

SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: MP/1516/0062

In the matter between:

Balitiye Patience Malope

Complainant

(on behalf of Fana Ntando Malope)

And

Department of Home Affairs

Respondent

INVESTIGATIVE REPORT

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

1. Introduction

- 1.1. The South African Human Rights Commission (hereinafter referred to as "the Commission") is an institution established in terms of section 181 of the Constitution of the Republic of South Africa Act, 1996 (hereinafter referred to as "the Constitution").
- 1.2. The Commission is specifically required to, promote respect for human rights, promote the protection, development and attainment of human rights and Monitor and assess the observance of human rights in the Republic.
- 1.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country

and to take steps to secure appropriate redress where human rights have been violated.

- 1.4. The South African Human Rights Commission Act 40 of 2013 (“the SAHRC Act”) provides the enabling framework for the powers of the Commission.
- 1.5. The SAHRC Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.
- 1.6. Chapter 3 of the South African Human Rights Commission’s Complaints Handling Procedures (CHP), provides that the Commission has the jurisdiction, after assessing the complaint for this purpose, to conduct or cause to be conducted, on its own accord or upon receipt of a complainant, an investigation into any alleged violation of or threat

2. Parties

- 2.1. The Complainant is Ms Balitiye Patience Malope, an adult female residing in Kabokweni Township in Nelspruit, Mpumalanga Province. The Complainant lodged the complaint on behalf of her son, Fana Ntando Malope formerly known as Ntando Adriaan Malope, hereinafter referred to as “Fana”.
- 2.2. The Respondent is the Department of Home Affairs (DHA), a national government department responsible for issuing and verifying the identity and status of all people living in South Africa amongst other responsibilities. The DHA is mandated inter alia to act as the custodian, protector and verifier of the identity and status of persons resident in South Africa; to control, regulate and facilitate immigration and the movement of persons through ports of entry and to determine the status of asylum-seekers and refugees in accordance with international obligations. The DHA is ultimately “legally and administratively

responsible for all matters pertaining to the issuing of births certificates and Identity Documents (ID) in the country.

3. Background of the Complaint

- 3.1. In 2010 Fana applied for an ID at the Respondent's Nelspruit offices, and as mentioned above the names recorded on the ID were Ntando Adriaan Malope as these were the names appearing on his birth certificate.
- 3.2. In 2011, Fana accompanied by the Complainant attended to the Respondent's Nelspruit offices where an application for the alteration of Fana's names from **Ntando Adriaan Malope** to **Fana Ntando Malope** was submitted.
- 3.3. On or about 20 June 2011, the Respondent addressed correspondence to Fana informing him that his application to alter his forenames had been approved and also advising him that in terms of section 27 of the Births and Deaths Registration Act No 51 of 1992 the alteration of the forenames had been gazetted under Government Gazette Notice No. 490.
- 3.4. As a result of the above application, the Respondent issued Fana with a new birth certificate and subsequently with a new ID reflecting the new forenames, which are Fana Ntando Malope.
- 3.5. In 2011, Fana and the Complainant were requested to attend to the Respondent's Nelspruit offices for a meeting wherein they were informed that the Respondent's officials had identified irregularities with Fana's birth registration.

- 3.6. Fana and the Complainant were interviewed by an official/investigator from the Respondent's Head Office in Pretoria. The same official further attended to Themba Hospital where Fana was born to verify whether Fana was indeed born in that hospital.
- 3.7. The Respondent's official further informed Fana and the Complainant that according to the Respondent's records, Fana was not registered as the Complainant's son but rather was registered as the son of Ms Moiponi Malope, who is unknown to both Fana and the Complainant.
- 3.8. The Respondent's official thereafter informed the Complainant that he would contact her as soon as he had finalised his investigation into the matter and furnish her with an investigation report. To date, the Complainant has not been furnished with such a report.
- 3.9. On or about 2015, the Respondent appointed another official to investigate this matter. The Complainant received a telephone call from an official of the Respondent, Ms Lindiwe Chauke, wherein the Complainant was furnished with a reference number, 1401041929 and advised to attend to the Respondent's Nelspruit offices as this matter had been finalised.
- 3.10. The Complainant thereafter attended to the Respondent's Nelspruit offices where she met the supervisor who informed her that the matter had not been finalised as advised by Ms Lindiwe Chauke.
- 3.11. On or about 16 February 2015, an official of the Respondent, Robela Mogane sent an electronic mail to other officials within the Respondent, carbon copying the Complainant, wherein Mogane stated that Fana's birth registration was fraudulent and as such the matter was being

escalated to the Respondent's Birth section for the attention of Shoki Mphokane.

