



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2011/0376

In the matter between:

Sibuyile Park Informal Settlement Residents

Complainant

And

Mangaung Metropolitan Municipality

Respondent

REPORT

(In terms of Article 21 of the Complaints Handling Procedures of 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, 108 of 1996 (hereinafter referred to as "*the Constitution*").

1.2. The Commission is specifically required to:

1.2.1. Promote respect for human rights;

1.2.2. Promote the protection, development and attainment of human rights;
and

1.2.3. Monitor and assess the observance of human rights in the Republic.

1.3. Section 184(2) of the Constitution empowers the Commission to *investigate and report on the observance of human rights* in the country.

1.4. The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.

1.5. Section 9(6) of the Human Rights Commission, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. Parties

2.1. The Complainants in this matter are residents of Sibuyile Park, an informal settlement situated in Bloemfontein, an area falling under the jurisdiction of Mangaung Metropolitan Municipality, Free State Province. (hereinafter referred to as '**Complainants**')

2.2. The Respondent is Mangaung Metropolitan Municipality, a Metropolitan Municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated at corner

Nelson Mandela & Markgraaf Streets, Bloemfontein (hereinafter referred to as '**Respondent**')

2.3. The Respondent is cited as the local government authority with jurisdiction over Sibuyile Park responsible for the delivery of basic municipal services to its residents.

3. Background to the Complaint

3.1. On Thursday, 03 February 2011, the Commission received a complaint from residents of Sibuyile Park (hereinafter referred to as "**Complainants**") an informal settlement situated in Mangaung, Bloemfontein.

3.2. In the complaint, the Complainants allege that the Mangaung Metropolitan Municipality (hereinafter referred to as "**Respondent**") failed in its constitutional and statutory obligations to do the following:

3.2.1. To make an application to the Provincial Government requesting the area to be proclaimed a township establishment;

3.2.2. To provide basic services such as sufficient water, sanitation and refuse removal;

3.2.3. To provide inhabitants of the area with access to adequate housing;

3.2.4. To make an application to the Provincial Government for the upgrading of the area on a priority basis in terms of the National Housing Code.

3.3. The Complainants further allege that, despite being inhabitants of the area since 1989, the municipality has ignored their plight for years. Exacerbating their disappointment is the fact that all around them developments and townships have sprung up and they have watched as other communities settled into safe, hygienic and functioning environments.

4. Preliminary Assessment

The Provincial Office of the Free State made a preliminary assessment of the complaint. The preliminary assessment of the Provincial Office was:

- That the alleged incident constituted a *prima facie violation* of the human rights of the residents of Sibuyile Park. In particular, the assessment determined that Sections 10, 14, 24, 27 and 32 of the Constitution had *prima facie* been violated;
- That the alleged violation *fell within the mandate and jurisdiction* of the South African Human Rights Commission;
- That the alleged *violation merited a full investigation* in terms of the Complaints Handling Procedures of the Commission.

5. Steps Taken by the Commission

In investigating the alleged violation, the methodology used by the Free State Office in conducting the investigation, involved a combination of *interview* and *physical inspection* techniques, namely:

- Interview with Residents;
- Interview with Respondent;
- *Inspection in loco* of the area;

4.1 *Interview with Residents*

4.1.1 The investigation team conducted several interviews¹ with local residents and community leaders to establish living conditions in the settlement.

4.1.2 During the interviews with the residents, some interviewees stated that none of the residents have access to sufficient water, decent sanitation or refuse removal services. The residents are forced to use sanitation facilities of nearby townships.² They have made exhaustive attempts to engage with the municipality, through the local councillor, to address their lack of formalisation, lack of access to adequate water and sanitation but nothing has been done thus far.

¹ 16 April 2012

² Bophelong and Freedom Square: Some of the residents have to pay to use sanitation facilities in nearby townships

- 4.1.3 According to residents, they have had to rely on toilet facilities of neighbouring townships as a result of the municipality's failure to introduce the bucket system as an interim measure.
- 4.1.4 The interviewees further stated that the municipality has only been able to install one (1) communal tap for approximately sixty (60) households. They were promised more taps in the last meeting with the municipality's representatives in 2011. Five (5) more taps were installed in the latter part of 2012.³
- 4.1.5 As a result of the above, most residents have to walk some distance and sometimes stand in queues to fill water containers. Those employed in the daytime find it particularly difficult to find the time to queue for water at the taps. The shortage of taps and the time taken to collect water means that most residents of Sibuyile Park do not have enough water to meet their basic household needs. The water situation is such that the residents would even struggle to extinguish a small fire quickly.
- 4.1.6 The interviewees further stated that the municipality has also failed to provide refuse removal services to residents of Sibuyile Park. Residents have to resort to taking their refuse to nearby townships for collection. Other refuse is taken to an open space and the uncovered waste is smelly and attracts flies and other vermin. It also poses serious health risks.
- 4.1.7 According to residents, some of the people in the settlement are persons with disabilities and others live with HIV/AIDS and therefore the lack of

³ Residents allege this happened as a result of the SAHRC intervention

access to adequate water is having a disproportionate impact on the people with disabilities and those living with HIV/AIDS.

- 4.1.8 One female interviewee stated that the burden of lack of sufficient water also falls heavily on women as they are generally required to collect water for their respective households.

