



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2011/0009

In the matter between:

Council for the Advancement of the SA Constitution

Complainant

And

South African Police Service

Respondent

REPORT

1. Introduction

1.1. This Report contains findings of the South African Human Rights Commission (*"the Commission"*), pursuant to an investigation undertaken by the SAHRC into a complaint alleging the violation of the human rights of a citizen in the course of a public protest.

1.2. The Council for the Advancement of the South African Constitution (*"the Complainant"*) alleges, in a nutshell, that members of the South African Police Services (*"the Respondent"*) assaulted and/or caused the death of an unarmed

citizen who was one of a group of dependants together in Fiskburg in the First State Program, including a public protest against local administration and their corruption, theft and misadministration of public administration.

1.4. In determining its role in this matter, the Commission determined that this set of facts gave rise to three (3) distinct possible courses of action:

1.3.1 **Criminal action** in respect of assault (alternatively, an attempt to commit a charge), and/or murder (alternatively, any other competent charges);

1.3.2 **Civil action** in respect of damages arising from loss of support to dependants of the deceased citizen (and any further ancillary relief);

1.3.3 A **Human Rights** investigation, into possible violations of Chapter II of the Bill of Rights.

1.4. The Commission determined that the parameters of its interest in this matter was a very specific and narrow one; it was **strictly limited to declaring and determining the nature, if any, of the human rights of parties that may have been violated** in the course of this incident.

1.5. Accordingly, this report should not be construed as making any legal conclusions on the criminal culpability or civil liability of the Respondents.

1.6. Where conclusions of fact or law are made in this Report that overlap or coincide with the conclusions made by the appropriate authorities in respect of civil and criminal actions, such conclusions are incidental similarities and should

and the Commission shall address the violation of either of these provisions
in writing.

2. Mandate of the Commission

- 2.1 The South African Human Rights Commission is established in terms of section 184 of the Constitution of the Republic of South Africa Act 108 of 1996 (*the Constitution*).
- 2.2 The Commission and the other institutions created under Chapter 9 of the Constitution are described as *"state institutions supporting constitutional democracy"*.
- 2.3 The Commission is specifically required to:
 - 2.3.1 Promote respect for human rights;
 - 2.3.2 Promote the protection, development and attainment of human rights; and
 - 2.3.3 Monitor and assess the observance of human rights in the Republic.
- 2.4 Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

- 2.5 The Human Rights Commission Act, 54 of 1994, enables the work of the Commission to pursue the aim of the promotion and protection of human rights and the promotion of the rule of law.
- 2.6 Section 9(6) of the Human Rights Commission, 1994, determines the procedure to be followed in conducting an investigation regarding the alleged violation of a threat to a fundamental right.

3 Detailed background to the Complaint

- 3.1 On the 15 April 2011, the Commission received a complaint from the Complainant against the Respondent in respect of the latter's conduct during the policing and crowd control of a public protest by a group of community members in Ficksburg in the Free State Province on the 13 April, 2011.
- 3.2 The Complainant alleges that the conduct of the Respondent members amounted to improper use of force against an unarmed and defenceless citizen.
- 3.3 According to the Complainant, members of the Respondent repeatedly assaulted the deceased, Andries Tatane, an unarmed community member during a peaceful public protest; and that such assault resulted in the death of a citizen at the hands of the Respondent.
- 3.4 The Complainant further alleges that, in the result, the actions of the Respondent amounted to a breach of a number of human rights protected in the Bill of Rights of the Constitution of the Republic of South Africa.

- 1.5 The Commission ruled upon the Commission to instruct the alleged violator of human rights.

4 Preliminary Assessment of Complaint

- 4.1 Upon receipt of the complaint, the Commission was alerted to the SAHR's role in determining a *criminal cause of action* for further investigation to be conducted for human rights violations arising from the alleged act.

- 4.2 As an outcome of the assessment, the Commission determined that the complaint gave rise to:

- 4.2.1 a *criminal cause of action* that fell outside the Commission's mandate. The Commission referred this aspect of the complaint to the Independent Police Investigative Directorate ('IPID')¹, a statutory body entrusted with the duty to investigate a myriad of criminal offences committed by members of the South African Police Service including police brutality.

- 4.2.2 a *civil cause of action* in respect of a Dependants Claim for damages for loss of support and other ancillary relief. The Commission referred this aspect to the Legal Aid Board of South Africa (LASA).