- 3.12. The Complainant thereafter sent an electronic mail to Shoki Mphokane wherein she highlighted her frustration with the manner in which the Respondent was dealing with the matter. The Complainant subsequently sent 2 (two) more emails to the Respondent on 24 March 2015 and 21 April 2015 requesting an update on the matter, but again the Respondent failed and/or refused to respond to the emails.
- 3.13. On or about 11 August 2015, on the advice of an official from the Respondent, Ms Thenga, the Complainant submitted letters from Fana's Primary and Secondary schools, and further submitted a letter from the hospital where Fana was born, confirming such birth. Further the Complainant submitted a copy of her ID and a copy of Fana's ID.
- 3.14. On or about 13 January 2016, after this complaint had been brought to the attention of the Commission, the Commission's Mpumalanga Provincial Office forwarded correspondence to the Respondent, addressed to Mashudu Makatu wherein the Complainant's allegations were put to the Respondent and the Respondent was requested to respond to the Commission's correspondence by 22 January 2016.
- 3.15. To date, the Commission has not received a response to the said allegation letter.

4. Preliminary Assessment

- 4.1. The Commission confirmed acceptance of the complaint in terms of its CHP on the basis of *prima facie* violations of human rights. On that basis, the Commission instituted an investigation of the complaint.

5. Rights allegedly violated

- 5.1. From its preliminary assessment of the complaint, the Commission identified *prima facie* violations of the rights to human dignity, citizenship and just administrative action, as enshrined in the Bill of Rights of the Constitution.

6. Steps taken by the Commission

6.1. Investigations

- 6.1.1. The investigation by the Commission involved:

6.1.1.1. The issue of an allegation letter to the Respondent on 13 January 2016 and a follow up electronic email on 14 January 2016. The Commission has not received any response to the abovementioned correspondence.

6.1.1.2. The Commission in its investigation of another matter relating to the blocking of IDs by the Respondent, received a report highlighting why the Respondent had blocked the IDs of several individuals. Fana's name was also included in that report and the reason for the blocking of his ID was stated as follows:

"MARKERS WERE SET WHEN FRAUDULENT BIRTHWERE REGISTERED. STILL WAITING FOR PROOF OF THE RIGHTFUL PARENTS OF THE APPLICANT"

7. Legal Framework

7.1. The Constitution

- 7.1.1. The Constitution is the benchmark for all legislation in South Africa. Its provisions are applicable to all persons, including juristic persons. 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. South African domestic laws and interpretation of rights therefore find form through the primary principles as contained in the Constitution of the country. These principles are however not interpreted in isolation but, as per the provision of section 39 of the Constitution.
- 7.1.2. The following provisions of the Constitution are relevant to the matter under consideration:
- 7.1.2.1. Section 10 (The right to human dignity): *“(1) Everyone has inherent dignity and the right to have their dignity respected and protected.”*
- 7.1.2.2. Section 20 of the Constitution: Citizenship *“No citizen may be deprived of citizenship”*
- 7.1.2.3. Section 33 of the Constitution: Just Administrative Action *“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”*

Domestic Legislation

7.2. **The South African Citizenship Act (as amended)** ¹

- 7.2.1. Section 2 (1) (a)-(b) of this Act provides that:

¹17 of 2010.

(1) Any person-

- (a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by birth; or
- (b) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.

7.2.2. Section 2 (2) (a)-(b) of this Act further provides that;

(2) Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection shall be a South African citizen by birth, if-

(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act²

7.3. Births and Deaths Registration Act³

7.3.1. Section 7 (1)-(2) of this Act provides that;

(1) "The Director-General may-

²No. 51 of 1992 as amended by Act No. 18 of 2010.

³Ibid.

(a) require any person who has furnished any particulars in terms of this Act to furnish the Director-General with proof of the correctness of such particulars; and

(b) investigate or cause to be investigated any matter in respect of which particulars are to be used for the registration thereof in terms of section 5.

(3) If in the course of the administration of this Act it comes to the attention of the Director-General that any particulars in respect of any person in any document submitted or preserved in terms of this Act or included in the population register are not correctly reflected, the Director-General may supplement and [correct] rectify such particulars in consultation with the person in question."

7.3.2. Section 24 of the Act further provides that;

24 (1) Any parent of a minor, or he himself if he is a person of age, may apply in the prescribed manner to the Director-General for the alteration of his or her forename under which his or her birth is registered, and the Director-General may alter such forename accordingly in the prescribed manner.

