



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: KZ/1516/0211

SIYABONGA KHANYILE

COMPLAINANT

And

HAYTHORNE SECONDARY SCHOOL

FIRST RESPONDENT

DEPARTMENT OF EDUCATION

SECOND RESPONDENT

SCHOOL GOVERNING BODY

THIRD RESPONDENT

MEC DEPARTMENT OF EDUCATION

FOURTH RESPONDENT

INVESTIGATIVE 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

Constitution¹ of the Republic of South Africa, (hereinafter referred to as “the Constitution”).

1.2. In terms of Section 184 (1) of the Constitution, the Commission is specifically mandated to:

1.2.1. Promote respect for human rights and a culture of 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 and to take steps to secure appropriate redress where human rights have been violated.

1.4. The South African Human Rights Commission Act² (hereinafter referred to as “the SAHRC Act”) provides the enabling framework for the powers of the Commission.

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

2. **The Parties**

2.1 The Complainant is Siyabonga Khanyile, an adult male, residing in KwaZulu-Natal (hereinafter referred to as “the Complainant”).

¹ The Constitution of the Republic of South Africa, 1996

² No. 40 of 2013

- 2.2 The First Respondent is Haythorne Secondary School, a public school in terms of Section 12 of the South African Schools Act³, situated at 30 Hickory Road, Woodlands, Pietermaritzburg, 3201 (hereinafter referred to as “the First Respondent”).
- 2.3 The Second Respondent is the Department of Education in the Province of KwaZulu-Natal, cited in its capacity as an interested party in the subject matter of this complaint, as well as the state regulator of the First Respondent (hereinafter referred to as “the Second Respondent”).
- 2.4 The Third Respondent is the School Governing Body of the First Respondent, a governing body vested with the governance of a public school in terms of Section 16 of the South African Schools Act (hereinafter referred to as “the Third Respondent”).
- 2.5 The Fourth Respondent is the Member of the Executive Council for Basic Education in the KwaZulu-Natal Province cited in his/her capacity as a bearer of constitutional and statutory responsibilities in respect of the provision, administration and funding of public schools in the Province, arising from the Constitution and the Schools Act (hereinafter referred to as “the Fourth Respondent”).

3. **Factual Background**

- 3.1 On or about 29 October 2015, the Commission received a complaint from the Complainant relating to the unfair disciplinary procedures followed by the First Respondent, regarding the alleged misconduct by his niece, Ms X⁴, (hereinafter referred to as “the Learner”.) The following information was provided by the Complainant:

³ No 84 of 1996

⁴ The personal information of the minor learner is confidential.

- 3.1.1 That he is the maternal uncle of the Learner, a fifteen (15) year old, Grade 10 learner enrolled at the First Respondent;
- 3.1.2 That the Learner was involved in an incident which occurred on or about 16 October 2015, wherein she was allegedly accused of consuming alcohol with a group of other learners at the First Respondent's boarding house;
- 3.1.3 The Complainant later learned that the First Respondent had telephonically contacted the parents of the learners who were involved in the alleged misconduct, to inform them about the incident. However the Learner's parent, Ms Z⁵ (hereinafer referred to as "Ms Z") was not notified;
- 3.1.4 The Complainant alleged that the reason furnished to him by the First Respondent for failing to contact Ms Z, was that the supervisor of the boarding house did not have Ms Z's contact number and therefore had requested that the Learner herself inform her mother about the alleged incident;
- 3.1.5 The Complainant later learned that the First Respondent had convened a meeting with the parents of the affected learners on or about 18 October 2015, wherein it was decided that the learners would be suspended from residing at the boarding house for a period of one (1) week but would be permitted to attend all classes as normal;
- 3.1.6 The Complainant alleged that Ms Z was not informed by the First Respondent about the meeting and neither was she informed about the outcome thereof;
- 3.1.7 The Learner was requested to vacate the boarding house on or about 21 October 2015. Due to the First Respondent's neglect in notifying Ms Z

⁵The name of the parent is withheld to protect the identity of the minor learner.

about the outcome of the meeting, Ms Z was not aware that the learner had to be fetched and therefore no arrangements were made to collect the Learner;

3.1.8 As a result, the Learner sought accommodation with a male learner⁶, (hereinafter referred to as “Mr K”), who was enrolled at First Respondent and who resided at a nearby informal settlement known as, “Site Eleven”;

