



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

REPORT INTO INEQUALITY IN ELDORADO PARK AND SURROUNDING AREAS AND DISRUPTION AT KLIPSPRUIT WEST SECONDARY SCHOOL AND SURROUNDING SCHOOLS

GP/1718/0043

1. INTRODUCTION

1.1 The South African Human Rights Commission (“the Commission”), established under Section 181 of the Constitution of the Republic of South Africa of 1996 (“the Constitution”) is a Chapter 9 institution referred to as a “state institution supporting constitutional democracy”.

1.2 The constitutional mandate of the Commission is to:

- a) Promote respect for human rights;
 - b) Promote the protection, development and attainment of human rights; and
 - c) Monitor and assess the observance of human rights in the Republic.
- 1.3 The Commission is in terms of Section 184(2) of the Constitution empowered to investigate and report on the observance of human rights in South Africa. The mandate of the Commission is further clarified under the South African Human Rights Commission Act 40 of 2013 (“the Act”) and additionally in the Promotion of Equality and Prevention of Unfair Discrimination Act 1 of 2000 (“PEPUDA”).
- 1.4 The Act provides an enabling framework for the powers of the Commission. The Commission’s Complaints Handling Procedures¹ (“CHP”), articulate the procedures to be followed in conducting an investigation regarding an alleged violation of/or threat to a fundamental right.
- 1.5 Article 3(b) of the Commission’s CHP provides that the Commission may conduct or cause to be conducted any investigation of its own accord into any alleged violation of, or a threat to a fundamental right after assessing a complaint for that purpose.

¹ Published in Government Gazette, No. 34963 on 27 January 2012. As of January 2018, the Commission implemented a new Complaints Handling Procedure.

1.6 In early May 2017, the Commission became aware, through various media reports, of alleged racial tensions, school disruptions and service delivery protests in Eldorado Park and the surrounding areas.

1.7 The aforementioned issues formed part of two own accord investigations, the first (under reference number GP/1718/0043) dealing with the general protest action in the Eldorado Park Community, and the second (under reference number GP/1718/0171) dealing more specifically with the effects of these tensions and racial issues on schools.

1.8 The Commission, through its Gauteng Provincial Office, consolidated the two abovementioned own accord investigations and proceeded to investigate this matter under article 13(5)(d) of its CHP, which states that:

“(5) Unless otherwise determined by the Provincial manager, the format of an investigation may include...

(d) appearance of a person before the Provincial Manager or any member of staff, as duly designated, for purposes of obtaining or clarifying information (investigation hearing), or to produce any articles or documents as contemplated in section 9(1)(c) of the Act.:

1.9 In line with the above article, the Commission's Gauteng Provincial Office convened a public Inquiry into the disruptions in Eldorado Park in order to conduct its probe and allow members of the public and interested stakeholders

to appear before the Commission, make oral submissions and answer questions posed by the Commission's investigation Inquiry Panel ("the Panel"). The Inquiry was held over four days from 10 to 13 October 2017, first at the JD Opperman Hall in Eldorado Park on 10 and 11 October 2017, and thereafter at the Johannesburg New Council Chambers in Braamfontein on 12 and 13 October 2017.

2. FACTS LEADING TO THE INQUIRY

Reports of protests

- 2.1 On Monday, 8 May 2017, the Commission became aware of various media articles about violent protests in Eldorado Park. The articles noted that residents in the area had barricaded the roads leading out of Eldorado Park (N12 East and West, Golden Highway etc.) with burning tyres and stones.
- 2.2 It was reported that there was a strong South African Police Service ("SAPS" or "police") presence and police had been firing rubber bullets to break up protests. It was further reported that a helicopter had fired tear gas canisters from the air in the area of the protest action. The residents, in turn, reacted by stoning police. It was further reported that protesters damaged property (for example, a truck was set alight) and that shops in the area had been looted.

2.3 Further incidents were reported by the media as having occurred during the protest including:

- i) Allegations of heavy-handedness by the police against protesters;
- ii) Police allegations that protesters were looting shops;
- iii) Damage to property:
 - o The overturning and setting a truck alight by protesters;
 - o Looting of the Spar store in the area;
 - o Robbery of a Shoprite store in the area;
 - o Damage to a BP Garage in the area; and
- vi) Threats to burn down a ward councillor's house.

2.4 In addition it was reported that residents were unable to leave Eldorado Park to attend work and that schools were closed, with learners being sent home.

2.5 The key reasons for the protest as reported by the media were frustrations relating to the:

- i) Slow delivery of housing;
- ii) Allocation of Reconstruction and Development Programme (RDP) houses; and
- ii) The demand for land to build houses by community members.

2.6 After a careful assessment of the media reports, the Commission determined that the issues above fell within the jurisdiction of the Commission as they presented as *prima facie* violations of rights.

2.7 Representatives of the Commission visited Eldorado Park on Tuesday, 9 May 2017 to assess the situation on the ground. It was found that the situation was tense and violent, and that disruptive protests had spread to surrounding communities, including Ennerdale and Kliptown.

Racial tensions and school disruptions

2.8 As part of its continuous monitoring of tensions in the area, it came to the Commission's attention that the Klipspruit West Secondary School ("KWSS/the School") was affected by the public unrest in Eldorado Park.

2.9 In July 2017, the Commission attended at KWSS and confirmed that the School had been experiencing disruptions to learning. No classes were being held at the time and teachers appeared to be on a go-slow. The reasons for this situation at the School were alleged to be related to racial tensions and alleged malpractices by the School Governing Body ("SGB").

2.10 The Commission convened an urgent meeting during the above visit with teachers of KWSS and the Circuit Director, Mr Kelly. At this meeting, it emerged that the appointment of a black principal had allegedly led to negative reactions from parents, the SGB, and community members, and had culminated in some teachers refusing to teach students at the School.

2.11 After the above meeting an agreement was reached between the teachers, parents, SGB and community that it would be in the best interest of the learners for school to resume as soon as possible.

2.12 The MEC of the Gauteng Department of Basic Education (“GDE”), Panyaza Lesufi, met with the School and other stakeholders after the meeting convened by the Commission. At the meeting with the MEC, the SGB had requested that the Head of Department of the GDE dissolve the SGB. The GDE acceded to this request and the SGB was dissolved.

2.13 Stability was short-lived, and in late July and early August 2017, media reports began surfacing once again that, despite the MEC’s intervention and dissolution of the SGB, KWSS and other schools in the area were again likely to experience disruption.

