

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT



FILE REF NO: MP/1819/0603

In the matter between:

ROXANNE BROCKLEY

FIRST COMPLAINANT

VANESSA PLATT

SECOND COMPLAINANT

BETSIE NAUDE

THIRD COMPLAINANT

JONAS MAISELA

FOURTH COMPLAINANT

And

EMALAHLENI LOCAL MUNICIPALITY

RESPONDENT

FINAL INVESTIGATIVE REPORT

1. INTRODUCTION

- 1.1. This is a report of an investigation conducted by the South African Human Rights Commission ("**Commission**") into systemic water access challenges at Emalahleni Local Municipality ("**Municipality**"), following a number of individual complaints from the residents of that Municipality.
- 1.2. In the various complaints received, it was alleged that water was not available at all in some parts of the Municipality, whilst other parts experienced frequent and unscheduled water cuts, in violation of residents' right of access to sufficient water. It was further alleged in one of the complaints that the water supplied by the Municipality was polluted, further violating residents' right of access to

sufficient water and an environment that is not harmful to their health or wellbeing.

2. PARTIES

- 2.1. The First to Third Complainants in this matter are adult females residing within the jurisdiction of the Municipality.
- 2.2. The Fourth Complainant in this matter is Mr Jonas Maisela, an adult male residing in Empumelelweni Ext 4, a settlement within the jurisdiction of the Municipality.
- 2.3. The Respondent in this matter is the Municipality, a public entity established in terms of the provisions of the Local Government Municipal Structures Act, 117 of 1998, with its main offices situated at 29 Mandela Street, eMalahleni, 1035.

3. MANDATE OF THE COMMISSION

- 3.1. The Commission is an institution established in terms of section 181 of the Constitution.
- 3.2. The Commission is specifically required to:
 - 3.2.1. Promote respect for human rights;
 - 3.2.2. Promote the protection, development and attainment of human rights; and to;
 - 3.2.3. Monitor and assess the observance of human rights in the Republic.
- 3.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 3.4. The South African Human Rights Commission Act, 40 of 2013 (**“the SAHRC Act”**), provides the enabling framework for the powers of the Commission.

- 3.5. Section 15(6) of the SAHRC Act determines the procedure to be followed in conducting an investigation regarding an alleged violation of or threat to a fundamental right.

4. BACKGROUND

- 4.1. As indicated above, the Commission received several complaints relating to challenges about access to water within the jurisdiction of the Municipality over a long period of time. The most recent of these complaints was received in September 2018 and February 2019. The complaints received in September 2018 were from the First to Third Complainants, whilst the complaint received in February 2019 was from the Fourth Complainant.
- 4.2. The First to Third Complainants complained of the increasing frequency of water cuts within the jurisdiction of the Municipality in the last two years, with the latest water cuts experienced at the beginning of September 2018. The First to Third Complainants further complained that, during the water cuts, the Municipality failed to make alternative water supply available to residents in a timeous manner, with tanked water supplied only on the third day of the water cuts in some areas. Moreover, the First to Third Complainants alleged that the water challenges at the Municipality are largely due to the poor maintenance of the existing water infrastructure.
- 4.3. Since the initial complaint, the First to Third Complainants complained of more unscheduled water cuts in December 2018, February 2019 and March 2019. In addition, in February 2019, the Second Complainant complained about the quality of water. She indicated that the water provided by the Municipality was polluted. In the complaint, it was specifically alleged that the water supplied “was milky due to excess magnesium”. It was also alleged that “there were reports of people getting sick and landing up in hospital” due to their consumption of polluted water. It was further alleged that the water from the taps smelt of “sewage” and looked “muddy” at times. In August 2019, the First Complainant also complained of the implementation of water shedding within the jurisdiction of the Municipality since the beginning of August 2019.

According to the communication from the Municipality that was attached to the further complaint, the Municipality was introducing water shedding as a result of an increase in water outages and/or cuts within its jurisdiction due to capacity constraints, increase in pipe bursts, ageing infrastructure and intermittent power outages.

- 4.4. In the complaint received from the Fourth Complainant in February 2019, he alleged that since December 2018, his area, Empumelweni Extension 4, had been without water. The area where the Fourth Complainant lives is an informal settlement and receives water through water tankers. The Fourth Complainant lodged a further complaint later in July 2019 regarding the lack of water provision in his locality for a period in excess of three weeks.

5. PRELIMINARY ASSESSEMENT

- 5.1. The Commission's preliminary assessment of the complaints revealed a *prima facie* violation of the Complainants' right of access to sufficient water as enshrined in section 27(1)(b) of the Constitution.

6. INVESTIGATIVE METHODOLOGY

- 6.1. The investigation of the above complaints was done using a combination of the following investigative methodologies:
 - 6.1.1. Corresponding with all the affected parties;
 - 6.1.2. Convening an investigative inquiry;
 - 6.1.3. Conducting site inspections; and
 - 6.1.4. Perusing the Municipality's facebook page.

7. INVESTIGATIVE PROCESS

Correspondence with all the affected parties

- 7.1. After the receipt of the initial complaints from the First to Third Complainants, the Commission addressed an allegation letter to the Municipality on 13 September 2018, inviting a response to the allegations that were levelled against it by 15 October 2018.
- 7.2. In its response dated 26 October 2018 but received on 29 October 2018:
 - 7.2.1. The Municipality conceded to chronic challenges with water supply within its jurisdiction. In the main, the Municipality attributed its water supply challenges to capacity constraints. In this regard, the Municipality indicated that its current water demand is 150 MI/d, whilst the combined capacity of its existing water supply schemes was 120 MI/d, resulting in a daily supply deficit of 30 MI/d. Power outages were another factor cited as contributing to the water supply challenges within the Municipality. In this regard, the Municipality averred that its water purification and distribution processes are wholly dependent on power supply. In the event of power outages, water supply is affected, and it takes the water system some time to recover and for operations to normalise. Due to funding constraints, the Municipality currently has only two standby generators out of the seven water stations that require standby generators.
 - 7.2.2. With regards to the specific water outage incident experienced at the beginning of September 2018, the Municipality averred that it experienced power outages during that period, mainly at the Witbank Dam, which is the main source of raw water supply to the various water purification plants. As water could not be pumped or conducted from the Witbank Dam, most areas within the Municipality were either without water supply or experienced low water pressure. The Municipality has a limited number of water tankers, which made it impossible for it to supply all the affected areas with tanked water

services in a timeous manner, given the number of areas that needed to be provided with alternative water supply.

7.2.3. The Municipality conceded that it is currently not undertaking any preventative maintenance of its water infrastructure. The only maintenance being done is reactive maintenance, due to funding constraints.

7.2.4. The Municipality indicated that it has taken steps and/or intends to take further steps to address the water supply challenges within its jurisdiction, which include the following:

- a) Augmenting its water supply through the implementation of the Anglo Water Scheme, which is expected to contribute an additional water supply of 16 MI/d to the water system.
- b) Augmenting its water supply through the implementation of the Glencore Water Scheme, which is expected to contribute an additional water supply of 8 MI/d to the water system.
- c) Augmenting its water supply through the implementation of the Doornpoort Water Scheme, which is expected to contribute an additional water supply of 15 MI/d to the water system.
- d) Entering into contracts with service providers to increase its capacity to provide alternative water supply through tanked water services in the event of a crisis. This notwithstanding, however, where water cuts affect a large number of areas at the same time (as would be the case when there are power outages at the Witbank Dam), it would be impossible for the Municipality to supply all the affected areas with tanked water services at the same time.
- e) Reviewing its organogram with the view to augmenting its capacity to undertake preventative maintenance of its water infrastructure.
- f) Setting aside a certain amount of money annually for the implementation of capital projects for the refurbishment and

upgrade of existing infrastructure and for addressing backlogs in terms of basic water and sanitation provision.

