



south african  
**human  
rights  
commission**

# Investigative Reports

*Volume 7*

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# Investigative Reports

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COMPLAINT NO: Northern Cape/1213/0125

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Complaint No: NC/1213/0125

In the matter between:

JOHN BULL FLAGG  
(On behalf of Residents of Promised Land Informal Settlement)

Complainant

and

GA-SEGONYANA LOCAL MUNICIPALITY

Respondent

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## REPORT

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### 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.

### 2. Parties

- 2.1. The Complainant in this matter is Mr. John Bull-Flagg on behalf of residents of the Promised Land Informal Settlements in Kuruman, (hereinafter referred to as “**Complainant**”).
- 2.2. The Respondent is Ga-Segonyana Local Municipality, a municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated in Kuruman (hereinafter referred to as “**Respondent**”).

### 3. Background to the Complaint

- 3.1. On 21st January 2013, the Commission received a complaint from the residents of the Promised Land Informal Settlement pertaining to service delivery. The residents alleged that they do not have access to sufficient water or water supply and access to basic sanitation. The Municipality is aware of their problem but to date no positive steps

have been taken by the Municipality in relation to water and sanitation problems in the Promised land.

#### **4. Preliminary Assessment**

The Provincial Office of the Northern Cape made a preliminary assessment of the complaint.

- 4.1. The Commission found that the Respondent's conduct amount to a ***prima facie*** violation of the rights to:
  - 4.1.1. Dignity – Section 10
  - 4.1.2. The right of access to water – in sections 27
  - 4.1.3. Access to information – Section 32 (1) (a)
- 4.2. The Commission further determined that the alleged violations fell within the mandate and jurisdiction of the South African Human Rights Commission.
- 4.3. The Commission further determined that a full investigation be conducted by the Commission in terms of the Complaints Handling Procedure of the Commission.

#### **5. Steps taken by the Commission**

In investigating the alleged violation, the methodology used by the Commission involved a combination of techniques, namely:

- Interviews with the residents;
- Inspection in loco in the area concerned;
- Correspondence with the Respondent.

##### **5.1. Interviews with residents**

- 5.1.1. The investigator conducted several interviews with local residents on 14th February 2013.
- 5.1.2. The interviews revealed the following:
  - 5.1.2.1. That Promised Land is an informal settlement approximately 7 kilometers away from Kuruman;
  - 5.1.2.2. That the population is about 3600;
  - 5.1.2.3. They have been living in that area since 2009;
  - 5.1.2.4. There is no provision for water;
  - 5.1.2.5. They have to walk at least 7 kilometers to Kuruman from their place of residence to get water;
  - 5.1.2.6. Due to the fact that they have to walk 7kilometers to fetch water they often times goes without water for days;
  - 5.1.2.7. The residents do not receive the prescribed 6000 kilolitres or 25 litres of water per day which is necessary for human consumption;
  - 5.1.2.8. Children of school-going age often times arrives late at school as they are compelled to fetch water;

- 5.1.2.9. Some residents are making use of wheelbarrows and donkey carts to fetch the water 7 kilometers away;
- 5.1.2.10. There is no sanitation and they make use of the veldt for sanitation purposes;
- 5.1.2.11. That because of the density of the population in the affected area, women and children are particularly vulnerable and prone to attacks, especially at night when they have to walk at least 2 kilometers to relieve themselves in the veldt;
- 5.1.2.12. Residents expressed their concern about the health risk being posed by the inadequate supply of water;
- 5.1.2.13. There are two water tanks that were donated to them by the Moffat Christian Mission, an organisation who does community work in the Kuruman area;
- 5.1.2.14. The water tanks are empty. The residents revealed that the Local Municipality refuses to service the water tanks with water;
- 5.1.2.15. The failure or neglect of the Respondent to provide water services poses a great deal of inconvenience to the residents in that the lack of water prevents them from cooking, cleaning and attending effectively to hygiene.
- 5.1.2.16. That the residents have been communicating to the Respondent on many occasions to provide water and sanitation, but to no avail;
- 5.1.2.17. According to the residents, they had lodged a written request to the Respondent for provision of potable water in December 2012 and the Respondent made it abundantly clear that they will never provide them with water and sanitation;
- 5.1.2.18. That Respondent does not consult with them with regard to planning and budgeting purposes and ignores their plight for water and sanitation services;
- 5.1.2.19. The residents submit that there are persons living with disabilities and older persons who are vulnerable groups who have to pay what little money they have on taxis to fetch and cart water for them.

## **5.2. Inspection *in loco***

- 5.2.1. On 14th February 2013 the Northern Cape Provincial Office visited the Promised Land to inspect the reported water and sanitation crisis and the following observations were noted:
  - 5.2.1.1. The Promised Land is an informal settlement situated approximately 7 kilometers from Kuruman;
  - 5.2.1.2. The majority of the 3600 people live in one room shacks;
  - 5.2.1.3. The shacks are made from corrugated iron;
  - 5.2.1.4. There are at least 40 brick houses;



- 5.2.1.5. The majority of the residents are unemployed;
- 5.2.1.6. There was no water connection visible within 200 metres of households;
- 5.2.1.7. There are no taps;
- 5.2.1.8. We could see the two water tanks which were donated by the Moffat Mission;
- 5.2.1.9. On closer analysis there was no water in these tanks at all;
- 5.2.1.10. We could count only ten pit toilets in the area;
- 5.2.1.11. There were no toilets within the shacks we have entered;
- 5.2.1.12. The distance from the Promised Land to Kuruman for carting water was more or less 7 Kilometers;
- 5.2.1.13. We could see women, children, persons with disabilities and many older persons;
- 5.2.1.14. There are gravel roads and no streetlights.

### **5.3. Request for written response to allegations**

- 5.3.1. On Wednesday, 20<sup>th</sup> March 2013, the Commission sent an allegation letter to the Respondent requesting the Respondent to respond in writing to the allegations within 21 (twenty-one) days from date of the letter.

### **5.4. Response from Respondent**

- 5.4.1. On 18<sup>th</sup> July 2013 the Respondent replied to the allegations as follows:
- 5.4.1. That the residents of Promised Land are occupying the land illegally;
- 5.4.2. That the Complainant was instrumental in illegally allotting sites to people occupying this land and has ulterior motives;
- 5.4.3. That the said land was earmarked for an Integrated Housing project called "Galowe" for 2000 low-cost houses;
- 5.4.4. The Municipality is not in a position to provide water nor render any services due to the fact that this settlement is unplanned;
- 5.4.5. That the residents have settled in a flood line;
- 5.4.6. That the Municipality does not have reasonable resources to provide services for these people;
- 5.4.7. It is impossible for the Respondent to lay internal services where there are no streets; the houses and shacks are just scattered around the area;
- 5.4.8. That the Municipality intends to apply for an eviction order to vacate the residents from the land.

### **5.5. Follow up inspection *in loco***

On 25<sup>th</sup> October 2013 the Northern Cape Provincial Office of the Commission conducted a follow up inspection at the Promised Land Informal Settlement. The following was established:

- 5.5.1. The situation remained unchanged;
- 5.5.2. The donated water tanks remains empty;
- 5.5.3. Residents have no water supply and continuous with the 7 kilometer walk to Kuruman to fetch water;
- 5.5.4. No sanitation services were put in place;
- 5.5.5. The Respondent did not put measures in place to ensure the supply of water for the people.

## **6. Applicable Legal Framework**

### **6.1. International instruments**

#### **6.1.1. International Covenant on Economic, Social and Cultural Rights<sup>1</sup>**

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

Article 11 enshrines the right of everyone to an adequate standard of living, which includes accessibility and availability of adequate housing, food and clothing. The rights to water and sanitation – being vital aspects of an “adequate standard of living” – are 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 spirit of this Covenant.

#### **6.1.2. United Nations Declarations on Human Settlements<sup>2</sup>**

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

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

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<sup>1</sup> 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 18 June 2013].

<sup>2</sup> Istanbul Declaration on Human Settlements, available online at [www.unhabitat.org](http://www.unhabitat.org) [accessed 18 June 2013].

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

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

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

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

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

The Committee highlighted the fact that this right is enjoyed without discrimination,<sup>5</sup> and that States Parties must specifically ensure that traditionally disadvantaged and marginalised persons are empowered to exercise their right to water.<sup>6</sup>

**6.1.4. United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation<sup>7</sup>**

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

**6.1.5. The Rio Declaration on Environment and Development<sup>8</sup>**

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

**6.1.6. The World Summit on Sustainable Development: Plan of Implementation<sup>9</sup>**

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

The Plan also states that in order for States to reverse the current trend in natural

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<sup>3</sup> Para 2.

<sup>4</sup> Para 10.

<sup>5</sup> At para 13.

<sup>6</sup> At para 16

<sup>7</sup> Resolution 64/292.

<sup>8</sup> UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

<sup>9</sup> 2002.

resource degradation, States must implement strategies, including targets, to protect ecosystems and to achieve integrated management of natural resources. To achieve this:

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

## **6.2. Regional instruments**

### **6.2.1. The African Charter on Human on People’s Rights<sup>10</sup>**

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

### **6.2.2. African Children’s Charter<sup>11</sup>**

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

### **6.2.3. South African Development Community Protocol on Health<sup>1212</sup>**

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

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

## **6.3. Constitutional framework**

The preliminary assessment of the Northern Cape Provincial Office of the Commission indicated that the rights alleged to have been violated are **sections 10 (right to dignity), section 27 (right to access to sufficient water), section 32 (access to information) of the Constitution of the Republic of South Africa**. Each of these rights is discussed hereunder:

### **6.3.1. Constitution s 1(a) – Foundational values**

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

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<sup>10</sup> 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 18 June 2013].

<sup>11</sup> 1990

<sup>12</sup> 1990

**6.3.2. Constitution s 7(2) – Obligation on the State**

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

**6.3.3. Constitution s 10 – The right to human dignity**

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

**6.3.4. Constitution s 27 (1) (b) – The right to water**

Section 27 (1) (b) recognises that everyone has the right to sufficient water and section 27 (2) requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

**6.3.5. Constitution s 32 (1) – Accesses to Information**

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

**6.3.6. Constitution s 139 – Duties of the municipality**

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

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

**6.3.6. Part B Schedule 4 of the Constitution – Local government Responsibilities**

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

## 6.4. Legislative framework

### 6.4.1. Water Services Act 108 of 1997

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

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

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

- (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.”

This is, however, qualified by Regulation 2 of the Regulations relating to Compulsory National Standards and Measures to Conserve Water.<sup>13</sup>

Section 5 of the Act states that:

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

### 6.4.2. Local Government: Municipal Systems Act 32 of 2000

The Act defines *basic municipal services* as:

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

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

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

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

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

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<sup>13</sup> Published under GN R509 in GG 22355 of 8 June 2001.

malpractice has occurred or is occurring in a municipality in the province, the MEC must:

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

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

#### **6.4.3. Local Government: Municipal Finance Management Act 56 of 2003**

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

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

### **6.5. Regulatory framework**

#### **6.5.1. Regulations Relating to Compulsory National Standard and Measures to Conserve Water<sup>14</sup>**

These Regulations provide that the minimum standard of basic sanitation service is

- *“the provision of appropriate health and hygiene education; and*
- *A toilet that is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, is well ventilated, keeps smell to a minimum and prevents the entry and exit of flies and other disease-carrying pests”<sup>15</sup>*

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

### **6.6. Policy framework**

#### **6.6.1. White Paper on Water**

Government’s white paper entitled “Water is Life, Sanitation is Dignity”<sup>16</sup> articulates government’s commitment to the provision of at least a basic water and sanitation service to all people living in South Africa. It states further that the provision of water and sanitation remains an important policy concern. The Government is also committed to reducing the backlog in services by 2008 in the

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<sup>14</sup> Supra

<sup>15</sup> Regulation 2.

<sup>16</sup> Department of Water Affairs and Forestry, October 2002.

case of water and 2010 in the case of sanitation. The policy of free basic water and sanitation services means that everybody in South Africa has a right to a basic amount of water and a basic sanitation service that is affordable.

### **6.6.2. National Sanitation Policy<sup>17</sup>**

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, is they impact on users, operators and the environment”*.

The policy lists the main types of sanitation systems used in South Africa, namely:

- 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.

### **6.6.3. White Paper on Basic Household Sanitation<sup>18</sup>**

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<sup>19</sup>:

- Developing norms and standards for the provision of sanitation;
- Coordinating the development by the municipalities of their Water Services Development Plans as a component of their integrated Development Plan;
- Providing support to the provinces and municipalities in the planning and implementing of sanitation improvement programmes;
- Monitoring the outcome of such programmes and maintaining a database of sanitation requirements and interventions;
- Providing capacity building support to provinces and municipalities in matters relating to sanitation;
- Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
- Undertaking pilot projects in programmes of low cost sanitation.

## **6.7. Strategic framework**

### **6.7.1. The Strategic Framework for Water Services<sup>20</sup>**

This Framework defines a basic sanitation facility as:

*“The infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum,*

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<sup>17</sup> Department of Water Affairs and Forestry, 1996.

<sup>18</sup> Department of Water Affairs and Forestry, 2001.

<sup>19</sup> E.4.1

<sup>20</sup> Department of Water Affairs and Forestry, 2003.



*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”.*

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<sup>21</sup>**

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

### **6.8. Relevant case law**

#### **6.8.1. Regional case law**

##### ***Social and Economic Rights Action Centre (SERAC) and Another v Nigeria<sup>22</sup> - The rights to health and an environment***

In dealing with an alleged violation of the rights to health and environment contained in the African Charter, the African Commission on human and Peoples Rights held that:

*“These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual...<sup>23</sup>*

#### **6.8.2. Domestic case law**

##### ***S v Makwanyane and Another<sup>24</sup> - The right to human dignity***

In this case this Constitutional Court, when dealing with the constitutionality of the death penalty, observed as follows:

*“Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and therefore 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”.*<sup>25</sup>

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<sup>21</sup> Department of Water Affairs and Forestry, April 2009.

<sup>22</sup> (2001) AHRLR 60 (ACHPR 2001)

<sup>23</sup> Paragraph 51.

<sup>24</sup> 1995 (3) SA 391 (CC)

<sup>25</sup> Para 329.

***NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*<sup>26</sup> - The right to human dignity**

In this case, dealing with an alleged violation of the claimants' dignity, the Constitutional Court held that "[a] constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is 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".<sup>27</sup>

The Court held further that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. In this regard, reference was made to the following dictum from the matter of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs x and Others; Thomas and Another v Minister of Home Affairs and Others*<sup>28</sup>:

*"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, possible 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 clear that dignity is not only a value that is fundamental to our constitution, it is a justiciable and enforceable right that must be respected and protected".*

***Government of the Republic of South Africa and Others v Grootboom and Others*<sup>29</sup> - The right to housing**

This matter was the first in which the Constitutional Court thoroughly addressed, interpreted and applied the constitutional right to housing.

The Court held that the determination of a minimum core which constitutes the State's obligation in respect of a particular right cannot be done without assessing the needs and opportunities for the enjoyment of that right, which will vary in different areas due to the prevalence or absence of relevant factors.<sup>30</sup> As the Court does not have access to sufficient information upon which to make the determination as to what constitutes a minimum core, it was held that it will be unable to do so. Rather, the appropriate question in the South African context is

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<sup>26</sup> 2007 (5) SA 250 (CC)

<sup>27</sup> 2007 (5) SA 250 (CC)

<sup>28</sup> 2000 (3) SA 936 (CC) para 35

<sup>29</sup> 2001 (1) SA 46 (CC)

<sup>30</sup> Para 32.

“whether the measures taken by the State to realise the right afforded by s 26 are reasonable”.<sup>31</sup>

**Beja and Others v Premier of the Western Cape and Others Case<sup>32</sup> – Content of the rights to housing, dignity and privacy**

In this matter the Western Cape High Court held that:

“Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with Section 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity.”<sup>33</sup>

**Joseph and Others v City of Johannesburg and Others<sup>34</sup> – “Public law right” to basic municipal services**

In this matter the Constitutional Court read sections 152 and 153 of the Constitution alongside the provisions of the Municipal Systems Act and the Housing Act to find that a *public law right to basic municipal services* existed, which imposed a duty on local government to provide such services.<sup>35</sup>

**Mazibuko and Others v the City of Johannesburg and Others<sup>36</sup> – The rights to water**

In this case the Constitutional Court assessed, interpreted and applied the right of access to sufficient water contained in s 27(1) (b) of the Constitution.

## 7. Legal Analysis

- 7.1. The Respondent is alleged to have violated the right to human dignity and access to sufficient and clean water as well as sanitation to the residents by its failure to supply sufficient water and sanitation and thereby leaving residents with no alternative but to take arduous 7 kilometers walks to fetch water.
- 7.2. The inspection in loco conducted in the affected area revealed that the allegations of the complainant were indeed accurate. The interviews conducted with the residents further confirmed the allegations.
- 7.3. The key constitutional provisions at issue in this case are section 10 and section 27(1) (b). Section 27 (1) (b) provides that “everyone has the right to have access to sufficient water”, and section 27(2) (b) obliges the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of “everyone’s right of access to sufficient water”.The above sections are particularly relevant in the context of the present complaint.
- 7.4. Furthermore, it is the case of the residents that they had been without water supply from 2009 and that the little water they cart over 7 km is inadequate to support life and personal hygiene.

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<sup>31</sup> Para 33.

<sup>32</sup> No. 21332/2010 (CPD)

<sup>33</sup> Para 147.

<sup>34</sup> 2010 (4) SA 55 (CC)

<sup>35</sup> Para 47.

<sup>36</sup> 2010 (4) SA 1 CC

- 7.5. All the rights in the constitution are interrelated and interdependent. To this end sanitation requires that water should be available for hygiene purposes. The lack of access to water and sanitation heightens the vulnerability of the women, children and persons with disabilities living in the effected area.
- 7.6. In terms of section 10 of the Constitution everyone has inherent indignity and the right to have their dignity respected. The constitutional court in *Makwanyane* reinforced this right and 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”.*
- 7.7. Thus our courts have therefore clearly articulated a need for an approach which not only acknowledges the centrality of dignity, but also the need to create a society which positively fosters respect. The courts has also reiterated that even if people illegally occupies land as per the respondents reply, they are still human beings worthy of being treated with respect and dignity. This implies that the respondent must take steps to address the plight of the people in the affected area. The present complaint must be seen in the backdrop of the said realities eloquently captured herein above.
- 7.8. Further to the 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.
- 7.9. It is common cause that the respondent, as local government, are responsible to ensure the provision of services to communities in a sustainable manner. This entails, *inter alia*, that within its available resources, a municipality should strive towards improving the quality of life of its community. The respondent is duty bound to be responsive to the needs of its community.<sup>37</sup>
- 7.10. The Respondent has to date not provided adequate information in respect of steps they intend to take to provide water and sanitation services to the people.
- 7.11. The Respondent, notwithstanding the plight of the people, submitting in its response to the allegation a clear and unambiguous refusal to provide water and sanitation services to the people in the affected area.
- 7.12. The respondent failed to discharge its primary responsibility for provision of water services to the local community in the Promised Land informal settlement.

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<sup>37</sup> Vide s6(2)(a) of Local Government Municipal Systems Act, 32 of 2000.

## 8. Findings

Based on the analysis of the constitutional rights, case law, applicable legislation and general legal framework, the Commission finds that:

### 8.1. Right to water

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

### 8.2. Right to human dignity

The Commission finds that the Respondent, by failing to take steps to provide water and sanitation services and thereby compel them to walk 7 km 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.

### 8.3. Right to 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.

## 9. Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to:

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

Accordingly, the Commission recommends that:

- 9.1. The Respondent is required to provide basic services to the complainants, which includes but not limited to water within 48 hours and proper sanitation within a reasonable time not exceeding three months from the date of this report as a temporary measure;
- 9.2. The Respondent to furnish the Commission with an operations and maintenance plan required to run water supply in an efficient, effective and sustainable manner to address access to basic water challenges facing residents of the municipality, especially women, children older persons and persons with disabilities within a period of three (3) months from the date of this finding;
- 9.3. The Respondent is required to enhance some level of transparency in its governance by convening regular feedback sessions every three (3) months relating to the supply of water to residents. A copy of the minutes to be submitted to the Commission;
- 9.4. Within a period of six (6) months from the date of this finding, the Minister of Human Settlements is required to appoint a task team to develop and provide the Commission with a nationwide plan for the upgrading of informal settlements;

- 9.5. The Minister of Human Settlements is required to conduct and/or provide the Commission with a progress report detailing what progress has been made in the upgrading of informal settlements over time, within a period of six (6) months from the date of this finding; and
- 9.6. The Commission on Gender Equality is required to take note of the findings in this report and to conduct an investigation into the impact of this issue on women in the area.

## **10. APPEAL**

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

Private Bag X2700  
Houghton  
2041

South African Human Rights Commission



**COMPLAINT NO: Free State/1314/0083**

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/1314/0083

In the matter between:

<b>Craig Thiem</b>	<b>Complainant</b>
and	
<b>Lenard Mac Kay</b>	<b>1<sup>st</sup> Respondent</b>
<b>Principal of Wilgehof Primary School</b>	<b>2<sup>nd</sup> Respondent</b>
<b>Chairperson of the School Governing Body, Wilgehof Primary School</b>	<b>3<sup>rd</sup> Respondent</b>
<b>District Director, Basic Education, Motheo District</b>	<b>4<sup>th</sup> Respondent</b>
<b>Head of Department, Basic Education, Free State</b>	<b>5<sup>th</sup> Respondent</b>
<b>MEC for Education, Free State</b>	<b>6<sup>th</sup> Respondent</b>

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## REPORT

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### 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:
  - a) Promote respect for 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.
- 1.3. Section 184(2) of the Constitution empowers the Commission to *investigate and report on the observance of human rights* in the country.
- 1.4. The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.
- 1.5. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

### 2. Parties

- 2.1. The Complainant in this matter is Mr Craig Thiem, an adult male parent of two learners at Wilgehof Primary School in Bloemfontein, Free State Province. (hereinafter referred to as **‘Complainant’**)
- 2.2. The First Respondent is Mr Lenard Mac Kay, an adult male teacher at Wilgehof Primary School (hereinafter referred to as **‘1<sup>st</sup> Respondent’**)
- 2.3. The Second Respondent is the Principal of Wilgehof Primary School, Mr Fanie Roeloffze (hereinafter referred to as **‘2<sup>nd</sup> Respondent’**). He manages the school under the authority of the Head of Department.



- 2.4. The Third Respondent is the Chairperson of the School Governing Body, Mr ZV Goliath (hereinafter referred to as '**3<sup>rd</sup> Respondent**'). According to section 16 of the Schools Act, the governance of every public school is vested in its governing body.
- 2.5. The Fourth Respondent is the District Director of Basic Education for the Motheo District, Ms NE Motsoeneng (hereinafter referred to as '**4<sup>th</sup> Respondent**'), who in terms of section 5 and 6 of the Free State Schools Education Act 2 of 2000 ('the FS Schools Act') is responsible for managing education in the district and providing advice, coordination of curriculum, institutional management and governance.
- 2.6. The Fifth Respondent is the Head of Department of Basic Education for the Free State Province, Mr Stanley Malope (hereinafter referred to as the '**5<sup>th</sup> Respondent**'), cited in his official capacity as the bearer of constitutional duties and statutory powers conferred by the Schools Act, as the executive authority over Wilgehof Primary School through the Principal, and as the employer of all educators employed by the Department.
- 2.7. The Sixth Respondent is the Member of the Executive Council for Basic Education in the Free State Province, Mr Tate Makgoe (hereinafter referred to as the '**6<sup>th</sup> Respondent**'), cited as the bearer of constitutional and statutory responsibilities in respect of the provision, administration and funding of public schools in the Free State, arising from the Constitution, the Schools Act and the FS Schools Education Act.

### 3. Background to the Complaint

- 3.1. On Friday, 31 May 2013, the Commission received a complaint from the Complainant, Mr Craig Thiem.
- 3.2. In his complaint, the Complainant alleges that his two minor children who attend Wilgehof Primary School in Bloemfontein, Free State Province have repeatedly complained to him about a white male teacher<sup>1</sup> with a racist attitude towards black learners at the school.
- 3.3. The Complainant states that the school is attended by predominantly black learners and run by a majority of white teachers.
- 3.4. The Complainant states further that this particular white male teacher and HOD in the school, in his class, displays a full-sized Apartheid flag in the front of his class room; and has a poster on the class wall that depicts blacks as having monkey-like primitive brains who can only make confusing noises. The flag and poster have been in the class room since his children first attended the school in May 2012.
- 3.5. The white male teacher also often refers to blacks as 'Kaffirs' in front of the black children in class. The very same teacher recently walked around the class room with a mirror and putting it in front of a black child's face and asked, '*what do you see?*' *When the child said, 'I don't know, sir,' the teacher responded by saying, 'A baboon...you see a baboon!'*
- 3.6. The Complainant further attached photographs of the flag and poster in the complaint. See below.
- 3.7. The Complainant further furnished the Commission with evidence of intimidation by the School Principal and his close associates to withdraw the complaint and the assault charges against the First Respondent.

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<sup>1</sup> First Respondent

- 3.8. He was further excommunicated from the circle of Christian fellowship in which the close associates of the School Principal belonged for refusing to succumb to the aforesaid request. One of the associates is a teacher who was suspended by the School Governing Body for making racial utterances at the school on the 2<sup>nd</sup> August 2013.

#### 4. Preliminary Assessment

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

- That the alleged incident constituted a *prima facie* violation of the human rights of the learners. In particular, the assessment determined that Sections 9, 10, 28, and 29 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.

#### 5. Steps Taken by the Commission

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

- Interview with Complainant's children;
- Interview with First Respondent;
- Interview with School Principal;
- Interview with Learners;
- *Inspection in loco* of the school;
- *Survey - Learners & Teachers*

##### 5.1. Consultation with Complainant's children

5.1.1. The investigation team conducted several interviews<sup>2</sup> with the children of the Complainant to relate their experiences with the First Respondent and for purposes of amplification of the complaint made by their father.

5.1.2. During the interviews with the children, they stated the following:

5.1.2.1. They first began attending Wilgehof Primary School in approximately April/May 2012;

5.1.2.2. From when they first attended school, they became aware of the First Respondent's often inappropriate behavior. This behavior was exhibited during class and assembly.

5.1.2.3. In assembly, the First Respondent would make disparaging and belittling remarks about various assembled children. He would also on occasion make negative comments in assembly about the current government, saying things like: *'It's the fault of your government and your President that I'm not allowed to hit you.'*

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<sup>2</sup> 31 May 2013 & 30 June 2013

- 5.1.2.4. On one occasion, a girl came to school with an unusual hairstyle. The First Respondent, in assembly, pointed her out and encouraged everyone to laugh at her. They both noticed that she nearly burst into tears. Similar such incidents have often happened since they were at the school.
- 5.1.2.5. They both heard the First Respondent often referring to children in class as 'kaffirs', 'monkeys', 'hooligans', 'barbarians' and 'arseholes'. He also nicknamed one girl 'Arseie', (as in 'arse') and one boy, 'Piss and Go'.
- 5.1.2.6. They further heard the First Respondent in the Grade six and seven classes hurling insults.
- 5.1.2.7. On a number of occasions, the First Respondent exhibited extreme anger and intimidating behavior in class, especially after the racism issue became known to him. This was after they had reported to their father that the First Respondent exhibited a poster in his class depicting black people as monkeys with primitive brains; and that there was an old South African flag in his class room.
- 5.1.2.8. The First Respondent, on one occasion, acted in a threatening manner towards one of them and uttered the following words in Afrikaans: 'Se vir jou pa ek sal vir hom bliksem.'
- 5.1.2.9. The First Respondent hit him on numerous occasions<sup>3</sup>, but was scared to report it to his father as he feared that he would be more victimised. Each time he hit him with his fist on his shoulder, except for one occasion when he used a thick wooden plank on his behind.
- 5.1.2.10. Subsequent to this, he noticed bruising on his shoulder and buttocks. He only reported this to his father after the First Respondent had been suspended. His father then opened a case of assault<sup>4</sup> against a minor against the First Respondent.
- 5.1.2.11. They both witnessed the First Respondent on a daily basis meting out corporal punishment to other learners.
- 5.1.3. According to the Complainant's children, they are willing to testify to the truth of these above statements and abuses involving the Principal, another suspended teacher and the Deputy Principal.

## 5.2. Interview with First Respondent

- 5.2.1. On Wednesday, 5 June 2013, the investigating team paid a visit to the school to commence with investigations into alleged racist incidents at the school.
- 5.2.2. Whilst in a meeting with the Principal of the School, officials from the Department of Education arrived to deliver a letter suspending<sup>5</sup> the First Respondent with immediate effect, pending investigations into alleged misconduct relating to the present complaint.

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<sup>3</sup> On 18 July 2012, 15 January 2013, 28 February 2013 and 02 May 2013

<sup>4</sup> CAS 595/6/2013

<sup>5</sup> In terms of Employment of Educators Act, 76 of 1998, item 6 of Schedule 2

- 5.2.3. As a result of the above, the investigating team was not able to interview the First Respondent.
- 5.2.4. The Commission attempted to obtain a formal response<sup>6</sup> from the First Respondent. The Commission was telephonically informed by the First Respondent's legal representative that due to a pending criminal case and disciplinary hearing against the First Respondent they would not provide the Commission with any response or comment to allegations leveled against him.
- 5.2.5. On the other hand, the Commission had already received a copy of a letter purportedly written by the First Respondent from the Head of Department as an annexure to their response letter<sup>7</sup>. The First Respondent legal representative confirmed that this letter was written by the First Respondent before he received instructions.
- 5.2.6. In this letter<sup>8</sup>, the First Respondent responds as follows to the allegations against him:

*“Concerning the ‘old South African flag’ in my class, I wish to apologize to anyone whom I have offended by displaying the flag in my class solely for teaching as I am a History teacher. The idea was never to promote the old flag. However after careful consideration and thought I understand that it might have been inappropriate to have it displayed in the class, I sincerely wish to apologize for any harm that I may have caused in any form. After the Departmental officials pointed out the reasons for their action taken I understand that displaying the flag in the manner in which I did was wrong and I removed the flag immediately.*

*The picture of Mr Julius Malema displayed in my class was put up by someone else, the learners did point it out to me and by no means did I ever discuss the picture with learners. It has also been removed and I too wish to apologize to anyone whom I offended by displaying this picture.*

*I would like to thank the members of the Department who addressed the matter, for having the school's as well as the learner's interests at heart. I too carry the interests of the learners in my class very highly and therefore once again wish to make it clear that I didn't mean to offend anyone.*

*In my defense (sic) I would like to say that the media is making it out to be a matter of racism and I have never and will never conform to being a racist. I was a teacher at Itsoseng Tswana Primary School from 1995 and was the HOD from 1995 to 1998 where I taught Social Science. I was also the first white male teacher to be a HOD at this school.”*

### 5.3. Interview with School Principal

- 5.3.1. On Wednesday, 5 June 2013, the Free State investigation team visited Wilgehof Primary School in Bloemfontein, and met with the School Principal.

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<sup>6</sup> 5 July and 16 July 2013

<sup>7</sup> 6 June 2013

<sup>8</sup> Dated 3 June 2013

- 5.3.2. The School Principal informed the Commission that he had been in charge of the school management since 1997.
- 5.3.3. He indicated that he was not aware of the old flag in the First Respondent's class room as he seldom inspects classes and stated that the concerned parent (Complainant) had a vendetta against the school.
- 5.3.4. The Commission requested permission from him to conduct interviews with all learners in Grade 6 and 7. The School Principal introduced the investigator to learners before interviews were conducted and questionnaires filled.
- 5.3.5. On Friday, 6 June 2013, the Commission received a response letter from the Head of Department and a copy of the letter from the Principal addressed to the Head of Department was also attached.
- 5.3.6. In his letter<sup>9</sup> addressed to the Head of Department, the School Principal stated the following:

*"I was on leave Friday, 31 May 2013, and on arrival back at school on Monday, 3 June 2013, I received a call from Palesa from the SABC to give her my view about what the Human Rights Commission found in one class at our school. This was the first time that I heard about an old flag and offensive picture that they found in class 25 of Mr LB Mac Kay.*

*Before I could investigate, a group of officials from the Department of Education and from the Office of the MEC addressed me in our Boardroom about the same problem. We went to the classroom together and found the flag on the wall and the picture on the notice board.*

*The officials gave the teacher a chance to explain the presence of these offensive materials and also reprimanded him about his insensitive behavior. They also gave him advice on using educational material like the old flag in the future. I asked the teacher to remove both items from the wall and Mr Mac Kay destroyed the photo. The officials and I went back to the boardroom where we discussed the issue further. It was clear that what we found was offensive material and I made a suggestion to the group that we must ask the teacher for a report. They agreed and provided me with an e-mail address to forward the report to before the end of the day.*

*Unfortunately we received negative media coverage over the last few days. The media and the officials of the Human Rights Commission did not come to the office and went after school at 15:00 to the class to take pictures. Unfortunately the concerned parent felt it would be better to inform the media and the Human Rights Commission rather than reporting this to my office or directly to the teacher involved. This whole modus operandi shows us that there was a hidden agenda and that a parent used this to target Mr Mac Kay.*

*Nevertheless offensive material was found and we apologize to the Education Department, our community and all our parents for being insensitive and*

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<sup>9</sup> Dated 5 June 2013

*unprofessional. Thanks also to the parent who brought this to our attention so that we could do something about it. It is just a pity that he followed the media route to harm our school's good name and put the MEC and the Education Department in a difficult situation."*

5.3.7. On Wednesday, 5 June 2013, the investigating team hand delivered an allegation letter providing full details regarding the alleged violation to the Principal and requested a response thereto on or before 26 June 2013.

5.3.8. The School Principal was suspended on Friday, 6 June 2013, pending outcome of investigations by the Department of Education.

#### 5.4. Interview with Learners

##### **a) Interview Process**

5.4.1. The investigating team conducted interviews<sup>10</sup> with Grade 6 and 7 learners<sup>11</sup> respectively. Their ages ranged between 11 and 15 years of age.

5.4.2. The consent of the School Principal was obtained prior to commencement of the interview process.

5.4.3. The interview process required approximately half of the learners in each classroom as others would be asked to complete the questionnaire. Interviews were individual and took approximately 5-10 minutes each. They were conducted in a classroom.

##### **Qualitative data**

5.4.4. The key objectives of the interviews were:

- To verify the correctness of allegations made by the Complainant;
- To obtain a factual account of the learners' experiences at the school and in particular, in the First Respondent's class; and
- To assess the school experience and environment for learners.

5.4.5. The other interview questions were aimed at eliciting information about the learner's particular experience of racism if any and their viewpoint on the caricature and the old South African flag put up in front of the classroom of the First Respondent, and perceptions about racism within the school.

5.4.6. Majority of learners interviewed stated that:

5.4.6.1. Allegations of racist name-calling<sup>12</sup>, bullying, demeaning remarks<sup>13</sup>, racial utterances and racial discrimination were indeed correct;

5.4.6.2. The old South African flag had been in the classroom of the First Respondent for more than a year.<sup>14</sup>

5.4.6.3. They were offended by the old South African flag.

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<sup>10</sup> 5 & 6 June 2013

<sup>11</sup> 200 learners in total

<sup>12</sup> K-word, Bush monkeys, Bobbejaans

<sup>13</sup> Hooligans; arseholes' not human beings; gemmors; moegoos; Their parents are failures

<sup>14</sup> Some learners stated that the flag had been put up in the First Respondent's classroom since 2007

- 5.4.7. Some learners interviewed stated that:
- 5.4.7.1. They saw the First Respondent putting the caricature depicting baboons and Mr Julius Malema on the notice board during the first term of 2013;
  - 5.4.7.2. They were offended by the depiction and caption as it sought to perpetuate stereotypical views against African people and someone they idolized and held in high esteem;
  - 5.4.7.3. The depiction and caption was pinned on the wall by the First Respondent.
  - 5.4.7.4. They were never taught about the old South African flag as claimed by the First Respondent;
  - 5.4.7.5. They were apprehensive to approach and ask the First Respondent about the old South African flag and the caricature in his classroom for fear of reprisals; some asked about it and were informed that he didn't have the new South African flag;
  - 5.4.7.6. They informed their parents about the old South African flag in the classroom but their parents did not report it; and
  - 5.4.7.7. The First Respondent often used abusive language towards them and on occasion, administered corporal punishment.<sup>15</sup>
- 5.4.8. Other learners who were in minority stated that:
- 5.4.8.1. The First Respondent was a good teacher;
  - 5.4.8.2. He taught history/Social Science and about the apartheid flag;
  - 5.4.8.3. The First Respondent would on occasion, ask them to compare the old South African flag with the new one.
  - 5.4.8.4. They didn't know why the First Respondent kept the flag even after lessons;
  - 5.4.8.5. The flag had been in the classroom since 2007;
  - 5.4.8.6. They were not aware that the flag was an apartheid flag; and
  - 5.4.8.7. The First Respondent would only hurl insults when he was angry about something in class.

**b) Survey**

- 5.4.9. A questionnaire was distributed to all learners. It was designed to elicit quantitative responses in relation to occurrences of racism at the school, if any. It also provided the possibility for open-ended responses, which could yield some useful insights.
- 5.4.10. The learners had to respond to eighteen (18) questions regarding their various experiences at the school. They had to identify whether or not they had experienced a particular racist incident. They also had to respond to a series of questions regarding:

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<sup>15</sup> The First Respondent allegedly used a cricket bat to administer corporal punishment

- How often do they think racism happens in their school;
- Whether they think teachers in their school see racism as an important issue;
- Knowledge of any policy in school dealing with racism and racist incidents;
- Teachers' confidence in dealing with racism in school;
- The manner in which the school dealt with racism; and
- Anti-racist education at school.

5.4.11. The questions were all designed in a tabulated manner and space was provided for answers.

#### **Quantitative and Qualitative data**

5.4.12. The investigating team adopted a mixed methodology approach to data collection, involving quantitative (Surveys/Questionnaires) and qualitative (individual interviews) data.

#### **Summary of the Data Collection process**

<b>Method</b>	<b>Survey/Questionnaire</b>	<b>Interviews</b>
Data Sources	Four Grade 6 Classes and Two 7 Classes	Four Grade 6 and Two 7 Classes
Total number of participants (Learners)	120	174

5.4.13. Upon examining the participants' experiences at the school, the investigating team found several key trends that can be summarized as follows:

5.4.14. Racist incidents: 60 % of participants in the survey conducted by the Commission reported that they think racism happens in their school on an occasional basis.

5.4.15. Reporting of racism: 81% of the participants in the survey reported that when they experience racist bullying and racism, they tended to report this to their parents instead of teachers.

5.4.16. Dealing with racism: 74% of the participants in the survey reported that they think their teachers do not view racism as an important issue.

5.4.17. Corporal punishment: 65 % of the participants in the survey reported that some teachers in the school, on occasion, administer corporal punishment

### **5.5. Inspection in loco**

5.5.1. In order to meticulously assess the complaint and have a better understanding of the allegations leveled against the school and its officials, an inspection in loco was decided upon and carried out on the afternoon of the 31<sup>st</sup> May 2013<sup>16</sup>, as well as 5 & 6 June 2013.

5.5.2. The inspection in loco was carried out at the school premises. In attendance at the first inspection in loco were the Complainant, representatives of the Commission and the South African Broadcasting Corporation ('SABC').

<sup>16</sup> Date of receipt of complaint



5.5.3. This inspection in loco was carried out swiftly at the behest of the Complainant in order to view the caricature and the apartheid flag before it could be removed by officials at the school.

5.5.4. The investigating team sought assistance from the general worker at the school in order to gain access to the classroom of the First Respondent as his classroom was locked.

