



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Ref No: FS/2011/0089

In the matter between:

DANISILE MAKE

(On behalf of Maseko Section Residents)

Complainant

DIHLABENG LOCAL MUNICIPALITY

Respondent

REPORT

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

1. Introduction

- 1.1 The South African Human Rights Commission (hereinafter referred to as the "**Commission**") is an institution established in terms of Section 181 of the

Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as the "**Constitution**").

- 1.2 The Commission and other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".
- 1.3 The Commission is specifically required to:
 - 1.3.1 Promote respect for human rights;
 - 1.3.2 Promote the protection, development and attainment of human rights;
and
 - 1.3.3 Monitor and assess the observance of human rights in the Republic.
- 1.4 Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.5 Further, section 184(2) (c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.
- 1.6 The Human Rights Commission Act, 54 of 1994 further supplements the powers of the Commission and provides the enabling framework for the powers of the Commission.
- 1.7 Section 9(6) of the Human Rights Commission Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or a threat to a fundamental right.

2. Parties

- 2.1** The Complainant is Mr Danisile Make, a Community Leader acting on behalf of the residents of Maseko Section at Fateng Tse Ntsho in Paul Roux, an area falling under the jurisdiction of the Dihlabeng Local Municipality in the Free State Province (hereinafter referred to as the "**Complainant**").
- 2.2** The Respondent is Dihlabeng Local Municipality, a Municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated at 9 Muller Street, Bethlehem (hereinafter referred to as '**Respondent**')

3. Background to the Complaint

- 3.1** The Commission received a complaint from Mr Danisile Make on the 28th June 2011.
- 3.2** The Complainant alleges that the Respondent has violated the rights of the residents of the Municipality to human dignity and the right of the residents to a clean environment, health, and privacy in that it had failed and/or refused and/or neglected to provide residents with adequate access to basic municipal services, including solid waste removal, water and sanitation. Further, that the Respondent had violated the resident's right to access information in that the Respondent has not been transparent and forthcoming with information that affects the community.
- 3.3** The Complainant further alleges that the Respondent has violated the rights of the residents of the Municipality to housing in that it had failed and/or refused and/or neglected to make an application to the Provincial Government to formalise Maseko

Section informal settlement and attempted to evict the residents from the land that they occupied for years.

- 3.4** The Complainant requested the Commission either to compel the Respondent to provide housing, water and sanitation services to the community; or alternatively that the Respondent relocate them to an agreed upon and suitable; alternative location.

4. Preliminary Assessment

- 4.1** The Provincial Office of the Free State made a preliminary assessment of the complaint.
- 4.2** The Commission found the Respondent's conduct to amount to a *prima facie* violation of the rights to: **dignity, privacy, a clean environment, the right to housing, health and access to information. Sections 10, 14, 24 and 26, 27 and 32 of the Constitution of South Africa, respectively.**
- 4.3** The Commission further determined that the alleged violations fell within the mandate and jurisdiction of the South African Human Rights Commission to investigate.
- 4.4** The Commission further determined that a full investigation be conducted by the Commission in terms of the Complaints Handling Procedures of the Commission.

5. Steps taken by the SAHRC

5.1 Request for written response to allegations

- 5.1.1 On 29 June 2011, the Free State Provincial Office of the Commission sent a letter to the Respondent setting out the allegations made by the Complainant, the preliminary assessment of the SAHRC and an invitation for it to respond in writing to the allegations within 21 (twenty-one) days from date of same letter.
- 5.1.2 On the 23 May 2012, the SAHRC sent a further letter to the Respondent urging its response to the letter of the 29 June, 2012.
- 5.1.3 On the 08 June 2012, the SAHRC received a response from the Respondent dated 06 June 2012. This response was subsequently forwarded to the Complainant for consideration.

5.2 Telephonic interviews

- 5.2.1 Subsequent to this, the SAHRC conducted several telephonic conversations with officials of the Municipality.
- 5.2.2 On the 10 October 2012, the investigation team also interviewed a random sample of residents of the Municipality to verify the factual version of the Complainant.

5.2.3 An interview with Mr Maseko revealed the following:

- Mr Maseko is a former Freedom Fighter and community leader.

