EC/2011/0019

In the matter between

Lindiwe Mazibuko, Democratic Alliance — Complainant

And

Department of Education, Eastern Cape Province — 1st Respondent

Department of Transport, Eastern Cape Province — 2nd Respondent

---

REPORT

(In terms of Article 21 of the Complaints Handling Procedures of the South African Human Rights Commission - promulgated in terms of the Human Rights Commission Act, 1994)

---

1. Introduction

1.1 The South African Human Rights Commission (hereinafter referred to as "the "Commission") is a state institution established in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as ("the Constitution"), to support constitutional democracy.

1.2 The Commission is mandated in terms of section 184 (1) (a-c) of the Constitution to:

"...promote respect, monitor and assess the observance of human rights in South Africa".

1.3 The right to basic education is a constitutionally protected right that is unequivocally granted to all children. It is considered a central facilitative right that is not qualified by expressions such as 'available resources', 'progressive realisation', or 'reasonable legislative measures' which are applicable to other socio-economic rights enshrined in our constitution.

1.4 Thus, the state must implement measures giving effect to the realisation of this right as a matter of absolute priority.

2. The Parties

2.1 The Complainant is MP Lindiwe Mazibuko, the Parliamentary Representative of the Democratic Alliance.

2.2 The 1st Respondent is the Department of Education in the Eastern Cape Province.

2.3 The 2nd Respondent is the Department of Transport in the Eastern Cape Province.

3. The Complaint

3.1 On or about 03 May 2012 the Eastern Cape Office of the Commission received a written complaint from MP Lindiwe Mazibuko acting in the interests of the learners of Zweledinga Senior Secondary School in Queenstown.

3.2 The Complainant alleges that the learners of Zweledinga have to travel long distances by foot in order to access the school.

3.3 During 2011/12 financial year these learners were provided with scholar transport services.

3.4 The above service was suspended in 2012/13 financial year without any notifications and/or reasons given to the said school.

3.5 The plight of the above mentioned learners is not isolated as most scholars especially in rural areas are still experiencing difficulties in accessing schools.

4. Preliminary Assessment

4.1 In the preliminary assessment of the Commission, the Respondent is in *prima facie* violation of:

4.1.1 the right to education in terms of section 29 of the Constitution;

4.1.2 Children's rights in terms of section 28 of the Constitution.

5. Investigative steps taken by the SAHRC

5.1 Investigators from the Eastern Cape Office of the Commission investigated this matter.

5.2 Recognising the systemic challenge of lack of transportation of learners to schools in the Provincial Office, as part of its investigations, the provincial office elected to visit a number of additional schools to verify and gather information relating to the scholar transport. The additional school visited are as follows:

(a) Lovermore Park Farm Primary School in Port Elizabeth
(b) Zweledinga Senior Secondary School in Queenstown
(c) Ntabankulu Senior Secondary School in Mqanduli
(d) Dalibaso Senior Secondary School in Mqanduli
(e) Luthubeni Senior Secondary School in Mqanduli
(f) Upper Mpako Senior Secondary School in Mqanduli

5.3 Interviews held at the schools revealed that the availability of transport to learners at these schools was not adequate.

5.4 The investigation revealed that in July 2012, the provision of service of scholar transport to learners of Zweledinga School was transferred from the Provincial Department of Education to the Provincial Department of Transport by agreement.

5.5 In terms of the memorandum of agreement signed by the above mentioned Departments in August 2011, the Department of Education is responsible for applications and qualifications requirements for learners and schools to participate in the programme whilst the Department of Transport is

responsible for planning the routes and modes of transport to meet the needs of the learners and schools. (Copy of Memorandum of Agreement is annexed hereto and marked "A").

5.6 For 2013/14 financial year, the Department of Transport budgeted R340 million for scholar transport and is currently transporting about 54 471 learners. The need for scholar transport is however almost 120 000 learners.

6. Applicable Law

The following law is applicable to this matter:

6.1 International Legal Instruments

6.1.1 The UN Convention on the Rights of the Child (1989)

This fundamental international instruments recognises the right of all children to basic education, and places duties of members states to actualise this right.

6.1.2 The UNESCO Education for All (2000)

This instrument recognises the fundamental link between education and sustainable social and economic development. It requires special and focused measures to secure the education rights for the most marginalised children.