- 7.3. In follow up correspondence addressed to the Municipality on 1 November 2018, the Municipality was requested to provide the Commission with implementation dates for the planned water augmentation schemes, as well as details of how it planned to deal with the power supply challenges, insofar as this affected water supply in the Municipality. The Municipality was further requested to provide details of the planned water and sanitation capital projects for the 2018/2019 financial year and to advise on the impact of these projects in addressing the current water supply challenge in the Municipality.
- 7.4. In its reply to the further probe dated 22 January 2019, the Municipality advised as follows:
- 7.4.1. Insofar as the implementation dates for the various water schemes are concerned, the implementation date for the Glencore Water Scheme was September 2018, whilst the implementation dates for the Anglo and Doornpoort Water Schemes were March 2019 and June 2025 respectively. A Transitional Advisor had been appointed to assist with the sourcing of additional funding for the implementation of the water schemes.
- 7.4.2. Insofar as the measures for addressing power failures that impact on the supply of water are concerned, it had repaired the “ring feed cables” to provide alternative supply to water points in the event of power failures. Additionally, 3 big generators were donated to it by Anglo American Coal for one of its pump stations. Eskom had also donated one medium size generator for the water treatment plant to ensure that water purification processes continue even in the event of power failures. Generators for the other less critical supply points were to be sourced during the course of the financial year, being the 2018/2019 financial year.
- 7.4.3. Insofar as capital projects for addressing water and sanitation challenges within the Municipality are concerned, whilst there were a

number of capital projects planned starting from the 2017/2018 financial year, only a handful of those projects were water related. None of the planned water related projects were aimed at contributing to the increase in water supply in the Municipality. Rather, the projects were largely for the construction of water distribution networks and bulk water supply lines, which means that the water infrastructure being constructed will likely become fallow (or underutilised at best) on completion, in the absence of an increase in water supply.

- 7.5. The First to Third Complainants were provided an opportunity to comment on the responses from the Municipality. No substantive comments were received from the Complainants other than to state that they continue to experience frequent water cuts and that their plight remained unchanged. They demanded urgent redress.

Written Inquiry Submissions

- 7.6. Following receipt of the further complaints from the First to Third Complainants, as well as the complaint from the Fourth Complainant, an investigative inquiry into the matter was convened. The aim of the inquiry was to probe, more broadly, the issue of water supply challenges across all areas within the Municipality.
- 7.7. In the inquiry notices issued on 27 February 2019, the Municipality, the Department of Water and Sanitation (“**DWS**”) and the Department of Co-operative Governance and Traditional Affairs in Mpumalanga (“**COGTA**”) were invited to make written submissions on the matter.
- 7.8. In addition to the invitation for written submissions, the Municipality was invited to appear before the Commission on 8 April 2019 for the *viva voce* (oral) leg of the inquiry. The Complainants were also invited to be part of the proceedings but none of them attended the proceedings. Only the Municipality appeared before the Commission on 8 April 2019.

7.9. In its written submissions to the Inquiry, received on 4 April 2019, COGTA made the following submissions amongst others:

7.9.1. The Municipality is a water services authority and provider within the area of its jurisdiction and therefore responsible for the maintenance, quality monitoring, development, regulation, as well as demand and supply management of water services.

7.9.2. The Municipality currently has a water demand of 148 MI/d, whilst the supply across all water schemes is at 130 MI/d, with a current deficit of about 18 MI/d.¹

7.9.3. The following are some of the factors impeding the reliable and sustainable provision of water at the Municipality:

- a) Water demand, which is greater than the Municipality's capacity to supply the water;²
- b) High water distribution losses across the network, which adversely impact on revenue generation and contribute to water cuts and customer dissatisfaction;
- c) Ageing water infrastructure, which is exacerbated by ineffective infrastructure maintenance;
- d) Resource shortages (plant, human resources, tools and spare parts) resulting in prolonged turnaround times in addressing emergency situations;³
- e) An ineffective customer care management system;

¹ These figures are different to those supplied by the Municipality. There is therefore no agreement on the scale of the challenge.

² COGTA submitted that this is in part due to infrastructural upgrades falling behind developments.

³ On the issue of human resources, according to the Department, the Municipality has a high rate of unfilled positions. In this regard, there are more than 54% of vacancies that are not filled as per the approved organogram. There is also a high rate of unqualified process controllers (more than 70%) which are running critical plants. There is therefore a significant risk to the effective and sustainable provision of water services.

- f) Outdated water infrastructure designs, exacerbated by the use of sub-standard construction material (i.e. asbestos cement);
- g) Mushrooming of informal settlements and uncontrolled development;
- h) Illegal connections to the municipal water infrastructure, together with the theft and vandalism of the infrastructure;
- i) Fluctuating raw water quality and restricted water treatment process train.

7.9.4. On the issue of water quality, two of the reservoirs (Point B and C) have not been cleaned in a long time, which could possibly cause the discolouration of water in the reservoirs if agitated.⁴ The Point A reservoir was reported to have a collapsing roof. In addition, the Witbank Treatment Plant though well operated, is not designed to treat manganese. Manganese is therefore currently only being treated manually using an oxidation system. A lime feeder is however, to be installed, which will aid the oxidation of manganese from the system.

7.9.5. The Municipality has taken some steps towards addressing the identified challenges, which include:

- a) The establishment of a Water Conservation and Water Demand Management unit, with the mandate of analysing the current water challenges; developing a water conservation and water demand management strategy; soliciting funds for the work of the unit; and overseeing the implementation of the water conservation and water demand management strategy;
- b) The prioritisation of the installation of bulk metres for accurate water balancing, accountability for water consumption and quantifying of real water losses;

⁴ This could, however, not be confirmed by the investigation of the Department.

- c) The prioritisation of water augmentation through mine water reclamation schemes.⁵
- d) The development of a Water and Sanitation Master Plan which has identified augmentation schemes to meet short to long term demand.

7.9.6. Additional measures that could be taken by the Municipality to ameliorate the challenges in the short, intermediate and long term, could include:

- a) In the short or immediate term:
 - (i) cleaning of the reservoirs;⁶
 - (ii) repairing of the structural damage on the reservoir at Point A of the water network;⁷
 - (iii) improving control measures for the transportation of potable water to rural areas;⁸ and
 - (iv) upgrading of water storage reservoirs and construction of bulk water infrastructure.⁹
- b) In the intermediate term:

⁵ Mine water reclamation schemes by Anglo and Glencore are already operational.

⁶ To be done by 30 June 2019 and on a regular basis thereafter.

⁷ To be done by end of April 2019.

⁸ To be done by 30 June 2019.

⁹The construction of a 10 MI reservoir and bulk water supply line at Point E of the water network reservoirs is ongoing. A contractor has been appointed to construct a reservoir with the capacity of 30 MI and bulk water supply lines for Siyanqoba Development.