4.2 Interview with Respondent

- 4.2.1 On Wednesday, 25 April 2012, the Free State Provincial Office sent an allegation letter providing full details regarding the alleged violation to the Respondent and requested a response thereto on or before 25 May 2012.
- 4.2.2 On Thursday, 14 June 2012, the Free State Provincial Office received a response from the Respondent, which did not comprehensively address itself to the merits of the complaint but merely denied allegations of human rights violations and scantily made reference to its Constitutional obligations and Integrated Development Plan⁴ (IDP).
- 4.2.3 According to the Respondent's Municipal Manager, Mrs Sibongile Mazibuko, issues raised in the allegation letter relating to formalising of the area are matters of planning which are budgeted for in the IDP.⁵

⁴ An Integrated Development Plan is an inclusive strategic plan for the development of the municipality. In terms of section 25 & 26 of the Municipal Systems Act, all municipalities are required to compile an Integrated Development Plan. The IDP is meant to be a product of bottom-up planning processes in order to link, integrate and coordinate sector plans within the municipality

⁵ The Respondent's IDP 2012-2016 does not include the upgrading of Sibuyile Park Informal Settlement nor does it address its formalisation.

4.2.4 The Municipal Manager further stated that the municipality cannot be seen to be condoning lawlessness⁶ and rewarding it with immediate developmental objectives.⁷

4.2.5 On Wednesday, 20 June 2012, the Free State Provincial Office sent another letter to the Respondent requesting the following information within a period of twenty one (21) days:

- Integrated Development Plan (IDP) 2012/2013;
- Informal Settlement Plan;
- Sustainable Human Settlement Plan;
- Refuse Removal Program;
- Water and Sanitation Policy;
- Minutes of Municipality's meetings with Residents;
- Upgrading of Informal Settlements Plan;
- Interim Plans to provide basic municipal services to Residents;
- The Provision of Formal Housing; and
- Permanent plans to relocate residents to an agreed new residential area.

4.2.6 The Provincial Office received a brief response from Respondent on the 26 July 2012.

4.2.7 On Wednesday, 01 August 2012, the Free State Provincial Office received a copy of Respondent's council approved IDP (2012-2016). The Respondent's Manager for Legal Services stated in the response letter that the Integrated

⁶ Sibuyile Park Residents deemed to be in unlawful occupation of the land.

⁷ Letter received from the Respondent 14 June 2012

Human Settlements Plan was in the process of being developed by the relevant Sub-Directorate.

- 4.2.8 To date the Respondent has failed to furnish the Provincial Office with all of the requested documents despite our repeated requests to do so.⁸

4.3 Inspection in Loco

- 4.3.1 On Wednesday, 14 November 2012, the Free State investigation team visited Sibuyile Park in Bloemfontein, an informal settlement falling under the jurisdiction of Mangaung Metropolitan Municipality in the Free State Province, to inspect conditions in the area and ascertain interim measures the Respondent had put in place to ameliorate the living conditions of inhabitants of this area.

- 4.3.2 The following observations were noted:

(a) General Observations

- 4.3.3 Sibuyile Park is located within the circumference of Bophelong and Freedom Square Townships in Mangaung, Bloemfontein. The settlement was occupied by residents 23 years ago.

⁸ Respondent has not complied with section 32 of PAIA reporting obligations for the past three years.

- 4.3.4 The vast majority of Sibuyile Park residents live in shacks. These are constructed with a combination of corrugated iron, wood and plastic. A handful of homes in Sibuyile Park are constructed of bricks. Conditions in the settlement are poor indeed.
- 4.3.5 There is no electricity whatsoever in Sibuyile Park. The residents use candles for lighting and paraffin stoves for cooking, both which pose significant fire risks.
- 4.3.6 As far as water is concerned, one (1) communal tap and more recently an additional five (5) have been installed by the Respondent to provide water to an estimated sixty (60) households. This is insufficient to meet basic needs like drinking, bathing and cleaning.
- 4.3.7 None of the residents has access to any form of formal sanitation. This is both demeaning and unsanitary.
- 4.3.8 Most residents of Sibuyile Park are impoverished and rely on social grants from government and levels of unemployment are very high. As a result of these, they cannot afford access to formal housing. The small minority who have access to formal employment work in low-paid jobs as cleaners and manual labourers.
- 4.3.9 The residents of the community predominantly speak Sesotho, Setswana and Xhosa.

(b) Substantive Observations

- 4.3.10 Sibuyile Park is a well established informal settlement with residents having resided there for periods of up to 23 years.⁹
- 4.3.11 The informal settlement is adjacent to and surrounded by two well developed residential areas.¹⁰
- 4.3.12 During the inspection period, the investigation team witnessed the living conditions and lack of infrastructure in the area. (*see Photos 1-10*)

“PHOTO 1” (SIBUYILE PARK INFORMAL SETTLEMENT)



