



Ref No: GP/1314/0159

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Complainant

and

JOHANNESBURG SOCIETY FOR THE BLIND

Respondent

REPORT

1. INTRODUCTION

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

1.2. The Commission is specifically mandated 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 Republic and to take steps to secure appropriate redress where human rights have been violated. The Human Rights Commission Act, 54 of 1994¹ (the HRCA) provides an enabling framework for the Commission to exercise its powers and to impose a mandatory duty of cooperation on both public bodies and private individuals.
- 1.4. Section 9(6) of the HRCA determines the procedure to be followed in conducting an investigation regarding an alleged violation of, or threat to, a fundamental right.
- 1.5. Chapter 3 of the Commission's Complaints Handling Procedures (CHP), provides that the Commission has the jurisdiction, after assessing a complaint for this purpose, to conduct or cause to be conducted, on its own accord or upon receipt of a complaint, an investigation into any alleged violation of or threat to a fundamental right.

2. THE PARTIES

- 2.1. The Commission is acting on its own accord in this matter as is in line with its constitutional and statutory mandate. The Commission instituted investigations on its own accord after an instalment of the South African Broadcasting Corporation's (SABC) current affairs program "Cutting Edge" came to its attention. The program instalment appeared to indicate that the Respondent

¹ The powers relied on in terms of the HRCA are materially the same as those of the Human Rights Commission Act 40 of 2013.

had, on 2nd of May 2013, violated the rights of a group of blind students who resided on its premises.

- 2.2. The Respondent is the Johannesburg Society for the Blind, a non-profit organisation with its principle place of business at 159 North Road, Roseacre, Johannesburg, Gauteng.

3. BACKGROUND TO THE COMPLAINT

- 3.1. The above-mentioned instalment of SABC's "Cutting Edge" Programme focused on seven blind students who were residents at the Respondent's premises.

- 3.2. The students alleged that they had been evicted from the premises of the Respondent. It appeared from the program that due to the evictions, the blind students had spent two nights outside the premises with no access to alternative shelter.

- 3.3. The program, over and above the allegation of eviction, carried content regarding:

- 3.3.1. The alleged misuse of the Respondent's vehicles by the CEO and the consequent unavailability of vehicles for use by residents, impacting on residents' freedom of movement; and

- 3.3.2. Allegedly poor quality and quantity of food served to residents.

4. PRELIMINARY ASSESSMENT

- 4.1. Other issues which arose during the course of the primary investigation related to:

- 4.1.1. The complaints handling procedures of the Respondent; and
 - 4.1.2. The exercise of the rights to assemble and protest.
- 4.2. In its preliminary assessment of the allegations raised in the program, the Commission noted that certain aspects of the allegations did not fall appropriately within its Constitutional mandate. These included aspects such as the payment of rentals, consequences of non-payment and resultant contractual breaches, such disputes being of a contractual and civil law nature.
- 4.3. With regard to the allegations raised regarding evictions and poor / inadequate food, the Commission undertook an investigation on the basis of the *prima facie* violations of fundamental human rights the Commission observed in the footage of the program.
- 4.4. With regard to the allegation that the Respondent's vehicles were misused by the CEO and therefore unavailable for use by residents, the Commission assessed records and logs provided to it and assessed control measures through interviews with management of the Respondent, staff, residents and student-residents.² Based on undisputed evidence provided to the Commission, the complaint, as far as transport was concerned, did not amount to a human rights violation. Given the circumstances, this aspect of the complaint was dispensed with at this early stage.

5. RIGHTS ALLEGEDLY VIOLATED

- 5.1. From its preliminary assessment of the complaint, the Commission identified a *prima facie* violation of the following human rights, as enshrined in the Bill of Rights of the Constitution:

² Referred to in the alternative hereafter as "students" and "student-residents".

- 5.1.1. Section 10 (the right to human dignity);
- 5.1.2. Section 17 (the right to assembly, demonstration, picket and petition);
- 5.1.3. Section 18 (the right to freedom of association); and
- 5.1.4. Section 27 (the right to health care, food, water and social security).

6. METHODOLOGY

6.1. In evaluating this matter the Commission assessed and considered:

- 6.1.1. Objective records provided and accepted by it, including minutes, letters recording resolutions, contracts, bank statements, travel logs and the Respondent's code of conduct;
- 6.1.2. Information obtained through desktop research; and
- 6.1.3. Information obtained through the conduct of an inspection *in loco* and through interviews with management, employees and residents of the Respondent.

7. STEPS TAKEN BY THE COMMISSION

- 7.1. The Commission received and reviewed the above mentioned program instalment.³
- 7.2. The Commission initiated an investigation consisting of an inspection *in loco*, as well as interviews with management, employees and residents of the Respondent. The Commission visited the Respondent's premises on the following occasions:

³ See paragraph 2.1. above.

- 7.2.1. On 9 May 2013, a delegation led by Commissioner Malatji, met with the Chief Executive Officer (CEO) of the Respondent, Ms Vangile Nyamathe, and her team;
 - 7.2.2. On 17 and 21 May 2013, staff members from the Commission's Gauteng Provincial Office (the Provincial Office) conducted follow-up interviews with the CEO and management staff as well as employees and residents of the Respondent; and
 - 7.2.3. On 7 November 2013 the Manager of the Provincial Office conducted final interviews with relevant parties.
- 7.3. For the purposes of this report, the version of events provided by the blind students, the CEO of the Respondent, staff and the South African Police Service (SAPS) are recorded in detail herein. These details are material to the Commission's consideration of the cause of the alleged violations and the assessment of probable likelihood of versions of an after-the-fact investigation.
- 7.4. The Commission requested and was provided with relevant documentation relating to the Respondent and its activities.⁴
- 7.5. During the above mentioned investigation the following, **undisputed information** relevant to the matter was provided:
- 7.5.1. Regarding the **governance and operations** of the Respondent, that the Respondent's core function is to provide two types of services:
 - 7.5.1.1. It acts as a permanent residence facility for the elderly who are blind;

⁴ The Commission requested a copy of the latest report on the Respondent issued by the Department of Social Development in terms of the Developmental Quality Assurance (DQA) programme. Management of the Respondent however indicated that they had not been provided with such report and were therefore unable to provide the Commission with a copy.