- 4.3 The residual cause of action was that of the investigation into possible violations of human rights. It was this aspect that the Commission decided to accept jurisdiction over, with a limited and specific interest in declaring the ambit of the

months of the deceased and public protests, measured against acceptable standards of the law, and making a finding that the law required any further inquiry of none.

5. Motivation for pursuing investigation

5.1 There are a number of reasons that motivated the Commission to undertake the investigation:

5.1.1 During pre-constitutional era public protests and demonstrations against the violation of human rights were often met by the use of force by law enforcement agents on defenceless citizens, frequently resulting in the loss of life;

5.1.2 In post-democratic South Africa, the Commission noted rise in the incidence of community protests within the Republic due to public discontent with municipal service delivery;

5.1.3 A growing policy inclination of the Respondent in post-democratic South Africa towards the use of force to maintain public order.

5.2 Drawing the strands of the afore-going reasons together, the Commission deemed it just and equitable to investigate the extent of violation of human rights by the conduct of the Respondents in any, as an essential feature of a duty to investigate.

6. Methodology employed in the conduct of the investigation

The Commission employed a number of methods during the investigation. These included desk-top research, interviews, written requests for response, review of video footage.

6.1.1 Desk-top Research

The investigation team conducted extensive legal research into the legal framework governing the Bill of Rights to identify the human rights that were affected in the course of the incident complained of; as well research into academic literature on best practices of policing, crowd management and the maintenance of public order in order to determine the parameters reasonableness of the limitations of these rights.

6.1.2 Interviews

The investigation team conducted interviews with a random number of members of the Ficksburg community to obtain eye-witness statements to verify the factual allegations of the Complainant.

6.1.3 Review of Video Footage

The Commission reviewed the video footage of the events of the 13 April, 2011 to verify the factual allegations of the Complainant.

6.1.4 Written requests for response to allegation

The Commission made written requests to the Respondent to respond to the allegations of the complainant. As at the date of this report, the Ministry of Police and the Respondent have failed to provide the Commission with a response.

7. Applicable Law

7.1 Constitutional Rights

7.1.1 The complaint before the Commission is that the human rights of the protesting public, and in particular those of the deceased, were unreasonably limited when the Respondent applied undue force on unarmed citizens in the course of a public protest.

7.1.2 Section 10 is one of the most significant rights, particularly in the context of the present complaint; the **right to have the inherent dignity** of everyone respected and protected is paramount. The right to dignity is also a basis for a number of political rights and informs the interpretation of all other fundamental rights.²

7.1.3 Section 11 of the Constitution provides that everyone has the **right to life**. In **S v Makwanyane**,³ the Constitutional Court described the rights to life and dignity as the most important of all human rights and the source of all other personal rights in the Bill of Rights.

Section 12 of the Constitution provides that everyone has the **right to freedom and security of the person**, which includes the right to the following: (a) freedom from arbitrary arrest or detention; (b) freedom from slavery or servitude; (c) freedom from forced labour; and (d) freedom from torture or cruel, inhuman or degrading treatment or punishment.

Section 12(1) also prohibits political parties in the state to protect individuals against violation of their physical integrity by others. The right to freedom from state violence includes individuals and the police use of excessive and/or arbitrary force.

Section 17 of the Constitution recognises the **right to assemble, demonstrate, picket and present petitions peacefully and unarmed.**

8 Domestic Legislation

(a) Regulation of Gatherings Act⁶

8.1 During the various States of Emergency in the 1980's "illegal" protest marches were often broken up violently by the police who used teargas, rubber bullets, water cannons and live ammunition to stop citizens from protesting against the Apartheid regime.

8.2 In order to "normalise" political activity in South Africa in preparation for the first democratic election, the apartheid Parliament accepted the Regulation of

Gatherings Act 1993. This Act for the first time affirmed that citizens had a right to take part in public life and protest in public and provided for the orderly regulation of large gatherings between the authorities and the participants. It also provided a mechanism for the State to demonstrate and enforce a well-regulated and orderly freedom of assembly that these gatherings should respect, in order to protect the rights of other examples of the right.

8.3 *Enacted title of the Act reads:*

Whereas every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so:

And whereas the exercise of such right shall take place peacefully and with due regard to the right of others...

8.4 In terms of section 1 of this Act, *'Demonstrations include a demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.'*

8.5 The Act only applies to a 'gathering' which is defined as *'any assembly, concourse or procession of more than 15 persons in or on any public road, or any other public place or premises wholly or partly open to the air.'*

8.6 Section 3 of the Act provides for the submission of the notice of the proposed gathering to an organisation or individual seeking to hold a gathering.