Repeated disruptions at KWSS and other schools

2.14 In late July 2017, at least 28 schools² in the area threatened to embark on a “go-slow” in solidarity with the KWSS. On 1 August 2017, the MEC reported that the threats had not materialised and that schooling was proceeding as normal. Unfortunately, later during August 2017, school disruptions (mostly at the KWSS) were again noted.

² Some media articles reported as many as 40 schools threatened to embark on a go-slow - <https://www.news24.com/SouthAfrica/News/go-slow-threat-over-black-principal-fails-20170801>, although reports were unclear with regard to an exact number.

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Further escalation at KWSS

- 2.15 On 12 September 2017, the Commission became aware of news reports that the KWSS was again in crisis. According to these reports, the School was completely dysfunctional. Reports indicated that learners were not attending classes and that violence and substance abuse was also occurring at the School.
- 2.16 In response to the above, the Commission sent urgent correspondence to the GDE requesting confirmation of these reports and information about the steps the GDE was taking in light of the situation at the School.
- 2.17 On 23 September 2017, the GDE responded and alleged that the disruptions at the KWSS were caused by the fact that four black teachers had been barred from entering the School by community members.
- 2.18 The Commission sought to determine the cause of disruptions and how they could best be addressed. The Commission, therefore, determined that an Inquiry would be an appropriate means through which to identify the cause of disruptions and recommend possible solutions.

3. TERMS OF REFERENCE OF THE INQUIRY AND KEY QUESTIONS FOR CONSIDERATION

3.1 In order to clarify the issues brought to the Commission's attention during its initial investigation of this matter, the Commission formulated Terms of Reference (attached hereto as **Annexure A**) to guide the Inquiry and provide clarity of process to interested parties.

3.2 As set out in the Terms of Reference, the Inquiry sought to:

- a) Investigate incidents of racism or racial discrimination, if any, at KWSS and surrounding schools in Eldorado Park;
- b) Investigate, in particular, allegations of racial abuse by and against learners, teachers and parents;
- c) Examine how the alleged racial abuse manifested itself;
- d) Establish the underlying causes of the alleged racism and or racial discrimination;
- e) Assess the impact of the allegations on the learning and teaching environment and the observance of fundamental rights;
- f) Note what steps were taken at all levels to address these problems;
- g) Investigate allegations that the "coloured" community of Eldorado Park and surrounding areas feel marginalised, ostracised and alienated by the South African government;
- h) Examine allegations of inequality, lack of service delivery and infrastructure development in Eldorado Park and surrounding areas;

- i) Investigate allegations regarding the use of excessive force by the South African Police Service (“the SAPS”) during service delivery protests in Eldorado Park;
- j) Explore the correlation between poverty, unemployment and service delivery protests; and
- k) Make findings, recommendations and issue directives, as appropriate.

3.3 The above Terms of Reference were intended to guide the content of submissions to be made to the Panel, to assist the Commission in its determination of the matter, and to make recommendations in fulfilment of the Commission’s constitutional mandate with respect to this particular investigation.

3.4 At the commencement of its investigation, the Commission issued a call for written and oral submissions to the public. It should be noted that while the Commission held sittings from 10 to 13 October 2017 during which both oral and written submissions were received, further written submissions were received through to 31 October 2017. The Commission determined that it would need to limit the scope of the investigation. This decision was informed by a preliminary assessment which indicated that the matters for consideration were of a complex nature and that many of the matters brought to the attention of the Commission deserved a fuller consideration over a longer period of time. Where the Inquiry was unable to gather sufficient evidence on a particular matter, this will be noted in the Report and the Commission may refer this matter to the appropriate authorities for further investigation.

3.5 The **key questions** for the purposes of the investigation were:

- a) Whether there was racial discrimination in schools in the Eldorado Park area (particularly KWSS), in the classroom or in other aspects of school administration, and if so, what effect such discrimination was having on the right to a basic education?
- b) Whether the protests were related to disruptions and the closure of KWSS, and the cause for such protest. In this regard, the Panel sought to determine in particular whether factors which caused the protest were fuelled by unjustified racial discrimination and/or stereotyping?
- c) Whether the SAPS appropriately responded to the protests, particularly protests held at schools in the Eldorado Park area and surrounding areas?

3.6 The Commission was appreciative of the numerous submissions received during the Inquiry. However, for the purposes of efficacy, only submissions that were central to the considerations of the key questions listed in paragraph 3.4 above are recorded in this report.

3.7 Nevertheless, a full transcript of all oral submissions, questions and answers during the Inquiry is available to the public on request to the Commission. In

addition, all written submissions received by the Panel are also available on request to the Commission.³

3.8 A summary of submissions, both oral and written, from stakeholders and attendees that speak to the key questions follow below.

4. SUBMISSIONS REGARDING RACIAL TENSIONS

General

4.1 The Commission received submissions from the public and relevant stakeholders on racial tensions in the course of the Inquiry and in the form of written submissions thereafter.

4.2 The Panel noted a consistent narrative during the Inquiry that spoke to racial tensions between the “coloured” and black communities in Eldorado Park and the surrounding areas.

4.3 Numerous submissions contained allegations that the “coloured” community in Eldorado Park and the surrounding areas had been discriminated against and disadvantaged to the benefit of black members of the community. These submissions indicated that the alleged discriminatory treatment of the “coloured” community was practised at a national level as well. The scope of the Inquiry

³ The Commission shall not be responsible for the costs of reproduction of material requested.

however, did not permit a consideration of alleged systemic discrimination of “coloured” communities nationally, and considerations by the Commission were therefore directed at a community level in the Eldorado Park and surrounding areas.

4.4 The appointment by the GDE of Ms B Makatu, a black female, as the principal of KWSS became central to the consideration by the Commission in the course of the Inquiry.

4.5 No record of formal objection by the School structures to her appointment was provided to the Panel. However, it appeared from submissions by individual members of the community that many were disgruntled by the appointment. Inputs from individual community members regarding their dissatisfaction with the appointment of Ms Makatu, refer to the appointment of a black principal at “a coloured school” as the “last straw”. Differently put, certain members of the community expected a new school principal at KWSS to be a “coloured” person and not a black person.

The marginalisation of the “coloured” community

4.6 Submissions from the Greater Eldorado Park United Civic Association (“GEPUCA”) and the Patriots for Equality (“PFE”), both of whom are public interest organisations in the area, presented a particular narrative that spoke to

alleged marginalisation as well as racial and social oppression of the “coloured” community in the area and in the country as a whole.

4.7 GEPUCA submitted that “coloured” individuals in the community felt left behind in South Africa’s constitutional democracy. This sense of being left behind, as well as other socio-economic challenges, such as the lack of housing, poverty and unemployment within their community, constituted some of the underlying causes of the protests.