7.5.1.2. It acts as a temporary residence facility for students who are furthering their education by undertaking Further Education Training (FET) and who meet the Respondent's admission criteria.

7.5.2. Regarding the **funding** of the Respondent:

7.5.2.1. The Respondent is partly financed through donations and the payment of rent by residents and partly subsidised by the Department of Social Development (DSD);

7.5.2.2. The **DSD subsidisation** is governed by a memorandum of understanding (MOU);⁵

7.5.2.3. In terms of the above mentioned MOU, the DSD is to make payment of a fixed amount to the Respondent in four "tranches" over a 12 (twelve) month period. No provision is however made for payment dates;⁶

7.5.2.4. The MOU specifically provides that payment is subject *inter alia* to the availability of funds;

7.5.2.5. Copies of bank statements provided to the Commission indicate that payment by DSD is not made consistently at the same time of the month, from one month to the next;

7.5.2.6. Student-residents pay a **monthly rental fee**;

7.5.2.7. Not all student-residents can afford this fee and management of the Respondent indicated that exceptions were made for such students once they engaged with the resident social worker and accountant about the reasons for non-payment;

⁵ A copy of the "Service Level Agreements 2013/2014" (the Agreements), referred to within the body of the Agreements as "(a) memorandum," was provided to and accepted by the Commission.

⁶ Save for the fact that "transfer of funds shall be made available within 30 (thirty) days after signing of [the] service level agreement," the date of signature is given as the 10th of May 2013.

7.5.2.8. Student-residents who failed to pay rent or make alternative arrangements, as per paragraph 7.5.2.7 above, are served with letters of demand;⁷ and

7.5.2.9. The non-payment of rent has an impact on the Respondent's financial situation. The interviews with both management and student-residents indicated that this in turn has an effect on the quality service the Respondent is able to offer residents.

7.5.3. Regarding the **background** to the events aired in the program instalment:⁸

7.5.3.1. In February 2013 student-residents were advised that they were to elect a Student Representative Council (SRC) *inter alia* to facilitate the resolution of complaints;

7.5.3.2. Student-residents did in fact elect an SRC;

7.5.3.3. Some student-residents were dissatisfied with the newly elected SRC and therefore purported to, themselves, elect a "new SRC" this group of students included a certain Mr F;⁹ and

7.5.3.4. Mr F was registered with the Respondent for FET training.

7.6. Regarding the **allegation of eviction** of student-residents featured on the programme instalment,¹⁰ interviews with relevant parties revealed two distinct versions of events.

7.6.1. The first view was that:

⁷ The Commission was provided with copies of such letters as examples.

⁸ See paragraph 2.1 above.

⁹ Names of students referred to in this report have been withheld in the interests of their privacy rights.

¹⁰ See paragraph 2.1. above.

- 7.6.1.1. Management of the Respondent, as represented by the CEO, allegedly refused to give student-residents an audience and to consider their concerns;
- 7.6.1.2. The day after the purported election of the "new SRC" the CEO called all student-residents into a meeting in which they were advised that she had been made aware of the fact that a protest was being organised;
- 7.6.1.3. The "new SRC" mandated its chairperson, Mr F,¹¹ to arrange a meeting with the CEO in order to raise certain concerns of the student-resident body with her;
- 7.6.1.4. However, upon approaching the CEO, Mr F was informed that based on misconduct and his failure to disclose to the Respondent the fact that he had a tertiary education he was ordered to leave the Respondent's premises. Mr F was further informed that his failure to disclose his tertiary education had the effect of taking away a desperately needed opportunity from other deserving candidates;
- 7.6.1.5. The SAPS were dispatched to assist with the removal of Mr F's clothes and other personal belongings;
- 7.6.1.6. Student-residents engaged with the SAPS and explained the circumstances leading to Mr F's forcible removal from the premises, where after the SAPS representative left the premises;
- 7.6.1.7. The "new SRC" took a decision that should Mr F be evicted, they would join him as a sign of support and protest against the actions of the Respondent's CEO;
- 7.6.1.8. The "new SRC" consequently spent the night in the parking lot on the Respondent's premises together with Mr F;

¹¹ *Ibid* at footnote 8 above.

- 7.6.1.9. One interviewee stated that a decision was then taken to bring their plight to the attention of the DSD, other interviewees indicated that a decision was taken to bring the matter to the attention of the media, and therefore to visit the offices of the SABC the following morning;
- 7.6.1.10. The next morning the group was refused access to the premises to collect their walking canes from the residency premises. They were consequently led by one of their members, who is only partially blind, in a search for the offices of the DSD/SABC;
- 7.6.1.11. They then located the Cutting Edge program's offices and provided a Cutting Edge journalist with an account of their plight;
- 7.6.1.12. They returned to the Respondent's premises but spent the second night, outside the premises of the Respondent on the pavement;
- 7.6.1.13. A relative of one of the student-residents assisted with food and blankets;
- 7.6.1.14. A passer-by enquired from the student-residents as to their situation, and thereafter engaged with management of the Respondent;
- 7.6.1.15. Student-residents were thereafter granted entry to the premises of the Respondent; and
- 7.6.1.16. Were called to a meeting where they were addressed by the CEO who advised that she wished to reach an amicable solution to resolve the matter. However, nothing was resolved at the meeting and students were eventually allowed to return to their rooms.

