of medical services provided by the Respondent;
- 8.3.3. Residents did not feel that their complaints were adequately dealt with and therefore felt that their voices are not being heard and / or are not taken seriously by the management of the Respondent;
- 8.3.4. Varied social dynamics appear to play an important role within the facility, firstly between residents and secondly, between residents and members of the management of the Respondent. Should these aspects not be attended to by the Respondent with a sufficient amount of sensitivity, perceptions amongst residents that their rights are being violated by the Respondent will continue. In this respect, social workers may play an important role in providing necessary guidance and support to all parties;
- 8.3.5. At present, insufficient protections are in place relating to confidentiality of personal information. Measures must therefore be put in place to ensure that residents feel comfortable and secure that any engagements with the resident social worker will not be divulged to any third parties, including the management of the Respondent. Taking into current views amongst some residents that their right to privacy has not been and will not be respected by social workers, it is likely that residents will be increasingly reluctant to engage with the services of the social worker. This in turn may have adverse consequences for the mental and emotional wellbeing of the residents, which can affect the overall social dynamics at the Respondent;
- 8.3.6. From national policies, it is clear that the services rendered to residents while at facility, including those rendered through sub-contractors, should be of an acceptable standard. These services should be geared towards ensuring that residents feel safe and comfortable in their living environment. Although the Commission was not able to establish any apparent violations in this respect, there is a need for complaints regarding service delivery to be appropriately dealt with in conjunction with external service providers;
- 8.3.7. Lack of transparency or perceptions thereof, may result in residents feeling excluded from decisions which have a bearing on their living conditions and being prevented from actively participating in matters affecting them. Increased information sharing regarding donations received and the financial affairs of the Respondent will encourage an open, transparent and accountable environment where residents are able to openly engage regarding matters affecting them.

9. FINDINGS

On a consideration of broad international normative standards and domestic legislation and frameworks as against the facts of the complaints lodged with it, the Commission finds that:

- 9.1. The Respondent has not contravened Section 9 of the Constitution or the provisions of PEPUDA in respect of the treatment of residents who fail to meet their rental payments; and

- 9.2. Taking into account normative guidelines found in international and national frameworks, the Commission finds that the Respondent ought to put in place measures to improve not only the general living conditions of residents but also the social dynamics amongst residents, between residents and the management of the Respondent.

Necessary improvements will ensure that the Respondent meets not only broader international standards but also the guiding principles set out in Section 27 and Section 10 of the Constitution and specific national policies such as the Policy Guidelines on Residential Facilities for People with Disabilities and Minimum Standards on Residential Facilities for Persons with Disabilities.

10. RECOMMENDATIONS

- 10.1. Based on the findings set out above, the Commission recommends that:

10.1.1. In respect of admission to Respondent, rules of conduct and conditions of residence –

- 10.1.1.1. The Respondent reviews its current policies and procedures related to engagement / admission practices; and
- 10.1.1.2. Relevant employees are trained to meet the specific standards of service delivery.
- 10.1.1.3. In respect of the above:
- 10.1.1.3.1. Reviewed policies must ensure that people with disabilities are received and orientated in a dignified manner and in a climate which is caring and safe, minimizing trauma and maximizing developmental opportunities. Policies and procedures should generally ensure that the outcomes as set out in the Departmental Guidelines are achieved;
- 10.1.1.3.2. Services offered through the Respondent must be clearly articulated during the interview process and before any binding agreements are signed by either party to avoid any misunderstanding between the parties and to avoid incorrect expectations being created with residents. In this respect, clear definitions of *'nursing care'* and *'basic care-giving'* should be provided.
- 10.1.1.2. The Respondent's pamphlet should be amended to specify the extent of medical services provided. In this respect, a definition of *'nursing care'* and *'basic care-giving'* should be provided.

10.1.2. With regard to Complaints:

- 10.1.2.1. A copy of the complaints procedure must be provided to all residents in a manner that takes into account a specific resident's disability and in a language understood by the resident and should be clearly explained; and

- 10.1.2.2. The complaints procedure must make provision for the following:
 - 10.1.2.2.1. Timeframes for response to complaints lodged with the Respondent, which timeframes must be strictly adhered to;
 - 10.1.2.2.2. The completion of a log report for each complaint received, timeframes for the completion of such reports and provision for the safekeeping of such reports for a period of no less than five years. The report compiled must include details of complaint, steps taken to address the complaint and details of the final outcome; and
 - 10.1.2.2.3. At least on level of appeal should residents be dissatisfied with the outcome of their complaints, which appeals procedure must be clearly described in the complaints procedures.

10.1.3. In respect of Medical services: -

- 10.1.3.1. In line with the nursing and medically related services offered by the Respondent to residents, the Respondent must develop clear guidelines regarding the provision of preventative, routine or emergency medical or dental care for residents when showing symptoms of serious illness or injury and the extent of such assistance;
- 10.1.3.2. Additional monitoring should be stipulated for residents assessed at any given time who may appear to need such monitoring due to a specific medical condition;
- 10.1.3.3. Guidelines referred to above should include turnaround times firstly for the assessment of a resident's medical needs and secondly for the implementation of assessment outcomes;
- 10.1.3.4. A reporting process should be implemented which must make provision for the managing nurse on duty to provide, with regards to each reported incident, his / her professional assessment of the situation and steps taken to address the situation.

10.1.4. Social dynamics: -

- 10.1.4.1. Residents and personnel should be required to attend bi-annual sensitization workshops, hosted by the Respondent, about the rights and responsibilities of people with disabilities. The manner of presentation of such workshops must take into account the age, capacity and diversity of the residents;
- 10.1.4.2. Residents should be provided with an opportunity to obtain emotional and social care and support which will enable them to identify and appropriately express their emotions and opinions. In this respect, the Commission recommends that the Respondent host an suitable training workshop aimed at providing residents with the tools to effectively communicate and resolve conflict with each other and with the management of the Respondent;

- 10.1.4.3. Staff members should be provided with thorough training on positive and pro-active behaviour management practices with specific reference to people with disabilities;
- 10.1.4.4. Applicable rules of conduct should be made easily accessible in various forms e.g. posters in communal areas and regularly distributed newsletters;
- 10.1.4.5. Applicable policies should make provision for residents to engage with management in the event of any misunderstanding and/or simply for the purposes of clarification and should be clearly communicated to residents; and
- 10.1.4.6. Regular information sessions should be hosted for all residents in order to ensure they understand the rules of conduct as well as the procedures to be followed in the event of any breach of the code of conduct.

