



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

REF: NW/2021/0157

SHEILA TSELAPEDI	First Applicant
TEBOGO CHAANE	Second Applicant
and	
PELONOMI DIEMENG	First Respondent
AGNES MOHANYEHANYE	Second Respondent
SELLOANE MARETELA	Third Respondent
ZANELE LAWU	Fourth Respondent
AGNES SEBE	Fifth Respondent
BOITUMELO DITLHOKWA	Sixth Respondent
TSHOLOFELO MOOKETSI	Seventh Respondent
LEBOGANG DITIRE	Eighth Respondent

FINAL INVESTIGATIVE REPORT

INTRODUCTION AND MANDATE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

1. This is a final investigative report in respect of the South African Human Rights Commission's ("the Commission") investigation into the allegations of infringement of the Complainants' right to dignity.
2. The Commission is an independent State institution established in terms of section 181 of the Constitution of the Republic of South Africa of 1996 ("the Constitution") to strengthen constitutional democracy. In terms of section 184(1) of the Constitution, the Commission is mandated to:
 - 2.1 promote respect for human rights and a culture of human rights;
 - 2.2 promote the protection, development and attainment of human rights; and
 - 2.3 monitor and assess the observance of human rights in the Republic.
3. The Commission is empowered, in terms of section 184(2)(a) and (b) of the Constitution, 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.
4. The Commission has additional powers in terms of legislation, including the South African Human Rights Commission Act 40 of 2013 ("SAHRC Act"). Further, the Commission follows the procedures set out in the South African Human Rights Commission Complaints Handling Procedures in investigating human rights violations.

BACKGROUND TO THE INVESTIGATION

5. On 04 December 2020, the Commission received a complaint from Ms Sheila Tselapedi and Mr Tebogo Chaane (“the Complainants”) concerning allegations of human rights violations. Briefly, the Complainants allege that:

5.1 On 23 November 2020, there was an unprotected protest at the building of the North West Provincial Legislature by the members of the National Education, Health and Allied Workers Union

5.2 The Respondents were part of the aforementioned protest.

5.3 The Respondents sang derogatory and offensive songs directed at the Complainants, including referring to the genitals of the Complainants’ mothers. These songs were sung in two separate videos in both isiZulu and seTswana.

5.4 The utterances in the first video referring to the First Complainant included the following words:

“Ke Sheila mosono wa mmahe, A nnywana. Hona jwale nkabe ke le moshomong waka, ka nne te masenyeletsa”.

English translation:

“Sheila, your mother’s pussy. You pussy. Right now, we should be at work, but because of you, we are not at work. Truly you are sabotaging us.”

5.5 The utterances in the second video referring to the Second Complainant included the following words:

“Chaane wee skeberesh, khuluma msono wa ka Nyoko. Ba mo nyobile, o rata nnywana.”

English translation:

“Chaane, you are a bitch. Talk you mother’s puss. They have fucked you, and you like pussy”

6. The Commission initiated an investigation in terms of section 13(3) of the SAHRC Act, which empowers the Commission to investigate any alleged human rights violation on receipt of a complaint.

THE PARTIES

7. The First Complainant is Mosetsanagape Sheila Tselapedi, an adult female employed at the North West Provincial Legislature in Mmabatho.
8. The Second Complainant is Tebogo Chaane, an adult male employed at the North West Provincial Legislature in Mmabatho.
9. The First to the Eight Respondents ("**Respondents**") are employed at the North West Provincial Legislature and the members of the National Education, Health and Allied Workers Union ("NEHAWU")

SCOPE OF THE COMMISSION'S INVESTIGATION

10. The Commission's investigation sought to probe whether the Respondents' conduct violated the Complainants' right to human dignity.
11. The Commission's investigation also sought to explore whether or not the language used during the protest constituted an expression protected in section 16(1) of the Constitution.

STEPS TAKEN BY THE COMMISSION IN CONDUCTING ITS INVESTIGATION

12. The Commission undertook the following steps to investigate the matter:
 - 12.1 On 15 April 2021, the Commission initiated an investigation into the allegations raised by the Complainants by sending an allegations letter for the Respondents' responses. On the aforesaid allegations letter, the Respondents were invited to participate in a mediation process in terms of

section 14 of the SAHRC Act, in an attempt to resolve the dispute. The investigation was initially against thirteen (13) Respondents.

