



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: MP/2011/0134

In the matter between:

Mr Henro Kruger (DA Councillor)

(On behalf of Witbank Residents)

Complainant

And

The Administrator, Emalahleni Local Municipality **First Respondent**

Emalahleni Local Municipality

Second Respondent

REPORT

1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "**Commission**") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as "*the Constitution*").

1.2. The Commission 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 (Hereinafter referred as “HRCA”, provides the enabling framework for the powers of the Commission.
- 1.5. Section 9(6) of the HRCA 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 Mr Henro Kruger, acting as a Councillor of the Democratic Alliance and on behalf of residents of Witbank, cited in his official capacity.
- 2.2. The First Respondent is the Administrator appointed as a consequence of the Emalahleni Local Municipality being placed under administration in terms of section 139 (1) of the Constitution.

2.3. The Second Respondent is the Emalahleni Local Municipality, established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 and, currently placed under administration.

3. Background to the Complaint

3.1. The Commission received a complaint from the Complainant on 15 November 2011.

3.2. The thrust of the complaint is that the Second Respondent has violated the rights of the residents of the Second Respondent (hereinafter referred to as the residents) by failing and/or neglecting to provide them with adequate, clean and safe water supply.

3.3. The Complainant alleged that some areas had had no water supply for six days or longer.

3.4. Furthermore, the Complainant alleged that Municipal Council Leadership and administration has allowed the water purification and supply infrastructure to deteriorate up to the point of violation of section 27 (1) (b)¹.

3.5. To substantiate his complaint, the Complainant submitted a list of names of residents who signed a petition (hereinafter referred to as

¹ Section 27 (1) (b) of the Constitution of the Republic of South Africa, 1996 provides that "Everyone has the right to have access to sufficient food and water".

“the petition list”) requesting the Commission to investigate the complaint.

4. Preliminary Assessment

The Commission made the following preliminary assessment:

- 4.1. That the allegations constituted a *prima facie* violation of human rights of the residents of the Emalahleni Local Municipality.
- 4.2. That a site inspection and consultations with the residents must be held.
- 4.3. That the alleged complaint fell within the mandate and jurisdiction of the Commission.
- 4.4. That the alleged violation required a full investigation in terms of the Complaints Handling Procedures of the Commission.

5. Steps Taken by the Commission

In investigating the allegations, the methodology used by the Commission in conducting the investigation, involved a combination of primary and secondary research, namely:

5.1. **Primary research** which included:

- (a) Face to face interviews with the residents².
- (b) Site inspection at Clewer village on 25 November 2011³.

² Interviews with the residents of Clewer, within the Emalahleni Municipality, conducted during the course of the inspection in loco on 25 November 2011.

³ 25 November 2011.

(c) Written requests for feedback and reports from the respondents⁴.

5.2. **Secondary research**, which included:

(a) An analysis of relevant legislation and case law.

5.3. **Site Inspection**:

(a) The Commission conducted a site inspection at Clewer village which falls under the jurisdiction of the Second Respondent.

(b) The purpose of the inspection was to verify the existence of issues raised by the Complainant.

(c) During the inspection, the Commission interviewed several residents at Clewer. The residents confirmed that there are instances in which they do not receive water and, in some instances the water they receive is dirty and not drinkable. This, they said, has been happening for over a year.

(d) The issues relating to water supply challenges were also confirmed by some residents mentioned in the petition list. For example:

(i) Ms Swart was contacted on 25 November 2011. She stated that she is a learner. She then confirmed that there were times she could not go to school because there was no water.

⁴07 December 2011, allegation letter directed to the Municipal Manager; 13 January 2012, follow up letter to the Acting Municipal Manager, T Matoane in respect of none compliance.

Further, she advised the Commission that sometimes there would be no water for approximately five days.

- (ii) Ms Masanobo was also contacted on 25 November 2011. She confirmed that the Second Respondent had on some occasion interrupted water, without notice, for approximately a week. As a result, this has left them without water to drink and cook.