#### **Legal basis of Inspection**

5.5.5. In terms of Section 10(1) of the Human Rights Commission Act, 54 of 1994, any member of the Commission, or any staff member of the Commission may, subject to the provisions of this section, for the purposes of any investigation, enter any premises on or in which anything connected with that investigation is or is suspected to be.

#### **Evidence collected during the Inspection - 31 May 2013**

5.5.6. The main objective of the inspection in loco was for the investigating team to observe the classroom of the First Respondent.

Photographs taken - 31 May 2013

(First Respondent's Classroom)

(View of the Classroom)

(Panoramic view of the Classroom)

(Caricature of Baboons & Mr Malema with caption pinned on the wall in front of the classroom, left-side of the chalk board)

(Social Sciences Teachers' Guide)

(Poster of the National Flag of South Africa pinned on the wall next to classroom 25 entrance)

(Poster on Child Abuse pinned on the wall of Classroom 25)

(Poster on Bill of Responsibilities for the Youth of South Africa pinned on the wall of Classroom 25)

#### **5.6. Request for written response to allegations**

5.6.1. On Wednesday, 5 June 2013, the Free State Provincial Office of the Commission delivered letters and questionnaires to the School Principal, the School Governing Body (SGB) and another letter to the Department of Education setting out the allegations made by the Complainant, and inviting their response in writing to the allegations on or before 26 June 2013.

5.6.2. On Thursday, 6 June 2013, the Commission received a swift but concise response from the Department of Education. The Commission further received responses to the questionnaire from the Principal and SGB on the 19<sup>th</sup> June and 15 July 2013 respectively.

### **Response from School Principal**

- 5.6.3. In his response to the investigation questionnaire, the School Principal stated the following:
- 5.6.3.1. The school does not have a policy on racism but has policies required by the South African Schools Act and the Department of Education and a policy on racism is not required.
  - 5.6.3.2. The school does not have an anti-racism action plan.
  - 5.6.3.3. The school promotes respect and a sense of pride amongst staff members and learners. A culture of ethical values is promoted.
  - 5.6.3.4. He does not know for how long the Old South African flag has been in the classroom and has never received any complaints about it neither from parents nor learners.
  - 5.6.3.5. The teaching personnel at the school comprises of 24 white and 6 black educators.
  - 5.6.3.6. The school views racial discrimination as unacceptable and respect for everybody is promoted.
  - 5.6.3.7. The school only started enrolling black learners in 2005. Only two white learners enrolled during 2012. The school currently has 789 learners.
  - 5.6.3.8. Every educator manages his/her classroom as a professional and a budget for classroom decorations and teaching aids. It is up to the educator to choose suitable material for the subject he/she is responsible for.
  - 5.6.3.9. Each educator received posters of the national coat of arms; the national flag of South Africa; the national symbols of South Africa and a book called 'My Country South Africa' celebrating national symbols and heritage.
  - 5.6.3.10. It is the educator's responsibility to ensure that the classroom is in such a condition that it is reasonable and fair to all learners and staff, different cultures, languages and religions. Every educator is expected to maintain a well selected and tasteful environment for learners and not to have any images displayed on the walls that can have any form of indirect discrimination.
  - 5.6.3.11. There has never been any incident of racism at the school. The school has an outspoken attitude of no tolerance to racism, no matter whether learners or teachers are involved.
  - 5.6.3.12. Some teachers have tried to play the racial card when they were reprimanded and this issue was investigated by the Department of Education task team and no evidence to proof these allegations was found.
  - 5.6.3.13. The school has an open-door management system in place wherein learners can report incidents where there is suspicion of racism.

- 5.6.3.14. The school does not tolerate racism and reject it with the contempt it deserves irrespective of the provocation.
- 5.6.3.15. The school (SGB included) never gave the educator permission to use the old South African flag. The educator never asked permission to put up the flag, because it has been used as a teaching aid. The Educator did not use the old flag as a symbol of apartheid or to hurt or insult anyone.
- 5.6.3.16. The pictures or images of baboons and Mr Malema were pinned on the board by a learner and was at the expense of Mr Malema who was acting in an inappropriate way during political meetings and brought ANC to shame by doing so.
- 5.6.3.17. The school's classrooms provide positive images that do not perpetuate the stereotypical images about other race groups. Posters were made available about the new flag, code of conduct, etc.
- 5.6.3.18. Teachers select material that respects the background of learners.
- 5.6.3.19. In several learning areas, especially Life Orientation and Social Science, the values and principles of all people and races being equal are emphasized. These learning areas do not only emphasize racial equality but also a vast array of other characteristics, e.g. male - female, rich - poor, etc
- 5.6.3.20. On National Public holidays such as Freedom Day, Heritage Day, etc. These issues are raised and we use the opportunity to educate learners appropriately. The school uses Production 2000, a theatre group, on a yearly basis and assemblies on Mondays for this purpose.

**Response from Chairperson of the School Governing Body**

- 5.6.4. The Commission received a response from the School Governing Body (SGB) to the investigation questionnaire.
- 5.6.5. The SGB responded as follows the allegations of racism at the school:
  - 5.6.5.1. No parents approached the SGB about a complaint against the First Respondent.
  - 5.6.5.2. The SGB has never received reports of racist incidents from the Principal or parents except allegations by teachers who usually took their grievances to their Union and the Department of Education.
  - 5.6.5.3. The SGB does not have a policy on racism or action plan on racial equality.
  - 5.6.5.4. The Chairperson of SGB was interviewed by the District Labour Task Team in 2012 on allegations of racism that were taken to the Department of Education by aggrieved teachers.

## 5.7. Questionnaire – Teachers

- 5.7.1. A self-completion questionnaire was distributed to twenty-three (23) teachers who were present at the school.<sup>17</sup>
- 5.7.2. Of the Twenty three (23) questionnaires that were supposed to be completed by teachers, only five (5) were completed and one (1) only contained a sentence<sup>18</sup>.
- 5.7.3. The investigating noted with grave concern that the questionnaires were only completed by black teachers at the school and the rest of the questionnaires were simply returned to the Commission without having been completed.<sup>19</sup> This gives credence to allegations of structural and institutional racism made by black teachers at the school. It is quite startling why only black teachers would decide to complete the questionnaire.
- 5.7.4. According to the information supplied by the school in respect to racial composition of the teaching personnel, the school had twenty-four (24) white teachers and six (6) black teachers.
- 5.7.5. The first page of the questionnaire focused on perceptions or opinions on racism in the school. The second page focused on the perspectives of educators around school curriculum, anti-racist education, attitudes towards racism and Headmaster's role in promoting race equality and equality of opportunity in all aspects of school life.
- 5.7.6. The last page of the questionnaire focused on the apartheid flag and a caricature in the First Respondent's classroom, the school's efforts to celebrate cultural diversity of the school community and measures put in place to equip pupils to increase their awareness and gain experiences that will enable them to develop positive attitudes towards a pluralistic society.
- 5.7.7. The teachers had to respond to twenty-five (25) questions regarding their various experiences at the school. They had to identify whether or not they had experienced or witnessed a particular racist incident. They also had to respond to a series of questions regarding:
- How often do they think racism happens in their school;
  - Whether they think the School Headmaster and Governing Body in their school see racism as an important issue;
  - Knowledge of any policy in school dealing with racism and racist incidents;
  - Teachers' confidence in school management to deal with racism in school;
  - The manner in which the school dealt with racism;
  - Anti-racist education at school; and
  - Whether they knew about the apartheid flag and a caricature in the First Respondent's school.

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<sup>17</sup> 20 June 2013

<sup>18</sup> "This is my second year at school and up to so far I've never experienced racism at the school".

<sup>19</sup> All questionnaires distributed to teachers were returned in separate sealed envelopes.

5.7.8. The questions were all designed in a tabulated manner and space was provided for answers.

5.7.9. The teachers responded as follows to the questionnaire:

**Racism**

- Racism occurs frequently at the school;
- There is a culture of racism and usage of derogatory names at the school

**Reporting racism**

- They are not confident in talking to the Headmaster about racism at the school;
- They have resorted to reporting racist incidents to the Union;
- Racist allegations were also reported to the Department of Education without success.

**Structural and Institutionalised racism**

- There is a long history of racist incidents amongst the teaching personnel wherein the Headmaster has acted partially in favour of white teachers;
- White teachers are given preferential treatment by the Headmaster; they are allowed to use remote control for gates whilst black teachers aren't allowed. Black teachers are not allowed to see their close acquaintances and they are refused entry during working hours but white teachers are allowed to see their families.
- Racist conduct is embedded within the school. A white female teacher was once accidentally touched by a black worker at the school and in return, she quickly wiped off her hand. When this was reported to the Headmaster, he did nothing about it.
- The Headmaster simply dismisses allegations of racist conduct or racial harassment and says black teachers are sensitive;
- The Headmaster is an autocrat and hardly listens to anyone;
- The Headmaster suppresses dissenting views and abuses power;
- The Headmaster has on occasion boasted that the Department of Education cannot do anything to him;
- The Headmaster has on one occasion told black learners to go back to the township where other learners are roaming around and doing nothing;
- Learners are not allowed to attend funerals to bury their fellow learners;
- The Headmaster confronted a black teacher for teaching about the history and legacy of Nelson Mandela;
- No activities are allowed at the school during the commemoration of June 16

**Caricature and Old South African Flag**

- The Apartheid flag has been in the First Respondent's classroom since the year 2000;
- The flag was reported to the Union and the Department of Education (Labour Relations & District Office)

- The First Respondent was approached several times by black teachers to remove the flag and the caricature but simply ignored them and laughed about it; He claimed to use the flag for teaching purposes.
- 5.7.10. The investigating team analysed the responses received from the few teachers<sup>20</sup> who completed the questionnaire.
- 5.7.11. Teachers' responses were analysed according to major themes which were collapsed into two major categories: attribution of racism to school management and attribution of racism to institutional factors/cultural factors.
- 5.7.12. The investigating team further received a copy of a letter<sup>21</sup> detailing attempts made by South African Democratic Teachers Union (SADTU) members at the school to draw the attention of the Department of Education<sup>22</sup> to their plight.
- 5.7.13. The letter contained a litany of grievances against the School Headmaster. Grievances raised by the SADTU members include:
- Racial prejudice;
  - Misuse and mismanagement of school funds;
  - Disrespect of African Culture;
  - Selective observation of historical activities;
  - Poor treatment of parents;
  - Lack of transparency and accountability; and
  - Racial inequality and nepotism in appointment of personnel at the school
- 5.7.14. The Commission further received a dossier containing allegations regarding misappropriation of funds at the school from a former employee.

#### **5.8. Telephone Interviews with Parents<sup>23</sup>**

- 5.8.1. On Tuesday, 16 July 2013, the Commission requested a list of parents of Grade 6 and 7 learners from the Acting Principal of Wilgehof Primary School.
- 5.8.2. The Acting Principal was reluctant to provide the Commission with access to contact details of the parents as part of its investigation citing privacy considerations after obtaining legal advice.
- 5.8.3. Following this, the Commission escalated the matter to the Chairperson of the School Governing Body and the Head of Department of Education requesting their urgent intervention.
- 5.8.4. The Acting Principal furnished the Commission with a copy of parents list for Grade 6 and Grade 7 classes on Thursday, 1 August 2013.
- 5.8.5. The investigating team conducted brief telephonic interviews with 48 parents out of 194 that appeared on the list.

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<sup>20</sup> Only black teachers who are in minority at the school completed the questionnaire

<sup>21</sup> Letter addressed to Free State MEC for Education dated 11 October 2012

<sup>22</sup> According to SADTU members many grievances were lodged with the Department of Education without any response of any form of remedial action

<sup>23</sup> 07 August 2013

- 5.8.6. Some parents' names on the list appeared twice as they had children in both Grade 6 and 7.
- 5.8.7. The primary aim of the interviews was to elicit information pertinent to the investigation and also to garner views about their children's well-being, facts and experiences about the school and the experiences related to them by their children.
- 5.8.8. During telephonic interviews, the investigating team emphasized the importance of truth and honesty to parents. Parents were requested to provide an unemotional account about the alleged racist incidents at Wilgehof Primary School.
- 5.8.9. Majority of the parents interviewed stated the following:
  - 5.8.9.1. They were shocked by allegations of racism at the school;
  - 5.8.9.2. Only discussed alleged racist incidents at the school with their children after seeing images of their school and classroom on television;
  - 5.8.9.3. Their children corroborated allegations made by the Complainant and his children;
  - 5.8.9.4. Their children did not report these racist incidents for fear of reprisals or victimization;
  - 5.8.9.5. Their children were accustomed to being called with demeaning words; they thought it was a joke and never bothered to report it to parents.
  - 5.8.9.6. The First Respondent would on occasion, lose temper and start making denigrating remarks about learners;
  - 5.8.9.7. The First Respondent would often distort the history of South Africa during lessons;
  - 5.8.9.8. Their children did not understand that the use of k-word and baboons was both inappropriate and offensive.
  - 5.8.9.9. Children only related their experiences after this complaint received widespread media coverage;
  - 5.8.9.10. They strongly felt that the SGB was biased and sought to protect the school management and teachers during a hastily convened emergency meeting in June 2013 after the story broke.
  - 5.8.9.11. The First Respondent is not suitable to work with children.
- 5.8.10. Some parents stated that they found the school environment to be generally hostile and not conducive for their children. The School Principal would sometimes urge them to take their children to township schools when they were called in for their children's lack of discipline at school.
- 5.8.11. Some of the parents have started looking for schools elsewhere for their children as a consequence of these allegations whilst others stated that their children like the First Respondent. Their children are now happy that the First Respondent and the Principal are suspended.

5.8.12. One parent claimed that her child complained about the racist conduct of the First Respondent even before this matter was in the public domain but regrettably did not take her child seriously.

5.8.13. One parent claimed that a few days before the alleged racist incidents were reported he had a verbal altercation with the First Respondent after he used the k-word and victimized his child.

## 6. Applicable legal framework

### 6.1. International instruments

#### GENERAL HUMAN RIGHTS

##### 6.1.1. Universal Declaration of Human Rights (1948)<sup>24</sup>

The Universal Declaration, which is widely regarded as reflecting customary international law and thus being universally binding, recognises in Article 1 that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Article 2 of the Declaration states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, 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,” while Article 7 outlines that

*“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”*

Article 5 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

Article 26 enshrines the right to education which “shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups...”

##### 6.1.2. International Covenant on Civil and Political Rights (1966)<sup>25</sup>

Article 2 of the Covenant enshrines the right to equality for all, and to the provision of rights without distinction or discrimination.

Article 7 stipulates that

*“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”*

Article 20(2) protects against hate speech, providing that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

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<sup>24</sup> 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 18 June 2013).

<sup>25</sup> 16 December 1966, United Nations, Treaty Series, vol. 999, p.171, available at: <http://www.refworld.org/docid/3ae-6b3aa0.html> (accessed 18 June 2013).



Article 26 of the Covenant recognises that

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

South Africa has both signed and ratified this Covenant, and it is therefore directly binding on the State and all State institutions.

### **6.1.3. International Covenant on Economic, Social and Cultural Rights (1966)<sup>26</sup>**

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

Article 13(1) of the Covenant enshrines “the right of everyone to education”, which

*“[S]hall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups...”*

Article 14 then entreats States Parties to progressively realise this right.

While South Africa has not ratified the Covenant it is a signatory State, and the government can therefore not act in a manner that is contrary to spirit of this Covenant.<sup>27</sup>

### **6.1.4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)<sup>28</sup>**

The Preamble to this Convention recognises “the inherent dignity of the human person” and refers to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights.

South Africa ratified this Convention in 1998, and it is therefore directly binding on the State and all State institutions.

## **THE RIGHT TO EDUCATION**

*“Internationally, the right to education is recognised as a precondition for the enjoyment of many civil and political rights, such as freedom of information,*

<sup>26</sup> 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae5b-36co.html> [accessed 18 June 2013].

<sup>27</sup> Vienna Convention on the Law of Treaties, Jan. 27, 1980, art.18, 1155 U.N.T.S. 331, 336

<sup>28</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae-6b3a94.html> [accessed 17 July 2013].

*expression, assembly and association. The right to vote and to be elected, or the right of equal access to public service, depends on at least a minimum level of education. Similarly, many economic, social and cultural rights can be exercised in a meaningful way only after a minimum level of education has been achieved.”<sup>29</sup>*

#### **6.1.5. Committee for Economic, Social and Cultural Rights – General Comment 13: The right to education (1999)<sup>30</sup>**

The Committee firstly gave content to the right to education as contained in the ICESCR, recognising 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 marginalized 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... promoting human rights and democracy, protecting the environment, and controlling population growth.”<sup>31</sup>*

The Committee then outlined the ‘four A’s’, which are “interrelated and essential features” of the nature of education which States Parties’ are compelled to provide. These are availability, accessibility, acceptability and adaptability. Of particular relevance to this claim is the standard of acceptability, which requires that

*“[T]he form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students...”<sup>32</sup>*

#### **6.1.6. UNESCO Convention Against Discrimination in Education (1960)<sup>33</sup>**

Article 5 of this Convention states that

*“(1)(a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance, and friendship among all nations, racial or religious groups...”*

South Africa has ratified this Convention, and it is therefore directly binding on the State and all State institutions.

#### **6.1.7. World Declaration on Education for All (1990)<sup>34</sup>**

This Declaration recognised in Article 5 that

<sup>29</sup> S Valley & Y Dalamba ‘Racism, ‘racial integration’ and desegregation in South African public secondary schools’ report on a study by the SAHRC (1999) at 12.

<sup>30</sup> Twenty-first session, 1999. U.N. Doc. E/C.12/1999/10 (1999).

<sup>31</sup> Para 1.

<sup>32</sup> Para 6.

<sup>33</sup> Adopted by the General Conference at its eleventh session, Paris, 14 December 1960.

<sup>34</sup> Adopted by the World Conference on Education for All – Meeting Basic Learning Needs, Jomtien, Thailand, 5-9 March 1990.

*“The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied and take into account the culture, needs and opportunities of the community.”*

## **RIGHT TO EQUALITY AND PROTECTION FROM NON-DISCRIMINATION**

### **6.1.8. International Convention on the Elimination of All Forms of Racial Discrimination (1965)<sup>35</sup>**

This seminal Convention on racial discrimination defines such as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Article 4 of the Convention provides that

States 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, or which attempt 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,....inter alia:

- a) Shall declare an offence punishable by law 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 racist activities, including the financing thereof;...
- c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

Article 5 imposes an obligation on States Parties to “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- e) Economic, social and cultural rights, in particular:...
- v) The right to education and training;...

Article 7 provides that

*“States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups...”*

<sup>35</sup> 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> [accessed 18 June 2013].

South Africa has both signed and ratified this Convention, and it is therefore directly binding on the State and all State institutions.

#### **6.1.9. UNESCO Declaration on Race and Racial Prejudice (1978)<sup>36</sup>**

Article 5(2) of the Declaration imposes a responsibility on

*“States, in accordance with their constitutional principles and procedures, as well as all other competent authorities and the entire teaching profession...to see that the educational resources of all countries are used to combat racism, more especially by ensuring that curricula and textbooks include scientific and ethical considerations concerning human unity and diversity and that no invidious distinctions are made with regard to any people; by training teachers to achieve these ends;...”*

### **CHILDREN’S RIGHTS**

#### **6.1.10. Declaration of the Rights of the Child (1959)<sup>37</sup>**

Principle 7 of this Declaration states that

*“The child is entitled to receive education...which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance...”*

#### **6.1.11. Convention on the Rights of the Child (1989)<sup>38</sup>**

This Convention comprehensively sets out the rights pertaining to children. Article 2(1) of the Convention imposes an obligation on States Parties to “respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

Article 3 provides that

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

Moreover, Article 1 stipulates that

*“1. State 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 care of the child.*

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<sup>36</sup> Adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session, 27 November 1978.

<sup>37</sup> Adopted by United Nations General Assembly Resolution 1386 of 10 December 1959.

<sup>38</sup> 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b3810.html> [accessed 18 June 2013].

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.”*

Article 28 of the Convention outlines the right of the child to education, including requiring States Parties to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention”.

Similarly, Article 29(1) compels States Parties to ensure that the education of the child be directed towards

Article 28 of the Convention outlines the right of the child to education, while Article 29(1) compels State Parties to ensure that the education of the child be directed towards

*“(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;*

*(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;*

*(c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living...;*

*(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;...”*

Finally, Article 37 of the Convention provides that

*“(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”*

South Africa both signed and ratified this Convention in 1995, and thus its provision are binding and have been relied upon by our courts in adjudicating matters which implicated children’s rights.

## **6.2. Regional Instruments**

### **6.2.1. The African Charter on Human and People’s Rights (1982)<sup>39</sup>**

Article 2 of the Charter underlines that the rights enshrined therein may be invoked without discrimination, providing that individuals are entitled to those rights “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”.

<sup>39</sup> 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 18 June 2013].

Article 5 recognises the right of every individual “to the respect of the dignity inherent in a human being”, which includes protection from and the prohibition of, inter alia, “torture, cruel, inhuman or degrading punishment and treatment”.

Article 17(1) of the Charter then provides that “[e]very individual shall have the right to education”. Article 25 states that

*“State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.”*

South Africa has both signed and ratified the Charter, and it is therefore directly binding on the State and all State institutions.

### **6.2.2. African Charter on the Rights and Welfare of the Child (1990)<sup>40</sup>**

Article 2 of the Children’s Charter provides that

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

Article 4 recognises the importance of the principle of the ‘best interests of the child’, stating that

*“1. In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.”*

Article 11 comprehensively sets out the nature and content of the child’s right to education in a similar manner to the Convention on the Rights of the Child, which education is to be directed towards, inter alia,

*“(2)(b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples’ rights and international human rights declarations and conventions;...”*

Article 17 details the manner in which juvenile justice should be administered, and in particular protects the child from torture, inhuman or degrading treatment or punishment.

South Africa has both signed and ratified the Children’s Charter, and it is therefore directly binding on the State and all State institutions.

### **6.3. Constitutional framework**

The preliminary assessment of the Free State Provincial Office indicated that the rights alleged to have been violated are sections 9 (the right to equality and protection from discrimination), 10 (the right to inherent human dignity), 28 (rights of the child) and 29

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<sup>40</sup> 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> [accessed 18 June 2013].

(the right to education) of the Constitution of the Republic of South Africa, 1996. Each of these rights is discussed hereunder, in turn.

**6.3.1. Constitution s 1(a) – Foundational values**

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

**6.3.2. Constitution s 7(2) – Obligation on the State**

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

**6.3.3. Constitution s 9 – The right to equality and protection from discrimination**

Section 9(1) enshrines the right to equality of all citizens, while s 9(2) gives content to that right by providing that “[e]quality includes the full and equal enjoyment of all rights and freedoms”.

Section 9(3) states that

*“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”*

Further, s 9(5) recognises that “[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

**6.3.4. Constitution s 10 – The right to human dignity**

Section 10 recognises the right of everyone to have their inherent dignity respected and protected. A lack of education deprives one of the opportunity for self-fulfilment, and is therefore inherently degrading and undermines one's human dignity.

**6.3.5. Constitution s 12 – The right to freedom and security of the person**

Section 12(1) enshrines the right to freedom and security of the person, including the right to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.

Moreover, s 12(2) recognises the right to bodily and psychological integrity, including the right to security in and control over their body.

**6.3.6. Constitution s 28 – The rights of the child**

Section 28(1) comprehensively outlines the rights of the child, including the s 28(1)(d) right to be protected from maltreatment, neglect, abuse or degradation while s 28(2) provides that

*“A child's best interests are of paramount importance in every matter concerning the child.”*

### **6.3.7. Constitution s 29 – The right to education**

Section 29(1) enshrines the right to a basic education for all.

## **6.4. Applicable legislative framework**

### **6.4.1. National Education Policy Act 27 of 1996**

This Act empowers the Minister of Education to determine national policy for education, encompassing education at schools. The Preamble states that the Act seeks to

*“[F]acilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights.”*

Section 3(4) (n) provides that the Minister of Education shall determine national policy for the “control and discipline of students at education institutions: Provided that no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any education institution”.

Section 4(b) of the Act provides that national education policy should be directed towards “enabling the education system to contribute to the full personal development of each learner and to the moral, social, cultural, political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes”.

### **6.4.2. South African Schools Act 84 of 1996**

This Act seeks to establish uniformity throughout schooling in South Africa and eradicate the remnants of the apartheid-era schooling system and the discriminatory policies thereof. The Act sets a uniform standard for public schools, encompassing their governance, curricula, funding and organisation.

Of particular relevance to this complaint is s 60 of the Act, which outlines the liability of the State for any damage or loss caused in connection with educational activities performed by a public school.

Moreover, section 10 of the Act constitutes a prohibition of corporal punishment, stating that

*“(1) No person may administer corporal punishment at a school to a learner.*

*(2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.”*

### **Abolition of Corporal Punishment Act 33 of 1997**

This Act sought to provide for the abolishment of corporal punishment authorized in legislation. Section 1 of the Act states that

*“Any law which authorises corporal punishment by a court of law, including a court of traditional leaders, is hereby repealed to the extent that it authorises such punishment.”*



**6.4.3. Employment of Educators Act 76 of 1998**

This Act governs the relationship between an educator – including teachers at public schools – and their employer. Section 18 of the Act defines *misconduct* as including the failure to comply with this Act or any other statute, regulation or legal obligation relating to education; and unfairly discriminates against other persons on the basis of race or other grounds prohibited in the Constitution. Such misconduct renders the educator subject to disciplinary proceedings. If the educator is found guilty of misconduct, s 18(3) stipulates the various sanctions which may be imposed.

**6.4.4. Free State School Education Act 2 of 2000**

This Act is of particular relevance to this claim, which arose within the Free State province and thus within the jurisdiction of this Act. The Act aims to “provide for a uniform system for the provision and control of school education in the Province”.

**6.4.5. South African Council for Educators Act 31 of 2000**

This Act provides the governing framework for the South African Council for Educators, which is the statutory professional body responsible for teachers, including teachers at public schools. One of the aims of the Act (s 2) is “to set, maintain and protect ethical and professional standards for educators”.

Among other stipulations, s 21 compels educators to register with the Council before taking up any teaching position. Such registration renders the educator subject to the Council’s code of professional ethics, compiled pursuant to s 5(c) of the Act.

**6.4.6. Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA) Act 4 of 2000**

This Act seeks to give effect to the Constitution’s equality clause, and defines *discrimination* as “any act or omission...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”. Those *prohibited grounds* include race, ethnic or social origin, colour and culture, as well as any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner.

Section 7 of the Act prohibits unfair discrimination on the specific ground of race, which conduct includes

*“[T]he dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person...”*

One of the purposes of the PEPUDA is to “prevent and prohibit hate speech”. Furthermore, it “endeavours to facilitate the transition to a democratic society, united in its diversity...and guided by the principals of equality, fairness, equity, social progress, justice, human dignity and freedom”. In particular, s 10(1) provides that

*“[N]o person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –*

- a) Be hurtful;*
- b) Be harmful or to incite harm;*
- c) To promote or propagate hatred.”*

*Moreover, s 12 of the Act reads as follows*

*“No person may –*

- a) Disseminate or broadcast any information*
- b) Publish or display any advertisement or notice,*

That could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person...”

#### **6.4.7. Children’s Act 38 of 2005**

This Act comprehensively provides for all the rights of children in South Africa, and is consistent with the international instruments discussed above as well as the overriding principle of the *best interests of the child* (sections 7 and 9 of the Act).

### **6.5. Applicable policy framework**

#### **6.5.1. White Paper on Education and Training (1995)<sup>41</sup>**

This Framework outlines the “priorities, values and principles for the education and training system” in the new constitutional dispensation. The Framework is aimed at effecting

“New education and training policies to address the legacies of underdevelopment and inequitable development and provide learning opportunities for all [which] will be based principally on the constitutional guarantees of equal educational rights for all persons and non-discrimination, and their formulation and implementation must also scrupulously observe all other constitutional guarantees and protections which apply to education.”

The values of education and training policy stipulated in the Framework include that

- “Education and training are basic human rights. The state has an obligation to protect and advance these rights, so that all citizens irrespective of race, class, gender, creed or age, have the opportunity to develop their capacities and potential, and make their full contribution to the society;
- The realisation of democracy, liberty, equality, justice and peace are necessary conditions for the full pursuit and enjoyment of lifelong learning. It should be a goal of education and training policy to enable a democratic, free, equal, just and peaceful society to take root and prosper in our land, on the basis that all South Africans without exception share the same inalienable rights, equal citizenship, and common national destiny, and that all forms of bias

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<sup>41</sup> Department of Education, Notice 196 of 1995.

(especially racial, ethnic and gender) are dehumanizing.”

The Framework recognises that giving effect to these values will require “the active encouragement of mutual respect for our people’s diverse religious, cultural and language traditions, their right to enjoy and practice these in peace and without hindrance, and the recognition that these are a source of strength for their own communities and the unity of the nation”.

The Framework also outlines the content of the right to education as contained in s 32 of the Interim Constitution, 1993.

#### **6.5.2. Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (1998)<sup>42</sup>**

While aimed at guiding governing bodies of schools in their adoption of a code of conduct for learners, this Framework nevertheless outlines the environment and culture that the Department of Education seeks to establish in schools, and is therefore relevant to this claim.

In particular, guideline 2.3. directs that codes of conduct should be aimed at fostering “a culture of reconciliation, teaching, learning and mutual respect and the establishment of a culture of tolerance and peace in all schools”. Moreover, guideline 4 outlines the principles and values to be taken into account when drafting codes of conduct, which broadly reflect those values underlining the Constitution’s Bill of Rights. Specifically, guideline 4.2. states that

*“No person may unfairly discriminate against a learner. All learners shall enjoy equal treatment before the law and shall receive equal protection and benefits of the law.”*

#### **6.5.3. Norms and Standards for Educators (2000)<sup>43</sup>**

This Framework, published in terms of the National Education Policy Act 27 of 1996, outlines the norms and standards pertaining to all educators, including teachers at public schools.

The Framework identifies “seven roles and associated competence for educators [which] are in effect the norms for educator development and therefore the central feature of all initial educator qualifications”. One such role is that pertaining to community, citizenship and pastoral duties, in terms of which

*“The educator will practice and promote a critical, committed and ethical attitude towards developing a sense of respect and responsibility towards others. The educator will uphold the constitution and promote democratic values and practices in schools and society. Within the school, the educator will demonstrate and ability to develop a supportive and empowering environment for the learner and respond to the educational and other needs of learners and fellow educators.”*

<sup>42</sup> Department of Education, Notice 776, published in Government Gazette 18900 of 15 May 1998.

<sup>43</sup> Department of Education, published in *Government Gazette* 20844 of 4 February 2000.

#### **6.5.4. Policy on Whole School Evaluation (2001)<sup>44</sup>**

This Framework, published in terms of the National Education Policy Act 27 of 1996, aims to ensure that schools are effectively monitored and evaluated so as to improve the quality and performance standards thereof.

#### **6.5.5. National Policy Framework for Teacher Education and Development in South Africa (2006)<sup>45</sup>**

This Framework, published in terms of the National Education Policy Act 27 of 1996, seeks to improve the overall quality of teaching throughout South Africa, from teacher education through to continuing professional education. In this way, all activities relating to teacher training can be made uniform.

One way in which the Framework seeks to ensure an improvement in the quality of teaching is by requiring that all teachers registered with the South African Council of Educators earn a specific number of professional development points over a three year period.

### **6.6. Applicable sector codes**

#### **6.6.1. South African Council for Educators Code of Professional Ethics**

This Code, drafted pursuant to s 5(c) of the South African Council for Educators Act 31 of 2000, governs the conduct of all educators registered with the South African Council for Educators (“SACE”).

Section 2(3) of the Code provides that educators registered with the SACE “acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa”.

Section 3 then stipulates that an educator “[respect] the dignity, beliefs and constitutional rights of learners and in particular children” and further “[strive] to enable learners to develop a set of values consistent with the fundamental rights contained in the Constitution of South Africa”.

### **6.7. Relevant case law**

#### **6.7.1. International case law**

##### **EUROPEAN COURT OF HUMAN RIGHTS**

The regional human rights court has developed a sound and comprehensive hate speech jurisprudence with a flexible, context based approach which seeks to balance the protection of the right to freedom of expression with the other individual rights such as the rights to dignity, equality, religion and culture.

In *Jerslid v Denmark*,<sup>46</sup> the Court outlined its approach to the determination of whether speech constitutes hate speech. In particular, it was held that the fundamental question is whether the speech was made with the intention to disseminate racist ideas through such speech. It was held that intention is determined by an objective enquiry, looking at the overall context in which the speech was made.

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<sup>44</sup> Department of Education, published in *Government Gazette* No. 22512 of 26 July 2001.

<sup>45</sup> Department of Education, published in *Government Gazette* No. 29832 of 26 April 2007.

<sup>46</sup> *Jerslid v Denmark*, 23 September 1994, Appl. No 158890/89.

In subsequent jurisprudence the Court has identified various factors external to the speech itself which are to be considered in determining the ‘context’ in which that speech was communicated, including

- Whether the political landscape was particularly sensitive at the time the speech was communicated. This would have contributed to the creation of a tense environment and thus make the existence of an intention to incite harm more likely;<sup>47</sup> and
- The particular historical context of the region in which the speech was communicated, which would determine how the ‘ordinary reasonable person’ would understand and respond to that speech.<sup>48</sup>

### 6.7.2. Foreign case law

#### UNITED STATES OF AMERICA

##### **Brown v. Board of Education, 347 U.S. 483 (1954)**

In this seminal judgment of the United State Supreme Court in which the policy of ‘separate but equal’ education along racial lines was deemed unconstitutional for being “inherently unequal”, a unanimous Court, per Chief Justice Warren, noted that “Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

It is, however, notable that in the later case of *San Antonio Independent School District v Rodriguez* 411 U.S. 1, 29-39 (1973), the same court refused to recognised a national right to education as derived from the American Constitution.

#### CANADA

##### **R. v. Keegstra [1990] 3 S.C.R. 697**

A High School teacher who had communicated anti-semitic statements to his students was charged with the criminal offence of unlawfully promoting hatred. He then challenged the constitutionality of that criminal provision on the basis of the constitutional right to freedom of expression.

On appeal to the Canadian Supreme Court, Dickson CJ held that communications which promote hatred against a particular group of persons are generally protected by freedom of expression provisions, however this protection needs to be balanced against the protection of equality and the right to non-discrimination. For this reason, the hate speech provisions which limit the right to freedom of expression are reasonable, and thus constitutional.<sup>49</sup>

<sup>47</sup> Zana, Yalciner and Incal v Turkey, 27 November 1997, Appl. No 1894/91.

<sup>48</sup> Vojani v Hungary, 8 July 2008, Appl. No 33629/06 at 4.

<sup>49</sup> At 755-758.

**Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825**

In this matter, a Jewish resident of Montcon, Canada filed a complaint with the regional Human Rights Commission against Malcolm Ross, a mathematics teacher at his children's school. The complaint alleged that certain publications and statements by Ross were anti-semitic and racist and had thereby poisoned the school environment in which he taught, despite a lack of evidence to show that Ross had propagated such views in the classroom itself. The complaint was also against the School Board, on the basis that their continued employment of Ross amounted to condoning his allegedly racist views.

The complaint was initially heard by the Human Rights Commission's Board of Inquiry, which held that

"Education of students must be viewed in the broad context of including not only the formal curriculum but the more informal aspects of education that come through interchange and participation in the whole school environment. This would be in keeping with the broad purposive approach taken to the interpretation of human rights legislation... Section 5 attempts to create a learning environment which is as free from discriminatory effects as is reasonably possible given the influence of factors beyond the control of those administering the educational system."<sup>50</sup>

The Board of Inquiry upheld the complaint against Ross, and held the School Board liable for Ross' utterances. On appeal, the Supreme Court of Canada noted that

"A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate..."

Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions...By their conduct, teachers as "medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond.

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system."<sup>51</sup>

It is notable that the Supreme Court's order that Ross be removed from his teaching position was upheld by the United Nations Human Rights Committee, which found that Ross' rights under the International Covenant on Civil and

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<sup>50</sup> *Attis v. New Brunswick School District No. 15* (1992), 15 C.H.R.R. D/339 (N.B. Bd. Inq.) at D/353-54.

<sup>51</sup> Paras 42-45.

Political Rights – particularly the right to freedom of expression – had not been violated.<sup>52</sup>

**Director of Child and Family Service v D.M.P. (MBQC, 2002, no. 32; MCJ, 2010, no. 37)**

In this case, the principle of the ‘best interests of the child’ was invoked in a matter in which the child’s parents were blatantly racist and had instilled in the racist notions and tendencies towards violence against minorities.

**6.7.3. Domestic case law**

**RIGHT TO HUMAN DIGNITY**

**S v Makwanyane and Another 1995 (3) SA 391 (CC)**

In this seminal case the Constitutional Court, when dealing with the constitutionality of the death penalty, observed as follows:

“Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.”<sup>53</sup>

**NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)**

In this matter, dealing with an alleged violation of the claimants’ dignity, the Constitutional Court held that “[a] constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom”.<sup>54</sup>

The Court held further that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. In this regard, reference was made to the following dictum from the matter of *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* 2000 (3) SA 936 (CC) para 35:

“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

<sup>52</sup> UN Human Rights Committee Communication No. 736/1997.

<sup>53</sup> Para 329.

<sup>54</sup> Para 49.

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 clear that dignity is not only a value that is fundamental to our constitution, it is a justiciable and enforceable right that must be respected and protected.

### **RIGHT TO EQUALITY AND PROTECTION FROM NON-DISCRIMINATION**

#### **President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC)**

In one of the first judgments by the Constitutional Court which addressed issues of discrimination in light of (the precursor to) s 9 of the Constitution, Goldstone J noted that

“The prohibition on unfair discrimination...seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”<sup>55</sup>

#### **Prinsloo v van der Linde and Another 1997 (3) SA 1012 (CC)**

In this matter, the Constitutional Court reasoned that ‘discrimination’ should be understood in the context of South Africa’s history of segregation and apartheid. In particular,

“Given the history of this country we are of the view that ‘discrimination’ has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.”<sup>56</sup>

### **SCOPE AND APPLICATION OF THE PROHIBITION OF HATE SPEECH**

#### **Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)**

In addressing the purpose and nature of the prohibition of hate speech in light of the constitutional guarantee of freedom of expression, the Constitutional Court noted that

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<sup>55</sup> Para 41.

<sup>56</sup> Para 31.



“The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’. Thus, open and democratic societies permit reasonable proscription of activities and expressions that pose a real and substantial threat to such values and to the constitutional order itself...There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity...Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interests...”<sup>57</sup>

### **RIGHTS OF THE CHILD AND THE PRINCIPLE OF THE ‘BEST INTERESTS OF THE CHILD’**

Our courts have continuously reiterated the primacy of the principle of the ‘best interests of the child’ in all matters involving children.

#### **Prohibition of corporal punishment**

#### **S v Williams and Others 1995 (3) SA 632 (CC)**

In one of its first judgments, the Constitutional Court addressed the issue of corporal punishment of juvenile offenders. The Court found that this was in conflict with the Bill of Rights, specifically the constitutionally-enshrined protection from cruel, inhuman or degrading treatment or punishment, in particular because “[a] culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands”.<sup>58</sup>

Moreover, it was noted that

“The deliberate infliction of pain with a cane on a tender part of the body, as well as the institutionalized nature of the procedure, involves an element of cruelty in the system that sanctions it. The activity is planned beforehand, it is deliberate. Whether the person administering the strokes has a cruel streak or not is beside the point. It could hardly be claimed, in a physical sense at least, that the act pains him more than his victim. The act is impersonal, executed by a stranger, in alien surroundings. The juvenile is, indeed, treated as an object and not as a human being. As pointed out in *Jackson v Bishop*.