3.1.9 The Complainant alleged that the Learner was raped by Mr K, whilst staying with him at the informal settlement;

3.1.10 On or about 24 October 2015, the Complainant and Ms Z were informed by friends of the Learner that she (the Learner) was no longer being accommodated at the boarding house;

3.1.11 The Complainant immediately fetched the Learner. He approached the supervisor of the boarding house and requested an explanation for Ms Z not having been informed about the incident and the subsequent removal of the Learner from the boarding house. The Complainant was advised by the supervisor that the “Body Master’s” Office did not have the contact details for Ms. Z.

3.1.12 The Complainant had requested the First Respondent to furnish him with the contact details of Mr K’s parents and/or legal guardian in order to:

- i) Pursue a claim for compensation from Mr K’s parents, in terms of Zulu culture;

⁶ The male learner is alleged to be 18 years old, however no conclusive evidence of this was provided and as precautionary measure given the uncertainty, the Commission will therefore refer to him as “Mr K”.

- ii) Institute criminal charges against Mr K for statutory rape in terms of the Sexual Offences Act No. 12 of 2009;

3.1.13 First Respondent refused to furnish the Complainant and/or Ms Z with the information referred to above;

3.1.14 The Complainant approached the Commission for assistance, as he was extremely aggrieved with the manner in which the First Respondent had dealt with the matter and its failure to consider the best interests of the Learner.

4. Preliminary Assessment:

4.1 On perusal of the contents of the complaint, the Commission made the following preliminary findings:

4.1.1 That the First Respondent's conduct constituted a *prima facie* violation of the following rights:

4.1.1.1. Section 10 - Human Dignity;

4.1.1.2. Section 28 – Children;

4.1.1.3. Section 32 – Access to Information;

4.1.1.4. Section 33 – Just Administrative Action;

4.1.2 The Commission determined that certain aspects of the complaint fell within its mandate. In this regard the Commission noted that it was not jurisdictionally competent to make determinations around matters of a criminal nature or civil proceedings, and proceeded to investigate the matter only in so far as the rights of children, access to information and basic education are concerned.

4.1.3 That the investigation be conducted in terms of the Commission's Complaints Handling Procedures.

5. Steps taken by the Commission⁷

- 5.1 The Commission contacted the Complainant to confirm that the Learner had been allowed to write the year-end examinations at First Respondent;
 - 5.2 The Complainant indicated that the Learner had been expelled only from the boarding house, but had been allowed to attend day classes at the First Respondent and to write the examination/s;
 - 5.3 The Commission consulted with the Complainant and informed him that it would be writing to the First Respondent regarding his allegations and further advised him to institute the necessary criminal charge/s against Mr K, for the alleged rape of the Learner;
 - 5.4 On or about 10 December 2015, the Commission sent an allegation letter to the Principal of the First Respondent and requested a response thereto;
 - 5.5 A response was received from the First Respondent on or about 19 January 2016.
- 5.6.1 The Complainant raised concerns regarding the details of who was present at a meeting convened by First Respondent, on or about 26 October 2015 and further disputed the dates in respect of two (2) issues viz.:
- a) the date of a meeting that was convened by the First Respondent, and,
 - b) the number of days that the Learner had stayed at the informal settlement.

⁷ At the conclusion of its investigation, a copy of the Commissions provisional draft report was forwarded to all parties and comments were received from the Complainant and the First Respondent. These comments do not materially affect the findings and recommendations in this report.

5.6.2 The First Respondent raised the following concerns:

- a) That the meeting convened with parents and/or guardians regarding the alleged incident took place on the 18 October 2015 and not 19th October 2015, as reflected in the draft report;
- b) That the Learner denied “that anything untoward had happened” between her (the Learner) and “Mr. K.” Furthermore, First Respondent was not furnished with any evidence that there was any form of sexual activity between the learner and “Mr. K”;
- c) That the Learner was not “expelled” from the boarding house, but rather she was suspended for a period of five (5) days;
- d) That First Respondent did not “abdicate its duty of care in relation to the Learner or had acted negligently towards the Learner in any way;
- e) That First Respondent conceded that it had failed to communicate with and/or notify the Learner’s parent about the alleged incident and further confirmed that had there been more effective communication between First Respondent and the parent, this specific incident could have been avoided;
- f) First Respondent disputed that it had any duty to report the alleged

statutory rape to the South African Police Service, however accepted that some form of additional investigation into the allegation of the statutory rape of the Learner should have been undertaken by it.