10.1.5. Breach of confidentiality:-

- 10.1.5.1. Policies should be developed to ensure confidentiality of information shared by residents with social workers in situations where social workers interact with other personnel and residents;
- 10.1.5.2. The complaints procedure described in paragraph 10.1.2 above should make provision for complaints regarding alleged breach of confidentiality by social workers and / or any other party. The complaints procedure should be clearly communicated to all residents, social workers, the Department and staff members of the Respondent; and
- 10.1.5.3. The Respondent should ensure that all complaints, lodged in terms of the complaints procedures, are communicated to the Department within 7 (seven) days of the date of receipt in order to allow the Department opportunity to take appropriate action; which action may include investigating any allegations and, where necessary, taking disciplinary action.

10.1.6. Physical care, environment, services: -

- 10.1.6.1. Within 3 months of the date hereof, an information workshop must be hosted, for the benefit of all residents, by the resident dietician and / or catering staff in order to:
 - 10.1.6.1.1. explain the process followed / considerations taken into account in the preparation of weekly menu plans;
 - 10.1.6.1.2. explain the determination of portion sizes; and
 - 10.1.6.1.3. educate residents with regard to basic nutrients and food groups;
- 10.1.6.2. The Respondent's complaints procedure as described in paragraph 10.1.2 should make provision for those residents who wish to lodge complaints about services rendered by sub-contractors, such as the cleaning and catering companies.

10.1.7. Transparency:-

- 10.1.7.1. The Commission recommends that the Respondent put in place measures in terms whereof all residents are advised of all donations received by the Respondent, whether monetary or otherwise, as well as the intended usage thereof. Where possible, a further report regarding the actual spending and / or utilisation of donations as per its allocated purpose should be provided to all residents; and
 - 10.1.7.2. In respect of all donations in kind intended for distribution to residents, the Commission recommends that with a view to ensuring that no perceptions of favouritism are created amongst residents, that a policy be developed and implemented to ensure a sufficient degree of transparency while at the same, not compromising the dignity of individuals.
- 10.2. The Respondent is to provide the Commission with a report setting out its progress in respect of the implementation of the abovementioned allegations **within 6 (six) months** of the date of receipt of the Commission's report. Such report is to include:
- 10.2.1. Steps taken towards implementing recommendations as set out above;
 - 10.2.2. Outstanding recommendations and applicable timeframes for implementation thereof; and
 - 10.2.3. Any shortcomings which may have become evident and the measures to be put in place to address same, together with applicable time frames.

10. APPEAL

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

Private Bag X2700
Houghton
2041

Signed on the 8th day of April 2014
South African Human Rights Commission



COMPLAINT NO: Limpopo/1213/0181

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Complaint No: **LP/1213/0181**

Hendrik Matsekoleng

Complainant

and

Department of Health and Social Development, Limpopo Province

Respondent

INVESTIGATIVE REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as “the Commission”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”).
- 1.2. In terms of section 184 (1) of the Constitution, the Commission is specifically mandated to:
 - 1.2.1. Promote respect for human rights and a culture of human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights; and
 - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Furthermore, section 184(2) affords the Commission authority to undertake research and education activities together with the duty to investigate and report on the observance of human rights. These duties contribute to and enhance the exercise of its authority in terms of section 184(2)(b) to take appropriate steps to secure redress where human rights have been violated.
- 1.5. The Human Rights Commission Act¹ (hereinafter referred to as “the HRC Act”), further supplements the powers of the Commission to fulfil its constitutional mandate.

2. Nature of Complaint

- 2.1. On the 16th of November 2012, the Commission received a complaint from the Complainant alleging that the Respondent had violated his niece’s² constitutional right to family care, as set out in section 28 of the Constitution.
- 2.2. The Complainant alleged that by removing the minor child from the care of her grandparents without following proper procedure, the Respondent was in contravention of not only section 28 of the Constitution, but also the Children’s Act³

¹ 40 of 2013.

² Hereafter referred to as the minor child.

³ 38 of 2005.

3. The Parties

- 3.1. The Complainant is Mr Hendrik Motsoeleng, an adult male residing at Ga-Masemola under the Sekhukhune District Municipality, Limpopo Province.⁴ The Complainant is the uncle of the minor child in question.
- 3.2. The Respondent is the Provincial Department of Health and Social Development,⁵ appointed in terms of section 132 (2) of the Constitution.

4. Preliminary Assessment

- 4.1. A preliminary assessment on receipt of this matter was informed by a consideration of the legal framework detailed below. A consideration of the rights which are alleged to have been violated in terms of the framework governed largely by the Constitution and the Children's Act, indicated a *prima facie* violation of the right to family care of the minor child.
- 4.2. Section 28(1)(b) of the Constitution determines that every child has the right to family care or parental care: or to appropriate alternative care when removed from the family environment.
- 4.3. In addition, section 151 of the Children's Act states that a presiding officer, on evidence that a child who resides in the area of the children's court concerned is in need of care and protection, must order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation. The Presiding officer may also issue an order that the child be placed in temporary safe care if it appears that it is necessary for the safety and well-being of the child.
- 4.4. As a result of the aforesaid, the Commission proceeded with the investigation as the information assessed constituted a *prima facie* violation of the section 28 of the Constitution.

5. Steps taken by the Commission

- 5.1. The Commission interviewed the Complainant in respect of the alleged allegations, and requested an urgent report from the Respondent in order to further assess the matter.
- 5.2. The Commission further met with Ms. Manamela on the 8th of March 2013 to establish the facts of this matter.
- 5.3. In the course of the interview with the Respondent, the Respondent furnished the Commission with a copy of a court order in respect of the removal of the child

6. Response by the Respondent

- 6.1. The Commission was informed that on the 18th of July 2012, the minor child approached the designated social worker to inform her of her living conditions. She indicated to the social worker that she was living with her "grandparents" as her mother was deceased. She further indicated that she needed help as her circumstances were akin to neglect and abuse.

.....
⁴ Hereafter referred to as the Complainant.