*“... (I) rrespective of any precautionary conditions which may be imposed, (it) offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess...”*<sup>59</sup>

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

In this matter the Constitutional Court conclusively held that the prohibition on corporal punishment in schools – even if those schools are independent – is

<sup>57</sup> Paras 29-30.

<sup>58</sup> Para 52.

<sup>59</sup> Para 90.

not unconstitutional. In particular, it was held that this prohibition constitutes a reasonable and justifiable limitation on the rights to freedom of religion and cultural life.

In coming to this conclusion, the Court stated that

“[T]he prohibition of corporal punishment is part and parcel of a national programme to transform the education system to bring it into line with the letter and spirit of the Constitution. The creation of uniform norms and standards for all schools, whether public or independent, is crucial for educational development. A coherent and principled system of discipline is integral to such development. The State is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation...”<sup>60</sup>

Moreover, the Court recognised that

“The second and more persuasive argument is to the effect that the State has an interest in protecting pupils from degradation and indignity. The respondent contended that the trend in Europe and neighbouring African countries was firmly in the direction of abolition of corporal punishment, and that the core value of human dignity in our Bill of Rights did not countenance the use of physical force to achieve scholarly correction. Accordingly, [the State] was under an obligation to prohibit such punishment, and to do so without exception and for the benefit of all children...”<sup>61</sup>

With particular reference to corporal punishment at school, Sachs J noted that

“We cannot, however, forget that...corporal punishment administered by a teacher in the institutional environment of a school is quite different from corporal punishment in the home environment. Section 10 [of the South African Schools Act 84 of 1996] grants protection to schoolchildren by prohibiting teachers from administering corporal punishment. Such conduct happens not in the intimate and spontaneous atmosphere of the home, but in the detached and institutional environment of the school. Equally, it is not possible to ignore either our painful past history when the claims of protesting youth were met with force rather than reason, or the extent of traumatic child abuse practiced in our society today...[S]uch broad considerations taken from past and present are highly relevant to the degree of legitimate concern that the State may have in an area loaded with social plan.”<sup>62</sup>

Consequently, “[t]he outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children”.<sup>63</sup>

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<sup>60</sup> Paras 39-40.

<sup>61</sup> Para 43.

<sup>62</sup> Para 49.

<sup>63</sup> Para 50.

**Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC)**

In this matter the Constitutional Court explained the nature and scope of the principle of the ‘best interests of the child’, stating that

“Section 28(1) is not exhaustive of children’s rights. Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1).”<sup>64</sup>

**De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others 2004 (1) SA 406 (CC)**

In this case the Constitutional Court was asked to balance the appellant’s right to freedom of expression against the principle of the ‘best interests of the child’. The Court held that a limitation on freedom of expression which served to preserve the dignity of a child was constitutional, and therefore the principle of the ‘best interests of the child’ prevailed.

**M v S (Centre for Child Law Amicus Curiae) 2007 (12) BCLR 1312 (CC)**

A primary issue which arose in this matter was the extent to which the principle of the ‘best interests of the child’ was to be taken into consideration when sentencing a child’s primary caregiver. Sachs J comprehensively outlined the paramount nature of that principle in all cases involving children, which is consistent with South Africa’s international obligations. In particular, it was noted that

“The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children’s rights.”<sup>65</sup>

Moreover, the Court acknowledged that “[e]very child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.”<sup>66</sup>

In particular, the standard imposed by the paramountcy of this principle “should be flexible as individual circumstances will determine which factors secure the best interests of a particular child...A truly principled child-centred approach requires a close and individualized examination of the precise real-life situation of the particular child involved.”<sup>67</sup>

<sup>64</sup> Para 17.

<sup>65</sup> Para 15.

<sup>66</sup> Para 18.

<sup>67</sup> Para 24.

## **RIGHT TO EDUCATION**

It is highly significant that no South African court has yet pronounced on the exact nature, content and scope of the right to education contained in s 29 of the Constitution. Nevertheless, in various cases concerning peripheral issues related to education and the education system in South Africa, our courts have given some indication of the considerations to be taken into account when adjudicating matters that implicate the right to education.

### **Christian Education South Africa v Minister for Education 2000 (4) SA 757 (CC)**

In a case in which a group of Christian parents argued that it was their constitutional right, in terms of the protection of freedom of religion, to have their children sanctioned at religiously-exclusive schools in the manner they deemed fit (namely through corporal punishment), the Constitutional Court noted the significance of the principle of the 'best interests of the child' in all matters involving children.<sup>68</sup> The Court then acknowledged the responsibility which rests on the State to "[protect] pupils from degradation and indignity" within the school environment.<sup>69</sup>

The Court further addressed the reasoning behind the ban on corporal punishment in schools, noting that the Department of Education had sought, in the new constitutional dispensation, to break with the past "[e]ducational systems of a racist and grossly unequal character" in favour of an approach which promoted "respect for the dignity and physical and emotional integrity of all children". This new policy was necessarily informed by the State's constitutional obligations.<sup>70</sup>

### **Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA)**

This matter involved an adjudication of the constitutionality of a policy relating to the rights of asylum seekers in South Africa to work and study pending the determination of their application for asylum. The Supreme Court of Appeal noted that

"The freedom to study is...inherent in human dignity for without it a person is deprived of the potential for human fulfillment."<sup>71</sup>

It was therefore held that a general prohibition that denies asylum seekers the right to study, without taking into account the particular circumstances of each applicant, is unlawful.

### **MEC for Education, Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC)**

In this matter in which the Constitutional Court addressed issues of discrimination based on religious and/or cultural practices at school, the Court noted that

"Teaching the constitutional values of equality and diversity forms an important part of education. This approach not only teaches and promotes

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<sup>68</sup> Para 41.

<sup>69</sup> Para 43.

<sup>70</sup> Para 50.

<sup>71</sup> Para 36.

the rights and values enshrined in the Constitution, it also treats the learners as sensitive and autonomous people.”<sup>72</sup>

**Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amicus Curiae) 2011 (8) BCLR 761 (CC)**

In a recent case in which the Constitutional Court was called upon to determine the constitutionality of an eviction order granted against a public school situated on private property in light of the right to education, Nkabinde J noted that

“Unlike some of the other socio-economic rights, [the right to education] is immediately realizable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.”<sup>73</sup>

The Court held further that “[t]he significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked...Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities...”<sup>74</sup>

## 7. Analytical framework

In analyzing this complaint, the Commission considered the following considerations and guidelines for the interpretation of the rights implicated.

### 7.1. The State’s duty to respect, protect, promote and fulfil the fundamental values of the Constitution

In adjudicating a complaint that implicates rights in the Bill of Rights, the general principles of the interpretation of statutes, in particular Constitution section 39(2) which requires that the “spirit, purport and objects of the Bill of Rights” – and thus the fundamental values of dignity, freedom and equality – be promoted when interpreting any legislation must be taken into account.

In this regard, it is significant that adequate education is essential to the promotion, exercise and protection of these core constitutional values.

### 7.2. The duty to consider foreign and international law

Section 39(1) of the Constitution provides that a court, tribunal or forum *must* consider international law and *may* consider foreign law when interpreting the Bill of Rights.

<sup>72</sup> Para 104.

<sup>73</sup> Para 37.

<sup>74</sup> Section 39 Paras 42-43.

Similarly, s 233 of the Constitution instructs our courts to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law” when interpreting legislation. In addition, Constitution s 231(2) requires that the court testing the constitutionality of a legislative provision do so in compliance with the international agreements which South Africa has enacted into legislation.

It is submitted that these stipulations similarly bind the Commission in its adjudication of a complaint which implicates rights contained in the Bill of Rights.

## **8. Analysis**

- 8.1. The First Respondent is alleged to have violated the right to equality, human dignity, education and the rights of the child of the learners by referring to them as ‘kaffirs’, ‘monkeys’, ‘baboons’ and ‘barbarians’.
- 8.2. The First Respondent is further alleged to have displayed an old South African flag and pinned to the wall a caricature depicting Mr Malema alongside baboons in the classroom.

### **THE RIGHT TO EQUALITY**

- 8.3. The right to equality is central to the South African Constitutional framework.
- 8.4. The attainment of equality as an ideal requires, among other things, eradication of racism which manifests itself in various forms in our society and its institutions.
- 8.5. Section 1 of the Constitution lists the ‘achievement of equality’ and ‘non-racialism and non-sexism’ among the foundational values of our constitutional democracy.
- 8.6. The Constitution specifically requires the enactment of legislation to prevent or prohibit unfair discrimination.
- 8.7. This legislation has taken the form of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act)

### **SECTION 10 - THE EQUALITY ACT**

- 8.8. In determining whether the conduct in question constitutes hate speech in terms of section 10(1) of the Equality Act, the starting point would be to examine whether these two requirements are implicated:
  - a) The publication, propagation, advocating or communication of words based on a prohibited ground
  - b) That could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred is prohibited.
- 8.9. The following analysis must undertaken before speech can constitute hate speech:
  - a) Whether there has been communication of words from one person to another;
  - b) Whether the communication is based on one or more of the prohibited grounds; and
  - c) Whether the words could reasonably be construed to demonstrate a clear intention to hurt, harm or promote or propagate hatred.
- 8.10. The investigation undertaken by the Commission revealed that there has indeed been a communication of words by the First Respondent to the Learners. The words of the First Respondent were directed towards learners.

- 8.11. In examining whether or not the conduct complained of falls within the ambit of the Act the following facts pertinent to this complaint were taken into consideration:
- a) The conduct complained of was made by a white person against black learners.
  - b) The issue of race was accordingly present in this case.
  - c) The referral to a human being as a ‘baboon’ or ‘kaffir’ could reasonably be construed to undermine his human dignity and constitute hate speech.
  - d) The conduct complained of accordingly falls within the ambit of the definition of prohibited ground of race.
- 8.12. The words uttered were further based on one or more of the “prohibited grounds”. In this instance the reference to “kaffir” is *inter alia* a derogatory term for black South Africans and South Africans like the Complainant, and it therefore refers to the race, ethnic or social origin, and culture.
- 8.13. “Prohibited grounds” include race, ethnic or social origin, culture, and any other ground as defined in part b of the definition.<sup>75</sup>
- 8.14. Section 10 does not require the utterer of the words to have any intention but it requires an enquiry into whether the words could reasonably be construed to demonstrate a clear intention. The context and the surrounding facts pertaining to the words, the circumstances, and the history of South Africa must be applicable to the construction that the Commission place upon the words and the effect thereof.
- 8.15. The intention with which the words are uttered is irrelevant in this instance as the provision does not require a finding that the utterer was actuated by hatred in order to constitute a contravention of s10(1) of the Equality Act.
- 8.16. The question of the intention of the utterer of the words is to be judged from an objective perspective.
- 8.17. When judged from the perspective of a reasonable person, the Commission finds that there was a clear intent by the First Respondent to be hurtful.
- 8.18. The group that was targeted by the First Respondent were black learners. The recipient community would accordingly view the use of the word “baboon” as hate speech. The word “kaffir” is commonly used as a disparaging term for a black person.
- 8.19. The concerning aspect for the Commission is the effect these utterances had on the learners.
- 8.20. In *Afriforum and Another v Malema* 2010 (5) SA 235 (GNP)
- Berteismann J held that the true yardstick of hate speech is neither the historical significance thereof nor the context in which the words are uttered, but the effect of the words, objectively considered, upon those directly affected and targeted thereby.
- The words ‘shoot the farmer/Boer’ as they appear in a popular ‘struggle’ song are experienced as a threat by a large number of South Africans, and, seen in the light of the definition of ‘hate speech’ in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, constitutes such speech.

<sup>75</sup> Section 1 of the Equality Act

- 8.21. Hate speech is not subject to a determination of fairness and in this instance the First Respondent cannot use the defence that the words were uttered in a joking manner.
- 8.22. In *Strydom v Chiloane 2008 (2) SA 247* at 251 Hartzenberg J held at paragraph 13, “*In Mangope v Asmal and Another 1997 (4) SA 277 (7)* at page 286 J - 287 A, the view was expressed that if a person is called a baboon, when severely criticized, the purpose is to indicate that he is base and of extremely low intelligence. It was also stated that it can be inferred from the use of the word, in the circumstances, that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It follows that the person described as a baboon in those circumstances may rightfully perceive them to be hurtful”
- 8.23. In the present matter, it can be inferred from the use of the word that the learners are of subhuman intelligence and not worthy of being described as a human beings by the First Respondent. The word has racist overtones.
- 8.24. Racist hate speech defies the constitutional ideals of dignity and equality and serves no legitimate constitutional purpose.
- 8.25. The meaning of the words uttered, taken literally and historically leaves the Commission with the conclusion that they are racist.
- 8.26. The use of the word “baboon” or “monkeys” by the First Respondent has racist meaning particularly when it’s used against black learners. In the judgment of the Labour Appeal Court in *Lebowa Platinum Mines Ltd v Hill and Others*,<sup>76</sup> it was stated that the can be no real dispute as to the racist meaning embedded in the word “bobbejaan” when used against a black person in South Africa.
- 8.27. In *Strydom v Chiloane 2008 (2) SA 247* at 251 Hartzenberg J held, “I accept, that when the words were uttered, by the Appellant, a white man, of and concerning the respondent, a black man, they had a racial connotation and a discriminatory import.

#### **THE RIGHT TO HUMAN DIGNITY**

- 8.28. Prejudice is borne of the belief in the inferiority of persons or a group of persons and amounts as such, to an indignity.
- 8.29. In the present matter, to determine whether the dignity of the learners was harmed, the question that should be asked is whether the conduct or words uttered harmed their dignity in that
- a) it was based on prejudice or stereotype;
  - b) perpetuates oppressive power relations; or
  - c) in conjunction with (a) and (b), diminishes the feelings of self-worth of the learners.
- 8.30. It is clear from the information gleaned from the investigation that learners were intimidated by the First Respondent and the racial utterances attributed to him were directed solely to black learners.
- 8.31. Learners interviewed including the Complainant’s children indicated that their feelings were hurt by disparaging words and demeaning remarks that the First Respondent would often make in the classroom.

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<sup>76</sup> (1998) 7 BLLR 666 (LAC)



- 8.32. By using racial slurs, the First Respondent undermined the fundamental dignity of learners and perpetuated views of racial superiority and inferiority that stem from the past.
- 8.33. Zondo JP in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry Farm v Kapp 2002 (2) BLLR 493 (LAC)* equated the use of racial slurs (in this matter the word 'kaffir' was used by the respondent with reference to a co-worker) with racial abuse (para 26) indicative of an attitude embedded in the culture of subordination and exploitation of black people (para 36). The learned Judge emphasized that such utterances and their effects are to be viewed against the background of our history of racism and racial abuse (para 39).
- 8.34. Hateful utterances cause systemic disadvantage to the targeted group, undermine dignity and adversely affect the equal enjoyment of rights and freedoms.
- 8.35. In *Gouws v Chairperson, Public Service Commission* Revelas J held:
- 'The word "Kaffir", particularly if used by a white person referring to a black person, and if uttered directly to a black person, is possibly the most humiliating insult that can be endured by a black person. Even though I did not have the benefit of any expert evidence on this topic, I readily accept that black South Africans find this word demeaning. It directly impacts on the human dignity of black persons and has become an example of what can be termed "hate speech".'*

#### **FREEDOM AND SECURITY OF THE PERSON**

- 8.36. The use of corporal punishment within the school setting has long been abolished and is prohibited by the South African Schools Act. The Constitution pledges to protect children from violence, maltreatment, and abuse.
- 8.37. Teachers have an important role to play in ensuring that children are protected from violence, maltreatment, and abuse. In the present complaint, the First Respondent failed to enable the realisation of this right as it was alleged by the Complainant's children that the First Respondent would on occasion administer corporal punishment.<sup>77</sup> These allegations were corroborated by learners interviewed by the Commission.
- 8.38. Our Constitution requires persons and groups to desist from practices which, according to their beliefs and traditions, may previously have been regarded as generally acceptable. In the past, public institutions had inflicted physical assaults upon citizens and other forms of abuse of their physical, emotional and psychological integrity. The practice of corporal punishment became deeply embedded in the fabric of our society as a result of that culture. Learners were subservient to the authority of teachers.
- 8.39. Corporal punishment is inherently violent, and involves a degrading assault upon the physical, emotional and psychological integrity of the person to whom it is administered.
- 8.40. In this instance, it alleged by the learners that the First Respondent would on occasion administer corporal punishment using a cricket bat. The learners were not able to do anything to counter this. Such punishment is degrading and unacceptable and in violation of the learners' human dignity.
- 8.41. The State has an obligation to ensure that the learners' constitutional rights are protected and ensure all children are free from exposure to harmful behaviours at school, such as the corporal punishment.

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<sup>77</sup> A criminal case of Assault is currently being investigated against the First Respondent

- 8.42. The First Respondent administered corporal punishment in a public school thereby exposing children to a learning environment that is harmful. Learners were subjected to indignity of suffering a painful and humiliating hiding deliberately inflicted on them in an institutional setting.
- 8.43. In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), the Court stated that

*“[T]he prohibition of corporal punishment is part and parcel of a national programme to transform the education system to bring it into line with the letter and spirit of the Constitution. The creation of uniform norms and standards for all schools, whether public or independent, is crucial for educational development. A coherent and principled system of discipline is integral to such development. The State is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation...”*<sup>78</sup>

## **THE RIGHT TO EDUCATION**

### **The connection between education and democracy**

- 8.44. It is notable that the United States Supreme Court, while declining to recognise a national right to education as derived from the American Constitution,<sup>79</sup> was nevertheless willing to acknowledge the relevance and importance of education to effective democratic participation, and thereby to democracy itself. As Berger argues,<sup>80</sup> how much more apparent is this connection in South Africa, where the Constitution necessarily and explicitly recognises the right to education.
- 8.45. In fulfilling its responsibility to educate, the State must be at pains to acknowledge the direct effect that such education will have on the future of its democracy, through either encouraging future voters towards democratic participation or dissuading them from any such active citizenship. Any system with such a significant impact upon democratic life must strive to meet standards of adequacy and fulfil the core constitutional values of dignity, equality and freedom. Racism in the classroom necessarily militates against such fulfillment.
- 8.46. In 2009 the President of the Republic of South Africa stated a number of education “non-negotiables”. One of these was that there would be no abuse of pupils by teachers. It is obviously one thing to make such pronouncements but this requires commitment by the education authorities to ensure that teachers do not engage in any form of racist conduct, humiliation or any form of physical or psychological abuse. In this regard, the Commission acknowledges the swift action taken by the Provincial Department of Education to suspend the First Respondent and the School Principal.

### **Education as the provision of a public service**

- 8.47. Public schools are part of the public administration, and they both exercise and perform statutory powers and functions relating to public education. Consequently, public schools – and the governing bodies, principals and teachers thereof – are subject to the

<sup>78</sup> Paras 39-40.

<sup>79</sup> *San Antonio Independent School District v Rodriguez* 411 U.S. 1, 29-39 (1973).

<sup>80</sup> E Berger ‘The right to education under the South African Constitution’ (2003) 103 *Columbia Law Review* 614 at 656.

basic values and principles governing the State generally and the public administration more specifically. This includes the duty to uphold the Constitution's foundational values of dignity, equality and freedom, encompassing the prohibition on discrimination.

8.48. In terms of the 4A legal framework,<sup>81</sup> State action must ensure that education is acceptable. This requires that the content of education is non-discriminatory; is culturally appropriate; the education is of a sufficiently high quality; and the school environment is safe.

8.49. The Commission accordingly finds that the conduct of the First Respondent falls short of what is required in terms of acceptable education and does not uphold the Constitution's foundational values of dignity, equality and freedom and had an adverse impact on the learning environment.

### **THE RIGHTS OF THE CHILD**

8.50. Our constitutional order mandates special protection to be afforded to children.<sup>82</sup>

8.51. In *Minister of Welfare and Population Development v Fitzpatrick and Others*,<sup>83</sup> the Court stated that:

*"Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)."*

8.52. The principle of 'best interest of the child' has established itself through all matters and legislation affecting the well-being of the child. It is an overarching common law principle that has been used to assist primarily South African courts and other institutions in the decision-making process.

8.53. In its General Comment No. 7,<sup>84</sup> the Committee stated the following:<sup>85</sup>

The principle of the best interest applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, well-being, as well as measures to support and assist parents and others who have the day-to-day responsibility for realizing children's rights...

8.54. It is against this backdrop, the Commission made the 'best interest' consideration, the ultimate consideration when dealing with this complaint.

<sup>81</sup> The 4A legal Framework was constructed by Katarina Tamasevski, the former UN Special Rapporteur on the right to education. The Framework maps out the scope and nature of the obligations on the State to fulfil the right to education as guaranteed by international laws

<sup>82</sup> South Africa's international obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the United Nations Convention on the Rights of the Child, require the abolition of corporal punishment in schools, since it involves subjecting children to violence and degrading punishment.

<sup>83</sup> 2000 (3) SA 422 (CC)

<sup>84</sup> Committee of the Rights of the Child, General Comment No. 7, 2005 CRC/C/GC/7/Rev. 1, para.13

<sup>85</sup> (Ibid)

### **Display of old South African flag and caricature at Wilgehof Primary School**

- 8.55. The Commission has noted the admission by the First Respondent that the display of the old South African flag in the classroom was inappropriate.<sup>86</sup>
- 8.56. The racist imagery associating Mr Malema with baboons cannot go unnoticed although it was not the focal point of the investigation.
- 8.57. It is significant in this instance because it was pinned to the wall of a classroom with predominantly black learners. Learners interviewed asserted that the caricature with a caption was pinned to the wall by the First Respondent and were exposed to this racist imagery for months. Some learners due to lack of knowledge found it funny and most of the learners interviewed found it offensive.
- 8.58. It is evident from the wording in the depiction and the use of language that it was not written by a learner.
- 8.59. Despite the assertion by the First Respondent that a learner pinned this caricature to the wall, the Commission finds that the First Respondent abdicated his responsibility as a teacher by not removing it. The picture was only removed after the Department of Education visited the school on Monday, 3 June 2013. This clearly demonstrates a deeply embedded insensitivity by and an educator.
- 8.60. Whilst acknowledging the importance of freedom of expression in a democratic society, racist parody cannot be condoned. A hateful association between blacks and baboons is both derogatory and dehumanizing. Racist caricatures are undergirded by stereotype and negative stereotyping of blacks has long been a way to brand black people as the inferior race.<sup>87</sup>
- 8.61. The caricature amounts to a public declaration of inferiority. In the Commission's view, the image or statement conveyed by the picture as associating or connecting a human being with the baboons renders such a person less worthy of respect and may amount to defamation.

## **9. Findings**

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

- 9.1. The First Respondent's crude racist remarks perpetrated against black learners constitute a clear incident of hate speech as defined by the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA);

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<sup>86</sup> Admission contained in a letter addressed to the Head of Department of Education, Free State

<sup>87</sup> Freedom of Expression Institute Commentary on the Display of the old South African flag and the caricature in the classroom at Wilgehof Primary School - 8 August 2013: "The recent incident where a history and life orientation teacher at Wilgehof primary school hung the old South African flag and a picture of former ANCYL president, Julius Malema alongside that of baboons is one that straddles the thin line between the right to receive and impart information and insinuations of racist conduct. As the Freedom of Expression Institute, our position therefore has to be measured and based on the facts, avoiding prejudice. On the flag, given the teacher involved in the matter teaches history and life orientation, one may find that this could be of benefit to learners in understanding the events that shaped this nations' current socio-political dispensation. This would therefore find defense in the guaranteed right to impart knowledge. However, as with all rights, due consideration has to be given to the extent to which this does infringe on other rights. Similarly, with regard to the display of the caricature, the question on whether or not such actions were in the interest of learners is relevant. Given the country's tainted past with institutionalized racism; this display falls short from being in the learning interest of school children. Such display therefore exceeds the limits of rightful free expression and borders on the insinuation of racism. Regardless of where this picture may have been displayed, the fact that it is within a learning environment does not inspire any confidence in what such impressionable minds would conclude from such conjuncture. It is therefore our opinion and conclusion that at least on the display of the picture, the correct action was taken in removing it from display."

- 9.2. The First Respondent's act of hate speech constitutes a clear violation of both the right to equality and human dignity of the learners;
- 9.3. The First Respondent's conduct of administering corporal punishment in clear violation of the South African Schools Act constitutes a violation of the right of the learners to be free from all forms of violence from either public or private sources and not to be treated or punished in a cruel, inhuman or degrading way as stated in section 12 of the Constitution;
- 9.4. The First Respondent's conduct of exposing learners to a learning environment that was harmful such as corporal punishment and harmful behaviours including display of racist imagery and the old South African flag is a violation of both the right to education and the rights of the child. Such display therefore exceeds the limits of rightful free expression and borders on the insinuation of racism.

## 10. 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 9 above, the Commission recommends the following:

- 10.1. The First Respondent should be subjected to a disciplinary process in terms of Employment of Educators Act 76 of 1998.

In this respect, the South African Council for Educators is urged to consider approaching the court to declare the First Respondent in terms of Part B of the National Child Protection Register (NCPR) as a person unsuitable to work with children, in terms of the Children's Act, 38 of 2005 (as amended).

- 10.2. The Free State Provincial Department of Education to assess the prevalence of racism in public schools in the Province. To this end, the Department is required to furnish the Commission with a report within a period of twelve (12) months informing the Commission of the outcomes of this assessment.

- 10.3. In line with the findings in paragraph 9.3 and 9.4, the Free State Provincial Department of Education should ensure that:

- 10.3.1. Education in all public schools is provided in a way that is consistent with human rights, including equal respect for every child, opportunities for meaningful participation, freedom from all forms of violence, and respect for equality.

- 10.3.2. Discipline in all public schools is administered in a manner consistent both with the child's dignity and with the right to protection from all forms of violence.

In this respect the Provincial Department of Education is urged to develop proven interventions to foster a rights based approach to the educational environment in all public schools.

- 10.4. The Free State Department of Education is further directed to probe the conduct of the School Principal and review his competence to lead the school and other allegations of impropriety and misappropriation of school funds;

- 10.5. The School Governing Body to provide the Commission with a Report within six (6) months on its anti-racism action plan;
- 10.6. The School Governing Body to provide the Commission with a policy on dealing with racism within twelve (12) months of date of this finding.

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 First Respondent in the Equality Court for any additional 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

Signed in Johannesburg on 18th day of September 2013  
South African Human Rights Commission



**COMPLAINT NO: Northern Cape/1314/0073**

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*Complaint No: NC/1314/0073*

In the matter between:

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION  
(On behalf of Dr Viljoen Combined School Learner)**

**Complainant**

and

**DR VILJOEN COMBINED SCHOOL**

**1<sup>st</sup> Respondent**

**CHAIRPERSON OF THE SCHOOL**

**2<sup>nd</sup> Respondent**

**GOVERNING BODY, DR VILJOEN**

**COMBINED SCHOOL**

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## REPORT

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### 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:
  - (a) Promote respect for 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.
- 1.3. Section 184(2) of the Commission empowers the Commission to *investigate and report on the observance of human rights* in the country.
- 1.4. The Human Rights Commission Act, 54 of 1994, provides an enabling framework for the powers of the Commission.
- 1.5. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of, or threat to, a fundamental right.

### 2. Parties

- 2.1. The Complainant in this matter is the South African Human Rights Commission, an institution supporting constitutional democracy established in terms of section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as ‘**Complainant**’)
- 2.2. The First Respondent is Dr Viljoen Combined School<sup>1</sup>, a public school as defined in the South African Schools Act, 84 of 1996 (the Act) (hereinafter referred to as ‘**1<sup>st</sup> Respondent**’).

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<sup>1</sup> “Combined School” means a school providing education in all grades falling under a primary school as well as all grades falling under a secondary school.



- 2.3. The Second Respondent is the Chairperson of the School Governing Body, Mr Ambrose Molatole (hereinafter referred to as '**2<sup>nd</sup> Respondent**'). According to section 16 of the Schools Act, the governance of every public school is vested in its governing body.

### 3. Background to the Complaint

- 3.1. On Friday, 24 May 2013, the attention of the Commission was drawn to a media report<sup>2</sup> alleging that learners at the school were exposed to dehumanizing and racist treatment meted out to them by the school's staff<sup>3</sup>.
- 3.2. According to the media report, learners at the school made the following allegations against the school's staff:
- 3.2.1. Teachers call them by racist, derogatory and belittling names like 'kaffirs, baboons and monkeys;'
  - 3.2.2. Teachers have not made an effort to inspire them, but they instead scold them at the slightest opportunity they get;
  - 3.2.3. One of the teachers habitually tells them, after seeing their ugly faces, he adores his dog even more because it is more beautiful than them;
  - 3.2.4. They are told to go back to the black schools in the location (township) because their parents can't even afford to pay school fees;
  - 3.2.5. They will never succeed in life and will end up like their parents who work in chain stores; and
  - 3.2.6. Teachers have repeatedly told them that they don't like them and don't see why they keep coming to school, because they have a dark future.

### 4. Preliminary Assessment

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

- (i) That the alleged incident constituted a *prima facie violation* of the human rights of the learners. In particular, the assessment determines that Sections 9, 10, 28, and 29 of the Constitution had *prima facie* been violated;
- (ii) That the alleged violation *fell within the mandate and jurisdiction* of the South African Human Rights Commission;
- (iii) That the alleged *violation merited a full investigation* in terms of the Complaints Handling Procedures of the Commission.

<sup>2</sup> The Weekly newspaper – 24 May 2013.

<sup>3</sup> Teaching and Administrative.

## 5. Steps Taken by the Commission

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

- (i) Interview with School Principal;
- (ii) Interview with Learners;
- (iii) Interview with three Teachers;
- (iv) *Inspection in loco* of the school; and
- (v) Survey - Learners & Teachers

### 5.1. Interview with School Principal

- 5.1.1. On Monday, 27 May 2013, the Free State investigation team visited Dr Viljoen Combined School in Bloemfontein, and met with the School Principal.
- 5.1.2. The purpose of the meeting was to discuss allegations leveled against the school's staff and the Principal.
- 5.1.3. The Principal indicated that the school would give the Commission their full cooperation and further that if allegations made in the newspaper are found to be true, they should be dealt with accordingly.
- 5.1.4. The Principal stated that before these allegations were made known, there had never been incidents of racism at the school.
- 5.1.5. He informed the investigating team that the school has predominantly white personnel with mostly black learners.
- 5.1.6. The school changed in 2003 from being largely Afrikaans school to being a parallel medium school.
- 5.1.7. He had attended several diversity management training sessions and subsequently imparted knowledge gained relating to diversity management to the staff members.
- 5.1.8. The Principal was furnished with an allegation letter<sup>4</sup> requesting his response on or before 28 June 2013.
- 5.1.9. The Commission requested permission from him to conduct interview with all learners. The School Principal introduced the investigating team to learners before interviews were conducted and questionnaires filled.

### 5.2. Interview with Learners

#### (a) Interview Process

- 5.2.1. The investigating team conducted interviews<sup>5</sup> with Grade 7, 8, 9, 10, 11 and 12 learners<sup>6</sup> respectively. Their ages ranged between 11 and 19 years of age.

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<sup>4</sup> Dated 29 May 2013.

<sup>5</sup> 29 May 2013.

<sup>6</sup> Average of 30 learners per class.

5.2.2. The consent of the School Principal was obtained prior to commencement of the interview process.

5.2.3. The interview process required approximately half of the learners in each classroom as others would be asked to complete the questionnaire. Interviews were individual and took approximately 5-10 minutes each. They were conducted in a classroom.

*Qualitative data*

5.2.4. The key objectives of the interviews were:

- (i) To verify correctness of allegations made in the media report;
- (ii) To obtain a factual account of the learners' experiences at the school; and
- (iii) To assess the school experience and environment for learners.

5.2.5. The other interview questions<sup>7</sup> were aimed at eliciting information about the learner's particular experience of racism if any within the school.

5.2.6. Majority of learners interviewed stated that:

- (i) Allegations of racist name-calling<sup>8</sup>, *demeaning remarks*<sup>9</sup>, racial utterances and racial discrimination against some teaching, maintenance and administrative staff were indeed correct;
- (ii) Not all teachers at the school were racist;
- (iii) The supervisor entrusted with maintenance of the school had on a recurrent basis made racist remarks<sup>10</sup> towards black and coloured learners; this supervisor was also involved in a physical altercation with a learner.
- (iv) Black learners are treated differently from their white and coloured peers.<sup>11</sup>

5.2.7. Some learners interviewed stated that:

- (i) When other learners are reprimanded by teachers, they take it completely out of context and personalise it.
- (ii) There is a general lack of discipline amongst learners; Learners do not have a good relationship with their teachers.
- (iii) Teachers often hurl insults towards them; Teachers say they get their bad attitude from their parents.
- (iv) Teachers make racist remarks when they are infuriated and then apologize later claiming it was a joke.

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<sup>7</sup> Do they think there is racism in the school; Have they personally experienced it, if yes, who was the perpetrator; and can they mention specific racist incidents.

<sup>8</sup> K-word, and baboons.

<sup>9</sup> Black bitches & gemors

<sup>10</sup> Refers to learners as 'Kaffirs' & Black bitches.

<sup>11</sup> Inconsistent application of disciplinary measures and punishment meted out to learners.

- (v) Some of the teachers have told them that if they can't speak or understand Afrikaans, they do not belong at Dr Viljoen. This is despite the fact that Dr Viljoen is a parallel medium school. Sometimes Afrikaans is the only language used to make announcements through intercom.
- (vi) They saw the Principal forcing male learners to shave using only one blade.
- (vii) The Principal has on occasion used racist language towards them and stated that white learners never caused trouble when they used to attend to school; Learners feel very intimidated by him.<sup>12</sup>
- (viii) When the Principal shouts at them, he always makes reference to the ANC and government.<sup>13</sup>
- (ix) Some teachers stated that since the school admitted black learners, they have brought a lot of corruption.
- (x) They learned about racism in the Life Orientation and Arts and Culture classes.
- (xi) They have learned about the right to a safe and educational environment which they do not enjoy at the school.

(b) *Survey*

5.2.8. A questionnaire was distributed to all learners. It was designed to elicit quantitative response in relation to occurrences of racism at the school, if any. It also provided the possibility for open-ended responses, which could yield some useful insights.

5.2.9. The learners had to respond to eighteen (18) questions regarding their various experiences at the school. They had to identify whether or not they had experienced a particular racist incident. They also had to respond to a series of questions regarding:

- (i) How often do they think racism happens in their school;
- (ii) Whether they think teachers in their school see racism as an important issue;
- (iii) Knowledge of any policy in school dealing with racism and racist incidents;
- (iv) Teachers' confidence in dealing with racism in school;
- (v) The manner in which the school dealt with racism; and
- (vi) Anti-racist education at school.

5.2.10. The questions were all designed in a tabulated manner and space was provided for answers.

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<sup>12</sup> The Principal has told learners that he is 'a boere man van die boere plaas'.

<sup>13</sup> The Principal has further said to 'call that Zuma of yours'.

*Quantitative and Qualitative data*

- 5.2.11. The investigating team adopted a mixed methodology approach to data collection, involving quantitative (Survey/Questionnaires) and qualitative (individual interviews) data.
- 5.2.12. Upon examining the participants' experiences at the school, the investigating team found several key trends that can be summarised as follows:
- 5.2.13. Racist incidents: 56% of participants in the survey conducted by the Commission reported that they think racism happens in their school on an occasional basis.
- 5.2.14. Reporting of racism: 65% of the participants in the survey reported that when they experience racist bullying and racism, they tended to report this to their parents instead of teachers.
- 5.2.15. Dealing with racism: 70% of the participants in the survey reported that they think their teachers do not view racism as an important issue.

**5.3. Request for written response to allegations**

- 5.3.1. On Wednesday, 29 May 2013, the Free State Provincial Office of the Commission delivered letters and questionnaires to the School Principal, the School Governing Body (SGB) and another letter to the Department of Education setting out the allegations made in the media report, and inviting their response in writing to the allegations on or before 28 June 2013.

*Joint Response from the School Principal and School Governing Body*

- 5.3.2. On Wednesday, 19 June 2013, the Commission received a written response from the Principal and School Governing Body (SGB).
- 5.3.3. In their response to the allegations, the School Principal and the SGB stated the following:
  - (i) During the previous dispensation, the school enrolled white learners only.
  - (ii) Since 1995 the school started to enroll black (African) and coloured learners as all stakeholders realised that the school had the responsibility to cater for more learners of all cultures. Consequently the school was the first ex-model C school to announce that learners of colour were selected on the RCL.
  - (iii) Since 2007 the school started to enroll English-speaking learners and it escalated so fast that currently more than 70% of the learners are taking English as a home language. The School has grown in numbers and in 2013 a total of 1133 learners were enrolled.
  - (iv) The accusations allegedly made by the learners in the media are totally unjustified due to the fact that to date, no complaint has been brought to their attention. If a complaint was laid, it would have been investigated and dealt with immediately.
  - (v) Teachers discipline learners on a daily basis and motivate them constantly to excel and succeed in life. The matric results of this school and the fact that parents and learners choose this school year after year show that the teachers do care about the learners at our school.

- (vi) No complaint in this regard has been brought to our attention therefore this remark is uncalled for.
- (vii) School fees are the responsibility of the parents and have nothing to do with the learners. Even if a parent should not be in a position to pay school fees, this would not exclude any learner from being taught at our school. The Schools Act is clear on this matter and teachers know that. No complaint in this regard has been brought to our attention.
- (viii) Our job as educators, is to uplift and encourage all our learners and to motivate and inspire them as teachers, we must picture a successful future to them and guide them on this path. The allegation is thus not true.
- (ix) We as teachers want the best for our learners and the way we care for them shows that we love them and want them to succeed. The learners at our school are our future and we would like to make a positive contribution to their future.

*Response to the Investigation Questionnaire*

- (x) The school does not have a separate policy on racism due to the fact that it has never been an issue. The school abides by the Constitution, the National Education Policy Act, 27 of 1996, the South African Schools Act, 84 of 1996, as well as the code of professional ethics of the South African Council for Educators
- (xi) The school does not have a policy on racial relations. It was never necessary because there have always been good relations between learners, parents and teachers.
- (xii) The school is registered as a public school.
- (xiii) The school recruits teachers by publishing vacancies in the Provincial Gazette. The school seldom has vacancies due to the fact that 28 members of the teaching staff have already been at the school for 25 years or more. The SGB makes recommendations to the Department of Education for appointment of teachers.
- (xiv) The school has three (3) black and forty-eight (48) white teachers. As an ex-model C school, the staff is still predominantly white due to the fact that 77% of the teaching staff have been at the school between 6 and 28 years.
- (xv) The school has 41 female and 10 male teachers.
- (xvi) Affirmative action only became part of the employment procedures after most of the teachers at the school had been appointed.
- (xvii) Racial discrimination is regarded as unacceptable and is therefore rejected with the contempt it deserves.
- (xviii) The racial demographic of the learners at the school is as follows: African (990); Coloured (121); and White (22).
- (xix) In-service training for teachers is done on a regular basis to address the needs of all children. The focus is on teaching and learning and from time to time, racial equality is addressed as well. The teaching staff received informal training on diversity, dealing with learners,

racial tolerance and disciplinary measures conducted by a lawyer and the SMGD of the school on separate occasions.

- (xx) There has never been any reported incident of racism at the school. Should there be such incidents, it would be the responsibility of the SMT and the Principal. To date, the SGB and school staff openly invited parents and/or learners to report any injustice to any teacher, SMT member or member of the School of Governing Body.
- (xxi) The school has a language profile.
- (xxii) Culprits would be reprimanded in the privacy of the Principal's office and a written warning would be filed. The SMGD of the school would be notified in this regard. For repeated behaviour more drastic steps would be taken such as referring the incident to the employer to be dealt with in accordance with the misconduct provisions of the Employment of Educators Act.
- (xxiii) Letters to parents are sent out in English and Afrikaans.
- (xxiv) The teaching staff, school management and the School Governing Body is fully aware of the differences among different people and communities and the sensitivity related to such differences.