Unsigned response received from the First Respondent

6.1 First Respondent advised as follows:

- 6.1.1 That Mr. Diaz, (hereinafter referred to as “the Principal,”) was contacted telephonically on or about 17 October 2015 by Mr. Crompton, the Superintendent of the boarding house, who informed him that on or about 16 October 2015, learners had been found consuming alcohol in one of the classrooms;
- 6.1.2 The Principal thereafter instructed Mr. Crompton to isolate the identified learners and to report to him (the Principal) the following morning;
- 6.1.3 Given the seriousness of the allegations, the First Respondent decided to convene an urgent meeting with the parents and/or guardians of the identified learners on Sunday, 18 October 2015 at 14h00;
- 6.1.4 Mr. Crompton was instructed to contact the parents telephonically and to request their attendance at the meeting;
- 6.1.5 On or about 18 October 2015, Mr. Crompton assured the Principal that all the parents had been notified telephonically and that they had been duly informed about the meeting;

- 6.1.6 The Learner was present at the meeting and was represented by a Mr. Sifunda Khanyile. A copy of the attendance register was attached to the response from the First Respondent, marked Annexure "A";
- 6.1.7 The decision reached at the meeting was that the identified learners would be suspended from the boarding house for a period of five (5) days, however they would be permitted to attend school, as day scholars during this time;
- 6.1.8 According to the Principal, the above decision was in accordance with the boarding house "Code of Conduct," as the seriousness of the offence and/or misconduct, warranted an immediate expulsion of the learners;
- 6.1.9 The Principal further advised that he had deviated from the Code of Conduct, as learners were scheduled to commence their final examination on 05 November 2015 and he did not want them to be prejudiced by expelling them from the school;
- 6.1.10 The decision to suspend the learners was subsequently endorsed by the Third Respondent, at a meeting held on 29 October 2015;
- 6.1.11 Identified learners were taken home by their parents and/or guardians, after the meeting on or about 18 October 2015;
- 6.1.12 The Principal denies any knowledge that Mr. Sifunda Khanyile had not taken the Learner home after the meeting;

6.1.13 On or about 26 October 2015, the Principal was notified by the Supervisor of the boarding house, that the Complainant came to visit the Learner on or about 24 October 2015 and was extremely upset that she (the Learner) was not there;

6.1.14 That the supervisor accompanied the Complainant to "Site 11", an informal settlement which is located in close proximity to the First Respondent, where the Learner was "found";

6.1.15 The Principal advised that it was only at this stage that he had ascertained that the Learner was not residing at the boarding house and he immediately contacted the Complainant to discuss the matter.

6.1.16 A meeting was convened between the Principal, Deputy Principal, the Complainant and the Learner on or about 26 October 2015. The Principal did not record the minutes of the said meeting, he however advised that the following was discussed:

- i) The Principal apologized to the Complainant for the 'situation that had transpired' and advised that it would have been avoided, had there been more effective communication between the boarding house and Ms. Z;
- ii) The Principal indicated that he would address the matter at a meeting that was scheduled for 29 October 2015 by the Third Respondent;
- iii) The Learner gave her assurance that 'nothing untoward' had occurred between herself and Mr. K. The Principal however urged the Complainant to take the Learner for the necessary medical examinations;

- iv) The results of the Learners medical examination would be provided to the First Respondent.

6.1.17 On or about 27 October 2015, the Principal received a written request from the Complainant for the contact details of Mr. K's parents and /or guardian. The Principal did not provide the details as he felt that he was not legally obliged to disclose confidential information of this nature to the Complainant, who was not the Learner's legal guardian;

6.1.18 The First Respondent was not able to report the alleged incident to the South African Police Service (SAPS) as no substantial and/or concrete medical evidence had been furnished by the Complainant and/or Ms. Z.

7. Legal Framework

7.1. Constitutional Provisions

i) Section 10 provides that:-

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

ii) Section 28 (1) (d) provides that:-

"Every child has the right to be protected from maltreatment, neglect, abuse or degradation."