4.8 The PFE submitted that their community were not allowed to self-identify by either the pre-democratic or the current government. This had allegedly led to, among other issues, forced integration, perpetual oppression and racial categorisation, all of which has been to the distinct disadvantage of the “coloured” community.

4.9 The Greater Eldorado Business Forum (“GEBF”), which is an organisation representing business and community interests in the Greater Eldorado Park area, largely echoed the above sentiments.

4.10 In particular, the GEBF noted that the Department of Human Settlements had failed to provide subsidised housing in the Greater Eldorado Park area, despite repeated calls from the community for access to housing.

4.11 However, for the purposes of this Inquiry, the Commission limited its focus on the alleged violations arising from the protest action in Eldorado Park.

4.12 The Panel encouraged the provision of candid evidence, and emphasised this need with a view to understanding what appeared from reports to be widespread resistance to the appointment of a black principal at KWSS. The Panel was able to glean, generally, the following alleged reasons (noting that some of the reasons are not congruent with one another) from attendees:

- a) The appointment (“imposition”) of a black principal in a “coloured” school was yet another form of racially oppressive treatment imposed on the “coloured” community. The reasons for the appointment varied, but the general theme seemed to be that black individuals were being forcefully integrated into the “coloured” community, and that “coloured” members of the community were not being afforded equal job opportunities;
- b) Proper procedure had not been followed in appointing Ms Makatu, which included the fact that she had scored the third highest in the GDE’s interview process, and had been appointed over the two candidates who had scored higher than she had;
- c) That the MEC revealed in July 2017, while answering questions from the Democratic Alliance in the Gauteng Provincial Legislature, that Ms Makatu had not scored the highest of all the candidates. This information was publicised in *The Star* newspaper on 5 September 2017. The Commission noted, however,

that this article was only made public more than a month after the initial July 2018 protests erupted against the appointment of Ms Makatu; and

- d) The South African Democratic Teachers Union (SADTU) had wrongfully influenced Ms Makatu's appointment. (The Commission notes that none of the attendees were able to confirm through direct evidence that Ms Makatu was, in fact, a SADTU member, or that SADTU was in any way involved in her appointment).

Allegations of racial discrimination directed at black individuals (including Ms Makatu)

4.13 While it may not be possible to determine the precise reason behind each individual protestor's objections to Ms Makatu's appointment, the Commission was able to determine that, to a significant extent, the fact that she was a black individual was a common unifying factor shared by the protestors. Her appointment appeared to be inextricably linked to the perceptions of marginalisation by the community.

4.14 The Commission notes the above in light of its observations of the media and through testimony received during the Inquiry, that in many of the protests that flared up in the area as a result of Ms Makatu's appointment, placards were

displayed by protestors stating “*this is a coloured school*”, “*we want a coloured principal*” and similar sentiments.

4.15 The above sentiments expressed during the protests create a strong impression that the opposition to Ms Makatu’s appointment was racially motivated. The Commission, therefore, undertook to receive further submissions from the public to clarify the reason behind the protests in respect of this issue.

4.16 The Commission also received submissions from black teachers at KWSS who alleged that they, too, had been victims of racism at the hands of other School staff as well as coloured members of the community. The written submissions from 13 black teachers from KWSS contained numerous allegations of race based discrimination including averments that:

- a) KWSS institutionalised racism, which was directed against black teachers;
- b) Black teachers are prevented from utilising school resources such as telephones and email;
- c) Black teachers are disproportionately overworked compared to coloured teachers, with one specific teacher being given 14 classes to teach by the Deputy Principal during 2016;

- d) Black teachers are not given formal invitations to attend the “Matric Ball” at the end of the year, whereas coloured teachers are;
- e) Black teachers have on numerous occasions been referred to by coloured members of staff using derogatory racial epithets, including “*baboon*” and the “*k-word*” and, despite complaints being laid against the perpetrators, nothing was done in response to these offences by KWSS or the GDE;
- f) The racist conduct experienced by these teachers reached a boiling point after the appointment of Ms Makatu as Principal, and on 12 September 2017, four of the black teachers were locked out of the School by coloured parents and members of the community, which led to the School becoming inoperative; and
- g) The resistance to the appointment of a black principal, mainly through the representative actions of the PFE, was motivated by race based anti-black sentiments.

4.17 The groups claiming to represent members of the “coloured” community in the area, including the PFE, GEPUCA and the GEBF, presented responses to allegations that the actions of the “coloured” community were motivated by race based hatred. A common theme in these responses was that the “coloured” community in the area was not being racist, but was instead responding to what they perceived to be yet another racist attack on them as “coloured” individuals.

4.18 The PFE, which claimed, throughout their testimony, to be an integral role player in the protests and resistance against the appointment of KWSS's black principal, repeated the point that the "coloured" community, particularly within Eldorado Park and the surrounding areas, felt they were being marginalised. One of the ways in which this group perceived such marginalisation was through the imposition of employment equity practices that resulted in a disproportionate number of black government employees (such as school principals) being appointed in the area. The PFE argued that this amounted to forced integration.

4.19 In addition, the PFE alleged that the SADTU had wrongfully influenced the appointment of Ms Makatu. However, when questioned further in this regard by the Panel, the PFE was unable to provide a reason, other than hearsay from other teachers in KWSS. Ms Makatu was not able to testify before the Panel, stating that she feared for her life and safety if she appeared before the Panel. This was a regrettable set-back for the Panel as her evidence would have been of great assistance in providing material insights.

4.20 A representative of the PFE, stated frankly in oral testimony that the community, which the PFE claimed to represent, would be lying to the Commission if they had said that race was not an issue or a factor influencing the resistance to Ms Makatu's appointment.

The GDE's response

4.21 The MEC, in his oral testimony, denied that the appointment of Ms Makatu was in any way racially motivated, aimed at marginalising, or at disadvantaging the "coloured" community in the area.

4.22 The MEC repeatedly affirmed the GDE's commitment to non-racialism and equality in schools within Gauteng; in the way that schools educate learners; the manner in which schools are administered; as well as the in the appointment of educators and principals.

4.23 The MEC stated that both he and his Department were surprised at the resistance encountered after Ms Makatu's appointment. The MEC stated that the SGB of KWSS had recommended Ms Makatu as a possible appointee to the position of principal. However, after pressure was exerted on the SGB by the community, the SGB reneged on its recommendation and requested that the MEC dissolve it. The MEC acceded to this request and, through the HOD, dissolved the SGB at the time.

