



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: NW/2009/0036

In the matter between:

George Mkhwanazi

Complainant

(On behalf of the residents of Klipgat C)

And

Madibeng Local Municipality

Respondent

REPORT

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

1. Introduction

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

- 1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as "*state institutions supporting constitutional democracy*".
- 1.3. The Commission is specifically required to:
 - 1.3.1. Promote respect for human rights;
 - 1.3.2. Promote the protection, development and attainment of human rights; and
 - 1.3.3. Monitor and assess the observance of human rights in the Republic.
- 1.4. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 1.5. Further, section 184(2) (c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.
- 1.6. The Human Rights Commission Act, 54 of 1994, further supplements the powers of the Commission.
- 1.7. Section 9(6) of the Human Rights Commission Act, 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 is George Mkhwanazi (hereinafter referred to as the "Complainant"), an adult male resident of Klipgat C, an area falling under the jurisdiction of Madibeng Local Municipality, North West Province.
- 2.2. The Complainant acts in his representative capacity on behalf of the residents of Klipgat C.
- 2.3. The Respondent is Madibeng 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 corner 53 Van Velden Street, Brits (hereinafter referred to as the "Respondent").

3. Nature of the Complaint

- 3.1. On 16 March 2013, the Commission received a complaint at the Commission's North West Provincial Office (hereinafter referred to as "the Provincial Office") from the Complainant.
- 3.2. The Complainant is acting in his representative capacity on behalf of the residents of Klipgat C.
- 3.3. In his complaint, the Complainant alleged that the community of Klipgat C had been without water supply for a period of 5 (five) weeks and the Respondent fails to address the problem, notwithstanding having been made aware of the plight.

- 3.4. The Complainant further complained that:
- 3.4.1 In failing to address the water crisis the Respondent was in violation of the constitutional rights of the residents of Klipgat C to have access to adequate supply of water;
 - 3.4.2 That the supply of water provided by the Respondent to the residents of Klipgat C was inadequate;
 - 3.4.3 That on several instances the Complainant discussed the issue with the Respondent in an attempt to resolving same, but to date the issue still stands as the Respondent keeps making empty promises;
 - 3.4.4 That the Respondent has to date failed and/or neglected and/or refused to provide the Complainant residents of Klipgat C with information regarding the steps that the Respondent has taken to address the water supply challenges.
- 3.5 In the result, the Complainant alleges that the Respondent's failure and/or neglect and/or refusal to provide the residents of Klipgat C with adequate clean and safe water supply amounted to a violation of the residents' constitutional rights to enjoy access to adequate and clean water.
- 3.6 Further, that the Respondent's failure and/or neglect and/or refusal to provide the residents with information as to the steps, if any, that were being taken by the Respondent to address their right to water amounted to a violation of the residents' constitutional rights to access information.

4. Preliminary Assessment

4.1. The Provincial Office made a preliminary assessment of the complaint that:

4.1.1 The alleged complaint constituted *prima facie* violation of the following provisions of the Constitution:

- a) *Section 27 (1) (b)* - Water
- b) *Section 32 (1) (a) and (b)* – Access to information

4.1.2 The assessed violations fell within the mandate and jurisdiction of the Commission;

4.1.3 There was no other organisation that could more effectively and expeditiously deal with the complaint.

5. Steps Taken by the Commission

In investigating the alleged violation, the methodology used by the Provincial Office, involved a combination of *interviews* and *physical inspection* techniques, namely:

- a) Interview with the Residents;
- b) Correspondence with the Respondent;
- c) *Inspection in loco* in the concerned area;

5.1 Interview with Residents

5.1.1 The investigation team conducted several interviews¹ with local residents to verify the complaint.

5.1.2 During the interviews with the residents, some interviewees informed that:

- a) Some residents of Klipgat C had been staying in the area for over 50 years and they previously relied on windmills for water;
- b) The windmills had provided sufficient water supply until the influx of people into the area when the windmills dried up;
- c) Klipgat C has about 3500 households;
- d) The water shortage problem in the area is long standing since 1994 and notwithstanding the Respondent being fully aware of the same², the Respondent fails and/or neglects to attend to the problem;
- e) From April 2013, the residents have been supplied with water tanks from allegedly, the Respondent, although no communication or confirmation in this regard has been provided by the Respondent;
- f) The residents receive about 4 water tanks for the entire Klipgat C which is made up of Jakkalasdans 1, Jakkalasdans 2 and Mashimong;
- g) Capacity of each water tank is about 3000 litres and the tanks are refilled twice a week - Mondays and Thursdays;

¹ 06 June 2013.