- Mr Maseko settled in the area in 1995. In 1996 the Respondent went to court, without consulting residents, to seek an eviction order. The Magistrate's Court granted this order but the residents later applied for a rescission of judgment, which was granted
- Later the Magistrate again passed judgment against the residents who then successfully applied for a stay of execution pending a review of the High Court.
- On 27 January 1997, in the matter between Springkan Moloi & Others v Paul Roux Transitional Local Council, Judge Edeling passed a judgment that the residents are not illegal squatters but that, they are lawful occupiers of the land.
- The Municipality's attorneys then gave an undertaking that they will have the area proclaimed as a township so that the residents can have municipal services. To date, that has still not been done.
- Following the eviction court battle, the area was named after Mr Maseko.
- Mr Maseko has tried on several occasions to speak to the councillors to improve the living conditions in the area.
- In 2006, the new councillor, Mr Joseph Mkhwane introduced limited service delivery processes: the buckets were now being emptied by the municipality and there are now communal taps accommodating about seventeen households each.

- The new councillor, Mrs Ausana Mkhwanazi who started her tenure in 2011, brought in solar systems for people who already had electricity in the formalized area adjacent to Maseko Section.
- Maseko section has no electricity and no water, except for the communal taps.
- The Municipality asked them to relocate to another area, the residents refused as the area where they were in was better than the area the Municipality had earmarked for them.
- Mr Maseko asserts that there are no rocks in the residential area where the residents are currently located; the Municipality is simply abdicating its responsibility to provide residents with access to basic services.
- Maseko section is located in a fertile land and this is apparent from vegetables grown by residents in their respective yards.
- Mr Maseko also highlighted the fact that even though the Municipality has alleged that the area cannot be developed, in some instances, the Municipality has encroached into the sites of residents of Fateng Tse Ntsho in developing the neighbouring township.

5.2.3 Interview with Mr Danisile Make – Community Leader

- There are no toilets, residents use the bucket system, no infrastructure, there is insufficient water as about seventeen households use one communal tap;

- The Municipality's allegations that the area cannot be developed because of rock is unreasonable as there are no rocks in the area where the people live;
- The area accommodates about 49 families, it is not more than 1000 people.
- Mr Make stated that the residents of Maseko Section refused to move to the other location because residents did not see any difference between the two areas, in fact, residents felt that the area they were in was better as it did not have sandy soil that made it impossible to travel to and from their houses when it rained.

5.3 Physical Inspection

5.3.1 On the 10 October 2012, the Free State Office dispatched a team to conduct an inspection in loco in Maseko Section.

6. Evidence collected during investigation

6.1. Written response of Respondent to the Complaint

In its letter of response dated 06 June 2012, the Municipal Manger of the Dihlabeng Local Municipality addressed the allegations as follows:

- 6.1.1 that the community of the Maseko Section Informal Settlement had been occupying the area illegally in terms of an order made by the Magistrates Court, but that there was a High Court judgment which overturned the Magistrates Court decision;

- 6.1.2 that the land could not be proclaimed for residential development due to the fact that the soil is not proper for the building of houses;
- 6.1.3 that there can be no municipal services like water, electricity and sewerage on the land due to the fact that the soil is not proper for the purpose and that sandstone rock was creating the problem and that it would not be financially viable to break the rock to install municipal services;
- 6.1.4 that the Respondent had previously made 353 erven on the north of Maseko section available and had offered it to about 40 residents/families but that the residents refused to relocate to the newly developed area.
- 6.1.5 The Respondent further stated that in view of the above, the demands of the residents were unreasonable.

In its letter dated the 2 November 2012 the Respondent further stated that:

- 6.1.6 After receiving the response from the Respondent, the SAHRC requested further information from the Respondent, including the Respondent's interim plans to ameliorate conditions in the area.
- 6.1.7 After the request from the SAHRC, the Municipality responded by saying that they are rendering the following basic municipal services to the residents of the area:
- Refuse removal;
 - Communal taps; and

- Use of the bucket system for sanitation.

6.1.8 The Respondent also stated that the Municipality had lodged an application to the Free State Government for funding to eradicate the informal settlement.

6.1.9 The Respondent also noted that it is incumbent upon the residents to ensure that they are on the waiting list as their relocation will depend on them being on the waiting list, and available funding.

6.1.10 After the request for further particulars by the SAHRC, the Respondent stated that on the 19 January 2010, the current Municipal Manager, Mr Tsoeli, had, through the Emendo Town and Regional Planners submitted an application to the Free State Government for funding to eradicate the informal settlements, this application was furnished to the SAHRC as proof.

6.1.11 The Respondent also furnished the SAHRC with the Municipality's Housing Sector Plan for the period 2011/2012, which essentially highlights the plans of the Municipality in relation to housing issues.

6.1.12 The Respondent also attached a letter that was sent to the Premier's Office that clarified whether the residents of Maseko section, Fateng Tse Ntsho were illegal occupiers of the land or not, this letter stated that the occupants were settling there legally.