(e) On 24 January 2012, the Commission received a response to the allegation letter from the Second Respondent. In the response, the Second Respondent submitted as follows:

- (i) That in the recent months it has encountered water supply interruptions in various areas. The most affected areas were listed as Phola, Ogies and Duvha Park residential areas.
- (ii) That the main causes of the water supply interruptions have been the old water network infrastructure that consists of asbestos pipes and old valves that have never been replaced for about 30 years.
- (iii) Furthermore, the Second Respondent submitted that its water supply infrastructure consists of the following components:

- **Water Purification Plant:** The plant is more than 40 years old and, it does not function up to its optimum level due to the aged and outdated infrastructure.
- **Reservoirs:** The Emalahleni Local Municipality is growing faster and this has an effect on the demand. The demand is higher than the supply because the current reservoirs are feeding new areas that were not initially planned as part of the system. As a consequence, the reservoirs are no longer working as a storage facility. This leads to water passing faster through the network up to a consumption point and leaves the upper lying areas without water or low pressure.
- **Asbestos Cement Pipes (ACPs):** In 1995, the Municipality embarked on a programme of ACPs replacement. Due to financial constraints, the program could not be implemented faster as planned. ACPs are no longer recommended for the provision of portable water due to health reasons and, during winter they also burst more often. The Second Respondent is continuing with its programme to replace ACPs.

- **Power Supply:** Water supply depends on the availability of electricity. If there is no electricity, there will be no water. The Second Respondent has encountered theft of copper cables which in turn affected electricity supply resulting in pro-longed water outages to communities.

(iv) In the event that the Second Respondent anticipated water interruptions, the Second Respondent would, at all times, inform residents via local community radio stations such as radio Kragbron and Emalahleni fm. Further, it would distribute flyers and announce via SABC radios and loud hailing.

(v) The Second Respondent has made interventions and is working on a “water project” to deal with the matter. On the one hand, the Department of Water Affairs and Mpumalanga Department of Cooperative Government and Traditional Affairs have intervened to assist the Second Respondent to supply portable water to communities.

(vi) In addition, Rand Water has been appointed to oversee the reinstatement of water supply. Rand Water personnel have already begun with, *inter alia*, refurbishment of the plant and reservoirs, improvement of water quantity and quality, mitigate

operational risk arising from mechanical and electrical failure, *etc.*

The project embarked upon by Rand Water would be completed on 29 June 2012.

(vii) On 18 March 2013, and following an undertaking by the Respondents that the water project would be completed on 29 June 2012, the Commission despatched a letter to the Second Respondent requesting the following information relating to the water project:

- Copy of the service level agreement with regards to the water project.
- Information of the completed components of the water project.
- Copy of the Second Respondent's strategic plan for 2013/2014.

(viii) The First and Second Respondents failed to provide the requested information on the deadline and despite the Commission's follow up letter, the First and Second Respondents still failed to provide this information.

5.4. Applicable Legal Framework

(1) Constitutional Framework

5.4.1. **Section 1 (a) of the Constitution**

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

5.4.2. **Section 7(2) of the Constitution**

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

5.4.3. **Section 10: The Right to Human Dignity**

Section 10 of the Constitution provides that:

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

5.4.4. **Section 27 (1)(a) & (b)**

Section 27 of the Constitution provides that:

“(1) Everyone has the right to have access to – (b) sufficient...water..;

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

5.5. International Legal Framework

(1) Universal Declaration of Human Rights

Article 25 of the UDHR provides:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing...”

(2) International Convention on Economic, Social and Cultural Rights (ICESCR)

Article 11 of the ICESCR states that:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

The ICESCR further states in Article 12:

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken . . . to achieve the full realization of this right shall include those necessary for. . .

(3) The prevention, treatment and control of epidemic, endemic, occupational and other diseases.”

5.6. Regional Legal Instruments

(1) African Charter on Human and Peoples' Rights

*The African Charter on Human and Peoples' Rights (African Charter) does not explicitly mention the right to water. Article 16(2) obliges state parties to the African Charter to take the necessary measures to protect the health of their people. As with the above instruments, the right to water must be deduced from the express provision of other rights such as health, the realization of which cannot be achieved without providing water and basic sanitation services.*⁵

(2) African Charter on the Rights and Welfare of the Child

"The African Charter on the Rights and Welfare of the Child (Charter on Welfare of the Child) explicitly includes the right to water. First, the Charter on Welfare of the Child provides that every child has the right to enjoy the best state of physical, mental and spiritual health."

In more explicit terms, the Charter on Welfare of the Child states that:

⁵ Access to sufficient water in South Africa: How far have we come? Siyambonga Heleba; Research Paper, 2009. Research, Community Law Centre, University of the Western Cape. www.communitylawcentre.org.za

States parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures to ensure the provision of adequate nutrition and safe drinking water.

5.7. Domestic Legal Framework

(a) The Water Services Act⁶

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.

(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.