⁵ Hereafter referred to as the Respondent.

- 6.2. Upon receiving this information, the designated social worker conducted a further interview with the minor child's school principal, who corroborated the information provided by the child. The social worker also determined that the grandparents were not blood-relatives of the minor child.
- 6.3. The Respondent proceeded to remove the child based on her findings as set out in section 150 of the Children's Act. She then approached the home of the minor child to remove the child from her home, pending a full investigation into her circumstances.
- 6.4. The social worker obtained a court order to confirm the removal on the 19th of July 2012. The child was subsequently placed in a place of safety pending further investigation by the Respondent into this matter.

7. Legal Framework

7.1. International law

7.1.1. The United Nations Convention on the Rights of the Child

The UNCRC determines that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. Article 9 states as follows:

States Parties shall ensure that a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Although the UNCRC only refers to the removal of the child from his or her parents, the key element of this article is that such removal may be necessitated should the child be in an environment detrimental to his or her wellbeing.

South Africa ratified the UNCRC on 16 June 1995.

7.1.2. The African Charter on the Rights and Welfare of the Child⁶

7.1.2.1. South Africa is also a signatory to the ACRWC, a regional commitment advancing the rights of children in Africa. The ACRWC recognises that the child should grow up in a family environment in an atmosphere of happiness, love and understanding. Section 18 and 19 of the ACRWC reiterates the abovementioned principles within the UNCRC, and states that no child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child. South Africa ratified the Act in 2000. It is bound to honour its obligations in terms of the Charter.

⁶ Hereafter referred to as the ACRWC.

7.1.3. The Constitution⁷

The Constitution recognises that children are particularly vulnerable to violations of their rights and that they have specific and unique interests. Over and above the specific recognition afforded to children in section 28 children are also entitled to the general protections afforded to everyone by the Constitution. They are therefore equal holders of rights extending beyond section 28 of the Bill of Rights, including the right to life, human dignity, equality as well as freedom and security of person.

Section 28 of the Constitution states the following:

1. Every child has the right:
 - b. to family care or parental care/ or to appropriate alternative care when removed from the family environment;
 - d. to be protected from maltreatment neglect abuse or degradation;
2. A child's best interests are of paramount importance in every matter concerning the child.

7.1.4. Domestic legislation

7.1.4.1. The Children's Act⁸

The object of the Children's Act is to give effect to the constitutional rights of children. This includes the giving of effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic. The objects also include the making of provision for structures/ services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children.

Chapter 9 of the Children's Act provides safeguards to the child should said child be found to be in need of care and protection. Section 150 of the Children's Act determines that a child is in need of care and protection when:

- (1) A child is in need of care and protection if, the child-
 - (a) has been abandoned or orphaned and is without any visible means of support;
 - (b) displays behaviour which cannot be controlled by the parent or care-giver;
 - (c) lives or works on the streets or begs for a living;
 - (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
 - (e) has been exploited or lives in circumstances that expose the child to exploitation;

⁷ 108 of 1996.

⁸ 38 of 2005.

(f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;

(g) may be at risk if returned to the custody of the parent; guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;

(h) is in a state of physical or mental neglect; or

(i) is being maltreated, abused; deliberately neglected or degraded by a parent a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

The Children's Act also further determines that where it appears on evidence, and under oath before a presiding officer of a children's court that a child who resides in the area of the children's court concerned is in need of care and protection, the presiding officer must order an investigation of the circumstances of the child, and may order that the child be removed from his or her home should it appear that said removal is necessary for the safety and well-being of the child.

7.2 Case Law

7.2.1. *C and Others v Department of Health and Social Development, Gauteng and Others*⁹

This matter concerns the confirmation of a declaration of constitutional invalidity of sections 151 and 152 of the Children's Act. More precisely, this case concerns the constitutionality of the statutory framework for the removal of children from their family environment. In a judgment written for the majority of the Constitutional Court, Yacoob J found that the relevant provisions in the Children's Act were aimed at catering for the best interests of children in an effort to comply with the Constitution. However, the Constitutional Court held that the laws did not provide sufficient safeguards for circumstances where a social worker or a police officer removed children wrongly or where the Children's Court makes an order on incorrect evidence. The provisions were accordingly found to be inconsistent with the Constitution. Yacoob J concluded that the appropriate remedy was to read into the provisions a requirement that all these removals should be automatically reviewed by the Children's Court shortly after the removals had taken place.¹⁰

8. Legal Analysis

8.1. Section 152 of the Children's Act determines the following:

- (1) A designated social worker or a police official may remove a child and place the child in temporary safe care without a court order if there are reasonable grounds for believing-

⁹ 2012 (2) SA 208 (CC).

¹⁰ See <http://www.saflii.org/za/cases/ZACC/2012/1media.pdf>.

(a) that the child-

(i) is in need of care and protection; and

(ii) needs immediate emergency protection;

(b) that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being; and

(c) that the removal of the child from his or her home environment is the best way to secure that child's safety and well-being.

8.2 Removal of the child without a court order is therefore sanctioned by the Children's Act; with the caveat that the caregiver of the child must be informed within 24 hours of removal, and, that the relevant court be informed not later than the next court day.

8.3. In *Du Toit and Another v Minister of Welfare and Population Development and Others*¹¹ the Constitutional Court held that

"[i]t is clear from section 28(1)(b) that the Constitution recognises that family life is important to the well-being of all children"

8.4. Furthermore, in *S v M*,¹² it emphasised "the importance of maintaining the integrity of family care".

8.5. The Court in *C and Others v Department of Health and Social Development, Gauteng and Others* nevertheless indicated that the serious circumstances described in the definition of a "child in need of care and protection", in section 150 of the Children's Act, testify to the importance of affording the state the power and procedures to remove children from the family environment to ensure their care and protection.

8.6. Although the removal may therefore be perceived as an infringement on the child's right to family care, it is counterbalanced by the rights of the child not to be abused and neglected.¹³

8.7. The right to parental care or family care however, and as set out in *C and Others v Department of Health and Social Development, Gauteng and Others*, requires that the removal of children from the family environment must be mitigated. The requirements that the removal be subject to automatic review and that all interested parties be given an opportunity to be heard are "essential safeguards of the best interests of the child."¹⁴

8.8. From the facts before the Commission, it is clear that the designated social worker followed proper procedure in respect of the removal of the child. The court order dated 19 July 2012 also indicated that the court confirmed the removal within less than 24 hours thereof.