7.6.2. The second view was that:

- 7.6.2.1. FET facilitators had brought to the Respondent's attention the fact that Mr F had not been attending classes;
- 7.6.2.2. Management at the Respondent engaged with Mr F in meetings in which he was:
 - 7.6.2.2.1. Cautioned regarding his behaviour;¹² and
 - 7.6.2.2.2. Engaged with on the issue of outstanding rental payments.
- 7.6.2.3. A further meeting between Mr F, Educators and Management of the Respondent, was held on 4 March 2013. At this meeting Mr F was verbally informed that due to his absenteeism, misconduct and non-payment of rental fees he was dismissed from the Respondent. Mr F was further informed that he had to vacate the Respondent's premises that same day – the notification was given verbally and not communicated in any other form;
- 7.6.2.4. Mr F refused to vacate the premises and SAPS Moffat View, was called to escort him off the premises;
- 7.6.2.5. Management, after consultation with the SAPS, agreed to provide Mr F with bus fare for his trip home and have a social worker escort him to the nearest bus station;
- 7.6.2.6. However, after the SAPS left, Mr F refused to leave with the social worker and the social worker therefore left him in the parking lot;
- 7.6.2.7. Mr F was then joined in solidarity by approximately 5 (five) other students;

¹² Minutes of this meeting were provided to and accepted by the Commission.

- 7.6.2.8. SAPS Moffat View was again contacted to attempt to negotiate with both parties;
- 7.6.2.9. The Respondent was later informed that the SAPS had requested that Mr F and the other students provide the contact details of their next of kin. The person whose details were provided by Mr F indicated that he was not related to Mr F, but had been his lecturer. This person further informed the SAPS that Mr F had already attained both a National Diploma as well as a BTech Degree (a higher qualification than that for which he was registered with the Respondent, see paragraph 7.5.3.4. above);
- 7.6.2.10. The other students were invited inside at 23:00 but, they refused to enter and were therefore locked out of the buildings but within its enclosed parking area;
- 7.6.2.11. The students left the premises early the next morning and boarded a bus, they returned later that day, accompanied by journalists, at which point they were refused entry to the premises;
- 7.6.2.12. The SAPS were again called and the students were escorted by the SAPS to the police station;
- 7.6.2.13. On 8 March 2013, Mr F was called for a meeting at the offices of the Respondent. The meeting was attended by representatives from the African National Congress (ANC), a representative from the Regional Office of the DSD, a representative from the local Department of Health and Social Development, Mr F and Management of the Respondent. The meeting resolved that Mr F had registered with the Respondent under false pretences and that he had never intended to study there, but had in fact registered with the Respondent in order to have a place to stay while

seeking employment. Mr F was informed that, on the basis of the above, his bursary would be withdrawn with immediate effect, and that he would be given until 31 March 2013 to vacate the Respondent's premises;

7.6.2.14. Mr F was given copies of a letter outlining the resolution of the meeting that took place on 8 March 2013, both in print and in Braille; and

7.6.2.15. The other students featured in the broadcast have all returned to the Respondent's premises and are continuing with their education.

7.6.3. The independent version of Captain Nkosi of SAPS Moffat View confirmed the following:

7.6.3.1. The SAPS Moffat View received a request for assistance from the Respondent relating to students who had refused to return to their rooms;

7.6.3.2. On arrival at the Respondent's premises a number of student-residents were found in the parking area;

7.6.3.3. The students were engaged with but refused to return to their rooms;

7.6.3.4. Information regarding the students reasons for undertaking protest action was requested;

7.6.3.5. Mr F, in response, indicated that he was unhappy with the Respondent's management;

7.6.3.6. The students were advised of alternatives available to them in order to resolve their dispute with the Respondent;

7.6.3.7. The students were requested to provide contact details of their next of kin;

7.6.3.8. Mr F was advised to refrain from influencing other students;

- 7.6.3.9. It was decided that the Respondent would organise transportation for Mr F to Park Station, from where he would board a bus that would take him home;
- 7.6.3.10. The bus ticket was to be paid for by the Respondent;
- 7.6.3.11. The Captain then left the Respondent's premises as everything appeared to be in order;
- 7.6.3.12. The following evening Captain Nkosi again responded to a call out to the Respondent's premises;
- 7.6.3.13. On arrival it appeared that the same students engaged with the previous day were on the pavement outside the Respondent's premises;
- 7.6.3.14. Upon enquiry the students advised that they had been refused entry to the Respondent's premises and had nowhere else to go;
- 7.6.3.15. The Captain offered to engage with the Respondent's management, however, the offer was refused;
- 7.6.3.16. The students were advised that the area was dangerous and that, in light of their vulnerability, that they could not be left on the sidewalk;
- 7.6.3.17. The students were rude and refused any assistance;
- 7.6.3.18. The students were removed to the Moffat View Station, where they stayed overnight; and
- 7.6.3.19. They were returned to the Respondent's premises the next morning by another police officer.

7.7. Allegation that food served to residents was of a poor quality:

- 7.7.1. Half the student-residents interviewed indicated that they felt that food portions were too small and that there have been instances where food served was past its sell-by date and therefore not fit for human

consumption. By way of example, it was alleged, that stale bread and sour milk has in the past been served to residents.

