



File Ref No: GP/1213/0412

VIOLET MFOBO

Complainant

And

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Respondent

REPORT

1. INTRODUCTION

- 1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. In terms of Section 184 (1) of the Constitution, the Commission is specifically mandated to:

1.3.1. Promote respect for human rights and a culture of human rights;

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

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

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

1.5. The Human Rights Commission Act 54 of 1994 (the HRC Act)¹, further supplements the powers of the Commission. In addition to other powers, duties and functions, the HRC Act confers powers on the Commission to conduct or cause to be conducted any investigation necessary for the exercise of its broad powers under the Constitution.

2. THE COMPLAINANT

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

3. THE RESPONDENT

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

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

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

4. THE COMPLAINT

4.1. On 3 October 2012, the Commission received a complaint from the Complainant relating to the conditions and access to services at the Hostel. The areas of concern on which the complaint is premised and which informed the basis of the Commission's investigation are listed below:

- 4.1.1. Ongoing lack of proper water, sanitation and sewerage;
- 4.1.2. Lack of electricity supply;
- 4.1.3. Removal of male children aged seven years and older from their mothers;
- 4.1.4. Lack of transparency and consultation;
- 4.1.5. Issues around the redevelopment of the Hostel; and
- 4.1.6. General issues, including but not limited to concerns about rentals, management of the cleaning contract, gender discrimination in respect of access to the Hostel and occupancy levels.

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

5. RIGHTS ALLEGEDLY VIOLATED

- 5.1. Section 9 – Equality;
- 5.2. Section 10 – Dignity;
- 5.3. Section 24 – Environment;

- 5.4. Section 26 – Housing;
- 5.5. Section 27 - Access to health care, food, water and social security;
- 5.6. Section 28(1(c) and Section 28(2) – Children;
- 5.7. Section 32 – Access to information; and
- 5.8. Section 33 – Just Administrative Action

6. STEPS TAKEN BY THE COMMISSION

Inspections *in loco*, consultations and information provided

- 6.1. The complaint was administered in terms of the Commission’s Complaints Handling Procedures, as gazetted.² During its investigation, the Commission undertook two inspections of the Hostel, held a number of consultative meetings with the Complainant and the Respondent and exchanged numerous correspondence with relevant parties:
 - 6.1.1. During October 2012 and June 2013, inspections *in loco* were undertaken at the hostel. The outcomes of these inspections are summarised below;³
 - 6.1.2. In February 2013, following the Commission’s first inspection of the Hostel where *prima facie* violations of a number of human rights were established, an allegations letter was forwarded to the Respondent, the Mayoral Committee of Health and Human Development, and the Municipal Manager;⁴
 - 6.1.3. On 22 February 2013, a brief response was provided to the Commission’s allegations letter by the Respondent;
 - 6.1.4. On 19 March 2013, the Commission consulted with the Complainant;
 - 6.1.5. On 22 April 2013, in light of the brief response received from the Respondent to its allegations letter, the Commission forwarded further correspondence to

² Gazetted January 2012.

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

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

the Respondent emphasising responses still outstanding in respect of its allegations letter;

- 6.1.6. On 16 and 24 May 2013, further responses were received from the Respondent;
- 6.1.7. On 20 August 2013, the Commission consulted with the Respondent; and
- 6.1.8. On 29 August 2013, the Respondent provided further information to the Commission on the basis of further requests arising from the contact based consultation on 20 August 2013.

6.2. Water, sanitation and sewerage

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

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

As the washing areas do not have doors, the stench from the stagnant water infiltrates the residential blocks of the Hostel.

- 6.2.6. The poor sewerage infrastructure causes constant blockages, which results in sewer waste being pumped onto the grounds of the Hostel. This causes a foul smell throughout the Hostel, an infestation of rodents and insects and potentially poses a severe health risk to the residents.
- 6.2.7. The Hostel was surrounded by informal dwellings. Make shift toilets had been installed by the Respondent against an outside wall of the Hostel to accommodate the informal dwellers. As a result, occupants of rooms situated in the vicinity were unable to leave open their windows due to the stench, raw sewerage and the infestation of rodents and flies which infiltrated the rooms. A storm water drain situated outside the Hostel also posed a problem in that it was noticeably blocked by the accumulation of rubbish from the nearby informal settlement.
- 6.2.8. The Commission was advised that although continuous contact had been made with the Johannesburg Roads Agency with a view to resolving the issue with the storm water drain, the issue has remained unresolved. To prevent sewerage from seeping into those Hostel rooms closest to the informal settlement, the Respondent intended to build a concrete slab against the wall of the Hostel. Although the Councillor initially agreed to this proposal (as per consultation with representative from the Respondent on 20 August 2013), she later retracted her approval and advised that the construction was not a viable use of funds. Notwithstanding such objection, the Respondent confirmed that it would be proceeding with the construction of the slab and that a contractor had already been appointed.
- 6.2.9. Plumbing networks and capacity volumes appear to have become increasingly compromised due to the demand on the system, which results in **regular blockages**. This necessitated the appointment of a full time plumber stationed at the Hostel. Although this contract had expired, processes had been put in place to appoint a new contractor (this was confirmed by

residents who had seen plumbers on site at the Hostel). The Respondent further confirmed that a process was underway to appoint an engineer to divert some of the dysfunctional sewer links. However, residents were of the view that because the infrastructure itself was outdated, problems with the plumbing and sewerage system would continue notwithstanding any repairs undertaken.

6.2.10. Continuous blockages in the external **sewer lines also resulted in spillover** on the Hostel grounds. Although Johannesburg Water (JW) was contacted regularly to attend to such blockages, their response was not always prompt. JW however advised that it had not received any complaints from the Hostel and that while it **supplied water up to ground level**, the **Housing Department was responsible for internal water reticulation** (including the water tank at the Hostel).