² The Residents allege to have made the Respondent aware of their water problem on several occasions and prior to approaching the Commission for assistance. The Residents also allege to have held several unsuccessful meetings with the Respondent.

- h) The trucks that refill the water tanks are construction trucks and the residents allege that the water appears dirty and not healthy for human consumption;
- i) This water supply is inadequate as the tanks are soon empty immediately after they have been refilled during the day and the people that are normally at work come back to empty water tanks in the evening;
- j) Due to the inadequate water supply and the fact that the water tanks are only refilled twice a week the residents often have to go for days without water;
- k) The school children lose out on valuable study time as they have to travel distances to draw water from the water tanks;
- l) The elderly and the sick spend money in hiring people to fetch water for them;
- m) The Respondent has made empty undertakings about a long term solution;
- n) The residents are left in the dark as to whether the Respondent is addressing this problem due to the fact that they do not receive updates from the Respondent;
- o) The last time the residents heard from the Respondent was in 2010³ when the Respondent once more made empty promises just to get the residents to cancel an intended illegal protest march⁴.

³ Meeting held between the Respondent and the Residents 25 March 2010 to discuss service delivery issues.

⁴ Illegal protest march scheduled for Friday, 26 March 2010.

5.2 Correspondence with the Respondent

- 5.2.1 The Commission through its Gauteng Provincial Office sent an allegation letter to the Respondent on 12 March 2009 and requested the Respondent to furnish its written response by not later than 26 March 2009.
- 5.2.2 In its written response dated 23 October 2009 the Respondent attached a copy of the Respondent's letter that was previously sent to the Complainant.
- 5.2.3 Briefly, on the issue of water supply, the Respondent informed in the above mentioned letter that:
- a) The Council of Madibeng has in its sitting of 30 June 2009, approved the handing over of water services by Sandspruit Works Association to the local Municipality of Madibeng;
 - b) This approval meant that Madibeng Municipality would as from 01 July 2009 be able to be directly responsible for the provision of water services due to the problems experienced as a result of getting these services through the service provider; and
 - c) The implementation of the handing over of the water services would assist the Respondent in overcoming some bottlenecks they experienced under the previous system and eventually address the challenges experienced.
- 5.2.4 The Provincial Office, in its letter dated 09 November 2012 requested the Respondent to provide an update regarding the Respondent's progress in

addressing the water crisis at Klipgat C as promised in the Respondent's above stated written response.

5.2.5 To date the Respondent has failed and/or refused to furnish the required written response.

5.3 Inspection in Loco

5.3.1 On Thursday, 06 June 2013, the North West Provincial investigators (the investigators) visited Klipgat C, to inspect the reported water challenges and the following observations were noted:

General Observations

- a) Klipgat C is a semi formal settlement.
- b) The community is vastly unemployed and living in desperate conditions.
- c) There are clear streets and no street lights.
- d) The houses are mostly shacks⁵ made of corrugated iron.
- e) Most residents are not formally educated, but displayed varying levels of functional literacy.
- f) The residents of the community predominantly speak Setswana.

⁵ 'Shack' refers to a dwelling constructed of a combination of corrugated iron, wood and plastic.

Substantive Observations

During the inspection at Klipgat C, the investigators established that indeed water supply was an existing problem as the following water tanks and several containers put in lines next to the water tank were seen:

“Photo A”



"Photo B"



"Photo C"



6. Applicable Legal Framework

6.1. Key International instruments

6.1.1. International Covenant on Economic Social & Cultural Rights (ICESCR)

Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living which includes accessibility and availability of adequate housing, food and clothing. The right to water falls under this article as it guarantees an adequate standard of living; water is one of the fundamental conditions for survival.

Although South Africa has not ratified the ICESCR, as a signatory State, the Government of South Africa cannot act in a manner that is contrary to the spirit of this Convention.

6.1.2. United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation⁶

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

⁶Resolution 64/292.

6.2. **Constitutional Rights**

6.2.1. **The right to water - Section 27 of the Constitution:**

- a) The right to have access to water is provided for herein.
- b) It is also provided hereunder that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

6.2.2. **The Right to Access Information**

Section 32 provides that everyone has the right of access to –

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

6.3. **Domestic Legislation**

6.3.1. **The Water Services Act⁷**

Section 3 of the Water Services Act states that:

(1) Everyone has a right of access to basic water supply and basic sanitation.