¹¹ *Du Toit and Another v Minister of Welfare and Population Development and Others* (Lesbian and Gay Equality Project as Amicus Curiae) [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).

¹² *S v M* (Centre for Child law as Amicus Curiae) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

¹³ As determined by s 28(1)(d) of the Constitution.

¹⁴ See par 34 of **C and Others v Department of Health and Social Development, Gauteng and Others**.

- 8.9. The designated social worker further informed the caregivers of the details of the placement of child, in order for them to be able to check on her wellbeing pending the investigation. The caregivers were also informed of their right to have the decision of the removal reviewed. The importance of providing the caregivers with an opportunity to contest the removal, as set out in *C and Others v Department of Health and Social Development; Gauteng and Others*, cannot be refuted.
- 8.10. In the final analysis the finding of the Commission is that proper processes was followed by the designated social worker in respect of the removal of the child, and no violation on the part of the Respondent is established in this matter

9. Findings

- 9.1. Against the background of the above the Commission makes the following findings:
- 9.1.1. That the designated social worker removed the child in line with processes set out by the Children's Act;
 - 9.1.2. That a court order confirmed the removal of the child based on the child being in need of care and protection; and
 - 9.1.3. Having considered the above, the Commission makes no adverse findings against the Respondent in this matter.

10. Appeal

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

**Private Bag X2700
Houghton
2041**

South African Human Rights Commission



COMPLAINT NO: Northern Cape/1213/0105

South African Human Rights Commission Report

Complaint No: NC/1213/0105

In the matter between

Senobia Booysen

On behalf of the Residents of Cilliers Informal Settlement

Complainant

And

Khai Garib Municipality

Respondent

REPORT

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as the “commission”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as “the Constitution”).
- 1.2. The Commission is specifically required to:
 - 1.2.1. Promote respect for human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights;
 - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Section 184 (2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.4. The Human Rights Commission Act, 54 of 1994, provides an enabling framework for the powers of the Commission.
- 1.5. Section 9 (6) of the Human Rights Commission Act, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. Parties

- 2.1. The complainant in this matter is Senobia Booysen on behalf of the residents of the Cilliers informal settlement (hereinafter referred to as “Complainant”).
- 2.2. The Respondent is Khai Garib Municipality, a municipality established in Terms of the provisions of the Local Government Municipal Structures Act, 117 of 1998, situated in Kakamas (hereinafter referred to as the “Respondent”).

3. Background to the Complaint

- 3.1. On 16th November 2012, the Northern Cape Provincial Office of the Commission received a complaint from the Complainant.
- 3.2. The Complainant is acting in her representative capacity on behalf of the residents of Cilliers informal settlement.

- 3.3. In her complaint, the Complainant alleged that the community of Cilliers had been without water supply and the Respondent fails to address the problem, notwithstanding having been made aware of the plight.
- 3.4. The Complainant further alleges that there are no adequate sanitation facilities in place and that they have to relieve themselves in the veldt.
- 3.5. The Complainant further complained that:
 - 3.5.1. In failing to address the water crisis the Respondent was in violation of the constitutional rights of the residents of Cilliers to enjoy access to adequate supply of water;
 - 3.5.2. That the current supply of water is inadequate;
 - 3.5.3. That on several instances the Complainant discussed the issue with the Respondent in an attempt to resolving same, but to date the issue still stands as the Respondent keeps making empty promises;
 - 3.5.4. That the Respondent has to date failed and/or refused to provide the Complainant residents of Cilliers with information, adequate or at all, on the steps that the Respondent's has taken to address the water supply challenges.

4. Preliminary Assessment

- 4.1. The Northern Cape Provincial Office made a preliminary assessment of the complaint that:
 - 4.1.1. The alleged complaint constituted prima facie violation of the following provisions of the Constitution:
 - Section 27 (1) (b) – water
 - Section 10 – dignity
 - Section 32 (1) (a) and (b) – Access to information
 - 4.1.2. The alleged violations fall within the mandate and jurisdiction of the South African Human Rights Commission.

5. Steps taken by the SAHRC

In investigating the alleged violation, the methodology used by the Commission, involved a combination of techniques, namely:

- Interviews with the residents;
- Correspondence with the Respondent;
- Inspection in loco in the area concerned.

5.1. Interview with Residents

- 5.1.1. The investigator conducted several interviews with local residents on 23rd November 2012.
- 5.1.2. During the interviews with the residents, some interviewees informed that:
 - Cilliers has about 200 households which comprises also Bourandt;

- The residents alleged that they have been living in Cilliers since 1999;
- The water shortage problem in the area is long standing since 1999 and notwithstanding the Respondent being fully aware of the problem, the Respondent fails and/or neglects to attend to the problem;
- That one JoJo tank was provided/installed to provide water but that the tank is refilled every three weeks;
- The water flow from the tank comes for only every five minutes in the morning;
- The water supply is inadequate as the tank is soon empty immediately after they have been refilled during the day and the people that are normally at work come back to an empty water tank in the evening;
- Due to the inadequate water supply and the fact that the water tank is only refilled every three weeks, the residents often have to go for days without water;
- In most instances they have to walk at least three kilometres into the nearby farms to get water from the dirty canal;
- Children of school going age often times arrive late at school because they have to travel long distances to fetch water from the canal;
- The elderly, sick and people with disabilities have to spend what little money they have in hiring people to fetch water for them;
- In meetings held with the Respondent and ward councillors they made empty promises about solving the water crisis;
- That the residents are not informed about proposed projects for water and sanitation plans and that they are not consulted on budget forecasting in these matters.
- Furthermore, the interview with the residents revealed that there are no sanitation facilities in the area and that they have to relief themselves in the veldt;
- That due to the lack of proper toilets women, children, the elderly and persons with disabilities have to walk at least two kilometres into the veldt at night to relief themselves.

5.2. Correspondence with the Respondent

- 5.2.1. The Commission sent an allegation letter to the Respondent on 2nd February 2013 and requested a written response to the allegation.