7.7.2. The remaining half of the student-residents interviewed indicated that they felt that food portions are adequate and that they have never been served food that was stale.

7.7.3. Management of the Respondent, as represented by the CEO responded as follows:

7.7.3.1. That the CEO personally purchases staples on a weekly basis;

7.7.3.2. That donations are often received in the form of food and that the Respondent has no control over the quality and timing of such donations; and

7.7.3.3. That a late payment of subsidies by DSD prevents effective planning and budgeting;

7.7.4. Information relating to **meal times and portions** were provided by the Respondent and are reflected below:

Breakfast 07:00	Cereal / soft porridge; two slices of bread; and tea.
Mid-morning snack 10:00	Two slices of bread; and tea.
Lunch 12:30	A "full meal"
Supper 17:00	Two slices of bread

7.7.5. The Commission's **inspection** of the Respondent's kitchen yielded the following:

- 7.7.5.1. A total of five products were found to be past their expiry date, this included porridge, cheese and frozen burger patties; and
 - 7.7.5.2. Bread was found, due to the low temperature of the fridge in which it was stored, to be harder than an equivalent non-refrigerated fresh loaf would be.
- 7.7.6. The Matron in charge of the kitchen indicated as follows:
- 7.7.6.1. The Respondent makes use of a recommended menu plan, which is approved by a registered dietician;
 - 7.7.6.2. On occasion however, due to financial constraints and unpredictability of donations, certain items on the menu for a specific day may be substituted with acceptable, equivalent items, example: rice may be substituted with potatoes or beef with chicken;
 - 7.7.6.3. Non-perishables, such as rice and pasta, are purchased by the Matron on a monthly basis;
 - 7.7.6.4. All staff that live on the Respondent's premises, including the Matron herself, eat from the same kitchen as the residents;
 - 7.7.6.5. The Matron has never personally received any direct complaints from anyone about the food, nor has she ever been made aware of any such complaints;
 - 7.7.6.6. In answer to a question about the serving of soured milk the Matron indicated that only long-life milk is purchased and the souring of milk would therefore be exceptional; and
 - 7.7.6.7. In response to questions about the freshness of bread served, the Matron indicated that bread is delivered to the Respondent three times a week and is stored in a fridge.

7.8. Complaints Handling Procedures:

- 7.8.1. A number of student-residents interviewed indicated that although some form of complaints handling procedures were in place, complaints took a while to be resolved. Other student-residents were satisfied with the level of complaints handling.
- 7.8.2. Management of the Respondent, as represented by the CEO responded as follows:
 - 7.8.2.1. The Respondent had, at the time of the airing of the abovementioned program instalment,¹³ both an undocumented complaints procedure and a documented set of "Boarding House Rules";¹⁴
 - 7.8.2.2. The Boarding House Rules are, on arrival, read to new residents and they are required to sign by way of a thumb print;
 - 7.8.2.3. On further questioning however it was established that the **Boarding House Rules were not available in Braille** and students are not furnished with copies for their own reference;
 - 7.8.2.4. Student-residents who have complaints are encouraged to raise these with so called "Passage Representatives";
 - 7.8.2.5. If a matter cannot be resolved with the assistance of a Passage Representative it is then escalated by the Passage Representative to the "Residence Committee";
 - 7.8.2.6. If a matter cannot be resolved by the Residence Committee it is escalated to senior management;

¹³ See paragraph 2.1. above.

¹⁴ A copy of the boarding house rules was provided to and accepted by the Commission.

7.8.2.7. Those matters not resolved by senior management are escalated to the Respondent's board of directors, the highest level of escalation; and

7.8.2.8. Management, staff, residential, student and volunteer committees are all represented at meetings of the Respondent's board of directors, and meet monthly with their constituents.

7.8.3. **After the events of May 2013 and aforementioned interviews with the Commission, the Respondent developed a Code of Conduct.**¹⁵ However the Commission notes in this regard that **no provision is made specifically addressing protest action.**

8. LEGAL FRAMEWORK

8.1. The vulnerability of people with disabilities is recognised internationally, regionally and on a national level. The international (and regional) frameworks provide South Africa with a broad normative framework within which to develop national legislation and policies aimed at protecting the rights of people with disabilities.

8.2. International Law

8.2.1. A major outcome of the International Year of Disabled Persons was the formulation of the **World Programme of Action concerning Disabled Persons (WPA)**, which programme was adopted by the UN General Assembly on 3 December 1982 (resolution 37/52).¹⁶ The WPA is a global strategy aimed at enhancing disability prevention,

¹⁵ A copy of which was provided to the Commission.

¹⁶ <http://www.un.org/disabilities/default.asp?id=23>.

rehabilitation and equalization of opportunities and the full participation of persons with disabilities in social life and national development. The WPA also **emphasizes the need to approach disability from a human rights perspective**.¹⁷ The rights of persons with disabilities, and specifically the rights affected in the matter under consideration are given specific protection in variety of international instruments, discussed below.

- 8.2.2. The formal recognition of the right to adequate food as a human right and as a part of the right to a decent standard of living was expressed by the United Nations (UN) in the **Universal Declaration of Human Rights**¹⁸ (UDHR) in 1948. **Article 25** of the UDHR provides that:

"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 and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (own emphasis).

- 8.2.3. Similarly the right to an **adequate standard of living and social protection, which encompasses a right to "adequate food"** is provided for in **Article 28(1)** of the **United Nation Convention on the Rights of Persons with Disabilities (2006) (UNCPRD)**¹⁹ and **Article 11(1)** of the **International Covenant on Economic, Social and Cultural Rights (ICESCR)**.²⁰ **Article 11(2)** of the ICESCR sets the standard for "adequate food" as "freedom from hunger."