6.1.13 The Respondent also forwarded correspondence from the Municipality's attorneys which sought to inform the Municipality that even though they had made an application to the Magistrates Court asking for the eviction of the residents of Fateng Tse Ntsho, which application was granted, the High Court found that the Magistrates Court decision to evict the residents was wrongful because the order/decision was made in terms of the old Prevention of Illegal Squatters Act of 1961 and this law was no longer applicable in

South Africa as it had been replaced by the Extension of Security of Tenure Act 62 of 1997.

6.1.14 Judge Edeling, who was seated at the High Court in Bloemfontein made an order to the effect that the residents of Maseko section in Fateng Tse Ntsho were lawful occupiers of the land and that the municipality had to make arrangements for the proclamation of the area as a township and offer services.

6.1.15 In his judgment, Judge Edeling also stated that even though the Respondent had stated that services cannot be rendered and the area cannot be developed due to the area not being conducive for development, there had been sites created for other people in the very same area where the Respondent had said it is not suitable for development.

6.2 Evidence collected during the Inspection in Loco

6.2.1 There are patent levels of unemployment in the area, the majority of people live in shacks, only a few houses are constructed with bricks and most of the people rely on social grants.

6.2.2 Residents do not have sufficient water as there are only few communal taps which are insufficient to meet their basic needs.

6.2.3 There is no electricity whatsoever in the community, people use candles and alternative methods for heat and light and cooking.

6.2.4 Some families who were able to afford to buy water tanks have bought them and placed them in their respective yards. When it rains, the tank fills up with water.

6.2.5 There are times when the buckets are not collected on time and this has resulted in residents resorting digging holes in their yards to dispose of the human excreta. This is both demeaning and insulting to their dignity as it is unsanitary and unhealthy.

6.2.6 The residents indicated that they are amenable to being resettled in a proper, developed area.

6.2.7 There is a township within very close proximity to Maseko section that is developed and has all services, it is surprising how close these two areas area and how one can have no services when the other one is fully catered for and functional.

(Photographs taken from the Inspection in Loco are attached below)



IMAGE 1: Photographed at Maseko on 10 October 2012.

The majority of people live in shacks with no other basic municipal services.



IMAGE 2: Photographed at Maseko on 10 October 2012.

The people of Maseko construct their own shack dwellings and put rocks on top of the building so that it does not blow away when there is wind. The electrical connections running above the houses service the township next to Maseko.



IMAGE 3: Photographed at Maseko on 10 October 2012.

The residents of Maseko are forced to use the bucket system, the zinc structure next to the bucket is the enclosure for the bucket. The water running next to the bucket is due to the fact that a hole was dug to empty the bucket as there was no collection.



IMAGE 4: Photographed at Maseko on 10 October 2012.

Residents who can afford it bought water tanks in order to conserve water so that when it rains, they can preserve water.

7. Applicable Legal Framework

7.1 International Instruments

(a) United Nations Declaration on Human Settlements (Habitat Agenda)¹

The United Nations Declaration on Human Settlements requires signatories to commit themselves to the following:

- *ensuring adequate shelter for all and making sustainable human settlements safer, healthier and more liveable, equitable and productive;*
- *recognizing the particular needs of women, children and youth for safe, healthy and secure living conditions;*
- *intensifying efforts to eradicate poverty and discrimination, promoting and protecting human rights and fundamental freedoms for all, and providing for basic needs, such as education, nutrition and life-span health care services and adequate shelter for all;*
- *improving the living conditions in human settlements in ways that are consonance with local needs and realities, and ensuring full and equal participation of all women and men and the effective participation of youth in political, economic and social life; and*

¹Istanbul Declaration on Human Settlement, available online at www.unhabitat.org

- *promoting full accessibility for people with disabilities, as well as gender equality in policies, programmes and projects for shelter and sustainable human settlement development.*

(b) The Rio Declaration²

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

(c) The African Charter on Human and People's Rights

The African Charter on Human and People's Rights states that all people have a right to a generally satisfactory environment favourable to their development.

(d) The World Summit on sustainable Development Plan of Implementation³

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

The Plan of Implementation also states that in order for States to reverse the current trend in natural resource degradation, states must implement

² Rio Declaration on Environment and Development, 1992.