7.3.3. Section 27 and 24 of the Act provides for an application by the parent of a minor child to the Director-General of the DHA for amplification or alteration of forename or surname and; if approved for the DG in turn to gazette the said alteration within a prescribed period, respectively.

7.4. The Promotion of Administrative Justice Act⁴

⁴ No. 3 of 2000.

7.4.1. Section 1 of this Act defines Administrative action as-

“any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...”

7.4.2. Section 3 of this Act further provides that;

S 3 (1) Administrative action which materially and adversely affects the rights and legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection 4, must give a person referred to in subsection 1;

(i) adequate notice of the nature and purpose of the of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable;

(v) adequate notice of the right to request reasons in terms of section 5;

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its own discretion, also give a person referred to in subsection (1) an opportunity to-

(a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.

7.4.3. Section 5 of this Act further provides that;

(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might have reasonably been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

8. Jurisprudence

The Constitution entreats the Commission to consider relevant case law in determining the nature and scope of a human right violation:

8.1. Just Administrative Action:

8.1.1. In President of the Republic of South Africa v South African Rugby Football Union (SARFU 3)⁵ the Constitutional Court articulated the test for determining whether conduct constitutes administrative action as follows,

*"In section 33 of the Constitution the adjective 'administrative' not 'executive' is used to qualify action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure,⁶ that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."*⁷

8.1.2. In further reference to whether the conduct of a public official amounts to administrative action the court in the SARFU 3 case went on to say that:

"Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily

⁵ [1999] ZACC 11; 2000 (1) SA 1 (CC).

⁶ Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others [1998] ZACC 17; 1999 (1) SA 374(CC); 1998 (12) BCLR 1458 (CC).

⁷ SARFU case at paragraph 141.

upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis”⁸

- 8.1.3. In the above case, the Constitutional Court further emphasised on the importance of an efficient administrative system and the role the Constitution plays in ensuring that public administration is cognisant of public interest and fundamental rights. To that end, the court stated that;

“The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South

⁸ Ibid.

Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights and accountability. The new Constitution envisages the role and obligations of government quite differently”

⁹

- 8.1.4. In **Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others (Bato Star)** the Constitutional Court dealt with the issue of reasonableness in relation to a decision by an administrator and held that;

“a decision will be unreasonable if it is one that a reasonable decision-maker could not reach...What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected”¹⁰

- 8.1.5. In another leading case in South African administrative law, **New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO**¹¹ (New Clicks) the court dealt with the issue of procedural fairness in

⁹ Ibid at paragraph 133.

¹⁰ Id at paragraph 44-45.

¹¹ (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (30 September 2005).

relation to administrative action specifically with reference to section 3 of PAJA wherein the court held that;

*“What section 3 of PAJA requires is that administrative action must be procedurally fair. It refers specifically to the giving of adequate notice and providing a reasonable opportunity to make representations, and makes it clear that what is necessary for this purpose will depend on the circumstances of each case”*¹²

The court further stated that

*“Standards of fairness called for in respect of law-making by legislative administrative action are different to standards of fairness called for in cases involving adjudication or administrative decisions such as licensing enquiries and the like where individual interests are at stake and decisions affecting particular individuals have to be taken. An individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns. The decisions may depend on particular facts and may sometimes involve disputes of fact that have to be resolved”*¹³

9. Dignity

9.1. The blocking of IDs has adverse impacts on those individuals whose IDs have been blocked, affecting employment, and basic transactions in everyday life. The inability to earn a living or conduct such every day functions as a result of a blocked ID violates the right to dignity.

9.1.1. This interrelation between the ability to earn a living and the right to dignity was confirmed by the court in *Affordable Medicines Trust and Others v Minister of Health of the RSA and Others*¹⁴ (*Affordable Medicines*) where the court held that “What

¹² Ibid at Par 151.

¹³ Ibid at Par 153.

¹⁴ [2005] ZACC 3; 2005 (6) BCLR 529.

is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence'. ... Limitations on the right to freely choose a profession are not to be lightly tolerated."

- 9.2. In *NM and Others v Smith and Others*¹⁵ the court expounded the importance of the right to dignity. The Court quoted the following in respect of the right to dignity:

"The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a

¹⁵2007 (5) SA 250 (CC).

value fundamental to our Constitution it is a justiciable and enforceable right that must be respected and protected.”¹⁶

10. Analysis

10.1. The Commission is guided in its determination of whether the Respondent has violated the Complainant's rights by the existing legislation, national jurisprudence and the Constitutional principles and facts of this matter.