¹⁷ *Ibid.*

¹⁸ Adopted 10 December 1948 UNGA Res 217 A (III).

¹⁹ UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106. Ratified by South Africa in November 2007.

²⁰ Adopted 16 December 1966 (entered into force 3 January 1976) 993 UNTS 3.

- 8.2.4. **General Comment 12, 1999, of the Committee on Economic, Social and Cultural Rights (CESCR)**, interprets the right to food as the right to adequate food being realised when every man, woman and child, alone or in community with others, has the **physical and economic access at all times to adequate food, or, means for its procurement**. Further, the UN Special Rapporteur on the Right to Food's definition extends the right to include "*regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food...*"²¹
- 8.2.5. **The right to food therefore requires that food be available, accessible and adequate for everyone without discrimination at all times**. This means that **states must provide an enabling environment in which people can produce or procure adequate food for themselves and their families**. However, where **individuals are unable to produce or procure adequate food for themselves and their families, states must ensure access to social security**.
- 8.2.6. The rights to **freedom of expression and opinion** and **access to information** are protected in **Article 21(c)** of the **UNCRPD**, **Article 20** of the **UDHR** and **Article 21** of the **International Covenant on Civil and Political Rights**²² (**ICCPR**). **Article 21(c)** of the **UNCRPD** provides as follows:

"States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others

²¹ <http://www.fao.org/righttofood/about-right-to-food/en/>.

²² Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities...” (own emphasis).

8.3. Regional Law

8.3.1. At the regional level, similar provisions to those in the international frameworks exist to protect the rights of persons with disabilities. The **Africa Decade of Disabled People (ADDP)**²³ (1999 – 2009) was an initiative of the non-governmental community of Africa, in cooperation with member states and governments of the Organisation of African Unity (OAU) (currently known as the African Union (AU)). The ADDP initiative was aimed at the furtherance of the equalization of opportunities for persons with disabilities. The **Continental Plan of Action** that flowed out of that initiative is aimed at implementing priority activities relating to disability. Some of the objectives of the Plan of Action include the formulation and implementation of national policies, **the creation of programmes and legislation to promote the full and equal participation of persons with disabilities, enhancing support services for disabled persons and the promotion and protection of disability rights as human rights.**²⁴

8.3.2. The **right to assemble and protest** is protected in the **African Charter on Human and Peoples' Rights**²⁵ (African Charter) in **Article 11**, which provides as follows:

²³ The goal of the African Decade of Persons with Disabilities is the full participation, equality and empowerment of people with disabilities in Africa.

²⁴ <http://www.africa-union.org/child/Decade%20Plan%20of%20Action%20-Final.pdf>.

²⁵ Adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

"Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others" (own emphasis).

8.4. From its commitments to international and regional frameworks, it is clear that South Africa is obliged to respect the obligations imposed by those frameworks in the interests of achieving and promoting full enjoyment of basic human rights for persons with disabilities in South Africa.

8.5. Domestic Law

8.5.1. The South African Constitution²⁶ is the benchmark for all legislation in South Africa. Its provisions are applicable to all persons, including juristic persons.²⁷ The values of equality, human dignity and freedom, form the basis of any constitutional analysis of the human rights protected in the Bill of Rights.²⁸ South African domestic laws and interpretation of rights therefore find form through the primary principles, as contained in the Constitution of the Republic.

8.5.2. The following provisions of the Constitution are relevant to the matter under consideration:

8.5.2.1. Section 9 (Equality):²⁹

²⁶ *Ibid* at footnote 1.

²⁷ Section 8 of the Constitution.

²⁸ Section 7 of the Constitution.

²⁹ The Promotion of Equality and Prevention of Unfair Discrimination Act, Act No. 4 of 2000 (PEPUDA) is a legislative measure enacted to **promote the achievement of equality and to prevent unfair discrimination**. The Commission has not considered this complaint in the context of PEPUDA, although the Respondent bears a duty to

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

...

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in subsection (3)...³⁰

8.5.2.2. Section 10 (Human Dignity):

"(1) Everyone has inherent dignity and the right to have their dignity respected and protected."

8.5.2.3. Section 17 (Assembly, Demonstration, Picket and Petition):

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

8.5.2.4. Section 18 (Freedom of Association):

"Everyone has the right to freedom of association."

ensure the fullest possible realisation of the rights of residents, this consideration, is unnecessary for the purposes of this analysis.

³⁰ Subsection (3) reads "(t)he state may not unfairly discriminate, directly or indirectly against anyone on one or more grounds, including... disability..."

8.5.2.5. Section 27 (Health Care, Food, Water and Social Security):

"(1) Everyone has the right to have access to –
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
(2) The State must take reasonable and other legislative measures, within its available resources, to achieve the progressive realization of these rights..."

8.5.2.6. Section 32 (Access to Information):

"(1) Everyone has the right of access to-...
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

8.5.2.7. Section 36(1) (The Limitations Clause):

"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.”*

8.5.2.8. **Fundamental rights provided for in the Bill of Rights³¹ can be limited** either in terms of the provisions of section 36 of the Constitution or where a limitation is created internally by the wording of the right itself. The rights contained in section 27 of the Constitution have such internal limitations, as is evidenced by the use of the word “progressive.”

8.5.3. In terms of the **Non Profit Organisations Act,³²** a non profit organisation (NPO) is described as:

“a trust, company or other association of person
(a) established for a public purpose; and
(b) the income and property of which may be not distributable to its members or office-bearers except as reasonable compensation for services rendered.”