5.3. Inspection *in loco*

- 5.3.1. On 23rd November 2012, the Northern Cape Provincial Investigator visited Cilliers, to inspect the reported water and sanitation crisis and the following observations were noted:

- 5.3.1.1. Cilliers is an informal settlement.
- 5.3.1.2. The community is vastly unemployed and living in desperate conditions.
- 5.3.1.3. There are gravel roads and no street lights.
- 5.3.1.4. The houses are mostly shacks¹ made of a combination of straw and corrugated iron.
- 5.3.1.5. Most residents are dependent on social security such as old age pensions, disability grants and children's grants.
- 5.3.1.6. The community is predominantly Afrikaans speaking.
- 5.3.1.7. The inspection revealed that there is indeed only one JoJo water tank and that the water supply is not sufficient to meet the domestic needs for cooking, cleaning and sanitation purposes.
- 5.3.1.8. In each of the shacks we have entered there was no toilet facility in place.
- 5.3.1.9. The distance from the shack to the nearest veldt was approximately two kilometres.
- 5.3.1.10. The distance from the shacks to the irrigation canal was three kilometres away.

6. Applicable legal framework

6.1. International Instruments

6.1.1. Universal Declaration of Human Rights (1948)²

The Universal Declaration, which is widely regarded as reflecting customary international law and thus being universally binding, recognises in Article 1 that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Article 25 of the Declaration states that

“(1) everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability or lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance”.

6.1.2. International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)³

Article 2 (1) explains the nature of the obligation resting on states parties with regard to the provision of socio-economic rights, highlighting that minimum core and progressive realisation are hallmarks of this obligation, while provision of the rights is subject to the state's available resources.

¹ 'Shack' refers to a dwelling constructed of a combination of corrugated iron, wood and plastic.

² 10 December 1948, 217 A (III).

³ 16 December 1966, United Nations, Treaty Series, Vol. 993, p3.

Article 11 enshrines the right of everyone to an adequate standard of living, which includes accessibility and availability of adequate housing, food and clothing. The right to water falls under this article as it guarantees an adequate standard of living; water is one of the fundamental conditions for survival.

While South Africa has not ratified the covenant, it is a signatory state, and the Government of South Africa can therefore not act in a manner that is contrary to the spirit of this covenant.

6.1.3. Convention on the Elimination of All Forms of Discrimination against Women (1979)⁴

Article 14 states that

“2) State parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ...

(h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”

6.1.4. Convention on the Rights of the Child (1989)⁵

Article 24 (1) of the Convention recognises “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”, and compels states parties to ensure access to such services and facilities. Article 24(2) obliges state parties to “combat disease and malnutrition... through provision of adequate nutritious food and clean drinking water.”

More generally, Article 27 enshrines “the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”. “This encompasses the necessary living conditions for the child’s development, as well as State support programmes with regard, inter alia, to housing”.

6.1.5. United Nations Committee on Economic, Social and Cultural Rights: General Comment No. 15 - The Right to Water (2002)

The committee gave content to the rights to water in the following manner;

“The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce risk of water - related disease and to provide for consumption, cooking, personal and domestic hygienic requirements”.

Significantly, the Committee emphasized that the right to water is a necessary requirement for the realisation of other human rights. Consequently although the right to water is not expressly enshrined in the core international human rights instruments, it is necessary for the provision of – and can therefore be derived from many of the rights contained therein.”

⁴ (1979) UN Doc. A/34/46.

⁵ 20 November 1989, United Nations, Treaty Series volume 1577, p. 3.

The Committee highlighted the fact that this right is enjoyed without discrimination, and that states parties must specifically ensure that traditionally disadvantaged and marginalised persons are empowered to exercise their right to water.

6.1.6. Convention on the Elimination of All Forms of Discrimination against Women (1979)⁶

“2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:...

(h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”.

6.1.7. United Nations General Assembly Resolution Recognizing Access to clean water and Sanitation (2010)⁷

The General Assembly adopted a resolution recognizing the right to water and calling on all states to provide safe, clean, accessible and affordable drinking water and sanitation for all.

It is notable that South Africa voted in favour of this Resolution.

6.2. Regional Instruments

6.2.1. The African Charter on Human and People’s Rights (1982)⁸

Article 5 of the Charter recognises the right of every individual “to the respect of the dignity inherent in a human being.”

South Africa has both signed and ratified the Charter and it is therefore directly binding on the State and all State institutions.

6.2.2. African Charter on the Rights and Welfare of the Child (1990)⁹

Article 14 of the Children’s Charter comprehensively sets out the right of all children to the enjoyment of the best attainable state of physical, mental and spiritual health, which includes the provision of necessary medical assistance and health care; adequate nutrition; safe drinking water and the integration of basic health service programmes into national development plans.

South Africa has both signed and ratified the Children’s Charter and it is therefore directly binding on the State and all State institutions.

6.3. Constitutional Framework

The Northern Cape Provincial Office determined that the following rights enshrined in the Constitution¹⁰ has been violated:

⁶ (1979) UN Doc. A/34/46.

⁷ (2010) Res/A/64/292.

⁸ 27 June 1981, CAB/LEG/67/3 rev. 5, 27 I.L.M58 (1982).

⁹ 11 July 1990, CAB/LEG/24.9/49 (1990).

¹⁰ Constitution of the Republic of South Africa 108 of 1996.

6.3.1. Foundational Values

Section 1(a) of the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and thereby forming the bedrock upon which the Constitution is based.

6.3.2. Obligation on the State

Section 7 (2) of the Constitution requires the State, in this matter the Respondent, to respect, protect, promote and fulfill the fundamental rights enshrined in the Bill of Rights.

6.3.3. The right to human dignity

Section 10 recognises the right of everyone to have their dignity respected and protected. A lack of access to water and decent sanitation, is inherently degrading, and undermines one's human dignity.

6.3.4. The right to access to information

Section 32 recognises that everyone has the right to access to information, both that which is held by the State and that held by another person which is required for the exercise or protection of any rights.

6.3.5. The right to access to water

Section 27 recognises the right of everyone to have access to sufficient water, which requires from the state to take reasonable and progressive measures, within its available resources, to achieve the progressive realisation thereof.