(2) Every water services institution must take reasonable measures to realise these rights.

⁷ 108 of 1997.

(3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.

Section 5 of the Water Services 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".

Basic sanitation is defined in the Water Services Act as:

"The 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".

6.3.2. The Municipal Systems Act⁸

The definition of basic municipal services according to the Act⁹ is:

"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

⁸ 32 of 2000.

⁹ Chapter 8 of the Municipal Systems Act.

- (c) Ensure that all members of the local community have access to at least the minimum level of basic municipal services.

6.3.3. **Section 73(1) (c) of the Local Government: Municipal Systems**

Act¹⁰, echoes the constitutional precepts and obliges a municipality to provide all members of communities with “*the minimum level of basic municipal services*”.

6.3.4. **Municipal Finance Management Act**¹¹

In considering the obligations of the Respondent with regard to its budgeting and finance processes, the Commission paid close consideration to Chapter Four of the Municipal Finance Management Act (hereinafter referred to as the “MFMA”). Section 28(1) of the MFMA is of particular relevance in its directive that municipalities may revise and approve their annual budget through an adjustments budget.

6.3.5. **Promotion of Access to Information Act**¹²

This Act protects and upholds the rights of people to access to information. It protects the right to access to information and seeks to

¹⁰ Act 32 of 2000.

¹¹ Act 56 of 2003.

¹² Act 2 of 2000.

enhance the transparency, accountability and effectiveness of government.

Public bodies are obliged to give information needed to exercise rights enshrined in the Constitution.

6.4. Case Law

The following case law was considered in determining the nature and scope of a human right in relation to the complaint at hand:

6.4.1 In **Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)** it was held that legislative measures adopted by the government must be supported by policies and programmes adopted must be reasonable "*both in their conception and implementation*".¹³

The Court held further that reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise and do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril.¹⁴

¹³ Grootboom at para [42].

¹⁴ Grootboom at para [44].

6.4.2 In **City of Johannesburg and Others v Mazibuko and Others**¹⁵ the Court in answering “*what would constitute sufficient water in terms of section 27(1)?*”the stated that:

"[16] In interpreting the right to sufficient water a purposive approach should be followed. In determining the purpose of the right one should have regard to the history and background to the adoption of the Constitution and the other provisions of the Constitution, in particular the other rights with which it is associated in the Bill of Rights.

There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

[17] A commitment to address a lack of access to clean water and to transform our society into one in which there will be human dignity and equality, lying at the heart of our Constitution, it follows

¹⁵ [2009] 3 All SA 202 (SCA).

that a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence.

Support for this conclusion is to be found in the 2002 General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights on the International Covenant on Economic, Social and Cultural Rights, in which it is stated: 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. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. . . . The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity. For this reason the elements of the right to water must be adequate for human dignity, life and health.

[18] The quantity of water that is required for dignified human existence would depend on the circumstances of the individual concerned”.

6.4.3 *The Federation for Sustainable Environment vs The Minister of Water Affairs. C/N 35672/2012 North Gauteng High Court* at [14] the court states the responsibilities of local government *inter alia* as per section 152 as:

"a) to provide democratic and accountable government for local communities

- b) *to ensure the provision of services to communities in a sustainable manner;*
- c) *to promote social and economic development;*
- d) *to promote a safe and healthy environment;*
- e) *to encourage the involvement of communities and community organisation in the matter of local government "within its available resources". This entails, inter alia, that within its resources, a municipality should strive towards improving the quality of life of its community. Municipalities are also bound to be responsive to the needs of their communities."*

7. Analytical Framework

In analysing this complaint, the Commission considered the following constitutional tests and guidelines for the interpretation of the reasonableness of the limitations posed by the Respondent on the rights of the Complainant:

(a) Test for Reasonableness of Limitation of Rights

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

- (a) The nature of the right;*
- (b) The importance of the purpose of the limitation;*

(c) The nature and extent of the limitation;

(d) The relation between the limitation and its purpose; and

(e) Less restrictive means to achieve the purpose.

(b) Interpretation of the Bill of Rights

Section 39 of the Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum –

(a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) Must consider international law; and

(c) May consider foreign law.