12.2 On 23 April 2021, the Commission received a letter from the Respondents' representatives, NEHAWU. In the letter, NEHAWU confirmed that they represent the Respondents. Furthermore, NEHAWU requested a seven (7) day indulgence to respond to the allegations, copies of the video recordings of the protest, and the mediation terms of reference.

12.3 On 11 May 2021, the Commission responded to NEHAWU fully and provided them with the requested video recordings.

12.4 On 17 May 2021, another letter was received from NEHAWU. Instead of responding to the allegations raised against its members, NEHAWU requested information that was already provided to it by the Commission, as follows:

13.4.1 a guarantee that the contents of the mediation will not be used in any other process except for the mediation;

13.4.2 the mediation terms of reference; and

13.4.3 video recordings of the protest.

12.5 On 18 May 2021, the Commission addressed a letter to NEHAWU confirming that all its queries were addressed in the Commission's letter dated 11 May 2021, and a request was made to the latter to provide an adequate response to the allegations raised.

12.6 Of the thirteen (13) Respondents, only five (5) Respondents managed to resolve the dispute with the Complainants through conciliation and mediation processes facilitated by the Commission. The five Respondents apologised profusely to the Complainants, both verbally and in writing. Consequently, only eight (8) Respondents remained.

12.7 On 26 May 2021, NEHAWU sent a letter to the Commission confirming the Respondents' willingness to participate in a mediation process but continued

to neglect and/or refuse to respond to the allegations against the Respondents. The Respondents' continued refusal to properly respond to the allegations raised resulted in the Complainants declining to participate in a mediation process with the eight (8) Respondents.

12.8 On 04 June 2021, an e-mail was received from NEHAWU advising that the Respondents deny the allegations of the infringement of the Complainants' human rights violation.

12.9 To assist the Commission in fully understanding the basis of the Respondents' denial, the Commission arranged a virtual meeting with the Respondents and NEHAWU on 28 June 2021. During the said meeting, it became apparent that there are material facts in dispute which could not assist the Commission then to make its findings on the matter. The Respondents alleged that:

12.9.1 The authenticity of the videos is questionable.

12.9.2 They are within their rights to protest and sing songs of any kind during protest action.

12.9.3 The songs sung during the protest were not directed to the Complainants.

12.9.4 The Complainants have a certain vendetta against specific members of NEHAWU, and, as evidence of this, certain members who appear in the videos were not included in the complaint.

12.9.5 There are Respondents mentioned in the complaint who do not appear in the videos.

12.9.6 This is an employer-employee dispute which should be resolved internally in line with the labour laws. Thus, the Commission does not have jurisdiction over the matter. Alternatively, the complaint was lodged prematurely with the Commission before exhausting all internal grievance processes.

- 12.10 The meeting was finalised on the basis that NEHAWU would provide the Commission with a list of Respondents who do not appear on the videos and a list of those members who were part of the protest songs but were not cited as Respondents.
- 12.11 On 09 May 2022 and in line with Section 15 of the SAHRC Act, the Commission issued a notice to the Respondents to appear before the Commission on 26 May 2022 to answer all the questions put to them regarding the matter.
- 12.12 The Respondents were provided with an opportunity to indicate by 10 May 2022 if the date proposed was suitable for them. There was no objection to the invitation nor the date proposed.
- 12.13 On the afternoon of 25 May 2022 (15:50), the Commission received correspondence from NEHAWU indicating that their members will not be available to appear before the Commission on the proposed date. The Commission responded to the correspondence from NEHAWU informing them that, regrettably, the Commission could not postpone the hearing. The Respondents were urged to be present at the hearing to make their oral presentations on the matter, as they had ample time to indicate their unavailability and that the Commission's officials were already in Mafikeng. The Commission received no response.
- 12.14 On 26 May 2022, the hearing proceeded with only the Second Respondent in attendance.

ISSUES TO BE DETERMINED

13. The issues for determination are as follows:

- 13.1 Whether the identified Respondents sang the songs in question.

- 13.2 Whether the songs sung by the Respondents during the protest amounted to a violation of the Complainants' right to human dignity in terms of section 10 of the Constitution.
- 13.3 Whether the Respondents' conduct is protected by the right to freedom of expression enshrined in section 16(1) of the Constitution.
- 13.4 In the event that the Respondent's conduct is not protected by section 16(1) of the Constitution, what would constitute an appropriate relief?