- (i) commissioning 3 package water plants with the capacity of 20 MI/d to augment water supply at Point D of the water network, Highveld Steel scheme and Doornpoort scheme;¹⁰ and
 - (ii) implementing measures to curb high water losses which may include the installation of pressure control valves, installation of bulk water metres, installation of domestic and industrial water metres, replacing old pipes in critical areas and exploring the use of non-destructive leak repair technology during repairs on the reticulation system.¹¹
- c) In the long term:
- (i) constructing a new 30 MI/d water supply scheme for Siyanqoba;¹²
 - (ii) constructing a 30 MI/d water recycling scheme at the Witbank Dam;¹³
 - (iii) replacing old asbestos cement pipes and introducing new technologies to reduce water losses;¹⁴
 - (iv) refurbishing the Witbank Water Treatment Plant;¹⁵
 - (v) upgrading the Ga-Nala Water Treatment Plant;¹⁶
 - (vi) building of additional storage at point A and E of the water system and installing telemetry system to increase water

¹⁰ Cost of each plant, according to the Department, is estimated at R45 million, requiring a total investment of R135 million for 3 plants.

¹¹ According to the Department, an estimated amount of R41million would be required for the implementation of these measures.

¹² According to the Department, an estimated amount of R1billion will be required for the scheme.

¹³ According to the Department, an estimated amount of R500 million will be required for the scheme.

¹⁴ According to the Department, an estimated amount of R150 million will be required for this intervention.

¹⁵ According to the Department, an estimated amount of R40 million will be required for the refurbishment.

¹⁶ According to the Department, an estimated amount of R15 million will be required for the refurbishment.

storage capacity and to improve the monitoring of the reservoir operations;¹⁷

(vii) replacing and refurbishing bulk water supply lines and the interconnecting pump stations, reservoirs and settlements to improve reliability of supply;¹⁸ and

(viii) installing bulk, residential metres, isolation valves and pressure monitoring devices in order to improve water balancing and monitoring of water distribution.¹⁹

d) In addition, the DWS, COGTA, Nkangala District Municipality and the Municipality to engage the mines upstream of the Witbank Dam to lower manganese pollution and the Municipality to augment its institutional capacity to deal with real-time maintenance of infrastructure. Moreover, the Municipality to consider upgrading its abstraction licence from the Witbank Dam and other sources to at least 145 Ml/d, to ensure sustainable water distribution. The licence upgrades will, however, need to be accompanied by measures to deal with water conservation and demand management by the Municipality.

7.10. In its submissions received on 8 April 2019, the day of the hearing, the Municipality made the following written submissions, amongst others, in addition to those made in its initial response to the Commission:

7.10.1. The Municipality has 34 wards comprising of both formal and informal settlements, with varying water service levels.²⁰ Its 34 wards receive

¹⁷ According to the Department, an estimated amount of R43 million will be required for these interventions.

¹⁸ According to the Department, an estimated amount of R100 million will be required for these interventions.

¹⁹ According to the Department, an estimated amount of R38 million will be required for these interventions.

²⁰ At Point A High and Low, service levels are at 50% and considered fair. At Point B High, service levels are at 60% and considered fair. At Point B Low, service levels are at 70% and considered good. At Point C High, service levels are at 60% and considered fair. At Point C Low, service levels are at 70% and considered good. At Point D Low, service levels are at 80% and considered very good. At Point E High, service levels are at 5% and considered extremely poor. At Point E Low, service levels are at 20% and considered poor.

varying water service levels due to the scarcity of water within its jurisdiction.

7.10.2. Informal settlements predominantly receive water through communal stand pipes, water tankers and boreholes, whilst formal settlements receive water through formalised water reticulation.

7.10.3. The levels of water service are highest at Point D Low²¹ of the water network and lowest at Point E High²² of the water network. Point E High is the reservoir that services the areas of Empumelelweni, complained of by the Fourth Complainant.

7.10.4. In the past two years, it has been experiencing regular water supply interruptions and intermittent water supply due to high water distribution losses, illegal water connections and the ageing infrastructure amongst others²³.

7.10.5. On average, it experiences 7 pipe bursts and 15 pipe leaks per day but only has capacity to address 4 pipe bursts and 7 pipe leaks per day due to resource constraints. Pipe bursts are the major cause of water cuts and interruptions. On average, it experiences 4 major water cuts per day due to pipe bursts. It takes between 1 to 2 days to repair pipe bursts, depending on the availability of spares. Water tankers are used as an interim measure in the event of water cuts.

7.10.6. It could not pre-empt the rise in water demand and properly plan for it due to high population growth and high rates of migration within its jurisdiction. Government processes of rolling out major infrastructure have also exacerbated the challenge.²⁴

²¹ Service levels are at 80%.

²² Service levels are at 5%.

²³ According to the Municipality, it has a water distribution network of more than 950 km and approximately 60% of it is made of old asbestos pipes which are prone to frequent failures when subjected to high pressure.

²⁴ An example of this is that the Municipality requires R4.5 billion to resolve water and sanitation challenges within its jurisdiction but only an amount of R110 million has been allocated for various projects.

7.10.7. Despite the challenges with its water services, it generally supplies water of good quality,²⁵ with the exception of seasonable incidents of manganese contamination. In this regard, water test reports from January 2018 to December 2018 submitted by the Municipality showed that whilst there are high levels of water pollution in the raw water received from the Witbank Dam, the quality of potable water supplied to residents was within the prescribed quality limits. Notably, whilst high levels of manganese were detected in the raw water from the Witbank Dam, manganese levels in the potable water supplied to consumers was within the prescribed quality limits. No excess magnesium was detected in the samples of raw and potable water.

7.10.8. It has also identified short, medium, and long term water augmentation schemes to supplement water supply, but the financing of these projects remains a challenge.

7.11. In its written submissions to the Inquiry received on 9 April 2019, after the hearing of 8 April 2019, DWS made the following submissions amongst others:

7.11.1. Whilst the overall access to water services at the Municipality is at 91%²⁶, challenges exist with regards to the provision of water services at the Municipality. The main causes of these challenges include:

- a) New developments and sprawling informal settlements that have not been accompanied by water infrastructure upgrades;
- b) Illegal water connections caused by the lack of implementation of By-Laws;

²⁵ Municipal water meets potable water quality standards and its level of purification efficiency is more than 90%, complying with all parameters of potable water quality.

²⁶ It is unclear how this level of supply is possible, when in its own submission, the Municipality has a 30 to 40 Ml/d daily water supply deficit. Moreover, this figure is much higher than those reported by the Municipality (see footnotes 21 to 23).

- c) High rates of water losses in the system;²⁷
- d) Ageing infrastructure resulting in frequent pipe bursts. This challenge is exacerbated by the slow pace of responding to pipe bursts by the Municipality; and
- e) Poor maintenance and operation of the water infrastructure, particularly the water treatment works.