#### 5.4. Questionnaire - Teachers

- 5.4.1. Teachers at the school refused to complete a self-completion questionnaire that was prepared by the Commission.
- 5.4.2. Most of the teachers<sup>14</sup> at the school further refused to be interviewed by the Commission after they were told of the Commission's interview with the School Principal.
- 5.4.3. The Commission was approached by the National Professional Teachers Organization of South Africa (NAPTOSA) with a view to conducting interviews with their members.
- 5.4.4. The Commission interviewed three (3) teachers who vehemently refuted all allegations of racial discrimination and utterances made by the learners.
- 5.4.5. The Commission further interviewed a black assistant teacher<sup>15</sup> who stated that learners only started to confide in her after the racism allegations were publicized. Learners told her that they were intimidated by the School Principal and learners alleged that some teachers had on occasion used the k-word.
- 5.4.6. According to the information supplied by the school in respect to racial composition of the teaching personnel, the school has forty-eight (48) white teachers and three (3) black teachers.
- 5.4.7. The first page of the questionnaire focused on perceptions or opinions on racism in the school. The second page focused on the perspectives of educators around school curriculum, anti-racist education, attitudes towards racism and Headmaster's role in promoting race equality and equality of opportunity in all aspects of school life.

<sup>14</sup> Members of SAOU refused to cooperate with the Commission's investigation and their representative Ms Ankla Bester wanted to dictate the manner in which interviews were to be conducted by the investigating team.

<sup>15</sup> She also works as a Youth Worker/Invigilator at the school.

- 5.4.8. The last page of the questionnaire focused on the school's efforts to celebrate cultural diversity of the school community and measures put in place to equip pupils to increase their awareness and gain experiences that will enable them to develop positive attitudes towards a pluralistic society.
- 5.4.9. The teachers had to respond to twenty-five (25) questions regarding their various experiences at the school. They had to identify whether or not they had experienced or witnessed a particular racist incident. They also had to respond to a series of questions regarding:
- (i) How often do they think racism happens in their school;
  - (ii) Whether they think the School Headmaster and Governing Body in their school see racism as an importance issue;
  - (iii) Knowledge of any policy in school dealing with racism and racist incidents;
  - (iv) Teachers' confidence in school management to deal with racism in school;
  - (v) The manner in which the school dealt with racism;
  - (vi) Anti-racist education at school; and
  - (vii) Whether they knew about the apartheid flag and a caricature in the First Respondent's school.
- 5.4.10. The questions were all designed in a tabulated manner and space was provided for answers.

## **6. Applicable Legal Framework**

### **6.1. International instruments**

#### GENERAL HUMAN RIGHTS

##### **6.1.1. Universal Declaration of Human Rights (1948)<sup>16</sup>**

The Universal Declaration, which is widely regarded as reflecting customary international law and thus being universally binding, recognises in Article 1 that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Article 2 of the Declaration states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status,” while Article 7 outlines that

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

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<sup>16</sup> 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 18 June 2013).



Article 26 enshrines the right to education which “shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups...”

#### **6.1.2. International Covenant on Civil and Political Rights (1966)<sup>17</sup>**

Article 2 of the Covenant enshrines the right to equality for all, and to the provision of rights without distinction or discrimination.

Article 20(2) protects against hate speech, providing that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

Article 26 of the Covenant recognises that:

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

South Africa has both signed and ratified this Covenant, and it is therefore directly binding on the State and all State institutions.

#### **6.1.3. International Covenant on Economic, Social and Cultural Rights (1966)<sup>18</sup>**

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

Article 13(1) of the Covenant enshrines “the right of everyone to education”, which:

*“[S]hall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups...”*

Article 14 then entreats States Parties to progressively realise this right. While South Africa has not ratified the Covenant it is a signatory State, and the government can therefore not act in a manner that is contrary to spirit for this Covenant.<sup>19</sup>

<sup>17</sup> 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 18 June 2013).

<sup>18</sup> 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> (accessed 18 June 2013).

<sup>19</sup> Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 18, 1155 U.N.T.S. 331, 336.

## THE RIGHT TO EDUCATION

“Internationally, the right to education is recognised as a precondition for the enjoyment of many civil and political rights, such as freedom of information, expression, assembly and association. The right to vote and to be elected, or the right of equal access to public service, depends on at least a minimum level of education. Similarly, many economic, social and cultural rights can be exercised in a meaningful way only after a minimum level of education has been achieved.<sup>20</sup>

### 6.1.5. Committee for Economic, Social and Cultural Rights – General Comment 13: The right to education (1999)<sup>21</sup>

The Committee firstly gave content to the right to education as contained in the ICESCR, recognising 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 marginalized 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 ... promoting human rights and democracy, protecting the environment, and controlling population growth.<sup>22</sup>

The Committee then outlined the ‘four A’s’, which are “interrelated and essential features” of the nature of education which States Parties’ are compelled to provide. These are availability, accessibility, acceptability and adaptability. Of particular relevance to this claim is the standard of acceptability, which requires that:

“[T]he form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students...<sup>23</sup>

### 6.1.6. UNESCO Convention Against Discrimination in Education (1960)<sup>24</sup>

Article 5 of this Convention states that:

“(1)(a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance, and friendship among all nations, racial or religious groups...”

South Africa has ratified this Convention, and it is therefore directly binding on the State and all State Institutions.

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<sup>20</sup> S Valley & Y Dalamba ‘Racism, ‘racial integration’ and desegregation in South African public secondary schools’ report on a study by the SAHRC (1999) at 12.

<sup>21</sup> Twenty-first session, 1999. U.N. Doc. E/C.12/1999/10 (1999).

<sup>22</sup> Para 1

<sup>23</sup> Para 6.

<sup>24</sup> Adopted by the General Conference as its eleventh session, Paris, 14 December 1960.

### 6.1.7. World Declaration on Education for All (1990)<sup>25</sup>

This Declaration recognised in Article 5 that:

“The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied and take into account the culture, needs and opportunities of the community.”

## RIGHT TO EQUALITY AND PROTECTION FROM NON-DISCRIMINATION

### 6.1.8. International Convention on the Elimination of All Forms of Racial Discrimination (1965)<sup>26</sup>

This seminal Convention on racial discrimination defines such as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Article 4 of the Convention provides that:

“States 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, or which attempt 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, ... *Inter alia*:

- (a) Shall declare an offense punishable by law 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 racist activities, including the financing thereof; ...
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

Article 5 imposes an obligation on States Parties to “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (e) Economic, social and cultural rights, in particular: ...
- (v) The right to education and training:...”

<sup>25</sup> Adopted by the World Conference on Education for All – Meeting Basic Learning Needs, Jomtien, Thailand, 5-6 March 1990.

<sup>26</sup> 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> (accessed 18 June 2013).

Article 7 provides that:

“States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups...”

South Africa has both signed and ratified this Convention, and it is therefore directly binding on the State and all State institutions.

#### **6.1.9. UNESCO Declaration on Race and Racial Prejudice (1978)<sup>27</sup>**

Article 5(2) of the Declaration imposes a responsibility on:

“States, in accordance with their constitutional principles and procedures, as well as all other competent authorities and the entire teaching profession ... to see that the educational resources of all countries are used to combat racism, more especially by ensuring that curricula and textbooks include scientific and ethical considerations concerning human unity and diversity and that no invidious distinctions are made with regard to any people; by training teachers to achieve these ends; ...”

### **CHILDREN’S RIGHTS**

#### **6.1.10. Declaration of the Rights of the Child (1959)<sup>28</sup>**

Principle 7 of this Declaration states that:

“The child is entitled to receive education ... which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance...”

#### **6.1.11. Convention on the Rights of the Child (1989)<sup>29</sup>**

This Convention comprehensively sets out the rights pertaining to children. Article 2(1) of the Convention imposes an obligation on States Parties to “respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.

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<sup>27</sup> Adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization as its twentieth session, 27 November 1878.

<sup>28</sup> Adopted by United Nations General Assembly Resolution 1386 of 10 December 1959.

<sup>29</sup> 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 18 June 2013].

Article 3 provides that:

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

Article 28 of the Convention outlines the right of the child to education, while Article 29(1) compels States Parties to ensure that the education of the child be directed towards:

- “(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living ...;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;...”

South Africa both signed and ratified this Convention in 1995, and thus its provision are binding and have been relied upon by our courts in adjudicating matters which implicated children’s rights.

## 6.2. Regional instruments

### 6.2.1. The African Charter on Human and People’s Rights (1982)<sup>30</sup>

Article 2 of the Charter underlines that the rights enshrined therein may be invoked without discrimination, providing that individuals are entitled to those rights “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”.

Article 17(1) of the Charter then provides that “[e]very individual shall have the right to education”. Article 25 states that:

“State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.”

South Africa has both signed and ratified the Charter, and it is therefore directly binding on the State and all State institutions.

<sup>30</sup> 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 18 June 2013].

### 6.2.2. African Charter on the Rights and Welfare of the Child (1990)<sup>31</sup>

Article 2 of the Children's Charter provides that:

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

Article 4 recognises the importance of the principle of the 'best interests of the child', stating that:

“1. In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.”

Article 11 comprehensively sets out the nature and content of the child's right to education in a similar manner to the Convention on the Rights of the Child, which education is to be directed towards, *inter alia*:

“(2)(b) fostering respect the human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions; ...”

South Africa has both signed and ratified the Children's Charter, and it is therefore directly binding on the State and all State institutions.

### 6.3. Constitutional framework

The preliminary assessment of the Free State Provincial Office indicated that the rights alleged to have been violated are sections 9 (the right to equality and protection from discrimination), 10 (the right to inherent human dignity), 28 (rights of the child) and 29 (the right to education) of the Constitution of the Republic of South Africa, 1996. Each of these rights is discussed hereunder, in turn.

#### 6.3.1. Constitution s1(a) - Foundational values

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

#### 6.3.2. Constitution s7(2) - Obligation on the State

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

#### 6.3.3. Constitution s9 - The right to equality and protection from Discrimination

Section 9(1) enshrines the right to equality of the citizens, while s 9(2) gives content to that right by providing that “[e]quality includes the full and equal enjoyment of all rights and freedoms”.

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<sup>31</sup> 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> [accessed 18 June 2013].

Section 9(3) states that:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Further, section 9(5) recognises that “[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

#### **6.3.4. Constitution s10 – The right to human dignity**

Section 10 recognises the right of everyone to have their inherent dignity respected and protected. A lack of education deprives one of the opportunity for self-fulfillment, and is therefore inherently degrading and undermines one’s human dignity.

#### **6.3.5. Constitution s 28 – The rights of the child**

Section 28(1) comprehensively outlines the rights of the child, including the s 28(1)(d) right to be protected from maltreatment, neglect, abuse or degradation while s 28(2) provides that:

“A child’s best interests are of paramount importance in every matter concerning the child”

#### **6.3.6. Constitution s 29 – The right to education**

Section 29(1) enshrines the right to a basic education for all.

### **6.4. Applicable legislative framework**

#### **6.4.1. National Education Policy Act 27 of 1996**

This Act empowers the Minister of Education to determine national policy for education, encompassing education as schools. The Preamble states that the Act seeks to:

“[F]acilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights.”

Section 4(b) of the Act provides that national education policy should be directed towards “enabling the education system to contribute to the full personal development of each learner and to the moral, social, cultural, political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes”.

#### **6.4.2. South African Schools Act, 84 of 1996**

This Act seeks to establish uniformity throughout schooling in South Africa and eradicate the remnants of the apartheid-era schooling system and the discriminatory policies thereof. The Act sets a uniform standard for public schools, encompassing their governance, curricula, funding and organisation.

Of particular relevance to this complaint is s60 of the Act, which outlines the liability of the State for any damage or loss caused in connection with educational activities performed by a public school.

#### **6.4.3. Employment of Educators Act 76 of 1998**

This Act governs the relationship between an educator – including teachers at public schools – and their employer. Section 18 of the Act defines *misconduct* as including the failure to comply with this Act or any other statute, regulation or legal obligation relating to education; and unfairly discriminates against other persons on the basis of race or other grounds prohibited in the Constitution. Such misconduct renders the educator subject to disciplinary proceedings. If the educator is found guilty of misconduct, s18(3) stipulates the various sanctions which may be imposed.

#### **6.4.4. Free State School Education Act, 2 of 2000**

This Act is of particular relevance to this claim, which arose within the Free State province and thus within the jurisdiction of this Act. The Act aims to “provide for a uniform system for the provision and control of school education in the Province”.

#### **6.4.5. South African Council for Educators Act, 31 of 2000**

This Act provides the governing framework for the South African Council for Educators, which is the statutory professional body responsible for teachers, including teachers at public schools. One of the aims of the Act (section 2) is “to set, maintain and protect ethical and professional standards for educators”.

Among other stipulations, section 21 compels educators to register with the Council before taking up any teaching position. Such registration renders the educator subject to the Council’s code of professional ethics, compiled pursuant to section 5(c) of the Act.

#### **6.4.6. Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA) Act 4 of 2000**

This Act seeks to give effect to the Constitution’s equality clause, and defines *discrimination* as “any act or omission ... 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”. Those *prohibited grounds* include race, ethnic or social origin, colour and culture, as well as any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner.

Section 7 of the Act prohibits unfair discrimination on the specific ground of race, which conduct includes:

“[T]he dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person ...”



One of the purposes of the PEPUDA is to “prevent and prohibit hate speech”. Furthermore, it “endeavours to facilitate the transition to a democratic society, united in its diversity ... and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom:.. In particular, section 10(1) provides that:

“[N]o person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

- (a) Be hurtful;
- (b) Be harmful or to incite harm;
- (c) To promote or propagate hatred.”

Moreover, s 12 of the Act reads as follows:

“No person may-

- (a) Disseminate or broadcast any information
- (b) Publish or display any advertisement or notice,

That could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person ...”

#### **6.4.7. Children’s Act, 38 of 2005**

This Act comprehensively provides for all the rights of children in South Africa, and is consistent with the international instruments discussed above as well as the overriding principle of the *best interests of the child* (sections 7 and 9 of the Act).

### **6.5. Applicable policy framework**

#### **6.5.1. White Paper on Education and Training (1995)<sup>32</sup>**

This Framework outlines the “priorities, values and principles for the education and training system” in the new constitutional dispensation. The Framework is aimed at effecting:

“New education and training policies to address the legacies of underdevelopment and inequitable development and provide learning opportunities for all [which] will be based principally on the constitutional guarantees of equal educational rights for all persons and non-discrimination, and their formulation and implementation must also scrupulously observe all other constitutional guarantees and protections which apply to education.”

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<sup>32</sup> Department of Education, Notice 196 of 1995.

The values of education and training policy stipulated in the Framework include that

- i “Education and training are basic human rights. The state has an obligation to protect and advance these rights, so that all citizens irrespective of race, class, gender, creed or age, have the opportunity to develop their capacities and potential, and make their full contribution to the society;
- ii. The realisation of democracy, liberty, equality, justice and peace are necessary conditions for the full pursuit and enjoyment of lifelong learning. It should be a goal of education and training policy to enable a democratic, free, equal, just and peaceful society to take root and prosper in our land, on the basis that all South Africans without exception share the same inalienable rights, equal citizenship, and common national destiny, and that all forms of bias (especially racial, ethnic and gender) are dehumanising.”

The Framework recognises that giving effect to these values will require “the active encouragement of mutual respect for our people diverse religious, cultural and language traditions, their right to enjoy and practice these in peace and without hindrance, and the recognition that these are a source of strength for their own communities and the unity of the nation”.

The Framework also outlines the content of the right to education as contained in s 32 of the Interim Constitution, 1993.

#### **6.5.2. Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (1998)<sup>33</sup>**

While aimed at guiding governing bodies of schools in their adoption of a code of conduct for learners, this Framework nevertheless outlines the environment and culture that the Department of Education seeks to establish in schools, and is therefore relevant to this claim.

In particular, guideline 2.3. directs that codes of conduct should be aimed at fostering “a culture of reconciliation, teaching, learning and mutual respect and the establishment of a culture of tolerance and peace in all schools”. Moreover, guideline 4 outlines the principles and values to be taken into account when drafting codes of conduct, which broadly reflect those values underlining the Constitution’s Bill of Rights. Specifically, guideline 4.2. states that:

“No person may unfairly discriminate against a learner. All learners shall enjoy equal treatment before the law and shall receive equal protection and benefits of the law.”

#### **6.5.3. Norms and Standards for Educators (2000)<sup>34</sup>**

The Framework, published in terms of the National Education Policy Act 27 of 1996, outlines the norms and standards pertaining to all educators, including teachers at public schools.

The Framework identifies “seven roles and associated competence for educators

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<sup>33</sup> Department of Education, Notice 776, published in *Government Gazette* 189000 of 15 May 1998.

<sup>34</sup> Department of Education, published in *Government Gazette* 20844 of 4 February 2000.

[which] are in effect the norms for educator development and therefore the central feature of all initial educator qualifications”. One such role is that pertaining to community, citizenship and pastoral duties, in terms of which:

“The educator will practice and promote a critical, committed and ethical attitude towards developing a sense of respect and responsibility towards others. The educator will uphold the constitution and promote democratic values and practices in schools and society. Within the school, the educator will demonstrate an ability to develop a supportive and empowering environment for the learner and respond to the educational and other needs of learners and fellow educators.”

#### **6.5.4. Policy on Whole School Evaluation (2001)<sup>35</sup>**

This Framework, published in terms of the National Education Policy Act, 27 of 1996, aims to ensure that schools are effectively monitored and evaluated so as to improve the quality and performance standards thereof.

#### **6.5.5. National Policy Framework for Teacher Education and Development in South Africa (2006)<sup>36</sup>**

This Framework, published in terms of the National Education Policy Act, 27 of 1996, seeks to improve the overall quality of teaching throughout South Africa, from teacher education through to continuing professional education. In this way, all activities relating to teacher training can be made uniform.

One way in which the Framework seeks to ensure an improvement in the quality of teaching is by requiring that all teachers registered with the South African Council of Educators earn a specific number of professional development points over a three year period.

### **6.6. Applicable sector codes**

#### **6.6.1. South African Council for Educators Code of Professional Ethics**

This Code, drafted pursuant to s 5(c) of the South African Council for Educators Act 31 of 2000, governs the conduct of all educators registered with the South African Council for Educators (“SACE”).

Section 2(3) of the Code provides that educators registered with the SACE “acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa”.

Section 3 then stipulates that an educator “[respect] the dignity, beliefs and constitutional rights of learners and in particular children” and further “[strive] to enable learners to develop a set of values consistent with the fundamental rights contained in the Constitution of South Africa”.

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<sup>35</sup> Department of Education, published in *Government Gazette* 22512 of 26 July 2001.

<sup>36</sup> Department of Education, published in *Government Gazette* 29832 of 26 April 2007.

## 6.7. Relevant case law

### 6.7.1. International case law

#### EUROPEAN COURT OF HUMAN RIGHTS

This regional human rights court has developed a sound and comprehensive hate speech jurisprudence with a flexible, context based approach which seeks to balance the protection of the right to freedom of expression with the other individual rights such as the rights to dignity, equality, religion and culture.

In *Jerslid v Denmark*,<sup>37</sup> the Court outlined its approach to the determination of whether speech constitutes hate speech. In particular, it was held that the fundamental question is whether the speech was made with the intention to disseminate racist ideas through such speech. It was held that intention is determined by an objective enquiry, looking at the overall context in which the speech was made.

In subsequent jurisprudence the Court has identified various factors external to the speech itself which are to be considered in determining the ‘context’ in which that speech was communicated, including:

- (i) Whether the political landscape was particularly sensitive at the time the speech was communicated. This would have contributed to the creation of a tense environment and thus make the existence of an intention to incite harm more likely;<sup>38</sup> and
- (ii) The particular historical context of the region in which the speech was communicated, which would determine how the ‘ordinary reasonable person’ would understand and respond to that speech.<sup>39</sup>

### 6.7.2. Foreign case law

#### UNITED STATES OF AMERICA

##### ***Brown v Board of Education, 347 U.S. 483 (1954)***

In this seminal judgment of the United States Supreme Court in which the policy of ‘separate but equal’ education along racial lines was deemed unconstitutional for being “inherently unequal”, a unanimous Court, per Chief Justice Warren, noted that:

“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to

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<sup>37</sup> *Jerslid v Denmark*, 23 September 1994, Appl. No 158890/89.

<sup>38</sup> *Zana, Yalciner and Incal v Turkey*, 27 November 1997, Appl. No 1894/91

<sup>39</sup> *Vajani v Hungary*, 8 July 2008, Appl. No 33629/06 at 4.

adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

It is, however, notable that in the later case of *San Antonio Independent School District v Rodriguez* 411 U.S. 1, 29-39 (1973), the same court refused to recognise a national right to education as derived from the American Constitution.

## **CANADA**

### ***R. v. Keegstra* [1990] 3 S.C.R. 697**

A High School teacher who had communicated anti-semitic statements to his students was charged with the criminal offence of unlawfully promoting hatred. He then challenged the constitutionality of that criminal provision on the basis of the constitutional right to freedom of expression.

On appeal to the Canadian Supreme Court, Dickson CJ held that communications which promote hatred against a particular group of persons are generally protected by freedom of expression provisions, however this protection needs to be balanced against the protection of equality and the right to non-discrimination. For this reason, the hate speech provisions which limit the right to freedom of expression are reasonable, and thus constitutional.<sup>40</sup>

### ***Ross v New Brunswick School District No. 15*, [1996] 1 S.C.R. 825**

In this matter, a Jewish resident of Montcon, Canada filed a complaint with the regional Human Rights Commission against Malcolm Ross, a mathematics teacher at his children’s school the complaint alleged that certain publications and statements by Ross were anti-semitic and racist and had thereby poisoned the school environment in which he taught, despite a lack of evidence to show that Ross had propagated which views in the classroom itself. The complaint was also against the School Board, on the basis that their continued employment of Ross amounted to condoning his allegedly racist views.

The complaint was initially heard by the Human Rights Commission’s Board of Inquiry, which held that:

“Education of students must be viewed in the broad context of including not only the formal curriculum but the more informal aspects of education that come through interchange and participation in the whole school environment. This would be in keeping with the broad purposive approach taken to the interpretation of human rights legislation... Section 5 attempts to create a learning environment which is as free from discriminatory effects as is reasonably possible given the influence of factors beyond the control of those administering the educational system.”<sup>41</sup>

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<sup>40</sup> At 755-758.

<sup>41</sup> *Attis v. New Brunswick School District No. 15*(1992), 15 C.H.R.R.D/339 (N.B.Bd. inq.) at D/353-54

The Board of Inquiry upheld the complaint against Ross, and held the School Board liable for Ross' utterances. On appeal, the Supreme Court of Canada noted that:

“A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate...Teachers are inextricably linked to the integrity of the school system.

Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions ... By their conduct, teachers as “medium” must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond.

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system.<sup>42</sup>

It is notable that the Supreme Court's order that Ross be removed from his teaching position was upheld by the United Nations Human Rights Committee, which found that Ross' rights under the International Covenant of Civil and Political Rights – particularly the right to freedom of expression – had not been violated.<sup>43</sup>

***Director of Child and Family Service v D.M.P. (MBQC, 2002, no. 32; MCJ, 2010, no. 37)***

In this case, the principle of the ‘best interests of the child’ was invoked in a matter in which the child's parents were blatantly racist and had instilled in her racist notions and tendencies towards violence against minorities.

**6.7.3. Domestic case law**

**RIGHT TO HUMAN DIGNITY**

***S v Makwanyane and Another 1995 (3) SA 391 (CC)***

In this seminal case the Constitutional Court, when dealing with the constitutionality of the death penalty, observed as follows”

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

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<sup>42</sup> Paras 42-45.

<sup>43</sup> UN Human Rights Committee Communication No. 736/1997.

and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.<sup>44</sup>

***NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)***

In this matter, dealing with an alleged violation of the claimants' dignity, the Constitutional Court held that "[a] constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights in cannot by 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".<sup>45</sup>

The Court held further that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. In this regard, reference was made to the following dictum from the matter of *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* 2000 (3) SA 936 (CC) para 35:

"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 clear that dignity is not only a value that is fundamental to our constitution, it is a justiciable and enforceable right that must be respected and protected."

**RIGHT TO EQUALITY AND PROTECTION FROM NON-DISCRIMINATION**

***President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC)***

In one of the first judgments by the Constitutional Court which addressed issues of discrimination in light of (the precursor to) s 9 of the Constitution,

Goldstone J noted that:

"The prohibition on unfair discrimination ... seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society

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<sup>44</sup> Para 329.

<sup>45</sup> Para 49.

in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked.<sup>46</sup>

***Prinsloo v van der Linde and Another 1997 (3) SA 1012 (CC)***

In this matter, the Constitutional Court reasoned that ‘discrimination’ should be understood in the context of South Africa’s history of segregation and apartheid. In particular: “Given the history of this country we are of the view that ‘discrimination’ has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied.

They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.<sup>47</sup>

**SCOPE AND APPLICATION OF THE PROHIBITION OF HATE SPEECH**

***Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)***

In addressing the purpose and nature of the prohibition of hate speech in light of the constitutional guarantee of freedom of expression, the Constitutional Court noted that:

“The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares that South Africa is founded on the values of ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’. Thus, open and democratic societies permit reasonable proscription of activities and expressions that pose a real and substantial threat to such values and to the constitutional order itself ... There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity ... Determining its parameters in any given case is therefore important, particularly where its exercise might intersect with other interest...<sup>48</sup>

**RIGHTS OF THE CHILD AND THE PRINCIPLE OF THE ‘BEST INTERESTS OF THE CHILD’**

Our courts have continuously reiterated the primacy of the principle of the ‘best interests of the child’ in all matters involving children.

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<sup>46</sup> Para 41.

<sup>47</sup> Para 31.

<sup>48</sup> Para 29-30.



**Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC)**

In this matter the Constitutional Court explained the nature and scope of the principle of the 'best interests of the child', stating that:

“Section 28(1) is no exhaustive of children’s rights. Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1).”<sup>49</sup>

**De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others 2004 (1) SA 406 (CC)**

In this case the Constitutional Court was asked to balance the appellant’s right to freedom of expression against the principle of the 'best interests of the child'. The Court held that a limitation on freedom of expression which served to preserve the dignity of a child was constitutional, and therefore the principle of the 'best interests of the child' prevailed.

**M v S (Centre for Child Law Amicus Curiae) 2007 (12) BCLR 1312 (CC)**

A primary issue which arose in this matter was the extent to which the principle of the 'best interests of the child' was to be taken into consideration when sentencing a child’s primary caregiver. Sachs J comprehensively outlined the paramount nature of that principle in all cases involving children, which is consistent with South Africa’s international obligations. In particular, it was noted that:

“The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children’s rights.”<sup>50</sup>

Moreover, the Court acknowledged that “[e]very child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.”<sup>51</sup>

In particular, the standard imposed by the paramountcy of this principle “should be flexible as individual circumstances will determine which factors secure the best interests of a particular child ... A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved.”<sup>52</sup>

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<sup>49</sup> Para 17.

<sup>50</sup> Para 15.

<sup>51</sup> Para 18.

<sup>52</sup> Para 24.

## RIGHT TO EDUCATION

It is highly significant that no South African court has yet pronounced on the exact nature, content and scope of the right to education contained in s 29 of the Constitution. Nevertheless, in various cases concerning peripheral issues related to education and the education system in South Africa, our courts have given some indication of the considerations to be taken into account when adjudicating matters that implicate the right to education.

### ***Christian Education South Africa v Minister for Education 2000 (4) SA 757 (CC)***

In a case in which a group of Christian parents argued that it was their constitutional right, in terms of the protection of freedom of religion, to have their children sanctioned at religiously-exclusive schools in the manner they deemed fit (namely through corporal punishment), the Constitutional Court noted the significance of the principle of the 'best interests of the child' in all matters involving children.<sup>53</sup> The Court then acknowledged the responsibility which rests on the State to "[protect] pupils from degradation and indignity" within the school environment.<sup>54</sup>

### ***Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA)***

This matter involved an adjudication of the constitutionality of a policy relating to the rights of asylum seekers in South Africa to work and study pending the determination of their application for asylum. The Supreme Court of Appeal noted that:

"The freedom to study is ... inherent in human dignity for without it a person is deprived of the potential for human fulfillment."<sup>55</sup>

It was therefore held that a general prohibition that denies asylum seekers the right to study, without taking into account the particular circumstances of each applicant, is unlawful.

### ***MEC for Education, Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC)***

In this matter in which the Constitutional Court addressed issues of discrimination based on religious and/or cultural practices at school, the Court noted that:

"Teaching the constitutional values of equality and diversity forms an important part of education. This approach not only teaches and promotes the rights and values enshrined in the Constitution, it also treats the learners as sensitive and autonomous people."<sup>56</sup>

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<sup>53</sup> Para 41.

<sup>54</sup> Para 43.

<sup>55</sup> Para 36.

<sup>56</sup> Para 104.

***Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another As Amicus Curiae) 2011 (8) BCLR 761 (CC)***

In a recent case in which the Constitutional Court was called upon to determine the constitutionality of an eviction order granted against a public school situated on private property in light of the right to education, Nkabinde J noted that:

“Unlike some of the other socio-economic rights, [the right to education] is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.<sup>57</sup>

The Court held further that:

“[t]he significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked ... Indeed, basic education is an important socio-economic right directed, among other things, at promoting an developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities...<sup>58</sup>

## **7. Analytical Framework**

In analysing this complaint, the Commission considered the following considerations and guidelines for the interpretation of the rights implicated.

### **7.1. The State’s duty to respect, protect, promote and fulfill the fundamental values of the Constitution**

In adjudicating a complaint that implicates rights in the Bill of Rights, the general principles of the interpretation of statutes, in particular Constitution section 39(2) which requires that the “spirit, purport and objects of the Bill of Rights” – and thus and fundamental values of dignity, freedom and equality – be promoted when interpreting any legislation must be taken into account. In this regard, it is significant that adequate education is essential to the promotion, exercise and protection of these core constitutional values.

### **7.2. The duty to consider foreign and international law**

Section 39(1) of the Constitution provides that a court, tribunal or forum *must* consider international law and *may* consider foreign law when interpreting the Bill of Rights. Similarly, s 233 of the Constitution instructs our courts to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law” when interpreting legislation. In addition, Constitution s 231(2) requires that the court testing the constitutionality of a

<sup>57</sup> 57 Para 37.

<sup>58</sup> Paras 42-43.

legislative provision do so in compliance with the international agreements which South Africa has enacted into legislation. It is submitted that these stipulates similarly bind the Commission in its adjudication of a complaint which implicates rights contained in the Bill of Rights.

## 8. Analysis

- 8.1. The First Respondent's teaching and maintenance personnel are alleged to have violated the right to equality, human dignity, education and the rights of the child of the learners by referring to them as '*kaffirs*', '*monkeys*', '*baboons*', '*gemors*' and '*black bitches*'.

### THE RIGHT TO EQUALITY

- 8.2. The right to equality is central to the South African Constitutional framework.
- 8.3. Section 1 of the Constitution lists the 'achievement of equality' and 'non-racialism and non-sexism' among the foundational values of our constitutional democracy.
- 8.4. Schools, as microcosms of the society at large, are challenged to transcend institutional and educational racism.
- 8.5. The Constitution specifically requires the enactment of legislation to prevent or prohibit unfair discrimination.
- 8.6. This legislation has taken the form of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act)

### SECTION 10 - THE EQUALITY ACT

- 8.7. In determining whether the conduct in question constitutes hate speech in terms of section 10(1) of the Equality Act, the starting point would be to examine whether these two requirements are implicated:
- (a) The publication, propagation, advocating or communication of words based on a prohibited ground; and
  - (b) That could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred is prohibited.
- 8.8. The following analysis must be undertaken before speech can constitute hate speech:
- (a) Whether there has been communication of words from one person to another;
  - (b) Whether the communication is based on one or more of the prohibited grounds; and
  - (c) Whether the words could reasonably be construed to demonstrate a clear intention to hurt, harm or promote or propagate hatred.
- 8.9. The investigation undertaken by the Commission revealed that there has indeed been a communication of words by the First Respondent teaching and maintenance personnel to the learners. Their words were directed towards learners.
- 8.10. In examining whether or not the conduct complained of falls within the ambit of the Act the following facts pertinent to this complaint were taken into consideration:
- (a) The conduct complained of was against black and coloured learners.
  - (b) The issue of race was accordingly present in this case.

- (c) The referral to a human being as a 'baboon', 'monkey', 'black bitch', 'gemors' or 'kaffir' could reasonably be construed to undermined his human dignity and constitute hate speech.
- (d) The conduct complained of accordingly fails within the ambit of the definition of prohibited ground of race.
- 8.11. The words uttered were further based on one or more of the "prohibited grounds". In this instance the reference to "kaffir" is *inter alia* a derogatory term for black South Africans and it therefore refers to the race, ethnic or social origin, and culture.
- 8.12. "Prohibited grounds" include race, ethnic or social origin, culture, and any other ground as defined in part b of the definition.<sup>59</sup>
- 8.13. Section 10 does not require the utterer of the words to have any intention but it requires an enquiry into whether the words could reasonably be construed to demonstrate a clear intention. The context and the surrounding facts pertaining to the words, the circumstances, and the history of South Africa must be applicable to the construction that the Commission place upon the words and the effect thereof.
- 8.14. The intention with which the words are uttered is irrelevant in this instance as the provision does not require a finding that the utterer was actuated by hatred in order to constitute a contravention of section 10(1) of the Equality Act.
- 8.15. The question of the intention of the utterer of the words is to be judged from an objective perspective.
- 8.16. When judged from the perspective of a reasonable person, the Commission finds that there was a clear intent by the First Respondent to be hurtful.
- 8.17. The group that was targeted by the First Respondent personnel were black learners. The recipient community would accordingly view the use of the word "baboon" and "monkey" as hate speech. The word "kaffir" is commonly used as a disparaging term for a black person.
- 8.18. The concerning aspect for the Commission is the effect these utterances had on the learners.
- 8.19. In *Afriforum and Another v Malema 2010 (5) SA 235 (GNP)* Bertelsmann J held that the true yardstick of hate speech is neither the historical significance thereof nor the context in which the words are uttered, but the effect of the words, objectively considered, upon those directly affected and targeted thereby.
- The words 'shoot the farmer/Boer' as they appear in a popular 'struggle' song are experienced as a threat by a large number of South Africans, and, seen in the light of the definition of 'hate speech' in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, constitutes such speech.
- 8.20. Hate speech is not subject to a determination of fairness and in this instance the First Respondent personnel cannot use the defence that the words were uttered in a joking manner. This would be trivializing racism.
- 8.21. In *Strydom v Chiloane 2008 (2) SA 247* at 251 Hartzenberg J held that paragraph 13, "In *Manope v Asmal and Another 1997 (4) SA 277(7)* at page 286 J - 287 A, the view was

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<sup>59</sup> Section 1 of the Equality Act

expressed that if a person is called a baboon, when severely criticized, the purpose is to indicate that he is base and of extremely low intelligence. It was also stated that it can be inferred from the use of the word, in the circumstances, that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It follows that the person described as a baboon in those circumstances may rightfully perceive them to be hurtful”

- 8.22. In the present matter, it can be inferred from the use of the word that the learners are of subhuman intelligence and not worthy of being described as a human beings by the First Respondent personnel. The word has racist overtones.
- 8.23. Racist hate speech defies the constitutional ideals of dignity and equality and serves no legitimate constitutional purpose.
- 8.24. The meaning of the words uttered, taken literally and historically leaves the Commission with the conclusion that they are racist.
- 8.25. The use of the word “baboon” or “monkeys” by the First Respondent personnel has racist meaning particularly when it’s used against black learners. In the judgment of the Labour Appeal Court in *Lebowa Platinum Mines Ltd v Hill and Others*,<sup>60</sup> it was stated that the can be no real dispute as to the racist meaning embedded in the word “bobbejaan” when used against a black person in South Africa.
- 8.26. In *Strydom v Chiloane 2008 (2) SA 247* at 251 Hartzenberg J held, “I accept, that when the words were uttered, by the Appellant, a white man, of and concerning the respondent, a black man, they had a racial connotation and a discriminatory import.

#### **THE RIGHT TO HUMAN DIGNITY**

- 8.27. Prejudice is borne of the belief in the inferiority of persons or a group of persons and amounts as such, to an indignity.
- 8.28. In the present matter, to determine whether the dignity of the learners was harmed, the question that should be asked is whether the conduct or words uttered harmed their dignity in that
  - (a) It was based on prejudice or stereotype;
  - (b) perpetuates oppressive power relations; or
  - (c) in conjunction with (a) and (b), diminishes the feelings of self-worth of the learners.
- 8.29. It is clear from the information gleaned from the investigation that learners were intimidated by the First Respondent personnel and the racial utterances attributed to him were directed solely to black and coloured learners.
- 8.30. Learners interviewed including the Complainant’s children indicated that their feelings were hurt by disparaging words and demeaning remarks that the First Respondent personnel would often make in the classroom.
- 8.31. By using racial slurs, the First Respondent personnel undermined the fundamental dignity of learners and perpetuated views of racial superiority and inferiority that stem from the past.

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<sup>60</sup> (1998) 7 BLLR 666 (LAC)

- 8.32. Zondo JP in *Crown Chickens (Pty) Ltd t/a/ Rocklands Poultry Farm v Kapp 2002 (2) BLLR 493 (LAC)* equated the use of racial slurs (in this matter the word ‘kaffir’ was used by the respondent with reference to a co-worker) with racial abuse (para 26) indicative of an attitude embedded in the culture of subordination and exploitation of black people (para 36). The learned Judge emphasised that such utterances and their effects are to be viewed against the background of our history of racism and racial abuse (para 39).
- 8.33. Hateful utterances cause systemic disadvantage to the targeted groups, undermine dignity and adversely affect the equal enjoyment of rights and freedoms.
- 8.34. In *Gouws v Chairperson, Public Service Commission* Revelas J held:
- “The word “Kaffir”, particularly if used by a white person referring to a black person, and if uttered directly to a black person, is possibly the most humiliating insult that can be endured by a black person. Even though I did not have the benefit of any expert evidence on this topic, I readily accept that black South Africans find this word demeaning. It directly impacts on the human dignity of black persons and has become an example of what can be termed “hate speech”.

## **THE RIGHT TO EDUCATION**

### **The connection between education and democracy**

- 8.35. It is notable that the United States Supreme Court, while declining to recognise a national right to education as derived from the American Constitution,<sup>61</sup> was nevertheless willing to acknowledge the relevance of importance of education to effective democratic participation, and thereby to democracy itself. As Berger argues,<sup>62</sup> how much more apparent is this connection in South Africa, where the Constitution necessarily and explicitly recognises the right to education.
- 8.36. In fulfilling its responsibility to educate, the State must be at pains to acknowledge the direct effect that such education will have on the future of its democracy, through either encouraging future voters towards democratic participation or dissuading them from any such active citizenship. Any system with such a significant impact upon democratic life must strive to meet standards of adequacy and fulfill the core constitutional values of dignity, equality and freedom. Racism in the classroom necessarily militates against such fulfillment.
- 8.37. In 2009 the President of the Republic of South Africa stated a number of education “non-negotiables”. One of these was that there would be no abuse of pupils by teachers. It is obviously one thing to make such pronouncements but this requires commitment by the education authorities to ensure that teachers do not engage in any form of racist conduct, humiliation or any form of physical or psychological abuse. In this regard, the Commission has noted with grave concern that the Provincial Department of Education did not take any action against the First Respondent teaching personnel and the School Principal.

