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COMPLAINT NO: FS/2012/0320

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2012/0320

In the matter between:

South African Human Rights Commission **Complainant**

(On behalf of Sasolburg residents)

and

Metsimaholo 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 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; and

1.2.3. Monitor and access 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, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

1.6. Article 3(b) of the South African Human Rights Commission's Complaints Handling Procedures, provides that the Commission has the jurisdiction to conduct or cause to be conducted any investigation on its own accord, into any alleged violation of or a threat to a fundamental right.

2. Background of the Complaint

2.1. On Monday, 26 March 2012, the attention of the Free State Provincial Office of the Commission was drawn to media reports that residents of Sasolburg in the Free State Province had been using pit latrines as toilets.

2.2. The media coverage of this incident coincided with the Commission's Human Rights Month Campaign on the theme "Water and Sanitation in South Africa – A question of Accessibility".

2.3. These media reports were preceded by similar reports a few months prior, of pit toilets in the Makhaza[1] and Rammulotsi areas of the Western Cape and the Free State Province, respectively.

3. Preliminary Assessment

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

- That the alleged incident constituted a prima facie violation of the human rights of the residents of Sasolburg. In particular, the assessment determined that Sections 10, 14, 24, 27 and 32 of the Constitution had prima facie been violated;
- That the alleged violation fell within the mandate and jurisdiction of the South African Human Rights Commission;
- That the alleged violation merited a full investigation in terms of the Complaints Handling Procedures of the Commission.

4. 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:

- Interview with Residents;
- Interview with Respondent;
- Inspection in loco of a random sample of pit latrines in the area;

4.1. Interview with Residents

4.1.1. The investigation team conducted several interviews with local residents to verify the observations of the media as contained in their media report.

4.1.2. During the interviews with the residents, some interviewees stated that although they had toilets in their houses, they did not have funds to connect their toilets to the water supply system. Others alleged that they had dug, used and filled multiple pit latrines in their yards over a period of time because they had no toilets in their houses.

4.1.3. Residents also told the investigators that several community meetings had been called by the Respondent to receive complaints regarding sanitation, but that notwithstanding, the situation had not been ameliorated despite undertakings by the Respondent to address this problem.

4.1.4. The interviewees lamented the lack of community participation in the design and implementation of municipal projects, and that there was inadequate consultation on the progress that the municipality had made towards reducing the implementation backlog in sanitation projects.

4.2. Interview with Respondents

4.2.1. On Tuesday, 27 March 2012, the Free State Provincial Office contacted the Municipality and spoke with the Acting Municipal Manager to confirm the correctness of the media report.

[1] Findings and Recommendations of the Commission in the matter of ANCYL Dullah Omar Region on behalf of Ward number 95 WC/2010/0029

4.2.2. The Acting Municipal Manager, Mr R. Thekiso, acknowledged the sanitation challenges in the Sasolburg area.

4.2.3. The Provincial Office advised the Manager that the Commission intended to investigate this alleged human rights violation.

4.2.4. As part of the investigation phase, the investigators requested a comprehensive report from the Respondent in order to identify sanitation challenges facing the Sasolburg area, as well as constraints faced by the Municipality in addressing these challenges.

4.2.5. The Respondent attributed the difficulty of connecting water from the meter to toilets to the Department of Human Settlements. They contended that it was the sole function of the Department of Human Settlements to install sewerage pipelines from the built-in toilet to the main sewerage system. Only a few toilets in the area were connected to the water supply system and the project was underway to connect other households subject to available resources and budget.

4.2.6. The Respondent stated that in their frustration some residents had bought their own pipes and connected water from the meter to their toilets because they had not been connected to the water supply system.

4.2.7. On the 6th December, 2012 the Respondent furnished the Commission with additional information in writing, to wit, that the funding received by the Respondent from the Department of Human Settlements was insufficient to capacitate the Municipality to deal new infrastructural and sanitation projects.[2]

4.3. Inspection in Loco

4.3.1. On Wednesday, 28 March 2012, the Free State investigators visited Sasolburg, an area falling under the jurisdiction of Metsimaholo Local Municipality in the Free State Province, to inspect the sanitation challenges highlighted in the media report.

4.3.2. The Free State investigators conducted an inspection of the Gortin and Amelia township sanitation facilities in Sasolburg.

The following observations were noted:

a) General Observations

4.3.3. Sasolburg is situated along the boundary between the Free State and Gauteng Province, and falls under the jurisdiction of Metsimaholo Local Municipality.

4.3.4. The investigators observed patent levels of poverty in the area.

4.3.5. The vast majority of Sasolburg's township residents live in homes constructed with bricks. Most shacks[3] in the informal settlements of Sasolburg had been constructed in an informal manner.

4.3.6. In addition, the residents of these informal settlements had no electricity and did not have access to sufficient water, and decent sanitation services.

[2] The new projects are MOOIPLAAT, MOOIDRAI and GORTIN.

[3] 'Shack' refers to a dwelling constructed of a combination of corrugated iron, wood and plastic.

4.3.7. Most residents are not formally educated but displayed varying levels of functional literacy.

4.3.8. A number of social problems were evident in the area. These included alcohol or substance abuse, teenage pregnancy, child-headed households, and cases of HIV and AIDS.

4.3.9. The residents of the community predominantly speak Sesotho, Xhosa and Zulu.

b) Substantive Observations

4.3.10. During the inspection period, the investigators established that most residents' were indeed using pit toilets as they were not connected to the water supply system. Residents had resorted to digging pit toilets in their yards as they were not connected to the sewer network. (**see Photos A, B, C**)

"PHOTO A"

"PHOTO B"

"PHOTO C"

4.4. The investigators further observed that Reconstruction and Development Programme (hereinafter referred to as RDP) houses had built-in toilets not connected to the sewer network or water supply system. There were no pipes connecting water from the meter to the built-in toilets (**see Photos D, E, F & G**)

"PHOTO D"

"PHOTO E"

"PHOTO F"

"PHOTO G"

5. Respondent's Response to Allegations

In response to the allegations of human rights violations, the Respondent responded as follows:

5.1. The Respondent furnished the Commission with a Report setting out the plans and progress that it had made towards addressing this challenge.[4]

5.2. To address the sanitation challenges in the township, the Respondent reported that

[4] Undated progress report from Respondent received by the Commission on 27 June 2012

it had initiated plans to construct a sewer network and a pump station. Out of a total number of 11 800 stands[5] identified, only 1741 stands have been connected to the sewer network.

5.3. The remainder of toilets that had not been connected to the sewer network was 12069. This figure includes areas that have not yet been proclaimed as townships but earmarked to form part of the overall infrastructural development in Sasolburg townships. These informal settlements also required construction of sewer network and pump stations to address water and sanitation challenges.

5.4. According to the report[6] from the Respondent, the project had been divided into phases subject to availability of funds.

5.4.1. Sanitation Phase 1 (in the report received by the Commission from the Municipality, there was no reference to what the Municipality would be executing in this phase);

5.5. Sanitation Phase 2 (in the report received by the Commission from the Municipality, there was no reference to what the Municipality would be executing in this phase);

5.6. The Gortin[7] Sanitation Phase 3 project, which was to connect the remaining 1641 toilets to the sewer network, has been implemented under the auspices of the Department of Human Settlements. 659 stands would be completed in the 2012/2013 financial year.

5.7. The Respondent alleged that it has been communicating with the Department of Human Settlements to provide direction regarding the issue of sewer connections and to source funding to reduce the infrastructure backlog.

5.8. According to the Respondent, Phase 4 of the sanitation project was likely to be implemented during the 2013/2014 financial year after the technical report or business plan for the project had been approved with recommendations by Department of Water Affairs in conjunction with Department of Cooperative Governance and Traditional Affairs.

5.9. The Respondent alleged that their integrated development plan had been informed by community needs after consultation with the community through relevant forums. Community liaison officers and project steering committees were tasked to keep the communities informed of the project progress and challenges through ward councillors and ward committee members.[8]

6. Applicable Legal Framework

6.1. Key International instruments

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

Article 11 of the ICESCR recognizes 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.

5 Stands refer to number of homes not connected to the sewer network.

6 Respondent's report to the Commission.

7 A township in Sasolburg.

8 Respondent's report to the Commission

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.[9]

6.1.2. General Comment no.15 (2003) of the UNESCR[10] 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.

6.1.3. United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation[11]

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

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, 14, 24, 26, 27 and 32 of the Constitution of the Republic of South Africa. 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 proper toilet facilities is inherently degrading, and undermines the human dignity of a human being.

6.2.2. The Right to Privacy

Section 14 entrenches the right to privacy.

6.2.3. The Right to Environment

Section 24(a) of the Constitution provides that:

"Everyone has the right –

a) to an environment that is not harmful to their health or wellbeing;"

6.2.4. The Right to Housing

The right of access to adequate **housing** is guaranteed in section 26 of the Constitution which provides 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."

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

Section 27 provides for the right to have access to water.

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[9] This principle was enunciated by the UN Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) "Nature of States Parties Obligations" UN Doc HRI/Gen 1/Rev 1 at 45 (1994) para 9; also endorsed in the Grootboom Case.

[10] The Right to Water: UN Committee on Economic, Social and Cultural Rights, November 2010

[11] Resolution 64/292

6.2.6. 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."*

6.2.7. 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.

6.3. Domestic Legislation

6.3.1. The Water Services Act[12]

Section 3 of the Water Services Act 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.

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.

6.3.2. The Housing Act[13]

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 all 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) Portable water, adequate sanitary facilities and domestic energy supply.[14]

[12] 108 of 1997

[13] 107 of 1997

[14] Section 1(vi) of the Housing Act 107 of 1997

Section 9 of the Housing 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:

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

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:

- Give priority to the needs of the poor in respect of housing development; and
- 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.

6.3.3. The Municipal Systems Act[15]

The definition of basic municipal services according to the Act[16] 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.

6.3.4. The Development Facilitation Act[17]

The Development Facilitation Act ("DFA") 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.

This Act creates two separate bodies responsible for land use planning in the same area.

[15] 32 of 2000

[16] Chapter 8 of the Municipal Systems Act

[17] 67 of 1995

6.3.5. The Less Formal Township Establishment Act[18]

In considering the role of the Provincial and Local sphere of government regarding the proclamation of townships, the Commission considered the Less Formal Township Establishment Act ("LeFTEA") which provides for shortened procedures for land development and township establishment. In terms of this Act, the decision-making authority lies with the Provincial government.

6.3.6. Municipal Finance Management Act[19]

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. Promotion of Access to Information Act[20]

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 public participation, 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 Policy[21]

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. 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 (VIP), if constructed to agreed standards and maintained property, provides an appropriate and adequate basic level of sanitation service.

Adequate basic provision is therefore defined as one well-constructed VIP toilet (in various forms, to agreed standards) per household.[22]

[18] 133 of 1991

[19] Act 56 of 2003

[20] Act 2 of 2000

[21] Department of Water Affairs and Forestry (1994)

[22] White Paper on Water and Sanitation Policy (1994)

6.4.2. National Sanitation Policy[23]

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:

- Traditional unimproved pits;
- Bucket toilets;
- Portable chemical toilets;
- Ventilated Improved Pit toilets;
- Low flow on-site sanitation (LOFLOS);
- Septic tanks and soakaways;
- Septic tank effluent drainage (solids-free sewerage) systems; and
- Full water-borne sewerage.

6.4.3. White Paper on Basic Household Sanitation[24]

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:

- Developing norms and standards for the provision of sanitation;
- Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
- Co-ordinating 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 to maintain 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.

6.5. Case Law

Decisions of the courts provide the means through which the nature and scope of human rights may be determined:

6.5.1. In **Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)** 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".*[25]

Further, that legislative measures adopted by the government must be supported by policies and programmes must be reasonable *"both in their conception and*

[23] Department of Water Affairs and Forestry (1996)

[24] Department of Water Affairs and Forestry (2001)

[25] Grootboom at para [41]

implementation".[26] 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. These measures should not ignore people whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril.[27]

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. 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.

6.5.2. In **NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)**[28] 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:

'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 way, and the right to life. Human dignity is also a constitutional value that is of

[26] Grootboom at para [42]

[27] Ibid at para [44]

[28] at paragraph [49]-[51]

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.'

6.5.3. In **S v Makwanyane and Another,** the Court observed as follows:

[51] '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."

The Court also dealt with interrelationship between privacy and dignity and concluded that:[29]

"The right to privacy recognizes 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 autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life."

6.5.4. In Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC)[30] the Court held:

"As we have seen, privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core."

6.5.5. In **Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC),[31]** 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 final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place."

29 NM v Smith at para [131]

30 at para [18]

31 at para [77]

6.5.6. In relation to the duties of all levels of government the Court held in **Grootboom[32]:**

"All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing."

Yacoob 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 a 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."[33]

In fact the Court has repeatedly held that the State, including municipalities, is obliged to treat vulnerable people with care and concern.[34]

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"[35]* and *"to promote a safe and healthy environment"[36].* A municipality is obliged to try to achieve these objectives. Section 73(1)(c) of the Local Government: Municipal Systems Act[37], echoes the constitutional precepts and obliges a municipality to provide all members of 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 erven, or communally, it must provide for the safety and privacy of the users.

6.5.7. The High Court in **Beja and others v Premier of the Western Cape and others. Case no. 21332/2010** went on to state in paragraph 147, that *"Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with s 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity".*

Erasmus J held at paragraph 142-143 that section 73(1)(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 section 10 (human dignity), 12 (freedom and security of person), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution.

6.5.8. In Joseph case,[38] the Constitutional Court read sections 152 and 153 of the Constitution together with provisions contained in the Municipal Systems Act

32 Grootboom at para [82]

33 Grootboom at para [83]

34 Joe Slovo at para [76]

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

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

37 Act 32 of 2000

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

and the Housing Act, creating a public law "right to basic municipal services" and outlining the duty on local government to provide these services.

6.5.9. In the **City of Johannesburg case,**[39] 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 socio-economic rights are not 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".*[40]

6.6. Regulatory Standards

Regulation 2 of the Compulsory National Standard[41] states that the minimum standard for basic sanitation services is –

a) the provision of appropriate sanitation

b) 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.

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.

6.7. Strategic Frameworks

6.7.1. The Strategic Framework for Water Services[42]

The Strategic Framework defines basic sanitation facility as:

The infrastructure necessary to provide a sanitation facility which is safe, reliable,

[39] See City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others [2010] ZACC 11

[40] In the Grootboom Case, the Court opined that although South Africa had not ratified the ICESCR, it was obliged to respect the spirit of this treaty, and not to act in a manner that is contrary thereto in the progressive realization of socio-economic rights.

[41] General Notice 22355 of 8 June 2001

[42] Department of Water Affairs and Forestry (2003)

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.[43]

It further defines a basic sanitation service as:

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 waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices.

6.7.2. Free Basic Sanitation Implementation Strategy[44]

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.

6.8. Codes

6.8.1. The National Housing Code

The National Housing Code was adopted in terms of the Housing Act. In terms of section 4(6) of the Housing Act,[45] the provisions of the National Housing Code are binding on all three spheres of government.

Included in the National Housing Code is the Upgrading of Informal Settlements Programme ("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 settelements.

The Programme identifies the following characteristics of an 'informal settlement':

- Illegality and informality;
- Inappropriate locations;
- Restricted public and private sector investment;
- Poverty and vulnerability; and
- Social stress.

The Programme is therefore applicable to all settlements that demonstrate one or more of the above characteristics.

The Programme document states that:

> *"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*

[43] Ibid

[44] Department of Water Affairs and Forestry (April 2009)

[45] 107 of 1997

projects should be dealt with on a priority basis."

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."*

The upgrading of informal settlements must be effected in collaboration with the residents thereof. Thus the Programme provides as follows:

> *"In order to ensure that community members assume ownership of their own development projects, the involvement of the community from the onset is key. Hence community participation should be undertaken within the context of a structured agreement between the municipality and the community."*

The Programme recognizes 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."*

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.

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.

The Programme makes provision for a comprehensive, fully costed, four-phase process for the upgrading of informal settlements. The four-phase process –

- Phase 1: The Application
- Phase 2: Project Initiation
- Phase 3: Project Implementation
- Phase 4: Housing Consolidation

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."

7. Analysis of the Investigation Findings

In analyzing this complaint, the Free State Office reviewed the information gleaned from the investigation to ascertain six (6) key issues:

- The nature and scope of alleged human rights violations;

- The reasonableness and/or adequacy of the steps taken by the Municipality to address the problem of sanitation in the Metsimaholo Local Municipality.
- Operational efficiencies of the Respondent;
- Inter-governmental collaboration;
- The adequacy of community participation in policy and programmatic planning and implementation.
- The adequacy of funding levels provided to the Respondent by Provincial Government to provide water and sanitation in the area.

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, privacy, clean environment, access to adequate housing and access to health care services, sufficient food and water and social security 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.

7.1.2. The inspection in loco of the affected areas in townships undertaken by the Commission revealed that the media reports were indeed accurate. Interviews conducted with residents shed further light and corroborated the media reports.

7.1.3. Basic sanitation forms part of the right to basic municipal services outlined in section 73 of the Municipal Systems Act.

7.1.4. Whilst the Respondent contends that the sanitation challenges in the Sasolburg townships stem from the lack of fulfillment of functions in respect of roles and responsibilities by the Provincial Department of Human Settlements, Water Affairs and Cooperative Governance and Traditional Affairs, the Respondent has not provided the Commission with information regarding interaction with the relevant Provincial government departments. The Respondent bears the duty to do so.

7.1.5. Further, the Respondent has not furnished the Commission with its Integrated Development Plan ('IDP'), water and sanitation policy, project action plans and timeframes, budget allocated, and minutes of community meetings despite repeated requests to do so.[46]

7.1.6. 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 obligations are outlined in the Water Services Act and the Municipal Systems Act and the Strategic Framework for Water Services.

7.1.7. On this basis the Commission finds the Respondent in substantive violation of the human rights listed above.

7.2. Reasonableness of steps taken by the Municipality to progressively address the challenge of Water and Sanitation

[46] Date of Request – 15 May 2012; Reminder letter – 26 June 2012

7.3. In terms of section 27, the Municipality is required to progressively realise the supply of adequate water and sanitation to the community.

7.4. The onus rests on the Municipality to prove that measures it took to progressively realise the supply of adequate water and sanitation to the community were reasonable.

7.5. According to the report[47] received from the Municipality, they engaged with the Department of Human Settlement to provide direction regarding sewer connections to households. The Commission was not in a position to ascertain the veracity of this assertion as the Municipality failed to furnish the Commission with proof of discussions it had held with this Department. It is thus difficult to conclude whether measures adopted by the Municipality to progressively realise the right to water and sanitation were reasonable or not.

7.6. Inter-governmental collaboration

7.6.1. According to the 2001 White Paper on Basic Household Sanitation, 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 their IDP and the coordination, together with the National Treasury, of the provincial and local governments Equitable Share[48] ('ES') and Municipal Infrastructure Grant[49] ('MIG') grants.

7.6.2. 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.

7.6.3. 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 are responsible for developing housing projects across the country in terms of the Constitution and the Housing Act.

7.6.4. Part E of the National Water Services Regulation Strategy[50] defines the approach to the regulation of sanitation. In terms of financing, the Department of Water Affairs monitors all Municipal Infrastructure Grant (MIG) applications for sanitation projects.

7.6.5. Since the National Sanitation Programme Unit was transferred to the Department of Human Settlements in 2009, there has been confusion over functions, and a lack of cooperation and collaboration between departments. It appears that the Department of Human Settlements is responsible for household sanitation infrastructure, while the Department of Water Affairs for bulk reticulation. The Respondent contends that it is the Department of Human Settlements'

47 Reported dated 11 April, 2012

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

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

50 Department of Water Affairs (January 2010)

responsibility to connect sewer networks to households. The Respondent's role is to monitor financial expenditure, commission projects, manage the maintenance and operation of sewer and water infrastructure.

7.6.6. The analysis of these findings leads to the conclusion that there is an absence of effective collaboration between the national policy sphere and the municipal delivery targets and capacities. This needs to be corrected.

7.7. Community Participation

7.7.1. The Respondent alleges project steering committees were required to keep the community informed of project progress and challenges through ward councillors and committee members. It is not clear whether there was adequate consultation with the community as the Respondent did not provide the Commission with minutes of these meetings.

7.7.2. The Respondent is bound by the Constitution and the National Housing Code to ensure community participation.

7.7.3. The burden to prove that adequate consultation took place rests on the Respondent. In the absence of minutes, a reasonable inference can be drawn that effective and interactive community participation did not take place.

7.7.4. 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 many toilets can be connected to the sewer network over a period of time. The fact that pit toilets remained for a lengthy period is an indication that the Respondent did not use the multi-year planning framework on service delivery.

7.7.5. The Municipal Systems Act states that municipalities must encourage and create conditions for the local community to participate in the affairs of municipalities including preparing, implementing and reviewing its integrated development plan; establishing, implementing and reviewing its performance management system; monitoring and reviewing of its performance, including the outcomes and impact; preparing its budget; and strategic decisions relating to the provision of municipal services.

7.7.6. 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 with the Promotion of Access to Information Act (hereinafter referred to as the "PAIA")[51], a law of national application which facilitates information sharing in the country and is meant to promote public participation.

7.7.7. PAIA obliges the Respondent to make information about its decisions relating to all aspects of the process, including project action plans, IDP, budget plans and the means through which the community can access the information the Respondent holds. In this sense, people are not only able to participate meaningfully in the project of the Respondent but they are also able to hold it accountable. It is clear

[51] The Promotion of Access to Information, Act 2 of 2000.

from the Commission's monitoring that the Respondent has not complied with its obligations in terms of the PAIA legislation in the past three (3) consecutive years.[52] A clear example of this is the absence of any records in accessible format which have been shared with the community during the implementation of the project.

7.7.8. Based on the Respondent's failure to share information and consult with the community, the Commission is unable to establish any factor which could be said to constitute a reasonable response by the Respondent. The Respondent's actions can however not be said to have been justified by any governing legislation or any provision of the Constitution.

7.7.9. In the circumstances, the Commission is unable to make a finding that the Respondent has executed the obligations listed above, even though the Respondent asserts that it has in its report[53].

7.8. Operational Inefficiencies

7.8.1. Section 9 of the Municipal Systems Act requires of municipalities to act as points of delivery. Local government is responsible for water services, including sanitation.

7.8.2. Section 10A[54] requires organs of State which assign functions to local government to provide the latter with sufficient funding and capacity as required. The Respondent in this matter depend on national and provincial governments for funding and capacity.

7.8.3. More clarity on the national institutional framework around basic sanitation particularly as the Department of Human Settlements took over the National Sanitation Programme from Department of Water Affairs in 2009 is required as the Respondent is constrained to act only within the parameters of national and provincial policies.

7.8.4. In the final analysis, the conclusion reached is that there are myriad challenges at the local government level, including shortage of critical skills and competencies, inadequate national financing to address sanitation backlog and lack of leadership and administrative competency at local level. In the present complaint, the Respondent has been adversely affected by interim management and instability at leadership level. The level of institutional capacity required to address sanitation challenges has not been adequately tabled.

7.9. Adequacy of Funding

7.9.1. According to the Respondent, funding for the implementation of the Programme is allocated to Provincial Governments by the Minister of Human Settlements on an annual basis.[55] The Provincial Department of Human Settlement must

[52] These include its mandatory duty to report to the Commission in terms of section 14 of PAIA and to make available an information manual of the records it holds in terms of section 14 PAIA. The latter manual is an important tool through which members of the public are able to obtain information from public bodies.

[53] Paragraph D of the report received on 11 April 2012

[54] Ibid

[55] Paragraph 3.4 of letter from the Respondent to the Commission dated 6th December, 2012

therefore do everything in its power to assist municipalities to achieve their obligations under this programme. The Respondent stated in its report that the Provincial Government had delayed to proclaim informal settlements in the area as townships.

7.9.2. The Nokotyana case[56] underlined the ineffective manner around the way in which the different spheres of government approached informal settlement upgrading, the lack of access to interim basic services in informal settlements, and the lack of minimum standards for basic sanitation provision.

7.9.3. The Respondent failed to provide the Commission with information regarding provision of interim basic services in informal settlements and imminent plans to upgrade them.

8. Summary of Findings

Based on the investigation conducted by the Commission and the analysis of applicable Constitutional, legislative, policy and regulatory frameworks, the Commission makes the following determinations:

8.1. Violation of Human Rights

The condition of unenclosed pit toilets and lack of health education gives credence to the allegation that the Respondent has violated the rights of residents to water, to health and to a clean environment;

The lack of privacy and security to the person presented by the present form of outdoor sanitation leads the Commission to a finding that the rights of residents to privacy and dignity have been violated.

Finding

The Commission is satisfied, on the facts of this complaint, that the Respondent is in violation of sections 10 (right to dignity), 24 (right to environment) and 27 (right to water and health).

8.2. Systemic Operational Inefficiencies & Constraints

With regard to operational efficiency of the Respondent, the Commission finds that the Respondent is weak in a number of operational competencies which include leadership and management. The Commission notes that the there was no substantive Municipal Manager in the Respondent for the period of one year between November 2011 – November 2012.

The transition period that culminated in the appointment of the new Municipal Manager on the 26th November 2012 was also fraught with leadership instability which adversely impacted on planning and operational efficiency and led to a continual decline in provision of water and sanitation services.

Finding

Governance, leadership and management of the Municipality during the period under investigation was weak.

[56] Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others [2009] ZACC 33

8.3. Poor Inter-governmental collaboration

The Respondent failed in its role and responsibility to effectively engage with the relevant National and Provincial Governments on budget and capacity challenges of the Municipality, particularly in this critical area of sanitation.

The National and Provincial Governments have not worked closely with the local sphere of government and the Respondent in particular, to ensure that the provision of sanitation is realized and sanitation infrastructure is installed and maintained. In this regard it was quite clear that both finance administration at the level of the water and sanitation project implementation and finance allocation was inadequate.[57]

Finding

Consequently, the finding of the Commission is that there were weaknesses in the inter-governmental collaboration of national, provincial and local government, (Department of Human Settlements/Municipality) resulting in the failure and/or neglect to provide adequate sanitation service delivery to the community of Salsolburg.

8.4. Inadequate Community Participation

The Respondent has failed and/or neglected to furnish the Commission with minutes of meetings[58] with the community in order for it to access the adequacy of public participation and municipal consultation around sanitation infrastructural challenges in Sasolburg;

The Respondent's failure to submit its Section 14 Report to the Commission for the last 3 years, coupled with alleged inadequate information transmitted to the community leads the Commission to uphold the allegation of violations to the right of access to information.

Finding

In the result, the finding of the Commission is that the Respondent has violated sections 32(1)(a) and (b) of the Constitution of the Republic of South Africa.

9. Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to "make recommendation 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. Human Rights Violations

The Respondent is directed to realise these rights within its available resources by taking positive steps to ensure that priority is given to the basic sanitation needs of

[57] Letter dated 6th December, 2012 from Metsimaholo Municipality, Para 3.4: *"Indeed the Municipality has been allocated funds directly from National Treasure for capital costs for MIG Projects, which is for backlogs only. However the Municipality is inundated with a number of new developments that includes GORTIN, AMELIA, MOOIDRAAI and MOOIPLATS which cannot be funded from MIG as they do not fall within the backlog category. The Department of Human Settlements is responsible for the funding of new Settlements, and to-date no funding has been made available for MOOIPATS, MOOIDRAAI and GORTIN."*

[58] Date of Request – 15 May 2012

the Sasolburg community; and that each member of the community has access to an enclosed toilet facility.