³ World Summit on Sustainable Development Plan of Implementation, 2002

strategies, including targets to protect ecosystems and to achieve integrated management of natural resources, to achieve this:

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

7.2 Constitutional Framework

(a) Section 1 (a) of the Constitution Act, 1996

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

(b) Section 7(2) of the Constitution

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

(c) Section 10: The Right to Human Dignity

Section 10 of the Constitution provides that:

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

(d) Section 14: The Right to Privacy

Section 14 of the Constitution provides that:

"Everyone has the right to privacy"

(e) Section 24: The Right to a Clean Environment

Section 24 of the Constitution provides that:

"Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being; and*
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –*
 - (i) Prevent pollution and ecological degradation*
 - (ii) Promote conservation; and*
 - (iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

(f) Section 26: The Right to Housing

Section 26 of the Constitution provides that:

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

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions".

(g) Section 27: The Right to Health

Section 27 of the Constitution provides that:

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

(a) Health care services, including reproductive health care;

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

(h) Section 32: Access to Information

Section 32 of the Constitution provides that:

"(1) Everyone has the right of access to –

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(i) Section 139: Duties of the Municipality

- i. Section 139(1) provides that when a municipality cannot or does not fulfill an executive obligation in terms of legislation, the relevant provincial

executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including –

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

7.3 Applicable Domestic Legislation

(a) The Housing Act⁴

The definition of 'Housing development' as included in Section 1 of the Act refers to access of the following two key elements on a progressive basis:

⁴Act 107 of 1997

- “Permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- Portable water, adequate sanitary facilities and domestic energy supply.”

(b) Section 28, Municipal Finance Management Act⁵

Chapter Four, Section 28(1) of the Municipal Finance Management Act (hereinafter referred to as the “**MFMA**”) gives a directive to municipalities that they may revise and approve their annual budget through an adjustments budget.

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

(c) Section 3, Water Services Act⁶

Section 3 of the Water Services Act provides that everyone has a right of access to basic water supply and basic sanitation.⁷

⁵ Act 56 of 2003

⁶ Act 108 of 1997

⁷Section 3, however is qualified in terms of Regulation 2 of the Regulations Relating to Compulsory Standards and Measures to Conserve Water.⁷

(c) The Municipal Systems Act⁸

The relevant provisions of the Municipal Systems Act are sections 106 and 107, which deal with provincial and national monitoring.

- a. Section 106 states that if an MEC has reason to believe that a municipality in the province cannot or does not perform a statutory obligation binding on that municipality, or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must:⁹
 1. By written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or
 2. If the MEC considers it necessary, designate a person or persons to investigate the matter.
 3. Section 107 states that the Minister by notice in the gazette, may require municipalities of any category or type specified in the notice, or of any other kind described in the notice, to submit to a specified national organ of state such information concerning the affairs as may be required in the notice, either at regular intervals or within a period as may be specified.

⁸ 32 of 2000

⁹ Section 106 of the Municipal Systems Act 32 of 2000

(d) Promotion of Access to Information Act¹⁰ (PAIA)

PAIA protects and upholds the rights of people to access information. It protects the right to access to information and seeks to enhance the transparency, accountability and effectiveness of government. Public bodies are obliged to give information needed to the public in order to facilitate the process of enabling people to exercise the rights that are enshrined in the Constitution.

The mandate of the SAHRC in relation to access to information is to raise awareness of the existence of the Promotion of Access to Information Act, Act 2 of 2000, to both members of the public and civil servants to educate the public on the provisions of the Act.

(e) The National Health Act¹¹

The National Health Act came into force in May 2005 and is the most important piece of legislation that helps to implement the constitutional rights to health. The National Health Act is the main law that gives clear, overall direction on health rights in South Africa. Some of the **aims** of the National Health Act are to:

- Make effective health services available to the population, equitably and efficiently;
- Protect, respect and fulfill the rights of the people of South Africa to progressively realize their constitutional right to health;
- Establish a national health system that will provide people with the best possible health services that available resources can afford.

¹⁰ Act 2 of 2000.

¹¹ Act 61 of 2003

(f) The National Environmental Act (NEMA)¹²

The National Environmental Management Act (NEMA) states that the interpretation of any law concerned with protecting and managing the environment must be guided by its principles.

At the heart of the NEMA principles is the principle of sustainable development, this means that organs of state must evaluate the social, economic and environmental impact of activities that may significantly affect the environment.

NEMA also seeks to protect the environment by:

- Creating a set of environmental principles that show the Government how it should act;
- Making the Government consider all the effects that a development can have before it is allowed to go ahead.

7.4 Applicable Regulatory Framework

(a) Regulations Relating to Compulsory Standards and Measures to Conserve Water.