8.7 Section 4 of the Act provides for the holding of a meeting after the submission of the section 3 notice to discuss the contents of the notice and whether

newspapers) should be referred to the proposed forms in order to make the regulations of the Regulations of Gatherings Act.

8.9 The Act does not stipulate any other conditions. The responsibility of law enforcement is to ensure that an intended public gathering takes place without any incident. The municipality, South African Police Service and the convener also have the right to discuss and negotiate with other organisations, especially if a public gathering has been invited to a public facility through of consultation and negotiation. It is the effect of the public gathering and its impact on public safety.

8.9 The notice of gathering contains binding conditions for the gathering. The convener together with the marshals at a gathering must take all reasonable steps to ensure compliance with such conditions.⁸ The police also have a duty to enforce the conditions of the notice.

8.10 The Act permits the use of force for crowd control where there are apparently 'manifest intentions' to kill or to seriously injure persons, or to destroy or seriously damage property.⁹ However, such use of force must be necessary, moderate and proportionate to the circumstances.

(b) South African Police Service Act¹⁰

Section 13(3) (b) of this Act, provides that *'Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.'*

(c) Criminal Procedure and Evidence Act 51 of 1977 as amended

Section 17(1)

Section 19(1) and (2) of the CP&F Act empower the police to apply lethal force in circumstances where a suspect is attempting to flee, or is a danger of flight to the police, and the use of lethal force is necessary to ensure the safety and security of the public and the police, and to prevent the escape of the suspect. The use of lethal force is also permitted in circumstances where the safety and security of the public and the police are at risk.

9 International Law

9.1 Universal Declaration of Human Rights

9.1.1 Article 3 recognises the *right to life, liberty and security of the person*, and places the duty of the state to protect the life of its inhabitants.

9.2 African Charter on Human and People's Rights

9.2.1 Article 6 provides that *every individual shall have the right to liberty and to the security of the person*. No one may be deprived of his freedom except for reasons and conditions previously laid down by law.

9.2.2 Article 11 provides that *every individual shall have the right to assemble freely with others*. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, safety, health, ethics and rights and freedoms of others.

10 Analysis of the Complaint

10.1 Framework for legal analysis

10.1.1 In analysing the available factual evidence against the applicable legal framework, the Commission considered the rights of the protesting public as set out in **Section 10, Section 11, Section 17 and Section 17** of the Constitution of the Republic of South Africa.

10.1.2 Against the enjoyment of these rights, the Commission considered the legal framework that defines the **acceptable limitations to the enjoyment of entrenched constitutional rights**.

10.1.3 Section 36 of the Constitution recognises that **fundamental rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society** based on human dignity, equality and freedom, taking into account all relevant factors including:

- (a) *The nature of the right;*
- (b) *The importance of the purpose of the limitation;*
- (c) *The nature and extent of the limitation;*
- (d) *The relation between the limitation and its purpose; and*
- (e) *Less restrictive means to achieve the purpose.*

(6) The Constitution provides that members of the police force have the duty to take lawful measures to protect and maintain order in the Republic and to uphold the interests of the law. The police have a constitutional obligation to protect the life, liberty and security of the citizen, to respect personal privacy and bodily integrity, and to uphold the fundamental rights and freedoms of the citizen. It is the duty of the police to protect the life, liberty and security of the citizen, to respect personal privacy and bodily integrity, and to uphold the fundamental rights and freedoms of the citizen. It is the duty of the police to protect the life, liberty and security of the citizen, to respect personal privacy and bodily integrity, and to uphold the fundamental rights and freedoms of the citizen.

(7) In order to establish that a violation of a constitutional right has occurred, the Commission will apply the **standard of proof on a balance of probabilities**.

10.2 Analysis of violations of human rights

Each of the rights that the Commission found to have been *prima facie* violated are analysed hereunder, in turn, using the legal framework for analysis set out in 10.1 above:

(a) Right to Dignity & Life¹²

10.2.1. Every human being has an inherent right to dignity and life.

According to O'Regan J,

The right to life is an essential antecedent to all the other rights in the Constitution. Where a life is taken or put at risk it would not be possible to exercise rights which are the basis of them and the right to life, as such, is central to the Constitution. In such a case, a violation of the right to life is a violation of the Constitution.