The Water Services Act defines basic sanitation as:

⁶ 108 of 1997

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.

Regulation 3 of the Compulsory National Standards states that the minimum standard for basic water supply services is:

(a) the provision of appropriate education in respect of effective water use; and

(b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month-

(i) at a minimum flow rate of not less than 10 litres per minute;

(ii) within 200 metres of a household; and

(iii) with effectiveness such no consumer is without a supply for more than seven full days in any year.

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 four-phase process:

(i) Phase 1: The Application

- (ii) Phase 2: Project Initiation
- (iii) Phase 3: Project Implementation
- (iv) Phase 4: Housing Consolidation

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.”*

(b)The Municipal Systems Act⁷

The definition of basic municipal services according to the Act ⁸is:

- *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.

⁷ 32 of 2000

⁸ Chapter 8 of the Municipal Systems Act

(c) The Development Facilitation Act⁹

The Development Facilitation Act (“DFA”) 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.

This Act creates two separate bodies responsible for land use planning in the same area.

(d) Municipal Finance Management Act¹⁰

(a) 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.

(b) Section 27(5) is also relevant in 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 MFMA.

5.8. Policy Framework

⁹ 67 of 1995

¹⁰ Act 56 of 2003

(a)White Paper on Water Supply and Sanitation Policy¹¹

The White Paper on Water Supply and sanitation Policy defines adequate sanitation as follows:

- *The immediate priority is to provide sanitation services to all which meet basic health and functional requirements including the protection of the quality of both surface and underground water. Higher levels of service will only be achievable if incomes in poor communities rise substantially. Conventional waterborne sanitation is in most cases not a realistic, viable and achievable minimum service standard in the short term due to its cost. The Ventilated Improved Pit (VIP), if constructed to agreed standards and maintained properly, provides an appropriate and adequate basic level of sanitation service.*

(b)National Sanitation Policy¹²

- (i) 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.

¹¹ Department of Water Affairs and Forestry (1994)

¹² Department of Water Affairs and Forestry (1996)

(ii) The policy lists the main types of sanitation systems used in South

Africa:

- (1) Traditional unimproved pits;
- (2) Bucket toilets;
- (3) Portable chemical toilets;
- (4) Ventilated Improved Pit toilets;
- (5) Low flow on-site sanitation (LOFLOS);
- (6) Septic tanks and soakaways;
- (7) Septic tank effluent drainage (solids-free sewerage) systems; and
- (8) Full water-borne sewerage.

(c) White Paper on Basic Household Sanitation¹³

(i) 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:

(ii) Developing norms and standards for the provision of sanitation;

¹³ Department of Water Affairs and Forestry (2001)

- (iii) Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
- (iv) Co-ordinating the development by the municipalities of their Water Services Development Plans as a component of their Integrated Development Plan;
- (v) Monitoring the outcome of such programmes and maintain a database of sanitation requirements and interventions;
- (vi) Providing capacity building support to provinces and municipalities in matters relating to sanitation;
- (vii) Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
- (viii) Undertaking pilot projects in programmes of low cost sanitation

(d)The Strategic Framework for Water Services¹⁴

- (i) The Strategic Framework defines basic sanitation facility as:

The infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated,

¹⁴ Department of Water Affairs and Forestry (2003)

*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.*¹⁵

(iii) 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.*

5.9. Free Basic Sanitation Implementation Strategy¹⁶

- According to this policy, 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.

¹⁵ Ibid

¹⁶ Department of Water Affairs and Forestry (April 2009)

5.10. **Case Law**

(a) The Constitution requires the Commission to consider relevant case law in determining the nature and scope of a human right.

(b) In **NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)**¹⁷ the Court held:

“[49] A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid - the restoration of human dignity, equality and freedom.

[50] As human dignity is regarded as foundational in our Constitution, a corollary thereto is that that it must be jealously guarded and protected. As this Court held in Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others:

'The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in

¹⁷ at paragraph [49]-[51]

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 plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.'

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

(a) "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".¹⁸

(b) In fact the Court has repeatedly held that the State, including municipalities, is obliged to treat vulnerable people with care and concern.¹⁹

(c) The role of local government, as stated in the Constitution is, among other things, *"to ensure the provision of services to communities in a sustainable manner"*²⁰ and *"to promote a safe and healthy environment"*²¹. A municipality is obliged to try to achieve these objectives. Section 73(1)(c) of the Local Government: Municipal Systems Act²², echoes the constitutional precepts and obliges a municipality to provide all members of communities with *"the minimum level of basic municipal services"*.