FACTUAL ANALYSIS

14. The main dispute of facts raised by the Respondents relates to the protest videos upon which the Complainants' complaint is based. As indicated above, the Respondents raised the following issues:
- 14.1 Some of the Respondents cited in the matter do not appear in the videos, and there are other individuals who do appear in the videos but were not cited as Respondents in the complaint lodged with the Commission.
- 14.2 The Commission did not take the necessary steps to verify the authenticity of the videos.
- 14.3 The songs sung during the protests were not directed at the Complainants.

The identities of the protestors

15. The Complainants' complaint is based on two videos showing the members of NEHAWU engaging in a protest by singing and dancing. On 25 May 2021, the Complainants individually identified to the Commission the respective Respondents as they appear in the videos singing and dancing.
16. At the Commission's meeting with the Respondent on 28 June 2021, NEHAWU acknowledged that some Respondents do not appear in the videos, whereas other Respondents do appear. Furthermore, they averred that certain individuals appeared in the videos but were not cited in the complaint. The Respondents failed

to provide the details of the individuals they dispute appearing on the videos, and vice versa, despite several requests for the aforementioned information. The Respondents were informed that should the Commission not receive the requested information, the Commission will make findings based on the information at its disposal.

17. The Respondents were provided ample time to respond fully to the allegations levelled against them, to provide sufficient information to the Commission on issues they were disputing, to appear before the Commission and make oral submissions regarding the allegations brought against them and to amicably resolve the matter with the Complainants. It was apparent during the Commission's investigation that the Respondents were wilfully refusing to cooperate with the Commission's investigation into the matter.

18. With regards to the Second Respondent, during her attendance at the Commission's hearing on 26 May 2022, she confirmed the authenticity of the video, her presence during the protest and admitted that she was dancing during the protest but denied singing the songs. She identified herself among the protestors in the video. She was wearing a surgical mask during that period, making it difficult to ascertain whether or not she sang the songs. This notwithstanding, the fact that she was dancing to the derogatory songs makes it more probable than not that she, too, was singing the songs in question. Moreover, by dancing to the song, she identified herself with the conduct of the other protestors who could be heard singing the songs in question and cannot, therefore, now seek to dissociate herself from their actions.

19. In light of the above, on a balance of probabilities, the Commission is satisfied that the cited Respondents sang the songs in question. The fact that there may be other members of NEHAWU who should have been cited as Respondents (but were not) does not detract from this fact.

The issue with the authenticity of the videos

20. The authenticity of the videos was confirmed verbally to the Commission by the Complainants, the Second Respondent and five (5) other NEHAWU members who

admitted that the songs infringed on the rights of the Complainants and subsequently apologised to the Complainants for their role in the matter.

21. The onus was on the remaining Respondents who disputed the authenticity of the video to establish their case. The Respondents failed to do so.

The Respondents' dispute that the protest songs were not directed at the Complainants.

22. In both videos, the Respondents can be heard clearly mentioning the Complainants' names and directing the insults to the Complainants, namely Sheila and Chaane, respectively.

23. It is common knowledge that the First Complainant's middle name is Sheila, and the Second Complainant's last name is Chaane.

24. The Respondents' assertions that the songs were not directed at the Complainants are, therefore, without merit.

LEGAL ANALYSIS

25. On the legal front, the Respondents disputed the jurisdiction of the Commission, averring that this was a labour matter. They also asserted that they were entitled to sing songs of any kind during protest action.

Jurisdiction of the Commission

26. During the meeting with the Respondents on 28 June 2021, the Respondents were informed that the Commission is empowered to investigate allegations of human rights violations. This matter relates to the allegations of infringement of the right to dignity emanating from the songs sung during the Respondents' gathering on 23 November 2020. The complaint is, therefore, within the jurisdiction of the Commission. The fact that another body may have concurrent jurisdiction does not detract from this fact.

Whether the songs sung by the Respondents during the protest amounted to a violation of the Complainants' right to human dignity in terms of section 10 of the Constitution.

27. Section 10 of the Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected. Dignity is not only a right but also a constitutional value. In this regard, section 1 of the Constitution states that the Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Recognising the right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. Therefore, this right is the foundation of many of the other rights enshrined in the Bill of Rights.¹ Dignity is a term that goes to the heart of what constitutes the quality of humanness².

28. 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*, the Constitutional Court held that:

“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 too 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.”

¹ S v Makwanyane 1995 (3) SA 391 (CC) at para 328

² http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812016000100023

29. In *S v Makwanyane*, the Constitutional Court held that:

“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”³.