10.2. The Respondent's conduct as weighed against the legislative provisions:

10.2.1. The South African Citizenship Act (as amended)

As pointed out section 2 (1) (b) of the South African Citizenship Act (as amended) summarily provides that any person born in or outside the Republic and one of his/her parents is a South African citizen, shall be considered a South African citizen by birth. The determining factor here seems to be the fact that one of the parents must be a South African citizen and the birth must have occurred before the commencement of this Act.

The fact that the Complainant is a South African citizen is not in dispute in this matter neither has the Complainant's citizenship status been questioned by the Respondent.

The issue for determination is whether the Complainant's son is a South African citizen. From a perusal of the facts and documents and/or evidence submitted it is clear that the Complainant is a South African citizen as evidenced by her valid

¹⁶*Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 at para 35.

South African identity. Therefore, if the facts are applied against the abovementioned provisions of the South African Citizenship Act, specifically the provision that any person born in or outside the Republic prior to the commencement of this Act and one of his/her parents is a South African citizen, shall be a South African citizen by birth, the conclusion that the Complainant's son qualifies to be a South African citizen. The Respondent's conduct is therefore contrary to the above-mentioned provisions of the Act to the extent that the Respondent blocked Fana's ID contrary to the Act.

10.2.2. The Birth and Deaths Registration Act (as amended)

Section 7 (1)-(3) of this Act provides that the Respondent's Director-General (DG) may request that he/she be furnished with proof of the correctness of any particulars submitted in accordance with the provisions of this Act. For this current matter, the particulars would therefore also include documents submitted during the registration of the birth of a child.

This Act further provides that should it come to the attention of the DG that the particulars furnished are not correctly reflected in the Respondent's register or population register, the Respondent's DG in consultation with the person in question may rectify such particulars. According to the documents in the Commission's possession the Complainant gave birth to her child Fana at Themba Hospital in Mpumalanga and was furnished with a hospital card confirming such birth and using that hospital issued card obtained a birth certificate for Fana (issued by the Respondent) in compliance with this Act.

The Respondent suspected that the Complainant was not Fana's mother and thereafter requested information from the Complainant demonstrating that she was indeed Fana's mother. The

Complainant subsequently furnished the Respondent with the relevant information and/or proof in the form of the hospital card and a copy of Fana's birth certificate issued soon after Fana was born.

According to section 7 (3) of this Act, the Respondent should have upon receiving the requested information from the Complainant supplemented its population register and/or rectified the dispute regarding Fana's parentage. It is noted that the Complainant submitted information on or about 2010 and again in 2015.

The failure and/or refusal by the Respondent to supplement or rectify its register even though it has been furnished with the requested further particulars by the Complainant is contrary to this Act. Consequently, the Respondent's conduct is unlawful.

An application for an alteration of forenames was submitted by the Complainant. The Respondent or DG as the case may be approved the application. The Respondent further gazetted the said alteration of forenames as per provisions of this Act.

If there were any irregularities regarding Fana's registration of birth it would be reasonable to assume that the Respondent would have become aware of such irregularity when the Complainant submitted the application for alteration of forenames or when the Respondent gazetted the said alteration of forenames.

10.2.3. The Promotion of Administrative Justice Act (PAJA)

It is accepted in South African law that the Respondent as an organ of state, derives its mandate from the Constitution, the South African Citizenship Act, the Births and Deaths Registration Act and various other statutes. In terms of its mandate, the Respondent's functions are administrative in nature and/or

constitute administrative acts (to the extent that the Respondent can show that its actions to block IDs is sanctioned by legislation), as it performs public functions. In the circumstances, PAJA is applicable to the current facts.

PAJA in section 3 provides that administrative action that materially and adversely affects and legitimate expectations of any person must be procedurally fair. The Act further provides that the right to procedurally fair administrative action will be realised if the administrative authority gives the person affected by the administrative action, adequate notice of the nature and purpose of the proposed administrative action.

The Respondent in this matter took a decision to block or put a marker (as the Respondent refers to it) on Fana's ID without any notification to the Complainant or Fana. The words *block(ed)* and *mark(ed)* will be used interchangeably throughout the report. The placing of a mark against a person's ID number is a widespread practice used by the Respondent to deal with suspected fraudulently obtained identity documents.