6.1.3 The Committee on Social, Economic and Cultural Right's General Comment on the Right to Education 13 (21st Session, 1999):

"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to

participate fully in their communities. Education has a vital role in empowering women, safeguarding children, promoting human rights."

6.2 Regional Legal Instruments

The African Charter on the Rights and Welfare of the Child

Article 21 states:

> *(1) "State Parties shall take all appropriate measures to eliminate harmful practises affecting the dignity of the child."*

Article 4 states that:

> *(1) "In all actions concerning the child by any authority, the best interest of the child shall be the primary consideration."*

6.3 Constitutional Provisions

6.3.1 Education

Section 29 of the Constitution stipulates:

> *(1)(a) "Everyone has the right to a basic education...."*

6.3.2 Children

Section 28 of the Constitution states:

> (1) "*Every child has the right –*

(a) To be protected from maltreatment and abuse;

(2) *"A child's best interests are of paramount importance in every matter concerning the child".*

6.3.4 Limitations of rights

Section 36 of the Constitution stipulates:

(1) *"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 rights;

(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."

6.4 Domestic Legislation

6.4.1 The Children's Act 38 of 2005

Section 6(2) provides that:

"All proceedings, actions or decisions in a matter concerning a child must-

(a) Respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interest of the child standard set out in section 7 ,subject to any lawful limitation;

(b) Respect the child's inherent dignity;

(c) Treat the child fairly and equitably;

(d) Protect the child from unfair discrimination on any ground;

(e) Recognise a child's need for development".

Section 6(4) states:

"In any matter concerning a child-

(a) An approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and

(b) Any delay in any action or decision to be taken must be avoided as far as possible."

6.5 National Policies

6.5.1 National Education Policy Act 27 of 1996, as amended

Section 4(a)(i) - The policy shall be directed toward the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 3 of the Constitution (interim), and in terms of international conventions ratified by Parliament, and in particular the right of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever.

6.5.2 National Policy for the Equitable Provision of an Enabling School Physical Teaching and Learning Environment (2010)

This policy commits to providing alternatives and to implementing these on a pro-poor basis where "ease of physical access to schools is not financially feasible". The policy proposes alternatives including the provision of transport and the provision of hostels.

6.5.3 Policy on Leaner Attendance (2010)

This policy provides standard procedures for recording, managing and monitoring of learner attendance, with the obligations of principals to identify learners who are frequently absent, to establish the cause of such absenteeism and to facilitate access to support for the learner to overcome the underlying difficulty.

6.5.4 Final Draft National Learner Transport Policy (2010)

Paragraph 4.2 of this policy provides that:

"Institutional arrangements have the objective of ensuring that adequate resources, based on defined targets and priorities, are available for scholar transport and that they are effectively used and properly monitored. The responsibility for developing and implementing a scholar transport service has until now been split between different Departments"

7. Case Law

7.1 Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others (CCT 29/10)

And

7.2 Section 27 and 2 Others v Minister of Education & Others, 2012

Both these cases confirm the principle that "the right to basic education is immediately realisable. It is not subject to progressive realisation within available resources."

8. Issues for determination

The Eastern Cape Provincial Office of the Commission determined that the following aspects require legal determination:

8.1 Whether the failure of the Respondents to provide adequate transportation, at state cost alternatively at subsidised cost, constituted a violation of the right to a basic education in terms of section 29 (1) (a) of the Constitution; and

8.2 Whether the failure to provide transportation to learners is a justifiable limitation to the learner's right to education in terms of section 36 of the Constitution.

9. Legal Analysis

9.1 An investigation into a violation of the constitutional right to a basic education follows a three-stage analysis;

9.2 Firstly, establishing whether there is a right to which the learners are entitled;

9.3 Secondly, establishing whether the Respondent's conduct has infringed the right and;

9.4 Thirdly, if the learner's right to basic education has been infringed, establishing whether this can be justified under Section 36 of the Constitution.

