



## **SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT**

File Ref. No.: FS/1213/0324

In the matter between:

**South African Human Rights Commission**

**Complainant**

(On Behalf of Henneman Residents)

And

**Matjhabeng Local Municipality**

**Respondent**

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### **REPORT**

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#### **1. Introduction**

1.1 The South African Human Rights Commission (hereinafter referred to as the "Commission") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "Constitution").

1.2 The Commission is specifically required to:

- 1.2.1 Promote respect for human rights;
- 1.2.2 Promote the protection, development and attainment of human rights;  
and
- 1.2.3 Monitor and assess the observance of human rights in the Republic.
  
- 1.3 Section 184(2) of the Constitution empowers the Commission to *investigate and report on the observance of human rights* in the country.
  
- 1.4 The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.
  
- 1.5 Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

## **2. Parties**

- 2.1 The Complainant in this matter is the South African Human Rights Commission (hereinafter referred to as "Complainant").
  
- 2.2 The Respondent is Matjhabeng Local Municipality, a municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated at One Reinet Street, Welkom (hereinafter referred to as "Respondent").
  
- 2.3 The Respondent is cited as the local government authority with jurisdiction over Henneman responsible for the delivery of basic municipal services to its residents.

### **3. Background to the Complaint**

- 3.1 On Monday, 21 January 2013, the attention of the Commission was drawn to a news broadcast by the South African Broadcasting Corporation (hereinafter referred to as the "SABC") which highlighted violent service delivery protests in Phomolong, Henneman, in the Free State Province.
- 3.2 The SABC news broadcast highlighted the plight of the residents of Phomolong and finally, their desperation in relation to service delivery in Phomolong.

### **4 Preliminary Assessment**

The Provincial Office of the Free State made a preliminary assessment of the complaint.

- 4.1 The Commission found that the Respondent's conduct amounted to a *prima facie* violation of the rights to dignity, a clean environment, the right to housing, access to health care services and access to information, contained in sections 10, 24 and 26, 27 and 32 of the Constitution.
- 4.2 The Commission further determined that the alleged violations fell within the mandate and jurisdiction of the Commission.
- 4.3 The Commission further determined that a full investigation be conducted by the Commission in terms of the Complaints Handling Procedures of the Commission.

## **5 Steps taken by the Commission**

### **5.1 Request for written response to allegations**

5.1.1 On Monday, 11 March 2013, the Commission sent an allegation letter to the Respondent setting out the observations of the Commission in regard to the media reports, the preliminary assessment of the Commission and an invitation for the Respondent to respond in writing to the allegations within 21 (twenty-one) days from date of same letter.

5.1.2 The Commission has to date not received any response from the Respondent.

### **5.2 Interviews conducted during the inspection *in loco***

5.2.1 On 20 February 2013, the Commission dispatched an investigator to conduct an inspection-in-loco of the municipality under review.

5.2.2 The Commission conducted interviews with members of the local police station in Henneman, the organisers of the protests and a random sample of residents of the Municipality to verify the accuracy of media reports.

#### **5.2.3 Interview with residents**

The residents of Henneman confirmed that they raised the following issues in the memorandum to the Mayor of Matjhabeng Local Municipality:

- a) **Poor state of roads** – the roads in the area are in a very bad state and become inaccessible when it rains;

- b) **Lack of decent sanitation & functioning sewer network** – residents alleged that pipes burst constantly and that the sewers have faeces in them which badly affect the health of the community. A senior citizen allegedly fell into the sewer and died. There are still over **1500** (one thousand five hundred) **bucket toilets** in Henneman. They further indicated that there is a very high level of tuberculosis in Phomolong which they attribute to the sewer and its unbearable smell.
- c) **Lack of access to healthcare services** - There is no hospital in Henneman and this is a grave infringement on the community's right to access health care services. Residents have to use one clinic which is only operational until four o'clock in the afternoon.
- d) **Lack of access to adequate housing** – Residents indicated that the Municipality had not allocated sites since around 1997 and there was congestion. To this end, people had placed themselves in an informal settlement to ease up the congestion that was in Phomolong. They also indicated that there was land that could be developed but that the Municipality had indicated that the land is used by a certain individual as a gliding site for his aeroplanes.
- e) **Vulnerable groups (Children)** – One of the residents who runs a Day Care Centre (crèche) of about 60 (sixty) children in Extension One in Phomolong, stated that the lack of decent sanitation in the area has resulted in the children at the crèche having to use only two bucket toilets. These toilets have no privacy and are not conducive for use by children. They are also not safe as a child can easily fall into the bucket, hence a

teacher always has to accompany and supervise a child who visits the toilet.

The crèche has a big hole into which the buckets are emptied because they cannot wait for the Municipality to empty them as they become full very quickly. They have employed a care taker who assists in emptying the buckets and ensuring that they are clean. There are toilets that have been built for the crèche but the Municipality never finished the project. Further, there is no water connection and so the toilets cannot be used.

They have complained to the Municipality about the problems they encounter with the bucket toilets and the Municipality has made promises on several occasions to come and try to fix the problem.

**f) Vulnerable groups (Older persons & Women)** – An elderly woman born in 1938 and who has resided in Phomolong all her life alleged that she has never had a flushing toilet; she uses a bucket toilet with a makeshift enclosure of dilapidated corrugated iron sheets. In around 2007, she had hopes that this unsanitary form of sanitation would end when the Municipality began a project of installing flushing toilets.