### **Education as the provision of a public service**

- 8.38. Public schools are part of the public administration, and they both exercise and perform

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<sup>61</sup> 61 *San Antonio Independent School District v Rodriguez* 411 U.S. 1, 29-39 (1973).

<sup>62</sup> 62 E Berger ‘The right to education under the South African Constitution’ (2003) 103 *Columbia Law Review* 614 at 656.

statutory powers and functions relating to public education. Consequently, public schools – and the governing bodies, principals and teachers thereof – are subject to the basic values and principles governing the State generally and the public administration more specifically. This includes the duty to uphold the Constitution’s foundational values of dignity, equality and freedom, encompassing the prohibition of discrimination.

- 8.39. In terms of the 4A legal framework,<sup>63</sup> State action must ensure that education is acceptable. This requires that the content of education is non-discriminatory; is culturally appropriate; the education is of a sufficiently high quality; and the school environment is safe.
- 8.40. The Commission accepts that racism is a social problem but when it adversely affects the learning environment, it has to be curbed.
- 8.41. The Commission accordingly finds that the conduct of the First Respondent teaching personnel falls short of what is required in terms of acceptable education and does not uphold the Constitution’s foundational values of dignity, equality and freedom and had an adverse impact on the learning environment.
- 8.42. The refusal to respond to allegations made by the learners by majority of the teachers including the maintenance supervisor leaves the Commission to solely consider the evidence of the learners which was never refuted. Whether the actions of this group of teachers and the maintenance supervisor were intentional or operating at a subliminal level, the Commission finds their actions unreasonable as they were offered an opportunity to rebut the allegations.
- 8.43. The Commission has taken into consideration that Public schools are responsible for educating a diverse student population in order to better prepare citizens for active participation in our democratic society. As such, teachers should be held to a higher standard in order to ensure schools are sites where students feel safe and respected and are not subjected to discrimination, racist utterances or remarks with racial connotations.

## THE RIGHTS OF THE CHILD

- 8.44. Our constitutional order mandate special protection to be afforded to children.
- 8.45. In *Minister of Welfare and Population Development v Fitzpatrick and Others*,<sup>64</sup> the Court stated that:
- “Section 28(1) is not exhaustive of children’s rights. Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).”
- 8.46. The principle of ‘best interest of the child’ has established itself through all matters and legislation affecting the well-being out the child. It is an overarching common law principle that has been used to assist primarily South African courts and other institutions

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<sup>63</sup> The 4A legal Framework was constructed by Katarina Tamasevski, the former UN Special Rapporteur on the right to education. The Framework maps out the scope and nature of the obligations on the State to fulfill the right to education as guaranteed by international laws.

<sup>64</sup> 2000 (3) SA 422 (CC)



in the decision-making process.

8.47. In its General Comment No. 7,<sup>65</sup> the Committee stated the following:<sup>66</sup>

“The principle of the best interest applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, well-being, as well as measures to support and assist parents and others who have the day-to-day responsibility for realizing children’s rights...”

8.48. It is against this backdrop, the Commission made the ‘best interest’ consideration, the ultimate consideration when dealing with this complaint.

## 9. Findings

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

- 9.1. The racist remarks made by the staff members of the First Respondent against black and coloured learners constitute a clear incident of hate speech as defined by the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPDUDA); this act of hate speech constitutes a clear violation of both the right to equality and human dignity of the learners;
- 9.2. The First Respondent failed to create a conducive learning environment free from harmful elements such as racist utterances and demeaning remarks and this constitutes a clear violation of both the right to education and children’s right.

## 10. 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 provision of fundamental rights within the framework of the law and the Constitution.*”

In view of the findings set out in Section 9 above, the Commission recommends the following:

- 10.1. The First Respondent & Second Respondent should establish policies and guidelines which clearly articulate principles and procedures to counter racism, including clear procedures for the resolution of complaints of racism at the school within a period of twelve (12) months of the date of this finding. A copy of the policy and guidelines should be submitted to the Commission for review;
- 10.2. The First Respondent in collaboration with the Provincial Department of Education to provide curriculum and resources which challenge racist attitudes and behaviours and increase teachers and learners’ understanding of racism;
- 10.3. The First Respondent Principal is urged to create an inclusive learning environment and ensure that all members of the staff understand their rights and responsibilities in relation to racist behaviour;
- 10.4. The Free State Provincial Department of Education to develop system-wide procedures for monitoring and reporting on initiatives to counter racism in public schools within a period of eighteen (18) months of the date of this finding; and

<sup>65</sup> Committee of the Rights of the Child, General Comment No. 7, 2005 CRC/C/GC/7/Rev. 1, para.13

<sup>66</sup> (ibid.).

10.5. The Free State Provincial Department of Education to provide training programs to the school staff in valuing diversity, cross-cultural understanding and strategies to counter racism within a period of six (6) months of the date of this finding; The Department should further monitor the participation of staff in training programs designed to counter racism and provide the Commission with a report.

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 First Respondent in the Equality Court for any additional 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 receipt of this finding**, by writing to:

Private Bag X2700  
Houghton  
2041

South African Human Rights Commission



**COMPLAINT NO: Gauteng/1314/0159**

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*Complaint No: GP/1314/0159*

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Complainant

and

JOHANNESBURG SOCIETY FOR THE BLIND

Respondent

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## REPORT

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### 1. INTRODUCTION

- 1.1. The South African Human Rights Commission (“the Commission”) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).
- 1.2. The Commission is specifically mandated to:
  - 1.2.1. Promote respect for human rights;
  - 1.2.2. Promote the protection, development and attainment of human rights; and
  - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the Republic and to take steps to secure appropriate redress where human rights have been violated. The Human Rights Commission Act, 54 of 1994<sup>1</sup>(the HRCA) provides an enabling framework for the Commission to exercise its powers and to impose a mandatory duty of cooperation on both public bodies and private individuals.
- 1.4. Section 9(6) of the HRCA determines the procedure to be followed in conducting an investigation regarding an alleged violation of, or threat to, a fundamental right.
- 1.5. Chapter 3 of the Commission’s Complaints Handling Procedures (CHP), provides that the Commission has the jurisdiction, after assessing a complaint for this purpose, to conduct or cause to be conducted, on its own accord or upon receipt of a complaint, an investigation into any alleged violation of or threat to a fundamental right.

### 2. THE PARTIES

- 2.1. The Commission is acting on its own accord in this matter as is in line with its constitutional and statutory mandate. The Commission instituted investigations on its own accord after an instalment of the South African Broadcasting Corporation’s (SABC) current affairs program “Cutting Edge” came to its attention. The program instalment appeared to indicate that the Respondent had, on 2nd of May 2013, violated the rights of a group of blind students who resided on its premises.

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<sup>1</sup> The powers relied on in terms of the HRCA are materially the same as those of the Human Rights Commission Act 40 of 2013

- 2.2. The Respondent is the Johannesburg Society for the Blind, a non-profit organisation with its principle place of business at 159 North Road, Roseacre, Johannesburg, Gauteng.

### **3. BACKGROUND TO THE COMPLAINT**

- 3.1. The above-mentioned instalment of SABC's "Cutting Edge" Programme focused on seven blind students who were residents at the Respondent's premises.
- 3.2. The students alleged that they had been evicted from the premises of the Respondent. It appeared from the program that due to the evictions, the blind students had spent two nights outside the premises with no access to alternative shelter.
- 3.3. The program, over and above the allegation of eviction, carried content regarding:
  - 3.3.1. The alleged misuse of the Respondent's vehicles by the CEO and the consequent unavailability of vehicles for use by residents, impacting on residents' freedom of movement; and
  - 3.3.2. Allegedly poor quality and quantity of food served to residents.

### **4. PRELIMINARY ASSESSMENT**

- 4.1. Other issues which arose during the course of the primary investigation related to:
  - 4.1.1. The complaints handling procedures of the Respondent; and
  - 4.1.2. The exercise of the rights to assemble and protest.
- 4.2. In its preliminary assessment of the allegations raised in the program, the Commission noted that certain aspects of the allegations did not fall appropriately within its Constitutional mandate. These included aspects such as the payment of rentals, consequences of non-payment and resultant contractual breaches, such disputes being of a contractual and civil law nature.
- 4.3. With regard to the allegations raised regarding evictions and poor / inadequate food, the Commission undertook an investigation on the basis of the *prima facie* violations of fundamental human rights the Commission observed in the footage of the program.
- 4.4. With regard to the allegation that the Respondent's vehicles were misused by the CEO and therefore unavailable for use by residents, the Commission assessed records and logs provided to it and assessed control measures through interviews with management of the Respondent, staff, residents and student- residents.<sup>2</sup> Based on undisputed evidence provided to the Commission, the complaint, as far as transport was concerned, did not amount to a human rights violation. Given the circumstances, this aspect of the complaint was dispensed with at this early stage.

### **5. RIGHTS ALLEGEDLY VIOLATED**

- 5.1. From its preliminary assessment of the complaint, the Commission identified a *prima facie* violation of the following human rights, as enshrined in the Bill of Rights of the Constitution:
  - 5.1.1. Section 10 (the right to human dignity);

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<sup>2</sup> Referred to in the alternative hereafter as "students" and "student-residents".

- 5.1.2. Section 17 (the right to assembly, demonstration, picket and petition);
- 5.1.3. Section 18 (the right to freedom of association); and
- 5.1.4. Section 27 (the right to health care, food, water and social security).

## 6. METHODOLOGY

- 6.1. In evaluating this matter the Commission assessed and considered:
  - 6.1.1. Objective records provided and accepted by it, including minutes, letters recording resolutions, contracts, bank statements, travel logs and the Respondent's code of conduct;
  - 6.1.2. Information obtained through desktop research; and
  - 6.1.3. Information obtained through the conduct of an inspection *in loco* and through interviews with management, employees and residents of the Respondent.

## 7. STEPS TAKEN BY THE COMMISSION

- 7.1. The Commission received and reviewed the above mentioned program instalment.<sup>3</sup>
- 7.2. The Commission initiated an investigation consisting of an inspection *in loco*, as well as interviews with management, employees and residents of the Respondent. The Commission visited the Respondent's premises on the following occasions:
  - 7.2.1. On 9 May 2013, a delegation led by Commissioner Malatji, met with the Chief Executive Officer (CEO) of the Respondent, Ms Vangile Nyamathe, and her team;
  - 7.2.2. On 17 and 21 May 2013, staff members from the Commission's Gauteng Provincial Office (the Provincial Office) conducted follow-up interviews with the CEO and management staff as well as employees and residents of the Respondent; and
  - 7.2.3. On 7 November 2013 the Manager of the Provincial Office conducted final interviews with relevant parties.
- 7.3. For the purposes of this report, the version of events provided by the blind students, the CEO of the Respondent, staff and the South African Police Service (SAPS) are recorded in detail herein. These details are material to the Commission's consideration of the cause of the alleged violations and the assessment of probable likelihood of versions of an after-the-fact investigation.
- 7.4. The Commission requested and was provided with relevant documentation relating to the Respondent and its activities.<sup>4</sup>
- 7.5. During the above mentioned investigation the following, **undisputed information** relevant to the matter was provided:
  - 7.5.1. Regarding the **governance and operations** of the Respondent, that the Respondent's core function is to provide two types of services:

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<sup>3</sup> See paragraph 2.1. above.

<sup>4</sup> The Commission requested a copy of the latest report on the Respondent issued by the Department of Social Development in terms of the Developmental Quality Assurance (DQA) programme. Management of the Respondent however indicated that they had not been provided with such report and were therefore unable to provide the Commission with a copy.

- 7.5.1.1. It acts as a permanent residence facility for the elderly who are blind;
- 7.5.1.2. It acts as a temporary residence facility for students who are furthering their education by undertaking Further Education Training (FET) and who meet the Respondent's admission criteria.
- 7.5.2. Regarding the **funding** of the Respondent:
  - 7.5.2.1. The Respondent is partly financed through donations and the payment of rent by residents and partly subsidised by the Department of Social Development (DSD);
  - 7.5.2.2. The **DSD subsidisation** is governed by a memorandum of understanding (MOU);<sup>5</sup>
  - 7.5.2.3. In terms of the above mentioned MOU, the DSD is to make payment of a fixed amount to the Respondent in four "tranches" over a 12 (twelve) month period. No provision is however made for payment dates;<sup>6</sup>
  - 7.5.2.4. The MOU specifically provides that payment is subject *inter alia* to the availability of funds;
  - 7.5.2.5. Copies of bank statements provided to the Commission indicate that payment by DSD is not made consistently at the same time of the month, from one month to the next;
  - 7.5.2.6. Student-residents pay a **monthly rental fee**;
  - 7.5.2.7. Not all student-residents can afford this fee and management of the Respondent indicated that exceptions were made for such students once they engaged with the resident social worker and accountant about the reasons for non-payment;
  - 7.5.2.8. Student-residents who failed to pay rent or make alternative arrangements, as per paragraph 7.5.2.7 above, are served with letters of demand;<sup>7</sup> and
  - 7.5.2.9. The non-payment of rent has an impact on the Respondent's financial situation. The interviews with both management and student-residents indicated that this in turn has an effect on the quality service the Respondent is able to offer residents.
- 7.5.3. Regarding the **background** to the events aired in the program instalment:<sup>8</sup>
  - 7.5.3.1. In February 2013 student-residents were advised that they were to elect a Student Representative Council (SRC) *inter alia* to facilitate the resolution of complaints;
  - 7.5.3.2. Student-residents did in fact elect an SRC;

<sup>5</sup> A copy of the "Service Level Agreements 2013/2014" (the Agreements), referred to within the body of the Agreements as "(a) memorandum," was provided to and accepted by the Commission.

<sup>6</sup> Save for the fact that "transfer of funds shall be made available within 30 (thirty) days after signing of [the] service level agreement," the date of signature is given as the 10th of May 2013.

<sup>7</sup> The Commission was provided with copies of such letters as examples.

<sup>8</sup> See paragraph 2.1. above.

- 7.5.3.3. Some student-residents were dissatisfied with the newly elected SRC and therefore purported to, themselves, elect a “new SRC” this group of students included a certain Mr F;<sup>9</sup> and
- 7.5.3.4. Mr F was registered with the Respondent for FET training.
- 7.6. Regarding the **allegation of eviction** of student-residents featured on the programme instalment,<sup>10</sup> interviews with relevant parties revealed two distinct versions of events.
  - 7.6.1. The first view was that:
    - 7.6.1.1. Management of the Respondent, as represented by the CEO, allegedly refused to give student-residents an audience and to consider their concerns;
    - 7.6.1.2. The day after the purported election of the “new SRC” the CEO called all student-residents into a meeting in which they were advised that she had been made aware of the fact that a protest was being organised;
    - 7.6.1.3. The “new SRC” mandated its chairperson, Mr F,<sup>11</sup> to arrange a meeting with the CEO in order to raise certain concerns of the student-resident body with her;
    - 7.6.1.4. However, upon approaching the CEO, Mr F was informed that based on misconduct and his failure to disclose to the Respondent the fact that he had a tertiary education he was ordered to leave the Respondent’s premises. Mr F was further informed that his failure to disclose his tertiary education had the effect of taking away a desperately needed opportunity from other deserving candidates;
    - 7.6.1.5. The SAPS were dispatched to assist with the removal of Mr F’s clothes and other personal belongings;
    - 7.6.1.6. Student-residents engaged with the SAPS and explained the circumstances leading to Mr F’s forcible removal from the premises, where after the SAPS representative left the premises;
    - 7.6.1.7. The “new SRC” took a decision that should Mr F be evicted, they would join him as a sign of support and protest against the actions of the Respondent’s CEO;
    - 7.6.1.8. The “new SRC” consequently spent the night in the parking lot on the Respondent’s premises together with Mr F;
    - 7.6.1.9. One interviewee stated that a decision was then taken to bring their plight to the attention of the DSD, other interviewees indicated that a decision was taken to bring the matter to the attention of the media, and therefore to visit the offices of the SABC the following morning;
    - 7.6.1.10. The next morning the group was refused access to the premises to collect their walking canes from the residency premises. They were

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<sup>9</sup> Names of students referred to in this report have been withheld in the interests of their privacy rights.

<sup>10</sup> See paragraph 2.1. above.

<sup>11</sup> *Ibid* at footnote 8 above.



consequently led by one of their members, who is only partially blind, in a search for the offices of the DSD/SABC;

- 7.6.1.11. They then located the Cutting Edge program's offices and provided a Cutting Edge journalist with an account of their plight;
- 7.6.1.12. They returned to the Respondent's premises but spent the second night, outside the premises of the Respondent on the pavement;
- 7.6.1.13. A relative of one of the student-residents assisted with food and blankets;
- 7.6.1.14. A passer-by enquired from the student-residents as to their situation, and thereafter engaged with management of the Respondent;
- 7.6.1.15. Student-residents were thereafter granted entry to the premises of the Respondent; and
- 7.6.1.16. Were called to a meeting where they were addressed by the CEO who advised that she wished to reach an amicable solution to resolve the matter. However, nothing was resolved at the meeting and students were eventually allowed to return to their rooms.

7.6.2. The second view was that:

- 7.6.2.1. FET facilitators had brought to the Respondent's attention the fact that Mr F had not been attending classes;
- 7.6.2.2. Management at the Respondent engaged with Mr F in meetings in which he was:
  - 7.6.2.2.1. Cautioned regarding his behaviour;<sup>12</sup> and
  - 7.6.2.2.2. Engaged with on the issue of outstanding rental payments.
- 7.6.2.3. A further meeting between Mr F, Educators and Management of the Respondent, was held on 4 March 2013. At this meeting Mr F was verbally informed that due to his absenteeism, misconduct and non-payment of rental fees he was dismissed from the Respondent. Mr F was further informed that he had to vacate the Respondent's premises that same day - the notification was given verbally and not communicated in any other form;
- 7.6.2.4. Mr F refused to vacate the premises and SAPS Moffat View, was called to escort him off the premises;
- 7.6.2.5. Management, after consultation with the SAPS, agreed to provide Mr F with bus fare for his trip home and have a social worker escort him to the nearest bus station;
- 7.6.2.6. However, after the SAPS left, Mr F refused to leave with the social worker and the social worker therefore left him in the parking lot;
- 7.6.2.7. Mr F was then joined in solidarity by approximately 5 (five) other students;

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<sup>12</sup> Minutes of this meeting were provided to and accepted by the Commission.

- 7.6.2.8. SAPS Moffat View was again contacted to attempt to negotiate with both parties;
  - 7.6.2.9. The Respondent was later informed that the SAPS had requested that Mr F and the other students provide the contact details of their next of kin. The person whose details were provided by Mr F indicated that he was not related to Mr F, but had been his lecturer. This person further informed the SAPS that Mr F had already attained both a National Diploma as well as a BTech Degree (a higher qualification than that for which he was registered with the Respondent, see paragraph 7.5.3.4. above);
  - 7.6.2.10. The other students were invited inside at 23:00 but, they refused to enter and were therefore locked out of the buildings but within its enclosed parking area;
  - 7.6.2.11. The students left the premises early the next morning and boarded a bus, they returned later that day, accompanied by journalists, at which point they were refused entry to the premises;
  - 7.6.2.12. The SAPS were again called and the students were escorted by the SAPS to the police station;
  - 7.6.2.13. On 8 March 2013, Mr F was called for a meeting at the offices of the Respondent. The meeting was attended by representatives from the African National Congress (ANC), a representative from the Regional Office of the DSD, a representative from the local Department of Health and Social Development, Mr F and Management of the Respondent. The meeting resolved that Mr F had registered with the Respondent under false pretences and that he had never intended to study there, but had in fact registered with the Respondent in order to have a place to stay while seeking employment. Mr F was informed that, On the basis of the above, his bursary would be withdrawn with immediate effect, and that he would be given until 31 March 2013 to vacate the Respondent's premises;
  - 7.6.2.14. Mr F was given copies of a letter outlining the resolution of the meeting that took place on 8 March 2013, both in print and in Braille; and
  - 7.6.2.15. The other students featured in the broadcast have all returned to the Respondent's premises and are continuing with their education.
- 7.6.3. The independent version of captain Nkosi of SAPS Moffat View confirmed the following:
- 7.6.3.1. The SAPS Moffat View received a request for assistance from the Respondent relating to students who had refused to return to their rooms;
  - 7.6.3.2. On arrival at the Respondent's premises a number of student-residents were found in the parking area;
  - 7.6.3.3. The students were engaged with but refused to return to their rooms;

- 7.6.3.4. Information regarding the students reasons for undertaking protest action was requested;
- 7.6.3.5. Mr F, in response, indicated that he was unhappy with the Respondent's management;
- 7.6.3.6. The students were advised of alternatives available to them in order to resolve their dispute with the Respondent;
- 7.6.3.7. The students were requested to provide contact details of their next of kin;
- 7.6.3.8. Mr F was advised to refrain from influencing other students;
- 7.6.3.9. It was decided that the Respondent would organise transportation for Mr F to Park Station, from where he would board a bus that would take him home;
- 7.6.3.10. The bus ticket was to be paid for by the Respondent;
- 7.6.3.11. The Captain then left the Respondent's premises as everything appeared to be in order;
- 7.6.3.12. The following evening Captain Nkosi again responded to a call out to the Respondent's premises;
- 7.6.3.13. On arrival it appeared that the same students engaged with the previous day were on the pavement outside the Respondent's premises;
- 7.6.3.14. Upon enquiry the students advised that they had been refused entry to the Respondent's premises and had nowhere else to go;
- 7.6.3.15. The Captain offered to engage with the Respondent's management, however, the offer was refused;
- 7.6.3.16. The students were advised that the area was dangerous and that, in light of their vulnerability, that they could not be left on the sidewalk;
- 7.6.3.17. The students were rude and refused any assistance;
- 7.6.3.18. The students were removed to the Moffat View Station, where they stayed overnight; and
- 7.6.3.19. They were returned to the Respondent's premises the next morning by another police officer.

**7.7. Allegation that food served to residents was of a poor quality:**

- 7.7.1. Half the student-residents interviewed indicated that they felt that food portions were too small and that there have been instances where food served was past its sell-by date and therefore not fit for human consumption. By way of example, it was alleged, that stale bread and sour milk has in the past been served to residents.
- 7.7.2. The remaining half of the student-residents interviewed indicated that they felt that food portions are adequate and that they have never been served food that was stale.

7.7.3. Management of the Respondent, as represented by the CEO responded as follows:

7.7.3.1. That the CEO personally purchases staples on a weekly basis;

7.7.3.2. That donations are often received in the form of food and that the Respondent has no control over the quality and timing of such donations; and

7.7.3.3. That a late payment of subsidies by DSD prevents effective planning and budgeting;

7.7.4. Information relating to **meal times and portions** were provided by the Respondent and are reflected below:

<b>Breakfast 07:00</b>	Cereal / soft porridge; two slices of bread; and tea
<b>Mid-morning snack 10:00</b>	Two slices of bread; and tea.
<b>Lunch 12:30</b>	A “full meal”
<b>Supper 17:00</b>	Two slices of bread

7.7.5. The Commission’s **inspection** of the Respondent’s kitchen yielded the following:

7.7.5.1. A total of five products were found to be past their expiry date, this included porridge, cheese and frozen burger patties; and

7.7.5.2. Bread was found, due to the low temperature of the fridge in which it was stored, to be harder than an equivalent non- refrigerated fresh loaf would be.

7.7.6. The Matron in charge of the kitchen indicated as follows:

7.7.6.1. The Respondent makes use of a recommended menu plan, which is approved by a registered dietician;

7.7.6.2. On occasion however, due to financial constraints and unpredictability of donations, certain items on the menu for a specific day may be substituted with acceptable, equivalent items, example: rice may be substituted with potatoes or beef with chicken;

7.7.6.3. Non-perishables, such as rice and pasta, are purchased by the Matron on a monthly basis;

7.7.6.4. All staff that live on the Respondent’s premises, including the Matron herself, eat from the same kitchen as the residents;

7.7.6.5. The Matron has never personally received any direct complaints from anyone about the food, nor has she ever been made aware of any such complaints;

7.7.6.6. In answer to a question about the serving of soured milk the Matron indicated that only long-life milk is purchased and the souring of milk would therefore be exceptional; and

7.7.6.7. In response to questions about the freshness of bread served, the Matron indicated that bread is delivered to the Respondent three times a week and is stored in a fridge.

## 7.8. Complaints Handling Procedures:

- 7.8.1. A number of student-residents interviewed indicated that although some form of complaints handling procedures were in place, complaints took a while to be resolved. Other student-residents were satisfied with the level of complaints handling.
- 7.8.2. Management of the Respondent, as represented by the CEO responded as follows:
- 7.8.2.1. The Respondent had, at the time of the airing of the abovementioned program instalment,<sup>13</sup> both an undocumented complaints procedure and a documented set of “Boarding House Rules”;<sup>14</sup>
  - 7.8.2.2. The Boarding House Rules are, on arrival, read to new residents and they are required to sign by way of a thumb print;
  - 7.8.2.3. On further questioning however it was established that the **Boarding House Rules were not available in Braille** and students are not furnished with copies for their own reference;
  - 7.8.2.4. Student-residents who have complaints are encouraged to raise these with so called “Passage Representatives”;
  - 7.8.2.5. If a matter cannot be resolved with the assistance of a Passage Representative it is then escalated by the Passage Representative to the “Residence Committee”;
  - 7.8.2.6. If a matter cannot be resolved by the Residence Committee it is escalated to senior management;
  - 7.8.2.7. Those matters not resolved by senior management are escalated to the Respondent’s board of directors, the highest level of escalation; and
  - 7.8.2.8. Management, staff, residential, student and volunteer committees are all represented at meetings of the Respondent’s board of directors, and meet monthly with their constituents.
- 7.8.3. **After the events of May 2013 and aforementioned interviews with the Commission, the Respondent developed a Code of Conduct.**<sup>15</sup> However the Commission notes in this regard that **no provision is made specifically addressing protest action.**

## 8. LEGAL FRAMEWORK

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

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<sup>13</sup> See paragraph 2.1. above.

<sup>14</sup> A copy of the boarding house rules was provided to and accepted by the Commission.

<sup>15</sup> A copy of which was provided to the Commission.

## 8.2. International Law

8.2.1. A major outcome of the International Year of Disabled Persons was the formulation of the **World Programme of Action concerning Disabled Persons (WPA)**, which programme was adopted by the UN General Assembly on 3 December 1982 (resolution 37/52)<sup>16</sup>. The WPA is a global strategy aimed at enhancing disability prevention, rehabilitation and equalization of opportunities and the full participation of persons with disabilities in social life and national development. The WPA also **emphasizes the need to approach disability from a human rights perspective**.<sup>17</sup> The rights of persons with disabilities, and specifically the rights affected in the matter under consideration are given specific protection in variety of international instruments, discussed below.

8.2.2. The formal recognition of the right to adequate food as a human right and as a part of the right to a decent standard of living was expressed by the United Nations (UN) in the **Universal Declaration of Human Rights<sup>18</sup> (UDHR)** in 1948. **Article 25** of the **UDHR** provides that:

*“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” (own emphasis).*

8.2.3. Similarly the right to an **adequate standard of living and social protection, which encompasses a right to “adequate food”** is provided for in **Article 28(1)** of the **United Nation Convention on the Rights of Persons with Disabilities (2006) (UNCRPD)**<sup>19</sup> and **Article 11(1)** of the **International Covenant on Economic, Social and Cultural Rights (ICESCR)**<sup>20</sup> **Article 11(2)** of the **ICESCR** sets the standard for “adequate food” as “freedom from hunger.”

8.2.4. **General Comment 12, 1999, of the Committee on Economic, Social and Cultural Rights (CESCR)**, interprets the right to food as the right to adequate food being realised when every man, woman and child, alone or in community with others, has the **physical and economic access at all times to adequate food, or, means for its procurement**. Further, the UN Special Rapporteur on the Right to Food’s definition extends the right to include *“regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food...”*<sup>21</sup>

<sup>16</sup> <http://www.un.org/disabilities/default.asp?id=23>.

<sup>17</sup> *Ibid.*

<sup>18</sup> Adopted 10 December 1948 UNGA Res 217 A (III).

<sup>19</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106. Ratified by South Africa in November 2007.

<sup>20</sup> Adopted 16 December 1966 (entered into force 3 January 1976) 993 UNTS 3.

<sup>21</sup> <http://www.fao.org/righttofood/about-right-to-food/en/>.

- 8.2.5. **The right to food therefore requires that food be available, accessible and adequate for everyone without discrimination at all times.** This means that **states must provide an enabling environment in which people can produce or procure adequate food for themselves and their families. However, where individuals are unable to produce or procure adequate food for themselves and their families, states must ensure access to social security.**
- 8.2.6. The rights to **freedom of expression and opinion** and **access to information** are protected in **Article 21(c)** of the **UNCRPD**, **Article 20** of the **UDHR** and **Article 21** of the **International Covenant on Civil and Political Rights**<sup>22</sup> (**ICCPR**). **Article 21(c)** of the **UNCRPD** provides as follows:

*“States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities...” (own emphasis).*

### 8.3. Regional Law

- 8.3.1. At the regional level, similar provisions to those in the international frameworks exist to protect the rights of persons with disabilities. The **Africa Decade of Disabled People (ADDP)**<sup>23</sup> (1999 - 2009) was an initiative of the non-governmental community of Africa, in cooperation with member states and governments of the Organisation of African Unity (OAU) (currently known as the African Union (AU)). The ADDP initiative was aimed at the furtherance of the equalization of opportunities for persons with disabilities. The **Continental Plan of Action** that flowed out of that initiative is aimed at implementing priority activities relating to disability. Some of the objectives of the Plan of Action include the formulation and implementation of national policies, **the creation of programmes and legislation to promote the full and equal participation of persons with disabilities, enhancing support services for disabled persons and the promotion and protection of disability rights as human rights.**<sup>24</sup>

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<sup>22</sup> Adopted 16 December 1966, (entered into force 23 March 1976) 999 UNTS 171.

<sup>23</sup> The goal of the African Decade of Persons with Disabilities is the full participation, equality and empowerment of people with disabilities in Africa.

<sup>24</sup> <http://www.africa-union.org/child/Decade%20Plan%20of%20Action%20-Final.pdf>.

- 8.3.2. The **right to assemble and protest** is protected in the **African Charter on Human and Peoples' Rights**<sup>25</sup> (**African Charter**) in **Article 11**, which provides as follows:

*“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others”* (own emphasis).

- 8.4. From its commitments to international and regional frameworks, it is clear that South Africa is obliged to respect the obligations imposed by those frameworks in the interests of achieving and promoting full enjoyment of basic human rights for persons with disabilities in South Africa.

8.5. Domestic Law

- 8.5.1. The South African Constitution<sup>26</sup> is the benchmark for all legislation in South Africa. Its provisions are applicable to all persons, including juristic persons.<sup>27</sup> The values of equality, human dignity and freedom, form the basis of any constitutional analysis of the human rights protected in the Bill of Rights.<sup>28</sup> South African domestic laws and interpretation of rights therefore find form through the primary principles, as contained in the Constitution of the Republic.

- 8.5.2. The following provisions of the Constitution are relevant to the matter under consideration:

8.5.2.1. Section 9 (Equality):<sup>29</sup>

*“(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, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

...

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in subsection (3)...”<sup>30</sup>*

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<sup>25</sup> Adopted 27 June 1981, (entered into force 21 October 1986) (1982) 21 ILM 58.

<sup>26</sup> *Ibid* at footnote 1.

<sup>27</sup> Section 8 of the Constitution.

<sup>28</sup> Section 7 of the Constitution.

<sup>29</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, Act No. 4 of 2000 (PEPUDA) is a legislative measure enacted to promote the achievement of equality and to prevent unfair discrimination. The Commission has not considered this complaint in the context of PEPUDA, although the Respondent bears a duty to ensure the fullest possible realisation of the rights of residents, this consideration, is unnecessary for the purposes of this analysis.

<sup>30</sup> Subsection (3) reads “(t)he state may not unfairly discriminate, directly or Indirectly against anyone on one or more grounds, including ...disability...”



8.5.2.2. Section 10 (Human Dignity):

*“(1) Everyone has inherent dignity and the right to have their dignity respected and protected.”*

8.5.2.3. Section 17 (Assembly, Demonstration, Picket and Petition):

*“Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”*

8.5.2.4. Section 18 (Freedom of Association):

*“Everyone has the right to freedom of association.”*

8.5.2.5. Section 27 (Health care, Food, Water and Social Security):

*“(1) Everyone has the right to have access to -*

*(a) health care services, including reproductive health care;*

*(b) sufficient food and water; and*

*(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.*

*(2) The State must take reasonable and other legislative measures, within its available resources, to achieve the progressive realization of these rights...”*

8.5.2.6. Section 32 (Access to Information):

*“(1) Everyone has the right of access to- ...*

*(b) any information that is held by another person and that is required for the exercise or protection of any rights.*

*(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”*

8.5.2.7. Section 36(1) (The Limitations Clause):

*“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. “*

8.5.2.8. **Fundamental rights provided for in the Bill of Rights<sup>31</sup> can be limited** either in terms of the provisions of section 36 of the Constitution or where a limitation is created internally by the wording of the right itself. The rights contained in section 27 of the Constitution have such internal limitations, as is evidenced by the use of the word “progressive”.

8.5.3. In terms of the **Non Profit Organisations Act**,<sup>32</sup> a non profit organisation (NPO) is described as:

*“a trust, company or other association of person*

*(a) established for a public purpose; and*

*(b) the income and property of which may be not distributable to its members or office-bearers except as reasonable compensation for services rendered. “*

8.5.4. NPO’s are private, non-governmental organisations with self governing boards accountable to their owners or members. NPO’s also need to account to their donors and to the general public since they operate in the public interest. NPO’s do not form part of the state or government, although donors may include government departments.

8.5.5. Like other juristic persons, **NPOs have to adhere to domestic legislative frameworks and, importantly, have to comply with the provisions and founding principles of the Constitution.**

8.5.6. **The Regulation of Gatherings Act**<sup>33</sup> (the RGA), is the national legislation enacted to provide for and regulate the exercise of the rights to assembly, demonstration, picket and petition and freedom of association.<sup>34</sup> The Preamble to the RGA provides that:

*“every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so... the exercise of such right shall take place peacefully and with due regard to the rights of others” (own emphasis).*

8.5.7. The RGA distinguishes between “demonstrations” and “gatherings”; “demonstrations” are defined as consisting of 15 (fifteen) or fewer persons and “gatherings” as consisting of more than 15 (fifteen) persons.<sup>35</sup> The RGA places far fewer and less onerous limitations on demonstrations than on gatherings, requiring for instance, that notification of a gathering be given to the relevant authority.<sup>36</sup>

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<sup>31</sup> Chapter 2 of the Constitution.

<sup>32</sup> Act 71 of 1997.

<sup>33</sup> Act 205 of 1993

<sup>34</sup> Contained In sections 17 and 18 of the Constitution

<sup>35</sup> S1 (xi) and (v) of the Act

<sup>36</sup> Section 2 of the Act

8.5.8. The **Promotion of Access to Information Act<sup>37</sup> (PAIA)** is a legislative measure enacted to enable **full protection all rights, through the protection of the right of access to information.** Although PAIA specifically makes provision for the process for requesting information, the preamble of the Act provides more generally for the **fostering of a culture among public and private bodies of automatic information sharing to give effect to this right.**

## 8.6. National Jurisprudence

8.6.1. In **S v Mamabolo<sup>38</sup>** the court held that the:

*“freedom to speak one’s mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation...”<sup>39</sup>*

8.6.2. In **S v Turrell<sup>40</sup>** the court held that:

*“[f]ree assembly is a most important right for it is generally only organized opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly.”<sup>41</sup>*

8.6.3. In **Satawu and Another v Garvas and Others<sup>42</sup>** the court had to consider the constitutionality of certain provisions in the Act which provided for liability for the organisers of a gathering in situations where reasonable steps were not taken to **prevent reasonably foreseeable damage.** In considering the reasonableness of the limitation the court gave recognition to the **centrality of the right to freedom of assembly** in the South African constitutional democracy, holding that:

*“It exists primarily to give a voice to the powerless... This right will in many cases, be the only mechanism available to them to express their legitimate concerns... Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms”<sup>43</sup> (own emphasis).*

The court emphasised the import of the right to assemble in the light the uniquely South African history under the apartheid regime, as well as its **“foundational relevance to the exercise and achievement of all other rights.”<sup>44</sup>**

In considering the justifiability of the limitation the court held that the Act struck an “appropriate balance”<sup>45</sup> between the purpose of the exercise of the right and the purpose of the limitation and further found there to be no less restrictive means to achieve this latter purpose. The limitation was therefore held

<sup>37</sup> 2 of 2000.

<sup>38</sup> 2001 (3) SA 409 (CC).

<sup>39</sup> Para 50.

<sup>40</sup> 1973 (1) SA 248 (C).

<sup>41</sup> Para 256.

<sup>42</sup> 2013 (1) SA 83 (CC).

<sup>43</sup> Para 61.

<sup>44</sup> Para 61.

<sup>45</sup> Para 81.

to be reasonable and justifiable in terms of the provisions of section 36 of the Constitution.

## 8.7. Key National Policies

- 8.7.1. The **Integrated National Disability Strategy (1997) (the Strategy)** refers to a wide range of strategies designed to facilitate access by people with disabilities to mechanisms which enhance their ability to live independently. Social welfare services in this respect include large institutions for people with disabilities, run either by subsidised welfare organisations, the private sector or the state.
- 8.7.2. The Strategy recognises that while these institutions provide shelter and necessary care for people who would otherwise have struggled to meet their needs, these **institutions are faced with a number of difficulties**. Also, conditions at these institutions differ considerably and many fall short of acceptable minimum standards, which results in the violation of various human rights. The Strategy further acknowledges that people with disabilities find themselves in extremely weak and vulnerable positions and that **their ability to obtain appropriate recourse is sometimes very limited**.
- 8.7.3. A pertinent recommendation contained in the Strategy<sup>46</sup> ‘relates to ‘Social Welfare and Community Development’ and specifically residential facilities. The recommendations refer to the development of national guidelines for the residential facilities for people with disabilities, including *“minimum standards and measures to ensure that the rights of people with disabilities are protected and their wishes taken into account”* (own emphasis).
- 8.7.4. Flowing from the Strategy, the aim of the **Policy Guidelines on Residential facilities for People with Disabilities (the Policy)**, is to provide basic information about the establishment and running of facilities for people with disabilities.<sup>47</sup> This includes the development of a framework for good governance and management practices in order to protect and promote the rights of people with disabilities.<sup>48</sup> Some of the principles contained in the policy include accessibility, accountability, Batho Pele, participation, individuality and human rights.
- 8.7.5. Importantly, the Policy acknowledges that there is currently **no specific legislation in place relating to people with disabilities or relating to the functioning of residential facilities for people with disabilities**. This legislative gap causes various difficulties, including those related to monitoring, compliance and securing appropriate redress.<sup>49</sup>
- 8.7.6. During 2011, **Minimum Standards on Residential facilities for Persons with Disabilities (the Minimum Standards)** were finalised and integrated into the comprehensive national policy framework on disability, aligning it with the **UNCRPD**. The Minimum Standards, which were rolled out in all provinces,<sup>50</sup> deal

<sup>46</sup> Recommendation 12b.

<sup>47</sup> Policy Guidelines on Residential Facilities for People with Disabilities, available on request from the DSD, undated, pg 6.