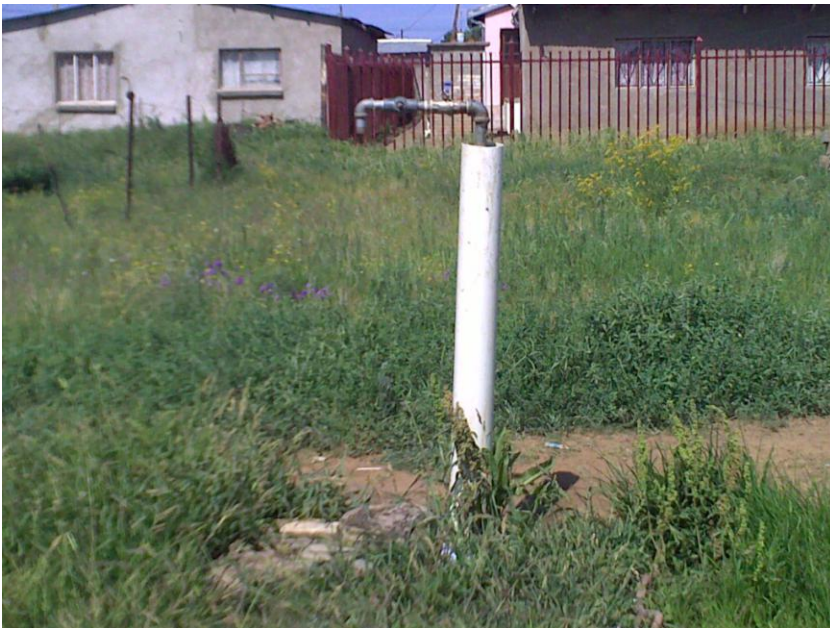
⁹ Sibuyile Park residents occupied the vacant erven/land in 1989.

¹⁰ Freedom Square and Bophelong

"PHOTO 2" (COMMUNAL TAP AT SIBUYILE PARK)



"PHOTO 3" (DYSFUNCTIONAL COMMUNAL STANDPIPE)



"PHOTO 4" (ADJACENT TOILET USED BY SIBUYILE PARK RESIDENT)



"PHOTO 5" (WOMAN WITH DISABILITY)



"PHOTO 6" (ELDERLY RESIDENT WITH DISABILITY)



"PHOTO 7" (REFUSE AT OPEN SPACE IN SIBUYILE PARK)



"PHOTO 8" (AN INFORMAL STAND WITH A BRICK HOUSE)



"PHOTO 9" (SIBUYILE PARK RESIDENT COLLECTING WATER)



"PHOTO 10" (PATH USED TO REACH COMMUNAL TAP)



5 Applicable Legal Framework

6.1 Key International instruments

6.1.1 International Covenant on Economic Social & Cultural Rights (ICESCR)

Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living which includes accessibility and availability of adequate housing, food and clothing. The right to water falls under this article as it guarantees an adequate standard of living; water is one of the fundamental conditions for survival.

Although South Africa has not ratified the ICESCR, as a signatory State, the Government of South Africa cannot act in a manner that is contrary to the spirit of this Convention.

6.1.2 General Comment no.15 (2003) of the UNESCR¹¹ recommended that before any action that interferes with the right of access to water is carried out by the State or third party, the relevant authority must ensure that such actions are performed in a manner warranted by law.

6.1.3 United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation¹²

The General Assembly adopted a resolution calling on all states to provide safe, clean, accessible and affordable drinking water and sanitation for all.

6.2 Constitutional Rights

The preliminary assessment of the Free State Provincial Office indicated that the rights alleged to have been violated according to the media report are sections 10, 14, 24, 26, 27 and 32 of the Constitution of the Republic of South Africa. Each of these rights are discussed hereunder, in turn:

¹¹ The Right to Water: UN Committee on Economic, Social and Cultural Rights, November 2010

¹² Resolution 64/292

6.2.1 The Right to Human Dignity

Section 10 is the right to have the inherent dignity of everyone respected and protected. Lack of access to decent sanitation is inherently degrading, and undermines the human dignity of a human being.

6.2.2 The Right to Privacy

Section 14 entrenches the Right to Privacy.

6.2.3 The Right to Environment

Section 24(a) of the Constitution provides that:

"Everyone has the right –

(a) to an environment that is not harmful to their health or wellbeing;"

6.2.4 The Right to Housing

The right of access to adequate **Housing** is guaranteed in section 26 of the Constitution which provides that:

"(1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

6.2.5 The Right to Health care, water and social security

Section 27 provides for the right to have access to water.

6.2.6 Local Government Responsibilities

Part B Schedule 4 of the Constitution mandates local government responsible for *"water and sanitation services limited to portable water supply systems and domestic waste-water and sewerage disposal."*

6.2.7 The Right to Access Information

Section 32 provides that everyone has the right of access to –

- a) any information held by the state; and
- b) any information that is held by another person and that is required for the exercise or protection of any rights.

6.3 Domestic Legislation

6.3.1 The Water Services Act¹³

5.9Section 3 of the Water Services Act establishes the following rights and obligations in respect of access to basic water supply and basic sanitation:

- (1) Everyone has a right of access to basic water supply and basic sanitation.*
- (2) Every water services institution must take reasonable measures to realise these rights.*

Section 5 of the Water Services Act states that:

¹³ 108 of 1997

If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.

The Water Services Act defines basic sanitation as:

The prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households.

Section 1 of the Water Services Act defines "*Basic Water Supply*" as:

The prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quality and quantity of water to households, including informal households to support life and personal hygiene.

The minimum standard of basic water supply and basic sanitation for the purposes of the Water Services Act is set out in the Regulations.

Regulations relating to Compulsory National Standards & Measures to Conserve Water¹⁴ ("the Regulations")

In terms of Regulation 3, a municipality is obliged to provide each of the residents with access to at least 25 litres per day at a water user connection within 200 metres of each of the residents' households.