However, the project was never completed. The enclosures and the toilet were built and installed but the toilet was not connected to any pipes or sewer network, hence it cannot be used and she cannot afford to complete the project herself. The toilet enclosure can now only be used as a store room. She indicated that their roads are also very bad and when it rains they become completely inaccessible. For this reason, when it rains the Municipality does not collect the buckets and the

residents have to dig holes in their yards in order to empty the buckets.

She further indicated that they also have a problem with sewerage and that the streets are always full of sewerage from burst pipes and it smells horrible. When it rains and the buckets are full, the smell from both is unbearable.

g) **Ill-health** – Residents stated that they are constantly ill because of the smell of the sewerage and some have been diagnosed with tuberculosis due to the spillage and the stench from the sewer network.

h) **Informal settlement dwellers (Indigent)** – Residents stated that the municipality has failed to provide their informal settlement with basic municipal services since they occupied the area in 2005. To date, the area has not been formalized and they do not have any basic municipal services like refuse removal or sanitation notwithstanding their indigent status.

#### 5.2.4 **Interview with Healthcare workers at Phomolong Clinic**

A professional nurse who works at Phomolong Clinic, stated that since her tenure in June 2012, she has witnessed a high prevalence of tuberculosis and HIV infections despite awareness campaigns conducted by the Clinic. She attributes this to a high level of substance abuse in the community and socio-economic conditions in the area particularly those relating to lack of decent sanitation and clean environment.

She also highlighted the fact that the Clinic is extremely busy as there is no hospital in the area and stated that nurses are overworked as

even people from the neighbouring farms use that clinic, which closes at four in the afternoon.

### **5.3 Physical Inspection**

5.3.1 On 20 February 2013, the Free State Office dispatched an investigator to conduct an inspection *in loco* in Phomolong, Henneman.

### **5.4 Evidence collected during investigation**

#### **Response of the Municipality's Unit Manager, Mr Atolo, during an interview conducted during the inspection *in loco***

During the Inspection *in loco*, the Commission's investigator managed to interview the Unit Manager of the Municipality, Mr Atolo, and he addressed some of the allegations as follows:

5.4.1 **Sites & Housing allocation**— The municipality allocated sites to residents of Phomolong in 2005 when the Municipality bought the land called 'Bokamoso' for residential sites. The Municipality is waiting for the Provincial Office to allocate funds for a survey to be conducted and to establish the area as a township, which establishment is the prerogative of the Department of Cooperative Government and Traditional Affairs (COGTA). The Municipality still awaits funding so that they can engage service providers to begin work.

5.4.2 **Roads** — Mr Atolo conceded that the roads are not in good condition because the soil is clay soil, and therefore whenever it rains the roads become inaccessible. He also agrees that the Municipality is unable to collect buckets when it rains due to the inaccessibility of the roads.



He stated that the challenge is that all six (6) towns falling under the Matjhabeng Municipality share resources, hence when there is a problem in Henneman, they have to wait for the town that has the resources to complete what they are doing.

He indicated however, that the Municipality has completed 75% of its work on roads and that they are embarking on a project of paving roads in Phomolong.

- 5.4.3 **Sanitation** –In around 2005/6, the bucket eradication programme began in Henneman, but it encountered problems at various levels because contractors did not do a proper job. The enclosures were completed and some toilets were connected but the problem is that whenever someone flushes the sewerage within the township and there is no proper outflow, hence the pipes constantly burst. This is the primary reason why there is a sewerage problem in Phomolong.
- 5.4.4 The Programme Management Unit (PMU) was responsible for this project and they indicated that the problem was due to lack of an outfall sewer that goes to the pump station, when people flush their toilets it goes through the township and has no way of reaching the pump station.
- 5.4.5 The Municipality has employed an interim solution to this problem in that they use a honey sucker which sucks the spillage in the township. This is, however, only a provisional measure.
- 5.4.6 The PMU has indicated that they applied for additional funding in 2010 which application was only approved in early 2013. A contractor has already been chosen, and once funds have been allocated and approved

the contractor will begin work. The PMU also endeavours to eradicate the bucket toilets.

5.4.7 **Healthcare services** – Mr Atolo confirmed that there is no hospital in Henneman, with the nearest hospitals being in Virginia and Welkom, and yet the Clinic in Henneman closes at four in the afternoon, hence the residents request that the Clinic at the very least be a twenty four hour clinic. Mr. Atolo however, indicated that this was the prerogative of the Department of Health.

5.4.8 **Schools** – Mr. Atolo indicated that he could not respond to this as schools are the prerogative of the Department of Education.

5.4.9 **Public Participation** – Mr. Atolo indicated that there are ward councillors who call monthly community meetings. He also indicated that they had recommended the establishment of the Henneman Community Development Forum which would comprise of various government departments, other stakeholders and non-governmental organizations. The purpose of this forum will be to have structured interaction to ensure a relationship with various government departments, non-governmental organizations, the municipality and the community in an effort to foster good communication practices, and find amicable solutions to the challenges facing Henneman.

## **5.5 Evidence collected during the Inspection in Loco**

5.5.1 There are patent levels of unemployment in the area, with many residents living off social grants.

5.5.2 Many residents are infected with tuberculosis.

5.5.3 The roads are in a very bad state and it is clear that they are not being properly maintained.

5.5.4 People who have settled themselves in the informal settlement do not have any basic municipal services.

5.5.5 There are times when the buckets are not collected on time and this consequently leads to the residents having to dig holes in their yards to dispose of the faeces, this is demeaning, an insult to their dignity and unsanitary and unhealthy.