<sup>48</sup> *Ibid* at 8-9

<sup>49</sup> *Ibid* at 22 - 23

<sup>50</sup> <http://www.pmg.org.za/report/20110125-annual-report-brlefig-department-social-development>

with a wide variety of issues and are applicable to all residential facilities for people with disabilities. Standards applicable to the present matter include:

- 8.7.6.1. **Rights of people with disabilities:** People with disabilities should **be given information about their rights and responsibilities** in a manner and form which takes into account age, capacity and diversity,<sup>51</sup>
- 8.7.6.2. **Complaints and grievance procedure:** Opportunities should exist for people with disabilities to **freely express dissatisfaction** with the services provided to them, and their concerns and complaints should be addressed seriously and without delay or reprisal. People with disabilities should be provided with a description of applicable complaint procedures in a manner that is age and language appropriate.<sup>52</sup>
- 8.7.6.3. **Physical care and environment:** People with disabilities must live in an accessible, safe, healthy, well-maintained environment which meets their needs in terms of privacy, safety and well-being. This standard refers to aspects such as safety, **compliance with nutritional and dietary requirements**, basic amenities that are consistently in good working order and are fixed timeously, the provision of individual private spaces and easy access to ablution facilities, all of which must be kept clean.<sup>53</sup>
- 8.7.6.4. **Behaviour management:** capacity and support which enables constructive and effective social behaviour should be provided. Residents should be made aware of the behaviour expected of them as well as any behaviour that is prohibited. A copy of any rules **in writing and in a form and language that they understand** must be provided to all residents and must be explained to them. Service providers should play a role in assisting people with disabilities to meet their behavioural expectations through teaching and developmental and / or therapeutic support.

## 9. ANALYSIS AND FINDINGS

- 9.1. It is clear that there is both national and international recognition of the heightened vulnerability of disabled persons. Notwithstanding the aforementioned, the Commission notes the paucity of national legislation conferring specific duties of protection and promoting fundamental rights of persons with disabilities. The Commission is guided in its consideration of the special measures which must be put in place to protect the rights of this vulnerable group by the existing broad international framework and the Constitutional principles.

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<sup>51</sup> Department of Social Development, Minimum standards on residential facilities for persons with disabilities at pgs 25 - 26

<sup>52</sup> *Ibid* at 26 - 27.

<sup>53</sup> *Ibid* at 27 - 29.

- 9.2. Although the principle of full participation in society, family and community is confirmed in the UDHR and applies to all people, including those with disabilities, in reality, disabled persons are often denied this opportunity for various reasons, including lack of awareness, indifference and fear. A lack of accessible information, and effective means of communicating grievances can further isolate persons with disabilities and lead to them feeling powerless, frustrated, confined and excluded within the very institutions where they live and regard as home.
- 9.3. Taking into account this contextual background, the UN identified two major challenges currently faced by residential facilities to be:
- 9.3.1. **Overstretched, ill-equipped and under-capacitated service providers and employees.** In this respect, it is important to note that staff members at a residential facility form a very important component of an efficient and effective service. Appropriately qualified, sensitised and experienced personnel are therefore required to ensure good quality service which is responsive to the specific needs of the people with disabilities they serve;<sup>54</sup> and
- 9.3.2. **A lack of a collective and coordinated effort** to address disability issues within residential facilities at domestic level.<sup>55</sup>
- 9.4. In analysing the complaint before it, the Commission considered the allegations as presented in the program instalment<sup>56</sup>, interviews with student-residents, meetings with representatives from the Respondent and facts gleaned from the Commission's own inspections of the Respondent's premises.
- 9.5. Having considered the abovementioned, the Commission established the following:
- 9.5.1. With regard to the **allegation of eviction**, the Commission considered the opposing versions put to it by the various parties interviewed; in this regard **greater reliance was placed on the independent version of the SAPS.** The Commission found that only one student-resident, out of the group featured in the abovementioned program instalment<sup>57</sup>, had in fact been evicted.
- 9.5.2. This eviction was the result of a series of events culminating in the internal disciplinary procedure of the Respondent. Having considered the steps taken leading up to the process and reasons informing the decision to evict, **the Commission finds that this allegation is unsubstantiated and that there is no violation in this respect.**
- 9.5.3. With regard to the allegation that **food served was of a poor quality**, the right to food is intrinsically linked to the rights to life and dignity and therefore the vulnerability of this right is of particular concern to the Commission. Although this right does not entitle individuals and groups to the provision of food it does oblige government to ensure that food is available, accessible and adequate, at all times and without discrimination.
- 9.5.4. In this respect the Commission notes that **the DSD does indeed provide social**

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<sup>54</sup> *Ibid* at note 45, pg 30.

<sup>55</sup> *Ibid* at 18.

<sup>56</sup> See paragraph 2.1. above.

<sup>57</sup> See paragraph 2.1. above.

**security to the Respondent's residents, as is provided for in the abovementioned MOU.<sup>58</sup> However a failure by the DSD to ensure consistency with regard to payment dates hinders the Respondent's ability to plan and budget, limiting its ability to take advantage of cost cutting measures and has an indirect impact on, and limiting effect on resident's right to food.**

9.5.5. Regarding the Respondents provision of food to residents the Commission found that **despite provision by the Respondent for checks on food stocks, some food items stored in the kitchen area were past their sell-by date.** In this respect the Commission established that the quality and portions of food served to student-residents to be affected by the following factors:

9.5.5.1. **A general overall strain on resources** experienced by the Respondent, which causes it to place a **degree of reliance on the good will of food donations** received. By their very nature these donations are unpredictable as to quantity, quality, type and frequency. Further to the unpredictable nature of donations, the Respondent, like many other NPO's lacks the means to control donations;

9.5.5.2. The inconsistency with regard to payment dates for payments made by the DSD; and

9.5.5.3. Non-payment of rental fees by some residents.

9.5.6. With regard to concerns around the **Respondent's Complaints Handling Procedures,**

9.5.6.1. It is clear from both the national and international legal frameworks that the rights to assemble and protest are necessary for the protection and achievement of other rights. In South Africa, in light of this Republic's unique history under the apartheid regime, the protection of these rights is particularly important.

9.5.6.2. The Commission established that the **student-residents featured in the programme instalment were attempting to exercise their rights to assemble and protest.** The Commission further **found the actions of the Respondent amounted to a limitation of the student-residents' ability to exercise these right and in so doing violated their rights to assemble and to protest. However, the Commission accepts that the Respondent was acting to protect the rights of other vulnerable non-protesting residents as well as staff members. The Commission therefore finds the limitation to have been reasonable and justifiable in light of the purpose of the limitation;** and

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<sup>58</sup> See paragraph 7.5.2.2 above.

- 9.5.6.3. The provisions of the Constitution, as well as supporting legislation and relevant jurisprudence, makes it clear that provision needs to be made for the safe exercise of this right. In light of the vulnerability of the disabled community, providing this community with the ability to exercise this right becomes even more significant, as it, in the words of the Constitutional Court “give[s] a voice to the powerless.”<sup>59</sup> **In this respect the Commission finds that the Respondent had no clear processes in place for protest action which would allow for the observance of rules, for both the safe exercise of the right and the protection of both protestors and non-protestors, in a manner which least affected the rights of the parties in the organisation.**

## 10. RECOMMENDATIONS

- 10.1. The Commission recognises that the Respondent has had a long history of **excellent service** in the sector. Organisations such as the Respondent do invaluable work in providing for, protecting and empowering otherwise vulnerable members of our society. The Commission further recognises that these organisations in general and the Respondent specifically, place a great reliance on the goodwill of others. It is not the intention of the Commission to burden the Respondent further but rather to assist through these recommendations to strengthen existing systems and practises.
- 10.2. Based on the findings set out above, the Commission recommends:
- 10.2.1. With regard to the findings related to **access to sufficient food**:
- 10.2.1.1. That **the DSD** revisit the terms of the existing MOU between it and the Respondent and that it enters into consultation with the Respondent in order to determine fixed dates for the payment of subsidies to the Respondent. That **within 6 (six) months** of the date of receipt of the Commission’s report **amendments to the MOU are affected in order to reflect the fixed payment dates**. That these **dates be strictly adhered to** in order to enable the Respondent to properly plan and budget.
- 10.2.1.2. That **the Respondent within 6 (six) months** of the date of receipt of the Commission’s report **develops guidelines to assist donors, outlining preferences with regard to quality of perishable donations and preferred timelines for receipt**. This should be done in a manner that will facilitate donations rather than alienate donors.
- 10.2.1.3. That **the Respondent within 6 (six) months** of the date of receipt of the Commission’s report **host an information workshop, for the benefit of all residents, and presented by a dietician**. The workshop must advise residents about the Respondent’s meal plans, with a view to **explaining the right to nutritious food, the Respondent’s preparation of menu plans, portion sizes, nutrients and food groups**.

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<sup>59</sup> Satawu and Another v Garvas and Others at para 50.



10.2.2. With regard to the findings related to **the rights to assemble and protest:**

10.2.2.1. That **the Respondent within 3 (three) months** of the date of receipt of the Commission's report **consult on and review its existing complaints handling procedures with residents and stakeholders with a view to making revisions there to. The revisions are to specifically include provision for the following:**

10.2.2.1.1. **Timeframes for response to complaints** lodged with the Respondent, which timeframes must be adhered to;

10.2.2.1.2. **The completion of a log report for each complaint received, timeframes for the completion of such reports and provision for the safekeeping of such reports** for a period of no less than five years. The report compiled must include details of each complaint, steps taken to address the complaint and details of the final outcome; and

10.2.2.1.3. **The exercise, by residents, of the right to peaceful demonstration. Procedures provided for in this regard must also clearly indicate where, how and the basis through which the right can safely be exercised in the context of the Respondents premises.** In this respect the Respondent may outline further, reasonable steps that it, in consultation with the DSD, deems necessary for the protection of the rights of persons under its care. **Staff members should be trained on procedures provided for in this regard.**

10.2.2.2. That **the Respondent within 1 (one) month** of hosting the consultations (as contemplated in paragraph 10.2.2.1. above):

10.2.2.2.1. **Provide copies of the revised complaints handling procedures, to all residents, in a manner and form that is accessible by them; and**

10.2.2.2.2. **Host an information workshop in which the Respondent's complaints handling procedures are explained to all residents.**

10.2.3. The Respondent is to provide the Commission with a report setting out its progress in respect of the implementation of the abovementioned recommendations **within 6 (six) months** of the date of receipt of the Commission's report. Such report is to include:

10.2.3.1. Steps taken towards implementing recommendations as set out above;

10.2.3.2. Outstanding recommendations and applicable timeframes for implementation thereof; and

10.2.3.3. Any shortcomings which may have become evident and the measures to be put in place to address same, together with applicable time frames.

## **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: Western Cape/1314/0095**

## SOUTH AFRICAN HUMAN RIGHTS COMMISSION

File Ref No: WC/1314/0095

In the matter between:

**Social Justice Coalition**

**COMPLAINANT**

and

**City of Cape Town**

**RESPONDENT**

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### REPORT

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#### 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(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “Constitution”).
- 1.2. In terms of Chapter 9, section 184 of the Constitution provides that:  
*“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.**(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,”*<sup>1</sup>
- 1.3. The Human Rights Commission Act, 54 of 1994 (hereinafter referred to as the “HRC Act”) as promulgated in terms of section 184(4) of the Constitution, further supplements the powers of the Commission.
- 1.4. Section 9(6) of the HRC Act and Complaints Handling Procedures issued in terms of it (Gazette, 27 January 2012, No. 34963) determine 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 Social Justice Coalition (hereinafter referred to as the “Complainant”) is a nongovernmental organisation (hereinafter referred to as the “NGO”) with its headquarters at Shawco Centre, K2, G323 Mongezi Road, Khayelitsha, Cape Town,

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<sup>1</sup> Constitution of the Republic of South Africa, 1996 (hereinafter “Constitution”), Section 184(1), (2).

Western Cape Province, Republic of South Africa. The Complainant's Public Benefit Number is 930 031 506 and its Non Profit Organisation Number is 067 089.

- 2.2. The City of Cape Town (hereinafter referred to as the "Respondent") is a Category A Municipality established in terms of the Local Government Municipal Structures Act, 117 of 1998, with its Head Office situated in the Civic Centre, 112 Hertzog Boulevard, Cape Town, Western Cape Province, Republic of South Africa. The Respondent is cited as the local government authority with jurisdiction over Khayelitsha responsible for the delivery of basic municipal services to its residents.

### 3. The Complaint

The Commission received the complaint on 14 May 2013 wherein the Complainant alleged that:

- 3.1. The Respondent contracted with a company known as Mshengu Services to supply and service portable chemical toilets in various areas around Cape Town, including Khayelitsha, for a total cost of approximately R165 million (one hundred and sixty five million rands).
- 3.2. Over the week of April 22 to 27, the Complainant conducted an exercise referred to as a "social audit," which consisted of:
  - 3.2.1. Counting portable chemical toilets supplied by Mshengu Services in four areas of Khayelitsha, namely RR Section, CT Section/Taiwan, Greenpoint and Emsindweni;
  - 3.2.2. Observing the state of portable chemical toilets in the four areas, specifically with regard to cleanliness, accessibility, door functioning and stability;
  - 3.2.3. Asking residents in all four areas about their experiences in using the portable chemical toilets; and
  - 3.2.4. Asking residents how many people use each chemical toilet.
  - 3.2.5. A total of 256 toilets were counted in the four areas (89 in CT Section, 52 in Emsindweni, 23 in Greenpoint and 92 in RR Section).
  - 3.2.6. Of these 256, 138 had waste overflowing, locked doors, no doors, extreme uncleanliness, instability, or severe damage.
  - 3.2.7. Residents reported that 32% of the toilets had not been emptied<sup>2</sup> in the week prior to the social audit and none of the toilets were cleaned<sup>3</sup> on a daily basis.
  - 3.2.8. Residents raised issues regarding the locations where toilets were situated.
  - 3.2.9. Residents reported that they were not consulted before services were instituted.
- 3.3. On 10 May 2013, the Complainant released a report of its social audit.<sup>4</sup> In the report, the Complainant stated that the social audit:

<sup>2</sup> For purposes of this report, the term "emptying" refers to the process of removing the human waste accumulated in the receptacle beneath the toilet seat and sanitizing the same.

<sup>3</sup> For purposes of this report, the term "cleaning" is used to mean cleaning and sanitizing of the toilet seat, the area surrounding the seat, the floor inside the chemical toilet and the area around the outside of the toilet.

<sup>4</sup> Report of the Khayelitsha 'Mshengu' Toilet Social Audit, page 22. Available at <http://www.sic.org.za/wp-content/uploads/2013/05/Social-Justice-Coalition-Report-of-the-Khayelitsha-Mshengu-Toilet-Social-Audit-10-May-2013.pdf> [accessed 21 May 2014].

*“...exposes egregious maladministration by the City of Cape Town in relation to outsourced services. In addition, we believe that Mshengu Services acted unlawfully by not fulfilling its contractual obligations. To prevent such occurrences in the future the SJC will now ask the Auditor General to investigate the contract, the Public Protector to investigate maladministration and the South African Human Rights Commission to investigate the rights violations.”*

## **4. Human Rights Under Investigation**

The Complainants alleged that the Respondent violated the rights to:

- 4.1. Equality (Section 9 of the Constitution).
- 4.2. Human dignity (Section 10 of the Constitution).
- 4.3. Privacy (Section 14 of the Constitution).
- 4.4. An environment not harmful to health or well-being (Section 24(a) of the Constitution).
- 4.5. Basic sanitation (Section 3(1) of the Water Services Act, 108 of 1997).

## **5. Investigation Undertaken by the Commission**

### **5.1. Steps Taken During the Investigation**

- 5.1.1. After receiving the complaint, the Commission assessed the situation and determined that the allegations of the complaint would, if substantiated, constitute a violation of the rights to equality, dignity, privacy, an environment not harmful to health or well-being as contained in sections 9, 10, 14, and 24 of the Constitution, respectively, and of the right to basic sanitation set out in section 3 of the Water Services Act.
- 5.1.2. On 29 May 2013, the Commission requested further information from the Complainant about matters set out in the social audit report.
- 5.1.3. On 20 June 2013, the Commission received further information from the Complainant.
- 5.1.4. On 11 July 2013, the Commission met with the Office of the Public Protector (hereinafter referred to as the “OPP”), which informed that it had received the complaint and had advised the Complainant that it must first exhaust internal remedies with respect to the contractual compliance and maladministration claims. It was agreed that OPP would address the contract management and service delivery aspects of the complaint if and when required as they relate to issues that fall within the mandate of the OPP. The Commission advised that it would focus its investigation on the human rights issues, particularly with regard to progressive realisation of the right to basic sanitation.
- 5.1.5. On 12 July 2013, the Commission sent a letter to the Respondent requesting a response to the Complainant’s allegations as well as additional information including the following:
  - i. How distribution ratios of chemical toilets were determined in the four named communities;

- ii. How servicing schedules were determined in the four named communities;
  - iii. Basic sanitation services provided in the four areas from 1 November 2010 until 30 June 2013 other than chemical toilets supplied and serviced by Mshengu;
  - iv. How sanitation services in the four areas from 1 November 2010 until 30 June 2013 were assessed in regard to the requirements set forth in Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water;
  - v. A description of sanitation service provision in CT Section, Emsidweni, Greenpoint, and RR Section in effect since 30 June 2013;
  - vi. Sanitation service provision in CT Section, Emsidweni, Greenpoint, and RR Section planned from 1 July 2013; and
  - vii. Community engagement efforts undertaken by the City in CT Section, Emsidweni, Greenpoint, and RR Section regarding sanitation services to be provided in those areas.
- 5.1.6. On 13 August 2013, the Respondent responded to the allegations letter.
- 5.1.7. On 21 August 2013, the Commission sent the Respondent's response to the Complainant for comment.
- 5.1.8. On 19 September 2013, the Commission received the Complainant's comments on the Respondent's response.

## 5.2. Information Received from the Respondent

- 5.2.1. Basic Sanitation Service
- i. The contract at issue in the complaint, entitled "*Rental, Delivering and Servicing of Portable Non-Flushing Chemical Toilet Units for Informal Settlements and Public Transport Interchange Sites Within the City of Cape Town*" was in effect from 1 November 2010 to 30 June 2013.<sup>5</sup> Under the contract, Mshengu was to supply and service 3 841 chemical toilets in 107 informal settlements throughout the metropolitan area.<sup>6</sup> The number of toilets supplied per settlement ranged from 1 to 292.<sup>7</sup> According to the terms of the contract, 36 of the settlements had more than 25 chemical toilets supplied. In total, these 36 settlements had 3 242 of the total 3 841 chemical toilets (84.4%).<sup>8</sup>
  - ii. Prior to 1 November 2010, the Respondent had had at least two other contracts with Mshengu for supplying and servicing chemical toilets in informal settlements in the City of Cape Town. One ran from July 2005 to June 2008 with a total cost of R133.2 million; the other from July 2008 to October 2010 with a total cost of R117.6 million.<sup>9</sup>

<sup>5</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 1, 17.

<sup>6</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 15-16.

<sup>7</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 15-16.

<sup>8</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 15-16.

<sup>9</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 58, 60.

- iii. The contract with Mshengu that expired in June 2013 was extended on 24 June 2013 for an additional period of up to 6 months (December 2013).<sup>10</sup>
- iv. The Respondent determines what sanitation services will be provided in informal settlements using guidelines contained in Part 3 of The National Housing Code: 2009 (Incremental Interventions: Emergency Housing Programme (hereinafter referred to as the “EHP”)).<sup>11</sup>
- v. “The City’s first priority is to provide an emergency level of service to households in all settlements, but as funds allow it also extends the coverage and density of services in each settlement beyond the basic level.”<sup>12</sup>
- vi. Chemical toilets are one of several sanitation options used in informal settlements within the Respondent’s jurisdiction.<sup>13</sup> Because they can be used in a flexible manner, they “*are in widespread use.*”<sup>14</sup>
- vii. In response to the Commission’s request for information regarding how sanitation services were assessed in regard to the requirements set forth in Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the Respondent replied that:

*“chemical toilets are designed to provide the minimum standard of basic sanitation by means of*

- *Enclosed design, providing privacy and protection from weather;*
- *Reducing smells and inhibiting fly-attraction through the addition of neutralizing chemicals to the containers;*
- *Not harming the environment as the content is disposed of at wastewater treatment plants.*”<sup>15</sup>

- viii. The Respondent has attempted to achieve a ratio of service provision of five households per sanitation point. The Respondent uses this ratio as its norm for basic sanitation. It does not include a consideration of either distance from the home to the toilet or the number of people using a particular toilet. Rather, the Respondent states that:

*“[t]he numbers are determined by taking into consideration a combination of multiple factors, including:*

- *the number of households in a specific informal settlement;*
- *the type of sanitation technologies already available;*
- *the availability of space to position toilet structures,*
- *historic locations which prevailed;*
- *infrastructure and land suitability;*
- *the type of sanitation technology in the area*
- *the usage frequency of current technologies already available;*

<sup>10</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 6.

<sup>11</sup> 13 August letter from the Respondent to the Commission, page 2.

<sup>12</sup> 13 August letter from the Respondent to the Commission, page 3.

<sup>13</sup> 13 August letter from the Respondent to the Commission, page 3.

<sup>14</sup> 13 August letter from the Respondent to the Commission, page 4.

<sup>15</sup> 13 August letter from the Respondent to the Commission, page 4.



- the sustainability of the sanitation technologies; and
- community acceptance of current or planned sanitation technologies.

*Distribution ratios are then determined by providing what is practically feasible while keeping all factors in mind.”<sup>16</sup>*

- ix. The Respondent further state that “[t]he capacity of chemical toilets is such that many more than five households can utilise them. The servicing schedule of three times per week is not predicated by volume but rather to ensure that the toilet is cleaned regularly as several households may be utilizing them.”<sup>17</sup> (emphasis added)
- x. However, the Respondent has also “acknowledged that it cannot guarantee on a daily basis the quality of cleanliness of each toilet...due to the huge number of informal Settlements and toilets and the frequency of use of the toilets. The cleanliness of a toilet depends on the user and can be spoiled immediately after it has been cleaned.”<sup>18</sup> (emphasis added)
- xi. Table 1 shows the total sanitation services provided by the Respondent in the four areas at issue in the complaint between 1 November 2010 and 30 June 2013.<sup>19</sup>

Area	Number of toilets				Servicing Ratio per Household	Avg No of People per Toilet <sup>1</sup>
	Communal flush <sup>2</sup>	Chemical	Portable <sup>3</sup>	Total		
RR	299	100	579	978	1:9	26
CT/Taiwan	411	110	1248	1769	1:8	28
Emsindweni	50	50	0	100	1:2	7
Greenpoint	86	79	0	165	1:10	32

**Table 1**

In Table 1, the term “servicing ratio” indicates the number of toilet facilities with respect to the number of households, taking into account all available toilet facilities in the specified area.<sup>20</sup> By way of example, according to this ratio, there is one toilet facility for every 10 households in Greenpoint. This toilet may be a chemical toilet or some other type. The ratio does not capture the number of people per household, the distance from the various households to the toilet or whether all deployed toilets are functioning.

- xii. Figures 1-3 show the placement of the chemical toilets within the four areas.

**Figure 1** – Chemical toilet placement in Greenpoint. Settlement area outlined in yellow. Toilets shown in green. Scale: 1cm = 50m.<sup>21</sup>

**Figure 2** – Chemical toilet placement in CT Section/Taiwan and RR Section.

<sup>16</sup> 13 August 2013 letter from the Respondent to the Commission, pages 4-5.

<sup>17</sup> 13 August 2013 letter from the Respondent to the Commission, page 5.

<sup>18</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 4.0.

<sup>19</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 7.0.

<sup>20</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 7.0.

<sup>21</sup> 13 August letter from the Respondent to the Commission, Annexure A to Annexure 1.

Settlement area outlined in yellow. Toilets shown in green with overall placement area outlined in white. Scale: 1cm = 62.5m.<sup>22</sup>

**Figure 3** - Chemical toilet placement in Emsindweni. Settlement area outlined in yellow. Toilets shown in green. Scale: 1cm = 22m.<sup>23</sup>

- xiii. Sanitation services in effect from 30 June 2013 to 31 December 2013 were the same as they were between 1 November 2010 to 30 June 2013 with the exception of 20 additional chemical toilets placed in RR Section after 1 July 2013.<sup>24</sup>
- xiv. According to the Respondent, the number and type of sanitation services are continually improved where practically possible in light of the multiple factors set out by the Respondent.<sup>25</sup>

#### 5.2.2. Community Engagement

- i. With regard to community engagement, the Respondent stated that *"the variety of services is discussed with communities."*<sup>26</sup>
- ii. The Respondent states that *"[c]ommunity engagement is of high priority when sanitation services are to be provided. The service provider liaises with the community through the community leadership whenever placing toilets. The City makes it mandatory for service providers to consult with the community. Proof of such consultation can be provided."*<sup>27</sup>
- iii. *"[T]he City makes it mandatory to the service provider to consult with the community. In emergency situations, consultation with communities is limited. In certain instances, demand for service is done through the Councillors or Health Inspectors with pre-determined location areas. For toilets that are installed by the City directly, full consultation with the Councillor, Community Members and Community Leadership is done since the infrastructure will be of a permanent nature."*<sup>28</sup>
- iv. Though the contract makes provision for Community Liaison Officers to facilitate ongoing engagement between communities and the Respondent, *"[t]he City opted to use Janitors and Community Workers instead of Community Liaison Officers who are more expensive to sustain."*<sup>29</sup>
- v. Lastly, the Respondent notes that community members employed through the Extended Public Works Programme to clean full flush toilets in the areas

<sup>22</sup> 13 August letter from the Respondent to the Commission, Annexure B to Annexure 1.

<sup>23</sup> 13 August letter from the Respondent to the Commission, Annexure C to Annexure 1.

<sup>24</sup> 13 August letter from the Respondent to the Commission, page 8. The letter notes an additional 140 communal flush toilets in RR Section that were installed by the end of 2012, but this figure appears to have been included in the general numbers described above. The letter also reports that RR Section was planned to receive an additional 10 communal flush toilets and Emsidweni was planned to have an additional 20 communal flush toilets installed. No further plans were indicated for Greenpoint or CT Section/Taiwan.

<sup>25</sup> 13 August letter from the Respondent to the Commission, page 8.

<sup>26</sup> 13 August letter from the Respondent to the Commission, page 2.

<sup>27</sup> 13 August 2013 letter from the Respondent to the Commission, page 9.

<sup>28</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 9.0.

<sup>29</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 8.0.

are asked to monitor contractor performance on an ad hoc basis through the use of quality control sheets in addition to their primary janitorial duties.<sup>30</sup> In the Respondent's view, this is a type of community engagement.

### 5.3. Response Received from the Complainant

- 5.3.1. The Complainant stated that the number of toilets that the Respondent listed does not accurately depict the lived reality as many of the toilets counted do not function as a result of a lack of proper maintenance. The Respondent's records fail to reflect this issue when offering data.
- 5.3.2. The Complainant found the Respondent's claims that it will install more toilets to be inconsistent with the Respondent's statements regarding the limited number of toilets that can be installed.
- 5.3.3. The Complainant requested proof of meaningful engagement between the Respondent and the affected communities.

### 5.4. Other Information Gathered by the Commission

- 5.4.1. According to data from the 2011 national census, 12,341 households in the City of Cape Town reported that chemical toilets were their primary toilet facilities.<sup>31</sup> Of those, 10,664 (86.4%) were in areas classified as "informal dwellings (shack; not in backyard; e.g., in an informal/squatter settlement or on a farm)."<sup>32</sup> Table 2 shows the number and percentage of the 10,664 households by population group.<sup>33</sup>

Population Group	Number (Percentage) of Households
Black African	9959 (93.40%)
Coloured	644 (6.04%)
Other	31 (0.29%)
White	17 (0.16%)
Indian or Asian	14 (0.13%)
Total	10,664 (100.00%)

**Table 2**

- 5.4.2. Table 3 shows the number of households living in informal settlements (dwelling not in another's backyard) in the wards where the Mshengu contract shows more than 25 chemical toilets in use for the contact period from November 2010 to June 2013.<sup>34</sup> As stated above, the total number of chemical toilets called for in

<sup>30</sup> 13 August 2013 letter from the Respondent to the Commission, page 9.

<sup>31</sup> [http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11\\_wd](http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11_wd). Fields: Geography (CPT: City of Cape Town) and Population group of head of household. Filter: Toilet facilities (Chemical toilet). [accessed 19 May 2014]

<sup>32</sup> [http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11\\_wd](http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11_wd). Fields: Geography (CPT: City of Cape Town) and Population group of head of household and Type of dwelling (Informal dwelling (shack; not in backyard; e.g. in an informal/squatter settlement or on a farm). Filter: Toilet facilities (Chemical toilet). [accessed 19 May 2014]

<sup>33</sup> [http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11\\_wd](http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11_wd). Fields: Geography (CPT: City of Cape Town) and Population group of head of household and Type of dwelling (Informal dwelling (shack; not in backyard; e.g. in an informal/squatter settlement or on a farm). Filter: Toilet facilities (Chemical toilet). [accessed 19 May 2014]

<sup>34</sup> Statistical data in Table 2 are derived from ward profiles of the Respondent, available at [http://www.capetown.gov.za/en/stats/Pages/wards\\_2011census.aspx](http://www.capetown.gov.za/en/stats/Pages/wards_2011census.aspx) [accessed 16 May 2014].

these areas by the contract was 3 242 (84.4%) of 3 841 toilets in all areas covered by the contract.<sup>35</sup>

Ward number	Number of Households by Population Group				
	Black	Coloured	Indian	White	Total
4	690	13	3	8	714
6	1099	217	1	0	1317
11	50	21	0	5	76
14	1010	358	2	5	1375
31	6	107	1	0	114
33	6941	19	5	2	6967
37	1054	2	0	0	1056
40	5427	27	3	0	5457
43	32	123	0	0	155
48	117	276	5	0	398
67	1225	1008	9	4	2246
74	3460	216	10	5	3691
80	7984	651	20	3	8658
86	1641	153	0	2	1796
87	5808	12	4	1	5825
89	8005	8	5	6	8024
90	5677	8	2	2	5689
93	4598	6	1	3	4608
95	11218	21	10	8	11257
96	2729	6	0	1	2736
104	6143	37	0	8	6188
105	1551	177	3	3	1734
111	1360	83	1	0	1444
Total	77825 (95.5%)	3549 (4.4%)	85 (1%)	66 (0.08%)	81525

**Table 3**

Though chemical toilets are not the only toilet facility used in the wards listed in Table 3, it is notable that the percentages of the population groups of residents of informal settlements are quite similar to the percentages shown in Table 2 for the households reporting that chemical toilets are their primary toilet facility.

5.4.3. The Respondent's integrated development plan for 2007-2011 set access to sustainable urban infrastructure and services as a strategic focus area for the period during which the contract at issue was executed (2010).<sup>36</sup> Among the key objectives in this focus area was universal access to basic sanitation.

<sup>35</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 15 and 16.

<sup>36</sup> Five-Year Plan for Cape Town, Integrated Development Plan (IDP), pages 27, 28, 30; available at [http://www.capetown.gov.za/en/IDP/Documents/idp/Previous\\_IDP/coct\\_IDP\\_20072008.pdf](http://www.capetown.gov.za/en/IDP/Documents/idp/Previous_IDP/coct_IDP_20072008.pdf) (accessed 28 May 2014).

- 5.4.4. On 26 May 2014, the Respondent awarded an additional contract to Mshengu and another supplier for *“Rental, Delivering, Placement, Servicing and Maintenance of Portable Non-Flushing Chemical Toilet Units for Informal Settlements and Public Transport Interchanges Citywide.”*<sup>37</sup> The overall value of the awarded tender is listed as R205 million, which indicates that the levels of use of chemical toilets is either maintained or increased for the new contractual period, the duration of which is not specified in the tender award announcement.

## 6. Issues to Be Determined by the Commission

- 6.1. After consideration of the information placed before it and obtained during the investigation, the Commission is called upon to make a determination of whether the following rights of the residents of the affected communities were infringed by the Respondent. In doing so the Respondent has to address the following questions, namely:
- 6.1.1. Whether the Respondent’s programme for providing basic sanitation services in the affected communities meets the requirements for reasonable action to progressively realise the right;
- 6.1.2. Whether the Respondent’s programme for providing basic sanitation services in informal settlements with long-term use of chemical toilets violates the residents’ right to equality; and
- 6.1.3. Whether the Respondent’s programme for providing basic sanitation services in informal settlements with long-term use of chemical toilets violated the residents’ right to dignity.

## 7. Legal Framework

- 7.1. Section 39(1)(b) of the Constitution mandates that whenever a court, tribunal or forum is interpreting rights contained in the Bill of Rights, it *“must consider international law.”*<sup>38</sup>

- 7.1.1. Universal Declaration of Human Rights 1948<sup>39</sup>

“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.”*<sup>40</sup>

“Article 25.

*“(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of this 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...”*<sup>41</sup>

<sup>37</sup> CITY OF CAPE TOWN, Tenders awarded in May 2014; available at [http://www.capetown.gov.za/en/SupplyChainManagement/Awarded%20Tenders%202014/Tenders%20Awarded%20May\\_2014.pdf](http://www.capetown.gov.za/en/SupplyChainManagement/Awarded%20Tenders%202014/Tenders%20Awarded%20May_2014.pdf) (accessed 5 June 2014).

<sup>38</sup> Constitution, Section 39(1)(b).

<sup>39</sup> Universal Declaration of Human Rights (hereinafter UDHR) G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (10 December 1948), available at <http://www.un.org/en/documents/udhr/> [accessed 13 May 2014]. South Africa ratified the UDHR on 10 December 1948.

<sup>40</sup> UDHR, Article 1.

<sup>41</sup> UDHR, Article 25.

7.1.2. International Covenant on Economic, Social & Cultural Rights 1966 (ICESCR)<sup>42</sup>

Article 2(1) explains the nature of the obligation resting on States Parties with regard to the provision of socioeconomic 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.<sup>43</sup>

Article 11 recognises the right of everyone to an adequate standard of living.<sup>44</sup>

7.1.3. United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation (2010)<sup>45</sup>

On 28 July 2010, through Resolution 64/292, the UN General Assembly adopted a resolution explicitly recognising 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.

South Africa voted in favour of this Resolution.

## 7.2. The Constitution of the Republic of South Africa, 1996

### ***“Rights***

7. ...

(2) *The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*<sup>46</sup>

### ***“Application***

8. (1) *The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*<sup>47</sup>

### ***“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, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

(3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

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<sup>42</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), 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 signed but not ratified the ICESCR.

<sup>43</sup> ICESCR, Article 2(1).

<sup>44</sup> ICESCR, Article 11.

<sup>45</sup> Resolution 64/292.

<sup>46</sup> Constitution, Section 7(2).

<sup>47</sup> Constitution, Section 8(1).

(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.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

**“Limitation of rights**

36. (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 purpose; and
- e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”<sup>48</sup>

**“Development duties of municipalities**

153. A municipality must-

- a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community;”<sup>49</sup>

**“Powers and functions of municipalities**

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.”<sup>50</sup>

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.”<sup>51</sup>

7.3. Domestic Legislation

7.3.1. Promotion of Equality and Prohibition of Unfair Discrimination Act<sup>52</sup>

The Promotion of Equality and Prohibition of Unfair Discrimination (hereinafter referred to as the “Equality Act”) gives expression to the equality right set out in Section 9 of the Constitution.

<sup>48</sup> Constitution, Section 36.

<sup>49</sup> Constitution, Section 153.

<sup>50</sup> Constitution, Section 156(1).

<sup>51</sup> Constitution, Schedule 4B.

<sup>52</sup> No. 4 of 2000

Section 6 of the Equality Act makes it unlawful for the State or any person to unfairly discriminate against any person.<sup>53</sup>

Section 1 of the Equality Act provides the following definitions relevant to this complaint:

*“discrimination’ means 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,”<sup>54</sup>*

***“prohibited grounds’ are-***

- a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or*
- b) any other ground where discrimination based on that other ground-*
  - i. causes or perpetuates systemic disadvantage;*
  - ii. undermines human dignity; or*
  - iii. adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);”<sup>55</sup>*

***“the State’ includes***

- a) any department of State or administration in the national, provincial or local sphere of government,”<sup>56</sup>*

*“6. Neither the State nor any person may unfairly discriminate against any person.”<sup>57</sup>*

Section 13 establishes the burden of proof for claims made under the Equality Act:

*“13. (1) If the complainant makes out a prima facie case of discrimination-*

- a) the respondent must prove, on the facts before the court that the discrimination did not take place as alleged: or*
- b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.*

*(2) If the discrimination did take place-*

- a) on a ground in paragraph (a) of the definition of “prohibited grounds” then it is unfair, unless the respondent proves that the discrimination is fair...”<sup>58</sup>*

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<sup>53</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter “Equality Act”), Section 6.

<sup>54</sup> Equality Act, Section 1.

<sup>55</sup> Equality Act, Section 1.

<sup>56</sup> Equality Act, Section 1.

<sup>57</sup> Equality Act, Section 6.

<sup>58</sup> Equality Act, Section 13.



Section 14 specifies factors that are relevant to a determination of fairness.

*"14. (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."<sup>59</sup>*

### 7.3.2. Water Services Act<sup>60</sup>

Section 3 of the Water Services Act states that:

*"3. (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."<sup>61</sup>*

<sup>59</sup> Equality Act, Section 14.

<sup>60</sup> 108 of 1997

<sup>61</sup> Water Services Act, Section 3.

Section 1 of the Water Services Act defines “basic sanitation” as:

*““basic sanitation” means 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.”<sup>62</sup>*

7.3.3. Local Government: Municipal Systems Act<sup>63</sup> (hereinafter referred to as the “Systems Act”)

*The definition of basic municipal services according to the Systems 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.”<sup>64</sup>*

*The Systems Act explicitly establishes the importance of provision of basic municipal services:*

*“(1) 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.”<sup>65</sup>*

Section 81 of the Systems Act provides that:

*“(1) If a municipal service is provided through a service delivery agreement... the municipality remains responsible for ensuring that that service is provided to the local community in terms of the provisions of this Act, and accordingly must-*

- a) Regulate the provision of the service, in accordance with section 41;*
- b) monitor and assess the implementation of the agreement, including the performance of the service provider in accordance with section 41...”<sup>66</sup>*

Section 41 of the Systems Act addresses

*“Core components – (1) A municipality must in terms of its performance management system and in accordance with any regulations and guidelines that may be prescribed-*

- a) set appropriate key performance indicators as a yardstick for measuring performance, including outcomes and impact, with regard to the municipality’s development priorities and objectives set out in its integrated development plan;*

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<sup>62</sup> Water Services Act, Section 1.

<sup>63</sup> No. 32 of 2000

<sup>64</sup> Local Government Municipal Systems Act No. 32 of 2000 (hereinafter “Systems Act”), Section 1.

<sup>65</sup> Systems Act, Section 73(1).

<sup>66</sup> Systems Act, Section 81.

- b) *set measurable performance targets with regard to each of those development priorities and objectives;*
- c) *with regard to each of those development priorities and objectives and against the key performance indicators and targets set in terms of paragraphs (a) and (b)-*
  - i. monitor performance; and*
  - ii. measure and review performance at least once per year;*
- d) *take steps to improve performance with regard to those development priorities and objectives where performance targets are not met;...<sup>67</sup>*

#### **7.4. Regulatory Standards**

##### 7.4.1. Basic Sanitation

The definition of basic sanitation service in Regulation 2(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water states that “[t]he minimum standard for basic sanitation services is:

*“a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.”<sup>68</sup> (emphasis added)*

This definition is primarily echoed in the Respondent’s Water Services Development Plan, which defines a basic sanitation facility as one with

*“[e]asy access to a safe, reliable, private toilet facility which is protected from the weather, ventilated, low smell, hygienic, minimises the risk of spreading diseases and enables safe treatment and/or removal of human waste and wastewater in an environmentally sound manner including communicating hygiene.”<sup>69</sup>*

#### **7.5. Case Law**

##### 7.5.1. Socioeconomic Rights

A number of key judgements have provided guidelines in assessing state action in realising socioeconomic rights such as the right to basic sanitation. In *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>70</sup> (hereinafter referred to as “*Grootboom*”), the Constitutional Court examined many important components of legislative measures, policies and programmes. Two of those components are reasonableness of government action and progressive realisation of rights.