7.11.2. Despite the highlighted challenges with its water services, the Municipality generally supplies good quality of water. In this regard, water testing conducted from November 2018 to July 2019 showed substantial compliance with water quality standards, with the exception of high levels of coliforms²⁸ in November 2018, as well as high levels of Heterotrophic Plate Count in December 2018.^{29 30}

7.11.3. The DWS indicated it had taken measures to assist the Municipality to comply with its obligations insofar as water provision is concerned, which include:

- a) Allocating the Municipality with 27 424 186.00 m³ (twenty seven million, four hundred and twenty four thousand and one hundred and eighty six cubic metres) of raw water per annum, to be abstracted from the Olifants water system;
- b) Allocating R25 million from the Water Services Infrastructure Grant in the 2018/2019 financial year for the refurbishment of the Emalahleni Treatment Works. An additional amount of R35 million

²⁷ These water losses are caused by various factors including pipe bursts and none revenue water. In this regard, the Municipality has a maximum target of 15% water loss through the supply of none revenue water but currently 50% of its total water supplied is none revenue water.

²⁸ Total Coliforms tested at Emalahleni Brungspruit were 109ml, above the maximum limit of 100ml.

²⁹ In Kriel, the total HPC tested at 1505, above the maximum limit of 1000. In Ruitspruit, the total HPC tested at 41000, above the maximum limit of 1000. In Phola the total HPC tested at 48750, above the maximum limit of 1000.

³⁰ Subsequent reports received from DWS further showed high levels of aluminium in May 2019.

to be allocated in the 2019/2020 financial year for various water services improvements across the Municipality.

7.11.4. Additional steps it intends to take to assist the Municipality to comply with its obligations insofar as water provision is concerned include:

- a) Initiating a project for the planning of the Emalahleni Bulk Water Supply Scheme aimed at upgrading the Witbank Water Treatment Works (from 75 MI/d to 100 MI/d) and other bulk pipelines and reservoirs;
- b) Continuing to engage the Municipality on their current challenges and providing advisory support; and
- c) Fast-tracking the approval of technical reports, to enable the Municipality to deal with the current crisis.

7.11.5. On the other hand, the Municipality is to take some of the following steps to address the challenges of water supply:

- a) Providing water through water tankers in the short term where there is no water reticulation;
- b) Fixing all water leaks and dealing with illegal connections in order to ensure water supply to all communities in the medium term;
- c) Reviewing the water services master plans and submitting technical reports which will assist in proper planning and implementation insofar as water services are concerned in the long term; and
- d) Undertaking the following measures in the indeterminate term:
 - (i) Improving the water balance by effecting water conservation and demand management measures;

- (ii) Reducing water demand by approximately 5.5. million m³/a, until the maximum target of 15% supply of non-revenue water is achieved;
- (iii) Reducing the unit consumption of 297 litres per capita per day to about 180 litres per capita per day;
- (iv) Developing a water conservation and water demand management programme;
- (v) Giving consideration to applying for a water re-use license in order to reclaim some of the waste water discharged from waste water treatment works;
- (vi) Appointing skilled employees to manage the water services projects within the Municipality; and
- (vii) Ring fencing of the water services budget for more effective management of the water services.

Oral Submissions at the Inquiry Hearing

7.12. As indicated above, in addition to an invitation to make written submissions for the purposes of the Inquiry, the Municipality was invited to appear before the Commission on 8 April 2019 for the purposes of giving *viva voce* evidence.

7.13. At the Inquiry, the Municipality reiterated much of its earlier written submissions and supplemented those submissions as follows:

7.13.1. Other than infrastructural challenges, power outages have significantly contributed to the challenge of water supply within the Municipality. Despite the introduction of additional water supply of 15 Ml/d in February 2019, the delivery of water services continue to be hampered by load shedding. The Municipality had identified the need for the purchase of two generators in the 2017/2018 financial year but could not do so due to financial constraints. The project was rolled over to the

2018/2019 financial year but again, due to financial constraints, the project could not be implemented. The project has once again been rolled over to the 2019/2020 financial year, depending on the availability of resources.

- 7.13.2. Lack of maintenance is also a major contributor to the water supply challenges at the Municipality. Approximately, R800 million is required for maintenance, which amount the Municipality does not have, as it currently owes Eskom over R2 billion and is struggling to raise revenue from its consumers, who owe it over R3 billion. It acknowledges, however, that maintenance of the infrastructure should be a priority, as lack of maintenance results in the quicker deterioration of infrastructure and in higher infrastructure replacement costs.
- 7.13.3. In order to augment water supply, a new water package plant with a capacity of 5 MI/d was introduced in January 2019. The actual production from the plant is, however, less than anticipated at 3.5 MI/d.
- 7.13.4. The Anglo Scheme which was expected to supply 16 MI/d to the water grid as of March 2019 has also not performed at the required levels. The scheme currently only supplies water at a rate of 12 MI/d. The Glencore scheme which supplies the Ogies and Phola area has, however, met expectations and there is therefore a noticeable difference in those areas insofar as water supply is concerned. Excess water from the Glencore scheme is used to supply the greater Emalahleni area.
- 7.13.5. Insofar as the alleged water contamination is concerned, whilst it is correct that previously (in 2014) it recorded a blue drop score of 43%, which is poor, it has made strides towards improving the quality of water supplied to its residents, recording a blue drop score of 86% in recent times. In this regard, whilst in January 2019, a high concentration of manganese³¹ was detected in the Witbank Dam due to plant process

³¹ Manganese is a chemical compound that is generated from mining activities and is commonly found in the Olifants Water system, due to the mining activities in the area. The Municipality's water treatment plant is not

failures, when the same water was tested at the Water Treatment Plant after processing, no manganese was detected. At other points of the network, discoloration of the water was detected but on investigation, it was determined that a burst pipe was responsible for the contamination. Allegations of sewage water contamination were also investigated but no sewage could be detected following a series of water tests. It is not aware of reports of people falling ill and landing in hospital as a result of consuming water supplied by it.

7.13.6. Insofar as the allegations relating to Empumelelweni are concerned, Empumelelweni has had water reticulation installed but does not currently have running water. Water in the various extensions of Empumelelweni is therefore supplied through tanked services. When it started supplying tanked water to the community, there were approximately 800 households. The settlement has now grown through the mushrooming of informal settlements, making the amount of water initially supplied to the settlement inadequate. It conceded therefore that there are challenges with the supply of water in Empumelelweni but denied that the settlement was last supplied with water in December 2018. Other challenges hampering the supply of water in Empumelelweni is the vandalism of the communal water tanks installed at strategic points in the community and the deliberate contamination of water in the water tanks. The Municipality pays over R1 million per month to service providers for the provision of water through tanked services. The provision of water in this manner is therefore unsustainable, more so because the water supplied in this way is non-revenue water.

7.13.7. Insofar as the support from other structures of government is concerned, it mainly receives advisory support. Whilst some technical support has been provided to the Municipality through the Municipal

equipped to treat manganese contamination. Manganese pollution manifests itself through odour and discoloration of water. The odour is distinct, it is not pungent like sewage and cannot therefore be mistaken for sewage contamination.

Infrastructure Support Agent (“**MISA**”) programme of COGTA, the technical support teams deployed to the Municipality are not always qualified or suitable for local government conditions. The kind of support it urgently requires, however, is financial support, as the current MIG funding it receives is insufficient. Without the requisite financial support, it will not be able to implement many of the identified projects, as many of them are unfunded. It also requires the following specific support from the responsible government departments amongst others:

- a) The policing of government policies relating to the abstraction of water from water resources;³²
- b) Policing of mines who are polluting water sources;
- c) The fast-tracking of grant applications for infrastructural projects; and
- d) The fast-tracking of applications for water permits.