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



**IMAGE 1: Photographed at Phomolong on 20 February 2013.**

*Residents of Phomolong are still subjected to the indignity of using bucket system toilets which is very unsanitary and unhealthy.*



**IMAGE 2: Photographed at Phomolong on 20 February 2013.**

*This project was never completed; toilet enclosures were built, the toilet fixtures were installed but the toilets were never connected to water pipes, hence these enclosures are just used as storage rooms.*



**IMAGE 3: Photographed at Phomolong on 20 February 2013.**

*Residents are forced to dig holes in their own yards to dispose of the contents of the buckets when the Municipality is unable to collect the buckets.*



**IMAGE 4: Photographed at Phomolong on 20 February 2013.**

*The sewer smells horrible and it keeps on getting worse, people fall into the filth and a member of the community has died from falling into one such sewer.*

## **6. Applicable Legal Framework**

### International instruments

#### **International Covenant on Economic, Social and Cultural Rights<sup>1</sup>**

Article 2(1) explains the nature of the obligation resting on states parties with regard to the provision of socio-economic rights, highlighting that minimum core and progressive realisation are hallmarks of this obligation, while provision of the rights is subject to the state's available resources.

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<sup>1</sup> 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 18 June 2013].

Article 11 enshrines the right of everyone to an adequate standard of living, which includes accessibility and availability of adequate housing, food and clothing. The rights to water and sanitation – being vital aspects of an 'adequate standard of living' – are clearly governed by this Article.

Article 12 recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. For such a right to be achieved, it is apparent that access to health care services is of primary importance.

While South Africa has not ratified the Covenant it is a signatory State, and the Government of South Africa can therefore not act in a manner that is contrary to spirit of this Covenant.

**United Nations Committee on Economic, Social and Cultural Rights:  
General Comment No. 4 – The right to adequate housing (1991)**

The right to housing applies to everyone, incorporating both an individual right and that of the family. The right must be interpreted broadly so as to cover a form of shelter which provides for security, peace and dignity rather than a simple cover over one's head. This is consistent with both the general principles of the Covenant – including the right to dignity – and the centrality of the attainment of the right to housing for the provision of other rights.

The requirement that the housing be *adequate* gives content to the right to housing, in providing for a minimum standard which includes legal security of tenure over one's shelter which protects against forced eviction, harassment and other threats; availability of services, materials, facilities and infrastructure; affordability of the housing so as not to compromise the satisfaction of other basic needs and rights; habitability; and accessibility (including adequate access for disabled persons).

The States parties' duty to provide for this right includes ensuring that housing policies and resources are directed towards disadvantaged and impoverished, and thus vulnerable, communities.

## **United Nations Declaration on Human Settlements<sup>2</sup>**

The United Nations Declaration on Human Settlements entreats signatories thereto to commit themselves to:

- a) Ensuring adequate shelter for all and making sustainable human settlements safer, healthier and more liveable, equitable, sustainable and productive;
- b) Recognising the particular needs of women, children and youth for safe, healthy and secure living conditions;
- c) Intensifying efforts to eradicate poverty and discrimination, promoting and protecting human rights and fundamental freedoms for all, and providing for basic needs, such as education, nutrition and life-span health care services and adequate shelter for all;
- d) Improving the living conditions in human settlements in ways that are consonant with local needs and realities, and ensuring full and equal participation of all women and men and the effective participation of youth in political, economic and social life; and
- e) Promoting full accessibility for people with disabilities, as well as gender equality in policies, programmes and projects for shelter and sustainable human settlement development.

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<sup>2</sup> Istanbul Declaration on Human Settlements, available online at [www.unhabitat.org](http://www.unhabitat.org) [accessed 18 June 2013].



## **United Nations Committee on Economic, Social and Cultural Rights: General Comment No. 15 – The right to water (2003)**

The Committee gave content to the right to water in the following manner:

“The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”<sup>3</sup>

Moreover, it was held that the right “contains both freedoms and entitlements”. The freedoms include “the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference”, while the entitlements refer to “the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.”<sup>4</sup>

The Committee recommended that before any action that interferes with the right of access to water is carried out by the State or any third party, the relevant authority must ensure that such actions are performed in a manner warranted by law.

The Committee highlighted the fact that this right is enjoyed without discrimination,<sup>5</sup> and that States parties must specifically ensure that traditionally disadvantaged and marginalised persons are empowered to exercise their right to water.<sup>6</sup>

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<sup>3</sup> Para 2.

<sup>4</sup> Para 10.

<sup>5</sup> At para 13.

<sup>6</sup> At para 16.

## **United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation<sup>7</sup>**

The General Assembly adopted a resolution calling on all states to provide safe, clean, accessible and affordable drinking water and sanitation for all.

## **Convention on the Rights of the Child<sup>8</sup>**

Article 24(1) of the Convention recognises “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”, and compels States parties to ensure access to such services and facilities.

Article 24(2) obliges States parties to “combat disease and malnutrition . . . through the provision of adequate nutritious foods and clean drinking-water.”

More generally, Article 27 enshrines “the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.” This encompasses the necessary living conditions for the child’s development, as well as State support programmes with regard, inter alia, to housing.

## **The Rio Declaration on Environment and Development<sup>9</sup>**

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

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<sup>7</sup> Resolution 64/292.

<sup>8</sup> 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 18 June 2013].