4.24 The MEC confirmed that, generally, the appointment of a principal at a school follows a strict legal process. Once funding is obtained for a post at a school from the Education Labour Chamber, in consultation with the relevant teachers' unions, the GDE advertises the posts to the public through the Government

Gazette. Thereafter, applications received for a post at a school are sent to the SGB of the particular school for consideration.

4.25 The SGB provides its recommendations and preferred candidates to the GDE after having considered applications and interviewed candidates. Thereafter, the GDE chooses from the recommendations submitted by the SGB and appoints the preferred candidate to the position. The process is set out in the GDE's Guidelines for Open Vacancy Circulars (the Guidelines), contained in the GDE's written submissions referred to below.

4.26 The GDE submitted, through its MEC and HOD, that Ms Makatu's appointment was in no way irregular and that it could provide documentary evidence to this effect.

4.27 The GDE further submitted that the test scores, which had been questioned by those who opposed Ms Makatu's appointment, were only one of many factors that played a role in determining which candidate to appoint as a principal. These scores are one of the ways that the SGB and the GDE may possibly narrow down the list of preferred candidates. It is not uncommon that at end of the process, the person scoring the highest score is not appointed.

The GDE's submission regarding Ms Makatu's appointment in particular

4.28 Further written submissions from the GDE spoke to the specific background of Ms Makatu's appointment, and documented the processes involved therein.

4.29 In its written submission, the GDE states that, from its point of view, the main issue *"relates to the allegation of irregular appointment of the School principal [of KWSS], who happens to be black, but the School is located in a predominantly Coloured community."*

4.30 Following from the above, the GDE states that it received complaints from, among others, the GEBF, alleging that the selection process was a facade and that the Department was marginalising coloured individuals by using these flawed processes in their communities. Furthermore, the GDE states that it received complaints that the selection Panel, which confirmed Ms Makatu's appointment, was not properly constituted during the shortlisting and interview phases of the appointment.

4.31 The GDE denied the allegations in the abovementioned complaints and maintained that its appointment of Ms Makatu was in line with the Guidelines and that allegations to the contrary were racially couched and not supported by any evidence.

4.32 The GDE's written submission, in summary, presented the procedure followed in Ms Makatu's appointment as follows:

- a) The vacant principal post was advertised in accordance with applicable law;
- b) A total of 29 applications were received;
- c) Panel members were nominated and appointed and, after signing confidentiality agreements on 7 March 2017, received training on 10 March 2017 in terms of the recruitment and selection process;
- d) Both National Professional Teachers' Association South Africa ("NAPTOSA") and SADTU had representatives as observers on the Panel
- e) A management plan for the appointment of the principal was developed and presented to the SGB on 14 March 2017;
- f) One coloured candidate and six black candidates were shortlisted by the SGB for interviews for the principal's post. The Chairperson of the Panel stressed the issue of compliance with the Employment Equity Act, 55 of 1998. The School's employment equity grid indicated that, as of March 2017, there were six coloured educators and five black educators at KWSS;
- g) Interviews were held on 24 March 2017 and the Panel recommended that Ms Makatu be appointed as the principal of KWSS;
- h) Ms Makatu scored third highest in the shortlisting process (with 198 points), but scored second overall when the scores for the shortlist and interviews are added together. Ms Makatu achieved a total score of 503.
- i) The Panel that recommended Ms Makatu's appointment was comprised of, among others:
 - five parents;

- an educator representative;
 - a SADTU observer;
 - a NAPTOSA observer; and
 - a Chairperson.
- j) The GDE notes that issue was taken by Complainants with the fact that the former SGB Chairperson, Pastor Aubrey van Lodewyk, did not have children at the School. The former SGB Chairperson would on this basis not be eligible to hold office within the SGB. This fact, according to complaints, therefore tainted Ms Makatu's appointment, even though the SGB Chairperson was not on the Selection Panel. The GDE denies that there was any irregularity in this regard as Pastor Van Lodewyk was in fact the legal guardian of two children who attended KWSS;
- k) The letters of complaint against the appointment of Ms Makatu, in the GDE's opinion, did not provide any evidence to show that the process described above was procedurally or substantively flawed;
- l) The GEBF alleged that it was acting on behalf of the SGB of KWSS, which the GDE disputed, given that the SGB had agreed to the appointment of Ms Makatu during the ratification meeting held on 28 March 2017.
- m) Records indicate that the Panel had in fact been properly constituted in that the parent component had the majority representation;
- n) The HOD was satisfied that the prescribed processes had been followed and therefore approved the recommendation of the SGB;

- o) The GDE was of the view therefore that the appointment of Ms Makatu as the principal of KWSS was procedurally and substantively fair.

Input from NAPTOSA

4.33 The Commission received submissions from NAPTOSA, which indicated that it echoed the sentiments of the MEC that racism cannot be entertained in the education system.

4.34 NAPTOSA's interest in the matter arises from its focus on ensuring that the best interests of learners are guaranteed and that teaching and learning are prioritised at all times.

4.35 NAPTOSA raised concerns that KWSS, as an institution of learning, had been allowed by the GDE to "fall apart" to the point where protests and disruptions began. The GDE's policy of Integrated Quality Management ("IQM") requires the GDE to constantly ensure and improve the quality of teaching and learning. KWSS's underperformance as a school was, in NAPTOSA's view, not noticed by the GDE until it was too late, and the GDE's response, however strong, was disappointingly reactive instead of proactive.

4.36 NAPTOSA also raised concerns regarding employment equity practices within the GDE. Specifically, an issue was raised with the fact that the GDE incorrectly implemented the concept of "the workplace", when applying the Employment of

Educators Act, 76 of 1998. In NAPTOSA's view, the school is not the workplace – the province is the workplace. This means that employment equity, from the GDE's point of view, must be implemented taking into account the demographic reality across the entire province, and not necessarily in a particular school. This incorrect application and misinterpretation of the policy, in NAPTOSA's view, has caused confusion in the affected communities and unnecessarily heightened tensions.

4.37 Importantly, NAPTOSA confirmed that they did send a representative to observe the appointment process of the Principal. As a result of these observations, NAPTOSA lodged no grievances and did not note any irregularities during the appointment process.

Input from SADTU

4.38 SADTU, which was also involved in and observant of the appointment process of KWSS's new principal in early 2017, raised objections against the PFE, accusing the organisation of having its own interests and being prepared to use schools as a tool to propagate their message to attract the interest of higher government structures.

4.39 SADTU pointed out that it and other labour unions (such as NAPTOSA) are only involved in the shortlisting and interview phase of the appointment of a principal. Thereafter, the SGB proceeds to make recommendations to the HOD, and the

HOD reverts with a final candidate from those recommendations – labour unions are not involved in these last two legs of the process, nor are they involved in the process of forming the Selection Panel. SADTU therefore denied exerting any undue influence in the recommendation and final appointment of Ms Makatu or any other principal.