6.2.11. With regard to the sewer lines, the Respondent advised that a contractor had assessed the condition of the infrastructure and found that one of the internal **lines ran under the building**, others were blocked and some were broken. JW was contacted but was unable to provide specialist contractors nor did JW have pre-approved contractors to assist. The contractor eventually appointed found the **scope of work to be vague as no proper site investigation report had been provided**, save for the brief report from the jetting contractor. A tender process was also unsuccessful due to the limited number of bidders and the discrepancy in quote rates. It was therefore resolved that a consulting engineer would be appointed to conduct a proper investigation and to prepare a detailed scope of work. Although processes for the appointment of a contractor had allegedly been implemented, the Respondent provided no further information regarding this, the work already completed etc.

6.2.12. It was acknowledged that, generally, low water pressure was experienced throughout the Alexandra area and JW was therefore in the process of **refurbishing old infrastructure across Alexandra**. However, JW later

confirmed that the water pressure problem in Alexandra does not necessarily affect the Hostel **as the supply to the Hostel comes from the Randjieslaagte Reservoir** supply zone.

6.2.13. Water is received from water tanks situated at the Hostel itself. However, as these **water tanks were worn out**, severe leakages occurred throughout the Hostel and water supply was therefore problematic. Gushing water from the ceiling was observed in certain blocks of the Hostel, which appeared to originate from the water tanker situated directly above the affected areas. The Commission was informed by residents that this problem had **commenced approximately three years ago**. The Commission was also advised that a resident, with her children, occupied the room next to the area with a severe leakage. The Commission was able to enter the room and noted that it was musty and that most if not all of the **resident's movable property was damp**. The Commission was advised that a new water tank had been installed at the Hostel in January 2013 (a copy of the purchase order was provided to Commission by the Respondent, dated 24 January 2013). However, it was alleged that the **new tank was not being used as it was not working properly** and a new contractor was therefore appointed during May 2013. In addition, two of the remaining tanks were apparently leaking.

6.2.14. It was submitted that during April 2010, a comprehensive assessment was done by **JW appointed consultants** of all water and sanitation problems at the Hostel and a project plan to implement all necessary repairs was effected. However, **due to poor workmanship**, the **plumbing and sewer situation deteriorated**. The condition of the sewerage system was alleged to be further compromised by ongoing vandalism and theft of saleable items. A continuous repairs and maintenance programme was therefore put in place to remedy the situation.⁵

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

- 6.2.15. The Respondent acknowledged that repairs were of a temporary nature, resulting in a recurrence of the problems, but noted that **no funding was available to fully and properly upgrade** the entire sewer system.
- 6.2.16. Children subjected to the conditions detailed above, and who are additionally vulnerable, experience not only the direct challenges posed by their living conditions, but significant adverse impacts to interrelated rights as well. In particular, their immature immune systems are particularly susceptible to the risks posed by their environment.

6.3. Electricity

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

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

- 6.3.1. The Respondent alleged that the supply of electricity was affected by continued **recourse to illegal electricity connections and increasing demand** on systems, which resulted in strain and outages. In this respect, residents alleged that illegal electricity connections were resorted to because of the absence of electricity supply for appliances.
- 6.3.2. The installation of an electric metering box system to limit illegal connections was prevented when City Power contractors were turned away by residents

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

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

- 6.3.3. Extensive electrical repair work undertaken and verified by an electrical engineer did not provide a permanent solution to the problem.
- 6.3.4. Special meetings of participating electricians, an electrical engineer, the Councillor and housing officials were held to assess the cause of the continuous outages and it was **determined that the illegal electricity connections were central to the problem**. Also, as a result of the linkage between circuit breakers in the block, entire blocks were affected by outages.

⁶ Note 4 above.

On that basis, it was proposed that the circuit breakers between rooms be separated while electricity meters were being installed.

6.3.5. On 29 August 2013, the Respondent provided the Commission with an engineer's report (dated March 2011) which confirmed that Geontsi Consulting Engineers had been commissioned by the Housing Department of the Respondent to assess the electrical power supply capacity, need for upgrades, inspect work done and sign off on work completed by contractors. The engineer's report does not appear to have been disputed by the Respondent. The engineer's report set out the following findings and recommendations:

- 6.3.5.1. The substation room was untidy and the excessive amount of water in the cable trenches posed a serious danger;
- 6.3.5.2. The main distribution board was not in good condition;
- 6.3.5.3. There was an imbalance in the currents;
- 6.3.5.4. The work done by the contractors presented a safety hazard in most blocks of the Hostel;
- 6.3.5.5. Surfix cables had not been installed in conduits and some connection boxes were not covered, leaving live wires exposed and posing a danger;
- 6.3.5.6. Based on the above, the engineer recommended, amongst others, that:
 - a) The water in the substation be pumped out and that the Respondent solve the water problem on site; and
 - b) That the main distribution board be replaced.

6.4. Children

6.4.1. Notably, a number of children of varying ages were residing at the Hostel.

6.4.2. During or about December 2007, the residents allegedly held a meeting to discuss the possible violation of their **right to privacy** arising out of rooms being shared, especially with those **women who had male children aged**

7 (seven) years and older. The Respondent alleged that pursuant thereto, a decision was made that male children aged 7 (seven) years and older would vacate the Hostel. A non-profit organisation approached the Respondent to advise of the potential human rights violations that could arise if such a decision was implemented. As a result, the **Respondent provided temporary shelter for affected families for approximately 1 ½ years.** At that time, emergency shelter was in the process of being constructed but the construction was stopped due to ongoing vandalism. During or about May 2009, **affected families were relocated to Municipal owned flats.**

6.4.3. At the time of the inspection, the Complainant advised that their Councillor had threatened further removals of male children in the near future. Although no such removals have taken place since the complaint was lodged with the Commission, the threat thereof remains of serious concern to some residents.

6.4.4. The Respondent advised that **uncertainty regarding the status of mothers with male children would continue** as women in the Hostel were always **having children** and **no clear measures were in place** to address the concerns around the privacy rights of residents *vis-à-vis* the rights of the mothers and children.⁷

6.5. Transparency and consultation

6.5.1. During the inspection, the Complainant indicated that she was aware that a certain amount of money had been allocated to the Respondent for the development and general upkeep of the Hostel. However, residents had **not been informed** about **how the allocated funds had been utilised.** Various attempts to obtain a response from the Respondent and other government departments in respect of the spending had been met with non-responsiveness.