Section 28 (2) provides that:-

"A child's best interest is of paramount importance in every matter concerning the child."

iii) Section 32 (1) provides that:-

“Everyone has the right of access to any information held by the State...held by another person and that is required for the exercise or protection of any rights...”

iv) Section 33 (1) provides that:-

“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair...the right to be given written reasons...”

Section 33 (2) provides that:-

“Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

7.2. Domestic Legislation

7.2.1 The Children’s Act⁸

i) Section 9 provides that:-

“In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.”

ii) Section 110 (1) provides that:-

“ Any...teacher...who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organization, the provincial department of social development or a police official.”

7.2.2 The South African Schools Act

- i)** In terms of Section 8, the governing body of a public school must adopt a code of conduct for learners, which is aimed at creating a disciplined and purposeful school

⁸ Act No. 38 of 2005

environment that is dedicated to the improvement and maintenance of a quality learning environment.

ii) Section 8 (5) provides that:-

“A code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings.”

iii) Section 59 (1) provides that:-

“A school must make information available for inspection by any person, insofar as such information is required for the exercise and protection of such person’s rights.”

7.2.3 The Promotion of Administrative Justice Act⁹

i) Section 3 (1) provides that:-

“Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.”

7.3. International Instruments

7.3.1 United Nations Convention on the Rights of the Child¹⁰

i) Article 3 (1) provides that:-

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

ii) Article 19 (1) provides that:-

“State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental

⁹ Act No.3 of 2000.

¹⁰ Entry into force on 02 September 1990.

violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent (s), legal guardian (s) or any other person who has the care of the child.”

iii) Article 19 (2) provides that:-

“Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

8. Case law

8.1 In the case of ***Long and Another v Jacobs***¹¹, the Court held that, *“Educators of a public school, and in particular the principal, MEC as functionaries of the state, were exercising a public power and were accountable for the implementation of the rights enshrined in the Constitution”*

8.2 The unreported case of ***Member of the Executive Council of Gauteng Responsible for Education v Cari Pierre Rabie 2006 (H) SA (TPD)***, dealt with a claim for damages that was instituted by a parent against the Waterkloof High School in Pretoria. The case involved a minor learner who sustained severe injuries whilst playing a dangerous game at school without any supervision. To determine negligence the Court used the three-part test which was formulated in the case of ***Kruger v Coetzee***¹²:

*“a) would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff;
b) would a reasonable person have taken steps to guard against that*

¹¹ Long and Another v Jacobs 2012 ZASCA 58

¹² Kruger v Coetzee 1966 (2) SA 428 (A) at 430.

possibility;
c) *did the defendant fail to take steps which he or she should have taken to guard against it?"*

The Court found that the School had a legal duty of care towards the learner and that it failed to take the requisite preventative steps to protect the learner from harm. The Court accordingly held that the school was negligent for breaching its duty of care and found that it was liable for damages.

8.3 The case of *Minister of Education and Another v Wynkwardt*¹³ also dealt with a claim for damages following an incident wherein a minor sustained severe injuries whilst he had been under the care and control of the employees of the Highlands Primary School in the Western Cape. In determining the issue of negligence, the Court noted that teachers owe young children in their care a legal duty to act positively to prevent them from sustaining physical harm.

8.4 In the case of *V v V 1998 (4) SA 169 (C)*, the Court stated that, *"The child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child..."*

9. Legal Issues and Analysis

The complaint is based on the alleged violations of the right to human dignity, access to information, administrative action that is lawful, reasonable and procedurally fair, as well as the right of a child to be protected from maltreatment, neglect, abuse or degradation. The Commission had to determine the following:

9.1 Whether the disciplinary proceedings held by the First Respondent on 18 October 2015 complied with due process in terms of:

- i) Code of Conduct of the boarding house;
- ii) Section 8 (5) of the South African School's Act; and

¹³ Minister of Education and Another v Wynkwardt 2004 (2) SA 1036 (A) WCHC.