10.2.2 The Respondents' conduct in the present case is found to be in violation of the provisions of sections 295B and 295C of the Indian Penal Code (IPC). The Respondents' conduct is found to be in violation of sections 295B and 295C of the IPC.

10.2.3 The Respondents' conduct in the present case is found to be in violation of the provisions of sections 295B and 295C of the IPC. The Respondents' conduct is found to be in violation of sections 295B and 295C of the IPC.

10.2.3 The use of force should not arbitrarily deprive life or undermine human dignity, and should not be disproportionate to the requirements of law enforcement. During the public protest in Ficksburg, an unarmed protester was assaulted in full view of bystanders. The video footage, which was widely publicized¹⁵, patently displayed this fact. It was apparent from this footage that the deceased could have been apprehended by the Respondents without the need to apply lethal force.

10.2.4 It was further clear that the deceased was not attempting to flee. Accordingly, he was not a suspect to warrant use of lethal force in terms of section 49(1) of the *Criminal Procedure Act*¹⁶. Even if the deceased had been obstructive to the Respondents in the carrying of their duties, it was open to the Respondents to employ alternative means of apprehending or otherwise subduing him. For this reason, the Respondents could not have been acting within the scope and ambit of the aforesaid section when the protester was

¹⁵ The Times of India, 2012.

¹⁶ Section 49(1).

¹⁷ Section 49(1) of the *Criminal Procedure Act*.

¹⁸ Section 49(1) of the *Criminal Procedure Act*.

¹⁹ Section 49(1) of the *Criminal Procedure Act*.

alled. The arrests and support of subsections 46(1) and (2) and (3) protect the safety and integrity of all persons.

10.2.6 In the absence of any evidence that the Respondent acted in a manner that would constitute a breach of the deceased's right to immediate medical attention of a high priority level, the Commission has arrived at the finding that the Respondent acted in a manner that is consistent with the deceased's right to the disposal of their own remains, as well as the right of the Respondent to protect the Respondent's

10.2.7 In the absence of any evidence that the Respondent acted in a manner that would constitute a breach of the deceased's right to the exercise of the rights of the deceased to protest in terms of section 17 of the Constitution, the Commission has arrived at the finding that no justifiable grounds, acceptable in an open and democratic society based on human dignity, equality and freedom, existed for the use of excessive force to limit the exercise of the rights of the deceased to protest in terms of section 17 of the Constitution.

(b) Freedom and security of the person¹⁷

10.2.7 Section 12(1) (c) requires the state to protect individuals, both negatively by refraining from such invasions itself and positively by restraining or discouraging private individuals from such invasions.¹⁸ The state is required to take appropriate steps to reduce violence in public and private life.

10.2.8 As aforesaid, it cannot be found on the facts that the deceased posed any threat or danger to the police or members of the public as he was unarmed.

10.2.9 Accordingly, the Commission does not find on the facts any compelling justification for the limitation by the Respondent of the exercise of the deceased of his freedom and right to security of person.

¹⁷ See section 12(1) (c).

¹⁸ See section 12(1) (c) and section 12(2) (a) of the Bill of Rights Act, 1996.

10.2.10 The Commission concludes that the respondents violated the respondents' right to assemble peacefully and agree to a number of the petition's matters, that is, a number of the respondents' demands for a peaceful and democratic society, and that the respondents' actions were unlawful.

(c) Right to peacefully assemble, demonstrate, picket and to present petitions¹⁹

10.2.11 Public demonstrations and marches are a regular feature of everyday South African life and the right to peacefully assemble, demonstrate, picket and to present petitions is an essential characteristic of a democratic society. However, these demonstrations and pickets must take place within certain procedural requirements outlined in the *Regulation of Gatherings Act* ('RGA').²⁰

10.2.12 An unpublished report²¹ on protest actions stated the following regarding alleged infractions on the right to assemble and expression:

"There is a growing perception that authorities have used the RGA, particularly section 3(2) to deny activists their basic civil rights. The RGA, according to activists, is used by the ruling elite to criminalise genuine grassroots political actions, delegitimise and discredit civil society organisations and social movements. Activists further caution that the RGA's provisions might seem harmless – but in essence pose a serious challenge to the poor – who might not be able to comply for a variety of reasons. At the same time, basic freedoms of association, expression and assembly are seriously and adversely affected by the onerous regulations, which some activists argue might be unconstitutional."

¹⁹ See section 17 of the Bill of Rights.

²⁰ See section 17 of the Bill of Rights.

²¹ See section 17 of the Bill of Rights.