³¹ Chapter 2 of the Constitution.

³² Act 71 of 1997.

- 8.5.4. NPO's are private, non-governmental organisations with self governing boards accountable to their owners or members. NPO's also need to account to their donors and to the general public since they operate in the public interest. NPO's do not form part of the state or government, although donors may include government departments.
- 8.5.5. Like other juristic persons, **NPOs have to adhere to domestic legislative frameworks and, importantly, have to comply with the provisions and founding principles of the Constitution.**
- 8.5.6. **The Regulation of Gatherings Act³³** (the RGA), is the national legislation enacted to provide for and regulate the exercise of the rights to assembly, demonstration, picket and petition and freedom of association.³⁴ The Preamble to the RGA provides that:

"every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so... the exercise of such right shall take place peacefully and with due regard to the rights of others" (own emphasis).

- 8.5.7. The RGA distinguishes between "demonstrations" and "gatherings"; "demonstrations" are defined as consisting of 15 (fifteen) or fewer persons and "gatherings" as consisting of more than 15 (fifteen) persons.³⁵ The RGA places far fewer and less onerous limitations on demonstrations than on gatherings, requiring for instance, that notification of a gathering be given to the relevant authority.³⁶

³³Act 205 of 1993

³⁴Contained in sections 17 and 18 of the Constitution

³⁵S1 (xi) and (v) of the Act

³⁶Section 2 of the Act

8.5.8. The **Promotion of Access to Information Act³⁷ (PAIA)** is a legislative measure enacted to enable **full protection all rights, through the protection of the right of access to information.** Although PAIA specifically makes provision for the process for requesting information, the preamble of the Act provides more generally for the **fostering of a culture among public and private bodies of automatic information sharing to give effect to this right.**

8.6. National Jurisprudence

8.6.1. In ***S v Mamabolo*³⁸** the court held that the:

"freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation..."³⁹

8.6.2. In ***S v Turrell*⁴⁰** the court held that:

"[f]ree assembly is a most important right for it is generally only organized opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly."⁴¹

8.6.3. In ***Satawu and Another v Garvas and Others*⁴²** the court had to consider the constitutionality of certain provisions in the Act which

³⁷ 2 of 2000.

³⁸ 2001 (3) SA 409 (CC).

³⁹ Para 50.

⁴⁰ 1973 (1) SA 248 (C).

⁴¹ Para 256.

provided for liability for the organisers of a gathering in situations where reasonable steps were not taken to **prevent reasonably foreseeable damage**. In considering the reasonableness of the limitation the court gave recognition to the **centrality of the right to freedom of assembly** in the South African constitutional democracy, holding that:

"It exists primarily to give a voice to the powerless... This right will, in many cases, be the only mechanism available to them to express their legitimate concerns... Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms"⁴³ (own emphasis).

The court emphasised the import of the right to assemble in the light of the uniquely South African history under the apartheid regime, as well as its **"foundational relevance to the exercise and achievement of all other rights."**⁴⁴

In considering the justifiability of the limitation the court held that the Act struck an "appropriate balance"⁴⁵ between the purpose of the exercise of the right and the purpose of the limitation and further found there to be no less restrictive means to achieve this latter purpose. The limitation was therefore held to be reasonable and justifiable in terms of the provisions of section 36 of the Constitution.

⁴² 2013 (1) SA 83 (CC).

⁴³ Para 61.

⁴⁴ Para 61.

⁴⁵ Para 81.

8.7. Key National Policies

- 8.7.1. The **Integrated National Disability Strategy (1997) (the Strategy)** refers to a wide range of strategies designed to facilitate access by people with disabilities to mechanisms which enhance their ability to live independently. Social welfare services in this respect include large institutions for people with disabilities, run either by subsidised welfare organisations, the private sector or the state.
- 8.7.2. The Strategy recognises that while these institutions provide shelter and necessary care for people who would otherwise have struggled to meet their needs, these **institutions are faced with a number of difficulties**. Also, conditions at these institutions differ considerably and many fall short of acceptable minimum standards, which results in the violation of various human rights. The Strategy further acknowledges that people with disabilities find themselves in extremely weak and vulnerable positions and that **their ability to obtain appropriate recourse is sometimes very limited**.
- 8.7.3. A pertinent recommendation contained in the Strategy⁴⁶ 'relates to 'Social Welfare and Community Development' and specifically, residential facilities. The recommendations refer to the development of national guidelines for the residential facilities for people with disabilities, including "*minimum standards and measures to ensure that the rights of people with disabilities are protected and their wishes taken into account*" (own emphasis).

⁴⁶ Recommendation 12b.

- 8.7.4. Flowing from the Strategy, the aim of the **Policy Guidelines on Residential Facilities for People with Disabilities (the Policy)**, is to provide basic information about the establishment and running of facilities for people with disabilities.⁴⁷ This includes the development of a framework for good governance and management practices in order to protect and promote the rights of people with disabilities.⁴⁸ Some of the principles contained in the policy include accessibility, accountability, Batho Pele, participation, individuality and human rights.
- 8.7.5. Importantly, the Policy acknowledges that there is currently **no specific legislation in place relating to people with disabilities or relating to the functioning of residential facilities for people with disabilities**. This legislative gap causes various difficulties, including those related to monitoring, compliance and securing appropriate redress.⁴⁹
- 8.7.6. During 2011, **Minimum Standards on Residential Facilities for Persons with Disabilities (the Minimum Standards)** were finalised and integrated into the comprehensive national policy framework on disability, aligning it with the **UNCRPD**. The Minimum Standards, which were rolled out in all provinces,⁵⁰ deal with a wide variety of issues and are applicable to all residential facilities for people with disabilities. Standards applicable to the present matter include:
- 8.7.6.1. **Rights of people with disabilities:** People with disabilities should **be given information about their rights and**

⁴⁷ Policy Guidelines on Residential Facilities for People with Disabilities, available on request from the DSD, undated, pg 6.