The regulation provides that the minimum standard of basic sanitation service is:

- the provision of appropriate health and hygiene education; and

¹² National Environmental Management Act 107 of 1998

- a toilet that "*is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, is well ventilated, keeps smell to a minimum and prevents the entry and exit of flies and other disease-carrying pests.*"

(b) Regulatory Standards

Regulation 2 of the Compulsory National Standard¹³ states that the minimum standard for basic sanitation services is –

(i)The provision of appropriate sanitation;

(ii)A toilet which is safe, reliable, environmentally sound, easy to keep clean, provides protection against weather, well ventilated, keeps smells to a minimum and prevents entry and exit of flies and other disease carrying pests.

7.5 Applicable Policy Framework

(a)White Paper on Water

Government's white paper entitled, "Water is Life, Sanitation is Dignity"¹⁴ articulates government's commitment to the provision of at least a basic water and sanitation service to all people living in South Africa. It states further that the provision of water and sanitation remains an important policy concern. The government is also committed to reducing the backlog in services by 2008 in the case of water and 2010 in the case of sanitation. The policy of free basic water and sanitation services means

¹³ General Notice 22355 of 8 June 2001

¹⁴ October 2002, Department of Water Affairs and Forestry

that everybody in South Africa has a right to a basic amount of water and a basic sanitation service that is affordable.

(b) National Sanitation Policy¹⁵

The National sanitation Policy defines sanitation as *"the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact on users, operators and the environment."*

(c) White Paper on Basic Household Sanitation¹⁶

According to the 2001 White Paper on Basic Household Sanitation, the Department of Water Affairs and Forestry had the following responsibilities, together with other national role-players:

- Developing norms and standards for the provision of sanitation;
- Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
- Coordinating the development by the municipalities of their Water Services Development Plans as a component of their Integrated Development Plan;
- Monitoring the outcome of such programmes and maintaining a database of sanitation requirements and interventions;

¹⁵ Department of Water affairs and Forestry, 1996

¹⁶ Department of Water Affairs and Forestry, 2001

- Providing capacity building support to provinces and municipalities in matters relating to sanitation;
- Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
- Undertaking pilot projects in programmes of low cost sanitation.

(d) White Paper on Health¹⁷

The White Paper on the Transformation of the Health System sets out key policy issues. It **aims** to:

- Unify the national health system to address the effects of apartheid on health;
- Re-organise the health service to give priority to primary health care through the district health care system, where certain aspects of health service delivery takes place at district (instead of national or provincial) level. A clear advantage of the district health model is that it seeks to bring health care services closer to people on the ground;
- Promote health;
- Strengthen disease prevention;
- Ensure that there are safe, good quality essential medication available in all health facilities;
- Recognise the need to increase access to services by making primary health care services available to all people;

¹⁷ White Paper on the Transformation of the Health System (1997)

- Give special attention to health services reaching people most in need of these services – the poor, the elderly, women and children;
- Promote the participation of community structures in health care delivery.

7.6 Applicable Programmatic Framework

(a) The Upgrading of Informal Settlements Programme (UISP)¹⁸

The Upgrading of Informal Settlements Programme was established by the Department of Housing in 2004 as part of its Breaking New Ground Policy Document. The broad objectives of the programme are to facilitate access to basic services, transform communities through upgrading and to engender local economic development through the improvements in infrastructure.

7.7 Applicable Sector Codes

(a) The National Housing Code¹⁹

The central objective of the National Housing Code is to encourage the development of social capital by supporting the active participation of communities in the design, implementation and evaluation of projects.

¹⁸ Breaking New Ground Policy Document, Department of Housing 2004

¹⁹ The National Housing Code, Technical and General Guidelines, Volume 2, 2009

The concepts of social capital and active participation are highlighted as the central objective of the UISP to reduce economic and social vulnerability through the development of a human settlement.

The Housing Code has emphasised the importance of community participation and places certain injunctions on service delivery agents. In this regard the Housing Code states:

"To ensure that fragile community survival networks are not compromised and to empower communities to take charge of their own settlements, one of the basic tenets of the programme is that beneficiary communities must be involved throughout the project cycle. All members of the community, even those who do not qualify for subsidies, should be included".

7.8 Strategic Frameworks

(a) The Strategic Framework for Water Services²⁰

The Strategic Framework defines a basic sanitation facility as:

"The infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases by facilitating the appropriate control of disease carrying flies and pests, and enables safe and appropriate treatment and/or removal of human waste and waste water in an environmentally sound manner".