<sup>9</sup> UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

## **The World Summit on Sustainable Development: Plan of Implementation<sup>10</sup>**

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

The Plan also states that in order for States to reverse the current trend in natural resource degradation, states must implement strategies, including targets, to protect ecosystems and to achieve integrated management of natural resources. To achieve this:

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

### Regional instruments

#### **The African Charter on Human and People's Rights<sup>11</sup>**

Article 16 enshrines the right of every individual to the best attainable state of physical and mental health, which compels States parties to ensure both the protection of one's health as well as access to medical attention when sick.

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<sup>10</sup> 2002.

<sup>11</sup> 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 18 June 2013].

### **Constitution s 1(a)– Foundational values**

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

### **Constitution s 7(2) – Obligation on the State**

This section requires the State, in this matter the Respondent, to respect, protect, promote and fulfill all fundamental rights enshrined in the Bill of Rights.

### **Constitution s 10 – The right to human dignity**

Section 10 recognises the right of everyone to have their inherent dignity respected and protected. A lack of access to decent sanitation is inherently degrading, and undermines one's human dignity.

### **Constitution s 24 – Environmental rights**

Section 24(a) provides that '[e]veryone has the right to an environment that is not harmful to their health or well-being', while s 24(b) recognises the right to have one's environmental protected through reasonable legislative and other measures, including those that prevent pollution and ecological degradation.

Article 24 recognises the right of all peoples to a general satisfactory environment favourable to their development.

### **African Children's Charter (1990)**

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

### **South African Development Community Protocol on Health (1999)**

A particularly relevant provision of this Protocol is Article 23, which states as follows:

"State parties shall collaborate, co-operate and assist each other in a cross-sectoral approach in addressing regional environmental health issues and other concerns, including toxic waste, waste management, port health services, pollution of air, land and water, and the degradation of natural resources."

### Constitutional framework

The preliminary assessment of the Free State Provincial Office of the Commission indicated that the rights alleged to have been violated are **sections 10 (right to dignity), 24 (right to an environment that is not harmful), 26 (right to housing), 27 (right of access to health care services) and 32 (right of access to information) of the Constitution of the Republic of South Africa.** Each of these rights is discussed hereunder, in turn.

### **Constitution s 26 – The right to housing**

Section 26(1) enshrines the right of all individuals to have access to adequate housing, with s 26(2) compelling the State to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

### **Constitution s 27 – The right to health care**

This provision recognises the right of everyone to have access to, inter alia, health care services, with the State required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation thereof.

### **Constitution s 32 – The right of access to information**

Section 32 provides that everyone has the right of access to information, both that which is held by the State and that held by another person which is required for the exercise or protection of any rights.

### **Constitution s 139 – Duties of the municipality**

Section 139(1) provides that “[w]hen a municipality cannot or does not fulfill an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including –

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

### **Part B Schedule 4 of the Constitution – Local government responsibilities**

This provision mandates that local government is responsible for “water and sanitation services limited to portable water supply systems and domestic waste-water and sewerage disposal.”

#### Legislative framework

### **Housing Act 107 of 1997**

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

- a) “[P]ermanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- b) portable water, adequate sanitary facilities and domestic energy supply.”

Section 2 of the Act sets out the general principles applicable to housing development. They provide that national, provincial and local spheres of government must *inter alia*:

- c) give priority to the needs of the poor in respect of housing development; and
- d) promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions.

Section 9 of the Act requires that every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy *inter alia* to:

- e) ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- f) ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are removed;
- g) ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner that is economically efficient;
- h) set housing delivery goals in respect of its area of jurisdiction;
- i) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.



### **The Development Facilitation Act 67 of 1995**

This Act was introduced to fast track low-income housing developments. It is one of a few routes available for land use planning and development in South Africa. The Act creates two separate bodies responsible for land use planning in the same area.

### **The Less Formal Township Establishment Act 113 of 1991**

This Act provides for shortened procedures for land development and township establishment. In terms of the Act, the decision-making authority lies with the Provincial government.

### **Water Services Act 108 of 1997**

The Act defines *basic sanitation* as “[t]he prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households.”

*Basic water supply* is defined as the “prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.”

Section 3 of the Act provides that everyone has a right of access to basic water supply and basic sanitation. The provision establishes, inter alia, the following rights and obligations in respect of access to basic water supply and basic sanitation:

- a) everyone has a right of access to basic water supply and basic sanitation.

- b) Every water services institution must take reasonable measures to realise these rights.

This is, however, qualified by Regulation 2 of the Regulations relating to Compulsory National Standards and Measures to Conserve Water.<sup>12</sup>

Section 5 of the Act states that:

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

### **The National Health Act 61 of 2003**

The Act came into force in May 2005 and is the most important piece of legislation that helps to implement the constitutional right to health, giving clear and overall direction on such rights. Some of the aims of the National Health Act are to:

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

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<sup>12</sup> Published under GN R509 in GG 22355 of 8 June 2001.

## **The National Environmental Act 107 of 1998**

The Act states that the interpretation of any law concerned with protecting and managing the environment must be guided by its principles, at the heart of which is the principle of sustainable development. Consequently, organs of state must evaluate the social, economic and environmental impact of activities that may significantly affect the environment.

The Act also seeks to protect the environment by:

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

## **Local Government: Municipal Systems Act 32 of 2000**

The Act defines *basic municipal services* as:

“A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.”