- iii) Administrative action that is lawful, reasonable and procedurally fair.
- a) The Learner was accused of consuming alcohol in one of the school's classrooms on or about 16 October 2015. In terms of the First Respondent's Code of Conduct, this constitutes a serious offence (class 3) which carries a sanction of expulsion;
- b) In such an instance the Code of Conduct provides for the parents of the affected learner/s to be notified telephonically and in writing of the alleged offence and of the date and time scheduled for all parties to meet;
- c) The First Respondent's disciplinary committee sits to recommend the sanction. Learners who are expelled with immediate effect from the boarding house may remain at school at the discretion of the Third Respondent, depending on the nature of the offence. Minutes of the meeting are thereafter presented to the Third Respondent for ratification and Learners are required to leave the boarding house immediately;
- d) In this matter, the First Respondent failed to furnish the Commission with any proof that the Learner's parent, Ms Z was notified telephonically and/or in writing either by it or any official from the First Respondent's boarding house regarding the Learner's alleged misconduct. According to the Complainant, the First Respondent delegated this responsibility entirely to the Learner to communicate same with her parent. The First Respondent's response confirms that this was the position and that the situation would not have arisen had there been more effective communication between the boarding house and the parent. The Principal's apology to the Complainant for this poor and/or lack of communication with the parent is accordingly an acknowledgment of the First Respondent's failure to comply with due process in terms of its code of conduct;

- e) The obligation and responsibility to communicate with parents and/or guardians of learners affected through processes such as disciplinary hearings arises for obvious reasons relating to the joint duty of care owed to children between bodies such as schools and parents. The responsibility finds statutory force in section 8(5) of the South African Schools Act. The failure to discharge this responsibility is therefore in contravention of section 8 of the South African Schools Act, as such conduct does not promote the safeguarding of a learners interests in disciplinary proceedings;
- f) The First Respondent's response also confirmed that the Principal and the Deputy Principal met with the Complainant and the Learner at the Complainant's request on or about 26 October 2016, however the minutes of this meeting were not recorded. The Principal also apologised in his response for not having recorded any minutes for the said meeting. Such conduct illustrates a further instance wherein the First Respondent flouted general procedures in failing to record the minutes of a meeting relating to a class three (3) offence;
- g) Whilst a register taken at the meeting held with parents on or about 18 October 2015 reflects that the Learner was represented by a Mr. Sifunda Khanyile, the First Respondent made no attempt to establish the relationship of Mr. Sifunda Khanyile to the Learner. The First Respondent further failed to contact the parent in order to verify whether Mr. Sifunda Khanyile was duly authorised by her to represent the Learner at the said meeting;
- h) Given the serious implications of such processes for the Learner, the First Respondent ought to have taken basic steps to ensure that the Learner was duly represented, by for example confirming same with the parent. These basic first steps could have resulted in completely different outcomes, amongst which would likely have been that the Learner's parent or the Complainant would have provided appropriate accommodation. The lack of communication from the First Respondent and/or its boarding facility severely compromised the safety and

dignity of the Learner, as a girl child who ultimately spent approximately two (2) – four (4) days at an informal settlement with Mr. K. The First Respondent's conduct was therefore negligent;

- i) The disciplinary proceedings conducted in the absence of the Learner's legal parent and/or guardian does not constitute administrative action that is lawful, reasonable and procedurally fair.

9.2 Whether the First Respondent has an obligation and/or duty of care in ensuring the safety of the Learner and whether it discharged its obligations:

- a) As a public school which offers boarding and/or hostel accommodation to its learners, the First Respondent has an obligation to ensure that the safety and interests of all learners are protected whilst in the care of the First Respondent. In the case of *Member of the Executive Council of Gauteng Responsible for Education v Cari Pierre Rabie*, the Court confirmed that a school holds a legal duty of care towards its learners and further that it has an obligation to take preventative steps to ensure that its learners are protected from harm;
- b) This was also confirmed in the case of *Minister of Education and Another v Wynkwardt* where the Court held that the teachers and/or staff of a school have a legal duty of care towards the children that are under their care and control. The Court further noted that this duty further extends to the teachers and/or staff acting positively in order to prevent the children from sustaining any physical harm;
- c) The Children's Act further emphasises the paramount importance of the care, protection and well-being of a child, and Section 110(1) of the Act stipulates a list of professionals that are obliged to report the abuse of children. This includes educators and provides that those who conclude or reasonably suspect that a child "has been abused in a manner causing physical injury, sexually abused or

deliberately neglected..." are obliged to report such incident/s to a designated child protection organization or to the SAPS;