In this respect, the Respondent is directed to:

1. furnish the Commission with a phased Plan on how it intends to progressively realise this objective. This Plan should be submitted to the Commission within 6 (six) months from date of this finding;
2. furnish the Commission with a Progress Report at least every three (3) months in respect of the progressive realisation of the right to water and sanitation services in the townships and informal settlements in Sasolburg.

   The Report to the Commission should demonstrate the following:
   - Clear bottom-up and consultative planning and implementation plans;
   - Interim measures for the provision of sanitation to the residents;
   - 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.

9.2. Inter-governmental Collaboration

The Department of COGTA is directed to take active measures to review the effectiveness of inter-governmental collaborative links between national, provincial and local government with respect to sanitation service provision in the Metsimaholo Municipality, and to furnish the Commission with a Report on this aspect, within 6 (six) months of date of this finding.

The Department of Human Settlements is directed to assess current infrastructural and sanitation projects in the Metsimaholo Municipality, to identify the causes of backlog, to develop plans and strategies to resolve same, and to furnish the Commission with a Report within 6 (six) months of this finding.

9.3. Improvement of Operational Efficiency

The Departments of Human Settlements and Water Affairs are directed to:

- undertake 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 operational and capacity shortcomings of the Metsimaholo Municipality to be addressed.
- furnish the Commission with a Plan detailing how it intends addressing and monitoring and evaluating operational and capacity shortcomings of the Metsimaholo Municipality, within 3 (three) months from date of this finding.

9.4. Community Participation

The Commission directs the Respondent to furnish the Commission with the Minutes of every community meeting held at least every three (3) months in respect of development in the Metsimaholo Municipality relating to access to water and t sanitation services.

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: Free State/2012/0103

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2012/0103

In the matter between:

Vumile Ernest Mokgatla **Complainant**

and

Hodisa Technical Secondary School **Respondent**

REPORT

(In terms of Article 21 of the Complaints Handling Procedures of SAHRC)

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 and the other institutions created under Chapter 9 of the Constitution are described as *"state institutions supporting constitutional democracy".*

The Commission is specifically required to:

1.3.1. Promote respect for 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.

1.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.4. Further, section 184(2)(c) and (d) affords the Commission authority to carry out research and to educate on human rights in the country.

1.5. The Human Rights Commission Act, 54 of 1994, further supplements the powers of the Commission.

1.6. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding an alleged violation of or threat to a fundamental right.

2. Nature of the Complaint

2.1. On Tuesday, 17 July 2012, the Commission received a complaint from Vumile Ernest Mokgatla (hereinafter referred to as **"Complainant"**) a Grade 11 pupil at a public Secondary School in the Free State Province.

2.2. The Complainant was a major who represented himself, having attained the age of majority at the time of the lodging of this complaint.

2.3. The Complainant states that he subscribes to the Rastafarian religion, and is an adherent to the practices thereof; that following his conversion into this faith he began to grow

his hair long, into dreadlocks, consistent with the vow of the Nazarene not to shear his hair with a razor.

2.4. In his complaint, the Complainant alleges that Hodisa Technical Secondary School (hereinafter referred to as the **"Respondent"**), acting on the strength of a Code of Conduct[1] regulating discipline in the school, had:

2.2.1. suspended him from school for violating the grooming requirements set out in the Code, and

2.2.2. ordered him to shear his dreadlocks from his head and not to return to school until he had done so.

2.5. The Complainant further alleges that in effecting the suspension, the Respondent did not afford him a reasonable opportunity to be heard; and that had he been provided with such opportunity, he would have argued that he is an adherent of the Rastafari religion, and that the wearing of dreadlocks is an integral part of the practice of his religious beliefs and on this ground, he should be exempted from the operation of the prohibition set out in the School Code.

2.6. The Complaint, yet further, that as a result of this administrative decision, and having no option, he sheared his hair and returned to school tuition.

2.7. Consequently, the Complainant alleges that his human right to hold religious beliefs, and practice his religion, as set out by the Constitution, have been violated.

3. History and Elements of the Rastafarian Movement

3.1. There is some debate in literature as to whether Rastafarianism is a formal religion or a movement. Some argue that Rastafarianism is merely a spiritual movement. Others suggest that Rastafarianism is more of an ethnicity than a religion.

3.2. The preponderance of literature suggests that is a religion. Those that argue that it is a religion define it as a monotheist religion that worships a single God, who takes the form of the Holy Spirit and inhabits humans.

3.3. It first arose in the 1930's in Jamaica[2] as a solution to the concerns of black people in the African diaspora.[3]

3.4. The adherents of this movement worship Haile Selassie I, Emperor of Ethiopia (ruled 1930 – 1974) as Jesus Christ incarnate. Haile Selasie is accorded the title, 'King of Kings and Lord of Lords' and thus the returned Christ, the savious and the redeemer of his people.[4]

3.5. Members of the Rastafarian movement are known as *"Rastas"* and they call their God after the Christian God *"Jah"* or *"Jah Rastafari"*.[5] Many of their teachings are derived from the Bible.

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[1] In this regard, the Commission wishes to point out that it is aware of similar limitations placed by School Governing Bodies in public schools in the Free State Province, and in the country, on the practice of religion within the school environment.

[2] It is largely derived from the thought of Jamaican political activist Marcus Garvey (1887 – 1940), who advocated a return to Africa as a means of solving the problems of Black oppression. Chambers Dictionary of beliefs and religions (1992) p430

[3] Hunt, Stephen, Alternative religions: A sociological introduction (2003) p126

[4] Chryssides, Goerge D, *Exploring new religions* (1999) p273

[5] Rastafari is derived from the name of Emperor Haile Selassie, Prince Ras Tafari (1891 – 1975)

3.6. The practice of Rastafarianism encompasses a number of key themes such as:

3.6.1. The spiritual use of cannabis or *"ganja"* as part of a spiritual act often accompanied by Bible Study[6], believed to be a sacrament that cleanses body and mind, that heals the soul, exalts consciousness, facilitates peacefulness[7], and brings adherents closer to God;

3.6.2. The rejection of western society, called *"Babylon",* together with its norms, values and cultures;

3.6.3. The embrace of various afro-centric and pan-africanist social and political aspirations of liberation from bondage and captivity by ***"Babylon"***;

3.6.4. The growing of hair in its natural pattern without cutting, combing or brushing same, thereby developing into dreadlocks;

3.7. Rastafarians associate dreadlocks with a spiritual journey of discipline and patience that one takes in the process of growing and locking one's hair.

3.8. The spiritual command and authority for the growing and locking of hair into readlocks is based on a scripture in the Book of *Numbers 6:5* of the Christian Bible:

> *"They must never cut their hair throughout the time of their vow, for they are holy and set apart to the Lord. Until their vow has been fulfilled, they must let their hair grow long".* **(New Living Translation)**

3.9. Consequently, Rastafarians regard the shearing of hair as a serious act of mutilation and a transgression of a sacred vow of priesthood. Adherents believe that the wearing of locks is in fulfillment of a Nazarite vow of the Biblical Priesthood in terms of *Leviticus Chapter 21, verses 5 & 6* of the Christian Bible:

> *"The priests must not shave their heads or trim their beards or cut their bodies… they must be set apart as holy to their God and must never bring shame on the name of God. They must be hole…."* **(New Living Translation)**

4. Preliminary Assessment

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

4.1.1. That the alleged incident constituted a *prima facie violation* of the human rights of the learner. In particular, the assessment determined that Sections 9 (Equality on the grounds of religion), 10 (human dignity), 12 (freedom and security of the person), 15 (freedom of religion, belief and opinion), section 29 (1) (right to education) and 33 (just administrative process) of the Constitution had prima facie been violated;

4.1.2. That the assessed violations *fell within the mandate and jurisdiction* of the South African Human Rights Commission;

4.1.3. That there was no other organisation that could more effectively and expeditiously deal with the complaint.

[6] Scriptural warrant is found for the practice in the Book of Genesis. God said to Adam: 'I have given you every herb bearing seed, which is upon the face of all earth…to you it shall be for meat.' (Genesis 1:29)

[7] Better a dinner of herbs where love is, than a stalled ox and hatred therewith (Proverbs 15:17)

5. Steps Taken by the Commission

5.1. On Friday, 10 August 2012, 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 twenty-one (21) days of receipt of the letter.

5.2. On Tuesday, 14 August 2012, the Free State Provincial Office received a response from the Respondent, which did not address itself to the merits of the complaint but merely stated the Respondent's desire to have the matter resolved amicably.

5.3. In addition to the response letter, the Provincial Office sought from the Respondent a copy of the Respondent's Code of Conduct. A copy of same was received on the 21st September 2012.

5.4. The Respondent asserts that the Code of Conduct of the School requires that all students should wear their hair short and unstyled, as a necessary practice for grooming and for discipline of learners.

5.5. The relevant section of the Code of Conduct read:

"The following hair styles are not allowed: Dreadlocks, curled hair, braiding and blonde hair".

6. Issues for Determination

The Provincial Office determined that the following five (5) aspects of the complaint constituted the salient issues for determination:

6.1. Whether the prohibition of the wearing of dreadlocks by learners, constituted a violation of the right to equality and an act of unfair discrimination against learners on grounds of religion in terms of Section 9(3) of the Constitution;

6.2. Whether the decision to order the Complainant to shear his dreadlocks, constituted a violation of the Complainants right to human dignity in terms of Section 10 of the Constitution;

6.3. Whether the prohibition of the wearing of dreadlocks, in terms of the Code of Conduct, constituted a violation and a reasonable limitation to Complainant's right to practice his religion in terms of Sections 15 (1) of the Constitution;

6.4. Whether the suspension of the Complainant from education tuition, constituted a violation of his right to education in terms of Section 29 (1).

6.5. Whether the failure of the Respondent to consult with the Complainant prior to suspending him from tuition, and further not allowing an opportunity for the Complainant to appeal the sanction, constituted a violation of the Complainant's right to just administrative process in terms of Section 33 (1).

7. Applicable Legal Framework

(a) International Instruments

7.1. International Covenant on Economic Social & Cultural Rights

The United Nations 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.*[8]

7.2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights 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 International Covenant on Civil and Political Rights 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 practice their own religion, or to use their own language.*

7.3. Declaration on the Rights of Persons Belonging to National or Ethnic Religions and Linguistic Minorities[9]

The Declaration 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.[10]

7.4. Declaration on the Rights of Persons Belonging to National or Ethnic Religions and Linguistic Minorities[11]

The Declaration reaffirmed that one of the main purposes of the United Nations, s proclaimed in the Charter of the United Nations, is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.[12]

7.5. United Nations Human Rights Council Resolution Combating Defamation of Religions[13]

The Human Rights Council 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.

8 General Comment No. 13 on the Right to Education – UN Document p6

9 Adopted by the United Nations General Assembly on November 25, 1981

10 Resolution Adopted by the UN General Assembly A/Res/55/97

11 Declaration approved by the UN General Assembly on 20 July 1992

12 Resolution Adopted by the UN General Assembly A/Res/47/135

13 Adopted as Resolution 13/16 on April 15, 2010

The Human Rights Council reaffirmed the pledge made by All States under the Charter of United Nations 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.

(b) Regional Human Rights Instruments

7.6. African Human Rights Instruments

The first part of the Charter (Articles 1 to 18) lists the rights acknowledged to every individual *"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 any status"* (Article 2).

(c) Constitutional Rights

The complaint before the Commission is an alleged violation of various rights enshrined in the Constitution.

7.7. Foundational Values

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.[14]

7.8. 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.*

7.9. The Right to Human Dignity

Section 10 is the right to have the inherent dignity of everyone dignity respected and protected. Given the facts of this matter and the intrinsic nature of the right, it has central significance.

7.10 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.

7.11. 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."

[14] Constitutional values in Section 1 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

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 fulfillment of the right to a basic education.

7.12. The Right to Just Administrative Action

Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Section 7(2) of the Constitution requires the State, and therefore the Respondent, to respect, protect, promote and fulfill all fundamental rights.

(d) Domestic Legislation

7.13. South African Schools Act[15]

The legislative framework relevant to this complaint is to be found 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 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. These guidelines by the Minister states are for the "consideration" of schools and not mandatory.

Section 8 (5) of the Act provides that a code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings.

In terms of Section 9 of the Act, *the governing body of a public school may, after a fair hearing, suspend a learner from attending the school, as a correctional measure for a period not longer than one week, or pending a decision as to whether the learner is to be expelled from school by the Head of Department.*

According to section 16 of the Schools Act, the governance of every public school is vested in its governing body.

Subsection 3 of the aforesaid section provides that the professional management of a public school must be undertaken by the Principal under the authority of the Head of Department.

Section 18 of the Schools Act provides that governing bodies must function in terms of a written constitution which must comply with minimum requirements determined by provincial MECs for Education in the Provincial Gazettes.

[15] 84 of 1996

In terms of section 20, the governing body of a public school must adopt a code of conduct for learners at the school.

Section 23 provides that public school governing bodies are to comprise elected members, the principal in his or her official capacity and co-opted members. The elected members comprise a member or members of each of the following categories:

- Parents of learners at the school;
- Educators at the school;
- Members of staff at the school who are not educators and learners in the eight grade or higher at the school.

The number of parent members on the governing body must comprise one more than the combined total of other members who have voting rights.

The primary function of the School Governing Body is to promote the interests of the school and ensure provision of quality education for its learners.[16] The powers of the governing body are limited and it may only perform such functions and obligations and exercise only such rights as prescribed by the Act.[17]

7.14. Promotion of Administrative Justice Act[18]

Section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

In terms of section 3(2)(b), an administrator, must a person referred to in subsection (1) –

(a) Adequate notice of the nature and purpose of the proposed administrative action;

(b) A reasonable opportunity to make representations;

(c) A clear statement of the administrative action;

(d) Adequate notice of any right of review or internal appeal, where applicable; and

(e) Adequate notice of the right to request reasons in terms of section 5.

7.15. Promotion of Equality & Prevention of Unfair Discrimination Act[19]

Section 1 of the Equality Act 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 the Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the State and private parties on listed grounds including, of course, religion.

16 Section 20(1) (a) of the Act

17 Section 16 (1) of the Act

18 3 of 2000

19 4 of 2000

In 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."*

The Act 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 or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

(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."

(e) Case Law

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

7.16. In Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others20 Ackermann J stated that:

> *"Human dignity has little value without freedom; for without freedom personal development and fulfillment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity."*

7.17. In NM v Smith *(Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)*[21] 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 or 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:

> *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 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.'*

[51] In S v Makwanyane and Another, 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."*

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20 1996 (1) SA 984 (CC)

21 At paras [49] [50]

7.18. 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:[22]

> *"The acknowledgement 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."*

7.19. In **S v Lawrence,**[23] the Constitutional Court has accepted that the right to freedom of religion at least comprehends:

> *The right to entertain such religious beliefs as 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.*

7.20. The Constitutional Court also noted in the aforesaid 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 not expected of the state to becompletely secular.

7.21. In ***Christian Education,***[24] *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 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. 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."*

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22 2000 (2) SA 1 (CC)

23 1997 (4) SA 1176 (CC). See also Currie 1 and De Waal J *The Bill of Rights Handbook* (Juta, Cape Town 2005) 338

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

7.22. In ***MEC for Education: KwaZulu Natal v Pillay,***25 the court ordered that,

> *the Governing Body of Durban Girls' High School, in consultation with the learners, parents and educators of the School and within a reasonable time, to 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.*

7.23. In ***Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another,*** Moseneke DCJ stated that a governing body has a *'defined autonomy over some of the domestic affairs of the school.'*

7.24. In ***Prince v President of the Law Society of the Cape of Good Hope,***[26] Sachs J in his dissenting judgment held that,

> *"The test of 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"*

8. Analytical Framework

In analysing this complaint, the Commission considered the following constitutional tests and guidelines for the interpretation of the reasonableness of the limitations posed by the Respondent on the rights of the Complainant.

(a) Test for Reasonableness of Limitation of Rights

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 all relevant factors, including –

(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.

(b) Interpretation of the Bill of Rights

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.

25 2008 (1) SA 474 (CC)

26 CCT36/00 (2002) (2) SA 794

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."*

9. Legal Analysis

9.1. The Respondent has not disputed that the Complainant learner is an adherent of the Rastafari religion that wore dreadlocks as a consequence. The Commission will thus not concern itself with questions whether, as a matter of religious doctrine, a particular practice, the practice of dreadlocks, is central to the complainant's religion.

9.2. In assessing whether the discrimination in this case is unfair, it is necessary for the Commission in the first instance to consider the reasonableness of the limitation and its impact on the Complainant's right to practice his religion.

9.3. To do so, the Commission has considered whether there was a rational relationship between the regulation (prohibition against the wearing of dreadlocks) and the legitimate interest asserted by the school (that of upholding discipline and grooming of learners).

9.4. A third consideration that occupied the mind of the Commission is whether there was an alternative means available to the Respondent that existed which could sufficiently have accommodated the right and interest of the Respondent to exercise and achieve learner discipline and grooming (e.g. requiring learners who wore long hair for religious purposes, to wear it in a manner that rendered it neat and tidy, and sufficiently well-groomed).

9.5. A fourth consideration in analysing the merits of the complaint was the impact that the exercise of the limitation (the prohibition against the wearing of dreadlocks) had on the right of the Complainant to education.

9.6. A review of the Code of Conduct of the School reflects that the list of hairstyles prohibited by the school have been arbitrarily determined without a clear, underlying and objective *characteristics-based criteria* to them (e.g. length, colour, texture, neatness etc).

9.7. Further analysis of the Code indicates that no exemption has been made by the Respondent for hairstyles maintained by learners for religious purposes or in keeping with religious codes and practices.

9.8. The dicta of the Constitutional Court in the **Lesbian and Gay Equality Project** case[27] is instructive with regard to the levels of tolerance for diversity required in

> *a democratic South Africa: "...the acknowledgement and acceptance of difference is particularly important in our country... South Africans come in all shapes and sizes. 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."*

9.9. The Constitutional Court, in **S v Lawrence[28]**, addressing itself to tolerance of diversity of religions in the new South Africa, also affirms *"The right to entertain such religious beliefs as a person chooses ... and the right to manifest religious* belief by worship and practice....."

[27] Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Home Affairs and Others 2000 (2) SA 1 (CC)

[28] 1997 (4) SA 1176

9.10. It is therefore the view of the Commission that in an open and democratic society based on human dignity, equality and freedom *"in which conscientious and religious freedom has to be regarded with appropriate seriousness.... the State [including state bodies such as public schools] 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 disrespectful of the law."*

9.11. The facts of this case, in the view of the Commission did exactly that. It placed the Complainant in an unenviable position where he either had to remain true to his faith, or be disrespectful of the Code and be expelled from the School. As a matter of fact, the Complainant was summarily suspended from educational tuition, and instructed not to return to the school until he had sheared his dreadlocks. This clearly left the Complainant with no choice but to shear his dreadlocks in order to return to the Respondent to enjoy his right to education. There can be little argument against the conclusion that the shearing of the dreadlocks of a Rastafarian is an extremely humiliating experience that undermined his human dignity. There also can be little argument that the suspension of the learner from educational tuition impacted adversely on his right to education.

9.12. 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 force people to act or refrain from acting in a manner contrary to their religious beliefs on the pain or threat of sanction.

9.13. What compounds unreasonableness of the actions of the Respondent is that the decision to exclude the Complainant from tuition was taken *without any form of prior consultation or hearing* that would afford the Complainant an opportunity to be heard.

9.14. Further still, the administrative decision having been taken to suspend the learners, the Respondent did not afford the Complainant an opportunity to appeal the decision of the school.

9.15. The right to be heard before an adverse administrative decision is taken against any person (procedural fairness), the right to be given reasons for decision in writing and the right to appeal a decision before its execution are fundamental rights of the person. This right is set out and entrenched in section 33 of the Bill of Rights.

9.16. *In casu, i*n order for the Respondent to succeed in its assertion that the limitation to the exercise of the right to religion was reasonable, and in its assertion that the decision to order the Respondent to shear a crop of hair that was being worn and maintained in observance of a religious belief and practice the Respondent ought to have arrived at the decision in a manner that was both *substantively fair* and also *procedurally fair.*

9.17. Because no formal hearing was held in which both the Complainant and the Respondent exchanged views and positions with regard to the maintenance of dreadlocks within the school environment, the Commission cannot find any basis to conclude that the Respondent considered the impact of the exercise of the right to religion by the learner on other learners and the educational environment; nor the impact of the ultimate administrative decision on the learner and his rights to religion and to education.

9.18. The Commission cannot find any evidence that allowing a religious exemption from the school's code would negatively impact on discipline at the school and as a result, on the quality of the education provided. There was no evidence that wearing dreadlocks

on religious grounds had a disruptive effect on the smooth running and discipline of learners in the school.

9.19. It is therefore clear that, when a school or other body draws up a code of conduct or religious policy, it should reasonably provide for the reasonable accommodation of all the different cultural and religious practices of the pupils in that school. This requires more than mere tolerance of what is perceived as "familiar". In the dissenting judgement of Sachs J in the case of **Prince v President of the Law Society of the Good Hope**[29] the Court stated that the test for tolerance as envisaged by the Bill of Rights of South Africa *"comes not in accepting what is familiar and easliy accommodated, but in giving reasonable space to what is 'unusual, bizarre or even threatening".*

9.20. Ideally, in a democracy and open society, School Codes of Conduct should be enabling of the exercise of diversity to the greatest possible extent. This should ideally include provisions in the code that allow for the exercise of all religions not just those that are considered orthodox and mainstream. The Respondent school had the opportunity to demonstrate its commitment to creating such a tolerant environment that accepts diversity but chose instead, to suspend the complainant, without any hearing whatsoever.

9.21. Finally, it should be pointed out that the Complainant in this matter missed formal classes for approximately three (3) weeks due to the Principal's decision. The administrative decision of the respondent of restraining the complainant from entering the school's premises until such time he had removed the dreadlocks had an adverse effect on his right to education. The conduct of the Respondent clearly violated the complainant's right of access to education.

10. Findings

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

10.1. The Respondent's Code of Conduct constitutes an unreasonable limitation, and a violation of, the Complainants right to practice his religion.

10.2. The directive of the Respondent to the Complainant to shear his dreadlocks, constitutes a violation of the Complainant's right to human dignity.

10.3. The directive of the Respondent to the Complainant to shear his dreadlocks as a precondition to access education constitutes a violation of the right of the Complainant to education.

10.4. The failure of the Respondent to consult with the Complainant prior arriving at the administrative decision to suspend the Complainant constitutes a violation of the Complainant's right to administrative justice.

10.5. The failure of the Respondent to provide the Complainant with an opportunity to appeal the decision of the Respondent, constitutes a violation of the Complainant's right to administrative justice.

11. 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*

[29] CCT36/00 (2002) (2) SA 794

adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."

11.1. The Commission recommends accordingly that:

11.1.1. The Respondent Governing Body review and amend the School Code of Conduct within a period of three (3) months from date of this finding.

Such amended Code of Conduct should demonstrate the following:

(a) reasonable accommodation of religious and culturally based deviations;

(b) set out the procedure for applying and possibly granting such exemptions; exemptions to be made only on religious considerations.

11.1.2. The Free State Provincial Department of Education to conduct an audit and review of the Codes of Conduct of other public schools in the 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;

11.1.3. The Free State Provincial Department of Education to issue revised Public School Guidelines on religious diversity in all public schools in the Province within a period of eighteen (18) months from date of this finding;

11.1.4. The Free State Provincial Department of Education to provide the Commission with a Report within six (6) months of date of this finding on the steps it intends to take to eliminate all forms of intolerance and of discrimination based on religion or belief, and reasonable accommodation of religious diversity in public schools in the Province.

12. 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

Signed in Johannesburg on the 3Rd day of April 2013

South African Human Rights Commission

COMPLAINT NO: Western Cape/2012/0030

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Complaint No: 5
WC/2012/0030

In the matter between:

DES JACOBS **Complainant**

and

OVERSTRAND MUNICIPALITY **Respondent**

REPORT

1. Introduction

1.1. The South African Human Rights Commission (Commission) is an institution established in terms of Section 181(1) of the Constitution of the Republic of South Africa, 1996 (Constitution).

1.2. The Commission is specifically required in terms of the Constitution:

Functions of South African Human Rights Commission.-

184. (1) The South African Human Rights Commission must –

(a) promote respect for human rights and a culture of human rights

(b) promote the protection, development and attainment of human rights, and

(c) monitor and assess the observance of human rights in the Republic.

Further, in terms of Section 184(2):

The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power-

(a) to investigate and to report on the observance of human rights;

(b) to take steps to secure appropriate redress where human rights have been violated;…"

1.3. The Human Rights Commission Act, 54 of 1994 (HRA) (as promulgated in terms of Section 184(4) of the Constitution), further supplements the powers of the SAHRC.

1.4. Section 9(6) of the HRA determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. The Parties

Mr Des Jacobs (Complainant) is an adult male resident of Betty's Bay, Overstrand Local Municipality, Western Cape Province.

The Overstrand Local Municipality (Respondent) is a Category B Municipality established in terms of the Local Government Municipal Structures Act, 117 of 1998, with its Head Office situated in Magnolia Street, Hermanus.

3. The Complaint

3.1. The Commission received the complaint on 17 April 2012 wherein the Complainant alleged that:

3.1.1. During the previous year, the Complainant's water supply had been restricted.

3.1.2. One day the Complainant returned home to discover that the water supply had been completely shut off.

3.1.3. The Respondent had disconnected the supply of water to the Complainant's residence due to lack of payment on the Complainant's municipal account.

3.1.4. The Respondent levied a fine against the Complainant of more than R4000.00 because of alleged tampering with his water meter.

3.1.5. The Complainant denies that he tampered with the meter.

3.1.6. As of 17 April 2012 water supply had been restored but was still restricted.

3.2. Due to the above, the Complainant is aggrieved, as he believes that his right to just administrative action has been violated by the Respondent.

3.3. Although the Complainant did not specifically identify the right to water within his complaint, the right is implicated by the facts set out in the complaint.

3.4. Complainant seeks to have the tampering fine removed from his account.

4. Human Rights Under Investigation

4.1. Section 27 of Chapter 2 of the Constitution of the Republic of South Africa 1996 states:

"Health care, food, water and social security. – 27. (1) Everyone has the right to have access to - ...

(b) sufficient food and water;...

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

4.2. Section 33 of Chapter 2 of the Constitution of the Republic of South Africa states:

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

5. Investigation Undertaken by the Commission

5.1. Upon perusal and assessment of the complaint and based on the Complainant's request for advice and relief, the Commission decided to further investigate the matter.

5.2. On 20 September 2012 the Commission sent an allegations letter to the Respondent requesting:

5.2.1. A response to the allegations;

5.2.2. Information regarding any attempts by the Respondent to assist the Complainant;

5.2.3. The Respondent's debt management policy in respect of persons unable to pay their municipal accounts;

5.2.4. Detailed reasons for the fine levied against the Complainant;

5.2.5. Reasons why the Complainant was not afforded an opportunity to make representations in respect of this matter; and

5.2.6. Details relating to the reasons for the disconnection of the Complainant's water supply.

5.3. On 22 January 2013, the Complainant was requested to provide additional information regarding matters raised in the Respondent's response, namely whether he had received formal notification from the Respondent that his water would be disconnected or any formal notification of the tampering fine/fee before it was levied against his account. On 22 January 2013, Complainant responded and answered both questions in the negative.

6. Respondent's Response

6.1. On 30 October 2012, the Commission received a written response from the Respondent in which the Respondent indicated the following: -

6.1.1. The Complainant appears to have financial difficulties.

6.1.2. The Complainant had made a payment arrangement with the Respondent but did not honour it.

6.1.3. Because of the Complainant's failure to honour the payment arrangement, the Respondent levied a "tamper fee" of R4665.60 on his account and a reconnection fee of R500 was levied on his account on two occasions.