Section 73(1) of the Act states that a municipality must give effect to the provisions of the Constitution and:

- a) give priority to the basic needs of the local community;
- b) promote the development of the local community; and
- c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

Sections 106 and 107 are relevant to the extent that they deal with provincial and national monitoring.

Section 106 provides that if an MEC has reason to believe that a municipality in the province cannot or does not perform a statutory obligation binding on that municipality, or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must:

- d) "by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or
- e) if the MEC considers it necessary, designate a person or persons to investigate the matter."

Section 107 states that "[t]he Minister, by notice in the Gazette, may require municipalities of any category or type specified in the notice, or of any other kind described in the notice, to submit to a specified national organ of state such information concerning their affairs as may be required in the notice, either at regular intervals or within a period as may be specified."

### **Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)**

Section 28(1) of the Act directs that municipalities may revise and approve their annual budget through an adjustments budget.

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

### **Promotion of Access to Information Act 2 of 2000**

This Act protects and upholds the rights of people to access information, and seeks to enhance the transparency, accountability and effectiveness of government. Public bodies are obliged to give information needed to the public in order to facilitate the

process of enabling people to exercise the rights that are enshrined in the Constitution.

#### Regulatory framework

### **Regulations Relating to Compulsory National Standards and Measures to Conserve Water<sup>13</sup>**

These Regulations provide that the minimum standard of basic sanitation service is:

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

In terms of Regulation 3, a municipality is obliged to provide each resident with access to at least 25 litres per day at a water user connection within 200 metres of each of the residents' households.

#### Policy framework

### **White Paper on Water**

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

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<sup>13</sup> Supra.

<sup>14</sup> Department of Water Affairs and Forestry, October 2002.

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

### **National Sanitation Policy<sup>15</sup>**

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

The policy lists the main types of sanitation systems used in South Africa, namely:

- a) Traditional unimproved pits;
- b) Bucket toilets;
- c) Portable chemical toilets;
- d) Ventilated Improved Pit toilets;
- e) Low flow on-site sanitation (LOFLOS);
- f) Septic tanks and soakaways;
- g) Septic tank effluent drainage (solids-free sewerage) systems; and
- h) Full water-borne sewerage.

### **White Paper on Basic Household Sanitation<sup>16</sup>**

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

- a) Developing norms and standards for the provision of sanitation;
- b) Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;

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<sup>15</sup> Department of Water affairs and Forestry, 1996.

<sup>16</sup> Department of Water Affairs and Forestry, 2001.

- c) Coordinating the development by the municipalities of their Water Services Development Plans as a component of their Integrated Development Plan;
- d) Monitoring the outcome of such programmes and maintaining a database of sanitation requirements and interventions;
- e) Providing capacity building support to provinces and municipalities in matters relating to sanitation;
- f) Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
- g) Undertaking pilot projects in programmes of low cost sanitation.

### **White Paper on Health<sup>17</sup>**

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

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

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<sup>17</sup> White Paper on the Transformation of the Health System, 1997.

- f) Recognise the need to increase access to services by making primary health care services available to all people;
- g) Give special attention to health services reaching people most in need of these services – the poor, the elderly, women and children;
- h) Promote the participation of community structures in health care delivery.

### Strategic framework

#### **The Strategic Framework for Water Services<sup>18</sup>**

This Framework defines a basic sanitation facility as:

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

It further defines a basic sanitation service as:

“The provision of a basic sanitation service facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices.”

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<sup>18</sup> Department of Water Affairs and Forestry, 2003.



## **Free Basic Sanitation Implementation Strategy<sup>19</sup>**

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

### Applicable sector codes

## **The National Housing Code<sup>20</sup>**

The National Housing Code was adopted in terms of s 4(6) of the Housing Act. The provisions of the Code are binding on all three spheres of government.

The central objective of the National Housing Code is to encourage the development of social capital by supporting the active participation of communities in the design, implementation and evaluation of projects. In this regard, the Code places certain injunctions on service delivery agents, stating that:

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

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<sup>19</sup> Department of Water Affairs and Forestry, April 2009.

<sup>20</sup> The National Housing Code, Technical and General Guidelines (Vol 2) 2009.

## Programmatic framework

### **The Upgrading of Informal Settlements Programme (UISP)<sup>21</sup>**

This Programme is published in terms of section 3(4)(g) of the Housing Act and contained in the National Housing Code, and was established by the Department of Housing in 2004 as part of its Breaking New Ground Policy Document. The broad objectives of the programme are to facilitate access to basic services, transform communities through upgrading and to engender local economic development through the improvements in infrastructure.

The Programme is the mechanism whereby municipalities and provinces can implement upgrading projects in informal settlements. The Programme provides that informal settlements are to be upgraded *in situ* in partnership with the residents thereof, in order to establish sustainable human settlements.

The Programme identifies the following characteristics of an 'informal settlement':

- a) Illegality and informality;
- b) Inappropriate locations;
- c) Restricted public and private sector investment;
- d) Poverty and vulnerability; and
- e) Social stress.

The Programme is therefore applicable to all settlements that demonstrate one or more of the above characteristics.

The upgrading of informal settlements must be effected in collaboration with the residents thereof. Thus the Programme provides as follows:

"In order to ensure that community members assume ownership of their own development and project, the involvement of the community from the onset is key. Hence community participation should be undertaken within the context of a structured agreement between the municipality and the community."

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<sup>21</sup> Breaking New Ground Policy Document, Department of Housing, 2004.