7.13.8. Besides the inadequate support it receives from other government structures, programmes of some government structures also tend to exacerbate the crisis the Municipality finds itself in. In this regard the Department of Human Settlement is undertaking various housing projects within the Municipality, despite there being no bulk infrastructure in the areas it is undertaking the projects.

Site Inspection

7.14. In addition to the inquiry, a site inspection was conducted in respect of this matter on 7 May 2019. The sites visited during the site inspection are the Witbank Dam, Point B reservoir, Witbank Water Treatment Plant, Point A reservoir, Empumelelweni and Point E reservoir.

³² According to the Municipality, DWS is responsible for the policing of these policies and laws. In this regard, it is alleged that farmers are illegally abstracting water from the Olifants water system without any consequences.

- 7.15. Only the representatives of the Municipality attended the site inspection. The Complainants did not attend the site inspection, despite an invitation being extended to them.
- 7.16. At the Witbank Dam, the Commission was provided with the following additional information by the representatives of the Municipality:
- 7.16.1. Approximately 105 MI/d to 110 MI/d of water is abstracted from the Witbank Dam on a good day, as opposed to the 75 MI/d the Municipality is licensed to abstract. Despite the over abstraction, however, the Municipality is unable to meet the daily water demand of 148 MI/d. The Municipality has not been able to supplement the water supply with underground water due to water contamination and the disturbances of the hydrological flow of water caused by the mining activities in the area. The Municipality is now looking to exploit various water reclamation schemes to supplement its water supply.
- 7.16.2. Empumelweni and Duva settlements have about 12 000 and 9000 new homes being built, which will add to the current water demand. The water demand from these new settlements is not accounted for in the current water demand calculation and therefore, the overall water demand is likely to rise further on completion of those projects.
- 7.16.3. The Witbank Dam has two abstraction levels, with four pumps in operation on an alternative basis depending on demand. The pumps are 90% efficient and have not had major challenges in terms of breakages.
- 7.16.4. The pumps are wholly dependent on electricity supply to work and any power interruptions at the Witbank Dam significantly impact on operations. 30% of the municipal electricity consumption is used by the Witbank Dam. Accordingly, a large amount of electricity is required to operate the pumps at the Witbank Dam, which supply cannot be replaced with alternative energy sources. As the Witbank Dam supplies 70% of the water needed within the Municipality, disruptions in

operations at the Witbank Dam have rippling effects across the Municipality which cannot be mitigated in a sustainable manner.

- 7.16.5. The Municipality pays Glencore R2 million per month for the servicing of the Glencore water reclamation scheme, which supplies water to the Phola and Ogies areas. The Municipality, however, only collects R600 000.00 from the residents of Phola and Ogies as revenue. The scheme is therefore not sustainable and it is foreseeable that it may run into challenges in the foreseeable future, resulting in the deepening of the water crisis within the Municipality.
- 7.16.6. The Municipality also currently owes Anglo American for the servicing of the Anglo water reclamation scheme, which is one of the reasons why Anglo has not increased water supply to 16 Ml/d as previously anticipated.
- 7.16.7. Due to the water demand being higher than the supply, the Municipality is unable to fill up the water storage reservoirs it has across its jurisdiction. The reservoirs across the Municipality therefore currently act as conduits, instead of stores for water to be used in the event of an unforeseen water crisis.
- 7.17. At Point B of the water system, the reservoir processes were explained to the Commission. The Commission was also shown a recently commissioned package plant which uses an ultra-filtration system, as one of the measures currently in place to improve water services within the Municipality.
- 7.18. At the Witbank Water Treatment Plant, the Commission was taken through the water treatment processes of the plant. According to the representatives of the Municipality, the current water treatment processes are in line with best practice and as a consequence, the quality of water within the Municipality has greatly improved.
- 7.19. At Point A of the water system, water levels were sitting at 10% at the time of the inspection. Point A is supposed to pump water to Point E of the water system, which in turn supplies Empumelelweni amongst others, but can only do

so when the water levels are at least at 20%. The current level which is below the required minimum of 20% is causing water access challenges at Empumelelweni.

7.20. At Empumelelweni, the residents interviewed complained about the unavailability of water in their area. Whilst some residents indicated that they have water taps in their homes, they advised that they hardly get water from those taps. They predominantly rely on water from water tankers, which is only supplied during working hours. Water provision in this manner makes water access a challenge for people who have to work during the day. What is even more of a challenge is that in some areas of Empumelelweni, the provision of water through tanked services is not scheduled and therefore, residents are not always prepared for the arrival of water tankers. The water supplied is also not sufficient to meet the current demand, as in some areas of Empumelelweni, the water tankers only fill one jojo tank for the week for the use of all the residents. During the inspection, some residents were observed fetching water from a nearby spring. The spring was surrounded with debris but the spring water itself was clear. The residents advised that the water is clean but this could not be verified.

7.21. At Point E of the water system, the Commission found construction under way. The Commission was informed by the representatives of the Municipality that the construction was for a new reservoir that will eventually supply Empumelelweni, once the water supply challenges have been resolved. This was the case despite there being another reservoir in the same area, which had not been used for its intended purpose, due to water supply challenges. The representatives of the Municipality were asked why they were constructing another reservoir when the existing reservoir was not in use and they advised that they had already committed to the project before the current crisis and therefore need to see it through.

7.22. Following the site inspections, the Commission has continued to receive complaints of water access challenges within the Municipality, which were brought to the attention of the Municipality. In response to one of the complaints, the Municipality advised as follows:

“Please note no progress has been made regarding the water shortage since the site visit you had with the director of technical services” sic.

Municipality’s Facebook Page

7.23. On perusal of the Municipality’s facebook page, the Commission found the facebook page replete with notices of water cuts and/or outages in various parts of the Municipality, as well as expressions of anger and frustration from residents over the inconvenience caused by these cuts. The most recent viewing of the Municipality’s facebook page was on 2 April 2020. From the notices, it appears that pipe breaks and low reservoir levels are cited as the main causes of water cuts and/or outages within the Municipality. It is noteworthy that these notices are published almost on a daily basis, which gives credence to the allegations of frequent water cuts made by the First to Third Complainants.

7.24. No notices regarding water shedding were found on the Municipality’s facebook page since 02 April 2020. The implementation of water shedding at the Municipality is therefore uncertain.

8. FACTUAL ANALYSIS

8.1. As indicated above, the complaints received against the Municipality relate to water unavailability due to frequent water cuts, and the poor quality of the water supplied.

8.2. With regards to the issue of water availability, it appears common cause that there is a water availability challenge within the Municipality, resulting in frequent disruptions in service in some parts of the Municipality, and in other parts of the Municipality being without water for prolonged periods of time. Whilst many reasons have been given for the current water crisis within the Municipality, the main causes appear to be the insufficiency of the current water resources and the inadequacy of the current water infrastructure due to ageing

and lack of maintenance amongst others. On the evidence before the Commission therefore, the complaints relating to water shortages and/or unavailability have been substantiated.