6.1.4. The Complainant did not make payment arrangements once the water was restricted on 7 July 2011.

6.1.5. That on 25 August 2011, a re-visit was done by the Respondent where it became evident that the restrictor had been removed. According to the Respondent, the Complainant denied removing the restrictor or having any knowledge of who did. (The Respondent does not indicate when the Complainant made these statements; the correspondence provided by the Respondent contains references to the Complainant discussing the tamper fee/fine in December 2011, 25 April 2012 and 2 May 2012, well after the fee/fine was imposed in August 2011.

6.1.6. The Complainant received a 14-day notice in June 2012.[1] (No copy of the notice has been provided and the Respondent did not specify the contents of the notice).

6.1.7. That the owner of the property is solely responsible for the meter.

6.1.8. That over a period of 33 months, the Complainant made only three payments to the Respondent.

6.1.9. The Respondent concluded its response with the following statement:

"Overstrand Municipality cannot deliver services without payments."

[1] The remainder of documentation supplied in this matter would indicate that this date should be June 2011, but as no copy of the notice if provided, the date is given here as it appears in the Respondent's response.

6.2. Documentation attached to the response shows account activity for the Complainant from January 2010 to September 2012. Three payments were made: R9902.40 in January 2011, R5400.00 in December 2011, and R504.67 in January 2012, for a total of R15807.07 over the 33 months, the schedule shows R25613.32 in charges levied, R1321.09 in interest, and R7950.95 in other fees and charges (such as collection costs, restriction fees, sheriff fees, the tamper fine/fee, and deposit increases).

6.3. The Respondent included a document with the Overstrand Municipality logo purportedly requesting contractors to visit the Complainant's home. Three dates are shown: 7 July 2011, 25 August 2011, and 30 August 2011. It appears that the first date reflects the day on which the water restrictor (disc) was installed. The second entry for the second date reflects the following handwritten entry: *"tampered!! The disc had been removed – we replaced the disc."* The final entry states only *"still restricted 11:35 30/8."*

6.4. The Respondent further provided copies of emails between the Complainant and various officials of the Respondent, which it represented, as being all of the correspondence between itself and the Complainant. This correspondence consisted of the following:

6.4.1. A thread of five messages dated 25/26 January 2012 (regarding a problem with the Complainant receiving email messages at the address he had previously supplied to the Respondent). In a message dated 26 January, an official of the Respondent refers to a payment agreement entered into between the Complainant and the Respondent, and acknowledges payments made by the Complainant. The contents of this message appear to indicate that the parties have agreed that the Complainant will, each month, pay the charges incurred for the previous month as well as an additional amount of R504.67, which would then be applied to the outstanding balance on his account (R6055.98 at December 2011). No copy of the agreement has been supplied to the Commission by either party. However, the schedule of payments supplied by the Respondent reflects a payment of R504.67 from the Complainant in January 2012.

6.4.2. A message dated 11 April 2012 that makes reference to a conversation between the Complainant and an official of the Respondent regarding the payment agreement arranged and what is required for the Complainant to restore his water supply. The message states that the Complainant had made no payments since January 2012 and that a drip system had been reinstalled as a result. The schedule of payments reflects no payments for February or March 2012 and that an additional restriction fee was imposed in March.

6.4.3. A thread of five messages dated between 25 April 2012 and 2 May 2012 in which the Complainant objects to the tampering fee and the requirement that all amounts on the account be paid off (including the fee) before full water supply can be restored. In messages dated 2 May 2012, both parties acknowledge a conversation between the Complainant and the Respondent whereby an arrangement had been reached. In his 2 May 2012 message, the Complainant acknowledges his responsibility for the arrears on the account but continues to contest the requirement that he pay the R4665.60 imposed in August 2011. In its 2 May 2012 message, the Respondent states that the agreement the Complainant signed stated that, in the event of a default on the December 2011 agreement, services would be stopped. Disturbingly, this message also indicates that the Respondent had unilaterally allocated the R5400 payment the Complainant

made in December 2011 to the tampering fee/fine despite the fact that the usage amount at that time totaled R8745.58 and that the Complainant was disputing the propriety of the imposition of the fee/fine.

6.5. On 22 January 2013 the Commission requested additional information from the Respondent, specifically regarding whether the Respondent conducted an investigation into the suspected tampering with the restrictor; the source of the authority for imposing the fine for the suspected tampering; and all formal letters and correspondence relating to the suspected tampering.

6.6. On 29 January 2013, the Respondent replied that it had conducted an investigation and referred to the report of 25 August 2011. As stated above, the findings of this investigation provided are limited to the statement *"tampered!! The disc had been removed – we replaced the disc."*

6.7. With respect to the R4665.60 amount imposed on the Complainant's account, the Respondent stated that "it is not a fine, but a tamper fee as approved by Council."

6.8. Finally, the Respondent stated that there was no further correspondence other that what had already been supplied to the Commission, which is described above.

7. Other Information Gathered by the Commission

7.1. The Overstrand Customer Care, Credit Control & Debt Collection Policy (Customer Care Policy), upon which much of the actions of the Respondent are based, contains the following pertinent provisions:

7.1.1. *"The administrative integrity of the Municipality must be maintained at all costs.*[2]

7.1.2. *"Unauthorised consumption, connection and reconnection, the tampering with or theft of meters, service supply equipment and the reticulation network and nay fraudulent activity in connection with the provision of municipal services will lead to disconnections, charges, penalties, loss of rights and/or criminal prosecutions. A certificate reflecting the nature and extent of the unauthorized activity must be issued by a duly qualified person to substantiate the claim.*[3]

7.1.3. *"The principle of providing services instead of payment for arrear accounts is supported.*[4]

7.1.4. *"Should a customer fail to enter into such agreement with Council or to provide the security described in clause 7.6, Council may(a) hold the customer liable for all outstanding debt on services for the property; and/or (b) restrict or discontinue the supply of services.*[5]

7.2. In its 22 January 2013 response to an enquiry sent to Overstrand Municipality by the Commission on 13 December 2012 regarding water and sanitation provision[6] within the Municipality, the Municipal Manager stated that *"All Overstrand consumers receive 6 kilolitres [of water] per month free of charge."*

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2 Overstrand Customer Care, Credit Control & Debt Collection Policy (Customer Care Policy), at paragraph 3.1.

3 Overstrand Customer Care, Credit Control & Debt Collection Policy (Customer Care Policy), at paragraph 3.9.

4 Overstrand Customer Care, Credit Control & Debt Collection Policy (Customer Care Policy), at paragraph 3.16.

5 Overstrand Customer Care, Credit Control & Debt Collection Policy (Customer Care Policy), at paragraph 7.2.10

6 This request was made pursuant to the Commission's mandate, set out in Section 184(3) of the Constitution to obtain information from organs of state in regards to measures taken towards the realisation of rights within the Bill of Rights, including, the right to water.

7.3. The approved tariffs for Overstrand Municipality according to 2012-2013[7] budget documents corroborates the above statement regarding provision of 6 kilolitres of water per month to all Overstrand consumers in that the tariff for 0-6 kilolitres for household consumption is R0.00.[8]

8. Legal Framework

8.1. International Law and Instruments

8.1.1. General human rights instruments

Universal Declaration of Human Rights 1948[9]

The Universal Declaration, which is widely recognised as reflecting customer 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 recognises the rights of all peoples to a minimum standard of health and wellbeing:

25. *"(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, widowhood, old age* or other lack of livelihood in circumstances beyond his control".

International Covenant on Economic Social & Cultural Rights 1966 (ICESCR)[10]

Article 2(1) explains nature of the obligation resting on state 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 right is subject to the state's available resources.

Article 11 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 – being vital aspects of 'an adequate standard of living' – are clearly governed by this Article.

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.[11]

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7 Budget and tariff information for 2011-2012 could not be accessed via the Overstrand Municipality website http://www.overstrand.gov.za

8 Overstrand Municipality Budget 2012 / 2013 Annexure B, available at http://www.overstrand.gov.za/index.php?option=com_docman&task=cat_view&gid=99&Itemid=159.

9 10 December 1948, 217 A (III), available at: http://www.refworld.org.docid/3ae6b3712c.html [accessed 14 October 2013]. South Africa ratified the UDHR on 10 December 1948.

10 10 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty series, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html [accessed 16 October 2013]. South Africa has not ratified the ICESCR.

11 Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

8.1.2. United Nations General Comments

8.1.2.1. The UN Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No 04 (1991) notes:

"In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.[12]

8.1.2.2. The CESCR in General Comment No. 15 (2003) notes:

"Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies... Where such action is based on a person's failure to pay for water their capacity to must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water."[13]

It is important to acknowledge that these comments merely provide guidance to the courts in South Africa and they are not binding in any way.

8.1.2.3. United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation (2010)[14]

On 28 July 2010, through Resolution 64/292, the Un General Assembly adopted a resolution explicitly recognizing the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights.

The Resolution called on all Member States and international organisations to provide financial resources help capacity building and technology transfer to help countries, specifically developing countries 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.

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[12] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: *The Right to Adequate Housing (Art. 11 (1) of the Covenant),* 13 December 1991, E/1992/23, available at: http://refworld.org/docid/47a7079a1.html [accessed 7 October 2013] at paragraph 7.

[13] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C 12/200/11, available at: http://refworld.org/docid/4538838d11.html [accessed 7 October 2013] at paragraph 56.

[14] Resolution 64/292.

8.2. The Constitution of the Republic of South Africa, 1996

8.2.1. The Right to Health Care, Food, Water and Social Security

Section 27 of the Constitution provides that:

27. (1) "Everyone has the right to have access to

(b) sufficient food and water; and

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

8.2.2. The Right to Just Administrative Action

Section 33 of the Constitution provides that:

33. (1) "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

(2) "Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons".

(3) National legislation must be enacted to give effect to these rights and must-

(a) "provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal";

(b) "impose a duty on the state to give effect to the rights in subsections" (1) and (2); and

(c) "promote an efficient administration".

8.2.3. Responsibilities of Local Government

Section 7(2) of the Constitution provides that:

7. (2) "The state must respect, protect, promote and fulfill the rights in the Bill of Rights".

Section 153 of the Constitution states that:

153. A municipality must-

"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";

Section 156 of the Constitution provides that:

156. (1) "A municipality has executive authority in respect of, and has the right to administer-

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation".

Part B of Schedule 4 of the Constitution sets out that local government is inter alia responsible for "water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems."

8.2.4. Organs of State

Section 239 of the Constitution provides that:

"organ of state" means-

(a) "any department of state or administration in the national, provincial or local sphere of government"; or

(b) Any other functionary or institution –

(i) "exercising a power or performing a function in terms of the Constitution or a provincial constitution"; or

(ii) "exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer";

8.3. Domestic Legislation

8.3.1. Local Government – Municipal Systems Act No. 32 of 2000

The definition of basic municipal services according to the Act 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".[15]

8.3.2. Water Services Act, 108 of 1997

Section 1 (iii) 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 quantity and quality of water to households, including informal households, to support life and personal hygiene".

Section 3 of the Water Services Act 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".

Section 4(3) of the Water Services Act states that:

(3) "Procedures for the limitation or discontinuation of water services must"-

(a) "be fair and equitable";

[15] Chapter 8 of the Municipal Systems Act

(b) "provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations unless-

(i) other consumers would be prejudiced;

(ii) there is an emergency situation; or

(iii) the consumer has interfered with a limited or discontinued service; and

(b) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services".

8.3.3. Promotion of Administrative Justice Act, 3 of 2000 (PAJA)

The PAJA provides a legislative basis for the review of administrative action and sets out procedures to be followed by administrators before certain decisions or rules are made. PAJA 'gives effect' to the constitutional rights in Section 33 of the Constitution.

(1) "Definitions – In this Act, unless the context indicates otherwise- "administrative action" means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive…

(bb) the executive powers or functions of the Provincial Executive…

(cc) the executive powers or functions of a municipal council

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial official or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1);

"decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a license, authority or other restriction;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;

"organ of state" bears the meaning assigned to it in section 239 of the Constitution",

Section 3 of PAJA states that:

3. "Procedurally fair administrative action affecting any person. -

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(i) a clear statement of the administrative action;

(ii) adequate notice of any right of review or internal appeal, where applicable; and

(iii) adequate notice of the right to request reasons in terms of section 5".

Section 8 of PAJA sets out the available remedies for an administrative action determined to be procedurally unfair. They include directing an administrator to give reasons[16], directing an administrator to act in a particular manner[17,] prohibiting an administrator from acting in a specified manner[18], and setting aside of the action under scrutiny.[19]

8.4. 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 meters of a household; and

(iii) with an effectiveness such no consumer is without a supply for more than seven full days in any year.[20]

8.5. Case Law

8.5.1. Socio-economic Rights

The Courts is a number of key judgments have interpreted the scope of these rights by providing guidelines in determining reasonableness and assessment of the state's obligations.

In ***Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (Grootboom)*** 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".*[21]

Whilst Grootboom dealt with the issue of housing this case is of relevance given that the right of access to housing is qualified by the same provision as the right to access to water namely: - *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*

The Constitutional Court noted 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

16 Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), Section 8(a) (i).

17 Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), Section 8(a) (ii).

18 Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), Section 8(b).

19 Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), Section 8(c).

20 General Notice 22355 of 8 June 2001.

21 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at paragraph 41.

22 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at paragraph

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.[23]

8.5.2. Right of access to sufficient water

Two cases decided by the Constitutional Court provide guidance on the issues raised in this complaint. In ***Mazibuko and Others v City of Johannesburg and Other[24] (Mazibuko)*** the Court found that:

> *"Applying this approach to section 27(1) (b), the right of access to sufficient water, coupled with section 27(2), 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.[25]*

The Court in ***Joseph and Others v City of Johannesburg and Others[26]*** concluded that the framework relating to the right to housing, water, sanitation and electricity, whether constitutional, legislative or policy-related, placed specific obligations on municipal authorities to provide access to basic services to all persons who rely on it)the municipality) for those services.[27]

The Supreme Court of Appeals (SCA) has also had occasion to consider permissible means taken by a municipality when collecting payments for basic services. In ***City of Cape Town v Strümpher***,[28] the SCA stated that:

> *"It is true that consumers, living within a municipal area, who wish to access water from a water service authority, such as the City, have to conclude a water supply contract with that authority. 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, such as the respondent. The right to water is a basic right.*[29]

The SCA went on to say:

> *"Water users have a statutory right to the supply of water in terms*

42.

23 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at paragraph 44.

24 *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009).

25 *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) at paragraph 50.

26 (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009).

27 (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009) at paragraph 39.

28 *City of Cape Town v Strümpher* (104/2011) [2012] ZASCA 54; 2012 (4) SA 207 9SCA) (30 March 2012).

29 *City of Cape Town v Strümpher* (104/2011) [2012] ZASCA 54; 2012 (4) SA 207 9SCA) (30 March 2012) at paragraph 9.

of s 11(1) of the Water Services Act which imposes a duty on a water services authority to ensure access to water services to consumers. It follows that the respondent's right to a water supply to the property could not be classified as purely contractual."[30]

9. Legal Analysis

The relevant question in this matter is whether the actions of the Respondent violated the Complainant's rights to access to sufficient water and to just administrative action.

To answer this question the Commission must determine:

9.1. whether the Complainant has established that the Respondent prevented him from being able to access sufficient water in his home; and

9.2. whether the Respondent's procedure in leveling the R4665.00 tamper fee/fine satisfies the requirement of just administrative action.

9.1. Right of access to adequate water

In the original complaint, the Complainant asserts that his water supply was at time completely shut off by the Respondent and that at other times water was available but flowing slowly (taking 25 minutes to fill the cistem, ostensibly meaning the toilet cistem). In the email thread supplied by the Respondent, reference is made to a drip system, which appears to be synonymous with the references of the Complainant to a reduced flow. At no point in the email threads does the Respondent specifically indicate that the Complainant's water was completely shut off, but references to reconnection fees support the Complainant's assertion that at certain points in time, he had no water supply at home. Each of these scenarios is examined below in turn to assess whether the Complainant's section 27(1) (b) right of access to water has been violated by the Respondent's actions.

9.1.1. Complete limitation of water supply

As set forth above, the minimum levels set out for basic water supply in the Water Services Act Regulations do not provide for a scenario in which no water supply is provided to a domestic user. The Overstrand Municipality policy is to provide 6 kilolitres free basic water a month.

This statement is supported by section 4(3) (c) of the Water Services Act, which states that:

4(3) "[p]rocedures for the limitation of discontinuation of water services must…

(c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services."

In its response to the Complainant's allegations, the Respondent acknowledges that the Complainant *"appears to have financial difficulties."* The Respondent therefore acknowledges that the Complainant is unable to pay for basic services. The Respondent's actions by shutting off the Complainant's water completely for failing to pay his municipal account would therefore be contrary to the provisions of the Water Services Act.

[30] *City of Cape Town v Strümpher* (104/2011) [2012] ZASCA 54; 2012 (4) SA 207 9SCA) (30 March 2012) at paragraph 11.

9.1.2. Water restriction

During the period that the Complainant's water was restricted by still flowing, there is no evidence to demonstrate that the Complainant did not have access to sufficient water as guaranteed by section 27(1) (b). The Constitutional Court made it clear in *Mazibuko* that section 27(1)(b) does not supply a right to a free flow of water on demand,[31] so some level of restriction can be imposed by a municipality without amounting to a breach of section 27(1)(b). Consideration must therefore be taken of the Complainant's specific circumstances and whether the restriction was such that it can be said to have prevented him from accessing sufficient water. Whilst the Complainant was inconvenienced by the restricted water supply in that it took 25 minutes to fill his cistem, this would not amount to a denial of sufficient water.

9.2. Right to Just Administrative Action

The remaining issue to be resolved is whether the imposition of the R4665.00 fine on the Complainant's municipal account was procedurally fair as set forth in PAJA. The right to just administrative action in Section 33 of the Constitution is given effect by the provisions of PAJA set out above. To satisfy PAJA, an administrative action must be procedurally fair.[32] Although there is no one set of steps that must be taken to ensure procedural fairness in every instance,[33] some of the mandatory characteristics of a fair procedure include: adequate notice of the action's nature and purpose, and a reasonable opportunity to make representations.[34]

9.2.1. To qualify as an administrative action, the Respondent's act of imposing the tamper fee/fine on the Complainant's account must first be a *"decision"* as defined in Section 1 of PAJA. On the facts, the Respondent made a determination that the restrictor had been tampered with; made a determination that the Complainant was responsible for the tampering; and then made a demand that the Complainant pay R4665. Any one of these actions satisfies the definition of a "decision".

9.2.2. To qualify as an administrative action under PAJA, the decision must be made by an organ of state. The Municipality is a local government entity, as Set forth in section 239 of the Constitution.

9.2.3. PAJA requires that in making the decision (under review) the organ of state must be performing a public function. The Respondent in providing water services exercises a public power conferred on it by schedule 4B ofthe Constitution, and in implementing its credit control, debt collection and customer care policy, The Respondent performs a prime function in terms of section 96 of the Local Government: Municipal Systems Act No. 32 of 2000.[35]

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[31] *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) at paragraph [50].

[32] Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), Section 3(1)

[33] Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), Section 3(2) (a).

[34] Promotion of Administrative Justice Act No. 3 of 2000 (PAJA), Section 3(2) (b) (i) and (ii).

[35] Section 96 of the Municipal Systems Act states as follows: *A municipality – (a) must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and (b) for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of this Act.*

9.2.4. In order for procedural protections to be relevant, PAJA requires that the administrative action must materially affect legal rights. The Complainant's rights have evidently been adversely affected in two instances by the imposition of the tampering fee/fine. Firstly, the Respondent has imposed a significant additional payment obligation of the Complainant's municipal account. Secondly, because of the Respondent's requirement that all amounts outstanding on a municipal account be paid before full flow of water can be restored, the presence of the additional R4665.00 places a significantly greater burden on the Complainant, to re-access a full flow of water. Furthermore, these effects are not abstract or amorphous; rather they are direct, external legal effects that impact on both the Complainant's finances and access to services. This is demonstrated by the Respondent's unilateral allocation of the Complainant's December 2011 payment towards payment of the fee/fine, rather than allocating this payment to the charges for services actually received. The consequence thereof has made it more difficult for the Complainant to clear not only his outstanding debt but also to remove the restrictions from his account.

9.2.5. The action of the Respondent to impose the fee/fine was taken by its Finance Department in implementing its debt collection policy and procedures. Therefore this action does not fall within any of the exceptions listed in the definition of "administrative action" set out in Section 1 of PAJA.

9.2.6. Based on the above, the Respondent's imposition of the tampering fee/fine satisfies the requirement of being an "administrative action" within the scope of PAJA. Furthermore, as described above, it materially and adversely affected the Complainant's rights. Consequently, the administrative action must be procedurally fair to satisfy the requirements of permissibility under PAJA and not run afoul of the Complainant's constitutional right to just administrative action.

9.2.7. In order for the administrative action taken to have been procedurally fair, the Respondent is required in terms of PAJA to have, *inter alia,* provided the Complainant with *"adequate notice of the nature and purpose of the proposed administrative action*[36] and *"a reasonable opportunity to make representations.*[37] In addition, the Respondent's own policy requires *that "[a] certificate reflecting the nature and extent of the unauthorized activity must be issued by a duly qualified person to substantiate the claim."* The only documentation supplied by the Respondent to substantiate the claim of tampering consists of the cryptic statements by the contractor, namely *"tampered!! The disc had been removed – we replaced the disc."* This statement does not meet the requirements of Respondents' own policy in that it is not a certificate reflecting the nature and extent of the unauthorized activity; nor is there any basis to conclude that the person writing it is duly qualified as there is no indication of who has authorized the action, as required by the Respondent's policy. Finally, there is no evidence that this document was ever supplied to the Complainant.

9.2.8. In addition to PAJA Section 4(3) of the Water Services Act sets out requirements for administrative procedures to be followed when water services are to be limited or discontinued. Of particular relevant to this matter is the requirement of

[36] Promotion of Administration Justice Act no. 3 of 2000 (PAJA), Section 3(2) (b) (i).

[37] Promotion of Administration Justice Act no. 3 of 2000 (PAJA), Section 3(2) (b) (i).

Section 4(3) (b), which states that such procedures must *"provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations.*[38]

9.2.9. Moreover, the statement in the Respondent's 30 October 2012 response that *"Overstrand Municipality cannot deliver services without payments"* fails to establish a procedure that would comply with the requirements set forth in Section 4(3) (c) of the Water Services Act.

9.2.10. The Complainant alleges that he received neither notice of the proposed administrative action, not a reasonable opportunity to make representations on his own behalf regarding the proposed action. The Commission failed to receive any evidence to disprove the Complainant's assertion from the Respondent.[39]

9.2.11. In concluding, the Respondent took administrative action that materially and adversely affected the Complainant's rights; failed to give him adequate notice of the nature and purpose of the proposed administrative action or to provide the Complainant a reasonable opportunity to make representations. As a result, the Respondent did not act in a procedurally fair manner in its administrative action and therefore violated the Complainant's right to just administrative action.

9.3. Limitations of Respondent's Debt Collection Policy and Procedures

The review of the Overstrand Customer Care Policy undertaken in the course of this investigation revealed several provisions that are inconsistent with a human rights approach and that are contrary to the spirit of Section 96 of the Municipal Systems Act. This act states that a municipality's collection activities are subject to applicable legislation, which is circumstances such as those described in this complaint, would include the Water Services ct and PAJA. Although the Constitution is not specifically invoked in Section 96, a municipality's activities are unquestionably also subject to the provisions of the Constitution and the Bill of Rights.

9.3.1. The first troubling statement appears in paragraph 3.1 of the Respondent's Customer Care Policy, which states that *[t]he administrative integrity of the Municipality must be maintained at all costs."* Implicit in this statement is the idea that fundamental human rights must yield to administrative integrity. Such an approach cannot be advanced in light of the constitutional importance placed upon the human rights contained in the Bill of Rights. Although administrative concerns and human rights do not exist independently of each other and in fact are often intertwined, one can never be said to categorically eclipse the other when a conflict arises. Moreover, the thrust of paragraph 3.1 clashes with the statement in paragraph 3.16 of the Policy, which states that *"[t]he principle of providing services instead of payment for arrear accounts is supported."* Paragraph 3.16 aligns with the constitutional requirement upon the Municipality to

[38] Section 4(3) (b) (iii) sets out an exception to this requirement when "the consumer has interfered with a limited or discontinued \service." However, in the current situation as the Respondent states only that the discontinued service on the Complainant's property was interfered with by someone and that it holds him responsible for what takes place on his property. The Respondent has not produced evidence that the consumer, i.e., the Complainant himself, interfered with the service. Consequently, the exception of Section 4(3) (b) (iii) of the Water Services Act is not applicable.

[39] The Respondent does refer to a 14-day notice given to the Complainant in June 2011 (see footnote 1 regarding the date of the notice).However, this notice purportedly pertained only to the restriction of water, not the imposition of the fee/fine. More importantly, the Respondent has not supplied a copy of the notice, so it cannot be assessed for purposes of sufficiency under PAJA.

manage its administration to give priority to the basic needs of the community,[40] and the provision of Section 4(3) (c) of the Water Services Act that a person should not be denied access to basic water services because of non-payment. The Municipality should be striving to achieve a balance between respect for fundamental human rights and administrative integrity.

9.3.2. Throughout the Customer Care Policy, including specifically at paragraphs 3.9 and 7.2.10, the Respondent states that services can be disconnected or discontinued without any qualification regarding basic services such as water to domestic users.

It appears that the Respondent has failed to make efforts to take not of necessary limitations on its debt collection procedures in instances involving fundamental rights. The notation in the email thread of 25 April 2012 to 2 May 2012 that the agreement reached by the parties in December 2011 included in part, a provision that Complainant's water services would be stopped ostensibly entirely, in the event of a further default is troubling.

The thought of removal of a fundamental right in this instance the right to free water and sanitation in event of non-payment is problematic. Case law further support the argument that agreements to waive fundamental human rights are questionable at best.[41] The use of such provisions in its agreements pertaining to provision of basic services, are problematic and inconsistent with constitutional obligations to "respect, protect, promote and fulfill the rights in the Bill of Rights.[42]

10. Findings

10.1. With regard to the complete shutoff of water alleged in the Complaint, the Commission finds that the Respondent violated the Complainant's right of access to sufficient water as set forth in section 27(1) (b) of the Constitution.

10.2. With regard to the restriction of water the Commission finds no violation of Complainant's right to sufficient water as set out in Section 27(1) (b) of the Constitution.

10.3. The Commission finds that the Respondent's conduct by imposing the tamer fee/fine constitutes a violation of the Complainant's right to just administrative action under Section 33 of the Constitution and the Promotion of Administrative Justice Act in that it failed to provide the Complainant with due notice of the nature and purpose of the proposed administrative action or a reasonable opportunity to make representations.

11. Recommendations

Based on the above discussion and findings, Commission recommends that the Respondent:

11.1. Cease any deliberate municipal action that prevents a municipal domestic water consumer of a municipality, including the Complainant, from receiving his/her free basic water amount (in this instance – at least 6 kilolitres of water per month as per Overstrand Municipal Policy) due to non payment.

[40] The Constitution of the Republic of South Africa 1996, Section 153(a).

[41] Beja and Others v Premier of the Western Cape and Others (21332/10) [2010] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC) (29 April 2011) at paragraph 102.

[42] Constitution of the Republic of South Africa 1996, Section 7(2)

11.2. Put in place steps and measures to ensure compliance with the requirements of PAJA when seeking to institute fines/levies.