- d) Despite Complainant not furnishing the First Respondent with the necessary medical report/evidence to confirm whether the Learner was sexually violated during the two (2) – four (4) days that she spent at the informal settlement with Mr. K, given the vulnerability of the girl child in our society and the Learner's tender age, the First Respondent ought to have referred the alleged incident to the relevant SAPS for investigation based on a reasonable suspicion in terms of the Children's Act. This duty arises regardless of whether the Complainant or Ms Z had themselves lodged such a complaint with the SAPS and Department of Social Development;
- e) Based on the above, the First Respondent did have a legal duty of care in respect of the Learner whilst she was under its care and control. The First Respondent therefore had a duty to verify the authenticity of the Learner's representative at the meeting of the First Respondent, as the representative who attended was not the Learner's parent and/or legal guardian as per the First Respondent's records. The First Respondent was also under a duty to take preventative steps and/or positive action to prevent the Learner from being exposed to any form of harm.
- f) In applying the three-part test formulated in the case of *Kruger v Coetzee* as referred to in paragraph 8.3 above, it was foreseeable that the Learner's interests would have been prejudiced had she not been adequately represented at the meeting involving an offence of a serious misconduct. It was also reasonable to expect that the Learner may not have reached home safely based on the fact that her parent and/or legal guardian was not present at the meeting especially since the authenticity of Mr Sifunda Khanyile had not been established by the First Respondent. The First Respondent's failure to communicate with Ms Z to confirm whether Mr Sifunda Khanyile had been authorised by her to attend the meeting and/or disciplinary hearing, as well as its failure to confirm whether the Learner had

reached home safely following the said meeting is a clear indication that First Respondent was negligent and in breach of its duty of care towards the Learner.

9.3 Whether the First Respondent's conduct violated the Learner's right to human dignity, access to information, administrative action that is lawful, reasonable and procedurally fair as well as her right to be protected from maltreatment, neglect, abuse or degradation?

- a) The First Respondent's conduct in failing to ensure that the Learner was represented at the meeting and /or disciplinary proceeding held on 18 October 2015 violated the Learner's right to administrative action that is lawful, reasonable and procedurally fair;
- b) The identity of Mr Sifunda Khanyile and his relationship to the Learner has to date not been established by the First Respondent. The Complainant has further confirmed that neither he nor Ms Z have any relatives known as Mr Sifunda Khanyile and that therefore he is unknown to them. As a result Mr Sifunda Khanyile was not duly authorised by either the Complainant or Ms Z to attend the urgent meeting convened by the First Respondent. As a consequence of the First Respondent's failure to verify his authority, it has to be concluded that the Learner was not represented during this process;
- c) According to the First Respondent's response, the Principal did not furnish the Complainant with the contact details of Mr. K's parents and/or legal guardian, as he did not feel legally obliged to divulge such confidential information to the Complainant as he was not the legal guardian of the Learner;
- d) The alleged violation of the right to access information is addressed hereunder.
- e) The First Respondent's basis for not furnishing the requested information is premised on two grounds. The first of which is that the information is confidential

and the second of which is that the Complainant was not the Learner's legal guardian. We deal with the latter basis of the refusal first.

- f) This response is concerning as the First Respondent had in fact engaged in a meeting with the Complainant on 26 October 2015 regarding the alleged misconduct, as well as the alleged incident which followed that resulted in the Learner spending approximately two (2) – four (4) days at the informal settlement unsupervised. The First Respondent accepted that the Complainant was the maternal uncle of the Learner and therefore engaged with him in the said meeting. The First Respondent's raising of this issue after the fact is therefore inconsistent with the procedure and action followed by it previously.
- g) The second and more significant consideration of the refusal to provide the personal information of Mr. K is considered below:

The Promotion of Access to Information Act¹⁴ (PAIA), creates a presumption in favour of the granting of access to information, otherwise referred to as the principle of *maximum disclosure*. However, PAIA recognises that not all information can always be given to requestors. In this regard one of the categories of information, subject to restrictions, is the personal or private information of persons. In accordance with the principle of *maximum disclosure*, private or personal information may be given, but the provision of such information is subject to certain conditions. Thus information may be given where the person to whom the private information belongs gives permission for its release, or where the information holder must provide such information in the course of criminal proceedings or investigations. The disclosure of information is regulated in PAIA and controls are entrenched in it for instance to ensure that the safety of individuals, investigations and proceedings under the Criminal Procedures Act¹⁵ and other laws are not

¹⁴ No. 2 of 2000

¹⁵ No. 51 of 1977

compromised. Sections 38 and 39 of PAIA provide examples of such controls over the flow of information.