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

- 6.5.2. In addition, the Complainant alleged that the residents had not been consulted regarding the prioritisation of the ward for urban management and service delivery, as alleged by the Respondent.
- 6.5.3. Regarding the consultation process, the Complainant submitted that although the Ward Councillor held **meetings, these were not conducted in a fair and transparent manner** and that as a result, decisions affecting the ward were made in the absence of input from the residents themselves. Numerous complaints had allegedly been lodged against the Councillor, who also resided at the Hostel, regarding various issues, such as her public statement that only the views of those residents affiliated to a specific political party would be considered. However, according to the Complainant, none of those complaints had been attended to. Mr Ndlovu confirmed that he was aware of the **existence of certain factions within the Hostel, which in his view, contributed to tensions and problems** being experienced by residents.

6.6. Redevelopment of the Hostel

- 6.6.1. The Complainant advised that the **Respondent had made numerous undertakings since 1994 that the Hostel would be renovated and upgraded**. However, it was alleged that none of these undertakings had been met and that since being informed about the proposed redevelopment, no updates had been provided to residents by stakeholders and/or the Councillor.
- 6.6.2. The Complainant confirmed that the residents had lodged complaints with MMC Bovu, Pennuel Ndlovu, the Regional manager of Hostels owned by the Respondent, and the Councillor. However, such attempts had for the most part, been fruitless.
- 6.6.3. The Respondent submitted that processes relating to the redevelopment of the hostel were underway. In this respect, the Respondent confirmed that a decanting site situated at Extension 52 in Alexandra had been acquired and

fully paid for, and that **approval for the site development plan for the Hostel was allegedly at an advanced stage**. It was also submitted that a presentation had been made to the Councillor regarding these developments and she in turn was expected to provide feedback to the greater community.

6.6.4. After undertaking an inspection of the Hostel during November 2012, MMC Bovu advised residents that an audit would be done to establish which residents qualified for Reconstruction and Development Programme (RDP) (and other forms of social) housing. However, **such audit had to date not taken place**, which the Complainant alleged was as a result of the Councillor failing and / or refusing to facilitate the process.

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

6.6.6. As part of the redevelopment, the Hostel was to **be demolished** and while the site was being developed, residents were to be temporarily relocated. In

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

6.7. Other⁸

6.7.1. Management of the cleaning contract

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

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

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

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

6.7.2. Rental

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

the Complainant was of the view that female residents who are not accorded these privileges at their Hostel were being discriminated against.

- 6.7.2.5. While the Respondent refuted allegations of discriminatory practices favouring male hostels, it was **conceded that in general, both rent collection and enforcement of payment was poor in both types of residences.**

6.7.3. Gender discrimination / access

- 6.7.3.1. The Complainant advised that **no male persons were allowed into the Hostel without prior authorisation.** In this respect, examples of various situations where the prohibition applied to the detriment of residents were cited. For instance, the Complainant advised that if furniture was delivered by a male person, the recipient resident would be required to transport the furniture over the remaining distance from the gate to her room as the male delivery person would not be permitted entry onto the premises itself. Similarly, male paramedics were not allowed onto the premises, which it is alleged, had previously led to the death of a resident. However, restricted access of emergency medical personnel to the Hostel was denied by the Respondent.

6.7.4. Occupancy levels

- 6.7.4.1. The Hostel was built to accommodate migrant women during 1972 and was designed to accommodate 2825 beds in 727 rooms averaging about four single women per room.⁹
- 6.7.4.2. The Commission was however advised that there were an estimated 3000 residents in the Hostel; excluding children (a precise figure could not be provided). Over the years, the occupancy levels had substantially increased for various reasons, including the birth of children and relatives of residents illegally sharing rooms.

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

- 6.7.4.3. The hostel is physically divided into blocks, each of which is occupied by approximately 64 residents, excluding their children. Respective blocks are serviced by 5 (five) toilets, 3 (three) bathrooms and 1 (one) communal kitchen each.
- 6.7.4.4. Although the women hail from different ethnic backgrounds, they are **not allowed the freedom to choose which rooms they occupy or the individuals with whom they would prefer to share their living space**. Upon registering at reception, women are allocated a room and no objections to allocations are entertained.
- 6.7.4.5. As a result of the **increased occupancy levels, the internal infrastructure had been severely compromised and additional pressure was placed on the water and electricity supply and the sewerage system**. The condition of the site, although considered solid, was therefore gradually being compromised by over-wet ground conditions caused by continuous water and sewer spillages, excessive overcrowding and general overload on the internal infrastructure.
- 6.7.4.6. The Respondent submitted that audits were conducted on an ongoing basis to control overcrowding (usually over weekends as not all residents stay at the Hostel during the week). However, according to the Respondent, residents had not been fully cooperative. Mr Ndlovu confirmed that the **lack of proper control systems contributed to overcrowding in the Hostel**.

7. APPLICABLE LEGAL FRAMEWORK

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

context of the rights to, amongst others, basic services, housing, and meaningful consultation.

7.1. **Women**

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

International and regional legal framework

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

7.1.1. **Article 3** of CEDAW states the following:

"States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose

¹⁰ 18 December 1979.

¹¹ 11 July 2003.

of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”¹²

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

“States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women; States Parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”¹³

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

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

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

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

¹² <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article3>.

¹³ <http://www.achpr.org/instruments/women-protocol>.

¹⁴ Note 10 above.

7.2. **Basic Services**

Water, sanitation and sewerage

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

International and regional legal framework

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

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

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

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

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

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

7.2.2. The resolution was preceded by the findings of the the **Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation**.¹⁹ The Special Rapporteur demonstrated that inadequate water and sanitation facilities impacts on and is intrinsically connected to the realisation of other rights such as education, health, work and dignity, amongst others.²⁰ Similarly in its **General Comment 15**²¹, the **CESCR**²² clarified that the content to the right to water must be seen as an entitlement of *"everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements."*²³

7.2.3. South Africa is a signatory to the **International Covenant on Economic Social & Cultural Rights**²⁴ (**ICESCR**). On this basis, South Africa must

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

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

²¹ 2002.