11.3. In the case of the Complaint herein, review the actions taken in respect of instituting the fine in light of the legal requirements as set out in the report above and inform the Commission of the outcome of this review process within three months of receipt of this report.

11.4. Complete a review of the Overstrand Customer Care, Credit Control & Debt Collection Policy provisions and debt collection procedures identified as problematic in this report and explicitly consider whether they are consistent with the Municipality's obligations set forth and to provide the Commission with a copy of the duly revised Policy and Procedures within six months of receipt of this Report.

12. Appeals Clause

Should any party not be satisfied with this decision, that party may lodge an appeal, in writing within 45 days of receipt of this report. A copy of the appeal form is available at any office of the SAHRC. The appeal should be lodged with the Head office of the SAHRC – contact details are as follows:

Private Bag X2700
Houghton
2041

South African Human Rights Commission

COMPLAINT NO: FS/2012/0077

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2012/0077

In the matter between:

Theunissen Forum	**Complainant**
and	
Department of Water Affairs	**1st Respondent**
Department of Co-operative Governance & Traditional Affairs	**2nd Respondent**
Masilonyana Local Municipality	**3rd Respondent**

REPORT

(In terms of Article of the Complaints Handling Procedures of the SAHRC)

1. Introduction

1.1. The South African Human Rights Commission (hereinafter called the "Commission") is and institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996.

1.2. The Commission is an institution created under Chapter 9 of the Constitution as a "state institution supporting constitutional democracy".

1.3. The Commission is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development oand attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. *Section 184(2) of the Constitution*[1] empowers the SAHRC to investigate and report on the observance of human rights in the country.

1.5. Further, *section 184)(2) and (d)* affords the Commission authority to carry out research and to educate on human rights related matters.

1.6. The *Human Rights Commission Act, 54 of 1994,* (hereinafter referred to as "the Act") further supplements the powers of the SAHRC.[2]

2. Parties

2.1. The Complainant is Theunissen Forum, a voluntary association of residents of Theunissen, an area falling under the jurisdiction of Masilonyana Municipality, Free State Province.

2.2. The 1st Respondent is the Department of Water Affairs, Free State (hereinafter referred to as "**DWA**").

2.3. The 2nd Respondent is the Department of Co-operative Governance and Traditional Affairs, Free State (hereinafter referred to as "**COGTA**").

1 The Constitution fo the Republic of South Africa, 1996 (Act 108 of 1996)

2 (No Detail of PDF)

2.4. The 3rd Respondent is Masilonyana 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 corner Theron & Le Roux Streets, Theunissen (hereinafter referred to as "**MLM**").

3. Background to the Complaint

3.1. On the 18th of July 2012 the Commission received a complaint from the Complainant setting forth certain allegations and seeking the intervention of the SAHRC in investigating the matter, and providing a resolution herein.

3.2. In a nutshell, the Complainant alleges that:

3.2.1. That there was a water crisis in the Masilonyana Municipality, and that the Respondent was in violation of the constitutional rights of the residents of Theunissen to enjoy access to adequate supply water; and that

3.2.2. That the supply of water provided by the MLM to the residents of Theunissen Municipality was *inadequate;*

3.2.3. That the supply of water provided by the Respondent to the residents was discoloured, contaminated with visible debris and *unsafe for human consumption.*

3.2.4. That on several instances the Complainant attempted to engage the Respondent in an attempt to discuss the matter; but that relevant officials of the Respondent have failed and/or neglected and/or refused to meet with the Complainants;

3.2.5. That the Respondent has failed and/or neglected and/or refused to provide the Complainant residents of Theunissen with information, adequate or at all, on the steps that the Respondent has taken to address the Complainant's water supply and safety concern.

3.3. In the result, the Complainant alleges that the Respondent's failure and/or neglect and/or refusal to provide the residents of the municipality with clean and safe water supply amounted to a violation of the residents' constitutional rights to enjoy access to adequate and clean water.

3.4. Further, that the Respondent's failure and/or neglect and/or refusal to provide the residents with information as to the steps that they were taking to address these issues amounted to a violation of the resident's constitutional rights to access information.

4. Preliminary Assessment

4.1. In the preliminary assessment of the Commission, there had been a *prima facie* violation by the Respondent of the constitutional rights of the Complainant in terms of:

4.1.1. Section 9 (2) of the Constitution;

4.1.2. Section 10 of the Constitution;

4.1.3. Section 27 (1) (b), Constitution Act; and

4.1.4. Section 32 (1) (a) and (b), Constitution

4.2. The Commission further noted that in terms of Section 27 (2) of the Constitution, the duty of the state to provide adequate and clean water was **subject to** the availability of resources; *to wit,* the state is required to take reasonable legislative and other steps, within its available resources, to achieve the progressive realisation of this right.

4.3. Yet further, the Commission determined that the alleged violation fell within the mandate and jurisdiction of the Commission;

4.4. Yet further, the Commission determined that the alleged violation merited further and fuller investigation;

4.5. In determined the appropriate Respondents to be investigated in the matter, the Commission identified the following parties:

4.5.1. Department of Water Affairs ("DWA");

4.5.2. Department Cooperative Government and Traditional Affairs ("COGTA"); and

4.5.3. Masilonyana Local Municipality ('MLM').

5. Issues for Determination

5.1 The three (3) key issues for determination in this matter were the following:

5.5.1. Whether the MLM had violated the rights of residents of the Masilonyana Municipality to access *adequate supply* of water;

5.5.2. Whether the MLM had violated the rights of residents of the Masilonyana Municipality to access to water that was *clean and safe for consumption;*

5.5.3. Whether the MLM had violated the rights of residents of the Masilonyana Municipality to *access information.*

6. Steps taken by the Commission

6.1. 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: Written correspondence with Respondent; and an *Inspection in loco.*

a) Correspondence with the Respondents

6.2. On or about 27 July 2012, the Commission forwarded an allegation letter to Respondent setting for the the allegations made against it by Complainant.

6.3. The purpose of this correspondence was threefold: (a) presenting the Commission's preliminary assessment of the rights violated as well as placing on record the allegations made against Respondent; (b) providing Respondent(s) with an opportunity to present its side of the matter; providing Respondent(s) with an opportunity to remedy the matter;

6.4. As per the SAHRC procedures, the Commission extended a period of twenty-one (21) days to the Respondent during which the Respondent was to furnish the Commission with a reply.

b) Inspection in loco

6.5. On the 19th September, 2012 the Commission conducted an inspection in loco of the Masilonyana Municipality.

7. Evidence collected during Investigation

7.1. *Response from the 1st Respondent*

On the 19th of October 2012 the Commission received a reply to its letter dated 27 July 2012 from the DWA, which stated *inter alia* the following:

7.1.1. That the 1st Respondent was aware of this water crisis;

7.1.2. That the 1st Respondent was currently putting measures in place to deal with this water crisis;

7.1.3. That the 1st Respondent had indentified 3 three projects worth 11 Million Rand for the construction of Theunissen Clean Water Pump Station, Two Earth Dams and a 2ML Reservoir in three upcoming financial years.

7.2. *Response from the 2nd Respondent*

On the 19th October 2012 the Commission received a reply to its letter dated 27 July 2012 from the DCOGTA, which stated inter alia the following:

7.2.1. Confirming that that the COGTA were aware that the MLM were the lowest performing municipality;

7.2.2. Confirming that the quality of water in MLM was below the desired standard and that there was no defence against the high risk posed to safe water drinking;

7.2.3. Further that the MLM communities were warned not to consume the tap water without first administering home disinfection treatments to the water like boiling or adding bleach;

7.2.4. Further that the management, operation and maintenance of the Theunissen Water Treatment Works were meeting the DWA legal requirements as per indicators in the SANS 241 and Regulation No 2834;

7.2.5. Advising that DWA sent a non compliance letter and a follow up letter to MLM requesting an action plan after the release of the blue Drop report;

7.2.6. Confirming that in June 2012 the Theunissen Water Treatment Plant was refurbished and that new filter nozzles and filter media were installed in two of the four filters;

7.2.7. It was further confirmed that as of the 24th August 2012 the drinking water quality as per the SANS 241 2011 specifications were superb and safe for drinking as per an independent sample test; annexed hereto;

7.2.8. In addition it was confirmed that current the Water Treatment Plant is overloaded by 20% but that if the old plant can be used this will meet the demand;

7.2.9. COGTA advised that a two day water summit was held in May 2012 and during this summit resolutions were made on a way forward;

7.2.10. DWA is also assisting MLM in order to improve the management and quality of water in the area;

COGTA also confirmed that on 3 July 2012 a meeting was held with the MLM and the Complainant;

7.2.11. COGTA confirmed that MLM had identified three projects for the MTEF period, these included:

a) Construction of a clean water pump station would cost R4.2 million;

b) Construction of two earth dams – R2 million;

c) Construction of 2ML reservoir – R4.8 million.

7.3. No Response from MLM.

7.4. Observations of Inspection in loco

a) General Observations

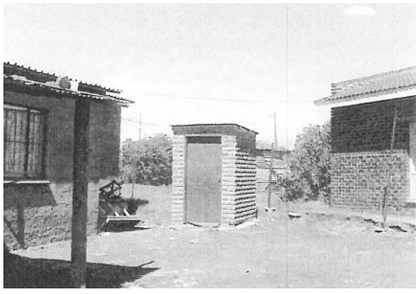
7.4.1. The community in Theunissen have a white community, middle to upper class, and a black/coloured community who are vastly unemployed and living in desperate conditions.

7.4.2. The town has three functioning big business which generate work and income for the community, namely, a animal feed factory, a brick manufacturing factory and an abattoir.

7.4.3. These businesses employ close to Two hundred people from the area.

7.4.4. The community residing in the informal sectors of the town are greatly impacted as they do not have sufficient access to water when water is available (one tap per seven households) and the almost Two Thousand (2000) toilets build in the nearby formal settlement have not been working since being built in 2007-2010.

7.4.5. The reason provided for this is that the contractor who was awarded the tender did not build the toilets properly, as a result it cannot/has not been connected to water or sewage pipes. Instead what community members are forced to use...



"Photo A" – Unused toilets:

"Photo B" – bucket toilets:

b) Substantive Observations

7.4.6. Water Reservoirs:

7.4.6.1. There are three functioning water reservoirs in the town, which according to the complainant, if maintained effectively and cleaned will service the towns needs;

7.4.6.2. There is a fourth water reservoir that was built (date unknown) at a cost (unknown)which has not been used since being built. It has now been virtually discarded and is being used by homeless person as shelter.

7.4.6.3. All pipes and fittings have been long removed and sold for scrap in order to secure money for food.

7.4.6.4. No enclosure is apparent, and if there was any it has since been removed.

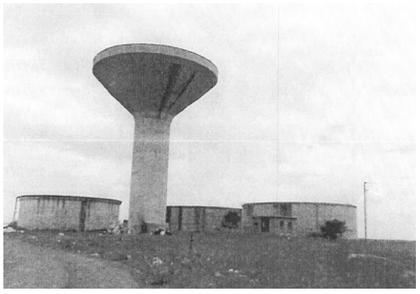
7.4.6.5. The area around the water reservoir is not secure and is right next to if not in the same space as a dump site.

7.4.6.6. There are people who live and "work" in the areas under and around the discarded fourth reservoir.

7.4.6.7. The area is also home to a few goats who eat the rubble and utilise the area for ablution purposes.

7.4.6.8. There are no visible ablution facilities in the area for the people currently squatting and there are no taps.

7.4.6.9. Access to the water reservoirs themselves is freely accessible to any member of the public at any time.



"PHOTO C" the reservoirs

7.4.1.10. Waste water treatment plant

7.4.1.11. The facility is very well kept, enclosed with fencing and gates. (this was not the case at the water reservoirs which provides the town of Theunissen with its drinking water)

7.4.1.12. The cleaning lady, the only staff member at the plant allowed the investigator to freely walk around the area unaccompanied.

"PHOTO D" the dumping grounds:

7.4.1.13. It appeared that none of the equipment was on or working in the plant.

7.4.1.14. Two of the damns which as explained to me collected solid waste and then in essence was suppose to separate the solid waste from the water and then facilitate a process of "purification" was stagnant had had green moss like substances floating of the top. The rotating arms were silent and not moving.

"PHOTO E" the people living in the area and the animals:

7.4.1.15. The "tunnels" or solid waste collection pits were unused and had weeds growing from them.

7.4.1.16. A few metres away from the plant a little canal ran from the plant to the river, and it would appear from the naked eye that untreated waste water was running form the plant through this little canal/stream into the river which feeds the dam with its water reserve for supply to Theunissen.

7.4.1.17. A room in the basement of the building housed unused new water metres which were gathering dust.

7.5. The investigators further observed the following:

a) At the animal "veiling" / action there old unused and discarded water plant still allows water to flow into stream and canals leading to the water supply of the town;

b) Manholes that are uncovered over flow with waste from the abattoir;

c) Covered manholes overflowing with waste water into surround ecosystems which (as it is untested) may have caused soil and water pollution in the area;

7.6. Other parties affected in the area are detainees at the local SAPS as the right of access to water and their rights to dignity are infringed when there is no water available for them. This results in police officers, who are employed by the state to police Theunissen, becoming water carriers to ensure that prisoners/detainees receive water for drinking use, bathing and ablution purposes.

7.7. Nurses at the local health care facilities are hesitant to treat patients as they are unable to wash their hands before and after handling patients.

8. Investigation Finding

The Investigation team inspected a number of sources of water supply from the area. The following were the findings of the investigation team:

8.1. *Adequacy of Supply*

8.1.1. The team observed that many of the residents did not have access to water;

8.1.2. The team interviewed a random sample of residents in the area and confirmed that many residents did not have access to adequate water supply.

Finding: It was patently clear from an inspection of the area, that many of the residents in this Municipality did not have access to water, in adequate amounts or at all. This fact has not been contradicted by any of the Respondents.

8.2. *Water cleanliness*

8.2.1. The investigation team observed that the water in some of the sources of supply in the Municipality was discoloured and contained impurities and micro-organisms that were visible to the eye.

8.3. *Water Safety*

8.3.1. *Working under the guidance of the Laboratory of the University of the free State, the team took waer samples from water pumps in Theusnissen and sent them for laboratory testing at the University.*

Finding: The results received from the Laboratory of the University of the Free State indicated that although the water appeared to be dirty and contaminated, the water was safe for consumption. See attached annexure marked "**ANNEXURE TF1**", attached hereto.

Private Bag X2700
Houghton
2041

South African Human Rights Commission

COMPLAINT NO: Free State/2012/0319

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2012/0319

In the matter between:

Lindiwe Mazibuko (DA Parliamentary Leader)
(On behalf of Brandfort Residents) **Complainant**

and

Masiloyana Local Municipality **Respondent**

REPORT

(In terms of Article 21 of the Complaints Handling Procedures of the SAHRC)

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; 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.

1.6. Article 3(b) of the South African Human Rights Commission's Complaints Handling Procedures, provides that *the Commission has the jurisdiction to conduct or cause to be conducted any investigation on its own accord*, into any alleged violation of or a threat to a fundamental right.

2. Parties

2.1. The Complainant is Lindiwe Mazibuko, a Member of Parliament, acting on behalf of residents of Brandfort, cited in her official capacity as the Parliamentary Leader of Democratic Alliance. (Hereinafter referred to as **"Complainant"**)

2.2. The Respondent is Masilonyana Municipality, a Municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 or 1998 with its Head Office situated at corner Theron & Le Roux Streets, Theunissen (hereinafter referred to as **"Respondent"**).

3. Background to the Complaint

3.1. The Commission received a complaint from the DA Parliamentary Leader Ms. Lindiwe Mazibuko (MP)[1]. This complaint was filed with the SAHRC Head Office in Johannesburg on 2 April 2012 after the Free State office had received a media inquiry on the 28th of March 2012 regarding the DA press release.

3.2. The thrust of the complaint is that the Respondent has failed and/or refused and/or neglected to provide residents of the Municipality with adequate, clean and safe water supply.

3.3. This alleged inadequate supply of water to the residents of this Municipality also received widespread media coverage in the Free State.

3.4. The *Express* and *Volksblad* newspapers in particular, stated the following:

3.4.1. "When water is available, it is generally not clean and it tastes bitter and smells bad. Every week for a whole day most of the time, there is no water and this has been going on for years but government is doing nothing about this..."[2]

3.4.2. "Dit is verskriklik. Vroue en meisies, wat eintlik op skool moet wees, stoor kruiwaens kilometers om 20 liter water te gaan haal. Dit neem amper 'n halwe dag."[3] (**English translation:** *"This is terrible. Women and girls, who really should be in school, pushing wheelbarrows miles to fetch 20 litres of water.")*

3.5. Further, a press statement[4] was released by the DA on 22 March 2012 in which the following allegations were contained:

3.5.1. "Residence of the Joe Slovo informal settlement in Brandfort, have to walk 3.5km on a daily basis to collect water from the waterworks";

3.5.2. "The reason for this is the municipality's failure to provide clean running water to residence of the informal settlement and surrounding are";

3.5.3. "The Marantha Clinic was without a regular supply of water for four weeks, resulting in nurses being hesitant to treat patients as the nurses could not wash their hands";

3.5.4. "In 2011 the army were called upon to provide water to the community after it had been without water for a week";

3.6. The aforementioned press statement cites the root causes of the problem as being the following:

3.6.1. Firstly, no maintenance is being performed at the Kanaal pump station;

3.6.2. Secondly, there is a serious leakage of water from the canal to the purification plant;

3.6.3. Thirdly, the water treatment plant is poorly-maintained and operated;

3.6.4. Fourthly, the municipality does not manage the drinking water supply, and there have been indications of bacteria in the water, including e-coli.

1 Member of Parliament

2 Express newspaper: date unknown; Jabulani Dlamini

3 Volksblad; Fri 23 March 2012; Pieter Steyn

4

3.7. No documents evidencing the aforementioned allegations were provided by the Complainants.

4. Preliminary Assessment

The Provincial Office of the Free State made a preliminary assessment of the matter in light of the complaint received and the media reports. The preliminary assessment of the Provincial Office was:

- That the allegations constituted a *prima facie violation* of the human rights of the residents of the Joe Slovo informal settlement and the surrounding Brandfort area.
- In particular, the assessment determined that Sections 10, 24, 27(1)(a) & (b), and S28(2) of the Constitution had *prima facie* been violated;
- That the alleged violation *fell within the mandate and jurisdiction* of the South African Human Rights Commission;
- That the alleged *violation merited a full investigation* in terms of the Commissions Complaints Handling Procedures of the Commission.

5. Steps Taken by the Commission

In investigating the allegations, the methodology used by the Free State Office in conducting the investigation, involved a combination of primary and secondary research namely:

5.1. Primary research which included

a) *Face to face interviews* with the Residents in the affected areas and interviews with the Respondent[5];

b) *Written requests* for feedback and reports from the Respondent[6]

c) *Inspection in loco* of the area;[7]

5.2. Secondary research, which included

a) An examination of media reports and related articles;

b) An analysis of relevant legislation and case law.

5.3. Inspection in loco:

a) On Friday, 30 March 2012, the Free State Provincial Office conducted an *inspection in loco* in Brandfort, an area falling under the jurisdiction of the Masilonyana Municipality (hereinafter referred to as the **"Respondent"**) to inspect and investigate the allegations as filed with the Commission.

b) The purpose of the inspection was to verify the allegations made in the media as well as by the complainant Ms. Mazibuko in the DA's press statement released on 22 March 2012.

[5] The interviews were conducted during the course of the inspection in loco on the 30th of March 2012

[6] 22 May 2012 Allegations letter directed to the Municipal Manger, Ms M Maphobole; 13 July 2012 follow up letter to Municipal Manager iro none compliance;

[7] 22 March 2011

6. Results of Investigation

The following general observations were noted during the course of the investigation:

6.1. Face to Face Interviews:

a) The investigation team conducted several interviews with local residents during its *inspection in loco* to verify the allegations as contained in the press release and the media reports.

b) During the interviews with the residents, some interviewees stated that it was approximately two years ago that the water shortages and contamination started;

c) Residents also told the investigators during the interview that they would experience water shortages for days at a time;

d) The interviewees informed the investigation team that some residents in the area experienced stomach problems due to the unclean water they have been exposed to;

e) One of the residence interviewed by the team alleged that on occasion when opening her tap to access water she was met with a slippery/slimy substance emanating from the tap. The team was also informed by the interviewee, that she has had on occasion being met with flesh-like substances, as if from an animal, being excreted from the tap on opening it. The interviewee also experienced illness allegedly related to the consumption of the contaminated water.

f) It was also noted during the interviews that residence allege that at some points when they have access to water they are met with water containing dead flies and mosquitoes, which when collected in a bucket smell foul. Residence advised during the interviews that when they collected water in a bucket from the taps the dirty would settle at the bottom of the bucket and the water would emit a bad smell.

6.2. Interview with Respondent

g) On Friday, 12 October 2012, the Free State Provincial Office met with the Municipality Acting Technical Director regarding the complaint received.

h) The following issues were discussed and the municipality were requested to provide a report in respect of these discussions:

- Background on water supply;
- Assessment of municipality's water and sanitation delivery;
- Current status and challenges pertaining to supply of uncontaminated water;
- IDP for 2012/13;
- Water supply and infrastructure develpment palns;
- Copy of short, medium and long term scenarios presentation;
- Copy of blue and green status report;
- Capacity (technical and institutional expertise) and budget constraints;
- Projected timeframes on elimination of contaminated water supply;
- Environmental and health impact studies on the supply of contaminated water;
- Evidence of community participation and continued engagement regarding water supply to the residents of Brandfort (minutes of municipality's engagements with affected residents)

No report has to date been received from the municipality in respect of the above.

7. Respondent's Response to Allegations

In response to the allegations of human rights violations, the Respondent responded as follows:

a) The Commission sent a formal letter requesting the Municipality to respond to the alleged violation. The Respondent did not provide the SAHRC with a comprehensive report within the stipulated time.

b) The Commission received a response from the Respondent on 23 July 2012, informing us that they are experiencing shortage of water due to old bulk infrastructure water supply, but that they had since sought funding through Public Grants.

c) The Respondent further explained that R8 million had been allocated to the Municipality by Department of Water Affairs (DWA) to upgrade the raw water bulk line in Brandfort.

d) They also indicated that the first phase of the project is in the planning stage, and that it will be completed by end of March 2013, which would resolve the capacity problem.

e) The Respondent also indicated that they had implemented phase 1 of the Brandfort water treatment works upgrading by R13 058 531 in 2011/2012 financial year through Municipal Infrastructure Grant ('MIG'), and the project was to increase the capacity and production of water in order to meet the increasing water demand. The Respondent alleges that they have applied for approximately R20 million for phase 2 of the project.

f) As for water quality, the Respondent alleges it had been trying with all resources available to provide clean water and that their latest results of water samples have proven that the water is drinkable.

g) The Respondent further mentioned that it had held a Water Summit in Brandtfort on the 23 and 24 of May 2012, and that all the relevant stakeholders including COGTA, DWA, were invited to come up with strategic and action plans on how to resolve the water crisis around Masilonyana. Upon the receipt of the response, the Commission requested the copy of the report of the Water Summit that the Respondent referred to.[8]

h) The Respondent alleges that some of the challenges that they had emanated from management, lack of monitoring of processes, lack of maintenance of machinery, reservoirs were not cleaned regularly and some were not covered.

i) In terms of Water Supply and Infrastructure Development, the Respondent indicated that they had challenges of funding, insufficient plant capacity, incompetent contractors and consultant, cable and pump theft, and also negligence by the community and the Municipal officers.

j) According to the report[9] from the Respondent, training and development of operators and officials, and the community development workshops which include Councillors, Ward Committee members, CDW's and NGO's concerning Water Sector Institutional Development and capacity building was advised.

k) The Respondent further mentioned that it had planned to recruit the local youth and other graduates that have potential to be trained as process controllers, and should also ensure that as a way forward, all the persons that are recruited or allowed to work at the treatment plants meet the necessary requirements of the Blue Drop.

[8] 23 July 2012

[9] Respondent's report to the Commission

8. Applicable Legal Framework

a) Constitutional Framework

8.1. Section 1(a) of the Constitution Act 108, 1996

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

8.2. Section 7(2) of the Constitution

This section requires the State, in this instance, the Respondent, to respect, protect, promote and fulfill all fundamental rights.

8.3. Section 10: The Right to Human Dignity

Section 10 of the Constitution provides that:

"Everyone has inherent dignity and the right to have their dignity respected and protected."

8.4. Section 24: The Right to a Clean Environment

Section 24 of the Constitution provides that:

"Everyone has the right –

a) to an environment that is not harmful to their health or well-being; and

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."

8.5. Section 27(1)(a) & (b)

Section 27 of the Constitution provides that:

1) "Everyone has the right to have access to –

a) health care services, including reproductive health care;

b) sufficient...water..;

2) The state must take reasonable legislative and other measures, within the available resources, to achieve the progressive realisation of each of these rights".

b) International Legal Framework

Universal Declaration of Human Rights

Article 25 of the UDHR provides:

"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..."

International Convention on Economic, Social and Cultural Rights

Article 11 of the ICESCR states that:

"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 ICESCR further states in Article 12

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken…to achieve the full realization of this right shall include those necessary for…(3) The prevention, treatment and control of epidemic, endemic, occupational and other diseases."

c) Regional Legal Instruments

African Charter on Human and People's Rights

The African Charter on Human and Peoples' Rights (African Charter) does not explicitly mention the right to water. Article 16(2) obliges state parties to the African Charter to take the necessary measures to protect the health of their people. As with the above instruments, the right to water must be deduced from the express provision of other rights such as health, the realization of which cannot be achieved without providing water and basic sanitation services.[10]

African Charter on the Rights and Welfare of the Child

"The African Charter on the Rights and Welfare of the Child (Charter on Welfare of the Child) explicitly includes the right to water. First, the Charter on Welfare of the Child provides that every child has the right "to enjoy the best state of physical, mental and spiritual health."

In more explicit terms, the Charter on Welfare of the Child states that:

States parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures to ensure the provision of adequate nutrition and safe drinking water.

d) Domestic Legal Framework

8.6. The Water Services Act[11]

8.6.1. Section 3 of the Water Services Act 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.

[10] **Access to sufficient water in South Africa: How far have we come?:Slyambonga Heleba:** Research Paper, 2009. Research, Community Law Centre, University of the Western Cape. www.communitylawcentre.org.za

[11] 108 of 1997

8.6.2. 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.

8.6.3. 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.

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

a) the provision of appropriate education 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.

8.6.5. And may be obtained for *"the acquisition of land, where the land to be developed is in private ownership, through negotiation or expropriation."*

8.6.6. The Programme makes provision for a comprehensive, fully costed, four-phase process for the upgrading of informal settlements. The four-phase process –

- Phase 1: The Application
- Phase 2: Project Initiation
- Phase 3: Project Implementation
- Phase 4: Housing Consolidation

8.6.7. 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."*

8.7. The Municipal Systems Act[12]

8.7.1. The definition of basic municipal services according to the Act[13] 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.

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

[12] 32 of 2000

[13] Chapter 8 if the Municipal Systems Act

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.

8.8. The Development Facilitation Act[14]

8.8.1. The Development Facilitation Act ("DFA") 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.

8.8.2. This Act creates two separate bodies responsible for land use planning in the same area.

8.9. Municipal Finance Management Act[15]

8.9.1. 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.

8.9.2. 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.

e) Policy Framework

8.10. White Paper on Water Supply and Sanitation Policy[16]

8.10.1. 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. 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 (VIP), if constructed to agreed standards and maintained properly, provides an appropriate and adequate basic level of sanitation service.