The Programme recognises that many informal settlements are situated on privately owned land and that often the first step in an upgrading project will be the acquisition of such land. Thus the Programme provides that funding is available and may be obtained for “the acquisition of land, where the land to be developed is in private ownership, through negotiation or expropriation.”

The Programme makes provision for a comprehensive, fully costed, four-phase process for the upgrading of informal settlements.

The Programme makes provision for the installation of both interim services and permanent municipal engineering services. The Programme states that “where interim services are to be provided it must always be undertaken on the basis that such interim services constitute the first phase of the provision of permanent services.”

Relevant case law

**Regional case law**

***Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) – The rights to health and an environment***

In dealing with an alleged violation of the rights to health and environment contained in the African Charter, the African Commission on Human and Peoples Rights held that:

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

“The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take

reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the ICESCR . . . requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a generally satisfactory environment favourable to development (article [24]) already noted, obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventionist conduct from the state; for example, to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual."<sup>22</sup>

***Purohit and Another v The Gambia (2003) AHRLR 96 (ACHPR 2003) – The right to health and health care***

In this decision, the Commission gave content to the right to health (in the context of access to health care service for mentally ill patients) in the following manner:

"Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind."<sup>23</sup>

The Commission nevertheless applied this right in the greater context of African states, and accordingly made the following qualification:

"The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African

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<sup>22</sup> Paras 51-52.

<sup>23</sup> Para 80.

countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into article 16 [of the African Charter] the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind."<sup>24</sup>

### **Domestic case law**

#### ***S v Makwanyane and Another* 1995 (3) SA 391 (CC) – The right to human dignity**

In this seminal case the Constitutional Court, when dealing with the constitutionality of the death penalty, observed as follows:

"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."<sup>25</sup>

#### ***NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) – The right to human dignity**

In this matter, dealing with an alleged violation of the claimants' dignity, the Constitutional Court held that "[a] constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of

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<sup>24</sup> Para 84.

<sup>25</sup> Para 329.

oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom.”<sup>26</sup>

The Court held further that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. In this regard, reference was made to the following dictum from the matter of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35:

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

***Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) – The right to housing**

This matter was the first in which the Constitutional Court thoroughly addressed, interpreted and applied the constitutional right to housing.

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<sup>26</sup> Para 49.

The Court highlighted the differences between Constitution s 26 and the relevant international law provisions, particularly Articles 2(1) and 11(1) of the ICESCR, noting that:

- The Constitution provides for the right of *access* to adequate housing, while the ICESCR provides for a right to adequate housing
- While the Constitution obliges the State to take 'reasonable legislative and other measures', the ICESCR requires states parties to take 'appropriate steps' which must include legislation.<sup>27</sup>

The Court held that the determination of a minimum core which constitutes the State's obligation in respect of a particular right cannot be done without assessing the needs and opportunities for the enjoyment of that right, which will vary in different areas due to the prevalence or absence of relevant factors.<sup>28</sup> As the Court does not have access to sufficient information upon which to make the determination as to what constitutes a minimum core, it is held that it will be unable to do so. Rather, the appropriate question in the South African context is "whether the measures taken by the State to realise the right afforded by s 26 are *reasonable*."<sup>29</sup>

In interpreting Constitution s 26, the Court held that subsections 1 and 2 (identifying the existence and scope of the right and the State's obligations in that regard) must be read together, with s 26(1) imposing a negative obligation which must also be read with subsection 3 (protection from eviction, demolition etc). Moreover, the expansion of the ICESCR right to adequate housing to encompass *access* to adequate housing recognises the broader context in which the right must be realised (i.e. the right does not just require the provision of shelter). State policy in terms of access to adequate housing must ensure the provision of the right for both those who can afford housing and those who cannot, and are thus most vulnerable, and must take the particular context of the community into account when providing for

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<sup>27</sup> Para 28.

<sup>28</sup> Para 32.

<sup>29</sup> Para 33.

the right and determining what appropriate (and thus reasonable) provision would constitute.<sup>30</sup>

The Court held that s 26(2) imposes a positive – but not unqualified – obligation on the State, namely:

1. To take reasonable legislative and other measures<sup>31</sup>

This incorporates the need to clearly allocate responsibilities to all relevant spheres of government in accordance with their general duties in the provision of services and amenities, and provide adequate financial support to each sphere. In particular, the national sphere must determine the national housing policy, with each sphere implementing that policy accordingly.

The primary determinant of the lawfulness of the State's conduct in this regard is the reasonableness of the content of the measure imposed by and adopted in accordance with the policy; "a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable". Moreover, the Court held that mere legislation is insufficient as the requirement provides for 'other' measures as well, which includes "appropriate, well-directed policies and programmes" to support the legislative measures adopted, which must also be reasonable both in their conception and their implementation.

In assessing reasonableness, the particular context of the housing policy must be considered in order to determine the capacity of the implementing entities. Furthermore, the context of the Bill of Rights as a whole is relevant, in particular the interconnectedness of the right to housing and other rights therein in light of the foundational principles (including human dignity).

2. To achieve the progressive realisation of the right<sup>32</sup>

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<sup>30</sup> Paras 34-38.

<sup>31</sup> Paras 39-44.

<sup>32</sup> Para 45.



This requirement stipulates the extent and content of the State's obligation. In particular, the interpretation of the phrase 'progressive realisation' is appropriate and relevant to South Africa's constitutional framework.

### 3. Within available resources<sup>33</sup>

Both the content of the obligation and the reasonableness of the measures undertaken by the State are determined with the regard to the State's available resources.