²⁰ Department of Water Affairs and Forestry, 2003

(b) Free Basic Sanitation Implementation Strategy²¹

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

7.9 Relevant Case Law

(a) Government of the Republic of South Africa and Others v Grootboom

In **Government of the Republic of South Africa and others v Grootboom and Others 2001 (1) SA 46 (CC)** it was held that section 26 of the Constitution 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*”.²²

The Grootboom case further states that legislative measures adopted by the government must be supported by policies and programmes adopted must be reasonable “*both in their conception and implementation*”, the court also 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.²³ The court further established that the right to “*adequate housing*” requires available land, appropriate services such as the

²¹ Department of Water Affairs and Forestry, April 2009

²² Grootboom at para 41.

²³ Grootboom at para 44.

provision of water and removal of sewerage and the financing of these, as opposed to the mere provision of bricks and mortar.²⁴

In relation to the duties of all levels of government, the Court held in Grootboom:²⁵

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

Yacoo J went on to state that:

"Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.

(b) **NM v Smith**

In **NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)** the court held that *"a constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all,*

²⁴Grootboom at para 42-44.

²⁵Grootboom at para 82.

*that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom.*²⁶

*The Court further held that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. The Court referred to judgements made in the matter of **Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others:***

"The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it clear that dignity is not only a value that is fundamental to our constitution, it is a justiciable and enforceable right that must be respected and protected".²⁷

(c) S v Makwanyane and Another

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

"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms

²⁶NM v Smith at para 49.

²⁷ NM v Smith at para 50-51

the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution”.

*“The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life”.*²⁸

(d) Beja and Others v Premier of the Western Cape and Others

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

Erasmus J held at paragraph 142-143 that section 73(1)(c) of the Municipal Systems Act requires a municipality to provide the “minimum level of basic services”, which includes the provision of sanitation and toilet services. He found that there was a violation of rights in terms of sections 10 (human dignity), 12 (freedom and security of the person), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution.

²⁸NM v smith at para 131.

The High Court, in the Bejajudgement undertook a thorough analysis of both the rights to dignity and privacy in the context of the provision of unenclosed toilets to the poor. At paragraph 146, the court held that:

*"The City's decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents **with respect and care for their dignity** was not taken into account when the City decided to install the unenclosed toilets".*

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

"Respect for human dignity is the unifying constitutional principle that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not to simply ensure that the 'haves' continue to have but to help create conditions in which the basic dignity of the 'have nots' can be secured".²⁹

(e) Leon Joseph & Others v City of Johannesburg & Others

In the **Joseph case**³⁰ the Constitutional Court read sections 152 and 153 of the Constitution together with provisions contained in the Municipal Systems Act and the Housing Act, creating a public law "right to basic municipal services" and outlining the duty on local government to provide these services.

²⁹ Sachs, A. (2009). *The Strange Alchemy of Life and Law*. Oxford University Press

³⁰ Leon Joseph and Others v City of Johannesburg and Others (2009) ZACC 30

8. Analysis

8.1 Access to Information

With regard to the duty of the Respondent in service provision, the SAHRC observes that the principles of active participation, social cohesion and community empowerment are key principles to the work of the Respondent. It is therefore incumbent upon the Respondent to demonstrate that effective and interactive community participation took place. Active communication and proactive information sharing lie at the heart of such engagement and participation. A municipality must demonstrate that effective and interactive community participation has taken place in the planning, implementation and evaluation of a project.

- There was nothing gleaned during the course of investigations that suggested that the Respondent had included active community participation in the project, the project was, for all intents and purposes, not a transparent one.
- Adequate consultation at the point of conceptualization would have provided the Respondent with clear insight of the community's needs and its own capacity to respond accordingly.
- In terms of the MFMA, a municipality must consult communities and present the budget available to undertake specific projects. The budget must be presented through the MTEF process, where there is an agreement as to how many toilets can be built to completion over a period of time. The fact that residents remain without proper sanitation and basic services for a lengthy period is an indication that the

Respondent did not consult, neither did the Respondent use the multiyear planning framework on service delivery.

- Access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives. The Commission has considered the Respondent's compliance or lack thereof with the Promotion of Access to Information Act (PAIA),³¹ a law of national application which facilitates information sharing in the country and is meant to promote public participation.
- PAIA obliges the Respondent to avail information about its decisions relating to all aspects of the process, including tenders and the means through which the community can access the information the Respondent holds. In this sense, people are not only able to participate meaningfully in the project of the Respondent, but they are also able to hold it accountable.
- In this instance, the residents of Maseko advised the Commission's investigators that they do not know anything about the plans to upgrade their area.
- Based on the Respondent's failure to respond to develop the area for over twenty years and its failure to share information and consult adequately with the community, the Commission finds no justification for the Respondent's actions.