6.3.2 The Housing Act¹⁵

5.10 The Housing Act defines housing development as:

¹⁴ GN R509 in Government Gazette 22355 of 8 June 2001

¹⁵ 107 of 1997

The establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis have access to-

(a) A permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and

(b) Potable water, adequate sanitary facilities and domestic energy supply.¹⁶

5.11 Section 9 of the Housing Act¹⁷ requires that every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy *inter alia* to:

- Ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- Ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are removed;
- Ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner that is economically efficient;
- Set housing delivery goals in respect of its area of jurisdiction;
- Initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

¹⁶ Section 1 (vi) of the Housing Act 107 of 1997

¹⁷ 107 of 1997

5.12 Section 2 of the Housing Act sets out the general principles applicable to housing development. They provide that national, provincial and local spheres of government must *inter alia*:

- Give priority to the needs of the poor in respect of housing development; and
- Promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions.

6.3.3 The Municipal Systems Act¹⁸

The definition of basic municipal services according to the Act ¹⁹is:

A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.

Section 73(1) of the Act states that a municipality must give effect to the provisions of the Constitution and:

- (a) Give priority to the basic needs of the local community;
- (b) Promote the development of the local community; and
- (c) Ensure that all members of the local community have access to at least the minimum level of basic municipal services.

¹⁸ 32 of 2000

¹⁹ Chapter 8 of the Municipal Systems Act

6.3.4 The Development Facilitation Act²⁰

The Development Facilitation Act (“DFA”) was introduced to fast track low-income housing developments. It is one of a few routes available for land use planning and development in South Africa.

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

6.3.5 The Less Formal Township Establishment Act²¹

In considering the role of the Provincial and Local sphere of government regarding the proclamation of townships, the Commission considered the Less Formal Township Establishment Act (“LeFTEA”) which provides for shortened procedures for land development and township establishment. In terms of this Act, the decision-making authority lies with the Provincial government.

6.3.6 Municipal Finance Management Act²²

In considering the obligations of the Respondent with regard to its budgeting and finance processes, the Commission paid close consideration to Chapter Four of the Municipal Finance Management Act (hereinafter referred to as the “MFMA”). Section 28(1) of the MFMA is of particular relevance in its directive that municipalities may revise and approve their annual budget through an adjustments budget.

²⁰ 67 of 1995

²¹ 133 of 1991

²² Act 56 of 2003

Section 27(5) is also relevant in that it permits provincial executives to intervene in terms of Section 139 of the Constitution if a municipality cannot or does not comply with the provisions of Chapter four of the MFMA.

6.3.7 Promotion of Access to Information Act²³

This Act protects and upholds the rights of people to access to information. It protects the right to access to information and seeks to enhance the transparency, accountability and effectiveness of government.

Public bodies are obliged to give information needed to exercise rights enshrined in the Constitution.

6.4 Policy Framework

6.4.1 White Paper on Water Supply and Sanitation Policy²⁴

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

The immediate priority is to provide sanitation services to all which meet basic health and functional requirements including the protection of the quality of both surface and underground water. Higher levels of service will only be achievable if incomes in poor communities rise substantially.

²³ Act 2 of 2000

²⁴ Department of Water Affairs and Forestry (1994)

Conventional waterborne sanitation is in most cases not a realistic, viable and achievable minimum service standard in the short term due to its cost. The Ventilated Improved Pit (VIP), if constructed to agreed standards and maintained properly, provides an appropriate and adequate basic level of sanitation service.

Adequate basic provision is therefore defined as one well-constructed VIP toilet (in various forms, to agreed standards) per household.²⁵

6.4.2 National Sanitation Policy²⁶

The National Sanitation Policy defines sanitation as “the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact on users, operators and the environment.

The policy lists the main types of sanitation systems used in South Africa:

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

²⁵ White Paper on Water and Sanitation Policy (1994)

²⁶ Department of Water Affairs and Forestry (1996)

6.4.3 White Paper on Basic Household Sanitation²⁷

According to the 2001 White Paper on Basic Household Sanitation, the Department of Water Affairs and Forestry had the following responsibilities, together with other national role-players:

- Developing norms and standards for the provision of sanitation;
- Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
- Co-ordinating the development by the municipalities of their Water Services Development Plans as a component of their Integrated Development Plan;
- Monitoring the outcome of such programmes and maintain a database of sanitation requirements and interventions;
- Providing capacity building support to provinces and municipalities in matters relating to sanitation;
- Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
- Undertaking pilot projects in programmes of low cost sanitation.

6.5 Case Law

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

6.5.1 In **Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)** it was held that section 26

²⁷ Department of Water Affairs and Forestry (2001)

requires the government to "*establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means*".²⁸

Further, that legislative measures adopted by the government must be supported by policies and programmes adopted must be reasonable "*both in their conception and implementation*".²⁹ The Court held that reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise and do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril.³⁰

The Court established that the right of access to "*adequate housing*" entails more than bricks and mortar. It extends and includes the provision of water and removal of sewerage and the financing of these, including the building of the house itself.

The requirements of privacy, protection against the elements and hygienic sanitation facilities are central features of any housing development in South Africa in that one of its aims is to secure basic human rights of the people who are meant to benefit from such housing developments.