8.11. National Sanitation Policy[17]

8.11.1. 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.

[14] 67 of 1995

[15] Act 56 of 2003

[16] Department of Water Affairs and Forestry (1994)

[17] Department of Water Affairs and Forestry (1996)

8.11.2. The policy lists the main types of sanitation systems used in South Africa:

- Traditional unimproved pits;
- Bucket toilets;
- Portable chemical toilets;
- Ventilated Improved Pit toilets;
- Low flow on-site sanitation (LOFLOS);
- Septic tanks and soakaways;
- Septic tank effluent drainage (solids-free sewerage) systems; and
- Full water-borne sewerage.

8.12. White Paper on Basic Household Sanitation[18]

8.12.1. 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:

- Developing norms and standards for the provision of sanitation;
- Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
- Co-ordinating 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 maintain 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

8.13. The Strategic Framework for Water Services[19]

8.13.1. The Strategic Framework 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, minimizes 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.[20]

8.13.2. It further defines a basic sanitation service as:

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 waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices.

[18] Department of Water Affairs and Forestry (2001)

[19] Department of Water Affairs and Forestry (2003)

[20] Ibid

8.14. Free Basic Sanitation Implementation Strategy[21]

8.14.1. 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.

d) Case Law

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

8.15. NM v Smith

8.15.1. In **NM v Smith (*Freedom of Expression Institute as Amicus Curiae*) 2007 (5) SA 250 (CC)[22]** 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:

'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 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.

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

[21] Department of Water Affairs and Forestry (April 2009)

[22] at paragraph [49]-[51]

"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".[23]

1.15.2. In fact the Court has repeatedly held that the State, including municipalities, is obliged to treat vulnerable people with care and concern.[24]

1.15.3. 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]. A municipality is obliged to try to achieve these objectives. Section 73(1)(c) of the Local Government: Municipal Systems Act[27], echoes the constitutional precepts and obliges a municipality to provide all members of communities with *"the minimum level of basic municipal services".*

1.15.4. Such minimum level of service would include the provision of water which is safe and clean for human consumption.

1.16. Joseph Leon & Others v City of Johannesburg

1.16.1. **In Joseph case,**[28] 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.

9. Analysis of the Investigation Findings

9.1. The Respondent is alleged to have violated the right to human dignity, a clean environment and access to sufficient and clean water and health of residents by its failure to supply sufficient water and thereby leaving residents with no alternative but to take arduous 3 km walks to fetch partially purified water.

9.2. The inspection in loco of the affected areas in the township undertaken by the Commission revealed that the media reports were indeed accurate. Interviews conducted with residents further confirmed allegations made by the Complainant.

9.3. Section 27(1) (b) of the Constitution provides that "everyone has the right to have access to sufficient water", and section 27 (2) obliges the State to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of everyone's right of access to sufficient water. The above sections are particularly relevant in the context of the present complaint.

23 Sachs, A. (2009). The Strange Alchemy of Life and Law. Oxford University Press

24 Joe Slovo at para [76]

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

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

27 Act 32 of 2000

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

9.4. Information gleaned from the investigation indicates that the municipality did not properly manage and protect its water resources due to poor maintenance of infrastructure thereby failing to secure sufficient water that is not harmful to human health or well-being.

9.5. Respondent contends that the water and sanitation challenges in the Brandfort townships stem from the lack of fulfillment of functions in respect of roles and responsibilities by the Water Affairs and Cooperative Governance and Traditional Affairs.[29]

9.6. In light of the above, it is important to highlight that, although municipalities have the responsibility and authority to administer water and sanitation services, all spheres of government have a duty, within their physical and financial capabilities, to work towards the objective[30] of ensuring that access to sufficient water as enshrined in the Constitution is progressively realized.

9.7. Further to above, it should be noted that the primary responsibility for providing water and sanitation services in South Africa lies with municipalities, in terms of Part B of Schedule 4 of the Constitution

9.8. The Respondent indicated in a brief report to the Commission that tests concluded that the current water supply in Brandfort is clean and drinkable; the rests of these tests were not made available to the Commission nor were the results independently verified.

9.9. The Respondent failed to discharge its primary responsibility for provision water services to the local community.

9.10. The summit conducted by the DWA and the Respondent that enabled open platform discussions by the community on issues pertaining to water, to a certain level sought to ensure that there was community participation and better understanding of challenges relating to access to water.

9.11. The Respondent has to date not provided adequate information in respect of other steps that it has taken to improve access to basic water supply. There is an indication that sufficient duty and diligence has not been practiced by the Municipality in carrying out its duty to ensure that the crisis could have been averted.

10. Finding

On the basis of the analysis carried out in the afore-going section, the finding of the SAHRC on the complaint lodged is as follows:

10.1. *Right to water*

The SAHRC finds that the Respondent has violated the rights of the residents in that it has failed and/or neglected to take reasonable steps to provide the residents with interim supply of clean and safe water for domestic purposes;

10.2. *Right to clean environment*

The SAHRC finds that in failing to notify the Residents about the possible contamination, and not providing and implementing sufficient emergency relief the Respondent has

[29] Respondent has not provided the Commission with information regarding interaction with the relevant Provincial government departments.

[30] Preamble of the Water Services Act

violated the rights of the residents in that it has failed and/or neglected to take reasonable steps to provide the residents with an adequate supply of clean and safe water;

10.3. *Right to human dignity*

The SAHRC finds that the Respondent by facilitating the provision of emergency relief such as portable water which resulted in residence having to walk 3km every day alternatively be left without water to bath, to cook or for sanitation purposes, has violated the right of the residents to human dignity.

10.4. *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.

11. 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 10 above, the Commission recommends the following:

11.1. The Respondent to furnish it 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;

11.2. The Respondent is required to enhance community participation and demonstrate some level of transparency in it 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.

11.3. The Department of Water Affairs to furnish the Commission with a report on capacity building support provided to the Respondent relating to supply of uncontaminated water to residents of the Municipality within six (6) months from the date of this finding;

11.4. The Department of Water Affairs is further directed to continue to monitor the water supply and infrastructural improvement programmes of the Respondent and to take regular samples for testing to ensure supply of safe and clean water.

12. APPEAL

You have the **right to lodge and 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/2012/0309

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: GP/2012/0309

In the matter between:

Mike Waters MP **Complainant**

and

National Department of Social Development **Respondent**

CLOSING 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, 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. Furthermore, section 184(2)(c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.

1.6. The Human Rights Commission Act 54 of 1994 ("the HRC Act"), further supplements the powers of the Commission. The HRC Act confers powers on the Commission to investigate complaints concerning fundamental rights and report on such matters.

2. Complaint

2.1. On the 7th of August 2012 the Commission received a complaint from Mr Mike Waters (hereinafter referred to as the complainant), a member of Parliament, against the National Department of Social Development (hereinafter referred to as "the DSD") regarding the implementation of the National Child Protection Register (hereafter referred to as the CPR).

2.2. The complainant alleges that the DSD is **failing to properly implement the CPR and that by failing to enforce the CPR, section 28 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996** (hereafter referred to as the Constitution), which reads as follows: ***"every child has the right to be protected from … neglect, abuse or degradation,"*** **is being violated.**

2.3. As a result the Commission was requested to investigate whether the CPR was being fully implemented.

3. The Complainant:

3.1. The Complainant is Mike Waters, an adult male and a member of parliament, representing the Democratic Alliance, a political party in the Republic of South Africa.

4. The Respondent:

4.1. DSD

4.1.1. The DSD is the **National Department of Social Development** responsible for national social services. The DSD is also the primary government department mandated to keep and maintain the CPR under section 11 of the Children's Act 38 of 2005 (hereafter referred to as the Act). The upkeep and maintenance of the CPR is central to its implementation.

4.2. DOJ&CD

4.2.1. The Commission **included the Department of Justice and Constitutional Development (hereafter referred to as the DOJ&CD)** in its investigation, as a primary role-player in the implementation of the CPR. The inclusion of the DOJ&CD in the investigation by the Commission is premised on the fact that the DOJ&CD is the primary governmental department tasked with the administration of Courts, and therefore has a joint obligation to facilitate the implementation of the CPR.

4.3. DWCPD

4.3.1. The Department of Women, Children and People with Disabilities was also included in the investigation on the basis of its mandate and central role to promote, facilitate, coordinate and monitor the realization of the rights of women, children and people with disabilities in terms of section 7(5)(a) of the Public Service Act [PSA], 1994 (promulgated under Proclamation No. 103 of 1994, 6 July 2009). The National Department of Women, Children and People with Disabilities was established to:

Monitor other government departments to ensure the mainstreaming, of gender, children's rights and disability considerations into all programmes of government and other sectors. This will help government to respond to issues of these targeted groups in an integrated and coherent manner".[1]

4.4. In this regard the Commission was guided by the provisions of section 5 (five) of the Act which states that to achieve the implementation of the CPR, public bodies in the national, provincial and, where applicable, local spheres of government involved with the care, protection and well-being of children ***must co-operate*** in the co-ordination of services delivered to children.

[1] The mandate of the DWCPD is set out on their website, available at http://www.dwcpd.gov.za/about/strategic_plan/ (accessed on 21/6/13)

5. Preliminary assessment:

The Gauteng Provincial Office undertook a preliminary assessment of the complaint in terms of its Complaints handling Procedures as gazetted.

5.1. The Commission found that the Respondent's conduct amounted to a *Prima facie* violation of the rights contained in section 28 of the Bill of Rights, which reads as follows: ***"every child has the right to be protected from ...neglect, abuse or degradation".***

5.2. The Commission further determined that the alleged violations fell within the mandate and jurisdiction of the SAHRC.

5.3. The Commission further determined that a full investigation was appropriate in terms of its Complaints Handling Procedures.

6. Steps taken by the Commission:

6.1. After receipt of the complaint and preliminary assessment thereof by the Commission on the **7th of August 2012,** the complaint was accepted in terms of the Commission's Complaints Handling Procedures as gazetted.

6.2. An assessment of the relevant frameworks through desktop research informed allegations formulated thereafter.

6.3. On the **2nd of November 2012** letters to DSD, DWCPD as well as DOJ&CD were issued with a final return date for responses of the 31st of December 2012.

6.4. On the **21st of November 2012,** DSD acknowledged receipt of the letter. DSD further indicated that the complaint was to be forwarded to the relevant directorate within the department, Directorate; Child Protection.

6.5. On the **22nd of November 2012,** the Commission issued a reminder to DSD, specifically to the Chief Director: Children, to respond to the Commission by the 31st of December 2012. Simultaneously, the complainant was updated with this information.

6.6. On the **7th of January 2013,** the Chief Director: Children responded indicating that a response to the Commission was already underway via the office of the Minister.

6.7. On the **23rd of January 2013** the DWCPD indicated by means of email correspondence to the Commission that the letter of allegation was never received by the DWCPD. The Commission furnished the DWCPD with proof of delivery report in the form of a transmission receipt. The information contained on the delivery report was contested by the DWCPD and a request for the retraction of a media statement issued by the Commission was made by said department. The Commission clarified the contents of the delivery report to the DWCPD, indicating that the report revealed that the letter of allegation was delivered, and that the media statement had been accurate and would not be retracted. The Commission noted that **no response was received from the DOJ&CD** at this stage of its investigations.

6.8. Some two months from the date of its request, the Commission received a response from the DWCPD on the **29th of January 2013.** On the same date the DOJ&CD also indicated per email that their response was en route to the offices of the Commission.

6.9. On the **7th of February 2013** the Commission received the response from the DSD consisting of a report and supporting records, three months from the date of its request.

6.10. On the **13th of February 2013** the Commission issued a final follow up letter to the DOJ&CD requesting a response and citing section 9(c) of the HRC Act empowering the use of subpoena powers by the Commission. The return date for this purpose was set as the 22nd of February 2013.

6.11. On the **8th of March 2013,** the Commission met with representatives from DSD, in order to clarify statistical data that had been furnished along with their response.

6.12. Due to the non-responsiveness of the DOJ&CD, the Chairperson of the Commission issued a final letter of request for response to the Minister of Justice and Constitutional Development on the **18th of March 2013.**

6.13. On the **2nd of April 2013** representatives from the DOJ&CD indicated that the letter to the Commission had been signed by the Director- General, however, reasons for the delay in receipt were to be investigated.

6.14. On the **11th of April 2013** the Commission received a two page response from the DOJ&CD in the form of a letter dated 5 April 2013.

7. Legal Analysis

7.1. Information requested by the Commission

7.1.1. As the primary implementer of the CPR, the Commission requested the following information from **DSD:**

7.1.1.1. A copy of the latest updated CPR;

7.1.1.2. A comprehensive report from DSD advising amongst others, whether the CPR had not been populated and updated;

7.1.1.3. The means through which updating is done via different sources of information;

7.1.1.4. The frequency with which it is updated

7.1.1.5. Data sources used to obtain information

7.1.1.6. An explanation of the monitoring and evaluation system of the CPR; as well as the frequency of monitoring and evaluation reports.

7.1.2. As a key department on all matters relating to children, the Commission required the following from **DWCPD:**

7.1.2.1. The measures in place to allow the DWCPD to monitor the proper implementation of the CPR.

7.1.3. The information requested from the **DOJ&CD** was based on its oversight of the Courts[2]

7.1.3.1. The number of Form 28's submitted to Part B of the CPR by Regional Courts nationwide; and;

7.1.3.2. Information regarding the training of Regional Court Magistrates on the Act, dates of training which had occurred, and the number of Regional Court magistrates trained in this regard.

7.2. Responses Received

7.2.1. Responses from the DSD are summarized below in accordance with the respective enquiries made by the Commission:

7.2.1.1. Provision of a copy of the latest updated CPR

The DSD responded that in terms of section 112 of the Act, the CPR was kept confidential; however, a comprehensive document was furnished to the Commission indicating the matters added to the CPR. The data furnished to the Commission included the period between **2010 and March 2013.** For purposes of this report, information deemed peripheral to the complaint has been omitted.

The information furnished is deemed to be as reflected in the CPR as **no inference to the contrary** needs to be drawn and no information to the contrary had been provided by the DSD. A subsequent attempt was however make to clarify information as referred to in paragraph 9.2.1.2.9 supra.

7.2.1.2. A comprehensive report from DSD advising amongst others, why the CPR has not properly been populated and updated.

The allegation that the CPR was neither properly populated nor updated was not refuted by the DSD. The DSD set out various challenges regarding the implementation of the CPR. These included challenges relating to **human resources, information management** as well as those relating to **stakeholder management.**

It was also clear however from the response of the DSD that attempts are being made by it to fully implement the CPR. Full achievement of this is reported to have been hindered by the factors cited above. One of the key issues highlighted by the DSD has been the **lack of submissions of convictions and findings of unsuitability by Courts.**

[2] Section 120(4) of the Act states the following:
(4) In criminal proceedings, a person must be found unsuitable to work with children –
(a) On conviction of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child; or
(b) If a Court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by 35 reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child. The specific findings referred to in Section 120[4] of the Act are clearly within the exclusive jurisdiction of the Courts. When such a finding is made, the clerk of the Court must submit said finding to Part B of the CPR by means of a Form 28. The latter form is submitted per post by the clerk of the Court to the CPR, which is administered by DSD.

The need for legal reform was also cited by the DSD, in this instance the particular **duplication of information and resources** resulting from the duty to populate the CPR with information that is similar to that required by the National Register of Sex Offenders was cited as a contributing challenge. These challenges are more closely considered in paragraph 9.4.9.

7.2.1.3. The means through which updating is done

The DSD set out the various different forms through which information is submitted to the CPR.[3] In this regard the DSD advised that:

7.2.1.3.1. **Since 2001,** provincial offices of the DSD had been receiving form 22's to record any report of **deliberate abuse and neglect** of children in terms of section 110 of the Act.

7.2.1.3.2. Outcomes of the Children's Courts and convictions are reported through a form 25. Convictions were only **recorded after the Act was fully implemented in 2010.**

7.2.1.3.3. Form 29's are submitted to the CPR by **employers** who wish to **screen their employees** against the CPR, and Form 30's are submitted by Individuals who would like to have their own name screened against the CPR.

7.2.1.3.4. Lastly, the form 28 is submitted by **Courts and other fora** to the CPR when a **finding of unsuitability** has been made in regards to a person.

7.2.1.4. In its submission the DSD indicated that one of the challenges that impacts the updating of the CPR is that **heavy reliance is placed on other role players** to submit the required forms. Secondly, both the DSD and the DOJ&CD highlighted **human resource constraints** as impacting on the updating of the CPR. In this regard it was submitted that submissions are sent, as well as received and logged, **manually.** The DSD points out that from April 2012 to September 2012, **19 199** applications for screening in respect of Form 29 and 30 were made to the CPR.[4] These requests had placed pressure on the DSD, so much so, that staff from other units in the department had been requested to assist with the backlog of applications received.

7.2.1.5. The frequency of updates

The DSD indicated that the CPR is updated immediately after the receipt of the submission of the various forms as described in par 7.2.1.3. It was however pointed out that in order for the CPR to be updated with the necessary frequency, the forms must first logically be submitted by relevant stakeholders. For instance, if the Courts do not submit form 25's and 28's the CPR **will not be a true reflection of the exact number** of convictions, abuse, neglect and unsuitability findings.

[3] A full discussion of the ambit of form 25 and 28 is discussed thereunder

[4] Upon receipt of forms 29 and 30 however, the DSD updates requestors of the inquired status within 21 working days of the form 29 and 30 being received.

7.2.1.6. Data sources used to obtain information

The DSD has indicated that the sources of data are those listed in paragraph 7.2.1.3. Therefore, upon receiving either form 25, 28, 29, or 30, the data contained in those forms is manually assessed or captured and used to populate the CPR. Information captured by means of a form 22 is electronically submitted and captured by provinces. In terms of the electronic submissions, these are attended to internally by provincial DSD staff.[5]

7.2.1.7. An explanation of the monitoring and evaluation system of the register; as well as the frequency of monitoring and evaluation reports

The DSD has listed various forums through which monitoring and evaluation takes place, including the Interdepartmental Consultative Forum, Welfare Service Forums, Child Protection Forums, and also includes the Portfolio Committee, Parliament, as well as provincial visits as mechanisms through which their performance is monitored. Minutes and reports emanating from these for a have all been attached by the DSD in their response to the Commission. No specific information regarding oversight or monitoring and evaluation of the manual data capturing process was provided save for the submission of outgoing documents for verification and signature.

7.2.2. The DWCPD

7.2.2.1. The monitoring of the CPR

In their response to the Commission, the **DWCPD indicated that it was aware of challenges pertaining to the implementation of the CPR,** but that these **challenges are due to the vast operationalising requirements and implementation obligations** called for by the Act. The DWCPD also highlighted **resource constraints and fiscal limitations** to enable adequate monitoring of implementation. In this regard the DWCPD recommended that serious attention be given to the alignment of the implantation of the CPR, and budgetary allocations. This echoes the DSD submissions. The DWCPD indicated further that through reviewing the Act, the feasibility of some of the provisions may be addressed.

7.2.3. The DOJ&CD

7.2.3.1. Regional Court submissions of Form 28

The DOJ&CD indicated that since implementing the *National Guide for Submission of Notification to the Child Protection Register,* there has been an increase of submissions of form 28's to the office of the CPR. In the previous financial year it is submitted that forty (40) form 28's were submitted to the CPR.

[5] For purposes of this report, the Commission accepts the DSD's submission of data submitted by means of form 22 is a reflection of information managed by the Information management Systems and Technology component of the DSD.

The DOJ&CD goes further in stating that during the first two quarters of this financial year, their statistical report already showed an increase in the number of submissions to a total of 70 submissions of form 28's. In this regard it is noted that the Commission received the response from the DOJ&CD as signed by the Honourable Minister, on the 11th of April 2013. The Minister, as indicated, signed this letter on the 5th of April 2013, which fell within a new financial year. The Commission therefore accepts that the DOJ&CD referred to the 2012/13 financial year as "this financial year", and that in the 2011/12 financial year, 40 form 28's were submitted.

For the period spanning from the 1st April 2011, and 30th of September 2012, a number of a 110 form 28's were sent to the CPR by Courts. Although the Commission requested the number of form 28's submitted by Regional Courts, the DOJ&CD submitted a total number collected by a **combined statistical reporting tool,** therefore not differentiating between Magistrate Courts and Regional Courts. The DOJ&CD indicated that efforts were underway to create a reporting tool which would enable the disaggregation of information to facilitate a distinction between submissions from the Regional Court data and those from the Magistrate Court.

7.2.3.2. Training of Regional Court Magistrates

The DOJ&CD responded that since the migration of the training function for the judiciary from Justice College to the South African Judicial Education Institute (SAJEI), **the training of judicial officers has been inexorably delayed.**

The DOJ&CD does however indicate that during a conference in 2012, the issue of the CPR was shared with approximately 150 Regional Court Magistrates from all provinces. No clear information was provided regarding the inclusion of members of the High Court bench or those from the District Courts. The DOJ&CD also indicated that from the 14th to 16th of March 2013, the SAJEI held a three day training course for Regional Magistrates on, inter alia, the Act, and that the CPR formed part of this training. No indication was given to the Commission about whether or not this course was optional.

8. Legal Analysis

8.1. International Obligations

8.1.1. South Africa ratified the **United Nations convention on the Rights of the Child [CRC]**[6] on 16 June 1995. The CRC was the first international treaty ratified by the **new** democratic government of our country. It was also the first legally binding international convention to **affirm human rights specifically for children globally.**

6 Hereafter referred to as the CRC.

8.1.2. Article 19 of the CRC states the following:

1. *States Parties shall take **all appropriate legislative, administrative, social and educational measures** to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
2. *Such protective measures **should, as appropriate, include effective procedures** for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other **forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.***

8.1.3. Through these provisions the CRC places an obligation on State Parties to not only enact laws that address and prevent the abuse and maltreatment of children, but also to put in place **effective administrative measures** to address the protection of children against these violations.

8.1.4. Article 19(2) specifically refers to **procedures** to be put in place by state Parties in order to report instances of child maltreatment.

8.1.5. South Africa is in addition a signatory to the **African Charter on the Rights and Welfare of the Child,**[7] a regional commitment advancing the rights of children in Africa. Article 16 of the ACRWC states the following:

1. *State Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.*

8.1.6. Although similar to the CRC, the ACRWC goes further in requiring State Parties to have specific measures in place **to effectively protect the child from harm and abuse.**

8.1.7. It is clear that both at international and regional levels State Parties have **unambiguous obligations to take specific, and all appropriate measures** to establish methods to protect children from harm and abuse, and also, to prevent harm and abuse from occurring. These measures must furthermore be implemented effectively. Merely enacting legislation is therefore insufficient; the legislation must be properly realized.

8.2. The Constitution

8.2.1. The status and application of international law is determined by the Constitution.

8.2.2. According to Boezaart,[8] international law refers to binding instruments that South Africa has ratified, such as the CRC and may also include non-binding instruments. In terms of **section 39 and 233** of the Constitution respectively,

[7] Hereafter referred to as the ACRWC.

[8] Boezaart, *Child Law in South Africa* (2009) 323.

Courts and tribunals **must** consider international law when rights contained in the Bill of Rights are interpreted. When national legislation is interpreted Courts and tribunals must adopt a preference for interpretations of legislation in question that are consistent with international law.

8.2.3. General public international law further requires States to ensure that domestic legislation conforms to international obligations (in casu the provisions of the CRC) and does not allow such States to rely on national law to justify non-compliance with their international obligations. **National law must therefore be brought in line with international obligations** to the extent it falls short of according protections committed to in international obligations.[9]

8.2.4. This positive relationship between international obligations and interpretation, in relation to section 28, finds form in the case **of M v S** 2008.[10] In the latter instance the Constitutional Court held that section 28 of the Constitution must be seen as responding in an expansive way to our international obligations as a State Party to the CRC. It was also found that the principles contained in the CRC guided all policies in South Africa in relation to children.

8.2.5. This approach is supported by experts such as Devenish[11] who contend that most rights elaborated in international instruments such as the CRC are captured in some form or the other in section 28 of the Constitution.

8.2.6. 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,[12] human dignity,[13] equality[14] and more specifically : freedom and security of person.[15]

8.2.7. Section 28 of the Constitution states the following:

1. Every child has the right

a. to a name and a nationality from birth;

b. to family care or parental care, or to appropriate alternative care when removed from the family environment;

c. to basic nutrition, shelter, basic health care services and social services;

d. to be protected from maltreatment, neglect, abuse or degradation;

e. to be protected from exploitative labour practices;

f. not to be required or permitted to perform work or provide services that

9 Robinson "The Right Of Child Victims Of Armed Conflict To Reintegration And Recovery 2012

10 M v S (Centre for Child Law as Amicus Curlae)2008 (5) BCLR 475 (CC);

11 Devenish *A Commentary on the South African Bill of Rights (1999) 375*

12 S11 of the Constitution.

13 S10 of the Constitution.

14 S9 of the Constitution.

15 S12 of the Constitution.

i. are inappropriate for a person of that child's age; or

ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

i. kept separately from detained persons over the age of 18 years; and

ii. treated in a manner, and kept in conditions, that take account of the child's age;

h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

i. not to be used directly in armed conflict, and to be protected in times of armed conflict.

2. ***A child's best interests are of paramount importance in evry matter concerning the child.***

3. In this section "child" means a person under the age of 18 years.

8.2.8. Against this background, section 8(1) of the Constitution specifies the binding nature of the Bill of Rights on all organs of state. This sub-section reads that the Bill 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

8.2.9. Section 28, and more specifically section 28(1) (d) therefore has both horizontal and vertical application. The State consequently has a clear and direct obligation to protect children from abuse and neglect, as read with the obligations arising from the CRC and ACRWC. These responsibilities are realised through the implementation of measures for their protection, which **measures must be effective in realizing implementation.**

8.2.10. The judgment of the constitutional Court in **Grootboom v Oostenberg Municipality and Others** 2000,[16] elaborated on the nature of the State's obligation in relation to section 28 rights. Yacoob J stated that where children are in parental or familial care, the State's obligation would normally entail **passing laws and creating enforcement mechanisms** for the maintenance of children and for their protection from abuse, neglect or degradation.

8.2.11. Section 28(2) of the Bill of Rights provides a useful yardstick in the approach to matters concerning the child, in that the **"best interests of the child"** principle, as advocated by the Constitution is of paramount importance in interpretation. The State is therefore obliged to test whether **a measure or system that is being implemented will serve the best interests of the child,** as this consideration must be taken into account in matters affecting the child.

[16] Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR277 (C).

8.2.12. According to Skelton[17] however, the Constitutional Court has made it clear that the "paramountacy principle" [sic] in relation to section 28(2) of the Bill of Rights, is not an absolute trump *vis-à-vis* other rights. The rights of the child may be limited where constitutionally permissible on the basis that the limitation is both reasonable and justifiable.

8.2.13. On the basis of the international and regional commitments and their constitutional interpretation, the State is said to have clear obligations to **protect and advance the interests of children by according them with protection against abuse and maltreatment** through the measures it implements to ensure the protection of children. The State must ensure that the best interests of children are expressly taken into account when implementing any such programme or measure.

8.3. Domestic legislation

8.3.1. Background of the CPR

8.3.1.1. The concept of a register based on mandatory reporting of child abuse was introduced in South African law in April 1998, in the new Regulations under the child Care Act.[18] **The primary purpose of this register was the protection of children.** Information for this register was obtained from three sources:

8.3.1.1.1. Criminal Court convictions;

8.3.1.1.2. Children's Court findings; and

8.3.1.1.3. Notifications received in terms of section 42(1) of Child Care Act.

8.3.1.2. Although the 1998 amendments to the Child Care Act brought some clarity to the reporting of the abuse of children, many uncertainties remained.