9.5 Section 29 of the Constitution explicitly protects the learner's right to a basic education. The purpose of the right to basic education is perhaps most evident from a reading of the opening lines of the Committee on Social, Economic and

Cultural Right's General Comment on the Right to Education 13 (21st Session, 1999) which states that:

> *"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children, promoting human rights."*

9.6 In Ex Parte Gauteng Provincial Legislature; In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill, 1996 (3) SA 165 (CC), the Constitutional Court held that: *"Section 29 (1) (a) created a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his basic education."*

9.7 The Constitutional Court confers both positive and negative elements of the right to basic education. By ensuring that learners are not prevented from accessing the schools, section 29(1) (a) operates like an ordinary civil and political right. Any interference with the legitimate exercise of the right can be justified only in terms that meet the test set out in section 36(1).

9.8 The Constitutional Court in the cases of Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others (CCT 29/10) and Section 27 & 2 Others v Minister of Education and Others, 2012.

9.9 Both cases confirmed the principle that "the right to basic education is immediately realisable and is not subject to progressive realisation within available resources."

9.10 The draft policy makes provision for affordable and safe transport at the cost of the state for all learners with additional needs and vulnerabilities, including

very young learners, learners with disabilities, and children living in rural areas who are vulnerable to the dangers of travel over long distances.

9.11 This suggests therefore that any failure and/or neglect of the Respondents to provide adequate transportation to learners of the schools listed in Paragraph 5.2 cannot possibly be said to be a reasonable and justifiable limitation within the meaning of section 36. An explanation advanced by the Respondents to the effect that there is insufficient financial resources to provide such transport is unacceptable.

9.12 The nature of the transportation services that the State is obliged to provide, and the circumstances that place the State under obligation to provide transport is set out in the National Learner Transport Policy. The policy determines that a 5 (five) kilometeres walk for a child in a rural area is dangerous as learners are susceptible to poor security due to distance, vegetation, dangerous animals and criminal elements.

9.13 In addition to this, the Policy on Learner Attendance obliges principals to identify learners who are frequently absent and establish the cause of such absenteeism. There is a supportive duty that rests on the Principals of the schools listed in Paragraph 5.2 above to take steps to assist the affected learners to overcome barriers to access education.

10. Finding

On the basis of the analysis set out in the preceding section, the Commission makes the following findings:

10.1 The failure and/or neglect of the Respondents to provide learners of the schools set out in paragraph 5.2 above with subsidised transportation to and back from school constitutes a violation of their right to basic education as per section 29 (1) (a) of the Constitution.

10.2 In failing and/or neglecting to provide subsidised transportation to and back from school amounts to an infringement of the duty of the State to consider the best interests of the learner as per section 28 (2) (i) of the Constitution.

11. Recommendations

The Commission recommends accordingly that:

11.1 The Respondents review the adequacy of their Memorandum of Agreement in which they set out and agree on their respective responsibilities with regard to the provision of transportation services to scholars.

11.2 The Respondents are to provide the Commission with **monthly written reports** on the progress made towards the delivery of transportation services to the learners of the Schools listed in paragraph 5.2 above, commencing at the end of July 2014. The Reports must, but not limited to, set out the Respondents progress in the following aspects:

(a) Location of the affected learners, per district;
(b) Number of learners requiring transportation per school as at the date of the first report and the extent to which this figure fluctuates throughout the reporting period;
(c) Number of learners that have been provided with transportation since the last report and the extent to which this figure fluctuates throughout the reporting period;
(d) Time-bound plans, including immediate and temporary plans, to address the transportation challenges of the affected children.

11.3 The Principals of the Schools listed in paragraph 5.2 above are directed to take proactive steps in establishing from learners who are registered at their respective schools whether the basis for their nonattendance is due to the lack of transportation. In the circumstances where this has been established, the Principals are then required to provide the Commission with a list of all

learners in their respective schools that are reported to be absent for the reason of lack of transportation to school. The first Report expected from each of the Schools is to be delivered to the Eastern Cape Provincial Office of the Commission every consecutive 30th day of the month of each school term.

11.4 The Commission makes this finding **without prejudice** to the entitlement of the Complainant or any other party, including the Commission, to institute legal proceedings against the Respondent in the Equality Court for any additional competent or alternative relief provided for in Section 21 of the Equality Act.

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
Adv. M.L. Mushwana
SAHRC
Private Bag X2700
HOUGHTON
2041

Signed in Johannesburg on the 28th day of August 2014.

L. Mokate
COMMISSIONER
SOUTH AFRICAN HUMAN RIGHTS COMMISSION