30. Human dignity is also recognised as an important cornerstone of international human rights law, as confirmed by numerous international human rights instruments. Article 1 of the Universal Declaration of Human Rights (UDHR) states that *“[a]ll human beings are born free and equal in dignity and rights”*.

31. In its preamble, the UDHR also recognises the inherent dignity and equality of all members of the human family as the foundation of freedom, justice and peace in the world.

32. The value of human dignity is not only recognised internationally and in the Constitution but also in our common law.

33. In *Sokhulu v New Africa Publications Ltd t/a “The Sowetan Sunday World” and Others* [2002] 1 All SA 255 (W), the court held as follows:

“The right to an unimpaired dignity is protected by the actio iniuriarum. Such can be invoked when a person is subjected to offensive and degrading treatment or is exposed to ill-will, ridicule, disesteem or contempt (Minister of Police v Mbilini 1983 (3) SA 705 (A) at 715G – 716A). In Brenner v Botha 1956 (3) SA 257 (T), Boshoff AJ (as he then was) said at 261 in fin – 262:

‘In cases of verbal injury, otherwise than in cases of defamation, the words complained of must impair plaintiff’s dignity and must be insulting

³ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 para 329.

in the sense that they must amount to degrading, humiliating or ignominious treatment.'

*There cannot be an impairment of dignitas without unlawfulness, and the question whether this requirement is satisfied or not is an objective one answered by having regard to the prevailing norms of society (De Lange v Costa 1999 (2) SA 857 (A) at 862 B – G)."*⁴ (Own emphasis)

34. In *Minister of Police v Mbilini* 1983 (3) SA 705 (A), the court held that:

"It is trite law that one of the rights which is protected by the actio injuriarum is the right to an unimpaired dignity. Dignity was defined by Melius de Villiers in 1899 in his well-known work The Roman and Roman-Dutch Law of Injuries at 24 as –

'that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.'

Further on at 24 and at 25, the following is stated:

*'Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right.'*⁵

35. In the case *Ryan v Petrus* 2010 (1) SACR 274 (ECG), the Court held that the use of the word "hoer" or "whore" clearly constituted unlawful aggression upon the appellant's dignity⁶.

⁴ See paragraphs 259c – d of the judgment.

⁵ See paragraphs 715G-716A of the judgment.

⁶ 2010 (1) SACR 274 (ECG)

36. Coming to the facts of this case, it cannot be gainsaid that the Respondents' utterances were aimed at dehumanising and humiliating the Complainants. The Respondents were dissatisfied with the internal decisions made by the management at their place of employment, of which the Complainants were a part. The derogatory remarks and hostility directed at the Complainants encouraged anger and disregard for fundamental human rights. The duty rested with the Respondents to follow the correct grievance processes within their place of employment to raise any dissatisfaction relating to the decisions of the management. Whilst the Respondents were within their right to peacefully picket, consideration ought to have been given to the dignity of the Complainants.
37. The utterances made by the Respondents during the picket went beyond voicing dissatisfaction with the decisions taken by management. Rather these utterances were willfully aimed at insulting and dehumanising the Complainants. The Respondents failed to uphold the Complainants' human dignity and treat them in a dignified and humane manner.

Whether the Respondents' right to freedom of expression is protected by section 16 of the Constitution

38. Section 16(1) states that everyone has the right to freedom of expression⁷.
39. Article 19 of the UDHR also refers to the right to freedom of expression, and it reads as follows:
- “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.*
40. Therefore, the UDHR indicates that freedom of expression is viewed internationally as a fundamental right and a prerequisite in any democracy. Moreover, it is universally accepted that freedom of expression creates a marketplace of ideas

⁷ Everyone has the right to freedom of expression, which includes—
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

and ensures individual development and self-fulfilment. In South African courts, too, this right is viewed as central to our constitutional democracy, given the extent to which it supports other rights⁸.

41. The Constitutional right to freedom of expression is, however, not unlimited. First, it has internal limitations in terms of section 16(2) of the Constitution in that the right does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Secondly, it can be limited in terms of section 36 of the Constitution by a 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.

42. Limitations of this right are also recognised in international law. In this regard, Article 19(3) of the International Covenant on Civil and Political Rights (“ICCPR”) states: “*The exercise of the rights to [freedom of expression], carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order or of public health or morals.*” Article 20 of the ICCPR states: (1) ‘*Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*’⁹

43. As indicated above, our common law has limited the right of freedom of expression by recognising the delictual claim of *actio iniuriarum*, amongst others. Further limitations to the right to freedom of expression have been placed by the recognition of the defamation claim.