- 8.3. The dire impact of such water shortages cannot be overstated, more so in the current context of the COVID 19 pandemic, where access to water is necessary in maintaining good hygiene practices and for the provision of meals; essential for the preservation of health and life. Accordingly, access to water is essential in giving effect to a range of related, interdependent rights. The impact of water shortages on the poor can also not be underestimated, as evidenced by the risk taking behavior of some residents of Empumelelweni, who have resorted to sourcing their water supply from sources that have not been established to be safe. These actions exacerbate the risks many affected communities face while attempting to survive the COVID 19 pandemic in difficult conditions.
- 8.4. With regards to the complaint relating to the quality of the water supplied by the Municipality, the Municipality has denied the allegation that it supplies contaminated water to its residents. In this regard, the Municipality averred that whilst compliance with potable water quality standards was a challenge in prior years, this is no longer the case. In support of this assertion, the Municipality provided the Commission with water quality reports from January to December 2018. The reports show that whilst there are high levels of pollution in the raw water from the Witbank Dam, the potable water supplied to consumers meets the prescribed water quality standards. This is in line with the finding of DWS that the potable water supplied by the Municipality was substantially compliant with the prescribed water quality standards.³³ Importantly none of the water quality reports identified excess magnesium in the water supplied to residents. In view thereof and in the absence of any other evidence to the contrary from the Complainants, the Commission finds that the complaint relating to the supply of contaminated water by the Municipality is not adequately substantiated and is therefore not pronounced on in this report.

³³ See paragraph 7.11.2 above.

8.5. What follows is a consideration of the legal framework applicable to water availability and access. The aim of such consideration is to determine whether the frequent water cuts at the Municipality, as well as the unavailability of water in some parts, violate the rights of residents as alleged and if so, the roles and responsibilities of the various duty bearers in redressing the identified violations.

9. LEGAL ANALYSIS

9.1. In terms of the Constitution, everyone has the right of access to *sufficient* water,³⁴ with the state having a concomitant obligation to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of this right.³⁵ According to the Constitution, local government is primarily responsible for the supply of potable water to its residents.³⁶ As a water services authority and provider, the Municipality is responsible for the supply of potable water within its jurisdiction.

9.2. When declining to prescribe the quantity of water that would meet the standard of sufficiency required by the Constitution,³⁷ the Constitutional Court indicated that the legislature and executive are best placed to set for themselves the targets that are achievable insofar as the realisation of social economic rights are concerned, having regard to the budgets at their disposal.³⁸

9.3. Insofar as the right of access to water is concerned, section 3(1) of the Water Services Act 108 of 1997 (“**WSA**”) provides that “[e]veryone has a right of access to basic water supply and basic sanitation.”

9.4. In section 1 of the WSA, “basic water supply” is defined as “the prescribed minimum standard of water supply services necessary ... to support life and

³⁴ See section 27(1)(b) of the Constitution.

³⁵ See section 27(2) of the Constitution.

³⁶ See Schedule 4B of the Constitution.

³⁷ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

³⁸ *Ibid*, Paragraph 61.

personal hygiene”. This definition of “basic water supply” is in line with the views expressed by the Committee on Economic, Social and Cultural Rights (“**CESCR**”) in its General Comment on the right of access to water, that for the rights in articles 11³⁹ and 12⁴⁰ in the Covenant on Economic, Social and Cultural Rights (“**ICESCR**”) to be given effect to, water supplied must be of such quality and quantity to enable the users to meet their personal and domestic water needs, which would ordinarily include the use of water for “drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.”⁴¹

9.5. In turn, the minimum standard of water supply services prescribed by the Minister in the National Water Standards Regulations is the “provision of appropriate education in respect of effective water use and minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month; at a minimum flow rate of not less than 10 litres per minute; within 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than 7 full days in any year.”⁴² The National Water Standards Regulations further provide that where there are water interruptions for a period of more than 24 hours, other than in cases where water was discontinued for nonpayment of services for example⁴³, consumers must be given access to alternative water services comprising of at least 10 litres of potable water per person per day, as well as sanitation services sufficient to protect health.⁴⁴

9.6. As indicated in paragraph 8.2 above, it is common cause in the present case that the Municipality has not been providing its residents with basic water supply as contemplated in the National Water Standards Regulations. In this regard, it

³⁹ Article 11 of the ICESCR deals with the right to an adequate standard of living, which includes the right to adequate food, clothing and housing, and to the continuous improvement of living conditions.

⁴⁰ Article 12 of the ICESCR deals with the right to the highest attainable standard of health.

⁴¹ Paragraph 12 of General Comment No. 15 on the right to water (Art.'s 11 and 12): 11/2000 (<https://www.escr-net.org/resources/general-comment-no-15-right-water>).

⁴² Regulation 3 of the National Water Standards Regulations.

⁴³ See section 4 of the Water Services Act.

⁴⁴ Regulation 4 of the National Water Standards Regulations.

is common cause that some areas of the Municipality experience regular water cuts, whilst others go for protracted periods without water, resulting in residents being without water for more than 7 full days per year. It is also common cause that in some instances, as was the case in September 2018, the Municipality takes more than 24 hours to supply affected residents with alternative water services, when there is an interruption in normal water supply. Moreover, even when water is supplied in some areas like Empumelelweni, the water supplied falls far below the required standard of 25 litres of potable water per person per day or 6 kilolitres per household per month. From the above therefore, it is apparent that the right of residents to have access to sufficient water contemplated in section 27(1)(b) of the Constitution is not being realised within the Municipality. What remains to be determined is the culpability of the Municipality and other state functionaries for the non-realisation of this right in section 27(1)(b) of the Constitution.

- 9.7. As indicated in paragraph 9.1 above, the right in section 27(1)(b) of the Constitution places a concomitant obligation on the state and municipalities by extension to take “reasonable legislative and other measures, within [their] available resources, to achieve the progressive realisation” of the right.
- 9.8. Equally, sections 3(2) and (4) of the WSA provide that every water services institution should take reasonable measures to realise the rights to basic water supply and basic sanitation and that the aforementioned rights are subject to the limitations provided for in the Act.
- 9.9. Moreover, sections 11(1) and (2) of the WSA provide that municipalities as water services authorities, have an obligation to “progressively ensure efficient, affordable, economical and sustainable access to water services... subject to the availability of resources; the need for an equitable allocation of resources to all consumers and potential consumers within the authority’s area of jurisdiction; the need to regulate access to water services in an equitable way; the duty of consumers to pay reasonable charges, which must be in accordance with any prescribed norms and standards for tariffs for water services; the duty to conserve water resources; the nature, topography, zoning and situation of the land in question; and the right of the relevant water services authority to limit

or discontinue the provision of water services if there is a failure to comply with reasonable conditions set for the provision of such services”. (own emphasis)

9.10. From the above, therefore, it is apparent that the obligation of municipalities to fulfil the right of access to sufficient water is not unconditional or limitless. In this regard, the Constitutional Court held that the constitutional obligation on the state to take reasonable legislative and other measures to progressively realise the right of access to sufficient water within available resources does not establish a claim for sufficient water on demand.⁴⁵ The court went on to state that “[t]he fact that the State must take steps progressively to realise the right implicitly recognizes that the right of access to sufficient water cannot be achieved immediately.”⁴⁶

9.11. Whilst section 27(2) of the Constitution and section 3(1) of the WSA does not require municipalities to immediately make an unlimited supply of water available to all residents on demand, it does require municipalities to take reasonable measures towards the realisation of the right of access to water. These measures can be in the form of plans, policies and/or programmes aimed at the realisation of the right. For the measures to pass the reasonableness test, however, it must be shown that the measures in question:⁴⁷

9.11.1. have appropriate financial and human resources allocated to them;

9.11.2. are capable of facilitating the realisation of the right;

9.11.3. are reasonable in both conception and implementation;

9.11.4. are flexible;

9.11.5. attend to crises;

9.11.6. do not exclude a significant segment of the affected population; and,

⁴⁵ See Mazibuko, Paragraph 57.