“Mandatory protection of safety of individuals, and protection of property

38. The information officer of a public body—

(a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual...;

Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings

39. (1) The information officer of a public body—

(a) must refuse a request for access to a record of the body if access to that record is prohibited in terms of section 60(14) of the Criminal Procedure Act, 1977

(Act No. 51 of 1977); or

(b) may refuse a request for access to a record of the body if—

(i) the record contains methods, techniques, procedures or guidelines for—

(aa) the prevention, detection, curtailment or investigation of a contravention or possible contravention of the law; or

(bb) the prosecution of alleged offenders,

and the disclosure of those methods, techniques, procedures or guidelines

could reasonably be expected to prejudice the effectiveness of those

methods, techniques, procedures or guidelines or lead to the circumvention

of the law or facilitate the commission of an offence”.

The PAIA therefore does not create an absolute right to information. In determining whether the First Respondent violated the Complainants right to information, some consideration must also be brought to bear on the accepted principle of South

African law that accused persons are innocent until proven guilty. The principle is entrenched in section 35 (3)(h) of the Constitution reads as follows:

*“Every accused person has a right to a fair trial, which includes the right...
h) to be presumed innocent, to remain silent, and not to testify during
proceedings...”*

- h) A consideration of our legal framework, together with more recent legislation expanding on this framework in the form of the Protection of Personal Information Act¹⁶, provides support for the non-disclosure of Mr K's personal information to the Complainant in the interests of justice. These considerations while legally justiciable would have allowed the Complainant to engage with the SAPS for the information he sought, had the First Respondent reported the suspected offence to the SAPS in the first instance. However, at the time the complaint was reported to the Commission, this was not done by the First Respondent. The First Respondent further did not put forward any of the above explanations to the Complainant, beyond raising the general protections of private information at the time that the request was made.
- i) Having considered the facts of the matter, a violation of the right to access to information cannot be established.
- j) The Commission recognises that the Complainant sought this information for the purposes of pursuing a claim for damages against Mr K and his family, in terms of the Complainant's cultural and religious practices and in the mistaken belief that he needed the information in order to lodge a criminal charge. The request for this information or need to access such information could and should have been made formally to the SAPS. Given the facts of this matter, this approach could not be adopted by the Complainant as the First Respondent had not provided it to the SAPS as required in terms of the Children's Act in the first instance. None the less, the mandatory reporting of the suspected offence to the SAPS by both the

¹⁶ No. 4 of 2013

Complainant and the First Respondent would have placed the information with the SAPS upon its investigation into the matter. The Complainant did not have to provide the SAPS with the precise information around the identity of the suspect to enable SAPS to investigate the matter and establish identity in the course of its investigation.

- k) Having been instructed by the First Respondent to leave the boarding house immediately and by the First Respondent failing to ensure that the Learner was adequately represented at the proceedings by either Ms Z or a representative duly authorised by her, the Learner as an unrepresented minor ended up spending approximately two (2) – four (4) days at an informal settlement with Mr K. In *S v Makwanyane*, the Court highlighted the right to dignity and emphasized that all human beings are to be treated with respect and concern. The First Respondent's poor exercise of its processes and responsibilities in this matter paved the way for the Learner, a vulnerable girl child to be exposed to maltreatment, neglect, abuse and degradation and this resulted in the violation of her human dignity.

9.5 Whether the First Respondent took any measures to protect the Learner's rights following the alleged incident/s?

- a) Having failed to ensure that the Learner was represented by her parent and/or legal guardian at a disciplinary meeting and/or hearing involving an offence pertaining to a serious misconduct, the First Respondent ought to have established the reason for the parent not attending the said meeting;
- b) The First Respondent further failed to confirm whether Mr Sifunda Khanyile was duly authorised by the Learner's parent to be present at the hearing and whether he has sufficient capacity to represent the Learner's interest;
- c) Given that the First Respondent failed to carry out the steps referred to in paragraphs (a) and (b) above, the First Respondent ought to have confirmed

with the Learner's parent whether she had reached her home safely following the severity of the sanction that was imposed on the Learner at the hearing. This would have ensured the safety and protection of the Learner's rights as a minor and a vulnerable girl child;