44. In dealing with cases of defamation in a workplace, the Court held that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable average person to whom it has been published. It includes not only statements that expose a person to hatred, contempt or ridicule

⁸ The right to freedom of expression: The mother of our democracy. WJ van Vollenhoven.

http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000600009

⁹ https://constitutionnet.org/sites/default/files/limitations_clauses.pdf

but also statements that are likely to humiliate or belittle the plaintiff, which tend to make him or her look foolish, ridiculous or absurd or which render the plaintiff less worthy of respect by his or her peers¹⁰. The Courts discourage making statements aimed at wilfully insulting an individual. Therefore, the same cannot be protected under the right of freedom of expression.

45. It is common cause that the Complainants hold senior management positions within the offices of the North West Provincial Legislature, and it may reasonably be expected that their position attracts public criticism. The Courts, however, have held that:

“A person who goes into public life must expect robust and often unfair criticism. That is part of the price of going into public life. But it does not follow that it is necessary to deprive him or her of any right to reputation. There are surely some libels so gross and offensive that they should be punishable only on condition that they are proved to be true”¹¹.

46. Therefore, it is clear from the international conventions, the Constitution, and the common law that when exercising the right to freedom of expression, utmost regard for other people’s rights, especially the right to human dignity, must be had.

47. During the meeting with the Commission, the Respondents indicated that they have a right to sing any song of their choice during their protest action. They, however, failed to take due recognition and respect for the rights and freedoms of others and to meet the just requirements of morality, public order and the general welfare in a democratic society.

48. The Respondents’ singing of the impugned songs was, therefore, not a legitimate exercise of the right to freedom of expression enshrined in section 16(1) of the Constitution.

¹⁰ *Nadia van der Westhuizen v Morgan Motlogelwa Ntshabelele* (case 2014/27063, judgment handed down 23 March 2015)

¹¹ *Holomisa v Argus Newspapers Limited* 1996(6) BCLR 836 W

FINDINGS

49. In light of the above, the Commission makes the following provisional findings:

- 49.1 On a balance of probabilities, the Commission finds that the Respondents sang the impugned songs.
- 49.2 The singing of the impugned songs amounted to a violation of the Complainants' right to dignity.
- 49.3 The Respondents' conduct is not protected by the right to freedom of expression enshrined in section 16(1) of the Constitution.

DIRECTIVES

50. In view of the above findings, the Commission makes the following directives:

- 50.1 The Respondents must issue an unconditional written apology to the Complainants within thirty (30) days of receipt of the final investigative report.
- 50.2 Copies of the written apology must be furnished to the Commission and the Complainants in person or by electronic mail.

FURTHER RECOMMENDATION

51. In addition to the above findings, the Commission recommends that the Complainants consider instituting criminal and civil proceedings against the Respondents in further vindicating their right to dignity.

OPPORTUNITY TO COMMENT ON THE PROVISIONAL INVESTIGATIVE REPORT

52. A copy of the provisional investigative report was shared with the parties on 13 March 2023 for their review and comments. In this regard, the parties were invited to submit their comments to the provisional investigative report in writing within fourteen (14) days of the report, being on or before 03 April 2023.

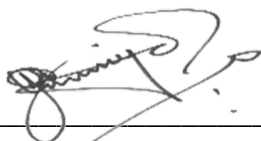
53. No comments were received from the parties, save for the written confirmation from the Complainants on 15 March 2023, expressing their satisfaction with the contents of the provisional investigative report.

54. In view of the above, the Commission's analysis, findings and directives in the provisional investigative report have been confirmed in this report, save for rephrasing the findings and adding a recommendation.

JUDICIAL REVIEW

55. The Commission's directives herein are binding on the Respondent. Should any of the parties be aggrieved by the findings and directives of the Commission as contained herein, such a party is entitled to challenge same in court through the process of judicial review. An application for judicial review must be made within 180 days of the date on which all internal remedies were exhausted. Where there are no internal remedies available, the application must be made within 180 days of the date on which the applicant became aware of the decision (or could reasonably be expected to have become aware of the decision).

SIGNED AT BRAAMFONTEIN ON THE 04 DAY OF OCTOBER 2023.



Adv. Bongani Majola
South African Human Rights Commission

Chairperson