²⁸ Grootboom at para [41]

²⁹ Grootboom at para [42]

³⁰ Grootboom at para [44]

Interpretation of the Bill of Rights requires that basic enquiries which seek to promote the rule of law, human dignity, equality and freedom be undertaken. Section 39 (1)(a) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

6.5.2 In *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*

2007 (5) SA 250 (CC)³¹ the Court held:

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

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

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

³¹ at paragraph [49]-[51]

value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.'

6.5.3 In S v Makwanyane and Another, this Court observed as follows:

[51] 'Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.'

The Court also dealt with interrelationship between privacy and dignity and concluded that:³²

"The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least - that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of

³² NM v Smith at para [131]

individual human worth, presupposes personal space within which to live this life."

6.5.4 Specifically in relation to the right to privacy the Court in **S v Jordan (Sex Workers Education & Advocacy Task Force as Amici Curiae) 2002 (6) SA 642 (CC)**³³ held that the constitutional commitment to human dignity invests a significant value in the inviolability and worth of the human body and the right to privacy, therefore, serves to protect and foster that dignity.

6.5.5 In **Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC)**³⁴ the Court held:

"As we have seen, privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core."

6.5.6 In **Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC)**,³⁵ Ackermann J characterises the right to privacy as lying along a continuum, where the more a person inter-relates with the world, the more the right to privacy becomes attenuated. Moreover that:

³³ at para [81]

³⁴ at para [18]

³⁵ at para [77]

"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place."

6.5.7 In relation to the duties of all levels of government the Court held in **Grootboom**³⁶:

"All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing."

Yacoob J went on to state that:

"Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the [council] towards the [occupiers] must be seen."³⁷

In fact the Court has repeatedly held that the State, including municipalities, is obliged to treat vulnerable people with care and concern.³⁸

The role of local government, as stated in the Constitution is, among other things, *"to ensure the provision of services to communities in a sustainable*

³⁶ Grootboom at para [82]

³⁷ Grootboom at para [83]

³⁸ Joe Slovo at para [76]

*manner*³⁹ and *"to promote a safe and healthy environment"*⁴⁰. A municipality is obliged to try to achieve these objectives. Section 73(1)(c) of the Local Government: Municipal Systems Act⁴¹, echoes the constitutional precepts and obliges a municipality to provide all members of communities with *"the minimum level of basic municipal services"*.

Such minimum level of service would include the provision of sanitation and toilet services. Irrespective of whether it is built individually or on separate erven, or communally, it must provide for the safety and privacy of the users.

6.5.8 The High Court in **Beja and others v Premier of the Western Cape and others. Case no. 21332/2010** went on to state in paragraph 147, that *"Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with s 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity"*.

Erasmus J held at paragraph 142-143 that section 73(1)(c) of the Municipal Systems Act requires a municipality to provide *"the minimum level of basic services"*, which includes the provision of sanitation and toilet services. He found

³⁹ Section 152(1)(b) of the Constitution

⁴⁰ Section 152(1)(d) of the Constitution

⁴¹ Act 32 of 2000

that there was a violation of rights in terms of sections 10 (human dignity), 12 (freedom and security of person), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution.

6.5.9 In Joseph case,⁴² the Constitutional Court read sections 152 and 153 of the Constitution together with provisions contained in the Municipal Systems Act and the Housing Act, creating a public law “right to basic municipal services” and outlining the duty on local government to provide these services.

6.5.10 In the **City of Johannesburg case,⁴³** the Constitutional Court ruled that the powers to rezone land and to approve a township establishment are components of “municipal planning”, a function assigned to municipalities in terms of section 156(1) of the Constitution. The Court further found that Chapters V and VI of the Development Facilitation Act are unconstitutional, in that they assign parallel powers to the provincial sphere of government in the form of Development Tribunals.

The Commission is also mindful however that no right is absolute and where reasonably justifiable may be limited in respect of a law of general application.

⁴² See Leon Joseph and Others v City of Johannesburg and Others [2009] ZACC 30

⁴³ See City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others [2010] ZACC

Section 26(2) of the Constitution dealing with the right to housing provides that
“the State must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right”.

6.6 Regulatory Standards

Regulation 2 of the Compulsory National Standard⁴⁴ states that the minimum standard for basic sanitation services is –

(a) the provision of appropriate sanitation

(b) a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against weather, well ventilated, keeps smells to a minimum and prevents entry and exit of flies and other disease carrying pests.

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

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

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

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

(ii) within 200 metres of a household; and

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

⁴⁴ General Notice 22355 of 8 June 2001

6.7 Strategic Frameworks

6.7.1 The Strategic Framework for Water Services⁴⁵

The Strategic Framework defines basic sanitation facility as:

The infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases by facilitating the appropriate control of disease carrying flies and pests, and enables safe and appropriate treatment and/or removal of human waste and waste water in an environmentally sound manner.⁴⁶

It further defines a basic sanitation service as:

The provision of a basic sanitation service facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices.

6.7.2 Free Basic Sanitation Implementation Strategy⁴⁷

According to this policy, municipalities are required to ensure that every household has access to basic sanitation, as per the Constitution, Water Services Act and the Municipal Systems Act. It acknowledges that there is a “right of access to a basic level of sanitation service” enshrined in the Constitution.

6.8 Codes

6.8.1 The National Housing Code

⁴⁵ Department of Water Affairs and Forestry (2003)

⁴⁶ Ibid

⁴⁷ Department of Water Affairs and Forestry (April 2009)

The National Housing Code was adopted in terms of the Housing Act. In terms of section 4(6) of the Housing Act,⁴⁸ the provisions of the National Housing Code are binding on all three spheres of government.