Consequently, s 26 of the Constitution requires that the Government "establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means."<sup>34</sup>

### ***Beja and Others v Premier of the Western Cape and Others Case No. 21332/2010 (CPD) – Content of the rights to housing, dignity and privacy***

In this matter the Western Cape High Court held that:

"Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with Section 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity."<sup>35</sup>

Erasmus J held further that s 73(1)(c) of the Municipal Systems Act requires a municipality to provide the "minimum level of basic services", which includes the provision of sanitation and toilet services. He found that there was a violation of rights in terms of sections 10 (human dignity), 12 (freedom and security of the person), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution.<sup>36</sup>

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<sup>33</sup> Para 46.

<sup>34</sup> Para 41.

<sup>35</sup> Para 147.

<sup>36</sup> Paras 142-143.

The High Court then undertook a thorough analysis of both the rights to dignity and privacy in the context of the provision of unenclosed toilets to the poor, concluding that:

“The City’s decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents with respect and care for their dignity was not taken into account when the City decided to install the unenclosed toilets.”<sup>37</sup>

***Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) – ‘Public law right’ to basic municipal services***

In this matter the Constitutional Court read sections 152 and 152 of the Constitution alongside the provisions of the Municipal Systems Act and the Housing Act to find that a “public law right to basic municipal services” existed, which imposed a duty on local government to provide such services.

***Mazibuko and Others v The City of Johannesburg and Others 2010 (4) SA 1 CC – The right to water***

In this case the Constitutional Court assessed, interpreted and applied the right of access to sufficient water contained in s 27(1)(b) of the Constitution.

The Court first outlined the content of the right of access to sufficient water (s 27(1)(b)), holding that the constitutional provision in which it is enshrined must be read alongside the qualification of the state’s obligation in that regard (s 27(2)).<sup>38</sup> Consequently, “it is clear that the right does not require the State upon demand to provide every person with sufficient water without more; rather it requires the State

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<sup>37</sup> Para 146.

<sup>38</sup> Para 49.

to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.”<sup>39</sup>

However, the Court itself is not well-placed to determine the actual quantity of water required to meet the State’s obligations in this regard; in any event, any such quantification would be too static to constitute sufficient protection of the right. The appellant’s argument for a quantification of the right to water therefore failed.<sup>40</sup> Rather, the test for whether the State has met its obligations is focused on the reasonableness of its conduct.<sup>41</sup>

***Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4 (CC) – Environmental rights and the principle of sustainable development***

In this matter, the Constitutional Court gave content to Constitution s 24, and particularly the principle of sustainable development, in the following manner:

“The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ‘ecologically sustainable development and use of natural resources while promoting justifiable economic and social development’. Sustainable

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<sup>39</sup> Para 50.

<sup>40</sup> Paras 51-60.

<sup>41</sup> Para 66.

development and sustainable use and exploitation of natural resources are at the core of the protection of the environment."<sup>42</sup>

## **7. Analysis**

### **7.1 Access to Information**

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

7.1.2 There was nothing gleaned during the course of investigations that suggested that the Respondent had included active community participation in the project, the project was, for all intents and purposes, not a transparent one.

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

7.1.4 In terms of the MFMA, a municipality must consult communities and present the budget available to undertake specific projects. The budget

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<sup>42</sup> Para 45.

must be presented through the Medium Term Expenditure Framework(MTEF) process, where there is an agreement as to how many toilets can be built to completion over a period of time. The fact that toilets remained inadequate and dysfunctional for a lengthy period is an indication that the Respondent neither consulted nor used the multiyear planning framework on service delivery.

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

7.1.6 PAIA compels the Respondent to make available information on its decisions relating to all aspects of the process, including tenders, as well as informing the community of how they can access such information. In this sense, residents are not only able to participate meaningfully in the Respondent's project, but are also able to hold the Respondent accountable.

7.1.7 In this instance, the residents of Phomolong advised the Commission's investigators that they do not know anything about the project, including having no information on the project's budget.

7.1.8 Based on the Respondent's failure to share information and consult with the community, the Commission finds no justification for the Respondent's actions.

7.1.9 It is therefore the finding of the Commission that the right of the residents to access information has been violated.

## 7.2 **Health & Environmental rights**

7.2.1 The health risks posed by the above situation, particularly to vulnerable groups with weak immune systems, are extremely serious. This situation is exacerbated by the fact that most people experiencing these conditions have very little means of combating diseases such as diarrhoea which result from the unhygienic bucket toilets system.

7.2.2 The fact that the residents of Phomolong constantly have to dig holes in their yards to dispose of human waste constitutes a failure by the State to fulfill its obligation to progressively realise the right of citizens to adequate sanitation. Moreover, this poses a serious threat to the residents' health.

7.2.3 Residents of Phomolong are forced to live in an area where the smell is unbearable due to a leaking sewer in the streets. They are also constantly ill because the environment is not clean.

7.2.4 The Water Services Act is explicit that the prescribed minimum standard of basic sanitation services is for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewerage from households, including informal settlements.

7.2.5 The Respondent has clearly not complied with the Water Services Act in that their actions or lack thereof fall short of the provisions of the Water Service act in that they have failed to provide the minimum standard of basic sanitation.

7.2.6 Residents of the Informal Settlement try to keep the area clean by themselves, there are no roads and the services are very limited, hence it is difficult to keep their area clean. Further, the fact that the residents have to dig holes in their yards to dispose of waste material, including human waste, violates their right to a clean environment.