4.40 SADTU, when questioned by the Panel, could not confirm whether Ms Makatu is or was at any relevant time a member of their trade union. SADTU submitted that they are not made aware of the trade union affiliations of applicants for positions in schools and therefore they could not be biased in favour of Ms Makatu.

4.41 The Panel asked SADTU to provide the Commission with written submissions after the Inquiry, and in particular to confirm, if possible, whether Ms Makatu was in fact a SADTU member. SADTU did not respond to this request.

4.42 SADTU accused PFE of repeatedly using threatening and intimidation tactics in schools to oppose black educators, using examples such as objections to the appointment of a black principal at the Roodepoort Primary, where the School was allegedly also shut down by the PFE and other protestors. This approach was alleged to have been repeated at Noordgesig Primary and thereafter at KWSS.

4.43 SADTU maintained, in the same vein as NAPTOSA that in its view, the appointment process “ran smoothly to its conclusion”. SADTU submitted that

issues arose only when the PFE objected to a black principal. SADTU expressed the view that the objection was raised solely on account of racial discrimination against black individuals.

4.44 SADTU further alleged that many of its black members in the Klipspruit area, and specifically in KWSS, were repeatedly mistreated and racially discriminated against by “coloured” educators, SGB members, and community members. SADTU stated that the PFE, in threatening SGB’s and schools whenever they appointed black principals (such as with Roodepoort Primary School and KWSS), was continuing this racist trend.

4.45 Racial discrimination, SADTU submitted, also affects learners in the area, with black learners being refused entry into school when they were running late, while permitting entry to coloured learners who arrived at the same time.

4.46 SADTU raised concerns that when a coloured principal is appointed in Gauteng, no one contests the appointment, which is not the case when a black principal is appointed.

5. ANALYSIS AND RELEVANT LAW RELATING TO THE RIGHT TO PROTEST

5.1 Apart from the evidence provided to the Panel, it is important to consider the legal framework governing basic rights implicated in the events forming the basis of the Inquiry. The relevant rights and legal framework are provided below.

The right to protest

5.2 Section 17 of the Constitution states that:

“Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”

5.3 The above right to assemble, demonstrate, picket and present petitions is, for the purposes of this investigation, referred to simply as the right to protest.

5.4 The Commission, following its 2016 National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa (“the National Hearing”) released a Report (“the National Report”)⁴. The Commission therein recognised the significance of the right to protest and held that:

“In its most common expression, protest plays a crucial role in ensuring the realisation of economic, social, cultural, civil and political rights. Another vital function of the right to a protest is the contribution it makes to ensure the emergence of an informed citizenry as it invariably affords exchange of ideas and provides an opportunity for unification around issues of common interest for a group. The right to protest therefore is instrumental to societal development as a

⁴ SAHRC - accessible at <https://www.sahrc.org.za/index.php/sahrc-publications/hearing-reports> .

whole and there are obligations on the state to protect, respect and fulfil the right to protest.”⁵

5.5 The Constitutional Court has unpacked the right to protest as follows:

“The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.”⁶

5.6 However, the Constitutional Court hastened to warn against using the right to protest in a manner that would infringe the rights of others, and held that:

“The fact that every right must be exercised with due regard to the rights of others cannot be overemphasised. The organisation always has a choice between exercising the right to assemble and cancelling the gathering in the light of the

⁵ Ibid Part I para 5.3.1.

⁶ *SATAWU and Another v Garvis and Others* 2012 (ZACC) 13 at para 61.

*reasonably foreseeable damage. By contrast, the victims of riot damage do not have any choice in relation to what happens to them or their belongings. For this reason, the decision to exercise the right to assemble is one that only the organization may take. **This must always be done with the consciousness of any foreseeable harm that may befall others as a consequence of the gathering. The organisers must therefore always reflect on and reconcile themselves with the risk of a violation of the rights of innocent bystanders which could result from forging ahead with the gathering.***" [own emphasis]

The use of excessive force

- 5.7 The Commission was made aware, during interactions with community members and KWSS employees in its preliminary investigations, of the alleged use of excessive force by the SAPS during the protests.
- 5.8 The Commission attempted to obtain information from the community and the organisations representing them about the alleged use of excessive force by the SAPS, in particular details of any injured protesters. However, no such information was forthcoming.
- 5.9 As a result of the above, the Commission is unable to make a finding with respect to the alleged use of excessive force by the SAPS during the protests. The Commission is of the view that in order to make a finding against the SAPS about

the use of excessive force, at least one direct account of such an incident would be required.

6. ANALYSIS AND RELEVANT LAW RELATING TO THE EFFECTS OF PROTEST ACTION ON SCHOOLS AND THE RIGHT TO A BASIC EDUCATION

6.1 In investigating the effects of protest action on schools in the affected areas and on the right to a basic education of the learners at those schools, the Constitution and the South African Schools Act⁷ (SASA) provide the foundation for the Commission's analysis.

The Constitution

6.2 Section 28 – Children

...

(2) A child's best interests are of paramount importance in every matter concerning the child.

6.3 Section 29 – Education

(1) Everyone has the right—

(a) to a basic education, including adult basic education;

⁷ Act 84 of 1996.

South African Schools Act (SASA)

6.4 The preamble to the SASA states that:

*"WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on **racial inequality and segregation; and***

*WHEREAS this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, **combat racism** and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic wellbeing of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State..." [emphasis added].⁸*

6.5 Section 3(6)(b) of the SASA states that:

"any other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending a school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months."

⁸ The Commission has also borne in mind related and relevant provisions: section 22 – withdrawal of functions from the governing bodies; and section 23 – membership of the governing body. While these sections bear relevance, the matters directly relating to the application of these provisions fall outside the scope of the hearing.

The SAHRC Findings regarding Protest Action and the Right to a Basic Education

6.6 In the National Report, the Commission found that:

“The right to a basic education is recognised as a constitutionally guaranteed right. Through education, individuals’ appreciation and ability to realise their human rights increases. Basic education is the core foundation through which a developing society such as South Africa can take on the challenge of improving the lives of its people and ensuring future growth and sustainability.”⁹

6.7 In recognising the interplay between the right to a basic education and the rights of the child, the Commission found that:

“Within the South African context, children are the main beneficiaries of the right to a basic education and, as such, society as a whole must act in a manner that takes into consideration the best interests of the child.”¹⁰

6.8 Given that the best interests of the child are of paramount importance in every matter concerning the child, this paramountcy extends an extra layer of protection to the right to a basic education. Therefore, a violation of the right to a basic education is not only a violation only of the right itself, but is also severely

⁹ Part I para 5.2.3.