Included in the National Housing Code is the Upgrading of Informal Settlements Programme⁴⁹ (“the Programme”). The Programme provides that informal settlements are to be upgraded *in situ* in partnership with the residents thereof, in order to establish sustainable human settlements.

The national Upgrading of Informal Settlements Programme (UISP), published in terms of section 3(4)(g) of the Housing Act and contained in the National Housing Code, is the mechanism whereby municipalities and provinces can implement upgrading projects in informal settlements.

The Programme identifies the following characteristics of an ‘informal settlement’:

- Illegality and informality;
- Inappropriate locations;
- Restricted public and private sector investment;
- Poverty and vulnerability; and
- Social stress.

The Programme is therefore applicable to all settlements that demonstrate one or more of the above characteristics.

The Programme document states that:

⁴⁸ 107 of 1997

⁴⁹ Informal Settlement upgrading refers to the process of incrementally improving the lives of shack dwellers living in informal settlements, through the provision of basic services, security of tenure and housing assistance where they live (i.e. *in situ*), with minimal disruption to people’s lives.

"Against the background of the Government's objective to upgrade all informal settlements in the country by 2014/15, it is clear that the programme is one of the Government's prime development initiatives and that upgrading projects should be dealt with on a priority basis."

The Programme provides that informal settlements must be upgraded *in situ*. Where this is not possible, such as where the land is not suitable for residential development, then the Programme provides for *"relocation in terms of a relocation strategy developed in collaboration with the community."*

The upgrading of informal settlements must be effected in collaboration with the residents thereof. Thus the Programme provides as follows:

"In order to ensure that community members assume ownership of their own development and project, the involvement of the community from the onset is key. Hence community participation should be undertaken within the context of a structured agreement between the municipality and the community."

The Programme recognises that many informal settlements are situated on privately owned land and that often the first step in an upgrading project will be the acquisition of such land. Thus the Programme provides that funding is available and may be obtained for *"the acquisition of land, where the land to be developed is in private ownership, through negotiation or expropriation."*

Funding for the implementation of the Programme is allocated to Provincial Governments by the Minister for Human Settlements on an annual basis. Such funds are transferred to the Provinces in terms of the provisions of the Division of Revenue Act.

The Programme provides that *"it will be the responsibility of a municipality to consider whether living conditions in a settlement in the area of jurisdiction merit the submission of an application for assistance under the Programme."* If so, the municipality is required to make the necessary application to the relevant Provincial Department of Housing.

The Programme makes provision for a comprehensive, fully costed, four-phase process for the upgrading of informal settlements. The four-phase process -

- Phase 1: The Application
- Phase 2: Project Initiation
- Phase 3: Project Implementation
- Phase 4: Housing Consolidation

The Programme makes provision for the installation of both interim services and permanent municipal engineering services. The Programme states *that "where interim services are to be provided it must always be undertaken on the basis that such interim services constitute the first phase of the provision of permanent services."*

7 Analysis of the Investigation Findings

In analysing this complaint, the Free State Office reviewed the information gleaned from the investigation to ascertain three (3) key issues:

- The nature and scope of human rights violations;
- The Respondent's failure to apply for funding to Provincial Government to upgrade the Sibuyile Park Informal Settlement in terms of the Upgrading

of Informal Settlements Programme, contained in the National Housing Code (“UISP”);

- the lack of or insufficient access to basic services; and
- The Respondent’s failure to make an application for proclamation of Sibuyile Park as a township establishment.

Factual and Legal analysis of the investigators are reported hereunder in respect of each human right violated:

7.1 Human Rights Violations

7.1.1 The Respondent is alleged to have violated the right to human dignity, privacy, clean environment, access to adequate housing and access to sufficient water of the residents by its failure to apply to the Provincial Government requesting the area to be declared a township establishment; to provide basic services such as water, sanitation and refuse removal; to provide inhabitants of the area with access to adequate housing; and to make an application to the Provincial Government for the upgrading of the area on a priority basis in terms of the National Housing Code.

- 7.1.2** The inspection *in loco* of the informal settlement undertaken by the Commission gave credence to allegations made by residents. Interviews conducted with residents confirmed their living conditions in the area.
- 7.1.3** Basic sanitation forms part of the right to basic municipal services outlined in section 73 of the Municipal Systems Act.
- 7.1.4** The Respondent is under a duty to act positively to protect, promote and fulfil the rights contained in Chapter 2 of the Constitution of the Republic of South Africa No. 108 of 1996 (“the Constitution”)
- 7.1.5** These rights include, *inter alia*, the right to human dignity, the right to equality, the right to security of the person, the right to sufficient water, the right of access to adequate housing, the right to an environment that is not harmful to health to the well-being of people and the right of access to information.
- 7.1.6** In terms of Part B of Schedule 4 of the Constitution, the primary responsibility for providing water and sanitation services lies with local government. These obligations are outlined in the Water Services Act and the Municipal Systems Act and the Strategic Framework for Water Services.

7.2 *Upgrading of Informal Settlements*

- 7.2.1. The Respondent states in its response to the complaint that it cannot be seen to be condoning lawlessness, effectively abdicating its constitutional and legislative obligations to ensure that the inhabitants of its area of jurisdiction have access to basic services.
- 7.2.2. The informal settlements are typically identified on the basis of their illegality and informality, inappropriate locations, poverty and vulnerability. This does

not however, preclude all spheres of government, in particular, the Respondent from providing its residents with basic municipal services.