<sup>67</sup> Systems Act, Section 41(1).

<sup>68</sup> Regulation 2(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water issued in terms of Sections 9(1) and 73(1)(i) of the Water Services Act (Gazette, 8 January 2011, No 509).

<sup>69</sup> Water Services Development Plan (WSDP) for City of Cape Town 2012/13 – 2016/17 Executive Summary, November 2012, page 4.

<sup>70</sup> 2001 (1) SA 46 (CC)

A reasonable government programme must have at least the following components:

*“A reasonable programme therefore must...ensure that the appropriate financial and human resources are available...”<sup>71</sup>*

*“The programme must be capable of facilitating the realisation of the right.”<sup>72</sup>*

*“These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state’s obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.”<sup>73</sup>*

*“The programme must be balanced and flexible and make appropriate provision for attention to ... crises and to short, medium and long term needs.”<sup>74</sup>*

*“To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”<sup>75</sup>*

The Court also noted that “[i]t is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings.”<sup>76</sup> In other words, the Court explained, “human beings are required to be treated as human beings.”<sup>77</sup>

With regard to progressive realisation, the Court explained that:

*“The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered*

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<sup>71</sup> Grootboom paragraph 39.

<sup>72</sup> Grootboom paragraph 41.

<sup>73</sup> Grootboom paragraph 42.

<sup>74</sup> Grootboom paragraph 43.

<sup>75</sup> Grootboom paragraph 44.

<sup>76</sup> Grootboom paragraph 83.

<sup>77</sup> Grootboom paragraph 83.

*over time. [The object of the right] must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.*<sup>78</sup>

In *Mazibuko and Others v City of Johannesburg and Others*<sup>79</sup> the Constitutional Court explained that:

*[W]hat [a] right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.*

### 7.5.2. Meaningful Engagement

The Court has also emphasised that another important component of reasonable state action, particularly in the context of realisation of socioeconomic rights, is timely and meaningful engagement efforts with communities and individuals likely to be affected by government action.<sup>80</sup> Like reasonableness, there is no exhaustive list of what is required to make engagement with a community meaningful. However, the Constitutional Court has identified illustrative examples of components of meaningful engagement such as:

- i. requiring government to engage with the community rather than simply imposing decisions made unilaterally;<sup>81</sup>
- ii. that all parties to the engagement be treated as equals, without preconceived notions of the persons within the community;<sup>82</sup>
- iii. good faith, reasonableness, willingness to listen and understand concerns on the part of all parties, whether from the government or the community;<sup>83</sup> and
- iv. proactive, respectful and honest efforts by all parties to find solutions that are mutually acceptable;<sup>84</sup>

### 7.5.3. Equality

The Constitutional Court has considered and elaborated upon the right to equality in several cases. The Court has noted that, within the constitutional order of South Africa post-1994, equality *“is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.”*<sup>85</sup>

<sup>78</sup> *Grootboom* paragraph 45.

<sup>79</sup> 2010 (4) SA 1 (CC).

<sup>80</sup> *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* (hereinafter “Olivia Road”) 2008 (3) SA 208 (CC) at paragraphs 10-13.

<sup>81</sup> *Residents of Joe Slovo Community v Thubelisha Homes* (hereinafter ‘Joe Slovo I’) 2010 (3) SA 454 (CC) paragraph 166.

<sup>82</sup> *Schubart Park Residents’ Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) at paragraphs 46, 49.

<sup>83</sup> *Joe Slovo I* at paragraph 244.

<sup>84</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (1) SA 217 (CC) at paragraph 39.

<sup>85</sup> *Minister of Finance and Other v van Heerden (van Heerden)* 2004 (6) SA 121 (CC) at paragraph 22.

*“[Within the South African constitutional order] crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.”<sup>86</sup>*

*“This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but “situation-sensitive” approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.”<sup>87</sup>*

*“Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.”<sup>88</sup>*

The interrelated nature of equality and dignity was explained in *President of the Republic of South Africa and Another v Hugo*<sup>89</sup> where the Court noted that:

*“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”<sup>90</sup>*

In *Harksen v Lane NO and Another*<sup>91</sup> the Constitutional Court provided a framework in which to examine claims of unfair discrimination under Section 9 of the Constitution. The first step of a *Harksen* enquiry involves an examination of whether the challenged action differentiates “between people or categories of people” and whether it is rationally connected to “the legitimate governmental

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<sup>86</sup> *van Heerden* at paragraph 25.

<sup>87</sup> *van Heerden* at paragraph 27.

<sup>88</sup> *van Heerden* at paragraph 31.

<sup>89</sup> 1997 (4) SA 1 (CC).

<sup>90</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at paragraph 41.

<sup>91</sup> 1998 (1) SA 300 (CC).

*purpose it is designed to further or achieve.*<sup>92</sup> However, if the differentiation is done on the basis of criteria set out in section 9(3) of the Constitution, which includes race, it can constitute unfair discrimination even if it is rationally connected to a legitimate governmental purpose.<sup>93</sup> The impact of the discrimination on the complainant is the determining factor in analysing whether the discrimination is unfair.<sup>94</sup> Factors to be considered, objectively and cumulatively, regarding impact include:

- “(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage...;*
- (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...;*
- (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.”*<sup>95</sup>

Discrimination that is determined to be unfair can be upheld as lawful only if it can be justified under section 36, which explains the permissible instances in which a right (such as the right to equality) can be limited.<sup>96</sup>

Discrimination need not be direct to be unlawful; section 9 prohibits unfair discrimination whether it is directly or indirectly done. In *City Council of Pretoria v Walker*<sup>97</sup> the Constitutional Court was required<sup>98</sup> to examine an instance of indirect discrimination.<sup>98</sup> The Court explained that the Constitution’s prohibition of both direct and indirect discrimination “*evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in [unlawful] discrimination...*”<sup>99</sup>

The organ of state under scrutiny in *Walker* had behaved differently towards residents of different geographical areas under its jurisdiction. Though this system of differentiation was not directly based on race, the Court recognised that

<sup>92</sup> *Harksen v Lane NO and Another (Harksen)* 1998 (1) SA 300 (CC) at paragraph 42.

<sup>93</sup> *Harksen* at paragraph 43.

<sup>94</sup> *Harksen* at paragraph 50.

<sup>95</sup> *Harksen* at paragraphs 49-50.

<sup>96</sup> *Harksen* at paragraph 51.

<sup>97</sup> 1998 (2) SA 363 (CC)

<sup>98</sup> *City Council of Pretoria v Walker (Walker)* 1998 (2) SA 363 (CC).

<sup>99</sup> *Walker* at paragraph 31.

*“[t]he effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. To ignore the racial impact of the differentiation is to place form above substance.”<sup>100</sup>*

In support of the actions it had taken, the organ of state presented evidence that they were reasonable, convenient and practical under the circumstances in the area, circumstances that were not the doing of the council.<sup>101</sup> The Court, while acknowledging that the new council had not created the situation, emphasised that the council was nevertheless responsible for ending the differentiation.<sup>102</sup>

Further, the Court was not persuaded by the fact that the council's actions were not motivated by an intent to unfairly discriminate. Rather, it emphasised that the purpose of the Constitution's anti-discrimination clause

*“... is to protect persons against treatment which amounts to unfair discrimination; it is not to punish those responsible for such treatment. In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken.”<sup>103</sup>*

In line with the Court's dignity jurisprudence, *Walker* emphasised that constitutional prohibition of unfair discrimination based on race is based upon the notion that “[n]o members of a racial group should be made to feel that they are not deserving of equal “concern, respect and consideration”...”<sup>104</sup>

In *Mvumvu and Others v Minister of Transport and Others*<sup>105</sup> the Court revisited the issue of indirect discrimination in a case where a geographically neutral act was challenged on the basis that it had a disproportionate adverse effect on a particular racial group.<sup>106</sup> In concluding that the challenged provisions amounted to indirect unfair discrimination that violated the section 9 equality right, the Court explained:

*“It will be observed that the applicants do not assert that the impugned provisions discriminate against black people in a manner that is direct... What is established by the applicants' evidence though is the fact that at a practical level the majority of the victims affected by the cap are black people. This in*

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<sup>100</sup> *Walker* at paragraph 33.

<sup>101</sup> *Walker* at paragraphs 24, 34.

<sup>102</sup> *Walker* at paragraph 24.

<sup>103</sup> *Walker* at paragraph 43.

<sup>104</sup> *Walker* at paragraph 81.

<sup>105</sup> 2011 (2) SA 473 (CC)

<sup>106</sup> *Mvumvu and Others v Minister of Transport and Others (Mvumvu)* 2011 (2) SA 473 (CC)



*turn shows that indirectly the provisions discriminate against black people in a manner that is disproportionate to other races.”<sup>107</sup>*

*“To the extent that the impugned provisions in this case overwhelmingly affect black people, they create indirect discrimination that is presumptively unfair.”<sup>108</sup>*

#### 7.5.4. Unconditional Applicability of Bill of Rights to Government

In *AAA Investments (Pty) Limited v The Micro Finance Regulatory Council and The Minister of Trade and Industry*<sup>109</sup> the Constitutional Court made clear that a municipality has the legal responsibility to carry out constitutional duties regardless of whether it is directly performing a function that it is legally required to perform:

*[t]he applicability of the Bill of Rights to the legislature and to the executive is unconditional as to function; the Bill of Rights is applicable to it regardless of the function it performs. Our Constitution ensures... that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.”<sup>110</sup>*

In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*<sup>111</sup> the Constitutional Court reiterated that a private entity performing a public function is an organ of state as defined in the Constitution and therefore has constitutional duties and is “accountable to the people of South Africa.”<sup>112</sup> The fact that the governmental entity continues to also have constitutional duties does not absolve the entity to whom a public function is delegated of constitutional responsibility for the public functions it has agreed to perform.<sup>113</sup> The Court made clear that a contract between a government entity and private entity to perform a public function, particularly where the public function impacts on the daily lives of a large number of people, cannot be viewed through the same lens as conventional business contracts.<sup>114</sup>

#### 7.5.5. Limitation of Rights

The Constitutional Court has made clear that an organ of state seeking to rely on Section 36 to justify a limitation of a right must act in terms of a law of general application.<sup>115</sup> A practice does not qualify as a law of general application.<sup>116</sup>

<sup>107</sup> *Mvumvu* at paragraph 29.

<sup>108</sup> *Mvumvu* at paragraph 32.

<sup>109</sup> 2007 (1) SA 343 (CC).

<sup>110</sup> *AAA Investments (Pty) Limited v The Micro Finance Regulatory Council and The Minister of Trade and Industry* 2007 (1) SA 343 (CC) at paragraph 40.

<sup>111</sup> [2014] ZACC 12 (CC).

<sup>112</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (hereinafter *AllPay*) [2014] ZACC 12 (CC) at paragraphs 58, 59.

<sup>113</sup> *AllPay* at paragraphs 64, 66, 67.

<sup>114</sup> *AllPay* at paragraph 63.

<sup>115</sup> *August and Others v Electoral Commission and Others* 1999 (3) SA 1 (CC) at paragraph 23.

<sup>116</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at paragraphs 7, 41.

## 7.6. Policy Documents

### 7.6.1. National Housing Code, Part 3

Volume 4 of Part 3 of the National Housing Code sets out programmes pertaining to incremental interventions. Section 2 describes the Emergency Housing Programme, which was instituted by government to:

*“address the needs of households who for reasons beyond their control, find themselves in an emergency housing situation such as the fact that their existing shelter has been destroyed or damaged, their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or face the threat of imminent eviction.*

This Programme is instituted in terms of section 3(4)(g) of the Housing Act 1997 and will be referred to as the National Housing Programme for Housing Assistance in Emergency Housing Circumstances. Essentially, the objective is to provide for temporary relief to people in urban and rural areas who find themselves in emergencies as defined and described in this Chapter.”<sup>117</sup>

The term “emergency” is thereafter defined and described as follows:

*“An emergency exists when the MEC, on application by a municipality and or the [provincial department], agrees that persons affected owing to situations beyond their control:*

- a) Have become homeless as a result of a declared state of disaster, where assistance is required...to alleviate the immediate crisis situation;*
- b) Have become homeless as a result of a situation which is not declared as a disaster, but destitution is caused by extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents;*
- c) Live in dangerous conditions such as on land being prone to dangerous flooding, or land which is dolomitic, undermined at shallow depth, or prone to sinkholes and who require emergency assistance;*
- d) Live in the way of engineering services or proposed services...and who require emergency assistance;*
- e) Are evicted or threatened with imminent eviction from land or from unsafe buildings...;*
- f) Whose homes are demolished or threatened with imminent demolition...;*
- g) Are displaced or threatened with imminent displacement as a result of a state of civil conflict or unrest...; or*
- h) Live in conditions that pose immediate threats to life, health and safety and require emergency assistance.*

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<sup>117</sup> National Housing Code 2009, volume 4, part 2 (hereinafter EHP) section 1, page 9.

- i) *Are in a situation of exceptional housing need, which constitutes an Emergency that can reasonably be addressed only by resettlement or other appropriate assistance, in terms of this Programme.*<sup>118</sup>

Section 2.5 sets out applicable norms and standards. Subsection A pertains to “*Municipal Engineering Services in Temporary Settlement Areas.*” (emphasis added). Table 2 of this subsection is entitled *Guidelines on maximum level of basic engineering services to be provided.*” According to this table, the maximum level of sanitation services is as follows:

- i. *“Temporary sanitary facilities must be provided. Due to varying geographical and similar conditions, facilities to be provided may vary from area to area. Where conditions permit the use of Ventilated Improved Pit Latrines (VIP toilets) must be provided as a first option. The Municipality must therefore ensure that the system employed is suitable for the particular conditions.*
- ii. *An acceptable standard will be one VIP toilet per five families. Cost should be estimated per family on a shared basis in the suggested dense settlement pattern. In circumstances where soil and other site conditions do not allow for the use of VIP toilets, alternative systems must be investigated. A small bore sewerage or other appropriate system (to be used on a shared basis with one toilet per five families within the suggested settlement pattern) could be provided.*

*The sewerage system must as far as possible be usable in a permanent configuration or layout in situations where future upgrading is envisaged as a first option towards a permanent housing situation.”*

#### 7.6.2. National Sanitation Strategy: Accelerating Sanitation Sector Delivery

In August 2005, the Department of Water Affairs and Forestry National Sanitation Programme Unit issued, on behalf of the National Sanitation Task Team, a policy document entitled “National Sanitation Strategy: Accelerating Sanitation Sector Delivery.” Section 7.6.3 addressed the use of emergency sanitation programmes in informal settlements.

*“Emergency sanitations [sic] programmes should be limited to very short term [sic] interventions that last a few days to a few weeks. Long term informal settlements must not be treated as emergency situations for the purpose of this strategy but should be provided with viable and sustainable solutions. Solutions such as communal facilities and chemical toilets should not be used where the system is expected to have a duration of more than [sic] one month.”<sup>119</sup> (emphasis added)*

<sup>118</sup> EHP section 2.3.1, page 15.

<sup>119</sup> Department of Water Affairs, National Sanitation Strategy: Accelerating Sanitation Sector Delivery

## 8. Legal Analysis

### 8.1. Basic Sanitation

Several issues are relevant to a determination of whether the residents' right to basic sanitation has been compromised, namely, whether the right is being progressively realised and whether the Respondent's programme to realise the right of the residents is reasonable in its implementation.

#### 8.1.1. Progressive Realisation

- i. A significant portion of the Respondent's programme for realising the right to basic sanitation from 2005 through 2013 consisted of the provision of chemical toilets. In the Respondent's words, chemical toilets "*are in widespread use*" within the Respondent's jurisdiction.<sup>120</sup>
- ii. The contracts to supply the chemical toilets were of a long-term nature (3 years, 2 years, and 3 years with at least an additional 6-month extension).
- iii. Under *Grootboom*, in progressively realising socioeconomic rights, government measures must flexibly take account of the degree and extent of the denial of the right that is to be realised. The long-term contracts used in this instance, particularly in that they were used one after another, reduce the Respondent's ability to adjust to changing circumstances flexibly. Rather, the effect of these contracts appears to be one where the Respondent considers that sanitation needs of residents are being served, so efforts to progress beyond the service they provide slows down or does not occur at all. It is significant in this regard to note that over the course of 2010-2013 only one significant increase was made in the four areas specifically at issue in this complaint - namely 140 full-flush toilets installed in RR Section in 2012. Two other minor increases were planned (20 chemical toilets for Emsindweni and 10 more full-flush toilets in RR Section). Otherwise, the Respondent appears to have erroneously concluded that basic sanitation services were in place in these areas, so planning or effectuating further efforts were not a priority.
- iv. In response to the Commission's request to specify planning going forward, the Respondent cited only the two minor increases and a plan to introduce janitorial services. As stated above, another apparent long-term contract has been put in place for informal settlements throughout the city. Therefore, all information provided by the Respondent regarding its plans for residents of the informal settlements covered by the contract indicates that little if any progression will occur for these residents with respect to the Respondent's efforts to realise their right to basic sanitation.
- v. In addition, the mathematical emphasis within the Respondent's approach that is reflected in the fixed distribution ratios and set weekly servicing schedules of the contract at issue. The approach is contrary to the teaching of *Mazibuko* against fixing quantities in a rigid and counter-productive way that prevents changing contexts from being taken into account. A reasonable programme to realise the right of basic sanitation must treat all persons

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<sup>120</sup> 13 August 2013 letter from the Respondent to the Commission, page 4.

affected, including residents of informal settlements, with “*care and concern*” rather than merely an exercise of statistical compliance or a cold problem-solving endeavour.<sup>121</sup>

- v. The use of long-term, repeated or extended contracts such as the ones seen in connection with this complaint stymies efforts to examine and lower the legal, administrative, operational and financial hurdles *Grootboom* specified were key to progressive realisation. Rather than lowering these impediments, the long-term contracting practices seen in this matter, which incorporate minimal monitoring and no apparent review mechanisms to test whether implementation is successful, institutionalize fundamentally inadequate practices, thus impeding realisation of the right to basic sanitation on a progressive basis. This institutionalisation also prevents adjustment to changing context mandated by *Mazibuko*, echoing the statement in *Grootboom* that a reasonable programme must be flexible.

#### 8.1.2. Reasonableness in Implementation

- i. In order to be consistent with the Respondent’s constitutional obligations, its programmes must be reasonable in their implementation. A significant portion of the Respondent’s overall programme for realising the right to access basic sanitation within its jurisdiction involves the use of the EHP in nonemergency settings. In fact, the Respondent often treats “basic” and “emergency” as interchangeable terms, despite the clearly defined circumstances that qualify as “emergencies” under the EHP. Read together, the Water Services Act, the Systems Act, the Compulsory National Standards and Measures to Conserve Water and the Respondent’s Water Services Development Plan conceive of basic sanitation as an ongoing, sustainable and healthy means of human excreta removal. Emergency sanitation, by its own terms and the commonly accepted meaning of the term, has an immediate, crisis-type quality; it is not a situation that is desirable to prolong by using it in a long-term programme.
- ii. The difference between emergency, temporary situations and informal, long-term, basic needs is well illustrated by the fact that the 1:5 ratio of toilets to households is a maximum amount under the EHP guidelines, i.e. a ceiling not to be exceeded. Under the Respondent’s programme for realising the right to basic sanitation, this ratio is viewed as a target, a milestone of sorts. The ratio is discussed at greater length below, at this point it is sufficient to note that it indicates that despite the Respondent’s tendency to portray these situations as equivalent, in substance they are not, as shown even by Respondent’s own interpretations. The Respondent’s use of the EHP to guide its actions in nonemergency, long-term situations is not reasonable.
- iii. The Respondent’s reliance upon the EHP is contrary to the Constitutional Court’s judgment in *Nokotyana* that the EHP applies only in situations fitting the Code’s definition of “emergency” and the DWA policy that chemical toilets should not be used in situations expected to last longer than a month. Both the *Nokotyana* decision (issued 19 November 2009) and the promulgation

<sup>121</sup> *Grootboom* at paragraph 44.

of the DWA policy (issued August 2005) predated the contract at issue in this complaint. The fact that the contract did not take these two legal pronouncements into account is not reasonable.

- iv. The criteria the Respondent reports having taken into account for determining that chemical toilets were a viable long-term option in realising the right to basic sanitation within the affected areas do not satisfy either its own definition of basic sanitation or that contained in Regulation 2 of the Compulsory National Standards and Measures to Conserve Water. According to the Respondent, chemical toilets provide privacy and protection from weather, smell reduction and fly inhibition from use of chemicals in the containers, and lessening of environmental impact because the waste that is captured in the container is emptied for disposal at a wastewater treatment plant. Absent from this examination is an explanation of how these toilets are considered reliable and easy to keep clean under the circumstances of their actual use. As the Respondent notes, the quality of cleanliness cannot be guaranteed on a daily basis due to the huge number of informal settlements and toilets and the frequency of use of the toilets. Moreover, the Respondent's assertion that smells are reduced by the addition of chemicals does not speak to the requirement of Regulation 2 that smells be kept to a minimum or the corresponding notation in the Respondent's own definition that the toilet be "low smell." It is unlikely a coincidence that many of the specific issues raised in the social audit pertain to reliability and cleanliness, including bad smell. Particularly by taking into consideration that the measures used are primarily intended for emergencies or other short-term events, it is not surprising that their ability to cope with long-term continuous use is less than ideal. The selection of a sanitation technology that does not meet mandatory national and local criteria without further explanation is not reasonable.
- v. With respect to distribution ratios set out in the contract, the Respondent provides a general list of factors that can be taken into consideration. Missing from the list are distance from the home to the toilet (contrary to the Respondent's definition of a basic sanitation service as providing "easy access") or the number of people using a particular toilet despite the Respondent's own recognition and the common sense conclusion that the levels of use of a particular toilet installation impact on its cleanliness and ability to be used for its intended purpose.
- vi. Moreover, despite the Commission's request for an explanation of the manner in which distribution ratios were determined for the four named areas, the Respondent did not explain how the factors it cited were taken into consideration, preventing an assessment of whether the Respondent is engaging in the context-sensitive approach that is mandated by *Mazibuko* in determining the appropriate content of the right to basic sanitation in this instance. Without such an explanation and in light of the other factors discussed above, the balance of the probabilities indicates that the Respondent took significant unreasonable actions in implementing its programme to realise basic sanitation with respect to long-term use of chemical toilets in informal settlements.

### 8.1.3. Meaningful Engagement

- i. The Respondent is aware of its obligations to engage meaningfully with communities regarding realisation of basic rights.
- ii. The descriptions the Respondent gives regarding the substance of how it fulfils those obligations are primarily of a general nature. The Respondent states that it discusses the variety of services with the community but does not provide any specifics of those discussions, where and when they took place with regard to the communities at issue in this complaint, how the information gathered was factored into decision making, or other details that would allow an assessment of whether engagement can be considered meaningful. The Respondent further states that the service provider liaises with community leaders but does not state how those leaders are identified, how information is then passed on to community members, how needed follow-up is identified and accomplished, etc. Interestingly, the Respondent describes consultation done when the Respondent is installing permanent sanitation infrastructure as “full”, involving councillors and community members as well as community leadership. The juxtaposition of this description with the consultation done by the service providers who supply sanitation infrastructure that the Respondent deems to not be of a permanent nature implies that service providers perform a lesser level of consultation. In any event, the lack of any further descriptive detail prevents actual determination of whether engagements were meaningful. Finally, and perhaps most importantly, as is made clear in the Systems Act and cases such as *AAA Investments and AllPay Consolidated Investment Holdings*, the fact that the contract may require the service provider to consult with communities does not absolve the Respondent of its constitutional responsibilities of meaningful engagement. The Respondent must remain an active participant in order to ensure that engagement is meaningful and ongoing.
- iii. It is notable that the two specific instances cited by the Respondent with regard to community engagement indicate that engagement has not been taken. First, the Respondent decided not to employ Community Liaison Officers under the 2010-2013 Mshengu contract because Community Liaison Officers “are more expensive to sustain.”<sup>122</sup> According to the contract, Community Liaison Officers work at a rate of R20,00 per hour, R5,00 more an hour than Cleaners. Second, the Respondent cites ad hoc monitoring activities assigned to persons employed by the Respondent in a separate capacity, namely to clean full flush toilets, as a type of meaningful community engagement. There is no indication how much information these ad hoc activities generate. In addition, the ad hoc nature of the activity counsels against rather than supporting a conclusion that it is meaningful with respect to the community at large.
- iv. Lastly, the photographs shown in Figures 1 to 3 demonstrate that toilet facilities are primarily placed in rows adjacent to roadways or other access

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<sup>122</sup> 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 8.0.

lanes. The most likely explanation for these configurations is convenience of the provider in accessing the toilets for servicing. It is difficult to believe that communities would, during a period of meaningful engagement, request that toilets be placed in full view of passing traffic as in the case of CT Section/Taiwan and RR Section, up to 100m from a person's home. The exception to that is seen in Greenpoint, where toilets are distributed throughout the middle section of the settlement area. However, no explanation is given as to why the upper and lower third of the settlement were excluded from the distribution. Without such background, it is difficult to conclude that residents of those areas, who are also of course a part of the community, would request a like configuration during meaningful engagement with decision makers.

## 8.2. Equality

- 8.2.1. A primary purpose of the contract at issue in this complaint is to provide non-flushing chemical toilets in the City of Cape Town. This service provision, when implemented as a long-term measure (at least 3 and possibly more than 8 years) violates the right to basic sanitation of the residents of the informal settlements involved as set forth above.
- 8.2.2. The vast majority of the chemical toilets (84.4%) are in informal settlements with populations that are overwhelmingly "Black African" (95.5%). This trend is borne out by census data for the City of Cape Town stating that persons living in informal settlements (not in another's backyard) who report that chemical toilets are their primary sanitation facility are also overwhelmingly "Black African" (93.4%).
- 8.2.3. The above numbers indicate that the effect of the violation of the right of access to basic sanitation falls very disproportionately on a particular racial group in comparison to other groups.
- 8.2.4. Though this component of the Respondent's programme is not overtly directed at any racial group, the evidence set forth above indicates that its adverse impact overwhelmingly falls on a single racial group in comparison to others. As was the case in *Mvumvu* and *Walker*, this disproportionate impact constitutes indirect discrimination on the basis of race, which is presumptively unfair.
- 8.2.5. One discrimination is determined to be unfair on a specified ground, the Equality Act shifts the burden onto the Respondent to prove that the discrimination is fair despite being based upon a prohibited ground.<sup>123</sup> The reasons given by the Respondent for its actions taken in regard to provision of basic sanitation via widespread, long-term use of chemical toilets in informal settlements primarily consist of issues of feasibility, convenience and practicality from the Respondent's perspective. However, as the Court made clear in *Walker*, these reasons may indicate fairness in discrimination that is not based on one of the constitutionally prohibited grounds, but they are insufficient to override a presumption of unfairness when a prohibited ground is involved.
- 8.2.6. The fact that there is no evidence to support a conclusion that the Respondent intended that its actions would unfairly discriminate against a particular racial

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<sup>123</sup> Equality Act, Section 13(2)(a)



group is of no moment. There can be no doubt of the impact of the discriminatory treatment described above on this racial group. As explained in *Walker*, the impact of the action is the critical inquiry, not the intent behind the action.

- 8.2.7. Furthermore, the more direct differentiating characteristic used by the Respondent in this instance, namely providing significantly different levels of service to persons living in informal settlements compared with those living in formal areas brings to mind the Court's word in *van Heerden* regarding the need to dismantle levels and forms of social differentiation and systematic under-privilege that lead to new patterns of disadvantage aside from those caused by uneven treatment on one of the prohibited grounds. Residents of informal settlements are historically and currently vulnerable and marginalised, as well as having much greater difficulty in accessing many benefits and advantages available to persons living in formal areas. These include basic service provision, personal safety, educational opportunities and economic opportunities. Though it is unnecessary in this instance to examine this aspect thoroughly, it is important to note that the treatment of informal dwellers, even without the overwhelming racial statistics seen in this complaint, often reflects the "*hurtful discrimination and stereotypical response*" that the *van Heerden* Court cautioned against.
- 8.2.8. Given that the treatment in this situation consists of unfair discrimination on the basis of race, a constitutionally and statutorily prohibited ground, the final step of the analysis requires an examination of whether the rights at issue have been permissibly limited under Section 36 of the Constitution. Because the Respondent is acting pursuant to policy and practice rather than a law of general application, Section 36 will not apply. Consequently, the Commission concludes that the Respondent has violated the residents' right to equality in this circumstance.

### **8.3. Human Dignity**

- 8.3.1. To promote and protect human dignity, government must take actions that treat human beings as human beings, which accord them with equal respect regardless of group membership. Government must act with care and concern and shy away from stereotyping or devaluing of persons who will be affected by decisions taken. Unfair discrimination in any context is inherently detrimental to human dignity, and when the discrimination takes place in a long-term, institutionalised manner, the effect on human dignity cannot be denied.
- 8.3.2. Furthermore, whether consciously or not, the Respondent has engaged in a consistent and misleading practice of equating fundamentally non-equivalent concepts and terms relevant to the issues in this complaint. Most egregiously, the Respondent equates "informal" with "temporary," which conveniently glosses over the reality that many informal settlements within its jurisdiction have been in existence for years if not decades. The Respondent's programme to realise the right to basic sanitation for the residents of informal settlements continually makes reference to guidelines pertaining to emergency situations. To conceive of life in informal settlements as equivalent to emergencies, constant states of crises, is a fundamental affront to the dignity of the residents of those areas.

#### 8.4. Area of Concern in Addition to Allegations of Complaint

8.4.1. In reviewing the contract at issue in this complaint, the Commission noted the following language in the Definitions portion of the “*Conditions Pertaining to Targeted Procurement: Major (Over R2 000 000)*”:

*“1.12 Woman*

*A female person who is a South African citizen and a female at birth.”<sup>124</sup>*

8.4.2. On its face, the reference to a person being “*female at birth*” has implications for transgender and intersex persons. In addition, the relevance of such a categorisation to targeted procurement is not apparent.

## 9. Findings

### 9.1. Basic Sanitation

The Commission finds that:

9.1.1. The Respondent’s programme for provision of basic sanitation services in the four areas at issue in this complaint was inadequate and unreasonable for the following reasons:

- i. The Respondent’s use of temporary sanitation technology such as chemical toilets as a type of long-term solution is not a reasonable component of a programme for realisation of the right of basic sanitation.
- ii. The Respondent’s use of the Emergency Housing Programme guidelines to determine levels of sanitation provision in nonemergency circumstances is not reasonable.
- iii. The Respondent’s use of fixed ratios and servicing schedules rather than a context-specific assessment of whether actual services provided satisfy set definitions of basic sanitation services is not a reasonable component of a programme for realisation of the right to basic sanitation.
- iv. The Respondent’s failure to ensure that the service provider meaningfully engaged with communities where services were to be provided or to independently engage meaningfully with those communities was unreasonable.

9.1.2. The Respondent violated the right to basic sanitation of the residents of the informal settlements where chemical toilets were deployed on a long-term basis.

### 9.2. Equality

The Commission finds that:

9.2.1. Use of the long-term contracts for provision of chemical toilets in informal settlements within the City of Cape Town significantly and adversely affected black African people (who make up the majority of the occupants of informal settlements) in comparison with white, Indian and coloured persons.

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<sup>124</sup> 13 August letter from the Respondent to the Commission, Annexure 4, page 49, paragraph 1.12.

9.2.2. This violation indirectly unfairly discriminates against persons of the specified racial group.

### **9.3. Human Dignity**

The Commission finds that:

9.3.1. The Respondent's institutionalisation of disparate, inadequate basic sanitation service provision to residents of informal settlements violated residents' rights to dignity.

9.3.2. The Respondent's conceptualisation of informal settlements as temporary living conditions despite the reality of their long-term existence and the characterization of life in informal settlements as equivalent to a constant state of crisis ignores the reality of the residents and their humanity and therefore violates the residents' right to dignity.

## **10. Recommendations**

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

- 10.1. That the Respondent immediately cease its use of the guidelines set out in the Emergency Housing Programme of the National Housing Code to inform the provision of basic sanitation in informal settlements and develop norms and standards for basic sanitation that are not based upon the guidelines set out in the Emergency Housing Programme portion of the National Housing Code within 6 (six) months. These norms and standards should instead incorporate human rights principles and take into account the social context and lived reality of the persons who will be provided with services. Specifically, these norms and standards must ensure that services are available, accessible, acceptable to users, and of appropriate quality. That the norms and standards developed incorporate the context in which a sanitation facility is used into its determination of whether it meets all aspects of the applicable definitions of basic sanitation facility.
- 10.2. That the Respondent, within 6 (six) months hereof develop its own Emergency Housing Programme which incorporates human rights principles and which takes realistic account of the housing backlog and the implications which this has for the time period that people will inevitably spend in emergency housing which will ensure compliance with the applicable definition of basic sanitation facility and ensures that the service provided is available, accessible, acceptable to users and of appropriate quality.
- 10.3. That the provision of a particular technology in a particular area be informed by an analysis, performed on a predetermined periodic basis not to exceed 6 months, of whether the technology employed complies with the norms and standards described in recommendation at 9.1.
- 10.4. That the Department of Water and Sanitation in the newly created national Ministry of Water and Sanitation and the South African Local Government Association provide training and/or materials designed to assist municipalities with devising norms and standards such as those described in recommendations 9.1 and 9.2.
- 10.5. That the National Department of Human Settlements define and regulate the acceptable extent of the use of the Norms and Standards for Municipal Engineering Services in Temporary Settlement Areas set out in the Emergency Housing Programme and monitor compliance by municipalities.

- 10.6. That the National Department of Human Settlements develop and monitor compliance with norms and standards for sanitation in settlements that are not temporary settlement areas as defined in the Emergency Housing Programme, that are not informal settlements suitable for upgrading in situ, but that are also not permanent formal housing. The current lack of such norms and standards for such settlements creates a policy vacuum in which violations such as those seen in this complaint can easily occur.
- 10.7. That the Respondent take significant measures to reinforce provisions relating to community engagement in its sanitation-related tenders.
- 10.8. That the Respondent revisit the language of its “Conditions Pertaining to Targeted Procurement: Major (Over R2 000 000)” to ensure compliance with human rights standards and principles such as those discussed in recommendation 9.1.
- 10.9. That the Respondent review their current programme of realising the right to basic sanitation, to ensure it complies with the requirements of progressive realisation, as defined by the Constitutional Court in cases as cited above.
- 10.10. That a copy of this report be forwarded to the Office of the Public Protector.

## **11. 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 Commission. The appeal should be lodged with the Head Office of the Commission - contact details are as follows:

**Private Bag X2700  
Houghton  
2041**

**Signed at Johannesburg on the 9th day of July 2014  
South African Human Rights Commission**



COMPLAINT NO: FS/1415/0057

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Complaint No: FS/1415/0057

In the matter between

SOUTH AFRICAN HUMAN RIGHTS COMMISSION  
(ON BEHALF OF BOKAMOSO RESIDENTS, QWAQWA)

Complainant

and

MALUTI A PHOFUNG LOCAL MUNICIPALITY

Respondent

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## REPORT

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### 1. Introduction

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

### 2. Parties

- 2.1. The Complainant in this matter is the South African Human Rights Commission, an institution supporting constitutional democracy established in terms of section 181 of the Constitution of the Republic of South Africa (hereinafter referred to as “Complainant”).
- 2.2. The Respondent is Maluti-A-Phofung Local Municipality, a Municipality established in terms of the provisions of the Local Government Municipal Structures Act, 117 of 1998, located in the Thabo Mofutsanyana district in the Eastern Free State Province with its administrative head office situated at corner Moremoholo and Motlounge Streets, Phuthaditjhaba (hereinafter referred to as the “Respondent”).
- 2.3. The Respondent is cited as the local government authority with jurisdiction over QwaQwa responsible for the delivery of basic municipal services to its residents.

### 3. Nature of Investigation

- 3.1. The investigation into this matter seeks to determine whether any one or more of the human rights listed in Chapter II of the Constitution (Bill of Rights), were violated during and after the eviction of Bokamoso residents in QwaQwa, Free State Province. The eviction took place on the 11 June 2014.

### 4. Background to the Complaint

- 4.1. On Tuesday, 10 June 2014, the attention of the Commission was drawn to imminent plans of the Respondent to evict unlawful occupiers of the remainder of Farm Bluegumbosch 199, Ha Tshohanyane, Bokamoso in QwaQwa.
- 4.2. The eviction followed the Constitutional Court decision to dismiss the application for leave to appeal made on behalf of Bokamoso residents. The application was dismissed on the basis that it bears no prospects of success. The eviction was initially ordered by the Free State High Court on the 17 August 2012.
- 4.3. The Chief of the Maboleta Traditional Council, Morena Tsolo Molepi sought the intervention of the Commission in order to halt the eviction process pending a comprehensive assessment of the needs of the residents, their details and personal circumstances, the impact of eviction on vulnerable groups, the provision of adequate alternative accommodation by the Municipality, and meaningful engagement with the residents.
- 4.4. The Commission subsequently sent an email to the Respondent's Municipal Manager requesting him to defer the planned eviction for a period of sixty (60) days in order to address concerns expressed by the Chief.

### 5. Preliminary Assessment

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

- 5.1. That the alleged incident constituted a *prima facie* violation of the human rights of the residents of Bokamoso. In particular, the assessment determined that Sections 10 (Human dignity), 25 (Property), 26 (Housing), 28 (Children), and 32 (Access to Information) of the Constitution had *prima facie* been violated;
- 5.2. That the alleged violation *fell within the mandate and jurisdiction* of the Commission; and
- 5.3. That the alleged *violation merited a full investigation* in terms of the Complaints Handling Procedures of the Commission.

### 6. 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:

- 6.1. Interview with Chief of Maboleta Traditional Council;
- 6.2. Interview with Residents;
- 6.3. Interview with Respondent; and
- 6.4. *Inspection in loco* of the area.

## **6.1. Interview with Chief of Mabolela Traditional Council**

- 6.1.1. On Tuesday, 10 June 2014, the Commission met briefly with Chief Tsolo Mopeli to discuss the impending eviction. It was agreed in that meeting that the Commission would engage with the Municipality with a view to halting evictions until such time that alternative accommodation had been secured for the residents.
- 6.1.2. Chief Tsolo Mopeli furnished the Commission with copies of the pleadings used in the High Court and the order dismissing the application made by the Constitutional Court on the 23 May 2014.
- 6.1.3. Due to lateness of the hour and in order to aid our investigations, the Commission requested a report from the Chief as he had to urgently return to QwaQwa.
- 6.1.4. On Wednesday, 18 June 2014, the Commission received a formal report from the Chief about the period leading up to the eviction and the aftermath of the eviction process.
- 6.1.5. In his brief report to the Commission, Chief Tsolo Mopeli states the following:
  - 6.1.5.1. The village council has been allocating land for livestock farming, burial purposes, circumcision schools, residential and business sites with the full knowledge and cooperation of the municipality for over a period of thirty years.
  - 6.1.5.2. The village council allocated 730 sites at Bokamoso in 2012 for residential purposes. Approximately 500 families were beneficiaries of the allocated sites and lived permanently in Bokamoso.
  - 6.1.5.3. On Monday, 9 June 2014, residents of Bokamoso were advised by the Sheriff to vacate the land and were handed two double-sided 4 page document reflecting both the initial Free State High Court and the Constitutional Court order.
  - 6.1.5.4. After the Chief enquired about provision of alternative accommodation for residents, he was told by the Sheriff that the Municipality would make alternative land available to residents.
  - 6.1.5.5. On the morning of the eviction, he immediately handed a copy of the email correspondence from the Commission to the Station Commander of Phuthaditjhaba Police Station.
  - 6.1.5.6. The Station Commander, who was already with law enforcement officials and other officials from the Municipality, replied to the correspondence by stating that the Sheriff was already on his way and police could only do what the Sheriff required them to do.
  - 6.1.5.7. Upon arrival of the Sheriff, he handed him a copy of the Commission's correspondence to the Municipality. After a brief meeting between the Sheriff and the Station Commander, the Sheriff told him and another community member that they could only stop the eviction if instructed to do so by the Mayor, Mr Vusi Tshabalala.
  - 6.1.5.8. He subsequently contacted the Mayor who acknowledged receipt of the Commission's correspondence. The Mayor informed him that their



lawyers had advised them to proceed with the eviction because the eviction order had been granted by the Court.