³¹ Respondent has not complied with its reporting obligations in terms of Section 32 of PAIA for the past 3 consecutive years.

- a. The Commission therefore makes a finding that the right to the dignity of the residents who are being forced to resort to the bucket system are being violated.

8.2 Health

The health risks posed by the above situation, particularly to vulnerable groups are extremely serious. This situation is exacerbated by the fact that most people experiencing these conditions have very little mean of combating diseases such as diarrhoea resulting from the unhygienic bucket systems.

The fact that the residents of Maseko constantly have to dig holes in their yards to dispose of human waste for over a period of twenty years goes against the obligation of the state to progressively realize the right of citizens to adequate sanitation. This poses a serious threat to the residents' health.

8.3 Consultation and Community Participation

It is clear that active participation, social cohesion and community empowerment are key principles to the UISP and it was incumbent upon the Respondent to demonstrate that effective and interactive community participation took place. Active communication and proactive information sharing lie at the heart of such engagement and participation.

Such community participation therefore is one which must be initiated and sustained from the point of inception of project plans through to implementation and evaluation of projects. A municipality must demonstrate that effective and interactive community participation has taken place in the planning, implementation and evaluation of a project.

Legislation and judgments of our courts have required not only consultation but the active participation of communities in such undertakings. There is absolutely nothing in this matter that would suggest that the Respondent included active community participation in the project, the project was, for all intents and purposes, not a transparent one.

Adequate consultation at the point of conceptualization would have provided the Respondent with clear insight of the community's needs and its own capacity to respond accordingly.

In terms of the MFMA, a municipality must consult communities and present the budget available to undertake specific projects. The budget must be presented through the MTEF process, where there is an agreement as to the process for the proclamation of the area as a township and the period it will take to do this and the manner and time-frame of installing municipal services and developing infrastructure and housing.

The Municipal Systems Act states that municipalities must encourage and create conditions for the local community to participate in the affairs of municipalities including:

- preparing, implementing and reviewing its integrated development plan;
- establishing, implementing and reviewing its performance management system;

- monitoring and reviewing of its performance, including the outcomes and impact; preparing its budget; and
- strategic decisions relating to the provision of municipal services.

Given the evidence in front of us, the SAHRC has serious reservations about whether any of the obligations listed above have been met.

Access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives. The Commission has considered the Respondent's compliance or lack thereof with the Promotion of Access to Information Act (PAIA), a law of national application which facilitates information sharing in the country and is meant to promote public participation.

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

In this instance, the SAHRC is not convinced that the residents actively participated in the process, the SAHRC is convinced that had there been active participation, the residents would be aware that the area they currently live in, is possibly not safe according to the Respondent and that it would be safer for them to move to another area.

8.4 Privacy and Dignity

- (a) The High Court, in the Beja judgment undertook a thorough analysis of both the rights to dignity and privacy in the context of the provision of unenclosed toilets to the poor. At paragraph 146, the court held that:

*"The City's decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents **with respect and care for their dignity** was not taken into account when the City decided to install the unenclosed toilets".*

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

"Respect for human dignity is the unifying constitutional principle that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not to simply ensure that the 'haves' continue to have but to help create conditions in which the basic dignity of the 'have nots' can be secured".³²

(c) The progressive realisation of rights defined within a continuum begins at the minimum socio-economic provision necessary to meet people's basic needs (minimum obligation), to its full realisation which culminates in the capabilities of people in society to meaningfully participate and shape society. This implies that persons are not only passive recipients but active participants in society and it is through this process where true empowerment, active participation and social cohesion will occur. The manner in which the Respondent rendered a basic service to the affected community is contrary to the Commission's understanding of progressive realisation.

³² Sachs, A. (2009). *The Strange Alchemy of Life and Law*. Oxford University Press

- (c) It is unacceptable that after twenty years, the Respondent has not taken reasonable measures to provide housing and other basic services.

8.5 Clean Environment

- (a) The Complainant has further alleged a violation of the right to a healthy environment. The Water Services Act is explicit that the prescribed minimum standard of basic sanitation services is for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewerage from households, including informal settlements.
- (b) The Respondent has clearly not complied with the Water Services Act in that their actions or lack thereof fall short of the provisions of the Water Service act in that they have failed to provide the minimum standard of basic sanitation.
- (c) The residents right to a clean environment has been violated by the fact that they have to dig holes in their yards to dispose of waste material including human waste.