8.3.1.3. The South African Law Reform commission [SALRC], was subsequently requested to investigate and review the Child Care Act and to make recommendations to the Minister for Social Development for the reform of this particular Act, and therefore, the ever evolving aspect of children's rights. **The SALRC proposed the establishment of the CPR as part of the new reformed legislation.** This recommendation was based on research undertaken in the United Kingdom, Australia, the United States of America and New Zealand. In support of its recommendation the SALRC recognised the value of the proposed CPR as providing **"protective potential for children as well as being a prospective source of data for planning, policymaking and resourcing purposes".**

8.3.1.4. The SALRC therefore recommended that provision be made for the registration of offenders, **solely for purposes of preventing their entry into positions of responsibility for, or close contact with, children.**

[17] Skelton "Child Rights Jurisprudence In Eastern And Southern Africa" (2009)

[18] The Child Care Act 74 of 1983 hereafter referred to as the Child Care Act.

8.3.1.5. On the 1st of April 2010 the Act repeated the earlier Child Care Act in its entirety. Through the new Act, the provisions for a CPR in Chapter 7 came into force. The CPR under the Act consists of two parts. Part A and Part B records inter alla offences against children and names of persons unsuitable to work with children respectively.

8.3.2. The CPR under the Children's Act 38 of 2005

8.3.2.1. The object of the Act is to **give effect to the constitutional rights of children.** This includes protection from maltreatment, neglect, abuse or degradation; and the giving of effect to the Republic's obligations concerning the well-being of children interms 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;**

8.3.2.2. Part A

8.3.2.2.1. Section 113 of the Act records the purpose of Part A of the CPR to be the following:

113. The purpose of Part A of the Register is-

a) to have a record of abuse or deliberate neglect inflicted on specific children;

b) to have a record of the circumstances surrounding the abuse or deliberate neglect inflicted on the children referred to in paragraph (a);

c) to use the information in the Register in order to protect these children from further abuse or neglect;

d) to monitor cases and services to such children;

e) to share information between professionals that are part of the child protection team;

f) to determine patterns and trends of abuse or deliberate neglect of children; and

g) to use the information in the Register for planning and budgetary purposes to prevent the abuse and deliberate neglect of children and protect children on a national, provincial and municipal level.

8.3.2.2.2. Section 114 expands the parameters of Part A from mere inclusion of information about the abuse and neglect of children, to require the mandatory recording of all convictions of all persons on charges involving the abuse or deliberate neglect of a child.

8.3.2.2.3. Part A therefore has a powerful function in preventing the abuse and deliberate neglect of children, as well as protecting them.

8.3.2.3. Part B

8.3.2.3.1 Part B in intended to be a record of **persons who are unsuitable to work with children.** The names of such persons are entered into Part B of the CPR. Any person may inquire whether his or her name appears on Part B of the CPR. Employers may also inquire whether the names of their employees appear on Part B of the CPR.

8.3.2.3.2. Section 119 of the Act states the following:

119. Part B of the Register must be a record of persons found in terms of section 120

a) the full names, surname, last known physical address and identification

b) the fingerprints of the person, if available;

c) a photograph of the person, if available;

d) a brief summary of the reasons why the person was found to be unsuitable to work with children;

e) in the case of a person convicted of an offence against a child, particulars of the offence of which he or she has been convicted, the sentence imposed, the date of conviction and the case number;

f) such other prescribed information.

8.3.2.3.3. As indicated supra,[19] section 120 lists the categories of persons who must be found unsuitable to work with children, and whose names must therefore be entered into Part B of the CPR. Section 120 of the Act states the following:

(4) In criminal proceedings, a person ***must be found unsuitable to work with children-***

(a) On conviction of murder, attempted murder, rape, indecent assault tor assault with intent to do grievous bodily harm with regard to a child; or

(b) If a Court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child.

[19] See FN 2.

8.3.2.4. Before the name of a person who has been convicted of the abovementioned crimes can be included in Part B of the CPR, the person must be **found to be unsuitable to work with children** as provided for under section 120 of the CPR. A finding that a person is unsuitable to work with children is made by a Children's Court, any other Court in criminal or civil proceedings in which that person is involved, or any forum established or recognised in law in any disciplinary proceedings concerning the conduct of that person relating to a child.[20]

8.3.2.5. In criminal proceedings, in order for a person's name to be added to the CPR in terms of section 120(4), he/she must have been convicted of the crime of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child, and, found unsuitable to work with children. **The conviction in itself is not an automatic finding of unsuitability as the legislature's intent clearly requires two separate acts from criminal courts: the conviction, and the finding.**

8.3.2.6. In addition, it is important to note that from the wording preferred by the legislature, it would appear that no **discretionary power is** bestowed on the courts in terms of the duty to make a finding. Convicted persons in terms of section 120(4) of the Act **must** be subjected to an unsuitability finding in criminal proceedings upon conviction.

8.3.2.7. **An inference may therefore be made that the exact number of persons convicted in South African Courts for the above-mentioned crimes against children, should also be reflected on Part B of the CPR when compared over a similar period of time.**

8.3.2.8. In addition, Part B of the CPR also records findings of unsuitability made by civil Courts and other for a. The number of persons reflected on Part B of the CPR will therefore be **more than the number of persons convicted of crimes** against children, should these for a have also made and submitted such findings.

8.3.2.9. **In summary Part A of the CPR includes convictions of persons found guilty of abuse or deliberate neglect of children. For their names to be specifically recorded in Part B, an unsuitability finding with regard to their contact with children by the courts is made and submitted for entry into Part B. Part B however is not limited to convictions and will include names of persons found unsuitable to work with children by other fora.**

8.3.2.10. In order to fulfil the objectives of the CPR, **it follows that both Parts of the CPR must be populated with information** in order to, amongst others, prevent persons found unsuitable to work with children, from entry into positions of responsibility for, or close contact with children.

[20] Although the Act also stipulates that a conviction is not a prerequisite for an unsuitability finding, there is a duty to make a finding of unsuitability when a person was convicted of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child.

8.3.3. The framework for the protection of the rights of child with specific regard to **the CPR therefore is rationally connected both in terms of necessity, and state responsibility to international and constitutional obligations.**

8.4. Abuse, neglect and violence against children in South Africa

8.4.1. Children by their very nature are extremely vulnerable, particularly to abuse. To fully appreciate the value of a mechanism such as the CPR, a brief contextual analysis of abuse and neglect in South Africa warrants recording.

8.4.2. In its 2011 Review of Equity and child Rights in South Africa, the Commission indicated that violence against children is pervasive in the country and that many crimes remain unreported. It was also indicated that people closest to children perpetrate the majority of cases of child sexual and physical abuse.[21]

8.4.3. Inequality, poverty and HIV and AIDS are major challenges which mark the South African society and severely increase the vulnerability[22] and conditions within which children in our country live. The United Nations Children's Fund reports that two-thirds of all children living in South Africa live in poverty.[23] Crimes against these children occur at a much higher rate than in countries where children are not subjected to such adverse poverty.

8.4.4. In the 2010/11 financial year, the South African Police Service reported that **54 225 children under the age of 18 years, fell victim to crimes such as murder, attempted murder, sexual offences, assault, and assault to do grievous bodily harm.[24]**

8.4.5. In the 2011/12 financial year, this number was reported to have decreased to 50 688 for the period under review.[25] It is noted however that crimes against children remain underreported and the statistical data presented represent only formally registered complaints to the SAPS.

8.4.6. In total, for the period of review relevant in this investigation, it is calculated that **104 913 serious crimes against children were reported to the South African Police Service.**

8.4.7. According to the 2010/11 Annual Report from the National Prosecuting Authority, an average of 1 673 high and lower Courts finalised 331 045 cases with a conviction rate of 88.7% within that year.[26] During 2012, an average of 1 685 High and Lower Courts finalised 316 098 cases, **achieving an 88.8% conviction rate.**

8.4.8. The data reflected in the national Prosecuting Authority annual reports did not assist in making an accurate correlation between the convictions and the number of crimes reported **against children specifically.**

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21 South Africa's Children: A review of Equity and Child Rights 6

22 For example in 2002 the world Health Organisation reported that child maltreatment is more likely in communities with high rates of poverty and fewer of the social networks and neighbourhood support systems that have been shown to protect children.

23 See http://www.unicef.org/southafrica/children.html

24 Crime Report 2010/11 South African Police Service 11.

25 Crime Statistics Overview 2011/12 South African Police Service 36.

26 The Commission notes in this regard that not all reported matters would result in a prosecution for a variety of reasons. Further to this, of the number prosecuted, not all prosecutions would result in concivtions.

8.4.9. **Data analysis** on the number of convictions in matters where a child was the victim of a serious offence is however concerning. For example, specific crimes of sexual offences were only measured in all Courts since 2011/12. There is no formal historical data specifically in the regard. Nevertheless, during 2011/12, the National Prosecuting Authority reported a 65% conviction rate which resulted in approximately 4500 convictions for sexual offences in general.

8.4.10. According to the South African Police Service, **more that 40% of sexual offences reported, are committed against children.** The statistics as reported by the SAPS and NPA do not provide a remotely reasonable comparator of statistics provided for the CPR.

8.5. Based on international frameworks, comparative jurisdictional information, domestic statutory and constitutional frameworks and a contextual analysis it is clear that the CPR was adopted by the State with a clear purpose to serve a s a measure to optimize protections for children. The measure therefore serves a valuable purpose within the broad range of protections put in place by the State in efforts to meet its constitutional obligations.

9. Application

9.1. In terms of section 124, if a person's name is added to Part B of the CPR, such person **must disclose this to his or her employer should he or she work, or be in contact with children.** What is important to note is that disclosure is subject to the person's name being added to Part B of the CPR, and not simply upon being convicted. A person whose name has therefore been erroneously or otherwise **omitted from being added to Part B of the CPR has no duty to disclose a conviction** akin to those referred to in section 120(4)(a).[27]

9.2. In terms of section 126, before a person is allowed to work or have access to children, an employer **must establish whether or not that person's name appears in Part B of the Register.** Should the name of a person who has been convicted in terms of section 120(4)(a) therefore note appear on Part B of the CPR, the employer will not be in a position to confirm that the person is allowed to work with children.

9.3. And accurate, complete and timely population of the CPR is therefore imperative for the protection of children from persons found unsuitable to work with them. The administrative inclusion onto the CPR of a person unsuitable to work with children will determine whether such person who may pose a risk to the safety and wellbeing of a child, will be allowed to work and care, or continue to work and care for vulnerable children. Should the name of such person not be added to the CPR as prescribed for by law, the protection envisaged in the form of reducing and preventing contact with children by such persons is completely lost. As a result, both the **measure and mechanism fail to effectively protect** against and mitigate the risk faced by children, as well as their families.

[27] Section 124 states that if the name of a person is entered in Pat B of the Register and that person must disclose that fact to the person who manages or operates the institution, centre, facility, shelter or school etc.

9.4. Data Integrity

9.4.1. In order to successfully implement the **CPR** and abide by the responsibilities as set out in the Act, Constitution and International jurisprudence, the DSD must consequently **efficiently populate** the CPR with data for it to function in terms of its intended purpose i.e. to allow for this information to be used in protecting children from maltreatment, abuse, neglect and degradation.

9.4.1.1. Data on Part A of the CPR

9.4.1.1.1. For purposes of populating Part A of the CPR with information contained in a form 22, the DSD has highlighted various challenges relating to the existing information management system [EDMS – Electronic Document Management System]. Poor lack of connectivity, lack of human resource support as well as the deployment of a dual system approach have all been cited as contributing to the DSD's challenges in population Part A of the CPR to meet the requirements of the Act.

9.4.1.1.2. Further to this, according to the information furnished by the DSD, the CPR **record reflects 270 convictions**[28] on Part A of its database, for the period under review.

9.4.1.1.3. The data reflects convictions added to the CPR Part A between **the periods of 2010 to March 2013.** The entry includes details of persons convicted in this regard, the crime committed, the sentence imposed, as well as reference to the Court order issued. These convictions are added by means of **form 25** of the General Regulation Regarding Children.[29] Regulation 39(2)(a) states that the Director-General must by notified in writing of the conviction of a person on a charge as contemplated in section 114(1)(b) of the Act, or of a finding as contemplated in section 114(1)(c) of the Act, by the registrar of clerk of the Court concerned, as the case may be, **within 14 days of such conviction or finding.**[30]

9.4.1.1.4. Should a conviction fall into the Category of section 120(4), **it is trite that this name must also appear on Part B of the CPR, as such a person convicted in terms of this section will almost always be unsuitable to work with children.**[31]

[28] The DSD provide the SAHRC with printed data. The number was established through a manual count of entries made, including information on Court orders and sentences.

[29] See par 7.2.1.3 supra. The Regulations specifically require all convictions of all persons on charges involving the abuse or deliberate neglect of a child; and section 114(1)(c) refers to all findings by a children's Court that a child is in need of care and protection because of abuse or deliberate neglect of the child.

[30] The Commission saw no value in testing compliance with submission dates since the issue of poor submission rates in itself made this enquiry unnecessary for the purposes of the finding.

[31] See section 120(4)(a) of the Act.

9.4.1.1.5. According to the data provided by DSD, 118 convictions added to Part A of the CPR were the result of the offence of rape of a child.[32] **It should follow that at the very least 118 names ought to appear on Part B of the CPR,** merely reflecting the information available regarding rape, on Part A. These names however, although fitting the criteria as set out by section 120(4) of the Act, cannot be added to Part B of the CPR until a Court **has made the necessary finding of unsuitability with regard to the convicted person.**

9.4.1.1.6. Bearing in mind that form 25 serves as a mere **notification of convictions,** no finding of unsuitability can be added to the CPR by means of form 25. As a result, the 118 person convicted of rape which appear in Part A, and ought to appear in Part B because they meet the unsuitability criteria, do not do so because **the finding of unsuitability is not done, submitted, or alternatively not recorded.**

9.4.1.2. Data for Part B

9.4.1.2.1. In submitting his complaint to the Commission, the Complainant indicated that at the time of submitting his complaint and according to his knowledge, there were only **26 names** included on Part B of the CPR.

9.4.1.2.2. For Part B of the CPR to be populated, a form 28 must be issued to the Director-General of DSD. The form 28 records a finding that a person is unsuitable to work with children. The Act states that the registrar of the relevant Court, or the relevant administrative forum, or, if the finding was made on application in terms of section 120(2),[33] the person who brought the application, must notify the Director-General of DSD in writing of any finding that a person is unsuitable to work with children.[34]

9.4.1.2.3. In responding to the Commission's request for updated confirmation of names relating to unsuitability findings in Part B of the CPR, the DSD initially submitted three (3) sets of data, presented below.

9.4.1.2.4. The DSD submitted a **list of 27 entries named "database on Unsuitability."** All names on this list have a "CPRB" reference number, information relating to the crime committed, the date of the unsuitability finding, as well as the date of entry.

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[32] The Commission has highlighted the crime of rape, as included in section 120(4) of the Act, in order to illustrate its finding below.

[33] Section 120(2) states that a finding may be made by a court or a forum of its own volition or on application by-
a) An organ of state involved in the implementation of this Act;
b) A prosecutor, if the finding is sought in criminal proceedings; or
c) A person having a sufficient interest in the protection of children.

[34] According to Regulation 42 of the General Regulations Regarding Children, this is done by means of a Form 28.

9.4.1.2.5. In relation to "persons found to be unsuitable to work with children", the DSD further submitted the following information:

9.4.1.2.6. 48 entries of person found to be unsuitable to work with children between 2010 and March 2012 was submitted. These 48 entries **do not bear a CPRB reference number nor are there findings adjacent to the entry indicating that these people were found unsuitable to work with children.**[35] The information provided herein reflects mere convictions with dates ranging between 2009 and 2011 (after the Act came into operation).

9.4.1.2.7. A further 40 entries of persons are listed as unsuitable to work with children form April 2012 to March 2013. Once again, these entries do not have CPRB reference numbers nor do they have unsuitability findings recorded.

9.4.1.2.8. The mere **inconsistencies in recording and presentation** of the information contained in the three (3) data sets described above reflect discrepancies relating to data integrity.

9.4.1.2.9. In attempting to reconcile the various sets of data, the Commission contacted the DSD to provide clarity about the exact number of entries on Part B of the CPR. The DSD was also requested to clarify why the reference numbers differed in their submission under "Persons found unsuitable to work with children". In an email dated 26 March 2013, the DSD sent information indicating that a total of 45 Form 28's had been received by it. Even this number **differed from the list of 27 entries reflected on their initial submission.** The DSD was once again requested to clarify this discrepancy, to which it responded on the 24th of May 2013, that the data base on person found unsuitable to work with children contains 305 entries, each bearing the acronym CPRB then followed by the number such as 001, 002, etc.

9.4.1.2.10. The Commission therefore received three (3) inconsistent sets of information at each opportunity provided to the DSD for clarity. A possible reason for this could be that some time had elapsed since the submission of the initial information to the Commission and that further entries had been made which caused the numbers to increase from 27 to 305 between March 2013 and May 2013. To this effect, the Commission noted that of the 305 entries submitted to the Commission in May, 189 were added to Part B of

[35] The CRPB reference refers to data added onto Part B of CPR.

the CPR after the Commission received the DSD's formal submission on the 7th of February 2013, 268 entries of findings were made by the DSD since the Commission's initial request for the information in November 2013. In the face of the number of inconsistencies in the various data sets provided **the Commission accepts the DSD's initial submission of 27 names on the part B of the CPR as being the DSD's formal intended response to its requests.**

9.4.1.2.11. At the time of submission therefore, it is accepted that the database on unsuitability reflected only 27 entries of persons unsuitable to work with children, vis a vis the 270 convictions reflected of Part A of the CPR. (Should information submitted by the DSD in March 2013 be considered, this number may rise to 116[36] vis a vis 270 conviction reflected on Part A of the CPR.)

9.4.1.2.12. In responding to the Commission's request regarding the number of form 28's submitted to Part B of the CPR by Regional Courts, the DOJ&CD indicated that **110 form 28's had been submitted by magistrates and regional Courts for the Period 1 April 2011 to September 2012** as per paragraph 7.2.3.1. Due to the fact that there is no differentiation between data collection tools of Magistrate and Regional Courts, it is not possible for the Commission to determine which entries were made by courts dealing only with matters of a criminal nature (and therefore in the course of criminal proceedings) and which were made by the different types of Magistrate Courts such as Children's Courts.

9.4.1.2.13. A discrepancy one again arises regarding the number of form 28's alleged to have been submitted by the DOJ&CD, to the number recorded on Part B of the CPR for the same period by the DSD. On the basis of the 110 form 28's having been submitted to Part B of the CPR by the DOJ&CD, a number of at least a 110 names, or close to a 110 names should have been reflected Part B of the CPR. This was not the case as according to the data provided by the DSD, by the 30th September 2012, only 27 entries were made on Part B of the CPR, *vis a vis* the DOJ&CD's 110 submissions.

9.4.2. In the circumstances it is clear that data **cannot be said to be an accurate reflection of statistics relating to persons found unsuitable to work with children,** based on the contradictory evidence submitted.

[36] This inference is made when the Commission takes into account that out of the 305 entries submitted to the Commission in May 2013, 189 were recorded only after the DSD made their formal submission.

9.5. Submission of Data

9.5.1. In terms of the framework for the submission of data to Part B of the CPR as described above, submissions of findings of unsuitability are a condition for the population of Part B of the CPR. If these findings are not made, or if they are not adequately submitted, Part B cannot be populated by DSD.

9.5.2. Whilst the DSD is the lead department in the implementation of the CPR, there is a **clear obligation on all relevant organs of sate to cooperate** in the establishing of a uniform manner in realising aspects on the Act. This duty of cooperation in terms of section four (4) of the Act requires an **integrated, co-ordinated and uniform manner in the implementation of the Act by relevant departments.** This duty becomes more pronounced where they have a direct obligation to assist in the functioning of measures such as the CPR. An overlap of jurisdictional obligations is therefore envisaged and is inevitable for the DOJ&CD with the primary responsibility of the DSD.

9.5.3. The DOJ&CD is central to the provision of information for the population of the CPR to DSD. It follows that if these submissions are **lacking (as is evident from the record of only 110 submissions made by all Courts in the period under review), the CPR cannot be an accurate reflection of persons found unsuitable to work with children.**

10. Findings

10.1. Analysis

Notwithstanding the admission to the Commission by the DSD and DWCPD that the population and updating of the CPR posed challenges, **on the Commission's own analysis** relying on a consideration of international legal frameworks and obligations, an interpretation of their impact on the state; domestic legislation and judicial precedent, the Commission makes the following findings:

10.1.1 In terms of international obligations, South Africa **must take all appropriate administrative and legislative measures to protect children from harm.**[37] This obligation is consonant with the "best interests of the child" measure in the Constitution.

10.1.3. The responsibility of the State in so far as its international obligations are concerned with regard to the rights of children is expanded specifically to require the State to put in place **effective administrative measures to address the protection of children against abuse, neglect and maltreatment.**[38]

10.1.4. In summary the State's obligation in terms of its international obligations, the constitution and case law is to pass laws and create enforcement mechanisms for the protection of children, particularly when the child is in the care of the State.[39]

10.1.5. While the CPR is clearly a measure envisaged to meet the State's obligations, it

[37] See par 8.1.2 supra.

[38] See par 8.1.3 supra.

[39] See par 8.2.8 supra.

cannot be said to be effective in its current implementation. It is clear that the intended purpose of the CPR was to create real and **potential protections for children,** and to provide a prospective source of data for planning, policymaking and resourcing purposes. It is also clear that Part B of the CPR was **to prevent persons who have been convicted of harming a child, to work or have close contact with children.**

10.1.6. Both Parts A and B of the CPR have **a broader purpose** intended to protect children from abuse. To this end, an accurate, compete, and accessible register is vital. The collation of information and management of the CPR is therefore central **to the legislation meeting its intended purpose to effectively protect children from abuse from persons who may have been convicted of crimes against children.**

10.1.7. On the evidence before the commission it appears that not all Courts are making findings. It is also evident that no system exists in the management of information to enable one to determine which courts are in fact not making findings and to enable measures to be put in place to address this concern. The sum effect is that the aim and objective of the CPR is negated, and rendered **ineffective.**

10.1.8. In this sense the **protective potential** of the measure is also negated as employers do not have an accurate and fully updated data source in the form of the CPR against which to vet **prospective and current employees.** The likelihood of a potential or current employee, who has been convicted in terms of Part A of the CPR, working with children, and thus posing a risk to their wellbeing, consequently increases drastically as the check in the form of a Part B unsuitability entry would not be possible. Similarly risk cannot be mitigated through cross references of Part B with Part A as no measures are in place for such referencing.

10.1.9. Having established a clear duty on the statutory functionary of the State to maintain the CPR, the Commission is obliged to consider the responses tendered by DSD explaining the current state of the CPR. In this regard the **Commission takes cognisance of the various challenges** submitted by the DSD in response to its enquiries testing the effectiveness of the implementation of the CPR. It is noted further that in recognition of the significance of the CPR the DSD persevered in its attempts to implement the CPR despite these challenges. In this regard the challenges which the DSD has put to the Commission are recorded in summary below:

10.1.9.1. One of the primary challenges experienced by the DSD as alleged is that of human resource constraints. It was put to the Commission that **although costing was done in relation to the implementation of the CPR initially in 2007, a moratorium was placed on the filling of posts** in the 2009/2010 financial year. This led to existing staff being inundated with the implementation of the CPR as applications for screening against the CPR increased in 2011. Although additional staff has since been allocated to the Directorate addressing the implementation of the CPR, the DSD contends that ***"the current staff is unable to cope with the increasing demand for screening and to meet the requirements of the Act."***[40]

[40] Para 3.2.1.3 of the DSD's initial submission to the SAHRC

10.1.9.2. The manual determination of data accuracy submitted to the CPR requires time as well as other resources. Due to the **significant number of incorrect or incomplete submissions received by the DSD,** the details contained in some of these submissions are verified telephonically. This in turn has an impact on human as well as financial resources.

10.1.9.3. The DSD's **dependency** on the supply of information by other stakeholders further frustrates the population of the CPR as the accuracy of the CPR is largely dependent upon the accurate submission of notifications and findings from stakeholders.

10.1.10. Section 4 of the Act indicates that government should take reasonable measures to the **maximum extent of their resources** in order to realize the rights contained in the Act, and thereby reflecting the rights contained in section 28 of the Constitution. Not further elaboration is given aside from this qualification. However, section 8 provides that:

The rights which a child has in terms of this Act ***supplement the rights which a child has in terms of the Bill of Rights.***

10.1.11. Without pronouncing on the reasonableness of any state programme, judicial precedent provides a valuable yardstick to the interpretation of reasonableness. **In Grootboom**[41] the Constitutional Court expressly stated that in order for a government programme to qualify as reasonable, measures must cater for the urgent needs of the most vulnerable sectors of society.[42] Judge Yacoob stated on behalf of a unanimous Court that:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.[43]

10.1.12. Although it is noted that convictions and unsuitability findings were only submitted to the CPR since 2010, the Commission is of the view that **more than a reasonable amount of time has elapsed from the time the first part of the Act was signed into law in 2006.** The second part of the Act was signed into law in March 2008 which gave all relevant stakeholders two years to prepare for the full implementation of the Act in April 2010. Additionally, since the commencement of its respective obligations in terms of the CPR, the DSD has had **almost three (3) years to take appropriate steps** to remedy what constitutes a clear violation of the its constitutional and statutory duty to protect the rights of children.

10.1.13. On the basis of the reasoning above, the DSD and National Parliament must therefore determine whether the **lack of sufficient resources, is reasonable and commensurate to the effect such constraints have** on the rights of children to be protected from abuse and neglect in the South African context. This is seen particularly in the context of the exceptionally high rates of crimes against children and their vulnerability as described in paragraph 8.4.

41 See FN 15supra.

42 Grootboom para 39-44;46;66;68;82.

43 Grootboom para 44.

10.1.14. Whole the ambiguity, inaccessibility and inaccuracies in the CPR appears to be attributed to arrange of reasons and actors, the role of **ensuring that all relevant officials are fully aware and capacitated to fulfil their obligations** cannot be gainsaid. The DOJ&CD, in playing a key role in the implementation of the CPR, has disclosed that training programmes for presiding officers in general had been **inexorably" delayed** due to the migration of all training programmes from the DOJ&CD to the South African Judicial Education Institute (SAJEI). It is therefore likely that all **presiding officers may not be fully aware of their duty in terms of the CPR.** Insufficient awareness contributes to poor application in respect of findings of unsuitability being made and on which updating of the CPR is dependent. Furthermore, no **evidence of a needs assessment of training and awareness for judicial officers appears to have been undertaken or planned.** The responsible department has also not fully considered the role of **other officials involved in the chain of submission.** In this regard, no work study, needs assessment or intention to include such officials in training have been provided.

10.1.15. The CPR is **not the sole register** capturing details of person convicted of offences against children.

10.1.16. The **National Register for Sex Offenders (NRSO)** came into operation on 16 June 2009. In terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[44] persons who are convicted of sexual offences against a child or a person who is mentally disabled may not work with, supervise or have access to a child or a person with a mental disability in the course of his/her employment. **The aim of the NRSO is therefore much the same as the CPR, and includes the details of persons convicted of sexual offences against children, as with the CPR.**

10.1.17. For the period under review, the number of registered names of sex offenders on the National Register for Sex Offenders (NRSO) **increased from 978 in 2010/11 to 2 340.** This figure indicates a progressive increase in the registration of offenders on the NRSO.