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

²³ Note 18 above at Article 2

²⁴ 16 December 1966.

promote the right of everyone to an adequate standard of living, which includes accessibility and availability of adequate housing, food and clothing. The right to water under Article 11 recognises that water is one of the fundamental conditions for survival, an essential component to an adequate standard of living.²⁵ The legally binding nature of a state's obligations in this regard is articulated in the **UN General Assembly Resolution Recognizing Access to Clean Water and Sanitation**.²⁶

Domestic legal framework

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

Constitution

Relevant provisions of the Constitution include:

7.2.4. Section 24 which states that "*Everyone has the right to an environment that is not harmful to their health or wellbeing*";

7.2.5. Section 27 which states that "*Everyone has the right to have access to ...sufficient water...*"

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

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

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

7.2.6. Section 152 states that:

"(1) The objects of local government are...

(b) To ensure the provision of services to communities in a sustainable manner...

(d) To promote a safe and healthy environment..."

7.2.7. Section 153 states that:

"A municipality must -

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

Legislation

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

(1) "Everyone has a right of access to basic water supply and basic sanitation.

(2) Every water services institution must take reasonable measures to realise these rights.

(3) Every water services authority must, in its water services development plan, provide for measures to realise these rights."

The Act defines basic sanitation as:

"The prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of

²⁸108 of 1997.

*human excreta, domestic waste water and sewage from households, including informal households.*²⁹

Section 5 of the same Act states that:

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

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

Regional case law

7.2.10. ***Social and Economic Rights Action Centre (SERAC) and Another v Nigeria***³² – **The rights to health and an environment**

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

"These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual . . . The

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

³⁰ Department of Water Affairs and Forestry (1994).

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

³² (2001) AHRLR 60 (ACHPR 2001)

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

7.2.11. ***Purohit and Another v The Gambia***³⁴ – The right to health and health care

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

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

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

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

³⁴ (2003) AHRLR 96 (ACHPR 2003)

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

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

Domestic case law³⁷

7.2.12. City of Cape Town v Strumpher³⁸

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

“the fact that a contract must be concluded does not, however, relegate the consumer’s right to water to a mere personal right flowing from that contractual relationship. It does not relieve the City of its constitutional

³⁶ Note 28 above, 84.

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

³⁸ 2012 (4) SA 207 (SCA)

*and statutory obligation to supply water to users... the right to water is a basic right.*³⁹

7.3. Electricity

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

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

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

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

⁴⁰ S Tulley, 'Access to Electricity as a Human Right' (2006) 24 NethQHmRts 557, 583 – 584.

⁴¹ Note 32 above, 584.

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

⁴³ Note 32 above, 587.

International and regional legal framework

7.3.1. **Article 14.2 (h) of CEDAW** states that:

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

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

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

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

7.3.3. In a report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living and on the Right to Non-

⁴⁴ Note 32 above, 559.

discrimination (Miloon Kothari) (2002),⁴⁵ it was emphasized that the broad interpretation of his mandate included issues of access to "*potable water, electricity, sanitation*" (own emphasis).⁴⁶ This supports the notion that adequate housing is deemed to include the provision of electricity.

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

Regional case law

- 7.3.5. The linkages between access to electricity, right to health and adequate standards of living have been considered in more developed countries as well. The **Baja California Human Rights Commission** in Mexico considered electricity access in the context of the rights to health and adequate living where poor families had been struggling for approximately 30 years to obtain fair electricity tariffs, particularly because of the high electricity consumption caused by excessive summer temperatures.⁴⁹

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

⁴⁶ Note 37 above.

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

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

⁴⁹ Note 37 above.

7.3.6. In *Free Legal Assistance Group and Others v. Zaire*, the failure of the Government to provide basic services such as safe drinking water and electricity (and the shortage of medicine) was found to constitute a violation of Article 16 of the ACHPR.⁵⁰

Domestic case law

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

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

7.4. **Housing**

Housing is a basic human need that profoundly impacts on other aspects of life, such as health, welfare and dignity. The significance of housing is recognised both

⁵⁰ African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995).

⁵¹ 2010 (4) SA 55 (CC)

⁵² (1999) (3) BCLR 342 (W)

⁵³ Note 32 above, 579.

internationally and domestically. From a South African perspective, **insecurity in respect of housing is fuelled by a number of factors, including historical dispossession and unequal land distribution, inequitable urbanization and poorly planned urban growth.**

International and regional legal framework⁵⁴

7.4.1. **Article 25(1) of the Universal Declaration of Human Rights⁵⁵** states that:

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

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

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

Under the ICESCR, states have an obligation to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to progressively realise the right to adequate housing. While the resource

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

⁵⁵ 16 December 1949

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

constraints of State parties are recognised, there are certain steps that can immediately be taken, such as prioritising “*those social groups living in unfavourable conditions by giving them particular consideration*”.⁵⁷

7.4.3. Characteristics of the right to adequate housing are discussed in **General Comment 4**⁵⁸ **on the right to adequate housing**.⁵⁹ It confirms that the right to housing should not be interpreted in a narrow or restrictive sense i.e. not simply a roof over ones head. Instead, it should be defined as, “*the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity*”.⁶⁰ Applying this broad interpretation, a number of conditions must therefore be met before shelter can be considered to constitute adequate housing, such as:

7.4.3.1. Availability of services, materials, facilities and infrastructure;⁶¹

7.4.3.2. The inclusion of certain facilities essential for health, security, comfort and nutrition such as **safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage** and emergency services;⁶²

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

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

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

⁵⁸ 1991

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

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

⁶¹ Para 8(b)

⁶² Para 8(b)

⁶³ Para 8(d)

⁶⁴ Para 8(e). Note 48 above.

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

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

Domestic legal framework

Constitution

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

*"1) Everyone has the right to have access to adequate housing ...
2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."*

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

National Legislation

A number of housing related frameworks at the domestic level confirm a national commitment to the realisation of the right of access to adequate housing and the interrelatedness of this right with other basic human rights. These frameworks also

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

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

acknowledge the need to progressively realise the right of access to adequate housing through appropriate housing programmes and policies.