6.3.6. The Duties of the Municipality

Section 139 (1) provides that “[w]hen a municipality cannot or does not fulfill an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking appropriate steps to ensure fulfillment of that obligation, including -

- (a) *Issuing a directive to the municipal Council, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations, and*
- (b) *Assuming responsibility for the relevant obligation in that municipality to the extent necessary*
 - (i) *To maintain essential national standards or meet established minimum standards for the rendering of a service;*
 - (ii) *To prevent that Municipal Council from taking unreasonable action that is prejudicial to the interest of another municipality or to the province as a whole; or*
 - (iii) *Maintain economic unity...*

6.3.7. Local government responsibilities

Part B Schedule 4 of the Constitution stipulates that local government is responsible for “water and sanitation services limited to portable water supply systems and domestic waste and sewerage disposal”.

6.4. Domestic Legislation

6.4.1. Promotion of Access to Information Act 2 of 2000

This Act protects and uploads the rights of people to access information, and seeks to enhance the transparency, accountability and effectiveness of government. Public bodies are obliged to give information needed to the public in order to facilitate the process of enabling people to exercise the rights that are enshrined in the Constitution.

6.4.2. Water Services Act 108 of 1997

The Act defines basic water supply as the “*prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene*”.

Section 3 of the Act provides everyone has a right of access to basic water supply and basic sanitation. The provision establishes, inter alia, the following rights and obligations in respect of access to basic water supply and basic sanitation:

- Everyone has a right to basic water supply and basic sanitation.
- Every water services institution must take reasonable measures to realise these rights.

This is however qualified by Regulation 2 of the Regulation relating to Compulsory National Standards and Measures to conserve water.

Section 5 of the Act states that:

“If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them”.

6.4.3. Local Government: Municipal Systems Act 32 of 2000

The Act defines basic municipal services as:

“A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety of the environment”.

Section 73 (1) of the Act states that a municipality must give effect to the provisions of the Constitution and

- give priority to the basic needs of the local community;
- promote the development of the local community;
- and ensure that all members of the local community have access to at least the minimum level of basic municipal services.

Section 106 and 107 are relevant to the extent that they deal with provincial and national monitoring.

Section 106 provides that if a MEC has reason to believe that a municipality in the province cannot or does not perform a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must:

- *“By written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or*

- *If the MEC considers it necessary, designate a person or persons to investigate the matter”.*

Section 107 states that “[t]he Minister by notice in the Gazette, may require municipalities of any category or type specified in the notice, or of any other kind described by the notice, to submit to a specified national organ of state such information concerning their affairs as may be required in the notice, either at regular intervals or within a period as may be specified”.

6.4.4. Local Government: Municipal Finance Management Act 56 of 2003

Section 28(1) of the Act directs that municipalities may revise and approve their annual budget through an adjustment budget.

Section 27 (5) is also relevant to that extent that it permits provincial executives to intervene in terms of Section 139 of the Constitution if a municipality cannot or does not comply with the provisions of Chapter Four of the Act.

6.4.5. Applicable Regulatory Framework

Regulations relating to Compulsory National Standards and Measures to Conserve Water¹¹

- *“[T]he provision of appropriate health and hygiene education; and*
- *a toilet that “is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, is well ventilated keeps smell to a minimum and prevents the entry and exit of flies and other disease-carrying pests”.*

In terms of Regulation 3, a municipality is obliged to provide each resident with access to at least 25 litres per day at a water user connection within 200 meters of each of the resident’s households.

6.5. Applicable Policy Framework

6.5.1. White Paper on Water

Governments white paper entitled “Water is Life, Sanitation is Dignity” articulates governments commitment to the provision of at least a basic water and sanitation service to all people living in South Africa. It states further that the provision of water and sanitation remains an important policy concern. The government is also committed to reducing the backlog services in 2008 in the case of water and 2010 in the case of sanitation. The policy of free basic water and sanitation services means that everybody in South Africa has a right to a basic amount of water and basic sanitation service that is affordable.

6.5.2. National Sanitation Policy¹²

The National Sanitation Policy defines sanitation as “*the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact on users, operators and the environment*”.

The policy lists the main types of sanitation systems used in South Africa, namely

¹¹ Published under GN R509 in GG 22355 of 8 June 2001.

¹² Department of Water Affairs and Forestry, 1996

- Bucket toilets;
- Portable chemical toilets;
- Ventilated improved pit toilets
- Low flow on-site sanitation;
- Septic tanks and soak-a ways;
- Septic tanks effluent drainage systems; and
- Full water-borne sewerage.

6.5.3. White paper on Basic Household Sanitation¹³

According to the 2001 White Paper on Basic House Hold Sanitation, the Department of Water Affairs and Forestry had the following responsibilities, together with other national role-players:

- Developing norms and standards for the provision of Sanitation;
- Providing support to the provinces and municipalities in the planning and implementation sanitation improvement programmes;
- Coordinating the development by the municipalities of their water services Development Plans as a component of their Integrated Development Plan;
- Monitoring the outcome of such programmes and maintaining a database of sanitation requirements and interventions;
- Providing capacity building support to provinces and municipalities in matters relating to sanitation;
- Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
- Undertaking pilot projects in programmes of low cost sanitation.

6.6. Applicable Strategic framework

6.6.1. The Strategic Framework for Water Services¹⁴

This framework defines a basic sanitation facility as:

“The infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases by facilitating the appropriate control of disease carrying flies and pests and enables safe and appropriate treatment and/or removal of human waste and waste water from the premises where this is appropriate and necessary and the communication of good sanitation, hygiene and related practices”.

6.6.2. Free Basic Sanitation Implementation Strategy¹⁵

According to this strategy, municipalities are required to ensure that every household has access to basic sanitation, as per the Constitution, Water Services Act and the Municipal

¹³ Department of Water Affairs and Forestry, 2001.

¹⁴ Department of Water Affairs and Forestry, (2003).

¹⁵ Department of Water Affairs and Forestry, App. 2009.

Systems Act. It acknowledges that there is a “right of access to a basic level of sanitation service” enshrined in the Constitution.

6.6.3. The Upgrading of Informal Settlements Programme¹⁶

This programme is published in terms of section 3 (4) (g) of the Housing Act and contained in the National Housing Code, as was established by the Department of Housing in 2004 as part of its Breaking New Ground Policy Document. The broad objectives of the programme are to facilitate access to basic services, transform communities through upgrading and to engender local economic development through the improvements in infrastructure.