The Respondent has the unenviable responsibility to eradicate fraud in respect of IDs. The steps taken toward the eradication of suspected fraudulent activity, however, must be in accordance with applicable legislation. In this matter, it appears that at some point the DHA suspected fraud, but contravened the Act in that no prior notification was given to the person whose ID was to be marked by the Respondent. Such notification would inform the affected person that the Respondent has identified an irregularity with the affected person's ID and/or birth registration. The said notification would further inform the affected person that unless he/she provides proof that his/her ID was legally obtained the Respondent will proceed to block that ID.

The conduct of marking of an ID by the Respondent without any notification is also contrary to PAJA in that section 3 of this Act provides that the person who will be affected by the decision of the administrative authority be given a reasonable opportunity to make adequate representations regarding the decision. The Complainant in this complaint only discovered that her son's ID had been marked after she attended to the Respondent's offices in Nelspruit for consultation.

According to section 3 of the same Act, the administrative authority must furnish the affected person with a clear statement or report regarding the administrative action. The Respondent herein requested one of its officials to investigate this matter during 2011, and undertook to provide the Complainant with a report regarding the outcome of the investigation, which to date the Complainant is still yet to receive. To that end, the Respondent's conduct is contrary to the PAJA as the Respondent has failed and/or refused to adhere to a fair procedure in its interaction with the Complainant.

From the above analysis, it is clear that the Respondent has contravened PAJA. Noting that the Commission has no authority and/or jurisdiction to judicially review an administrative action as judicial review falls within the purview of courts of law, the Commission brings to the attention of the administrator that its failure to adhere to the provisions of PAJA regarding the exercise of its administrative authority has led to the violation of Fana's fundamental human rights, namely the right to dignity and the right to citizenship.

10.3. The Respondent's conduct as weighed against jurisprudence and Constitutional principles.

From the various cases mentioned above, it is patently clear that administrative authority should be accountable, just and transparent.

In relation to the issue of why the administrative authority should be transparent and accountable at all times, the court in the **SARFU 3** case held that *“the Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated.”*

The arbitrary marking of IDs by the Respondent and the long period of time the Respondent takes to resolve disputes relating to marked IDs violates the affected people’s citizenship rights, their right to dignity and their rights to administrative action that is procedurally fair and reasonable. Due to the mark that has been placed against Fana’s ID, he is unable to vote, attend institutions of higher learning and apply for employment. Fana cannot enjoy the rights other citizens in the Republic enjoy as a result of the Respondent’s conduct.

The fact that Fana cannot apply for employment means that his right to dignity is also violated. The link between employment and the right to dignity has already been established and is recorded in the pronouncement by the court in the **Affordable Medicines** judgement.

10.3.1. Reasonableness

Beyond considerations of fairness, but closely related thereto is the consideration of reasonableness. On the facts of this matter, the Commission takes into account the handling of the matter by the DHA, the timespan impacting on the matter and its impact on the Complainant and her son.

While the Commission accepts that the Respondent is duty bound to identify and take steps to eradicate fraud in respect of IDs, the question to be considered is whether in failing to make a decision

over a period of 7 (seven) years, the DHA has acted reasonably. The fact that in 2011, the Respondent had in fact approved the issuing of an ID, does not assist the Respondent, nor does its silence in the matter, or the handling of the matter by at least three different officials in the course of the 7 year period.

Decisions by our courts regarding the determination of reasonableness relating to administrative decisions abound. 4 such pronouncements are instructive in this matter and are detailed below.

10.3.2. In *Katabana v the Chairperson of the Standing Committee for Refugee Affairs*,¹⁷ Honourable Judge Davis found that the applicant had been waiting for more than three years for a decision on his asylum claim. He found further that for the applicant to have to wait further for a decision would not be in the interests of justice (in this particular case the court substituted the decision of the Standing Committee for Refugee Affairs).

10.3.3. In the case of *Mbanga v MEC for Welfare, Eastern Cape and Another*,¹⁸ an applicant for a social grant (an old-age pension) waited for more than two and a half years with no response from the Eastern Cape Department of Welfare. The court held that **three months** was a reasonable time within which the application for the grant should have been considered, finding the delay unreasonable.

10.3.4. In particular, Honourable Judge Leach stated¹⁹ that while *'patience is a virtue, I venture to suggest that even the patience of Job would have been tested by the inefficiency of the officialdom in this case, as notwithstanding regular enquiries being made to the*

¹⁷ Unreported judgment no. 25061/2011. 14 December 2011.

¹⁸ 2002 (1) SA 359 (SE):369B-G.

¹⁹ 2002 (1) SA 359 (SE):662 H-I.