### 7.3 **Consultation and Community Participation**

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

7.3.2 Such community participation must therefore be initiated at the time of inception of project plans, and sustained through both implementation and evaluation of such projects. A municipality must demonstrate that effective and interactive community participation has taken place in the planning, implementation and evaluation of a project.

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

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

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

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

- a) preparing, implementing and reviewing its integrated development plan;
- b) establishing, implementing and reviewing its performance management system;
- c) monitoring and reviewing of its performance, including the outcomes and impact; preparing its budget; and
- d) strategic decisions relating to the provision of municipal services.

7.3.7 The Commission has serious reservations about whether any of the obligations listed above have been met.

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



information sharing in the country and is meant to promote public participation.

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

#### 7.4 **Dignity**

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

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

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

*"Respect for human dignity is the unifying constitutional principle that is not only particularly diverse, but extremely unequal. This implies that the Bill of*

*Rights exists not to simply ensure that the 'haves' continue to have but to help create conditions in which the basic dignity of the 'have nots' can be secured.*<sup>43</sup>

(c) When observed along a continuum, the state's obligation to progressively realize socio-economic rights starts with the minimum socio-economic provision necessary to meet a person's basic needs, being the minimum obligation. The full realisation of this obligation – and thereby of the rights concerned – culminates in the capabilities of people in society to meaningfully participate and shape society. This implies that persons are not only passive recipients but active participants in society and it is through this process that true empowerment, active participation and social cohesion will occur. The manner in which the Respondent rendered a basic service to the affected community is contrary to the Commission's understanding of such progressive realisation.

## 7.5 **Housing**

7.5.1 The Complainant further alleges a violation of the right to housing, on the basis that the area has not been developed, residents still live in shacks with no proper housing and the Municipality has not provided sites since about 1997.

7.5.2 In the *Grootboom* case, the Constitutional Court stated at paragraph 82 that:

*"All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirement of Section 26 of the Constitution. Every step at every level of government must be consistent*

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<sup>43</sup> Sachs, A, *The Strange Alchemy of Life and Law* (2009) Oxford University Press.

*with the constitutional obligation to take reasonable measures to provide adequate housing.”*

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

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

*(a) Conduct socio-economic surveys to determine population growth, the housing needs and the housing backlog including compilation of a housing waiting list;*

*(b) Submit housing needs to the Province;*

*(c) Help applicants in filling housing subsidy application forms;*

*(d) Inspect buildings, including the laying out of foundations, installation of infrastructural services and the construction of houses;*

*(e) Manage the implementation of the housing sector plan;*

*(f) Establish and manage a complaint system; and to*

*(g) Promote, where feasible, on-site housing redevelopment of informal settlements.*

## **7.6 Obligations and Responsibilities of National and Provincial Government**

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

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

## **8. Findings**

Based on the investigation conducted by the Commission and the analysis of the constitutional rights, case law, applicable legislation and general legal framework, the Commission finds that:

- 8.1 The Respondent failed to adequately conceptualize, plan and implement its project, which resulted in the residents being forced live in an undeveloped area with no municipal services and infrastructure;
- 8.2 The Complaint of violations of the rights to human dignity, privacy, a clean environment, housing, health children, and access to information are upheld; and

- 8.3 The provincial and national government departments have not adequately monitored the work of the Respondent or intervened in respect of their legislative and Constitutional obligations.

## 9. Recommendations

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

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

Accordingly, the Commission recommends that:

- 9.1 The Respondent is required to complete the installation of toilets in Phomolong to allow for proper usage and enable the residents to have their right to dignity protected and their basic sanitation needs met.
- 9.2 The Respondent is required to provide a proper system of waste removal that has a proper outfall sewer thus ensuring that people are able to flush their toilets without the waste running into the streets.
- 9.3 To this end the Respondent is required to:
- 9.3.1 Furnish the Commission with a progress report at least every six (6) months from the date of this finding; and further to,

- 9.3.2 Furnish the Commission with a progress report at least every three (3) months in respect of the progressive realisation of the right to water and sanitation services in Henneman, Phomolong.
- 9.4 The report to the Commission must demonstrate the following:
- 9.4.1 The Respondent's implementation and budgetary plans;
- 9.4.2 Interim measures for the provision of sanitation to the residents;
- 9.4.3 The manner in which it has identified and responded to the rights of vulnerable groups such as women, children and people with disabilities.
- 9.5 The Respondent is required to provide the Commission with the framework stipulating the manner in which meaningful and ongoing consultation with the community will be undertaken. To this end, the Respondent is directed to furnish the Commission with the minutes of every community meeting held at least every three (3) months in respect of development in the municipality relating to access to water and decent sanitation services.
- 9.6 The Free State Provincial Department of Cooperative Governance and Traditional Affairs together with the Department of Human Settlements are directed to provide the Commission with a report and a detailed plan on strategies intended to deal with challenges, as well as a report outlining clear time-frames for the resolution of the municipality's operational and capacity

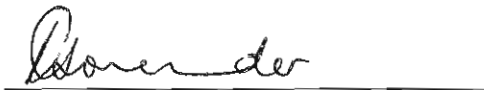
shortcomings. The report should be furnished to the Commission within three (3) months from date of this finding.

**11. APPEAL**

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

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

SIGNED AT JOHANNESBURG ON THIS THE 18TH DAY DECEMBER  
OF 2013.



Deputy Chairperson

Pregs Govender

**South African Human Rights Commission**

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