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

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

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

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

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

...

(e) promote-

...

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

...

(x) promote... the housing needs of marginalised women and other groups disadvantaged by unfair discrimination...

respect, protect, promote and fulfill the rights in the Bill of Rights in Chapter 2 of the Constitution."

Section 9(1) of the HA confirms that:

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

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

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

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

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

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

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

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

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

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

And

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

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

Domestic case law⁷⁴

The Commission has consistently placed reliance on the Constitutional Court housing related case of ***Government of the Republic of South Africa and Others v Grootboom and Others***⁷⁵ as a guiding authority insofar as considerations of the

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

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

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

⁷³ Note 57 above, 47.

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

⁷⁵ 2001 (1) SA 46 (CC)

progressive realisation of rights and standards of reasonableness apply to the interpretation of socio-economic rights.

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

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

7.5. Children

Children are considered one of the most vulnerable groups in society. It is of central importance that the rights of the child be carefully evaluated in the context of the complaint before the Commission. In the present matter, the rights of the child are affected generally, **in respect of the living conditions** described above, and more

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

⁷⁷Note 60 above, 42.

⁷⁸Note 60 above, 44.

specifically, in respect of the allegation that women with male children aged 7 (seven) years and older are requested to vacate the Hostel.

International legal framework

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

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

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

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

Article 27 of the UNCRC states the following:

- “1. States Parties recognize the right of every child to **a standard of living adequate for the child's physical, mental, spiritual, moral and social development;***
- 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development;*
- 3. States Parties, in accordance with national conditions and within their means, shall take **appropriate measures to assist parents** and others responsible for the child to implement this right and shall in*

case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."

7.5.2. **Article 4 of the African Charter on the Rights and Welfare of the Child**⁷⁹ (ACRWC) takes this a step further by citing that "*in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.*"

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

Domestic legal framework

Constitution

7.5.4. Section 28(1)(c) of the Constitution states that "*every child has the right to basic nutrition, shelter, basic health care services and social services*".

7.5.5. Section 28(2) of the Constitution states that "*a child's best interests are of paramount importance in every matter concerning the child.*"

National Legislation

7.5.6. The principle relating to the best interests of the child is confirmed in **Section 9 of the Children's Act 38 of 2005**. This Act states that "*in all*

⁷⁹ 1990

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

matters concerning the care, protection and well-being of a child, the standard that the child's best interests are of paramount importance, must be applied." (Section 7 of the same Act explains the content of this principle).

Domestic case law

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

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

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

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

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

⁸¹ 2008 (3) SA 232

⁸² 2012 (2) SACR 331

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

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

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

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

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

⁸³ 2008 (1) SA 223

situated, which renders them particularly vulnerable. For this reason, a particularly **careful weighing up of the circumstances is recommended** in the present circumstances.

7.6. **Meaningful consultation**

Chenwi and Tissington confirm that:

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

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

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

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

⁸⁶ Note 65 above.

⁸⁷ Note 65 above.

⁸⁸ Note 65 above, 10.

⁸⁹ Note 65 above, 10.

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

International legal framework

- 7.6.1. As a signatory to the **ICESCR**, South Africa is obligated to consider recommendations flowing from that Convention, including the requirement relating to "*extensive genuine consultation in respect of right to adequate housing and in respect of proposed evictions and proposed resettlement.*" This includes considering representations from affected persons and communities (see above regarding **General comments 4**).
- 7.6.2. The Africa Commission on Human and People's Rights, through the ACHPR, talks to the need for meaningful engagement and participation of individuals in development decisions that affect their communities.⁹⁰

Domestic legal framework

Constitution

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

⁹⁰ Note 64 above, 17.

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

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

*"1. Everyone has the right of access to:
a. any information held by the state..."*

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

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

National legislation

7.6.6. Section 2 of the HA sets out general principles applicable to all three spheres of government that must be adhered to when developing housing. The provision requires that national, provincial and local spheres of government must facilitate active participation of all relevant stakeholders in housing

⁹¹ Note 65 above, 7.

development and must “*consult meaningfully with individuals and communities affected by housing development; and make it possible for all relevant stakeholders to participate in housing development.*”⁹² The phrase “all relevant stakeholders” must be interpreted to include communities as the target recipients of social housing programmes.⁹³

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

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

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

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

⁹³ Note 65 above, 9 – 10.

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

Domestic case law

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

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

⁹⁶ Note 59 above.

⁹⁷ Note 59 above.

⁹⁸ Note 59 above.

⁹⁹ Note 64 above, 21.

8. ANALYSIS

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

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

¹⁰⁰ Note 57 above, 9.

¹⁰¹ Note 57 above, 9.

¹⁰² Note 65 above, 4.

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

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

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

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

Subsequent to the fall of Apartheid and as part of a package of reforms, the new democratic government developed **the Gauteng Hostels Eradication Programme**¹⁰⁷ implemented during or about 2007 in response to the problematic old hostel system and to integrate hostels into township communities. The development of this Programme highlights the fact that hostels of this nature are no longer appropriate in a democratic society in South Africa, particularly when viewed in the context of the historical establishment of the hostels during the Apartheid era. The Programme intends to incorporate persons living in hostels into the broader communities and will see the eradication of old hostels to be replaced by new family housing units, known as Community Residential Units¹⁰⁸ (or complexes), thereby

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

¹⁰⁶ Note 85 above.

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

¹⁰⁸ MH Mothotoana *Implementation of the hostel redevelopment project within the City of Johannesburg Metropolitan Municipality* (2011), 25 – 26:

The Hostel Redevelopment Programme was replaced in 2009 by the Community Residential Unit (CRU) Programme contained in the National Housing Code. This Programme was aimed at achieving six policy objectives: firstly, to promote humane living conditions for hostel residents; secondly, to include hostel residents, neighbouring communities and other stakeholders affected by the redevelopment in decision-making processes; thirdly, to promote social integration within hostel communities and also among hostels and the neighbouring communities; fourthly, to

offering affordable rental to both existing hostel residents and members of the neighbouring communities.¹⁰⁹

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

8.1. Nature and scope of human rights violations

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

8.2. Interpretation

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

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

include plans for accommodating those who will be displaced by the project; fifthly, to initiate local institutions and administrative procedures into the system in order to sustain improvements and undertake socio-economic development; and sixthly, it embodies a development orientated towards empowerment, participation and the promotion of economic opportunities. Hostel redevelopment was to include converting the single rooms into family accommodation and providing infrastructure such as basic water, roads, electricity, and sanitation.