10.2.14 In terms of the gathering: All a gathering in March 2011 and all of the respondents. A gathering in April 2011 of respondents of a gathering of respondents. Whether respondents gathered in April 2011. A gathering in April 2011 of respondents relevant staff officers and a demonstration of people officers in April 2011. The Act was designed to ensure that public gatherings and demonstrations are ordered within the legally prescribed limits without regard for the rights of others.

10.2.15 The respondents protest are an expression of a concern of a concern of the provision of basic services to the public, particularly the impoverished members of society. In fact, e.g. protesters expressed concerns with their local municipality and cited theft, corruption, maladministration and nepotism as their main grievances.

10.2.15 It is unclear from our investigations whether the organisers of the protest complied with provisions of RGA when they embarked on this protest action. In any event, this aspect is not material to the determination of the issues for determination.

10.2.16 The first protest in March 2011 went without any significant unrest as residents presented their memorandum. The second protest, on the 13th April 2011, was also initially commenced without unrest. Thereafter, enraged supporters set fire to the library and the home affairs office.²² A storeroom at the municipal offices was burned to the ground. Police used water cannons, rubber bullets, and tear gas to disperse the dangerous crowd.²³ There was no meaningful attack of the Respondents by the protesting public; certainly, none of the nature that posed a threat to the members of the Respondent.

²² The Respondent's report on the protest on 13 April 2011, dated 13 April 2011, at page 10 of the report.

²³ The Respondent's report on the protest on 13 April 2011, dated 13 April 2011, at page 10 of the report.

10.2.17 Police members used powers in terms of RGA to lead protesters and to obstruct or hinder by using force disproportionate to the circumstances involved at that time for 1.1.1. In fact, the Respondents used force disproportionate to the circumstances involved in the case. The Commission finds evidence that the acts of violence and damage to public property by the protesting residents constitute a violation of the rule of law and the rights of others and that the weapons used or force by the Respondents in the view of the Commission, the Commission cannot be correct. The Commission finds evidence against public property damaged for the use of riot control and the use of the Respondents in writing cannot be correct.

10.2.18 In the result, the Commission concludes that the Respondents acted in violation of the deceased's right to peacefully assemble, demonstrate, picket and to present petitions as enshrined in the Constitution; and that this was done in a manner that is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

11. Findings

11.1 Based on the investigation conducted by the Commission and the analysis of the Constitution, reports and the applicable law, the Commission finds that:

11.1.1 The Respondent's members acting in pursuance of their mandate in terms of section 205 of the Constitution neglected provisions of RGA by using excessive force resulting in the injury and/or death of one protester;

11.1.2 The Respondent's members used a degree of force that was disproportionate in the factual circumstances of the case; and in so doing, unduly limited and violated the deceased protester's right to life in terms of section 11 of the Constitution and/or to freedom and use of the person in terms of section 12 of

the Constitution and the protesting public and deceased protesters and it peacefully and amicably to assemble, demonstrate, picket and exercise their rights.

- e) The Respondent's members were not fully equipped to deal with the situation and failed, within the circumstances, to devise a plan to regulate and control the gathering.
- f) The Respondent failed to ensure that adequately qualified and equipped members were present, with a set of regulations or resolutions formulated in accordance of the IMA. If adequately qualified persons had been present, such that the police have reasonably foreseen that the demonstration in question would degenerate into violence and prepared for that eventually,

11.1.5 The Respondent failed to ensure that adequate numbers of police officers were deployed to minimize or avoid destruction of public property.

12. Recommendations

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

12.2 The Commission recommends accordingly that:

- 12.2.1 The Respondent to improve training of police officers in managing and regulating gatherings to ensure that future police interventions in public protests result in a non-violent and democratic outcome.

17.2. The Respondent to accept a training course for the Public. But first together with the Commission's Advisory Department. The Respondent should put more focus on the training and first training for the staff of the first.

17.3. The Respondent should accept a course for the staff together with a course to state there is a lack of training.

17.4. The Respondent to accept the Chairperson of the Minister of Education and General Education Training Affairs to collectively report every year to the Commission. It has put in place to address the phenomenon of increasingly violent community protests. The latter to report on measures to ameliorate systemic failures in local government that often lead to service delivery protests, and to report to the Commission on meaningful engagement on such concerns so as to avert these protests.

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 IN *[illegible]* THE *[illegible]* DAY OF *[illegible]*
2012

[Signature]
Commissioner P. Tladi
South African Human Rights Commission