10.2. Although the full operation of **the NRSO falls outside of the ambit of this complaint,** it should be noted that **the number of names registered on Part B of the CPR pales in comparison to the number of names captured on the NRSO.** This is even more concerning when taking into account that the same clerks or registrars of Court submitting information to the NRSO carry the responsibility of submitting these convictions to the CPR.

10.2.1. On a consideration of the facts of this matter, both international norms and domestic legal frameworks as well as the South African context, as discussed above, the Commission therefore finds as follows:

10.2.1.1. Having established that the CPR is a mechanism created by statute as a measure designed to prevent and protect children from abuse and neglect; and to realise the constitutional protections afforded children, the resulting **failure to adequately maintain and populate** the CPR as

[44] The Criminal Law (Sexual Offences and Related Matters) Amendment Act No.32 of 2007.

is required by its founding legislation, **violates the rights of children** in terms of section 28 of the Constitution.

10.2.1.2. Based on the information submitted by the DSD and stakeholders, the responsible departments **have been aware of challenges with the updating of the CPR for a period of time.**

10.2.1.3. Reports submitted by DSD indicate that interdepartmentally, some **efforts have been made to improve the effectiveness as well as accuracy of the CPR.**

10.2.1.4. **Effectiveness can however only be measured when th3e CPR is accurately populated, implemented and monitored. This has clearly not occurred.**

10.2.1.5. In the light of the contextual considerations of the extreme vulnerability of children, high levels of abuse and neglect of children in South Africa, as well as data captured by the SAPS, and the NRSO, the CPR **cannot be accepted to be a true reflection of crimes committed against children, or to constitute an accurate record of persons found unsuitable to work with children;**

10.2.1.6. The State, in so far as the CPR is concerned is therefore not **fulfilling its objective** of protecting children from abuse and neglect, as set out in section 113 and 18 of the Act, for reasons set out in paragraph 9.2 and 9.3 supra. **The CPR, can therefore not be said to be effectively implemented;**

10.2.1.7. Proper information collation is key to harness the **protective potential the CPR has for children.** Current information management processes including the collation of submissions, receipt and recording of data in so far as the CPR is concerned is inadequate within the DSD as well as between departments.

9.1.1.8. **Training** of all relevant officials for the purposes of fulfilling obligations and responsibilities in respect of the Act, does not appear to have taken account of needs, been planned for, or sustained in any co-ordinated form or manner.

10.2.1.9. Current means of **monitoring, evaluating and general oversight** of implementation needs to be developed further to ensure a cooperative, integrated and cohesive approach to fully implement the CPR in terms of the duty of cooperation between public bodies as prescribed by the Act itself as well as the Constitution.

11. Recommendations

Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country. In addition to the latter is its duty to **take steps to secure redress where rights have been violated.** Accordingly, the Commission makes the following recommendations:

11.1. The DSD is required to put in place **urgent measures** to ensure the CPR is accurately and fully populated with available information. This recommendation is made on the basis that the DSD has demonstrated a capacity to increase the capturing of data on part B of the CPR by **more than 1000%** since the date of the Commission's initial request in September 2012. To this end, the Commission therefore requests that:

11.1.1. The updated CPR is submitted to it within the **next 4 months** for the period commencing 2012 to date.

11.2. The DSD is required to conduct an urgent and **comprehensive audit** of challenges and needs across relevant business units to inform its needs, within the next 3 (three) months. A report of the audit is to be provided to the Commission on completion thereof.

11.3. It is recommended that the DWCPD increase its frequency in **monitoring implementation** of the CPR.

11.4. The COJ&CD is required to develop a comprehensive programme **for training and sustained awareness** of **all relevant Court officials** regarding their duties under the Act to facilitate and support the accurate, timely updating of the CPR.

11.5. To this end, it is further recommended that in the interim the DOJ&CD take **urgent steps to ensure Court managers and Registrar's are in a position to fulfil compliance obligations on an urgent basis.** The plan referred to in 11.4 above is to be provided to the Commission within **4 months** of date hereof. A report detailing the interim steps taken to secure compliance is to be provided to the Commission within 60 days hereof.

11.6. In light of the pending review of the Act, the Commission recommends that the DSD as the leading department in this regard, **consult on possible reforms to the Act with a view to increasing practical efficiencies, accuracy and accessibility.** In this regard **section 120(4)** of the Act could be considered for reform directed at reducing the administrative burden currently being experienced by the Courts by allowing Courts to deem a person unsuitable to work with children upon the relevant conviction in criminal proceedings:

*(4) In criminal proceedings, a person must be found **(DEEMED)** unsuitable to work with children –*

(a) On conviction of murder, attempted murder, rape indecent assault or assault with intent to do grievous bodily harm with regard to a child;

The recommended amendment may **address the need for a second and separate administrative finding of unsuitability from having to be made,** allowing the names of persons so convicted to be added to the CPR without the requirement of an unsuitability finding.

11.7. It is recommended further that the DOJ&CD consider a **review of the CPR *vis a vis* the operation of the NRSO.** There appears to be a number of levels of overlap between the two registers which have the potential to duplicate resources. In this regard the viability of a binary register system must be explored.

12. Appeal

12.1. You have the right to lodge a appeal against this decision. Should you wish to lodge such an appeal, you are hereby advise 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 in Johannesburg in June 2013

South African Human Rights Commission

COMPLAINT NO: North West/2012/0046

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Ref No: NW/2012/0046

In the matter between:

Ms M obo Minor Child X **Complainant**

and

AFRIKANER VOLKSEIE SPORT **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 18 of the Constitution of the Republic of South Africa Act, 1996 (hereinafter referred to as the, ("**Constitution**").

1.2. The Commission and other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. The Commission is specifically required to:

1.3.1. Promote respect for 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) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.5. Further section 184(2) (c) and (d) affords the Commission authority to carry out research and educate on human rights related matters.

1.6. The human Rights Commission Act[1] further supplements the powers of the Commission and provides the enabling framework for the powers of the Commission.

1.7. Section 9(6) of the Human Rights Commission Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or a threat to a fundamental right.

2. The Parties

2.1 The complainant is Ms M[2], an adult female resident of Madikwe Village, Rustenburg, North West Province (hereinafter referred to as the ("**Complainant**"), acting in her representative capacity as the mother and natural guardian of minor child X[3].

1 54 of 1994

2 In ***Governing body of the Rivonia Primary School and another v MEC for Education Gauteng Province and another [2012] 1 All SA (GSJ) at paragraph [96-98J and Johnson Media Inv LTD v M and others 2009 (4) SA 7 (CC) at paragraph [42]***, the court held that 'disclosing identities of children or their parents could be prejudicial to [the learner] and has the potential to isolate the child involved"

3 The minor child's name is wrongly cited in the Commission's allegation letter, the complaint letter from the Democratic Alliance as well as in the Respondent's written response.

2.2. The Respondent is Afrikaner Volkseie Sport, a non profit Company incorporated in South Africa on September 18, 2009, in terms of the Companies Act[4], and conducting its business from 18 Schroder Street, Upington, Northern Cape (hereinafter referred to as ("**Respondent**").

3. Background to the Complaint

3.1. At all material times hereto, the .Respondent was a non profit company headed by Mr Peter Stans[5] (hereinafter referred to as "**Mr Stans**") and founded upon the following provisions as per the Respondent's constitution[6] ("the Respondent's constitution"):

"Die Christelike-Protestantse geloof

Gegrond op die Bybel en soos verwoord in die drie formuliere eenheid.

Die uitleef van die Afrikanerkultuur.

Waar ons die kultuurbeskouing huldig dat kultuur die handelinge is wat die mens doen in gehoorsaamheid aan God Drie-enig se kultuuropdrag aan die mens."* (Afrikaans***)**

Translated into English:

"The Christian Protestant faith.

Based on the Bible and put in words in the three formulary of Unity.

Live to the fullest the Afrikaner culture,

We held the cultural view that culture is the way man acts when he/she is obedient to the Holy Trinity's cultural order to man."

3.2. On or about 25 June 2012, the Complainant completed the Commission's complaint form.

3.3. The complaint according to the Commission's complaint form received at the Commission's North West Provincial Office is that:

a) The Complainant's daughter was informed by her coach at her school, Hoerskool Wagpos High School that the following Monday of May 7 2012 there would be a"bokkie week" of hockey· trials at Hoerskool Grenswag and child X and her school mates could attend so long they organized own transport, had birth certificates and registration fee of R20.00 per learner;

b) The Complainant accompanied minor child X to Hoerskool Grenswag in Rustenburg on Monday May 7 2012 for the hockey trials;

c) The Complainant went to register by producing minor child X's birth certificate and paying the R20.00 registration fee;

d) Thereafter one Mr Koen, a teacher/coach at Hoerskool Grenswag called minor child X and her two schoolmates and asked who sent them;

e) The minor children answered that their coach had recommended to them that they participate in this event;

[4] Act 3 of 2011

[5] Head of the Respondent

[6] A two paged document bearing the Respondent's logo on the first page received from Mr Winston Rabotapi of the DA who obtained it from the Respondent during their exchange of correspondence and documents on the issue at hand.

f) Mr Koen then told minor child X, in front of her two schoolmates that the trials were for white kids only;

g) Minor child X called the Complainant, her mother, to speak to Mr Koen. Mr Koen repeated the same words to the Complainant, to wit, that that the trials were for white kids only;

h) The Complainant was refunded her R20.00;

i) Minor child X returned home without having participated in the event.

3.4. The Complainant alleges that her minor child's constitutional rights to equality and human dignity had been violated as a result of having been turned away from the hockey trails on the basis of her race and/or colour and/or culture and/or social origin.[7]

3.5. The Complainant requested the Commission to investigate this matter.

3.6. Prior to this complaint being lodged with the Commission, the Democratic Alliance through its Mr Winston Rabotapi[8] (hereinafter referred to as "Mr Rabotapi") had written to the Respondent requesting:

a) Clarity on the requirements for attendance of *Bokkie week* trials;

b) An explanation regarding the decision to send the Complainant home; and

c) Confirmation whether athletes who participate in *Bokkie Week* trials take part in other elite school sport events such as the trials and tournaments for provincial school sports teams.

3.7 In the Respondent's letter dated 11 May 2012 in response to Mr Rabotapi's enquiry the Respondent stated, *inter alia,* that "***Afrikaner Volkseie Sport is in 1991 gestig as 'n geleentheid vir Afrikaner kinders om hulle reg tot volkskap uit te lewe ook op sportgebied***". (Afrikaans)

Translated into English:

> *"Afrikaner People's Own Sport was founded in 1991 when parents, teachers and children realised that there were new circumstances and demands but they were culturally still bound to the Afrikaner People as a different nation with a strong urge to choose their own language, traditions and emblems".*

3.8. The Respondent attached its constitution to the response addressed to the Mr Rabotapi.

3.9. Mr Rabotapi attached both the Respondent's response and constitution to his complaint letter to the Commission, with the request for the Commission to investigate the matter.

4. Key Quotes from the Respondent's Constitution

The following key extracts are quoted from the Respondent's constitution to illustrate the nature of the Respondent:

a) "Afrikaner Volkseie Sport het in 1991 ontstaan deurdat ouers, onderwysers en kinders besef het dat daar nuwe omstandighede en nuwe eise is, maar dat hulle steeds kultuureel verbonde bly aan die Afrikanervolk as onderskeibare volksentiteit met 'n sterk drang om ons taal, tradisies en emblem gekies." *(Afrikaans)*

[7] The Commission's Complaint form dated 25 June 2012

[8] Shadow Minister of Sport & Recreation, Democratic Alliance

Translated into English:

"Afrikaner people's own Sport was founded in 1991 as an opportunity for Afrikaner children to live out their right to their culture also in sports."

d) **"*Ons wit beklemtoon dat ons nie enige ander strukture wil beveg of vervang nie. Ons doel is slegs om geleentheid te bied vir ons kinders en volksgenote wat dieselfde kultuurwaardes as ons wil handhaaf"*.** *(Afrikaans)*

Translated into English:

"We would like to emphasise that we do not want to battle with other structures or want to replace them. Our only aim is to provide an opportunity for our children and fellow Afrikaner People with the same culture values as us."

e) ***"Die Bokkieweke staan glad nie in kompetisie met enige ander sportgroeperinge nie en sal eerder 'n ondersteuningsrol speel op amateurvlak vir enige sportsoort wat dit wil aangryp. AVS wil erkenning geniet by die Afrikanervolk en in die wereld."*** *(Afrikaans)*

Translated into English:

"The "Bokkieweke" is not in competition with any other sport groups and plays a more supportive role on amateur level for any kind of sport that wants to make use of this opportunity. AVS wants to enjoy acknowledgement from the Afrikaner people and the world."

5. Preliminary Assessment

5.1. In its preliminary assessment of this complaint, the Commission's North West Provincial Office found the Respondent's constitution to be unconstitutional and its conduct to constitute *prima facie* violations of:

5.1.1. **Section 9** of the Constitution of the Republic of South Africa, 1996 ("the Constitution") - Equality;

5.1.2. **Section 10** of the Constitution - Human dignity;

5.1.3. **Section 12** of the Promotion of the Equality and Prevention of Unfair Discrimination Act 4 of 2000;

5.2. The Commission also made preliminary assessment that:

5.2.1. The investigation of the alleged violations fell within the mandate and jurisdiction of the Commission;

5.2.2. The Respondent's possible defences of freedom of religion, belief and opinion - Section 15 of the Constitution and freedom of association – Section 18 of the Constitution;

5.2.3. That the Commission is the organization best placed to effectively and expeditiously deal with the complaint.

6. Steps taken by the Commission

6.2.1. Pursuant to the assessment of this complaint and on 30 August 2012, the North West Provincial Office of the Commission sent an allegation letter to the Principal of Hoerskool Grenswag[9], since the hockey trials had been held at that school.

[9] The school in Rustenburg, North West Province where the hockey trials in question were held

6.2.2. In the allegation letter the Commission:

(a) Advised Hoerskool Grenswag of the complaint lodged against it;

(b) Advised Hoerskool Grenswag of the Commission's preliminary assessment of the human rights violated;

(c) Invited Hoerskool Grenswag to respond to allegations;

(d) Called for a response within twenty-one (21) days.

6.2.3. The Commission received written response dated 20 September 2012 from the Mr L. H. J. Koen, Hoerskool Grenswag teacher that turned the Complainant away from the hockey trials. In this letter Mr Koen stated that:

a) Hoerskool Grenswag had no involvement in the matter;

b) Sport organization "*Stellaland*"[10]" had organized the hockey trials and rented sport facilities from Hoerskool Grenswag;

c) Staff members of "*Stellaland*" were responsible for all the administration; and

d) He (Mr Koen) only acted on behalf of Reverend Stans (Mr Stans), head of Afrikaner Volkseie Sport (the Respondent).

6.2.4. Subsequent to this, the Commission contacted Mr Stans telephonically to request an explanation for the exclusion.

6.2.5. In the above telephone discussion Mr Stans acknowledged that he knew of the complaint at hand and requested a copy of the Commission's letter of 30 August 2012[11] addressed to Hoerskool Grenswag and a copy of the Commission's letter of 21 January 2013 addressed to Mr Koen to furnish a written response on behalf of the Respondent.

6.2.6. The Commission furnished Mr Stans with the requested letters and required Mr Stans to furnish the written response by 09 May 2013.[12]

6.2.7. After a number of requests for further particulars from Mr Stans, which further particulars were provided to him by the Commission, the Commission received the written response from the Respondent.

6.2.8. In its written response, the Respondent neglected to and/or refused to respond to the substance of the allegations. Instead, the Respondent stated amongst other things that:

(a) ***"Ten opsigte van die beginselgrondslag van die werksaamhede van AVS deel ons graag enkele feite met u. Dit is belangrik dat u daarop sal let dat AVS nie buite die Grondwet van Suid-Afrika funksioneer of wil funksioneer nie. Die reg van vrye assosiasie word deur die huidige Grondwet gewaarborg. AVS werk nie deur die statutere strukture van skole nie, maar op 'n private individuele basis. Verder moet u veral daarop let dat AVS nie op 'n rassegrondslag funksioneer nie, maar op 'n internasionaal erkende***

[10] Alternative name for the Respondent

[11] Commission's allegation letter

[12] Extension for the Respondent to furnish its written response

en gefundeerde beginsel van die volkerebasis, soos bevestig deur die Verenigde Nasies. In Suid-Afrika is daar egter 'n mag der menigte strukture wat hulle aan die rasvergrype skuldig maak, onder andere: Association for the Advancement of Black Accountants of South Africa, Black Business Executive Circle (BBEC), Black Brokers Council of South Africa (BBCSA), Black Business Women's Association (BBWA) en Black In format." *(Afrikaans)*

Translated into English:

> *"Regarding the principle basics of the work activities of the AVS we gladly share a few facts with you. It is important to take note that the AVS is not functioning outside the Constitution and it has no wish to do so. The right to free association is guaranteed by the current Constitution. The AVS does not function by the statutory structures of schools but on a private individual basis. Also take especially note that the AVS does not function on a racial basis but on an international recognised and funded principal of the nation basis, as confirmed by the United Nations. In South Africa there is however a vast amount of structures that is guilty of racial transgressions, for instance: Association for the Advancement of Black Accountants of South Africa, Black Business Executive Circle (BBEC), Black Brokers Council of South Africa (BBCSA), Black Business Women's Association (BBWA) and Black Information Technology Forum."*

And further,

(b) "Ek onderstreep weereens dat AVS nie rasgedrewe is nie, maar op to volksgerigte basis funksioneer. Die feit dat die Afrikanervolk 'n blanke volk is, is nie as gevolg van die keuse van die Afrikaner nie, maar is so beskik deur die Raad van die Drie-Enige God. Erens het ek hierdie feit ook in Engels raakgelees: "it is an act of God".

Translated into English:

> *"I want to emphasise again that AVS is not racial driven, but its function is nation directed. The fact that the Afrikaner nation is a white nation is not out of own choice, it was ordained by the Council of the Holy Trinity of God. I somewhere read this fact also in English: "it is an act of God."*

(c) "AVS spreek egter sy opregte spyt uit oor die feit dat een van sy beamptes klaarblyklik nie volledig binne die riglyne van AVS opgetree het en Rego Modise nie onmiddelik die volledige korrekte inligting ontvang het nie. Haar deelname kan nooit vanwee haar ras geweier word nie, maar vanwee die feit dat sy nie 'n lid is van die Afrikanervolk nie, maar lid van die Tswanavolk. (Dieselfde beginsel geld ook waar seuns inisiasieskole bywoon. 'n Tswana seun woon tog nie 'n Zulu inisiasiegeleentheid by nie.) Sy het na my wete ook nie 'n persoonlike uitnodiging tot deelname aan die proewe van AVS Stellaland ontvang nie, maar het bloot by die proewe opgedaag. AVS onderneem hiermee om aan die betrokke beampte heropleiding te gee ten einde die herhaling van so 'n situasie sover moontlik te voorkom."

Translated into English:

(d) "AVS wants to communicate it sincerest regret that, apparently one of the officials did not act within the guidelines of the AVS. Rego Modise did not receive the correct information immediately. Her participation could never have been refused because of her race, but from the fact that she is not a member of the Afrikaner nation. She is a member of the Tswana nation. (The same principle counts where boys attend initiation schools. A Tswana boy does not attend a Zulu initiation event). To my knowledge she also did not receive a personal invitation to take part in AVS's Stellaland trials, she simply showed up. AVS hereby undertake to give the official in question some re-training in order to prevent such a situation from happening again."

7. Applicable Legal Framework

7.1. International Legal Instruments

7.1.1. Universal Declaration of Human Rights, 1949

Article 1

"All 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".

7.1.2. International Convention on the Elimination of all forms of Racial Discrimination ("CERD")

The International Convention on the Elimination of all Forms of Racial Discrimination defines *"'racial discrimination" as unfair differentiation based on "race, colour, descent, or national or ethnic origin".*

Further,

'CERD provides that states who are parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin which attempts to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures designed to eradicate all incitement to or acts of such discrimination and to this end with due regard to the principles embodied in the universal declaration of human rights and the rights expressly set forth in article 5 provide inter alia that participating states:

(a) Declare an offence punishable by law of all dissemination of ideas based on racial superiority or hatred incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin and also the provision of any assistance to racial activities including the financing thereof;

(b) Declare illegal and prohibit organizations and also organized and all other propaganda activities which promote and incite racial discrimination and further that such states recognize participation in such organizations or activities as an offence punishable by law".

7.1.3. International Covenant on Civil and Political Rights

Article 2

"Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

7.2. Regional Legal Instruments

7.2.1. The African Charter on Human Rights and People's Rights

Article 2

"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."

7.3. National Constitution

The following provisions of the National Constitution are applicable:

7.3.1. Section 9 of the Constitution – Equality

"9.

(1) Everyone is equal before the law and has 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, legislation, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may taken;

(3) The State may not unfairly discriminate directly or indirectly against anyone on or one or mere grounds including... race;

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection;

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

7.3.2. Section 10 of the Constitution - Human Dignity:

"Everyone has inherent dignity and the right to have their dignity respected and protected."

7.4. Domestic Legislation

7.4.1. Promotion of Equality and Prevention of Unfair Discrimination[13] ("Equality Act")

Section 1 (9) (viii) of Equality Act defines "discrimination" as: "any act or omission, including a policy, law, rule or 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 Equality Act provides that neither the state nor any person may unfairly discriminate against any person.

Section 7 of Equality Act:

"...subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

(b) The engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;

(c) The exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;"

Section 13 of Equality Act provides that:

(a) The Applicant must make out a prima facie case of discrimination.

(b) In that event, the respondent must prove that the discrimination did not take place or that the conduct is not based on any of the prohibited grounds.

(c) If the discrimination did take place on one of the listed grounds then it will be presumed to be unfair unless the respondent proves that it is fair.

(d) If the discrimination occurred, but was based on an analogous ground, and if the applicant provided the criteria necessary to establish analogous grounds, then the discrimination will be deemed to be unfair unless the respondent proves that it is fair.

Section 14 of Equality Act deals comprehensively with the criteria that must be considered before a determination is made as to whether the act or conduct amount to unfair discrimination.

This section provides useful guidelines on balancing the associational rights of voluntary association's associational rights and those of the applicant's rights to be treated equally.

[13] Act 4 of 2000

7.5. Relevant Case Law

7.5.1. *Harksen v Lane NO*[14]

The Constitutional Court proposed a working formula to determine whether the right to equality has been infringed.

7.5.2 *Van Heerden v Minister of Finance*[15]

In this case, the Court refined the formula to determine whether the right to equality has been infringed. The Court stated the following factors to consider in answering this question:

1) *Does the differentiation bear a rational connection to a legitimate governmental objective? This is referred to as mere differentiation. If there is a rational connection to a legitimate governmental objective, there is no violation of section 9(1).*

2) *If there is no violation of section 9(1), the applicant can proceed to determine whether the challenged law or conduct amounts to a violation of section 9(3).*

3) *If the law or conduct falls within the provisions of section 9(2) (the affirmative action clause), it is very unlikely to be simultaneously unfair discrimination.*

4) *If the differentiation is on a listed or specified ground, then discrimination is deemed to be established. Listed grounds refer to the list of seventeen grounds mentioned in section 9(3). If there is differentiation on a ground that is not specified, then in that event, discrimination will be deemed to be established, if the applicant proves that the ground is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to effect them in a comparably serious manner. These are sometimes referred to as analogous grounds.*

5) *The prohibition is against unfair discrimination. If there is discrimination on a specified ground then unfairness is presumed. If it is on an analogous ground, then the applicant will have to prove unfairness. In Hugo, the court laid down the following guidelines for determining whether the discrimination is unfair:*

    i. *The position of the complainant and whether they have been the victim of past patterns of discrimination.*

    ii. *The purpose of the discriminatory law or practice and particularly whether it is aimed at achieving a worthy and important societal goal.*

    iii. *The extent to which the rights of the complainant has been impaired.*

6) *If the discrimination is unfair, then a determination would have to be made as to whether it is reasonable and justifiable in an open and democratic society.*

[14] 1998(1)SA300(CC)

[15] 2004 (6)SA121(CC)

8. Analysis of the Complaint

8.1. The right to freedom of religion, belief and opinion is a fundamental right entrenched in the Constitution. However, several laws limit this seemingly expansive right. For instance, the South African Schools Act[16] prohibits corporal punishment in schools - despite the fact that the Christian Bible providing for corporal punishment. The same goes for the right to freedom of association. It is also not an unlimited right.

8.2. This means, therefore, that although a person is free to exercise the benefits obtained through these rights, one still has a responsibility to have regard to limitations set out in legislation and other person's rights that in a way limit the exercise of these rights.

8.3. In the present complaint, it is common course that the coach/teacher that refused minor child X entry into the hockey trials organised by the Respondent acted on the instructions of the Respondent. The Respondent has admitted this, and the facts in this regard are not in dispute.

8.4. It is further common cause that minor child X was refused participation in hockey trials organised by the Respondent solely because she is not white (Afrikaner) and the hockey trials were exclusively for white children (Afrikaner children) only.

8.5. In its written response[17] the Respondent states that ***"...Haar deelname kan nooit vanwe***ë ***haar ras geweier word nie, maar vanwee die feit dat sy nie 'n lid is van die Afrikanervolk nie, maar lid van die Tswanavolk***". (Afrikaans)

Translated into English:

"... her participation could never have been refused because of her race, but from the fact that she is not a member of the Afrikaner nation. She is a member of the Tswana nation".

8.6. Any exclusion from a voluntary association because a person possesses or does not possess an unchangeable characteristic, in this instance the Complainant not being an Afrikaner, will be adequate to establish a prima *facie case* of discrimination.

8.7. The Respondent had been made aware of the Commission's preliminary finding that in the event that the Complainant's allegations were found to be true the Respondent's conduct would amount to unfair discrimination on the basis of race.

8.8. The Commission extended several opportunities to the Respondent to furnish its side of the story to enable the Commission to arrive at a fair and informed decision. In other words, the Respondent was afforded more than one opportunity to prove that its conduct, if it was found to be discriminatory, it was not an unfair discrimination.

8.9. Initially the Respondent simply referred the Commission to an undated document allegedly by the Department of Education, North West Province which the Respondent sought to use to its defence that the alleged Department had accepted the Respondent's general activities and objectives as constitutional.

8.9. Upon knowledge that the Commission was in possession of its constitution, the Respondent attempted to justify its constitution by simply informing the Commission that:

[16] 84 of 1996

[17] Final written response

"Die feit dat die Afrikanervolk 'n blanke volk is, is nie as gevolg van die keuse van die Afrikaner nie, maar is so beskik deur die Raad van die Drie-Enige God. Erens het ek hierdie feit ook in Engels raakgelees: "it is an act of God". *(Afrikaans)*

Translated into English:

"The fact that the Afrikaner nation is a white nation is not out of own choice, it was ordained by the Council of the Holy Trinity of God. I somewhere read this fact also in English: 'it is an act of God'"

9. Finding

9.1. In the analysis above, the exclusion of minor child X from a sporting event on the basis of her race or social origin is juxtaposed against the justification offered by the Respondent in support of its exclusionary.

9.3. There is no dispute of fact in this matter as the entire incident was witnessed by the Complainant and minor child X's two school mates. Minor child X alleges that her exclusion from the sporting event humiliated her, was hurtful and diminished her human dignity.

9.4. The Respondent's explanation and/or justification for the exclusion is Respondent's possible defences of freedom of religion, belief and opinion - section 15 of the Constitution and freedom of association - section 18 of the Constitution fall short of the test for fairness and reasonable set out in the Harksen case as the exclusion was based solely on a differentiation based solely on the colour and/or race and/or social origin of the minor child.