Section 39(2) of the Constitution makes it clear that the Act must be interpreted in light of the "*spirit, purport and objects of the Bill of Rights.*"

8. Legal Analysis

8.1. Water is one of the most important substances on earth. All the living beings must have water to survive. If there was no water there would be no life on earth.

8.2. The State is obliged in terms of **Section 27(2) of the Constitution** and the Water Services Act to take reasonable legislative and other measures

within its available resources to achieve the progressive realization of everyone's right to access to sufficient water.¹⁶

8.3 In terms of **Section 84 of the Municipal Structures Act**, the responsibility for providing water services rests with district and metropolitan municipalities. However, the Act allows the Minister of Provincial and Local Government Affairs to authorise a local municipality to perform these functions or exercise these powers.

8.4. **Section 4** of the **Water Services Act** states:

- (3) *Procedures for the limitation or discontinuation of water services must:*
- a) *be fair and equitable;*
 - b) *provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless:*
 - i) *other consumers would be prejudiced;*
 - ii) *there is an emergency situation; or*
 - iii) *the consumer has interfered with a limited or discontinued service; and*
 - c) *not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.*

¹⁶ See footnote 15 supra.

- 8.5 Further, the **Water Supply and Sanitation Policy White Paper (Nov 1994)** states:

Basic water supply is defined as:

Quantity:

25 litres per person per day. This is considered to be the minimum for direct consumption, for the preparation of food and for personal hygiene. It is not considered to be adequate for a full, healthy and productive life which is why it is considered as a minimum.

Cartage:

The maximum distance which a person should have to cart water to their dwelling is 200m.

- 8.6 The **Water and Sanitation Service Standard¹⁷** states:

The minimum standard for basic water supply service is the provision of appropriate education in respect of effective water use, and, a minimum capacity 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 100 metres of a household, with a maximum of 25 families sharing, and with an effectiveness such that

¹⁷ Preliminary Draft 02, March 2008.

no consumer is without a supply for more than seven full days in any year.

- 8.7 In the present case, from the interviews and physical inspection conducted, it was confirmed that indeed the residents did not have access to water alternatively sufficient water for domestic purposes.
- 8.8 It is common cause that as per the provisions of the Water Services Act, the National Water Act and the Constitution as respectively stipulated above, the duty and responsibility of the provision of sufficient and clean water to the residents of Klipgat C and surrounding areas rests with the Respondent.
- 8.9 It is further common cause as it was confirmed through the interviews with Residents of Klipgat C that the Respondent was aware of the residents' water plight and notwithstanding, the Respondent failed to and/or refused to resolve this water crisis once and for all.

9. Finding

- 9.1 Based on the legislative, constitutional and international human rights obligations,¹⁸ the Commission finds that the Respondent violated the Complainant's right to access to adequate, clean drinking water.

¹⁸ The South African Constitution of 1996 allows for reference to international law in its interpretation. Section 39(1)(b) obliges "a court, tribunal or forum" to "consider international law" "[w]hen interpreting the Bill of Rights". In *S v Makwanyane and Another*,¹³ the South African Constitutional Court (CC) held that in terms of the above section 'public international law' means both international law that is binding on South Africa and international law that is not binding on South Africa. The CC stressed that our courts are obliged to consider both 'hard' and 'soft' international law in their interpretation of the Bill of Rights.

9.2 The Respondent further violated the Complainant's right to access to information.

10. Recommendation

10.1 The Commission recommends:

10.1.1 The Respondent to increase the supply of water services to 3 (three) tanks per section in Klipgat C (Mashimong, Jakkalasdans 1 & 2 Sections) every second day of the week.

10.1.2 The Respondent to provide the Commission within a period of three (3) months of the date of this finding, with a Report indicating interim measures the Respondent has put in place to address access to water challenges;

10.1.3 The Respondent to provide the Commission, within a period of three (3) months of the date of this finding, with a Report that sets out immediate measures that the Respondent is taking to remove impurities from the water supplied to the Residents of Klipgat C;

10.1.4 The Respondent to provide the Commission with a detailed report within a period of six (6) months of the date of this finding in respect of measures put in place to ensure that the challenge of adequate supply of water is permanently resolved.

10.1.5 The Respondent to furnish the Commission with the Minutes of every community meeting held at least every three (3) months with the Residents in addressing access to water challenges.

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 OF December 2013



COMMISSIONER P. GOVENDER
DEPUTY CHAIRPERSON

South African Human Rights Commission