⁴⁸ Ibid at 8 - 9

⁴⁹ Ibid at 22 - 23

⁵⁰ <http://www.pmg.org.za/report/20110125-annual-report-briefing-department-social-development>

responsibilities in a manner and form which takes into account age, capacity and diversity.⁵¹

- 8.7.6.2. **Complaints and grievance procedure:** Opportunities should exist for people with disabilities to **freely express dissatisfaction** with the services provided to them, and their concerns and complaints should be addressed seriously and without delay or reprisal. People with disabilities should be provided with a description of applicable complaint procedures in a manner that is age and language appropriate.⁵²
- 8.7.6.3. **Physical care and environment:** People with disabilities must live in an accessible, safe, healthy, well-maintained environment which meets their needs in terms of privacy, safety and well-being. This standard refers to aspects such as safety, **compliance with nutritional and dietary requirements**, basic amenities that are consistently in good working order and are fixed timeously, the provision of individual private spaces and easy access to ablution facilities, all of which must be kept clean.⁵³
- 8.7.6.4. **Behaviour management:** Capacity and support which enables constructive and effective social behaviour should be provided. Residents should be made aware of the behaviour expected of them as well as any behaviour that is prohibited. A copy of any rules **in writing and in a form and language that they understand** must be provided to all residents and must be explained to them. Service providers should play a role in assisting people with disabilities to meet

⁵¹ Department of Social Development, Minimum standards on residential facilities for persons with disabilities at pgs 25 - 26

⁵² *Ibid* at 26 – 27.

⁵³ *Ibid* at 27 – 29.

their behavioural expectations through teaching and developmental and / or therapeutic support.

9. ANALYSIS AND FINDINGS

- 9.1. It is clear that there is both national and international recognition of the heightened vulnerability of disabled persons. Notwithstanding the aforementioned, the Commission notes the paucity of national legislation conferring specific duties of protection and promoting fundamental rights of persons with disabilities. The Commission is guided in its consideration of the special measures which must be put in place to protect the rights of this vulnerable group by the existing broad international framework and the Constitutional principles.
- 9.2. Although the principle of full participation in society, family and community is confirmed in the UDHR and applies to all people, including those with disabilities, in reality, disabled persons are often denied this opportunity for various reasons, including lack of awareness, indifference and fear. A lack of accessible information, and effective means of communicating grievances can further isolate persons with disabilities and lead to them feeling powerless, frustrated, confined and excluded within the very institutions where they live and regard as home.
- 9.3. Taking into account this contextual background, the UN identified two major challenges currently faced by residential facilities to be:
- 9.3.1. **Overstretched, ill-equipped and under-capacitated service providers and employees.** In this respect, it is important to note that staff members at a residential facility form a very important component of an efficient and effective service. Appropriately qualified,

sensitised and experienced personnel are therefore required to ensure good quality service which is responsive to the specific needs of the people with disabilities they serve;⁵⁴ and

9.3.2. **A lack of a collective and coordinated effort** to address disability issues within residential facilities at domestic level.⁵⁵

9.4. In analysing the complaint before it, the Commission considered the allegations as presented in the program instalment⁵⁶, interviews with student-residents, meetings with representatives from the Respondent and facts gleaned from the Commission's own inspections of the Respondent's premises.

9.5. Having considered the abovementioned, the Commission established the following:

9.5.1. With regard to the **allegation of eviction**, the Commission considered the opposing versions put to it by the various parties interviewed; in this regard **greater reliance was placed on the independent version of the SAPS**. The Commission found that only one student-resident, out of the group featured in the abovementioned program instalment⁵⁷, had in fact been evicted.

9.5.2. This eviction was the result of a series of events culminating in the internal disciplinary procedure of the Respondent. Having considered the steps taken leading up to the process and reasons informing the decision to evict, **the Commission finds that this allegation is unsubstantiated and that there is no violation in this respect.**

⁵⁴ *Ibid* at note 45, pg 30.

⁵⁵ *Ibid* at 18.

⁵⁶ See paragraph 2.1. above.

⁵⁷ See paragraph 2.1. above.

- 9.5.3. With regard to the allegation that **food served was of a poor quality**, the right to food is intrinsically linked to the rights to life and dignity and therefore the vulnerability of this right is of particular concern to the Commission. Although this right does not entitle individuals and groups to the provision of food it does oblige government to ensure that food is available, accessible and adequate, at all times and without discrimination.
- 9.5.4. In this respect the Commission notes that **the DSD does indeed provide social security to the Respondent's residents**, as is provided for in the abovementioned MOU.⁵⁸ **However a failure by the DSD to ensure consistency with regard to payment dates hinders the Respondent's ability to plan and budget, limiting its ability to take advantage of cost cutting measures and has an indirect impact on, and limiting effect on resident's right to food.**
- 9.5.5. Regarding the Respondent's provision of food to residents the Commission found that **despite provision by the Respondent for checks on food stocks, some food items stored in the kitchen area were past their sell-by date**. In this respect the Commission established that the quality and portions of food served to student-residents to be affected by the following factors:
- 9.5.5.1. A **general overall strain on resources** experienced by the Respondent, which causes it to place a **degree of reliance on the good will of food donations** received. By their very nature these donations are

⁵⁸ See paragraph 7.5.2.2 above.

unpredictable as to quantity, quality, type and frequency. Further to the unpredictable nature of donations, the Respondent, like many other NPO's lacks the means to control donations;

9.5.5.2. The inconsistency with regard to payment dates for payments made by the DSD; and

9.5.5.3. Non-payment of rental fees by some residents.

9.5.6. With regard to concerns around the **Respondent's Complaints Handling Procedures,**

9.5.6.1. It is clear from both the national and international legal frameworks that the rights to assemble and protest are necessary for the protection and achievement of other rights. In South Africa, in light of this Republic's unique history under the apartheid regime, the protection of these rights is particularly important.