Department of Welfare in Port Elizabeth, time passed without any indication whether the applicant's application had been granted or refused.'

10.3.5. In the case of *Vumazonke and Others v MEC for Social Development and Welfare for Eastern Cape Province*²⁰ the officials had a duty to take decisions in respect of the applicants' applications for disability grants. There was no law that prescribed a time period within which such decisions had to be taken. In addition, decisions had not been taken despite the passage of time. Honourable Judge Plasket held that in the circumstances, there had been an unreasonable delay in taking the decisions. He held that any delay **beyond three months** is unreasonable in the absence of special circumstances.

11. Findings

Based on the investigation conducted by the Commission and the analysis of applicable Constitutional principles, legislative provisions, and national jurisprudence, the Commission makes the following findings:

- 11.1. That the Respondent violated the right of the Complainants son to citizenship and by extension the right to dignity.
- 11.2. That the Respondent's actions are contrary to the provisions of the South African Citizenship Act and the Birth and Deaths Registration Act.
- 11.3. The Respondent's practise of marking Fana's ID was done without any consultation with him.
- 11.4. The Respondent does not appear to have a strategy to deal with people it suspects as having fraudulently obtained identity documents. In the

²⁰ ECJ (050/2004) [2004] ZAECHC 40 (25 November 2004): 39.

absence of any response from the DHA, and having considered the facts of this matter and reports by civil society organisations on similar matters, it appears frequently that the prerequisites of fairness, reasonable expectation, lawfulness and basic values of the Constitution are not given effect in implementation. Ironically, the IDS are issued by the Respondent in the first place. The Respondent's response is to simply mark the ID of the suspected fraudster without any notification and wait for the suspect to discover for him/herself that their ID has been blocked. This conduct is contrary to PAJA which requires that there be some form of consultation with the person to be affected before such a drastic decision can be taken. Consequently, the Respondent's conduct is in violation of section 3 of PAJA.

- 11.5. The Respondent does not consider the impact its decisions have on people whose IDs have been marked, as evidenced by the delays in processing the matter. The Respondent has been processing the Complainant's matter since 2011. The Respondent's delay in processing complaints relating to blocked IDs is unreasonable considering the effect the marking of an ID has on the affected person.
- 11.6. The Respondent's officials do not appear to be adequately trained to deal with matters pertaining to blocked IDs, or one would have expected that matters such as the one before the Commission would efficiently and expeditiously have been resolved once the documentation proving citizenship were submitted by the Complainant on 11 August 2015.
- 11.7. Consequently, the Commission finds that the allegations as contained in the complaint have been substantiated.
- 11.8. The Commission however, acknowledges that the Respondent has since taken steps to unblock Fana's ID during July 2017, and the introduction in 2016 of a process to ensure that affected persons are

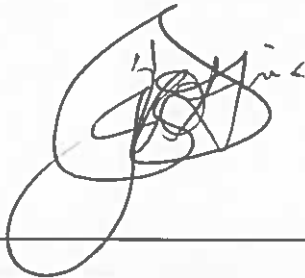
informed of the Respondent's intention and reason/s for marking/blocking his/her ID.

12. Recommendations

- 12.1. In terms of the Human Rights Commission Act, the Commission is entitled to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.
- 12.2. In view of the findings set out above, the Commission recommends the following:
 - 12.2.1. That the Respondent review and align all operational systems relating to the issuing of IDs and investigations of fraud relating to IDs with legislation such as PAJA, and judicial precedent.
 - 12.2.2. That the Respondent identifies and provides to the Commission, the number of IDs affected by suspected fraudulent activity, the number of investigations of such alleged fraud, and the duration of such investigations.
 - 12.2.3. In addition, the Respondent is to include in the report referred to in para above, details of the steps to be taken in responding to complaints regarding delays in the issuing of findings in respect of blocked IDs. The report is to be presented to the Commission after 60 (sixty) days of receipt of this investigative report.
 - 12.2.4. The report from the Respondent to the Commission should demonstrate the following:
- 12.3. An outline of the consultative process the Respondent will put into place.

- 12.4. A written commitment that the Respondent will henceforth not block or mark IDs without consultation with ID holders and in contravention with the constitutional provisions outlined above.

SIGNED IN JOHANNESBURG ON THE 18th DAY OF December 2018

A handwritten signature in black ink, appearing to be 'JB Sibanyoni', written over a horizontal line.

**COMMISSIONER JB SIBANYONI
SOUTH AFRICAN HUMAN RIGHTS COMMISSION**