⁴⁶ See Mazibuko, Paragraph 28.

⁴⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), Paragraphs 39, 41, 42 and 43.

9.11.7. balance short, medium and long-term needs.

9.12. Additionally, in terms of section 11(1) of the WSA, water provision measures must meet equity standards, as well as comply with the duty to conserve water resources.

9.13. In the present case, the Municipality has submitted various plans which it says, if implemented, will address the current water crisis in the medium to long term. These plans include the augmentation of the current water supply through various water reclamation projects, as well as, addressing the current infrastructural challenges by replacing old pipes amongst others.

9.14. Whilst these plans are an important step, they fall below the reasonableness standard required in terms of section 27(2) of the Constitution and the WSA, as they do not adequately balance the medium to long term needs of the residents with their short term needs, especially those who are poor who find themselves in the fringes of Emalahleni suburbia like Empumelelweni. Rather, the emphasis of the plans is on what needs to be done in the future to meet optimal levels of water supply, without adequate consideration being given to measures that need to be taken to ensure basic water supply to all residents first; contrary to the provisions of section 5 of the WSA.⁴⁸ In this regard, section 5 of the WSA provides that, where the available water services are unable to meet the requirements of all its existing consumers, preference must be given to the provision of basic water supply and basic sanitation to the residents.⁴⁹

⁴⁸ In *Mazibuko*, the Constitutional Court held that “[i]n most circumstances it will be reasonable for municipalities and provinces to strive first to achieve the prescribed (and, in the absence of a challenge, presumptively reasonable) minimum standard, before being required to go beyond that minimum standard for those to whom the minimum is already being supplied” (see *Mazibuko*, Paragraph 76).

⁴⁹ As indicated above, basic water supply refers to the “minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month; at a minimum flow rate of not less than 10 litres per minute; within 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than 7 full days in any year”. Basic sanitation on the other hand refers to, as a minimum, to the provision of a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevent the entry or exist of flies and other disease –carrying pests.

- 9.15. In August 2019, the First Complainant advised of the planned implementation of water shedding by the Municipality. As indicated in paragraph 7.24 above, however, on perusal of the Municipality's facebook page, there was no indication of the implementation of this measure by the Municipality. The Commission is of the view that, if such a measure were to be implemented (in an open, transparent and predictable manner which allows for prior planning and preparation), it may go a long way in ensuring that all existing consumers receive the basic water supply in the interim, whilst the Municipality works on incrementally increasing water supply to optimal levels in the long term.
- 9.16. Other concerns over the proposed plans are that the plans are not geared towards responding to crisis situations, such as abrupt and unexpected operational disruptions which impact on water supply, making them inflexible. In this regard, the Municipality conceded in its submissions that it is unable to ensure water supply to its residents during power cuts or disruptions at the Witbank Dam.
- 9.17. Furthermore, the proposed measures lack the financial backing required to ensure successful implementation. In this regard, the Municipality made it clear in its submissions that it does not currently have the financial resources needed for the implementation of its proposed plans and that therefore, the proposed plans are currently un-implementable, unless the Municipality is able to secure additional financial resources.
- 9.18. Whilst our courts have long accepted that the scarcity of resources is a constraint to the enjoyment of rights given the socio-historical context of South Africa,⁵⁰ and that the state cannot be required to do more than its available resources permit,⁵¹ the mere mention of resource constraints does not exonerate the state from its constitutional obligations. In this regard, in the Constitutional Court found that organs of state could not escape their constitutional and/or statutory obligations in circumstances where the unavailability of resources necessary to fulfil those obligations was due to an

⁵⁰ *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696.

⁵¹ *Grootboom*, Paragraph 46.

incorrect or mistaken understanding of the constitutional and/or statutory obligations in question.⁵²

9.19. As indicated in paragraph 9.14 above, where a municipality is unable to meet the demand of water supply to all its residents at optimal levels, it is required to prioritise the provision of basic water supply to all its residents, instead of stretching its limited resources in trying to realise optimal levels of water supply for only a few of its residents. In the present case therefore, resource constraints cannot be the basis for the Municipality's failure to meet the minimum requirements of basic water supply to its residents.

9.20. In any event, it appears to the Commission that the Municipality may have contributed to its worsening financial woes. In this regard, the Municipality averred that its financial crisis is largely due to the non-payment of services by consumers, with it being owed about R3 billion for services. The Commission was not formally addressed on why the Municipality has allowed this state of affairs to continue unabated, as the amount owed could not have accrued over a period of one or two years, but appears to have been allowed to accrue despite the financial crisis it presently finds itself in. It must be noted, that it is the responsibility of the Municipality to ensure that consumers pay for the services rendered, and to take steps where consumers refuse to pay for services. This is crucial in ensuring the sustainability of the water services being rendered by the Municipality and in fact legislatively mandated.⁵³ The WSA and its attendant regulations clearly provide that municipalities may impose conditions for the supply of water, which may include the condition to pay for the water services provided.⁵⁴ In its latest Tariff Schedule, other than the free provision of 6 kilolitres of water per household per month, all classes of consumers are required to pay for water services provided, albeit at different rates. This is the case regardless of whether a resident resides in a suburb or a township. Insofar as the Municipality has been providing water services

⁵² *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*, 2012 (2) SA 104 CC, Paragraph 69 and 74

⁵³ Section 11(1) and (2) of the WSA.

⁵⁴ See Section 4 of the WSA.

without charge to residents (other than the free supply of 6 kilolitres per household per month provided for in its Tariff Schedule), it is a decision of the Municipality's own choosing and not a decision mandated by legislation or its own policies. As is apparent from the submissions of the Municipality, this decision has compromised the Municipality's capacity to render water services to its residents in a sustainable manner. The Municipality has a duty therefore to correct this situation.