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

- 8.2.2. Section 39(2) of the Constitution makes it clear that the Act must be interpreted in light of the *"spirit, purport and objects of the Bill of Rights."*
- 8.2.3. Against the background of Section 39 of the Constitution, the Commission's investigation into the conditions at the Hostel **confirmed that violations of the abovementioned rights had taken place**, none of which may be deemed to have been justifiable in terms of Section 36 the Constitution.
- 8.2.4. In this respect, the Respondent is alleged to have violated the rights mentioned above by failing to ensure that the Hostel constituted adequate accommodation as per international and domestic standards. The **reasonableness of steps** taken by the Respondent must be considered against the **particular vulnerability of those affected by the conditions at the Hostel, being women and children from poor economic backgrounds, often with little or no support systems.**

8.3. **Obligations and Responsibilities of National and Provincial Government**

- 8.3.1. Important to the Commission's analysis is a consideration of the **roles of the different spheres of government** and whether the Respondent complied with its constitutional (and legislative) mandate in (progressively) realising the rights of the residents of the Hostel.
- 8.3.2. It is incumbent upon both provincial and national departments to monitor and intervene, where necessary, in the work of local government structures, as envisaged in Section 41 of the Constitution. This cooperation is, in the current service delivery context at local government level, also true of the planning and budgeting undertaken by municipalities. The municipality, given its awareness of the scarce resources at its disposal and knowledge/awareness of the conditions at the various hostels, **ought to have engaged national**

and provincial departments more closely and indeed, more vigorously. Such engagements would have alerted the relevant public bodies of the need for urgent interventions and budgetary reprioritisation. In this respect, recommendations were made by the Respondent to obtain necessary funding from the national and provincial departments. However, it is **not clear whether the various spheres of government properly engaged with each other in this respect and what progress**, if any, has been made in obtaining the funding referred to, which would allow the redevelopment of the Hostel **to proceed in a more cohesive and expeditious manner**.

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

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

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

"[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires

*that everyone must be treated with care and concern. **If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test'** (our emphasis).*

These considerations and standards of reasonableness as set out in the **Grootboom** case were considered throughout the Commission's analysis. In particular, the Commission considered the **reasonableness and adequacy of interim steps** taken by the Respondent pending the finalisation of the redevelopment of the Hostel. In its assessment reasonableness is assessed firstly, with regard to the interim measures and conditions at the Hostel **as it currently is** and secondly, steps related to the pending redevelopment, including but **not limited to the period of time that has elapsed** since redevelopment plans were first conceived, budgetary issues and the **impact of delays in implementation**. In this respect, the Commission also considered the violations which are alleged to have taken place and which may potentially be exacerbated instead of being mitigated as is required for progressive realisation.

8.4.1. Water, sanitation and sewerage at the Hostel

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

8.4.1.1. The **Respondent's response that certain steps have been taken to address problems experienced at the Hostel is noted**. However, from the Commission's last inspection of the Hostel, it appeared that severe issues around water supply, leakages and sewer blockages **persisted in a manner that severely impacts** the residents.

8.4.1.2. In this regard, the **Commission accepts the engineer's report that the entire system impacting on water supply and sanitation requires an overhaul**.

8.4.1.3. It is clear from the information provided to the Commission that firstly, inordinately **long periods elapsed between the reporting of problems and steps being taken to address same** and secondly, **similar problems recur with a frequency that indicates the inadequacy of steps taken.**

8.4.1.4. The Respondents response to problems appears to have been largely of an ad-hoc and fragmented nature. By way of example, it was recognised that the scope of work related to the pipes was too vague to properly proceed with work. However, the issue of storm water drainage was then dealt with separately. It is **clear that a comprehensive assessment and cohesive plan is therefore required** to properly address the problem as opposed to a fragmented approach which does more harm to the planning, allocation and utilisation of resources.

8.4.2. Electricity supply

8.4.2.1. The Respondent has taken a number of steps with a view to addressing the problem of electricity supply to the Hostel. However, the proposal relating to the installation of electric metering boxes was rejected by the residents on the basis of firstly, lack of sufficient consultation and secondly, the impracticality of the proposal and the daily prejudice that would be experienced by the residents as a result thereof.

8.4.2.2. The Commission notes in the first instance that reference was made to a further consultation being conducted with the residents on the issue and secondly, discussions with City Power to devise alternative arrangements for maintaining a functional electricity system at the Hostel. However, it is not apparent from the information provided whether **such further consultation has taken place** with the residents and / or whether City Power has prepared **a report proposing alternative arrangements for the Hostel.**

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

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

8.4.3. Removal of male children

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

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

in the least possible impact on the rights of the child. This would necessarily entail a consideration of the importance of the maintenance of the family unit insofar as it is related to the best interests of the child.

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

8.4.4. Lack of transparency and consultation

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

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

the Councillor and has failed to communicate with Complainants about the matter.

8.4.5. Issues around the redevelopment of the Hostel

8.4.5.1. A number of the problems experienced by the residents on a daily basis may be directly or indirectly linked to the proposed redevelopment of the Hostel (and development of Extension 52), and delays in the implementation thereof.

8.4.5.2. In respect of the above, residents have voiced concerns about not being sufficiently updated regarding the progress of the redevelopment. They therefore remain uninformed about the status of their future accommodation and living conditions. This **lack of sustained and meaningful information sharing** has no doubt exacerbated the frustration and discontent experienced by the residents regarding their current living conditions.