- 7.2.3. The Respondent has a duty to give priority to the needs of the poor in terms of provision of basic services and housing development.
- 7.2.4. The Upgrading of Informal Settlements Programme ("Programme")⁵⁰ provides that informal settlements are to be upgraded *in situ* in partnership with the residents thereof.
- 7.2.5. This programme relates to the provision of grants to municipality to carry out the upgrading of informal settlements within its jurisdiction in a structured manner. The grant funding also assist the municipality in fast tracking the provision of security of tenure, basic municipal services, social and economic amenities and the empowerment of residents in informal settlements to take control of housing developments directly applicable to them.
- 7.2.6. The programme includes, as a last resort, in exceptional circumstances, the possible relocation and resettlement of people on a voluntary and co-operative basis as a result of the implementation of upgrading projects. It should be noted that Informal settlement upgrading does not involve relocation but in some instances relocation to nearby land or to well-established formal areas is necessary for de-densification.
- 7.2.7. The Respondent did not furnish the Commission with proof of application for funding to upgrade Sibuyile Park. Funding for the implementation of the Programme to upgrade informal settlements is allocated to Provincial Governments⁵¹ by the Minister for Human Settlements on an annual basis.⁵²

⁵⁰ Included in the National Housing Code in terms of the Housing Act

⁵¹ The Provincial Department of Human Settlement will be responsible for the funding and implementation of the programme

⁵² Such funds are transferred to the Provinces in terms of the provisions of the Division of Revenue Act

- 7.2.8. The Respondent clearly did not apply to the Provincial Government for funding upgrading of Sibuyile Park. The Respondent did not attempt to even conduct a pre-feasibility study to determine geotechnical conditions in the area and an environmental impact assessment to support its planning and decision-making processes.
- 7.2.9. The Respondent IDP for 2012-2016 has not earmarked Sibuyile Park for development.
- 7.2.10. In terms of section 27, the Municipality is required to progressively realise the supply of adequate water and sanitation to the community.
- 7.2.11. The Respondent has not undertaken a clear socio-economic and demographic profile of the settlement. The installations of standpipes to provide basic water by the municipality in Sibuyile Park demonstrates that the municipality is aware of the existence of the informal settlement but despite the aforesaid have failed to provide permanent services to the residents.
- 7.2.12. The Programme⁵³ included in the National Housing Code states that "*where interim services are to be provided it must always be undertaken on the basis that such interim services constitute the first phase of the provision of permanent services.*"
- 7.2.13. Having regard to the residents' length of tenure in Sibuyile, the Commission submits that the Respondent has a legal duty in terms of the Upgrading of

⁵³ Upgrading of Informal Settlements Programme

Informal Settlements Programme to provide interim basic services and security of tenure pending the outcome of the application for the Programme.

7.3. Formalisation of the Settlement

- 7.3.1. The Respondent failed to make an application to the Provincial Government for the informal settlement to be proclaimed as a township but that does not preclude it from complying with the Upgrading of Informal Settlements Programme ('UISP') provided for in the National Housing Code.
- 7.3.2. Funding for the implementation of the Programme is allocated to Provincial Governments by the Minister of Human Settlements on an annual basis. Provincial Government, through the relevant Department of Housing must do everything in its power to assist municipalities to achieve their obligations under this programme. The Respondent did not attribute the lack of developmental initiatives in Sibuyile Park informal settlement to the Provincial Government. Their correspondence was lacking in detail and failed to address salient issues raised in it.
- 7.3.3. The Nokotyana case,⁵⁴ underlined the defective manner around the way the different spheres of government approach informal settlement upgrading, the lack of access to interim basic services in informal settlements, and the lack of minimum standards for basic sanitation provision.

⁵⁴ Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others [2009] ZACC 33

- 7.3.4. The Respondent failed to provide the Commission with information regarding provision of interim basic services in the informal settlement and imminent plans to upgrade it.⁵⁵
- 7.3.5. The Respondent has neglected the plight of Sibuyile Park residents by not encouraging and creating conditions for them to participate in the affairs of municipality including preparing, implementing and reviewing its integrated development plan; establishing, implementing and reviewing its performance management system; monitoring and reviewing of its performance, including the outcomes and impact; preparing its budget; and strategic decisions relating to the provision of municipal services.
- 7.3.6. Access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives. The Commission has considered the Respondent's compliance with the Promotion of Access to Information Act (hereinafter referred to as the "PAIA")⁵⁶, a law of national application which facilitates information sharing in the country and is meant to promote public participation.
- 7.3.7. PAIA obliges the Respondent to make information about its decisions relating to all aspects of the process, including project action plans, IDP, budget plans and the means through which the community can access the information the Respondent holds. In this sense, people are not only able to participate

⁵⁵ Letter sent 28 September 2012

⁵⁶ Promotion of Access to Information Act 2 of 2000.

meaningfully in the project of the Respondent but they are also able to hold it accountable. It is clear from the Commission's monitoring that the Respondent has not complied with its obligations in terms of the PAIA legislation in the past three (3) consecutive years.⁵⁷ A clear example of this is the lack of awareness in the community about development initiatives planned in the area.