- d) In addition, upon the First Respondent becoming aware that the Learner had not been taken home but had rather spent approximately two (2) – four (4) days at an informal settlement with Mr K, the First Respondent ought to have reported this incident to the local SAPS, as well as to the Second Respondent to ensure that the necessary investigation/s were conducted.
- e) The First Respondent claims that the alleged incident was not reported to the SAPS on the basis that the Complainant had not furnished it with a medical report to confirm whether or not the Learner had been sexually violated. The First Respondent has a duty in terms of Section 110(1) of the Children's Act to report any instance/s of abuse pertaining to a child, even if this is based on a reasonable suspicion. Given the seriousness of the allegations involved, the First Respondent also failed to make any follow-up enquiring regarding same either with the Complainant or Ms Z. Given that the Learner was only fifteen (15) years old at the time of the alleged incident, the First Respondent also failed to undertake any internal investigation and/or impose any sanction against Mr K for his alleged inappropriate conduct with another learner and/or a minor;
- f) The First Respondent also failed to provide the Learner with counselling following the alleged incident or to canvass this with Ms Z;
- g) As confirmed in the case of *V v V*, a child's rights is paramount. This requires that the best interests of a child must be protected and further that suitable and/or appropriate action must be taken for the benefit of a child. In light of the First Respondent's conduct reflected above, it failed to take any reasonable measures to protect the best interests and/or rights of the Learner.

10. Findings

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

- 10.1 The First Respondent failed to comply with due process in terms of its Code of Conduct, as well as in terms of Section 8(5) of the South African Schools Act;
- 10.2 The First Respondent failed to discharge its obligation to ensure the safety of Learner whilst she was under its care and control and further failed to protect the rights and best interests of the Learner;
- 10.3 The First Respondent further failed to discharge its duty of reporting the alleged abuse of a learner in terms of the Children's Act;
- 10.4 The First Respondent's conduct was therefore negligent and it violated the Learner's right to human dignity; administrative action that is lawful, reasonable and procedurally fair, as well as her right to be protected from maltreatment, neglect, abuse or degradation.

11. Recommendations

In terms of section 13 (1) (a) (i) of the SAHRC Act, the Commission is obliged 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 human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights."

The Commission therefore recommends the following:

- 11.1. That the Second Respondent conducts a detailed investigation in this matter which is to be completed within a period of three (3) months from that date of signature of this report;
- 11.2. That the Second Respondent is to provide the Commission with a comprehensive report on its finding/s following the investigation referred to in paragraph 11.1 above. The report is to include *inter alia*:
 - a) The detailed steps taken by the Second Respondent in the investigation of this complaint;
 - b) The sanction/s to be imposed in respect of the conduct of the First Respondent and/or any other school that is found to be in transgression of complying with due process which prejudices the best interests of any learner;
 - c) The protective and/or remedial measures to be implemented by the Second Respondent in ensuring that the First Respondent does not engage in similar conduct in future. This must include, but is not limited to a form of sensitivity training of the First Respondent's staff both at school and its boarding house around the vulnerability of the girl child in our society;
 - d) The support and/or relief that is to be provided to the Learner given the situation that she has had to endure to date;
 - e) The report referred to in paragraph 11.2 above is to be furnished to the Commission within three (3) months of the date of signature of this report;
- 11.3 That Complainant and /or Ms Z to:
 - a) Institute with immediate effect the necessary criminal charge against the suspect;

and

- b) Seek appropriate support for the purposes of determining whether and how to pursue a civil claim for damages against the First and/or Second Respondent.

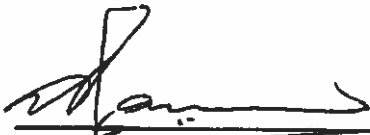
12. Appeal

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, B. C. Majola
South African Human Rights Commission
Private Bag X2700
Houghton, 2041**



**Angie Makwetla
Commissioner,
The South African Human Rights Commission**



**Adv A.H. Gaum
Commissioner,
The South African Human Rights Commission**

Signed at BRAAMFONTEIN on the 13th day of APRIL
2017.