8.6 Housing

The Complainant further alleges a violation of the right to housing as residents live in shacks and the area has seen no development.

The Grootboom case at paragraph 82 states that:

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

(a)Section 152 (1)(b) and Section 152 (1)(d) of the Constitution further states that the role of local government is among other things, *"to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment"*.

(b)The Respondent has also responded by stating that it is not the responsibility of the Municipality to provide housing but the responsibility of local and provincial government, the SAHRC finds this to be indefensible. The Respondent's own Housing Plan states the following in terms of municipal institutional arrangements:

In terms of the national and provincial housing policy, legislation and programmes, the Municipality is expected to perform the following housing functions, amongst others:

- *Conduct socio-economic surveys to determine population growth, the housing need and the housing backlog including compilation of a housing waiting list;*
- *Submit housing needs to the Province;*
- *Help applicants in filling housing subsidy application forms;*
- *Inspect buildings, including the laying out of foundations, installation of infrastructural services and the construction of houses;*
- *Manage the implementation of the housing sector plan;*
- *Establish and manage a complaint system; and to*
- *Promote, where feasible, on-site housing redevelopment of informal settlements.*

(c)The Respondent's assertion that they are not responsible for housing is therefore unfounded.

8.7 Obligations and Responsibilities of National and Provincial Government

- (a) National and provincial government departments have a clear responsibility to ensure that municipalities meet their obligations. A number of steps could have been taken at the early stages of planning and implementation of the project as a whole. These steps would have necessarily included the obligation of provincial government to monitor reports of the local municipality.

- (b) It is incumbent upon both provincial and national departments to monitor and intervene if necessary in the work of local government structures. This is also true of the planning and budgeting undertaken by municipalities. National and provincial departments should have exercised closer monitoring of the Respondent. Such monitoring and scrutiny of the work of the Respondent would have permitted intervention by the MEC and relevant National Ministers timeously.

9 Findings

Based on the investigation conducted by the Commission and the analysis of the Constitutional rights, court judgments and applicable legislation, the Commission finds that:

- 9.1 The Respondent failed to adequately conceptualize, plan and implement its project, which resulted in the residents being forced live in an undeveloped area with no municipal services and infrastructure;

- 9.2 The Respondent's submission that they are not responsible for the delivery of housing and that housing is the responsibility of Provincial and Local Government is not justified and is unacceptable and goes against their own Housing Plan;

- 9.3 The Respondent's further submission that the area cannot be developed contradicts the Municipality's application for funding which includes Fateng Tse Ntsho as an area to be developed as well. This submission by the Respondent is also contrary to the Municipality's Housing Plan which also includes Fateng Tse Ntsho as an area to be developed, no where do these two documents make mention of the area not being suitable for development.
- 9.4 The Complaint of violations to the rights of human dignity, privacy, a clean environment, housing, health and access to information are upheld; and
- 9.5 The provincial and national government departments have not adequately monitored the work of the respondent or intervened in respect of their legislative and Constitutional obligations.

10 Recommendations

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

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

The Commission recommends accordingly that:

- 10.1 The Respondent furnish the Commission with a detailed report on why they state that it is not their prerogative to apply to the Provincial Government for proclamation of

Maseko as a township despite a High Court Order advising them to do so within three (3) months of date of this finding.

10.2 The Respondent is required to provide the Commission with the framework through which meaningful and ongoing consultation with the community will be undertaken. To this end, the Respondent is directed to furnish the Commission with the minutes of every community meeting held at least every three (3) months in respect of development in the municipality relating to access to water and decent sanitation services.

10.3 The Respondent is required to provide the Commission with a detailed plan and report on the area they intended to relocate the residents to, this report must demonstrate the following:

- The Respondent's implementation and budgetary plans;
- Interim measures for the provision of sanitation to the residents;
- Interim measures for the provision of other basic municipal services including water;
- The manner in which it will identify and respond to the rights of vulnerable groups like women, children and people with disabilities.

10.4 The Respondent is required to submit an expert report on conditions of the soil and or rock that allegedly prevents the area from being developed, within six (6) months from date of this finding.

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 AT _____ ON THIS THE _____ DAY OF
_____ 2013.

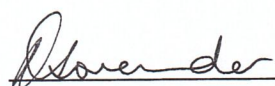
Deputy Chairperson
P. Govender
South African Human Rights Commission

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

SIGNED AT BRAAMFONTEIN ON THIS THE 10 DAY OF
JUNE 2013.



Deputy Chairperson
P. Govender
South African Human Rights Commission