6.7. Case Law

6.7.1. The right to Human dignity

S v Makwanyane and Another 1995 (3) SA 391 (CC)

In this case the Constitutional court, when dealing with the Constitutionality of the death penalty, observed as follows:

“Respect for the dignity of all human beings is particularly important in South Africa for apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution”.

NM and Others v Smith and Others 2007 (5) SA 250 (cc)

In this matter, dealing with an alleged violation of the claimants’ dignity, the Constitutional Court held that “[a] constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – restoration of human dignity, equality and freedom”.

The court held further that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. In this regards, reference was made to the following dictum from the matter of Dawood¹⁷ and Thomas:

“The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the Constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading

¹⁶ Breaking new Ground Policy Document, Dept. of Housing, 2004.

¹⁷ Dawood and Another v Minister of Home Affairs and Others.

*way and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations clause. Section 10, however, makes it clear that dignity is not only a value that is fundamental to our Constitution; it is a justifiable and enforceable right that must be protected and respected.*¹⁸

6.7.2. Socio-economic rights and the provision of services generally

Government of the Republic of South Africa and others v Grootboom and Others 2001 (1) SA 46 (CC)

This matter was the first in which the Constitutional Court thoroughly addressed, interpreted and applied the constitutional right to housing and is of wider relevance with regard to the provision of all socio-economic rights.

The court held that the determination of minimum core which constitutes the states obligations in respect of a particular right cannot be done without assessing the needs and opportunities for the enjoyment of that right, which will vary in different areas due to the prevalence or absence of relevant factors. As the court does not have access to sufficient information upon which to make the determination as to what constitutes a minimum core, it is held that it will be unable to do so. Rather, the appropriate question in the South African context is “whether the measures taken by the state to realise the [socio-economic right concerned] are reasonable”.

In assessing reasonableness, the particular context of the policy under consideration must be taken into account in order to determine the capacity of the implementing entities. Furthermore, the context of the Bill of Rights as a whole is relevant, in particular the interconnectedness of the social economic right concerned and other rights therein in light of the foundational principles including human dignity.

Moreover, the court held that legislative measures adopted by the government must be supported by policies, while the programmes adopted must be reasonable “both in their conception and implementation”. The court also held that reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise and significantly for the complaint under consideration, do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights is most in peril.

6.7.3. Joseph and Others v City of Johannesburg and others 2010 (4) SA 55 (CC)

In this matter the Constitutional court read section 152 and 153 of the Constitution alongside the provisions of the Municipal Systems Act and the Housing Act to find that a “public law right to basic municipal services” existed, which imposed a duty on local government to provide such services.

6.7.4. Right to access to water

Mazibuko and Others v The City of Johannesburg and Others 2010 (4) SA 1 CC

In this case the Constitutional Court assessed, interpreted and applied the right of access to sufficient water as enshrined in section 17(1) b of the Constitution.

¹⁸ Thomas and Another v Minister of Home Affairs and Others 2000 (30 SA 936 (CC) para 35.

The Court first outlined the content of the right of access to sufficient water in section 27(1)(b), and held that the constitutional provision in which it is enshrined must be read alongside the qualification of the State's obligation in that regard as set out in section 27(2). Consequently, *"it is clear that the right does not require the State upon demand to provide every person with sufficient water without more; rather it requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources"*.

However, the Court itself is not well-placed to determine the actual quantity of water required to meet the State's obligations in this regard; in any event, any such quantification would be too static to constitute sufficient protection of the right. The argument for a quantification of the right to water therefore failed. Rather, the test for whether the State has met its obligations is focused on the reasonableness of its conduct.

7. Legal Analysis

7.1. Right to Water

- 7.1.1. Water is one of the most important substances on earth. All the living beings must have water to survive. Water is life, a commodity people cannot live without.
- 7.1.2. The inspection in loco of the affected area in the informal settlement undertaken by the Commission revealed that the allegations made by the Complainant were indeed accurate. Interviews conducted with residents further confirmed the allegations made by the complainant.
- 7.1.3. Section 27 (1) (b) of the Constitution provides that "everyone has the right to have access to sufficient water", and section 27 (2) obliges that state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of "everyone's right of access to sufficient water". The above sections are particularly relevant in the context of the present complaint.
- 7.1.4. In terms of Section 84 of the Municipal Structures Act, the responsibility for providing water and sanitation services in South Africa rests with municipalities. However, the Act allows the Minister of Provincial and Local Government Affairs to authorise a local municipality to perform these functions or exercise these powers.
- 7.1.5. The Respondent failed to discharge its primary responsibility for provision of water services to the local municipality.
- 7.1.6. The Commission submits that the Respondent violated the right to human dignity by not providing the residents of Cilliers with sufficient water and decent sanitation.
- 7.1.7. It is the case of the complainant that the residents of Cilliers have not had an effective or reliable supply of fresh drinking water since 1999. Furthermore on find alternative means of addressing sanitation needs, one of those being relieving themselves in the veldt day and night.
- 7.1.8. The investigation conducted by the Commission and the inspection in loco revealed that indeed there has not been running water and sanitation facilities

since 1999 and that despite numerous meetings which they have had with the municipality, nothing has been done in this matter.

7.2. Right to Dignity

- 7.2.1. The former Constitutional court judge, Albie Sachs, in arguing that the right to dignity is of central significance states:

“Respect for human dignity is the unifying constitutional principle that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists, not to simply ensure that the “haves” continue in which the basic dignity of the “have nots” can be secured”.

- 7.2.2. Notwithstanding that there has been one water tank, the water supply is still inadequate and on the day of the inspection the tank was empty. Furthermore, the residents revealed that they have to walk a distance of at least two kilometres in order to access water and the length of time over which they have been forced to make do without a daily supply of water is unacceptable.

- 7.2.3. Also by forcing the people to relieve themselves in the veldt, their right to dignity are being gravely infringed. It was reported that women and the vulnerable groups such as the disabled and elderly have to bear the constant risk of being attacked at night when walking into the veldt. This was based on sporadic incidences of violence which had occurred in these instances. It is therefore the finding of the Commission that the failure of the Respondent to provide proper sanitation violates the dignity of the residents who are being forced to sit behind the bushes to relief themselves.