¹⁰ Part I Para 5.4.11.

at odds with the best interests of the children affected by a violation of the right to a basic education. The Commission has adopted the interpretation advocated by Van der Vyver accordingly and notes that:

“The right to basic education is furthermore a fundamental right that must prevail over other conflicting constitutional rights and freedoms”¹¹

6.9 Therefore, only in the most exceptional circumstances, and employing as many mitigating measures as possible, can the wilful disruption of schooling through any means (and the violation of the right to a basic education that ensues) be deemed justifiable. The Commission reiterates this vital principle, as set out in its National Report in 2016.

School disruptions caused by the protests

6.10 Any analysis of the right to education must be viewed within the context of its significance. As expressed by the Committee on Economic, Social and Cultural Rights *“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”¹²* Education is therefore closely linked to the eradication of

¹¹ JD Van der Vyver “Constitutional protection of the right to education” (2012) 27(2) SAPL 30.

¹² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education* (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, at para 1.

poverty, the attainment of substantive inequality, and the optimum development of individuals.

6.11 Throughout its investigation, the Commission either witnessed or was informed by various stakeholders, including the GDE, that the protests being investigated directly led to schools in the area being closed (in the case of KWSS, the gates to the school were locked by protestors), indirectly led to go-slows by teachers or otherwise caused disruptions to school operations, all of which brought a halt to schooling for thousands of learners for a number of days throughout the period.

6.12 The abovementioned disruptions occurred in May 2017, but reoccurrences were noted well into the last quarter of the academic year as well. This placed learners at additional risk in that they were missing classes while end-of-year examinations loomed.

6.13 The effect of the protest was in all reasonable likelihood even more devastating for Grade 12 students, bound to write their final examinations. According to a media report¹³, KWSS, in particular, held a 60% matric pass rate in 2016. However, the matric pass rate for 2017 (following shortly after the protests and school disruptions) dropped to 46%. The same media report quoted teachers and community members expressing their view that the “disastrous” results were caused by the protests, with one teacher from KWSS being quoted as saying:

¹³ Accessible at <https://www.iol.co.za/the-star/news/matricresults2017-klipspruitwest-results-no-surprise-12619163>.

“All the problems at the school, which led to violent protest clearly had an effect on the Grade 12 learners. I don’t blame them from performing poorly, it was bound to happen because the environment was not conducive. Even the camp was not going to help because they were already behind with their school work.”

7. ANALYSIS AND RELEVANT LAW RELATING TO RACIAL TENSIONS IN ELDORADO PARK AND SURROUNDING SCHOOLS, IN PARTICULAR, KWSS

7.1 Insofar as the Commission is enjoined to investigate the allegations of racial tensions in Eldorado Park, the Constitution and PEPUA are of paramount importance.

The Constitution of South Africa

7.2 The State is under a duty to act positively to protect, promote and fulfil the rights contained in Chapter 2 of the Constitution. These rights include:

7.2.1 Section 10 – Human Dignity

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

7.2.2 Section 9 – Equality

- (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. . .*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). . .*

Promotion of Equality and Prevention of Unfair Discrimination Act (“PEPUDA”)

7.3 Section 7 of PEPUDA states:

“Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including--

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;

(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;

(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;

(d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.”

Racial Tension and Discrimination at the KWSS

7.4 In as much as there is testimony that the protests at the School in July, August and September 2017 were not racially motivated against the appointment of a black school principal, the Commission also received testimony and evidence that strongly suggested otherwise.

7.5 For example, the panel received testimony suggesting that the protests were justified by (and as a result of) a newspaper article in the Star that raised allegations that the MEC had admitted that Ms Makatu’s test results were lower than the other top three candidates (discussed at paragraph 4.13 (g) herein). However, this article was only released on 5 September 2018, at which point KWSS had *already* been disrupted by protestors demanding a “coloured” Principal.

7.6 On closer inspection of evidence provided by parents, educators and members of the community, it is reasonable to conclude that the basis for objecting to the appointment of the school principal at this KWSS had little to do with the alleged procedural defects associated with her appointment. The evidence of the GDE and records submitted to the Panel have been persuasive in this regard and nothing objective or persuasive to the contrary was put before the Commission to demonstrate that the appointment of Ms Makatu was unfair, irregular, and/or inconsistent with the prescripts of the legal framework.

7.7 Accordingly, the explanation that the reason for the protest against the appointment of Ms Makatu was based on procedural defects in the appointment process is meritless. This conclusion is buttressed by the fact that, even in the midst of the protest, the protestors were not advocating for the appointment of the highest scoring candidate in the interview, who also happened to be a black individual.

7.8 The above finding is also supported by some of the testimonies to the Panel from the community members and educators who are public officials. To reflect a few:

a. Testimony by a community member:

“So yes when you listen to the utterances of parents in Klipspruit West they talk about, okay the general saying is that we don't want a black principal.¹⁴”

¹⁴ Transcript Eldorado Park Hearing – Day 1, page 67 – line 4.

...

*They are taking people from outside, black people from outside of our community, from outside of Eldorado Park and placing them in the jobs in Eldorado Park. **This is one of the reasons for the strike.** Another reason for the strike is, a couple of years ago when projects were done in Eldorado Park it was only black people that were working on those projects, labourers, SMMEs and contractors were only blacks and we walked around in the community and we said no this thing needs to stop, it is only black people that are working here. And this is a predominantly coloured community.¹⁵ [Emphasis added]*

- b. An exchange between one of the former SGB members and a Panel member:

"PANEL MEMBER: So the assumption was that if four black teachers were allegedly causing problems in your perspective, another black educator whom you hadn't met yet, would cause the same problems if they came as well?

FORMER SGB MEMBER: worse

PANEL MEMBER: worse?

FORMER SGB MEMBER: Because I mean she is the head of the school.¹⁶

15 Transcript Eldorado Park Hearing – Day 2, page 121 – line 20 – 25.

16 Transcript Eldorado Park Hearing – Day 2, page 30 - lines 16 – 26.

7.9 There are also allegations that black teachers are terrorising students at KWSS, which was attested to by an educator during the Inquiry.¹⁷ However, no evidence was presented to the Panel of any reported cases at the police station or any other forum to support the allegation of black teachers terrorising students at KWSS.

7.10 Based on a consideration of the evidence, it is inconceivable that the tensions and disruption at KWSS could be attributed to any other factors but racism. The racial tension at KWSS appears to be fuelled from a number of sources including parents, teachers and is also present to varying degrees in the community at large.