9.5. The Respondent's explanation and/or justification for the exclusion is illegitimate, unjustifiable and unacceptable in an open and democratic country, and does not meet the requirements of section 36 of the Constitution for a fair and reasonable limitation of a right.

9.6. Further, the Respondent has to date not extended an apology to the Complainant.

9.7. The Commission finds as follows:

a) The Respondent has acted in violation of sections 9 (4) (Equality) and 10 (Human Dignity) of the Constitution;

b) The Respondent has acted in contravention of section 7, read with section 13, of the Promotion of Equality and Prevention of Unfair Discrimination Act.

10. Recommendations

10.1. The Commission recommends that the Respondent should review and amend its constitution and policies, particularly with regards to its membership and participation provisions.

10.2. Until such time that the Respondent has revisited and amended such provisions so as to ensure that they are constitutionally valid, the Respondent should desist from engaging in exclusionary membership and participation practices to its organization on the sole basis of race and social origin.

10.3. The Commission further recommends that the Respondent issues an unequivocal and unreserved written apology to the Complainant within 14 (fourteen) days of receipt of this finding.

10.4. The Commission makes this finding **without prejudice** to the entitlement of the Complainant or any other party, including the Commission, to institute legal proceedings against the Respondent in the Equality Court for any additional competent or alternative relief provided for in section 21 of the Equality Act.

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

South African Human Rights Commission

COMPLAINT NO: EC/2012/0039

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Complaint No: EC/2012/0039

In the matter between

LINDIWE MAZIBUKO, DEMOCRATIC ALLIANCE	**Complainant**
and	
DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE	**1st Respondent**
DEPARTMENT OF TRANSPORT, EASTERN CAPE PROVINCE	**2nd Respondent**

REPORT

1. Introduction

1.1 The South African Human Rights Commission (hereinafter referred to as the "Commission") is a state institution established in terms of Chapter 9 of the Constitution of the Republic of South Africa Act, 1996 (hereinafter referred to as ("the Constitution"), to support constitutional democracy.

1.2 The Commission is mandated in terms of section 184 (1) (a-c) of the Constitution to:

"...promote respect, monitor and assess the observance of human rights in South Africa".

1.3 The right to basic education is a constitutionally protected right that is unequivocally granted to all children. It is considered a central facilitative right that is to qualified by expressions such as 'available resources', 'progressive realisation', or 'reasonable legislative measures' which are applicable to other socio-economic rights enshrined in our constitution.

1.4 Thus, the state must implement measures giving effect to the realisation of this right as a matter of absolute priority.

2. The Parties

2.1. The Complainant is MP Lindiwe Mazibuko, the Parliamentary Representative of the Democratic Alliance.

2.2. The 1st Respondent is the Department of Education in the Eastern Cape Province.

2.3. The 2nd Respondent is the Department of Transport in the Eastern Cape Province.

3. The Complaint

3.1. On or about 03 May 2012 the Eastern Cape Office of the Commission received a written complaint from MP Lindiwe Mazibuko acting in the interests of the learners of Zweledinga Senior Secondary School in Queenstown.

3.2. The Complainant alleges that the learners of Zweledinga have to travel long distances by foot in order to access the school.

3.3. During 2011/12 financial year these learners were provided with scholar transport services.

3.4. The above service was suspended in 2012/13 financial year without any notifications and/or reasons given to the said school.

3.5. The plight of the above mentioned learners is not isolated as most scholars especially in rural areas are still experiencing difficulties in accessing schools.

4. Preliminary Assessment

4.1. In the preliminary assessment of the Commission, the Respondent is in *prima facie* violation of:

4.1.1. the right to education in terms of section 29 of the Constitution;

4.1.2. Children's right in terms of section 28 of the Constitution.

5. Investigative Steps taken by the SAHRC

5.1. Investigators from the Eastern Cape Office of the Commission investigated this matter.

5.2. Recognising the systemic challenge of lack of transportation of learners to schools in the Provincial Office, as part of its investigations, the provincial office elected to visit a number of additional schools to verify and gather information relating to the scholar transport. The additional school visited are as follows:

(a) Lovemore Park Farm Primary School in Port Elizabeth

(b) Zweledinga Senior Secondary School in Queenstown

(c) Ntabankulu Senior Secondary School in Mqanduli

(d) Dalibaso Senior Secondary School in Mqanduli

(e) Luthubeni Senior Secondary School in Mqanduli

(f) Upper Mpako Senior Secondary School in Mqanduli

5.3. Interviews held at the schools revealed that the availability of transport to learners at these schools was not adequate.

5.4. The investigation revealed that in July 2012, the provision of service of scholar transport to learners of Zweledinga School was transferred from the Provincial Department of Education to the Provincial Department of Transport by agreement.

5.5. In terms of the memorandum of agreement signed by the above mentioned Departments in August 2011, the Department of Education is responsible for applications and qualifications requirements for learners and schools to participate in the programme whilst the Department of Transport is responsible for planning the routes and modes of transport to meet the needs of the learners and schools. (Copy of Memorandum of Agreement is annexed hereto and market "A").

5.6. For 2013/14 financial year, the Department of Transport budgeted R340 million for scholar transport and is currently transporting about 54 471 learners. The need for scholar transport is however almost 120 000 learners.

6. Applicable Law

The following law is applicable to this matter:

6.1. International Legal Instruments

6.1.1. The UN Convention on the Rights of the Child (1989)

This fundamental international instruments recognises the right of all children to basic education, and places duties of members states to actualise this right.

6.1.2. The UNESCO Education for All (2000)

This instrument recognises the fundamental link between education and sustainable social and economic development. It requires special and focused measures to secure the education rights for the most marginalised children.

6.1.3. The Committee on Social, Economic and Cultural Right's General

Comment on the Right to Education 13 (21st Session, 1999):

"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 marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children, promoting human rights."

6.2. Regional Legal Instruments

The African Charter on the Rights and Welfare of the Child

Article 21 states:

(1) *"State Parties shall take all appropriate measures to eliminate harmful practices affecting dignity of the child."*

Article 4 states that:

(1) *"In all actions concerning the child by any authority, the best interest of the child shall be the primary consideration."*

6.3. Constitutional Provisions

6.3.1. Education

Section 28 of the Constitution stipulates:

(1) (a) "Everyone has the right to a basic education..."

6.3.2. Children

Section 28 of the Constitution states:

(1) "Every child has the right-

(a) To be protected from maltreatment and abuse;

(2) "A child's best interests are of paramount importance in every matter concerning the child".

6.3.4. Limitations of rights

Section 36 of the Constitution stipulates:

(1) "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 all relevant factors, including-

(a) the nature of the rights;

(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 purposes; and

(e) less restrictive means to achieve the purpose."

6.4. Domestic Legislation

6.4.1. The Children's Act 38 of 2005

Section 6(2) provides that:

"All proceedings, actions or decisions in a matter concerning a child must-

(a) Respect, protect, promote and fulfill the child's rights set out in the Bill of Rights, the best interest of the child standard set out in section 7, subject to any lawful limitation;

(b) Respect the child's inherent dignity;

(c) Treat the child fairly and equitably;

(d) Protect the child from unfair discrimination on any ground;

(e) Recognise a child's need for development".

Section 6(4) states:

"In any matter concerning a child-

(a) An approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and

(b) Any delay in any action or decision to be taken must be avoided as far as possible."

6.5. National Policies

6.5.1. National Education Policy Act 27 of 1996, as amended

Section 4(a)(i) – The policy shall be directed toward the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 3 of the Constitution (interim), and in terms of international conventions ratified by Parliament, and in particular the right of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever.

6.5.2. National Policy for the Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010)

This policy commits to providing alternatives and to implementing these on a pro-poor basis where "ease of physical access to schools is not financially feasible". The policy proposes alternatives including the provision of transport and the provision of hostels.

6.5.3. Policy on Leaner Attendance (2010)

This policy provides standard procedures for recording, managing and monitoring of learner attendance, with the obligations of principals to identify learners who are frequently absent, to establish the cause of such absenteeism and to facilitate access to support for the learner to overcome the underlying difficulty.

6.5.4. Final Draft National Learner Transport Policy (2010)

Paragraph 4.2 of this policy provides that:

"Institutional arrangements have the objective of ensuring that adequate resources, based on defined targets and priorities, are available for scholar transport and that they are effectively used and properly monitored. The responsibility for developing and implementing a scholar transport service has until now been split between different Departments"

7. Case Law

7.1. Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others (CC 29/10)

And

7.2. Section 27 and 2 Others v Minister of Education & Others, 2012

Both these cases confirm the principle that "the right to basic education is immediately realizable. It is not subject to progressive realisation within available resources."

8. Issues for Determination

The Easter Cape Provincial Office of the Commission determined that the following aspects require legal determination:

8.1. Whether the failure of the Respondents to provide adequate transportation, at state cost alternatively at subsidized cost, constituted a violation of the right to a basic education in terms of section 29 (1) (a) of the Constitution; and

8.2. Whether the failure to provide transportation to learners is a justifiable limitation to the learner's right to education in terms of section 36 of the Constitution.

9. Legal Analysis

9.1. An investigation into a violation of the constitutional right to a basic education follows a three-stage analysis;

9.2. Firstly, establishing whether there is a right to which the learners are entitled;

9.3. Secondly, establishing whether the Respondent's conduct has infringed the right and;

9.4. Thirdly, if the learner's right to basic education has been infringed, establishing whether this can be justified under Section 36 of the Constitution.

9.5. Section 29 of the Constitution explicitly protects the learner's right to a basic education. The purpose of the right to basic education is perhaps most evident from a reading of the opening lines of the Committee on Social, Economic and Cultural Right's General Comment on the Right to Education 13 (21st Session, 1999) which states that:

"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 marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children, promoting human rights."

9.6. In Ex Parte Gauteng Provincial Legislature; In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill, 1996 (3) SA 165 (CC), the Constitutional Court held that: *"Section 29 (1) (a) created a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his basic education."*

9.7. The Constitutional Court confers both positive and negative elements of the right to basic education. By ensuring that learners are not prevented from accessing the schools, section 29(1) (a) operates like an ordinary civil and political rights. Any interference with the legitimate exercise of the right can be justified only in terms that meet the test set out in section 36(1).

9.8. The Constitutional Court in the cases of Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others (CC 29/10) and Section 27 & 2 Others v Minister of Education and Others, 2012.

9.9. Both cases confirmed the principle that "the right to basic education is immediately realisable and is not subject to progressive realisation within available resources."

9.10. The draft policy makes provision for affordable and safe transport at the cost of the state for all learners with additional needs and vulnerabilities, including very young learners, learners with disabilities, and children living in rural areas who are vulnerable to the dangers of travel over long distances.

9.11. This suggests therefore that any failure and/or neglect of the Respondents to provide adequate transportation to learners of the schools listed in Paragraph 5.2. cannot possibly be said to be a reasonable and justifiable limitation within the meaning of section 36. An explanation advanced by the Respondents to the effect that there is insufficient financial resources to provide such transport is unacceptable.

9.12. The nature of the transportation services that the State is obliged to provide, and the circumstances that place the State under obligation to provide transport is set out in the National Learner Transport Policy. The policy determines that a 5 (five) kilometers walk for a child in a rural area is dangerous as learners are susceptible to poor security due to distance, vegetation, dangerous animals and criminal elements.

9.13. In addition to this, the Policy on Learner Attendance obliges principals to identify learners who are frequently absent and establish the cause of such absenteeism. There is a supportive duty that rests on the Principals of the schools listed in Paragraph 5.2. above to take steps to assist the affected learners to overcome barriers to access education.

10. Findings

On the basis of the analysis set out in the preceding section, the Commission makes the following findings.

10.1. The failure and/or neglect of the Respondents to provide learners of the schools set out in paragraph 5.2. above with subsidised transportation to and back from school constitutes a violation of their right to basic education as per section 29 (1) (a) of the Constitution.

10.2. In failing and/or neglecting to provide subsidised transportation to and back from school amounts to an infringement of the duty of the State to consider the best interests of the learner as per section 28 (2) (i) of the Constitution.

11. Recommendations

The Commission recommends accordingly that:

11.1. The Respondents review the adequacy of their Memorandum of Agreement in which they set out and agree on their respective responsibilities with regard to the provision of transportation services to scholars.

11.2. The Respondents are to provide the Commission with **monthly written reports** on the progress made towards the delivery of transportation services to the learners of the Schools listed in paragraph 5.2. above, commencing at the end of July 2014. The Reports must, but not limited to, set out the Respondents progress in the following aspects:

(a) Location of the affected learners, per district;

(a) Number of learners requiring transportation per school as at the date of the first report and the extent to which this figure fluctuates throughout the reporting period;

(a) Number of learners that have been provided with transportation since the last report and the extent to which this figure fluctuates throughout the reporting period;

(a) Time-bound plans, including immediate and temporary plans, to address the transportation challenges of the affected children.

11.3. The Principals of the Schools listed in paragraph 5.2. above are directed to take proactive steps in establishing from learners who are registered at their respective schools whether the basis for their nonattendance is due to the lack of transportation. In the circumstances where this has been established, the Principals are then required to provide the Commission with a list of all learners in their respective schools that are reported to be absent for the reason of lack of transportation to school. The first Report expected from each of the Schools is to be delivered to the Eastern Cape Provincial Office of the Commission every consecutive 30th day of the month of each school term.

11.4. The Commission makes this finding **without prejudice** to the entitlement of the Complainant or any other party, including the Commission, to institute legal proceedings against the Respondent in the Equality Court for any additional competent or alternative relief provided for in Section 21 of the Equality Act.

12. 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: Eastern Cape/2012/0457

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref no: EC/2012/0457

In the matter between:

DETT VAN DEN BOUGAARD	**First Complainant**
DOS VAN DEN BOUGAARD	**Second Complainant**
and	
SOUTH AFRICAN POST OFFICE (JEFFREY'S BAY)	**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; 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 Act, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. The Parties

2.1. The Complainants are Dett and Dos Van Den Boogaard, an adult married couple residing at Jeffrey's Bay. (Hereinafter referred as the **"Complainants"**)

2.2. The Respondent is South Africa Post Office: Jeffrey's Bay (SAPO) a public company incorporated in terms of Companies Act 61 of 1973 and is owned by the State. (Hereinafter referred as the **"Respondent"**)

3. Background of the Complaint

3.1. On or about 16 March 2012, the Eastern Cape office of the South African Human Rights Commission received a complaint from the Complainants in their personal capacity and also on behalf of the Organization for People with Disabilities South Africa (OPD).

3.2. Their complaint is summarized as follows:

3.2.1. There is no disabled parking bay near the entrance of Jeffrey's Bay Post Office and the pavement is not flat;

3.2.2. There is only one entrance where people with disabilities can enter the building;

3.2.3. The ramps are too steep and the counters are too high for people using wheelchairs and for physically challenged people;

3.2.4. There are no facilities at all for people with sight and/or hearing impairments.

3.3. On 23 November 2010 the ODP conducted an audit on the accessibility Jeffrey's Bay Post Office and its findings were communicated to the Branch Manager of the Respondent who later assured that the matter is being attended to.

4. Preliminary Assessment

4.1. In the preliminary assessment of the Commission, the Respondent is in *prima facie* violation of:

4.1.1. The human rights of disabled people who are in need of the services of the Respondent. In particular, the assessment determined that sections 9 and 10 of the Constitution had prima facie been violated;

4.1.2. That the alleged violation falls within the mandate and jurisdiction of the South African Human Rights Commission;

4.1.3. The Commission's decision to investigate the matter is supported by its Complaints Handling Procedures as gazette.

5. Investigative Steps Taken by the Commission

5.1. Upon receipt of the complaint and preliminary assessment thereof by the Commission, the complainant was requested on 18 April 2012 to submit a detailed statement of the complaint.

5.2. On 10 May 2012 the Complainants furnished the Commission with the requested information.

5.3. On the same day, the allegations were forwarded to the Branch Manager of the Respondent via email.

5.4. After various reminders a formal letter dated 19 November 2012 was dispatched by fax and post to the Respondent requesting responses to the allegations made by the Complainants.

5.5. A response was received by the Commission from the Respondent on 19 December 2012.

6. Responses received from Respondent

6.1. In its written response, the Respondent indicated the following:

6.1.1. It conceded that the Post Office was inaccessible to people with disabilities and that a ramp was to be constructed.

6.1.2. On 22 January 2013, the Respondent confirmed that a ramp was installed on the 22 December 2012.

6.2. Notwithstanding that the complainants acknowledged that the ramp was built, they bemoaned that the ramp was not according to the prescribed standards and contended that a lot was still outstanding to make the building accessible to people with disabilities.

7. Inspection in loco

7.1. On Friday, 07 June 2013, the investigators of the Commission's Eastern Cape office visited the Respondent's premises, to inspect and verify the changes effected by the Respondent.

7.2. The following observations were noted:

7.2.1. There is no disabled parking bay nearby the entrance of the building.

7.2.2. There are two entrance points, one point has a set of steps leading to the building and consequently is entirely inaccessible to people using wheelchairs (see "Photo A").

7.2.3. The second entrance point, the one with no staircase has two poles erected on it which creates a barrier for those in wheelchairs to access the post office (see "Photo B").

7.2.4. The ramps that are in place are too steep and as thus not suitable (see "Photo C").

7.2.5. The counters inside the Post Office are too high and therefore cannot accommodate persons with disabilities (see "Photo D").

Photo A

The second entrance point at Reyger Street. It is clear that a person using a wheelchair cannot enter the building using this entrance.

Photo B

The Verbena road entrance is the only entrance used by wheelchair bound persons to access the post office. At the entrance there are two poles which obstruct their accessibility. The distances between the poles are too narrow.

Photo C

The ramp leading to the post boxes is too steep and has no handrail starting from lower landing area.

Photo D

Counters are too high for persons with disabilities.

8. Applicable Law

The following law is applicable to this matter:

8.1. Constitutional Provisions

8.1.1. Section 9 – Equality

(3) The state may not unfairly discriminate directly or indirectly against anyone on 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 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.

8.1.2. Section 10: Human Dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

8.2. Domestic Legislation

8.2.1. The Promotion of Equality and Prevention of Unfair Discrimination Act[1]

Section 6 states that:

"Neither the State nor any person may unfairly discriminate against any person".

Section 9 stipulates that:

"Subject to section 6, no person may unfairly discriminate against any person on ground of disability, including

a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons"

8.2.2. National Building Regulations and Building Standard Act[2]

Part S – Facilities for persons with disabilities

(1) In any building contemplated in regulation S1 requiring facilities for persons with disabilities:

a) persons with disabilities shall be able to safely enter the building, use all the facilities subject to the provisions of sub-regulation (3) within it and leave it;

[1] Act 4 of 2000

[2] Act 103 of 1977

b) there shall be a means of access suitable for use by persons with disabilities, from the main and ancillary approaches of the building to the ground storey; via the main entrance, and any secondary entrance;

c) There shall be a means of egress suitable for use by persons with disabilities from any point in a building to a place of safety in the event of an emergency;

d) any lift installation that is provided shall be capable of serving the needs of persons with disabilities who are likely to be using the building; and

e) any commonly used path of travel shall be free of obstacles which limit, restrict or endanger the travel of persons with disabilities, or which prevent persons with disabilities from accessing the facilities provided in the building and the presence of such obstruction shall be made evident in a suitable manner to persons with impaired vision; and

f) a suitable means of access shall be provided to any auditorium or hall situated in any building and such auditorium or hall shall, in relation to its seating capacity, be provided with sufficient open space to accommodate a reasonable number of people who use wheelchairs or other assistive devices.

8.3. International Legal Instruments

8.3.1. Convention on the Rights of Persons with Disabilities[3]

Article 9 deals with accessibility:

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

b) Information, communications and other services, including electronic services and emergency services.

8.3.2. UN Committee on Economic, Social and Cultural Rights[4]

Clause 9 stipulates that:

"The obligation of State parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more that merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take a positive action to

[3] 1 UN Assembly Convention on the Rights of People with Disabilities, January 2007

[4] General Comment No. 5 of UN Committee on Economic, Social and Cultural Rights, 2006

reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources wilt need to be made available for this purpose and that a wide- range of specially tailored measures will be required"

8.4. Regional Legal Instruments

The African Charter on Human and People's Rights[5]

Article 18(4)

"The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs".

8.5. National Policies

8.5.1. White Paper on an Integrated National Disability Strategy

This White Paper represents the government's thinking about what it can contribute to the development of disabled people and to the promotion and protection of their rights. One of the policy objectives is to create a barrier free society that accommodates the diversity of needs, and enables the entire population to move around the environment freely and unhindered.

8.5.2. Disability Rights Charter of South Africa

Article 10 states:

"All new environments shall be accessible and safe to disabled people and all reasonable steps shall be taken to make existing built environments accessible and safe".

8.5.3. Department of Public Works Disability Policy Guidelines

Guideline Principles

a) Self Representation – to ensure the involvement of persons with disabilities and their organizations to attain the successful implementation of this Policy Guidelines.

b) Inherent Dignity – to ensure promotion and protection of the inherent dignity and the human rights of persons with disabilities

c) Enabling Environment – to facilitate the progressive realization of access to services and infrastructure by people with disabilities

d) Recognition of Diversity – to recognize and respond to the special needs of persons with disabilities in their diversity.

This Policy Guideline recognizes access needs of all diverse disabilities, including lighting, sound, signage, tactile, ramp, parking, ablution facilities and etc. It offers the criteria to guide the Department in prioritizing public buildings and properties in making them accessible by catering to the diverse needs of persons with disabilities.

[5] CAB/LEG/67/3 rev.5,21 ILM 58 (1982)

9. Case Law

9.1. Hasken v Lane NO and Others[6]

Goldstone J at Para 51 provided some guidelines on what constitutes unfair discrimination:

a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;

c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

9.2. Singh v Minister of Justice and Constitutional Development[7]

The Complainant, who is partially blind took the Magistrate Commission to Court after her application to become the Magistrate had been turned down. The Complainant said she was overlooked because she had a visual impairment, making it impossible for her to get a driver's licence, a requirement for the appointment.

"The Court held that the criteria used by the 3rd Respondent was unfairly discriminatory in that the Applicant's gender and/or disability was not appropriately considered when the short listing was done by the 3rd Respondent. Further that Respondents should specifically and seriously have regard to the provisions section 174 and section 9 of the Constitution of the Republic of South African Act 108 of 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 together with the protocols signed by the Government of the Republic of South Africa dealing with promoting the position of disabled people."

9.3. National Coalition for Gay and Lesbian Equality v Minister of Justice[8]

"Substantive equality is envisaged when s 9(2) unequivocally asserts that equality includes 'the full and equal enjoyment of all rights and freedoms'. The State is further obliged 'to promote the achievement of such equality' by legislative and other measures designated to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination' which envisages remedial equality"

6 1997 (11) BCLR 1489 (CC)

7 2013 (3) SA 66 (EqC)(23 January 2013)

8 (CCT11/98) [1998] ZACC15; 1999 (1) SA (6)

10. Legal Analysis

10.1. In the case in point, disabled persons are finding difficulties in accessing the Jeffrey's Bay Post Office compare to other citizens who are able bodied with no impediments and by so doing it unfairly discriminates against people with disabilities.

10.2. The Constitution recognizes and protects the right to equality as enshrined in section 9 and further prohibits unfair discrimination.

10.3. Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was enacted to give effect to section 9 of the Constitution so as to prevent unfair discrimination.

10.4. PEPUDA defines discrimination as:

"Any act or mission, including 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
c) from any person on one or more of the prohibited grounds

10.5. Inaccessibility of the Respondent's premises imposes burdens to people with disabilities especially wheelchair users and/or people with limited walking abilities to utilize the services offered by the Respondent.

10.6. According to section 6 of PEPUDA neither the State nor any person may unfairly discriminate against any person. Harksen's[9] case has provided some guidelines as to what constitutes unfair discrimination looking at the consequences of the impact on the complainant.

10.7. People with disabilities cannot access the Respondent premises on their own, they heavily rely on the assistance of others and this affect negatively on their self worth as they see themselves as secondary citizens rather citizens who have full equal rights.

10.8. Section 9 of PEPUDA, explicitly prohibits the state or any person to discriminate any person on the ground of disability including infringement of the code of practice of the SABS that governs environmental accessibility, and failure to eliminate obstacles that unfairly limit or restrict disabled people from enjoying equal opportunities or failure to take steps to reasonable accommodate their needs.

10.9. The duty to advance and promote the position of disabled people are clearly mentioned in the Convention of Rights of People with Disabilities (CRPD) and the African Charter on Human and People Rights. South Africa ratified CRPD in November 2007.

10.10. Part S of the National Building Regulations and Building Standard Act set out the requirements and guidelines for facilities for people with disabilities.

10.11. The South African Bureau of Standard (SABS) sets out specifications and compliance standard for facilities for people with disabilities and contravening of same is an infringement under section 9(b) of PEPUDA.

10.12. In terms of South African National Standards (SANS) as set out in SABS, any ramp shall provide a safe, comfortable, and convenient route for wheelchair users. It shall have a gradient which is not steeper that 1:12 and have a clear trafficable surface of not less than

[9] At para 50-51

1 100mm wide and have a level landing at the bottom and top of each ramp of not less than 1,2m in length.

10.13. PEPUDA adopts an inclusive approach towards people with disabilities requiring that they be treated on an equal footing with other groups through positive action. Further that, government must take steps to ensure that people with disabilities can participate as fully as possible in all aspects of life and not be prevented from doing so because opportunities and resources are denied to them.

11. Findings

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

11.1. The Respondent does not have a disabled parking bay nearby its entrance, this is in contravention of SABS code and section 9 of PEPUDA.

11.2. The distances between the poles at the main entrance used by wheelchair bound persons are too narrow, 620mm – 720mm and as a result they obstruct the width of accessibility.

11.3. The ramps installed by the Respondent in December 2012, one at the main entrance and the other leading to the post boxes are too steep for persons who are wheelchair bound and are not in line with the specifications provided by South African Bureau of Standards, SABS.

11.4. There are no handrails on both sides of the new ramps.

11.5. No teller point is set at a reasonable level for those who are wheelchair bound. At such time that the wheelchair bound persons approach the teller point, they are unable to be fully assisted as the counter top is too high and proves difficult with regards to communications between the teller and the person who is wheelchair bound.

11.6. The changes made by the Respondent are not entirely according to the prescribed standards as per the SABS standards and thus not acceptable.

11.7. The Jeffery's Bay Post Office building is inaccessible to people with disabilities.

12. Recommendations

12.1. 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."

12.2. In view of the findings set out in Section 11 above, the Commission recommends the following:

12.2.1. The Respondent must renovate all the ramps it has recently installed at Jeffrey's Bay Post Office within **six (6) months** of receipt of this report and must have handrails and be in line with the prescribed regulations.

12.2.2. The Respondent must make provision of one teller point at the Post Office that will cater for the wheelchair bound within **three (3) months** of receipt of this report.

12.2.3. The two poles erected at the entrance at Verbena Road should be adjusted to accommodate the wheelchair bound. This should be done within **a month** of this report.

12.2.4. The Commission recommends that the Respondent request from Kouga Municipality provision of a wheelchair accessibility parking space in close proximity of the entrance of Jeffrey's Bay Post Office within **three (3) months** of receipt of this report.

12.2.5. Once a demarcated parking bay is allocated then such parking bay should bear the international symbol for people with disabilities.

12.2.6. The Respondent is directed to provide the Commission with a report within **three (3) months** of receipt of this report on the steps it has taken to make the Jeffrey's Bay Post Office accessible to people with disabilities.

13. 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 in Johannesburg on the 2nd day of June 2014
South African Human Rights Commission

Design & layout: www.itldesign.co.za

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