9.5.6.2. The Commission established that the **student-residents featured in the programme instalment were attempting to exercise their rights to assemble and protest.** The Commission further **found the actions of the Respondent amounted to a limitation of the student-residents' ability to exercise these right and in so doing violated their rights to assemble and to protest.** However, the Commission accepts that the **Respondent was acting to protect the rights of other vulnerable non-protesting residents as well as staff members.** The Commission therefore finds the **limitation to have been reasonable and justifiable in light of the purpose of the limitation;** and

9.5.6.3. The provisions of the Constitution, as well as supporting legislation and relevant jurisprudence, makes it clear that provision needs to be made for the safe exercise of this right. In light of the vulnerability of the disabled community, providing this community with the ability to exercise this right becomes even more significant, as it, in the words of the Constitutional Court "give[s] a voice to the powerless."⁵⁹ **In this respect the Commission finds that the Respondent had no clear processes in place for protest action which would allow for the observance of rules, for both the safe exercise of the right and the protection of both protestors and non-protestors, in a manner which least affected the rights of the parties in the organisation.**

10. RECOMMENDATIONS

10.1. The Commission recognises that the Respondent has had a long history of **excellent service** in the sector. Organisations such as the Respondent do invaluable work in providing for, protecting and empowering otherwise vulnerable members of our society. The Commission further recognises that these organisations in general and the Respondent specifically, place a great reliance on the goodwill of others. It is not the intention of the Commission to burden the Respondent further but rather to assist through these recommendations to strengthen existing systems and practises.

10.2. Based on the findings set out above, the Commission recommends:

10.2.1. With regard to the findings related to **access to sufficient food:**

⁵⁹ *Satawu and Another v Garvas and Others* at para 50.

- 10.2.1.1. That **the DSD** revisit the terms of the existing MOU between it and the Respondent and that it enters into consultation with the Respondent in order to determine fixed dates for the payment of subsidies to the Respondent. That **within 6 (six) months** of the date of receipt of the Commission's report **amendments to the MOU are affected in order to reflect the fixed payment dates**. That these **dates be strictly adhered to** in order to enable the Respondent to properly plan and budget.
- 10.2.1.2. That **the Respondent within 6 (six) months** of the date of receipt of the Commission's report **develops guidelines to assist donors, outlining preferences with regard to quality of perishable donations and preferred timelines for receipt**. This should be done in a manner that will facilitate donations rather than alienate donors.
- 10.2.1.3. That **the Respondent within 6 (six) months** of the date of receipt of the Commission's report **host an information workshop, for the benefit of all residents, and presented by a dietician**. The workshop must advise residents about the Respondent's meal plans, with a view to **explaining the right to nutritious food, the Respondent's preparation of menu plans, portion sizes, nutrients and food groups**.
- 10.2.2. With regard to the findings related to **the rights to assemble and protest**:

10.2.2.1. That **the Respondent within 3 (three) months** of the date of receipt of the Commission's report **consult on and review its existing complaints handling procedures with residents and stakeholders with a view to making revisions there to. The revisions are to specifically include provision for the following:**

10.2.2.1.1. **Timeframes for response to complaints** lodged with the Respondent, which timeframes must be adhered to;

10.2.2.1.2. **The completion of a log report for each complaint received, timeframes for the completion of such reports and provision for the safekeeping of such reports** for a period of no less than five years. The report compiled must include details of each complaint, steps taken to address the complaint and details of the final outcome; and

10.2.2.1.3. **The exercise, by residents, of the right to peaceful demonstration. Procedures provided for in this regard must also clearly indicate where, how and the basis through which the right can safely be exercised in the context of the Respondents premises.** In this respect the Respondent may outline further, reasonable steps that it, in consultation with the DSD, deems necessary for the protection of the rights of persons under its care. **Staff members**

should be trained on procedures provided for in this regard.

10.2.2.2. That **the Respondent within 1 (one) month** of hosting the consultations (as contemplated in paragraph 10.2.2.1. above):

10.2.2.2.1. **Provide copies of the revised complaints handling procedures, to all residents, in a manner and form that is accessible by them; and**

10.2.2.2.2. **Host an information workshop in which the Respondent's complaints handling procedures are explained to all residents.**

10.2.3. The Respondent is to provide the Commission with a report setting out its progress in respect of the implementation of the abovementioned recommendations **within 6 (six) months** of the date of receipt of the Commission's report. Such report is to include:

10.2.3.1. Steps taken towards implementing recommendations as set out above;

10.2.3.2. Outstanding recommendations and applicable timeframes for implementation thereof; and

10.2.3.3. Any shortcomings which may have become evident and the measures to be put in place to address same, together with applicable time frames.

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 ON THIS THE 3RD DAY OF SEPTEMBER 2014.



**Adv B. Malatji
Commissioner
South African Human Rights Commission**