7.11 There is overwhelming evidence that the black school principal in particular was simply rejected by the community and the School on account of her race. This is a violation of her constitutional rights, including the right not to be unfairly discriminated against on the basis of race. As such, the treatment meted out to the principal and widely publically reported sentiment is an outright violation of her dignity.

Racial tension at other schools in Eldorado Park.

7.12 As one of the educators from Eldorado Main School testified:

"I am currently an educator there. My submission is that of racism. I believe

¹⁷ Ibid page 29 – line 1 and page 30, lines 1 – 15.

*that our school is administering racism towards black teachers.*¹⁸

7.13 A community member further testified at the Inquiry that:

*“...I am asking the Human Rights Commission to specifically investigate the employment processes and procedures especially in Eldorado Park, Klipspruit and all the other coloured areas. Why I need you to investigate those employment processes and procedures is because those processes and procedures are racist. Reason – they are only employing black people. **The reason why I am saying this is racist, everywhere you go, I am talking specifically about the coloured areas especially Eldorado Park, everywhere you go you speak to a black person. If you want to hire this hall you go to a black person, if you want to hire the Don Matemen [sic] Hall you go to a black person. If you want to go and pay your rent or your water at the rent office, you speak to a black person. Everywhere you go it is just black people. Coloureds are not employed. This is why I am saying that these employment processes and procedures are racist.**”*¹⁹ **[Emphasis added].**

7.14 While there was no full probe into racial tension at other schools in and around Eldorado Park, extracts from submissions to the Panel as recorded above indicate, *prima facie* evidence that the racial tension is not confined to KWSS. Having accepted that some of the racial tension stems from the community at

¹⁸ Ibid page 4 line 10 – 15.

¹⁹ Transcript of the Hearing Day 2, page 120 line 5 - 15

large, it is also probable therefore that other schools in and around Eldorado Park are experiencing racial tensions.

7.15 The Panel further accepted that *prima facie* evidence of racial tensions between “coloured” and black communities within the Eldorado Park area exists. This issue is one of serious national concern, as it is widespread. A separate investigation and other interventions to respond more fully to this issue are urgently required.

7.16 The “coloured” community has experienced both historical and structural racism and disadvantage in the course of our shameful history. Weak social cohesion programs, continued socio-economic hardships, and poor awareness of the realities in post-apartheid South Africa have deepened instead of lessening feelings of continued marginalisation, neglect and continued racial discrimination for many such communities. Nevertheless, the vision of social cohesion, equality and dignity must fortify efforts to eradicate violations of basic rights and our past cannot provide any justification for further violations in a new constitutional dispensation.

7.17 The current context of South Africa is a significant factor that needs consideration. As with other previously disadvantaged groups, the “coloured” community continues to suffer from the legacy of historical inequality and poverty which plagued our country, and which the Commission accepts as a reality. This reality has contributed to the heightening of the community’s frustration with

continued inequality and poverty, deepening the communities' perceptions of exclusionary bias by the State for services and 'forced integration'. The crux of this matter appears to be rooted in broader socio-economic issues, social equity and inclusion. The Constitutional Court has stated, in this regard that:

"We must remind ourselves that restitution measures, important as they are, cannot do all the work to advance social equity. A socially inclusive society idealised by the Constitution is a function of a good democratic state, for the one part, and the individual and collective agency of its citizenry, for the other. Our state must direct reasonable public resources to achieve substantive equality "for full and equal enjoyment of all rights and freedoms." It must take reasonable, prompt and effective measures to realise the socio-economic needs of all, especially the vulnerable. In the words of our Preamble the state must help "improve the quality of life of all citizens and free the potential of each person."²⁰ That ideal would be within a grasp only through governance that is effective, transparent, accountable and responsive. Our public representatives will also do well to place a premium on an honest, efficient and economic use of public resources."²¹

7.18 The Commission notes that during oral submissions to the Panel, responses closely mirrored the principles along which the machinery of apartheid operated, for example, separate communities and no integration. It is an unfortunate

²⁰ The Preamble to the Constitution.

²¹ South African Police Service v Solidarity obo Barnard (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC) at para 33.

A.H.G

consequence of South Africa's racially segregated past that the "coloured" community in Eldorado Park's preference for non-integration could result in a denial of the opportunity to their children to participate in a fully integrated educational environment, with richer, more diverse teaching and outcomes. This was sadly illustrated in the oral submissions of an educator at a primary school who objected to the learners attending Zulu classes. The community's persistence in objecting to a black principal reinforces the apartheid concepts of separation on the basis of race and denies us the opportunity to be enriched on the basis of our differences, perpetuating this message through critical places of learning and integration, like schools.

8. FINDINGS, DIRECTIVES AND RECOMMENDATIONS

Racial tensions and discrimination at KWSS and schools in the surrounding area

- 8.1 There is sufficient evidence before the Commission to find that there is racial tension in the Eldorado Park community and at KWSS, which is a microcosm of the community in which it is located.

- 8.2 It is the Commission's finding that the rejection of a black school principal, Ms B. Makatu, was racially motivated and therefore, unconstitutional and inconsistent with section 7 of PEPUDA.

- 8.3 It is **directed** that the GDE conduct a survey at KWSS and schools in the Greater Eldorado Park area to identify and assess policy and procedures which deviate from the Constitution and law, particularly in respect of racism. The GDE must provide the Commission with its survey findings and a plan of action to address any negative findings within **two months** of the commencement of the 2019 school year.
- 8.4 The Commission **directs** that the GDE includes in its action plan, race sensitivity and diversity programs for educators, school management teams and members of the SGBs of KWSS and other schools in Eldorado Park area.
- 8.5 The Commission **recommends** that community based structures such as the PFE, GEPUCA and GEBF be provided the tools to advance social cohesion programmes and interventions in the community through local government, in collaboration with the Office of the Premier, Gauteng, within three months of the release of this report. The reference to the PFE, GEPUCA and GEBF should not be read to exclude other community based organisations and formations, as the reference to these organisations is made specifically on account of their interaction with the Panel. Their support to advocate for sensitisation and training and to widen this call shall therefore be invaluable to deepening social cohesion and contributing to the securing of reforms which resonate with the broader transformation agenda in the community.

Violation of the right to a basic education

8.6 The Commission has over a long period of time been involved in addressing the impact of protest-related action on the right to a basic education and released the National Report in 2016, as referred to previously herein. The National Report findings and recommendations of the Commission have been tabled before Parliament and the report is before the National Department of Basic Education. Key findings and directives from the National Report are reiterated here as they resonate with and have relevance to this Inquiry.