- 6.1.5.9. The Sheriff stated that the evicted people would be accommodated at a temporary shelter.
- 6.1.5.10. From then on, he went back to Bokamoso to report to the residents about the outcome of his deliberations with the Municipality, the Sheriff and law enforcement officials.
- 6.1.5.11. Residents expressed their disappointment upon hearing that the request to defer eviction by the Commission had been rejected by the Municipality.
- 6.1.5.12. Immediately thereafter, police vehicles entered Bokamoso and announced that because the Court had ruled against them living on this land, they must leave immediately otherwise they would be forcefully removed.
- 6.1.5.13. Nothing was mentioned about the alternative land or accommodation that was to be made available to the evictees.
- 6.1.5.14. A group of people belonging to a private demolition company started entering homes and took belongings outside. They used a bulldozer to flatten houses. Belongings of the evictees were loaded onto trucks and taken to a factory in the industrial area for storage.
- 6.1.5.15. Some of the evictees managed to dismantle their own dwellings, in order to prevent them from being crushed down by the bulldozers. Other evictees were overtaken by the demolishers and their houses and belongings were left in ruins.
- 6.1.5.16. Some evictees received help from their families and friends to dismantle their corrugated iron sheets and transport their belongings, because it was not clear as to where they would be relocated. They were not certain whether their belongings would be safely kept at the factory.
- 6.1.5.17. At the end of the eviction process, 50 families at Bokamoso were left without shelter.
- 6.1.5.18. 41 families were taken to the Fire Department and given food by the Municipality. Those who did not receive any assistance were left in the cold and stayed overnight at Bokamoso.
- 6.1.5.19. The Chief's residence was amongst those that were demolished and despite this he was ordered to leave the Fire Department premises as the situation was now deemed to be under the control of the Municipality.
- 6.1.5.20. On Thursday, 12 June 2014, the evictees made their way to the Fire Department to find out more about the plans that had allegedly been made for alternative land.
- 6.1.5.21. He found deplorable conditions at the Fire Department where males and females were crowded together in one room. There was no water

and toilets were blocked. Children couldn't attend school and some missed their exams as they were uncertain about where they would be resettled. Much of the furniture that was taken to the factory was damaged and some of the belongings of the evictees had been stolen.

- 6.1.5.22. Some of the evictees, who received shelter from families and friends for the night, arrived at the Fire Department on the 12<sup>th</sup> June and were told that they were no longer part of the evictees who need to be provided with alternative accommodation and land because they had other options of residence.
- 6.1.5.23. The Municipality took 41 households who slept at the Fire Department on the first night to a piece of land at Snake Park in Bluegumbosch for purposes of alternative accommodation.
- 6.1.5.24. Temporary accommodation provided by the Municipality was made up of old corrugated iron sheets belonging to the evictees and new corrugated iron sheets bought by the Municipality. These temporary shelters are three metres apart.
- 6.1.5.25. On Saturday, 14 June 2014, other evictees were moved to Makwane Youth Centre after the intervention of the MEC for Social Development, Ms Ntombela.

## **6.2. Interview with Residents/Evictees**

- 6.2.1. On Wednesday, 18 June 2014, the Commission embarked on a visit to QwaQwa to interview the evictees, to assess their plight and observe their living conditions.
- 6.2.2. The investigating team first paid a visit to Snake Park in Bluegumbosch where 41 households have been relocated to by the municipality.
- 6.2.3. The investigating team found that the municipality had erected 28 shacks in this area as alternative 'temporary' accommodation for the evictees.
- 6.2.4. The evictees gave account of their dreadful experiences and the resultant impact of the eviction of their lives.
- 6.2.5. The evictees stated the following:
  - 6.2.5.1. After the eviction they were placed in a temporary shelter at the municipality's Fire Department in QwaQwa.
  - 6.2.5.2. On Friday, 13 June 2014, the Municipality provided them with alternative accommodation at Snake Park.
  - 6.2.5.3. They do not have sanitation or toilet facilities in Snake Park. They have resorted to using toilets of residents in Snake Park.
  - 6.2.5.4. A communal tap was installed by the Municipality on the 13 June 2014.
  - 6.2.5.5. They are all from impoverished backgrounds. They are mostly unemployed and rely on social grants.
  - 6.2.5.6. They used to occupy RDP houses belonging to other people before they were allocated land by the Chief in Bokamoso.

- 6.2.5.7. They feel that the Municipality was inconsiderate and acted inhumanely by carrying out the eviction in winter during cold conditions in QwaQwa.
- 6.2.5.8. A voting station tent was erected in Bokamoso during the May national and provincial elections.
- 6.2.5.9. The Municipality has failed to inform them about plans to relocate them to an approved municipal site.
- 6.2.5.10. The Municipality promised to provide their children with counseling and has failed to fulfill this promise.
- 6.2.5.11. The MEC for Human Settlements visited the Snake Park area and promised them that government had found a site for them but couldn't state exactly where this was.
- 6.2.5.12. They have no information on the proposed relocation site identified by the municipality.
- 6.2.5.13. Some were dismissed from their work due to failure to report for duty as they were trying to safeguard their belongings.
- 6.2.5.14. Children couldn't attend school as a result of the eviction. Snake Park is far from their schools.
- 6.2.5.15. Their relocation to Snake Park has resulted in old residents openly threatening them.
- 6.2.5.16. They cannot purchase nearby sites as they are unaffordable for them.
- 6.2.5.17. Their belongings were damaged by the bulldozer and the personnel of the demolition company.
- 6.2.6. Other evictees interviewed include the elderly, persons with disabilities and women.
- 6.2.7. They are all struggling to make ends meet and mostly rely on pension and disability grants from government.
- 6.2.8. The investigating team also visited the Makwane Youth Centre where 194 evictees are temporarily accommodated by the Municipality.
- 6.2.9. The investigating team interviewed the evictees based at the Makwane Youth Centre.
- 6.2.10. Most of the eviction victims fault the Municipality for their plight.
- 6.2.11. The evictees at Makwane Youth Centre stated the following:
  - 6.2.11.1. Houses were demolished in their presence and this left them devastated.
  - 6.2.11.2. An elderly lady, and two males were hospitalised and a four months old baby suffered from diarrhea immediately after the eviction.
  - 6.2.11.3. Some evictees suffer from chronic illnesses and couldn't take their pills on time.
  - 6.2.11.4. One of the evictees was looking after her daughter who had a one month old baby when the eviction took place.

- 6.2.11.5. They requested a temporary mobile clinic but they were told that mobile clinics had been assigned to other areas in the municipality.
- 6.2.11.6. Most of their belongings were taken to the QwaQwa Industrial Area for safekeeping.
- 6.2.11.7. No inventory of their possessions was taken when they were evicted.
- 6.2.11.8. Some of their possessions were stolen whilst in safekeeping at the Industrial Area.
- 6.2.11.9. Some lost their identity documents during the eviction and demolishing of houses.
- 6.2.11.10. On Sunday, 15 June 2014, officials from the Department of Home Affairs visited the shelter to establish the number of people who had lost their identity documents.
- 6.2.11.11. Children could not attend school.
- 6.2.11.12. One of the evictees studying at the University of South Africa stated that the eviction severely hampered his preparation for June examinations.
- 6.2.11.13. The Municipality appointed a service provider to provide them with food.
- 6.2.11.14. The Municipality didn't provide them with food in some of the days.
- 6.2.11.15. The Mayor has not been to the shelter.
- 6.2.11.16. A major cold snap had descended on QwaQwa during the eviction and it was cold at the shelter.
- 6.2.11.17. The Department of Social Development gave them two gas heaters.
- 6.2.11.18. Evictees are vulnerable at night due to the fact that the Youth Centre is not lockable.
- 6.2.11.19. They now have to walk long distances to work.
- 6.2.11.20. One of the evictees has a wheelchair bound daughter.
- 6.2.11.21. All females at the shelter share the same mobile toilet. The mobile toilet is not designed to accommodate persons with disabilities.
- 6.2.11.22. All males also share the same toilet.
- 6.2.11.23. Other proper functioning toilets are used by the Social Workers.
- 6.2.11.24. One of the evictees was injured by a corrugated iron sheet during the eviction and has not received medical attention.
- 6.2.11.25. The municipal did not meaningfully engage with them.
- 6.2.11.26. They could not change their clothes for a week after they were moved to Makwane Youth Centre as their clothes were kept at the industrial area.
- 6.2.11.27. They were told that they would only stay at the Youth Centre temporarily and would then be moved to an alternative municipal site. No date of relocation was fixed and they are still in the dark.

6.2.11.28. The Methodist Church of South Africa was able to provide them with blankets and food.

6.2.11.29. Some evictees slept on the floor and on beds without mattresses.

6.2.12. The evictees accused government of abandoning them.

6.2.13. The following observations were noted in the areas visited:

### **6.3. General Observations**

6.3.1. The land from which the people were evicted is in the vicinity of the University of Free State QwaQwa campus.

6.3.2. The vast majority of evictees are unemployed and rely on social grants from government.

6.3.3. They predominantly speak Sesotho and isiZulu.

6.3.4. The conditions at the Makwane Youth Centre were deplorable.

### **6.4. Substantive Observations**

6.4.1. The evictees residing in Snake Park use one communal tap for water.

6.4.2. There are no toilets for evictees in Snake Park.

6.4.3. The toilets used by men at Makwane Youth Centre are unsanitary.

6.4.4. During the inspection period, the investigation team witnessed the conditions in the area.

### **6.5. Visit to Respondent Municipal Offices - Phuthaditjhaba**

6.5.1. On the same day of the investigation, the investigating team paid a courtesy visit to the municipal offices of the Respondent with the intention of informing the Municipal Manager that the Commission had conducted investigations to look at the aftermath of the evictions.

6.5.2. The Municipal Manager and the Mayor were unavailable. The Acting Provincial Manager met with the Personal Assistant to the Municipal Manager, COGTA officials and an official from the Premiers intervention team.

### **6.6. Respondent's response to allegations**

6.6.1. On Tuesday, 10 June 2014, the Commission sent an email to the Municipal Manager of the Respondent requesting the deferment of the eviction that was due to take place the following day.

6.6.2. On Wednesday afternoon, 11 June 2014, the Commission received a response from the Respondent through their attorneys.

6.6.3. They stated the following in their response letter:

- i. The allegation that residents were only informed to vacate land on the 10<sup>th</sup> was incorrect;
- ii. An order was granted on 12 July 2012 ordering the unlawful occupants to vacate the said property on or before 17 August 2012;
- iii. This order was also duly served on the occupants by the Sheriff of Phuthaditjhaba on 2 August 2012;

- iv. Consequent to the service of the abovementioned order, the occupants appealed against the court order;
- v. Therefore it was clear that the occupants knew that they needed to vacate the said premises on or before 17 August 2012;
- vi. Notice boards were also erected at the entrances of the said property, clearly indicating that the occupants were illegally occupying the property, that the court ordered that they should vacate the property and that they could apply for sites at the municipality;
- vii. The occupants' application for leave to appeal was dismissed by the Free State High Court in Bloemfontein as well as their petition to the Supreme Court of Appeal;
- viii. On 23 May 2014 the Constitutional Court of South Africa also dismissed with costs the occupants' application for leave to appeal;
- ix. The said order was faxed to the respective attorneys of record, which included the unlawful occupiers' attorney on 26 May 2014. Therefore it was clear that the occupants were aware of the Constitutional Court's order since 26 May 2014;
- x. Morena Tsolo Mopeli also had a meeting with the occupants on Sunday 8 June 2014 informing the occupants that they would be evicted on Wednesday 11 June 2014;
- xi. The Constitutional Court did not order that any further notice should be given to the occupants before the date of eviction. However as a courtesy, the sheriff of Phuthaditjhaba was instructed to once again serve the said court order as well as erecting a notice board informing the occupants to vacate the property;
- xii. This notice board clearly indicated that the occupants may apply for alternative sites at the municipality which they failed to do;
- xiii. The Municipality made the necessary provisions to assist all persons who would be evicted by having available shelter, bedding as well as food. Persons evicted would not be left in the cold and would be looked after. The Municipality also arranged for the necessary transport to assist any occupant who wished to relocate to another site;
- xiv. The Municipality could not grant any further extension to stay on the said land as there was no infrastructure and the occupants' further occupation of the said land was a health risk;
- xv. From the onset the occupants' *modus operandi* was to increase the amount of occupants and illegal structures after every postponement or after the applications for leave to appeal, despite the High Court's order interdicting them from erecting further structures and occupying the said premises;
- xvi. The occupants had no respect for the court and court orders and bluntly contravened these orders;
- xvii. The Municipality ran the risk that the amount of occupants and structures would increase should they be granted any further extension;

- xviii. The Municipality would suffer a great deal of financial loss if it did not proceed with the said eviction;
  - xix. The Municipality earmarked certain sites for the relocation of the occupants and same would be made available;
  - xx. The Commission's availability to mediate the said matter at this late stage would not resolve this matter and nay extension of time would only give the occupants further time to increase the amount of occupants and structures, causing greater problems.
- 6.6.4. On Tuesday, 17 June 2014, the Commission sent an allegation letter providing full details regarding the alleged violation to the Respondent and requested a response thereto within a period of 14 days.
- 6.6.5. The Commission required a detailed report from the municipality addressing the following:
- i. Provision of alternative accommodation;
  - ii. Relocation plans to an approved municipal site;
  - iii. Access to basic municipal services;
  - iv. Interim services to be provided to evictees;
  - v. Protection of the rights of vulnerable group; and
  - vi. Security of tenure for evictees.
- 6.6.6. The Commission did not receive the report within the stated period. Subsequent to this, a follow up letter was sent to the Respondent on the 17 July 2014. An additional period of 14 days was given to the Respondent to respond to the previous correspondence. The Commission did not receive any response.

## **7. Applicable Legal Framework**

### **7.1. Key International instruments**

#### **7.1.1. International Covenant on Civil and Political Rights<sup>1</sup>**

Article 17 (1) provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

#### **7.1.2. International Covenant on Economic, Social and Cultural Rights<sup>2</sup>**

Article 11(1) provides that "the State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

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<sup>1</sup> 1966

<sup>2</sup> 1966

### **7.1.3. Convention on the Elimination of All Forms of Discrimination Against Women<sup>3</sup>**

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

### **7.1.4. Convention on the Rights of the Child<sup>4</sup>**

Article 20 (1) provides that “[a] child temporarily or permanently deprived of his or her family environment, or is whose own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”

Article 27 obliges State Parties to take appropriate measures to assist parents and others responsible for the child to implement the child’s right to an adequate standard of living, and in case of need, provide material assistance and support programmes, particularly with regard to, among other, housing.

### **7.1.5. United Nations Commission on Human Rights<sup>5</sup> (UNCHR)**

The UNCHR affirmed that the practice of forced evictions is a gross violation of human rights, in particular the right to adequate housing (para 1) The UNCHR urged governments to:

- i. Take immediate measures, at all levels, to eliminate the practice of forced evictions;
- ii. Give legal security of tenure to all people currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups; and
- iii. Provide immediate restitution, compensation or appropriate and sufficient alternative accommodation or land to persons and communities that have been forcibly evicted. This has to be based on mutually satisfactory negotiations with those affected and be consistent with their wishes, rights and needs.

The UNCHR reaffirmed<sup>6</sup> that the practice of forced eviction violates several human rights, in particular the right to adequate housing. Government were further urged to ensure that any eviction that is otherwise deemed lawful is carried out in a manner that does not violate any of the human rights of those evicted.

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<sup>3</sup> CEDAW 1979

<sup>4</sup> 1989

<sup>5</sup> Commission on Human Rights Resolution 1993/77: Forced Evictions, adopted on 10 March 1993

<sup>6</sup> Commission on Human Rights Resolution 2004/28: Prohibition of forced evictions, adopted on 16 April 2004



**7.1.6. United Nations Commission on Economic, Social and Cultural Rights (CESCR)****General Comment 4 The Right to adequate housing<sup>7</sup>**

The General Comment 4 identified a number of factors to be taken into account in determining whether particular forms of shelter can be considered to be “adequate housing” in terms of the ICESCR. These include: legal security of tenure; availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

**7.1.7. United Nations Educational, Scientific and Cultural Organization (UNESCO)**

The international ideal for access to housing has been described by UNESCO in these terms:<sup>8</sup>

‘The right to adequate housing should not be understood narrowly as the right to have a roof over one’s head. Rather, it should be seen as the right to live somewhere in security, peace and dignity. This right has a number of components, including the following:

- i. Legal security of tenure: everyone should enjoy legal protection from forced eviction, harassment and other threats;
- ii. Habitability: housing must provide inhabitants with adequate space and protection from the elements and other threats to death;
- iii. Location: housing must be in a safe and healthy location which allows access to opportunities to earn an adequate livelihood, as well as access to schools, health care, transport and other services;
- iv. Economic accessibility: person or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not compromised;
- v. Physical accessibility: housing must be accessible to everyone, especially vulnerable groups such as the elderly, persons with physical disabilities and the mentally ill;
- vi. Cultural acceptability: housing must be culturally acceptable to the inhabitants, for example reflective of their cultural preferences in relation to design, site organization and other features;
- vii. Availability of services, materials, facilities and infrastructure that are essential for health, security, comfort and nutrition, such as safe drinking water, sanitation and washing facilities.’

**7.1.8. United National Special Rapporteur on Adequate Housing**

The UN Special Rapporteur on Adequate Housing presented basic principles and guidelines to the Human Rights Council as its fourth session in 2007.

The Basic Principles and Guidelines list, amongst others, detailed steps to be taken by states before, during and after evictions.

<sup>7</sup> General Comment 4 was adopted on 12 December 1991 UN doc. E/1992/23

<sup>8</sup> ‘Poverty and Human Rights: UNESCO’s Anti-Poverty Projects.’

Before an eviction, the guidelines include:

- i. Giving appropriate notice to all people likely to be affected that an eviction is being considered and that there will be public hearings on the proposed plans and alternatives.
- ii. Giving a reasonable time period for public review of, comment on, or objection to the proposed plan.
- iii. Providing opportunities and facilitating the provision of legal, technical and other advice to affected people about their rights and options.

During an eviction, the guidelines include:

- i. The mandatory presence of governmental officials or their representatives on site during evictions, who must identify themselves to the people being evicted and formal authorisation for the eviction action.
- ii. Allowing access, upon request, to neutral observers, including regional and international observers.
- iii. The carrying out of evictions in a manner that does not violate the dignity and human rights to life and security of those affected.
- iv. The taking of steps by states to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected.
- v. Ensuring that any legal use of force is in accordance with the principles of necessity and proportionality, as well as the basic principles on the use of force and firearms by law enforcement officials and any national or local code of conduct consistent with international law enforcement and human rights standards.
- vi. Ensuring that evictions do not take place in bad weather, at night, during festivals or religious holidays, before elections, or during or just before school examinations.
- vii. Ensuring that no one is subject to direct or indiscriminate attacks or other acts of violence, especially against women and children, or arbitrarily deprived of property or possessions as a result of demolition, arson and other forms of deliberate destruction, negligence or any form of collective punishment. This includes protecting property and possessions that are left behind involuntarily against destruction and arbitrary and illegal appropriation, occupation or use.
- viii. Not requiring or forcing those evicted to demolish their own dwellings or other structures. However, the option to do so must be provided to them so that they can salvage possessions and building materials.

After an eviction, the guidelines include:

- i. The immediate provision upon eviction, or just compensation and sufficient alternative accommodation, or restitution when feasible by states and other parties responsibilities for doing so.

- ii. Ensuring, at the very minimum, that the evicted people or groups, especially those who are unable to provide for themselves, have safe and secure access to: essential food, potable water and sanitation; basic shelter and housing; appropriate clothing; essential medical services; livelihood sources; fodder for livestock and access to common property resources previously depended upon; and education for children and childcare facilities.
- iii. Ensuring that members of the same extended family or community are not separated as a result of evictions.
- iv. Making special efforts to ensure the equal participation of women in all planning processes and in the distribution of basic services and supplies.

## **7.2. Regional Instruments**

### **7.2.1. African Charter on Human and Peoples' Rights<sup>9</sup>**

The right to housing is not explicitly provided for under this Charter. However, the African Commission on Human and Peoples' Rights has found this right, including a prohibition on unjust evictions, to be implicit in articles 14 (right to property), 16 (right to the best attainable state of physical and mental health) and 18(1) (protection of the family).

### **7.2.2. African Charter on the Rights and Welfare of the Child<sup>10</sup>**

Article 20 provides that the primary obligation of parents is to secure conditions of living necessary to the child's development and in case of need, State Parties should take all appropriate measures to provide, material assistance and support programmes, particularly with regard to, among other, housing.

### **7.2.3. African Commission on Human and Peoples' Rights (ACHPR)**

In its 2012 resolution, the ACHPR urged State Parties to use eviction only as a last resort for purposes of development projects, to provide adequate eviction notices, and to supply housing in accordance with international and regional standards.<sup>11</sup>

## **7.3. Domestic Legislation**

### **7.3.1. Constitutional Rights**

The preliminary assessment of the Free State Provincial Office indicated that the rights alleged to have been violated according to the report are sections 10, 25, 26, 28 and 32 of the Constitution of the Republic of South Africa. Each of these rights are discussed hereunder, in turn:

#### **7.3.1.1. The Right to Human Dignity**

Section 10 is the right to have the inherent dignity of everyone respected and protected.

<sup>9</sup> 1981

<sup>10</sup> 1990

<sup>11</sup> Resolution 231 Adopted at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights held in Yamoussoukro, Côte d'Ivoire, from 9 to 22 October 2012

### **7.3.1.2. The Right to Property**

Section 25 (5) provides that the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

This right is an integral component of the right to have access to adequate housing.

The state has an obligation to ensure access to land for the homeless on a progressive basis.

### **7.3.1.3. The Right to Housing**

Section 26(3) of the Constitution provides that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.” This section is aimed at ensuring that every person has access to adequate housing and the state may not interfere with such access unless justifiable.

Section 26(1) imposes a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.

### **7.3.1.4. Children**

Section 28 (1) (c) of the Constitution provides an unqualified right for every child to basic shelter. Where parents are unable to shelter their children, the Court in the *Grootboom* case<sup>12</sup> stated that the obligation falls to the state.

Children therefore have both an unqualified right to shelter; and a weaker (because qualified) but larger right of access to adequate housing.

### **7.3.1.5. The Right to Access Information**

Section 32 of PAIA 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.”

## **7.4. Other Domestic Legislation**

### **7.4.1. The Prevention of Illegal Eviction and Unlawful Occupation of Land Act<sup>13</sup> (PIE Act)**

Section 4(7) of the PIE Act provides for the eviction of unlawful occupiers who had occupied property for a period longer than six months, expressly requires a court to, in considering all the relevant circumstances, consider “whether land

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<sup>12</sup> *Government of the Republic of South Africa and Other v Grootboom and Others* 2001 (1) SA 46 (CC)

<sup>13</sup> Act 19 of 1998

has been made available or can reasonably be made available by a municipality or other organ of state...for the relocation of the unlawful occupiers.”

This Act reinforces the court order requirement under section 26(3) of the Constitution.

The PIE Act defines an unlawful occupier as a person living on land without the express or tacit (unspoken or implicit) consent of the owner or person in charge, or without any other legal right to occupy the land.<sup>14</sup>

The PIE Act sets out the procedures for evictions carried out by two groups of people: (1) an owner or person in charge; and (2) an organ of state.

An organ of state may institute proceedings, under section 6 of PIE, for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in sale of execution pursuant to a mortgage.

The organ of state is required to give notice to the owner or person in charge of the land before instituting eviction proceedings.

In deciding whether it is fair to grant an order for eviction, a court is required to consider the following:

- i. The circumstances under which the unlawful occupier occupied the land and erected the building structure;
- ii. The period the unlawful occupier and his or her family have resided on the land in question; and
- iii. The availability to the unlawful occupier of suitable alternative accommodation or land.

#### **7.4.2. The Housing Act<sup>15</sup>**

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) Potable water adequate sanitary facilities and domestic energy supply.<sup>16</sup>*

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

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<sup>14</sup> Section 1 of PIE Act

<sup>15</sup> 107 of 1997

<sup>16</sup> Section 1(vi) of the Housing Act 107 of 1997

and necessary steps within the framework of national and provincial housing legislation and policy *inter alia* to:

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

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

Section 2 (1) (b) of the Housing Act requires all levels of government to consult meaningfully with individuals and communities affected by housing development.

#### **7.4.3. The Municipal Systems Act<sup>17</sup>**

The definition of basic municipal services according to the Act<sup>18</sup> 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.”

#### **7.4.4. Promotion of Access to Information Act<sup>19</sup>**

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

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<sup>17</sup> 32 of 2000

<sup>18</sup> Chapter 8 of the Municipal Systems Act

<sup>19</sup> Act 2 of 2000

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

## 7.5. Policy Framework

### 7.5.1. The Emergency Housing Programme (EHP)<sup>20</sup>

This Programme provides a policy framework for the provision of alternative accommodation in a variety of instances. The Programme aims to be a responsive, flexible and rapid programme to address homelessness, hazardous living conditions, and temporary or permanent relocation of vulnerable households or communities.

The Emergency Housing Programme is designed to provide temporary relief to households in exceptional housing need, living in unsafe conditions, or rendered homeless, through the provision of secure access to land, engineering services, and shelter.

The process of emergency housing provision begins when the municipality identifies a case of exceptional housing need. The municipality is then required to identify one of the criteria outlined in the policy and must submit an application to the Provincial Department of Human Settlements (Emergency Housing Programme, 2009:63). The policy allows for municipalities to fund emergency housing responses through alternative means or bridge funding.

The policy allows for relocation or resettlement in case of evictions where households must be moved, and a suitable and available site exists for future development.

An eviction is specifically classed in the policy as an emergency housing situation.<sup>21</sup>

## 7.6. Case Law

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

**7.6.1.** In ***Government of the Republic of South Africa and Others v Grootboom and Others*** the Constitutional Court set out the parameters of a “reasonably policy”.

A reasonable housing policy must be:

- i. Comprehensive, coherent, flexible and effective;
- ii. Have sufficient regard for the social, historic and economic context of poverty and deprivation;
- iii. Take into account the availability of resources;
- iv. Take a phased approach, including short, medium and long-term plans;
- v. Allocate responsibilities clearly to all three spheres of government;
- vi. Respond with care and concern to the needs of the most desperate; and
- vii. Be free of bureaucratic inefficiency or overly onerous regulations.<sup>22</sup>

<sup>20</sup> This programme is provided for in Part 3 Volume 4 of the National Housing Code

<sup>21</sup> Department of Human Settlement “Emergency Housing Programme” 9 and 15

<sup>22</sup> *Government of the Republic of South Africa and Other v Grootboom and Others* 2001 (1) SA 46(CC) para 39, 42, 43, 44, 45 and 99

**7.6.2.** In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,<sup>23</sup> the Constitutional Court considered an open list of factors to determine whether an eviction would be just and equitable given the circumstances. These factors include:

- i. The length and duration of occupation by the occupiers;
- ii. Whether their occupation was once lawful;
- iii. Whether the owner was aware of the occupiers when purchasing the property;
- iv. Whether the eviction would lead to homelessness; and
- v. Whether there is a competing risk of homelessness on the part of the private owner of the property.<sup>24</sup>

**7.6.3.** In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,<sup>25</sup> the Court authorised the eviction of a large group of occupiers subject to a set of strict requirements in relations to the State's provision of alternative accommodation. In this case the Court endorsed relocating the residents to Temporary Residential Units (TRUs) in terms of the Emergency Housing Programme. The Court prescribed that TRUs had to:

- vi. Be at least 24 square metres in size;
- vii. Be accessible by tarred road;
- viii. Be individually numbered for identification;
- ix. Have walls constructed for Nutec;
- x. Have galvanized corrugated iron roofs;
- xi. Be supplied with electricity by a prepaid electricity meter;
- xii. Be located within reasonable proximity of communal ablution facilities;
- xiii. Make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage; and
- xiv. Make reasonable provision for fresh water, which may be communal.<sup>26</sup>

**7.6.4.** In *Port Elizabeth Municipality v Various Occupiers*,<sup>27</sup> the

Constitutional Court enunciated various important aspects that a court would have to consider prior to authorizing an eviction order. These include: the degree of emergency or desperation that drove people to find accommodation, whether the community is settled and would be uprooted by an eviction order, and the availability of alternative accommodation, even if it is temporary accommodation (especially if it a settled community). The Court also asserted that there may be other relevant factors that a court would have to have due regard to depending on

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<sup>23</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104(CC)

<sup>24</sup> Para 39

<sup>25</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC)

<sup>26</sup> para 7

<sup>27</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ("PE Municipality")



the particular circumstances of the case, indicating that the list of considerations is not closed.<sup>28</sup>

Sachs J observed:

*“[14] It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when State action intensifies rather than mitigates their marginalization. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of claims of the desperately poor to the basic elements of a decent existence.”*

The Constitutional Court pointed out that, in relation to the impact of eviction on people’s privacy and sense of security:<sup>29</sup>

*“Section 26(3) evinces special constitutional regard for a personal place of abode. It acknowledges that a home is more than just a shelter from the elements. It is zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that established itself on site that has become its familiar habitat.”*

**7.6.5.** In ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)***,<sup>30</sup> Sachs J wrote:

*“The right to speak and to be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity. Indeed, in a society like ours, where the majority were for centuries denied the right to influence those who ruled over them, the ‘to be present’ when laws are being made has deep significance.”*

**7.6.6.** In ***NM v Smith (Freedom of Expression Institute as Amicus Curiae)***<sup>31</sup> 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**

<sup>28</sup> *PE Municipality* para 30

<sup>29</sup> *PE Municipality* para 17

<sup>30</sup> *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curia)* 2006 (2) SA 311 (CC) para 627 (New Clicks’)

<sup>31</sup> *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) at paragraph (49)-(51)

*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 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, possible 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.*

- 7.6.7.** In **Joseph and Others v City of Johannesburg and Others**,<sup>32</sup> 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.

## **8. ANALYSIS**

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

### **8.1. Human Rights Violations**

- 8.1.1. The Respondent is alleged to have violated the right to human dignity, housing, and access to information of the residents by its failure to mitigate the impact of eviction on vulnerable groups and not providing residents with adequate alternative accommodation, and by its failure to meaningfully engage with them.
- 8.1.2. The inspection *in loco* of the areas undertaken by the Commission gave credence to allegations made by the Chief of Maboela Traditional Council. Interviews conducted with the evicted people confirmed allegations of inadequate alternative accommodation and lack of meaningful engagement.

#### **The Right to Human Dignity**

- 8.1.3. Housing forms an indispensable part of ensuring human dignity. Proper sanitation brings dignity, equality and safety for the evicted people.
- 8.1.4. The alternative accommodation provided by the Respondent in Snake Park only had one communal tap and did not have basic sanitation. The evicted people relied on toilets in the adjacent township. Women and children had to suffer the indignity of humiliation by not having access to safe and private sanitation facilities closer to their dwellings.

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<sup>32</sup> See *Joseph and Others v City of Johannesburg and Others* (2009) ZACC 30

- 8.1.5. The sanitation facilities provided by the municipality at Makwane Youth Centre excluded the needs of persons with disabilities and were not accessible. No sanitation facilities were earmarked exclusively for their use. The Commission found that their needs were overlooked as sanitation facilities did not meet their physical demands.
- 8.1.6. The Commission finds that the sanitation facilities provided for evictees at Makwane Youth Centre were unhygienic and undignified.
- 8.1.7. Some of the evicted people slept on the floor in an undignified manner and on beds without mattresses.

### **The Right to Housing**

- 8.1.8. Section 26 of the Constitution guarantees to everyone the right to have access to adequate housing. Housing is essential for normal healthy living. The right to adequate housing is indivisible from and interdependent with other rights. Apart from the right to of access to adequate housing, people in rural areas need access to land to sustain themselves. The present complaint emanates from a former homeland which is located in a rural part of the Province.
- 8.1.9. The Commission's investigations established that the Respondent did not have adequate alternative accommodation for all the evicted people as a significant majority of them were temporarily relocated to a Youth Centre as the eviction had rendered them homeless. The Commission found that vulnerable people were also rendered homeless as a result of the failure of the Respondent to ensure that the eviction process would not lead to homelessness. This demonstrates that the Respondent failed to acknowledge the gravity of the situation by continuing with the eviction despite lack of sufficient alternative accommodation.
- 8.1.10. The eviction should not have resulted in the community of Bokamoso becoming homeless or vulnerable to the violation of other human rights. In making a decision to evict Bokamoso residents, the Respondent should have considered the viability of alternative accommodation. The investigations revealed that the Respondent failed to appropriately consider the viability of alternative accommodation and the temporary shelters provided were inadequate. The Commission finds that there was no compelling reason or need to evict the Bokamoso residents on the 11 June 2014 when there was at that stage inadequate alternative accommodation.
- 8.1.11. The Respondent had a duty to ensure that an eviction was carried out humanely. The eviction executed by the Respondent resulted in possessions and building materials being destroyed. No enumerations were done to record details of the assets of evicted persons.
- 8.1.12. The Commission finds that the actions of the Respondent violated the right of access to adequate housing of the evicted people

### **Access to Information**

- 8.1.13. Evictees received short notice from the Respondent to vacate the land without any demonstrable urgent and compelling public interest need for the land. They were informed and reminded only a few days before the eviction which was insufficient to make suitable arrangements. The Respondent proceeded with

eviction despite the Commission's plea to halt the eviction for a further period of 60 (sixty) days.

- 8.1.14. The evicted persons stated that the Respondent failed to meaningfully engage with them and in most instances deprived them of information. The least that was expected from the Respondent was to engage meaningfully with the evictees both individually and collectively. This would have assisted the Respondent to conduct a comprehensive assessment of the needs of this community, their personal circumstances and availability of adequate alternative accommodation. In *Abahlali base Mjondolo Movement SA v Premier of the Province of KwaZulu-Natal (Abahlali)*,<sup>33</sup> the Constitutional Court determined that proper engagement would include a comprehensive assessment of the needs of the affected community or group of occupiers. In this matter, a comprehensive assessment was not done by the Respondent. The Commission therefore finds that proper engagement did not take place prior to and after the eviction process. The dire consequences that resulted from the eviction would have been avoided had the municipality engaged with the evicted people. The engagement would have culminated in mutually acceptable solutions.
- 8.1.15. The location of alternative accommodation was also determined by the Respondent without consultation with the affected evictees. The Commission finds this approach unacceptable in light of the decision of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,<sup>34</sup> where Sachs J denounced the "top-down" approach to engagement adopted by the State, in terms of which state officials would unilaterally make decisions without consultation or inclusion of the community.<sup>35</sup> The Commission finds that the Respondent failed to have due regard to the disruptive effects of relocation on the community and to the proximity of alternative accommodation to schools, and the evictees' places of employment.
- 8.1.16. The need for meaningful engagement between the Respondent and the evictees in this instance is derived from the following constitutional obligations of municipalities and the state:
- i. To provide services to communities in a sustainable manner, promote social and economic development and encourage the involvement of communities and community organisations in matters of local government.<sup>36</sup>
  - ii. To fulfill the objectives in the Preamble to the Constitution and to respect, protect, promote and fulfill the rights in the Bill of Rights;<sup>37</sup> and
  - iii. To take reasonable legislative and other measures to realise the right of access to adequate housing.
- 8.1.17. Nothing was gleaned from the investigation to prove that the Respondent considered views of the evictees. The Respondent was required to take into account, in particular, all alternative plans proposed by the affected people.

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<sup>33</sup> *Abahlali base Mjondolo Movement SA v Premier of the Province of KwaZulu-Natal (Abahlali)* 2010 (2) BCLR 99 (CC)

<sup>34</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 545 (CC)

<sup>35</sup> Para 378

<sup>36</sup> Section 152(1) of the Constitution

<sup>37</sup> Section 7(2) of the Constitution

- 8.1.18. The evictees did not have full access to information about the planned relocation of resettlement. If they had been provided with information, this would have enabled them to protect their access to livelihoods and jobs.
- 8.1.19. It is further important to highlight the fact that the Respondent has not complied with its obligations in terms of section 32 of the Promotion of Access to Information Act (PAIA)<sup>38</sup> for more than three (3) years. The Respondent has not complied with section 14 PAIA obligations as well.
- 8.1.20. The Commission finds the purported eviction notice furnished to residents of Bokamoso before the scheduled date of eviction inadequate and reasons furnished for not halting the eviction unreasonable.

## 9. FINDINGS

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

- 9.1. The Respondent has violated the right to human dignity of the evicted people by providing them with inadequate and unsanitary sanitation facilities;
- 9.2. The Respondent has violated the right of access to adequate housing of the evicted people by its failure to provide them with sufficient alternative accommodation that is habitable, accessible and located in close proximity to public amenities and job opportunities.
- 9.3. The Respondent's insufficient engagement with the community about a range of issues on consequences of eviction including alternative accommodation and relocation and general lack of information about future resettlement plans upholds the complaint of a violation of the right of access to information.

## 10. Recommendations

In terms of the Human Rights Commission Act, 54 of 1994, 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 9 above, the Commission recommends the following:

- 10.1. The Respondent is directed to provide the evicted persons with adequate alternative accommodation where they can live without the threat of another eviction and with access to basic services such as sanitation, water and refuse services within a period of three (3) months from the date of this finding.
- 10.2. The Respondent is directed to furnish the Commission with a permanent relocation plan for the evicted people within a period of three (3) months from the date of this finding; this plan should make special arrangements for the elderly, orphan children, persons with disabilities and other vulnerable or marginalised groups.
- 10.3. The Respondent is required to enhance community participation and demonstrate some level of transparency in its governance by convening regular feedback sessions every

<sup>38</sup> Promotion of Access to Information Act 2 of 2000

three (3) months relating to access to adequate housing. A copy of the minutes to be submitted to the Commission.

- 10.4. The Respondent is urged to apply to the Provincial Department of Human Settlements for provision of emergency housing funding to ameliorate the plight of the evicted persons who have been rendered homeless.
- 10.5. The Free State Department of Cooperative Governance, Traditional Affairs and Human Settlements is directed to carry out a full social impact assessment of evictions on vulnerable and marginalised groups in the Province within a period of twelve (12) months. A copy of the report to be submitted to the Commission for review.
- 10.6. The Free State Department of Cooperative Governance, Traditional Affairs and Human Settlements is further directed to develop a human rights-based approach and plan to evictions to guide municipalities in the Province within a period of twelve (12) months. A copy of the plan should be submitted to the Commission for review.

## **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 receipt of this finding**, by writing to:

**Private Bag X2700  
Houghton  
2041**

**South African Human Rights Commission**





South African Human Rights Commission  
Private Bag X2700  
Houghton  
2041