8.4.5.3. In addition, **it is apparent, and in fact not disputed by the Respondent, that the Hostel in its current state is not able to adequately service the needs of the residents due to failing infrastructure and an inability to permanently resolve some of the problems** experienced by the residents as a result thereof. The question currently before the Commission is therefore **whether interim measures adequately address ongoing violations in an acceptable manner** and the impact of issues related to the anticipated redevelopment, such as undue delays in implementation. Against this background, it is important to note that our courts have found that **an inordinate delay** in making a decision is

considered “*an infringement of the fundamental right to just administrative action*”¹¹⁰ in terms of Section 33 of the Constitution and PAJA.

8.4.6. Miscellaneous issues

8.4.6.1. Rental – The Complainant and other residents are of the view that not all hostels are treated equally in respect of the payment of rental. In this respect, it would appear that residents are not aware of the **promulgated tariffs**, as advised by the Respondent, which **creates perceptions of inconsistency in the application of rules**. This perception in itself lends credence to residents’ calls for consultation and information sharing.

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

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

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

8.5. In analysing the steps taken by the Respondent as set out above, the Commission took into account the vulnerability of those individuals affected by the conditions at the Hostel, namely women and children, many of whom would be considered indigent. An important consideration is that **a number of these**

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

individuals are not provided with many options in respect of their housing in the city and surrounding areas. Their **primary needs are at present dictated by income**, proximity to the city, employment **and basic survival**.

- 8.6. In addition, it is to be borne in mind that due to the circumstances of most of the residents, their only means to access justice and relief was through their Ward Councillor and local authority. Therefore, their **inability to secure appropriate relief through consultation and their local authority** has rendered the residents even more frustrated and disillusioned.
- 8.7. The Commission is **equally cognisant of financial and other burdens imposed on the various spheres of government** in their attempts to progressively realise the socio-economic rights enshrined in the Bill of Rights. The Commission is therefore aware of the **balancing of interests** required in its consideration of this complaint.
- 8.8. Having considered international and domestic legal frameworks and jurisprudence, the Commission is of the view that **while the Respondent has taken steps to address some of the problems faced by the residents, it has fallen short in some respects**. The Commission is therefore tasked with considering the adequacy and reasonableness of the interim measures put in place by the Respondent pending the proper implementation of the redevelopment of the Hostel (as many of the internationally accepted requirements relating to adequate housing will not be properly met until such time) and certain steps related to the pending redevelopment in the context of the alleged violations to basic human rights.

9. **FINDINGS**

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

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

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

10. **RECOMMENDATIONS**

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

10.1. **Consultation and information sharing**

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

10.1.1.1. Residents are to be consulted broadly regarding complaints about living conditions, including but not limited to issues relating to electricity supply, lack of proper water, sanitation and sewerage and the integrity and condition of the Hostel structure. All complaints and input from residents are to be reported on and steps for response to the complaints and timelines for responses are to be communicated to both the Commission and residents **within 3 (three) months** from date of completion of the consultation process with residents. It is recommended that an employee of the Respondent, whose full contact details are to be provided to residents, be assigned to deal with all complaints;

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

10.1.1.3. Urgent and **immediate steps** must be taken to consult with residents regarding the status of accommodation of children at the Hostel and particularly, the allegation that male children aged 7 (seven) years and older are forced to vacate the Hostel;

10.1.1.4. Residents are to be consulted with regarding the issue of access control measures. Consultation should include conditions for entry into the Hostel, roles of security personnel and grievance processes. This consultative process

must inform the formulation of access control measures to be implemented by the Respondent;

10.1.1.5. Based on the uncertainty regarding consultation processes and concerns about the Councillor's failure and/or refusal to properly consult with residents and/or to allow active participation in decision-making processes that affects the Hostel, it is recommended as follows:

10.1.1.5.1. That the Respondent take steps to ensure that all complaints by residents and relating to the Councillor are formally tabled with the Office of the Speaker of the Respondent and the relevant Section 79 Housing Committee **within 2 (two) months from date of this report;**

10.1.1.5.2. Measures should also be put in place to accommodate those residents who wish to lodge anonymous complaints to protect their identity; and

10.1.1.5.3. In line with the Office of the Speaker's duties to assess the needs of the councillors, arrange suitable training to develop political governance capacity and individual skills of councillors, to enforce the Council's Code of Conduct and to manage complaints relating to councillors, the Commission recommends that **within 1 (one) month from date of referral to that office,** the Office of the Speaker investigate and provide responses as deemed appropriate to address the complaints so tabled.

10.1.2. The Respondent is to provide the following information, and where available, written supporting documents, to all residents in the Hostel and the Respondent's Section 79 Housing Committee within **1 (one) month** from date hereof:

10.1.2.1. **Full disclosure of the allocated budget and expenditure** insofar as the budget and expenditure relate to the Hostel, including a full history of and supporting documents relating to tender processes and the appointment of service providers in relation to work undertaken on the Hostel since 2007;

10.1.2.2. In order to ensure openness and transparency, the Commission recommends that the **official gazetted tariffs** and applicable rental fees be distributed to all residents in the Hostel. Any changes to rental are to be communicated to the residents within a reasonable time before the implementation of any rental increases.

10.2. **Audits**

The Commission recognises the need as well as the potential benefits of conducting general audits at the Hostel as a comprehensive understanding of key needs and priorities will assist in mitigating current violations and encouraging long term reforms. Against this background, the Commission recommends that the Respondent formulate **processes and procedures for regular audits and communicate same** to residents to ensure that accurate information is available at reasonable intervals. Such processes and procedures are to be formally communicated to all residents **within 3 (three) months from date hereof**. In this respect, audit processes on the specific key areas below are to be completed within **3 (three) months from date hereof**:

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

10.2.2. The Commission is of the view that **regular audits of occupancy levels** will assist the Respondent in developing plans relating to the Hostel and the upgrade of the current infrastructure as an interim measure pending the

redevelopment of the Hostel. In addition, such information will assist in ensuring **appropriate contingency measures** are in place to avoid a recurrence of the violations currently occurring at the Hostel. On this basis, the Commission recommends that the Respondent undertake an audit of all residents in the Hostel, including but not limited to, the following areas:

- 10.2.2.1. **Infrastructure and delivery needs** of the Hostel and the residents of the Hostel; and
- 10.2.2.2. Details of all residents who have already applied for RDP and / or other forms of social housing and the progress of each application already lodged with the Respondent;
- 10.2.2.3. Details of all families who would be affected if the threatened practice of removal of male children / mothers with male children is implemented;
- 10.2.2.4. All placement processes, guidelines and criteria for the purposes of allocating living areas to respective residents;
- 10.2.3. The findings of such audit must be communicated to the Respondent's Section 79 Housing Committee, the residents and, in respect of those findings which relate to individual residents who have already applied for social housing, must be communicated to those affected individuals specifically, within **1 (one) month from date of completion of the audit.**

10.3. **Violation Specific Recommendations**

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

10.3.1. Removal of male children aged seven years and older

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

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

10.3.1.3. That **within 1 (one) month from date of completion of the audit process referred to in paragraph 10.2.2.3 above**, the Respondent consults with the Department of Women (DW) and the Department of Social Development (DSD) around viable alternative options and interim measures that can be implemented with a view to ensuring that affected families are not forced to vacate the Hostel but are instead, for example, accommodated with their mothers in specifically allocated areas of the Hostel.

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

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

10.3.2.1. A health inspector from the Department of Health undertake an inspection of the Hostel **within 3 (three) months from date hereof** and provide the Commission and the Respondent with a report of its findings;

10.3.2.2. The Respondent ensure that adequate measures are put in place to ensure that pending the finalisation of the redevelopment of the Hostel, appropriate interim relief is **immediately** provided in respect of the upkeep and maintenance of the water, sanitation, sewerage supply to the Hostel. A report

in this respect is to be provided to the Commission **within 1 (one) month from date hereof;**

10.3.2.3. The Commission recommends that the defective water tanker situated in Block G of the Hostel be **immediately attended to, but not later than 1 (one) month from date hereof**, whether repaired or replaced; and

10.3.2.4. That the residents most affected by the leaking defective water tanker are relocated to alternative rooms in the Hostel or other suitable accommodation **with immediate effect.**

10.3.3. Lack of electricity supply

10.3.3.1. That **immediate measures** are put in place to monitor the safety of residents and to remove immediate threats to the safety of the women and children;

10.3.3.2. That a report on the electricity needs of the residents is provided to the Commission **within 1 (one) month from date hereof;**

10.3.3.3. That **within 1 (one) month from date hereof**, the Respondent, in consultation with relevant authorities including but not limited to City Power, develop alternative arrangements for maintaining a safe and functional electricity system that is most viable in the short term pending redevelopment of the Hostel. Such alternative measures are to be clearly communicated to the residents **within 1 (one) month from date of conclusion of meetings with the relevant authorities;**

10.3.3.4. That pending the above, the Respondent ensures that immediate measures are put in place to ensure that electricity supply to the Hostel is not unnecessarily interrupted.

10.3.4. Gender based discrimination

10.3.4.1. Proper access control measures together with conditions for entry into the Hostel must be formulated (in line with the outcome of the consultation process referred to in paragraph 10.1.1.4) and must be communicated to all residents **within 4 (four) months from date hereof**. In this respect, access limitations are to be in keeping with the law and clearly displayed outside the Hostel to avoid misunderstandings regarding applicable procedures and processes;

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

10.4. Redevelopment of the Hostel

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

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

¹¹¹ As cited in paragraph 7.4.3. of this report.

¹¹² As cited in paragraph 7.4.9. of this report.

residents **within 6 (six) months from date of receipt of this report.** In respect of the residents, the Respondent is to ensure that the contents of the report are widely and properly understood by all residents.

10.5. **General**

10.5.1. The Commission recommends that **within 9 (nine) months from date hereof,** a consolidated report of the action plan, implementation timeframes, outcomes and findings of the Respondent in respect of all of the Commission's recommendations as mentioned above, be submitted to the Commission and **to the Respondent's Section 79 Housing Committee** in light of this committee's oversight role and mandate to monitor the delivery and outputs of the executive.

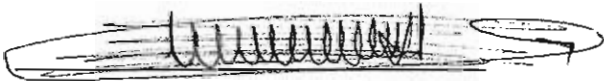
10.5.2. The Commission recommends, within a reasonable period of time but not longer than six (6) months from the date of this finding, that the Minister of Human Settlements establish a task team to investigate the reform of hostels of this nature on a nationwide basis and that the Commission is provided with regular progress reports on the investigation undertaken by the task team;

11. APPEAL

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

The Chairperson, Adv M.L. Mushwana
South African Human Rights Commission
Private Bag X2700
Houghton
2041

SIGNED ON THIS THE 6th DAY OF June 2014.



M. L. Mushwana
Chairperson
South African Human Rights Commission

Annexure A



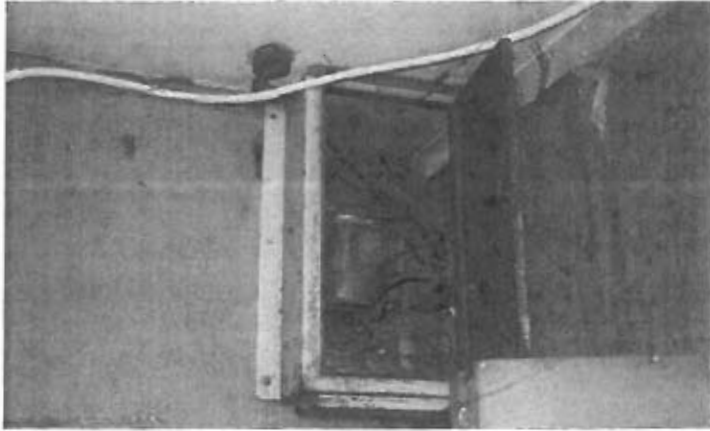
Rubbish in hostel grounds



Flooded laundry rooms



Flooded hostel grounds caused by blocked sewer lines



Old electricity connections



Leaking water from defective water tanker
(through ceiling)



Flooded kitchen caused by defective water
tanker



Flooded bathroom caused by leaking water tanker



Water damaged ceiling and electricity connection



Rubbish and raw sewerage (from portable toilets installed for informal settlement) accumulating against outside wall of hostel