8. Summary of Findings

Based on the investigation conducted by the Commission and the analysis of applicable Constitutional, legislative, policy and regulatory frameworks, the Commission reaches the following findings:

8.1 Violation of Human Rights

8.1.1. Right to dignity

The deprivation of basic municipal services and the lack of provision of ablution facilities to residents of Sibuyile Park constitute a violation of their right to human dignity. Depriving people access to basic toilet facilities is an affront to their dignity.

The Respondent has dealt with the plight of people in Sibuyile Park in an undignified manner by failing to provide them with access to basic sanitation as a temporary measure pending the upgrading of the settlement.

⁵⁷ These include its mandatory duty to report to the Commission in terms of section 32 of PAIA and to make available an information manual of the records it holds in terms of section 14 PAIA. The latter manual is an important tool through which members of the public are able to obtain information from public bodies.

The complaint of a violation of the right to human dignity is upheld.

8.1.2. Right to environment

The lack of refuse collection or refuse removal service by the Respondent has resulted in huge volumes of all types of waste being left in open spaces for lengthy periods of time. The uncovered waste is smelly and attracts flies and other vermin. It poses serious environmental and health risks.

The complaint of a violation of the right to environment and health are upheld.

8.1.3. The right to housing

The failure of the Respondent to make an application to the Provincial Government for the proclamation of the area as a township establishment has resulted in residents not being provided with formal housing. Despite the area having a clear demarcation of yards, the Respondent has made no provision for formal housing in the settlement.

The Complaint of a violation of the right of access to housing is upheld.

8.1.4. The right to water

The Complainants alleged that communal taps provided by the municipality cannot sufficiently meet the basic needs of the residents. As a result residents have to walk for some distance and stand in queues to fill water containers.

The investigators noted that an additional five (5) taps were installed in the informal settlement for approximately sixty (60) households. These taps are adequate in the interim pending relocation or proclamation of the area as a

township. The taps are within the minimum legal requirement of 200 metres walking distance.

8.1.5. The right of access to information

The Respondent has failed to furnish the Commission with minutes of meetings that the community allege they had with their representatives.

The Respondent's failure to submit its Section 32 Report to the Commission for the last 3 years and inadequate information transmitted to the community upholds the allegation of violations to the right of access to information.

In the result, the finding of the Commission is that the Respondent has violated sections 32 (1) (a) and (b) of the Constitution of the Republic of South Africa.

9. Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to *"make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."*

In view of the findings set out in Section 8 above, the Commission recommends the following:

9.1 Human Rights Violations

The Respondent is directed to realise these rights within its available resources by taking positive steps to ensure that priority is given to the basic needs of the community of this informal settlement and that each member of the community has access to basic municipal services pending the upgrading of Sibuyile Park. The interim services should consist of the following:

- Access to one chemical toilet⁵⁸ per five (5) households;
- Access to a regular and reliable refuse removal service; and
- Access to more water standpipes within 200 metres walking distance from the nearest shack.

In this respect, the Respondent is directed to:

1. furnish the Commission with a phased Plan on how it intends to progressively realise this objective. This Plan should be submitted to the Commission within 6 (six) months from date of this finding; thereafter, the Respondent is directed to
2. furnish the Commission with a progress report at least every six (6) months in respect of the progressive realisation of the right to water and sanitation services in all informal settlements under its jurisdiction.
3. Furnish the Commission with a Plan to make application to the Provincial Government to upgrade the informal settlement in terms of

⁵⁸ A chemical toilet is a portable, standalone unit which uses chemicals below the toilet to neutralise human waste. Chemical toilets are only suitable for short-term temporary use

the National Housing Code. The Plan to be submitted within (3) months from the date of this finding. The Respondent should provide the Commission with the following:

- Proof of Application to the relevant Provincial Authority for proclamation of the area as a township establishment;

The report to the Commission should demonstrate the following:

- Clear bottom-up and consultative planning and implementation plans;
- Interim measures for the provision of sanitation to the residents;
- Effective structures and platforms to ensure improved consultation and dissemination of information from the Municipality and the Residents on the issue of formalisation, sanitation and access to basic services.

9.2 Inter-governmental Collaboration

The COGTA (Free State) is directed to take active measures to review the effectiveness inter-governmental collaborative links between national, provincial and local with respect to Upgrading of Informal Settlements, and furnish the

Commission with a Report on this request, within 6 (six) months of date of this finding.

The Free State Department of Human Settlements is directed to assess infrastructural and housing development needs of communities in informal settlements in the Free State, and furnish the Commission with a Report within 6 (six) months of the outcome of its consideration.

9.3 Community Participation

The Commission directs the Respondent to furnish the Commission with the Minutes of every community meeting held at least every three (3) months in respect of development in the municipality relating to access to water and decent sanitation services for residents in informal settlements.

The Respondent is further directed to engage with the community on resettlement plans or relocation to an agreed formalised and well-developed area.

10. APPEAL

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

**The Chairperson, Adv M.L. Mushwana
South African Human Rights Commission
Private Bag X2700
Houghton, 2041**

SIGNED IN _____ THE _____ DAY OF
_____ **2013.**

Commissioner P. Govender

Deputy Chairperson

South African Human Rights Commission

The Chairperson, Adv M.L. Mushwana
South African Human Rights Commission
Private Bag X2700
Houghton, 2041

SIGNED IN BEAUFORT THE 10 DAY OF
JUNE 2013.



Commissioner P. Govender

Deputy Chairperson

South African Human Rights Commission