- 7.2.4. In this instance the Celliers informal settlement, like many other such areas, invariably bears the brunt of the legacy of apartheid, under developed, under resourced. In Mason do¹⁹, O’Reagan J, with respect aptly put it as follows:

“[57] The legacy of apartheid era therefore is that our towns are deeply divided. Eight years²⁰ after the dawn of the democratic era, this remains so. There is much to be done to achieve the constitutional vision of a society in which the divisions of the past²¹ have to be healed. The unjust and unequal allocation of resources over decades, indeed centuries, means that those who live in formerly white suburbs generally have better services and conditions of as a matter of fact, largely occupied by black people. These disparities were graphically captured by Kriegler J in his judgment in Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council²² as follows:

“The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the costs of black urban areas. The results are tragic and absurd; sprawling black townships with hardly a tree in sight, flanked by a vanguard of informal settlements and guarded by towering floodlights, out of stone throws reach. Even if only short

¹⁹ 2003 (2) SA 413.

²⁰ Now eighteen years (my comment).

²¹ Preamble to the Constitution.

²² 1999 (1) SA 374 (CC) at 417 B-C.

distance away, nestled amidst trees and water and birds and tarred roads and paved sidewalks and streetlight suburbs and parks, and running water, and convenient electrical amenities...we find white suburbia”.

The present complaint must be seen in the backdrop of the said realities eloquently captured herein above.

7.3. Access to Information

- 7.3.1. On the basis of the interviews with the residents it was established that despite meetings that had been requested by them with the Respondent, those meetings either never occurred and when they do, the Respondent failed to give the residents a clear direction on delivery of water and sanitation services.
- 7.3.2. With regard to the duty of the Respondent in service provision, the Commission observes that the principles of active participation, social cohesion and community empowerment are key principles to the work of the Respondent. It is therefore for the Respondent to demonstrate that effective and interactive community participation took place. The community must be engaged in the planning, implementation and evaluation of projects in the affected area.
- 7.3.3. In this regard, the residents suggested that ward councillors are ineffective and do not take their complaints seriously and makes empty promises and that they doubt whether project planning, if at all is transparent.
- 7.3.4. Furthermore the residents are not adequately consulted, thus the Respondent has no clear insight into the community’s needs and thus fail to respond accordingly.
- 7.3.5. In terms of the MFMA, a municipality must consult communities and present the budget available to undertake specific projects. The budget must be presented through the MTEF process, where there is an agreement as to how the municipality intends to deal with water shortages and inadequate sanitation services. The fact that the residents unsuccessfully attempted to acquire information from the Respondent is an indication that the Respondent does not consult with the communities on service delivery and corresponding time frames.
- 7.3.6. Access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives. The Commission has considered the Respondent’s compliance or lack thereof with the Promotion of Access to Information Act (PAIA), a law of national application which facilitates information sharing in the country and is meant to promote public participation.
- 7.3.7. PAIA obliges the Respondent to avail information about its decisions relating to all aspects of the process of service delivery projects, including tenders and the means through which the community can access the information the Respondent holds. In this sense, people are not consulted on any prospects of short term plans for water supply and sanitation or either whether it was budgeted for and for which financial year.
- 7.3.8. Based on the Respondent’s failure to share information and consult with the residents of Cilliers, the Commission finds that the Respondent violates the right to access to information of the residents of the affected area.

7.4. Duties of Municipality

- 7.4.1. It is common cause that the respondent is responsible for the implementation and administration of “the Water Services Act” and its regulations and the National Water Act 36 of 1998 and its regulations. It is further common cause that the respondent, as local government, are responsible to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment.
- 7.4.2. This entails, *inter alia*, that within its available resources, a municipality should strive towards improving the quality of life of its community.²³ Municipalities are also duty bound to be responsive to the needs of their communities.²⁴
- 7.4.3. National and provincial government departments have a clear responsibility to ensure that municipalities meet their obligations. It is incumbent upon both provincial and national departments to monitor and intervene, if necessary, in the work of local government structures, thus exercising closer monitoring of the work of the Respondent.
- 7.4.4. It is the submission of the SAHRC that the respondent must strive to resolve as speedily as possible the water and sanitation problem in the Cilliers informal settlement. It must equally have a progressive plan to achieve this objective and must engage and inform the community of the steps and progress of doing so. The respondent is accountable to the community.

8. Findings

Based on the analysis of the Constitutional rights, case law and applicable legislation, the Commission finds that:

8.1. Right to water

The SAHRC find that the Respondent has violated the rights of the residents in that the Respondent has failed/and or neglected to take reasonable steps to provide the residents access to water for domestic purposes;

8.2. Right to human dignity

The SAHRC finds that the Respondent by failing/neglecting the facilitation of the provision for relief such as potable water which resulted in residents having to walk two to three kilometres everyday be left without water to cook, cleaning and sanitation purposes, has violated the rights of the residents to human dignity.

8.3. Right of access to information

The lack of effective communication between the Respondent and the community and the inability to disseminate information about plans to ameliorate their access to basic water services and general lack of information upholds the complaint of a violation of the right to access to information.

²³

²⁴ Vide s 6(2)(a) of Local Government Municipal Systems Act, 32 of 2000.

9. Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to “*make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution*”.

The Commission recommends accordingly that:

1. The Respondent is required to ensure that the community of Cilliers informal settlement has sufficient access to clean water within 48 hours, thereby enabling people to have their rights to dignity restored.
2. The respondent is required to provide the Commission with measures that they have taken to ensure that the community of the Cilliers informal settlement has decent sanitation facilities, thus enabling the people to have their dignity restored.
3. The Respondent should furnish the Commission with a progress report as least every six (6) months from the date of this finding of their progress made in this regards, in respect of the progressive realisation of the right to sanitation and water in the Cilliers informal settlement.
4. The report to the Commission must demonstrate the implementation and budgetary plans; as well as immediate interim measures for the provision of safe and clean water and adequate toilets for the residents.

10. Appeal

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of receipt of this finding, by writing to:

**Private Bag X2700
Houghton
2041**

South African Human Rights Commission



South African Human Rights Commission
Private Bag X2700
Houghton
2041