(d) Such minimum level of service would include the provision of water which is safe and clean for human consumption.

(e) In the **Joseph case**,²³ the Constitutional Court read sections 152 and 153 of the Constitution together with provisions contained in

¹⁸ Sachs, A. (2009). *The Strange Alchemy of Life and Law*. Oxford University Press

¹⁹ Joe Slovo at para [76]

²⁰ Section 152(1)(b) of the Constitution

²¹ Section 152(1)(d) of the Constitution

²² Act 32 of 2000

²³ See *Leon Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30

the Municipal Systems Act and the Housing Act, creating a public law “right to basic municipal services” and outlining the duty on local government to provide these services.

5.11. **Analysis of the information received during the Investigation**

(a) The rights implicated in this complaint are the rights to have access to sufficient clean water, health and human dignity of residents.

(b) The inspection *in loco* undertaken by the Commission revealed that the Respondents have failed on their obligation to provide sufficient clean water which in turn encroached on the right to the health of the residents. Interviews conducted with residents further confirmed allegations made by the Complainant.

(c) Section 27(1) (b) of the Constitution provides that “everyone has the right to have access to sufficient water”, and section 27 (2) obliges the State to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of everyone’s right of access to sufficient water. The above sections are particularly relevant in the context of the present complaint.

- (d) Information collected from the investigation indicates that the Second Respondent did not properly manage and protect its water resources due to poor maintenance of infrastructure thereby failing to secure sufficient water that is not harmful to human health or well-being.
- (e) The Second Respondent did not deny that there are problems relating to the provision of sufficient water to the residents. The Second Respondent has further not denied that the water infrastructure has not been maintained for a very long time.²⁴
- (f) In light of the above, it is important to highlight that although municipalities have the responsibility and authority to administer water and sanitation services, all spheres of government have a duty, within their physical and financial capabilities, to work towards the objective²⁵ of ensuring that access to sufficient water as enshrined in the Constitution is progressively realized.
- (g) Further to the above, it should be noted that the primary responsibility of providing water and sanitation services in

²⁴ Respondent has not provided the Commission with information regarding interaction with the relevant Provincial government departments.

²⁵ Preamble of the Water Services Act

South Africa lies with municipalities, in terms of Part B of Schedule 4 of the Constitution.

(h) The Respondent failed to discharge its primary responsibility for provision water services to the local community.

(i) The First and Second Respondents have, to date, failed to provide the requested information relating to the water project despite the Commission's appeal to do so on the deadline stipulated therein. There is an indication that sufficient duty and diligence have not been practiced by the Second Respondent in carrying out its duty to ensure that water problems could have been averted. For that reason, the First Respondent was appointed.

5.12. **Findings**

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

5.12.1. *Right to water*

The Commission finds that the Second Respondent has violated the rights of the residents in that it has failed and/or neglected to take reasonable steps to provide the residents with sufficient and clean

water. In the absence of the requested information on the water project, Second Respondent has further failed to provide the residents with interim portable water pending the finalisation of the water project.

5.12.2. *Right to human dignity*

The Commission finds that by failing to provide the residents with sufficient and clean water, and thus violating the residents' right enshrined in section 27 of the Constitution, the Respondents have violated the residents' right to human dignity.

6. 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."

In view of the findings made above, the Commission recommends the following:

- 6.1. That the Respondents furnish the Commission with an operational and maintenance plan required to run water supply in an efficient,

effective and sustainable manner to address access to basic water challenges facing residents of the Second Respondent, especially women, children and other vulnerable groups within a period of three (3) months from the date of this finding;

6.2. That the First and Second Respondents enhance community participation and demonstrate some level of transparency in their governance by convening regular feedback sessions every three (3) months relating to the supply of water to residents. A copy of the minutes must be submitted to the Commission together with the abovementioned plan;

6.3. That the Department of Water Affairs furnish the Commission with a report on capacity building support provided to the Respondents relating to supply of uncontaminated water to residents of the Second Respondent within six (6) months from the date of this finding;

6.4. The Department of Water Affairs to monitor the water supply and infrastructural improvement programmes of the Second Respondent and take regular water samples for testing to ensure continuous supply of safe and clean water.

7. APPEAL

You have the **right to lodge an appeal** against the findings in this report. 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 IN Johannesburg ON THE 18TH DAY OF
December **2013**.



Deputy Chairperson

Commissioner P. Govender

South African Human Rights Commission