- 9.21. Further concerns with the proposed plans and/or programmes include the fact that some of the measures included in the Municipality's plans have already proved ineffective or unsustainable⁵⁵ but no measures have been put forward to redress the identified deficiencies in the plans. Moreover, the Municipality has failed to immediately implement measures which would require minimal financial investment, such as the disconnection of illegal water connections.
- 9.22. In view of all the concerns raised above, the Commission is not satisfied that the Municipality has complied with its obligations to take reasonable measures to fulfil the right of its residents to sufficient water.
- 9.23. In terms of section 154 of the Constitution, National and Provincial Government is required to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their function", which includes the fulfilment of their obligations in terms of section 27(1)(b) of the Constitution. In the present case, other than pointing out what the Municipality has done wrong and what it needs to do to address its current challenges insofar as water access is concerned, there is no indication of what the Mpumalanga Provincial Government is doing to support and strengthen the capacity of the Municipality to fulfil its obligations insofar as water provision is concerned. The fact that the quantification of the water challenge at the Municipality by the Provincial Government and the Municipality differed (as evidenced by the differing submissions on the capacity challenges at the Municipality) point to a lack of an audit of the state of affairs, effective monitoring

⁵⁵ In this regard, the Anglo Water Reclamation Scheme is not performing at expected levels, whilst the sustainability of the Glencore Water Reclamation Scheme remains doubtful.

and support. The need for such actions are heightened in view of the fact that the Municipality was under administration less than 5 years ago. It is further concerning for the Commission that despite having been placed under administration in the recent past, the Municipality is still incapable of effectively running its affairs and fulfilling its constitutional obligations, in respect of the provision of water services. Of even greater concern to the Commission is the submission by the Municipality to the effect that the Provincial Government, through its human settlement development programme, is not effectively contributing to efforts to resolve the current water crisis⁵⁶. More is required therefore from the Provincial Government to effectively support and strengthen the capacity of the Municipality to manage its own affairs through close consultation, management of risk, needs identification, planning and monitoring.

9.24. If the Municipality continues to be in breach of its constitutional obligations, which include the provision of potable water, consideration may need to be given by the Provincial Government to once again intervening in terms of section 139 of the Constitution. Given the necessity of water in sustaining all life and human activities, the Provincial Government has a duty to take all steps necessary to ensure that the Municipality complies with its obligations in section 27(1)(b) of the Constitution and the WSA insofar as water provision is concerned. In this regard, the CESCR had the following to say about the importance of the right of access to water: "Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights."⁵⁷ This statement takes a far more significant and has particular impetus for urgency in the present context of the Covid 19 pandemic, where access to water may be the difference between life and death, particularly for the poor, who are most likely to have no access to water of a suitable quality or who may have insecure access to suitable water. The vulnerability of such persons is exacerbated by the lack of adequate water not only in respect of the COVID 19 virus, but to most threats to health occasioned

⁵⁶ See paragraphs 17.13.7 -8 of this report.

⁵⁷ Paragraph 1 of General Comment No. 15.

by disease and poor immune systems. In the current context of the COVID 19 pandemic, additional challenges exacerbate prevention controls as many people do not have ready access to tools and gear which assist in limiting the spread of the COVID 19 and other infections.

9.25. The DWS also has a duty, as the custodian of water resources in South Africa,⁵⁸ to ensure that this scarce resource is used optimally for the benefit of all. This duty entails in part ensuring that mining activities do not adversely impact on water security within the Municipality and that where this is the case, steps are urgently taken against the perpetrators to redress the problem. In this regard, the Municipality has complained that the DWS is not doing enough to safeguard water resources in the area, including underground water.

10. FINDINGS

10.1. In light of the above, the Commission makes the following findings:

10.1.1. The allegation of frequent water cuts and the unavailability of water in some parts of the Municipality for prolonged periods has been substantiated and accepted as fact.

10.1.2. The allegation of provision of polluted potable water in the Municipality is not substantiated on the evidence before the Commission and is therefore dismissed.

10.1.3. The frequent water cuts and the unavailability of water in some parts of the Municipality for prolonged periods amount to a breach of the Municipality's obligations in terms section 3 of the WSA and Regulations 3 and 4 of the National Water Standards Regulations and are consequently a violation of residents' right to have access to sufficient water enshrined in section 27(1)(b) of the Constitution.

⁵⁸ Section 3 of the National Water Act, No. 36 of 1998.

10.1.4. The Municipality's proposed plans for addressing the current water availability challenge fall far below what is required of the Municipality in terms of section 27(2) of the Constitution and sections 5 and 11 of the WSA in that they do not, amongst others, adequately address the needs of residents in the short term. Moreover, the proposed plans are inflexible, not properly financed and not geared towards responding to crisis situations.

10.1.5. The Provincial Government, as well as the National Government, through the DWS, have not done enough to support and strengthen the capacity of the Municipality to manage its affairs in so far as water provision is concerned, in breach of their obligations in terms of section 154 of the Constitution.

11. DIRECTIVES

11.1. In light of the findings set out in paragraph 10 above, the Commission makes the following directives:

11.1.1. In view of the threat that the lack of access to water currently poses on the health and life of residents in the context of the Covid 19 pandemic, the Municipality must, within 7 days of this report, confirm that all areas within its jurisdiction will receive a basic supply of water for the duration of the state of national disaster. The Municipality must further confirm the measures it will put in place to achieve this and to ensure places such as clinics have adequate supply of such water.

11.1.2. Within 90 days of this report, the Municipality must consider the findings made in the report, and in consultation with the relevant Provincial Departments and the Nkangala District Municipality ("**NDM**"), provide the Commission with a consolidated Council approved plan dealing with the following aspects:

- a) The steps it intends to take to comprehensively address the crisis of water availability within its jurisdiction in the short to long term.

The plan must prioritise the provision of basic water supply and make appropriate resource allocations for the implementation of the plan within the Municipality's maximum available resources. The plan must also consider the viability and sustainability of the existing water schemes.

- b) The steps it intends to take to recover revenue for water use. The revenue recovered must be ring-fenced and redirected towards the resolution of the current water crisis within the Municipality.

11.1.3. After the submission of the report referred to in paragraph 11.1.2 above, the Municipality must report to the Commission on a quarterly basis on the implementation of the plan submitted.

11.1.4. Within 90 days of this report, the Provincial Government (as directed by the Office of the Premier and COGTA as the case may be), must, in consultation with the Municipality and the NDM:

- a) Conduct an assessment of the impact of the human settlement development taking place at the Municipality on the current water access crisis at the Municipality, as well as report on the steps it intends to take to ameliorate the challenge.
- b) Conduct a holistic assessment of the Municipality's capacity (financial, human and technical) to fulfil its obligations insofar as water provision is concerned. To the extent that deficiencies have been identified, the Provincial Government, together with the Nkangala District Municipality, must provide the Commission with a time bound plan detailing the steps it will be taking to assist the Municipality to address each of the identified inadequacies or limitations. The Provincial Government and the Nkangala District Municipality must thereafter report to the Commission on a quarterly basis on the implementation of the proposed interventions.

11.1.5. Within 90 days of the report, the DWS must conduct an assessment of the impact of mining activities in the Municipality, insofar as water provision is concerned. To the extent that the assessment identifies adverse impacts in this regard, the DWS must detail the steps it is taking or intends to take to address the identified challenges. The DWS must thereafter report to the Commission on a quarterly basis on the progress made in addressing the identified challenges.

12. COMMENTS TO THE PRELIMINARY INVESTIGATIVE REPORT

- 12.1. The parties cited in the report were invited to submit their comments to the preliminary report in writing within 14 days of this report.
- 12.2. The Commission received comments only from DWS, the First Complainant and the Fourth Complainant.
- 12.3. In the comments received, the DWS repeated the submissions reflected in paragraph 7.11 above, whilst the First and Fourth Complainants merely advised of the challenges they continue to face insofar as water provision within the Municipality is concerned.
- 12.4. The comments received therefore did not have any material impact on the preliminary findings and directives made in this report.

SIGNED AT **JOHANNESBURG** ON THE **20TH** DAY OF **AUGUST 2020**.



Advocate M.S Ameermia
Commissioner
South African Human Rights Commission