8.7 As noted during the Inquiry, schooling in the Eldorado Park area was repeatedly and for prolonged periods of time severely disrupted by the protests. The Commission also notes that the disruption to learning was attributable not only to the broader protests in the surrounding community, but also to the go-slow by the teachers at a number of schools. This invariably resulted in a loss of crucial learning time.

8.8 The Commission has already noted in paragraph 6.9 above that *“only in the most exceptional circumstances, and employing as many mitigating measures as possible, can the wilful disruption of schooling through any means (and the violation of the right to a basic education that ensues) be deemed justifiable”*.

8.9 In addition to the above, and no matter the reason for objecting to the appointment of the KWSS Principal, the protests could have found expression in a manner that did not disrupt the rights of learners to a basic education. A

collective interest in ensuring that the right to education was not affected would have seen other options adopted by protestors including choices around the area of protest, time of protest or method of protest *without* forcing schools to close or having teachers embark on a go-slow for prolonged periods of time.

8.10 The protests could have taken place in a manner less restrictive and imposing on the learners of the affected schools. While the right to protest is fundamental and one which is cherished in our democracy, its exercise must be balanced with other rights, and protestors therefore have a duty to ensure that the right is exercised with due regard to other rights, particularly, the right to a basic education.

8.11 Furthermore, the Commission held, in the National Report,²² that:

“[t]he manner in which the right to protest is exercised needs to take into consideration other rights such as the right to a basic education and the principle of the “best interests of the child”. Ensuring that children do attend school should be a priority for communities, public officials and civil society, acting in concert in the interests of the children’s right to education.”

The Commission, in this Inquiry, finds that no such priority was given by protestors to the interests of the children’s right to a basic education. The neglect

²² Part IV para 1.8.

to do so consequently results in a violation of the constitutional principle that the best interests of the child are paramount in all matters concerning the child.

8.12 As a result, the closure of the schools and disruption caused to the education of learners in the Eldorado Park area constituted an unjustified violation of the right to a basic education of all affected learners.

8.13 In order to avoid future violations of the right to a basic education, the Commission **directs** that the GDE develops and implements more effective early warning systems to assist in preventing community protest-related school disruptions, and to report any such disruptions to the SAPS, regardless of where they arise in Gauteng, in order to ensure appropriate enforcement of section 3(6)(b) of the SASA.

The conduct of the protest on 8 May 2017 and the role of the SAPS

8.14 The reasons for the protest are multifaceted, including on account of poor service delivery, lack of delivery of RDP houses in Eldorado Park and the surrounding area and feelings of marginalisation.

8.15 As noted above, the Commission did not receive a response from members of the public to its call for submissions relating to the excessive use of force by the SAPS. In the circumstances regard has not been had to the SAPS National

Instruction 4 of 2014 in respect of police conduct and crowd management during public gatherings and demonstrations.

8.16 In light of the above, the findings in this report should not in any way be construed as indemnifying the SAPS from liability where evidence to this effect could warrant such a finding before an appropriate body or forum.

Racial tension and discrimination in Eldorado Park and beyond

8.17 The Commission is alive to the history and current racial tension in the country within coloured communities, including the recent incidents at Reiger Park, Ennerdale and Kliptown.

8.18 The Commission remains acutely aware of the racial segregation instilled by the apartheid government and its living legacy. The Commission also takes note of the sensitive issues affecting “coloured” communities and their role in the new constitutional dispensation where, regrettably, such communities consider themselves racially marginalised. The sense from the Inquiry is that many in the “coloured” community are of the view that rigid implementation of restitution measures²³ perpetuates their disadvantage, in the light of the fact that they were (under apartheid) and remain (under democracy) a racial minority experiencing poverty and inequality.

²³ For example, job and business opportunities and, broadly, access to socio-economic rights.

A.H.G

8.19 The Commission is mindful of the fact that it has not been possible to probe such matters comprehensively, nor would it have the jurisdiction to hold civil and criminal trials in respect of the persons / organisations whose conduct would have had to have been scrutinised in such an investigation. However, given the nature of the information presented to the Commission and its observation in the course of this probe, the following findings and recommendations are made:

8.20 There is *prima facie* evidence of serious racial tension in the Greater Eldorado Park between “coloured” and black communities. There is a perception that the government unfairly prioritises black communities when it comes to service delivery and job opportunities at the expense of “coloured” communities.

8.21 The Commission accepts a submission by GEPUCA that coloured individuals in this community have real feelings of being left behind in South Africa’s constitutional democracy. This sense of being left behind, as well as issues of lack of housing, poverty and unemployment within the coloured community, formed one of the underlying causes of the protests.

8.22 It is **recommended** that a more focused provincial dialogue regarding the racial tension between racial groups be convened under the auspices of the provincial and local government, together with Chapter 9 bodies working with human rights and other stakeholders to begin the journey of addressing the tensions and facilitating both healing and social cohesion.

Remaining issues

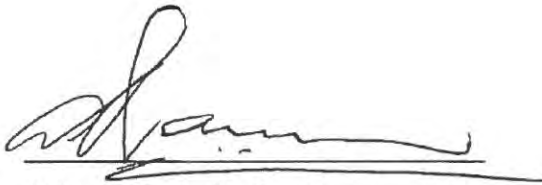
8.23 In the course of the Commission's proceedings, submissions and suggested recommendations were made by some of the parties in relation to various issues that call for consideration as to whether such recommendations fall within the ambit of the Commission's terms of reference for this particular Inquiry.

8.24 These issues relate to suggested recommendations with regard to general poor service delivery, the high unemployment rate and the government's development plans for Eldorado Park. In this regard, the Commission **directs** that a further investigation is conducted by the Office of the Premier in Gauteng within a period of 180 days to deal with the above issues. This investigation must include relevant governmental departments, including the Gauteng MEC for Human Settlements, the Department of Cooperative Governance and Traditional Affairs, and the City of Johannesburg. Interested civil society organisations and community structures should also be involved in this investigation. A copy of the report findings and recommendations of this proposed investigation should be submitted to the Commission before December 2019.

8.25 The Commission's directives herein are binding against both the State and private individuals against whom they are directed.

8.26 Parties are entitled to have the findings and directives of the Commission reviewed by the High Court within appropriate timeframes, should such finding/s and directive/s be disputed.

SIGNED ON THIS THE 11 DAY OF December 2018.

A handwritten signature in black ink, appearing to read 'A. H. Gaum', written over a horizontal line.

Advocate A. H. Gaum

Commissioner

South African Human Rights Commission