



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2012/0320

In the matter between:

South African Human Rights Commission

Complainant

(On behalf of Sasolburg residents)

And

Metsimaholo Local Municipality

Respondent

REPORT

1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "**Commission**") is an institution established in terms of Section 181 of the 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 Act, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

1.6. Article 3(b) of the South African Human Rights Commission's Complaints Handling Procedures, provides that the Commission has the jurisdiction to conduct or cause to be conducted any investigation on its own accord, into any alleged violation of or a threat to a fundamental right.

2. Background of the Complaint

- 2.1. On Monday, 26 March 2012, the attention of the Free State Provincial Office of the Commission was drawn to media reports that residents of Sasolburg in the Free State Province had been using pit latrines as toilets.
- 2.2. The media coverage of this incident coincided with the Commission's Human Rights Month Campaign on the theme "*Water and Sanitation in South Africa – A question of Accessibility*".
- 2.3. These media reports were preceded by similar reports a few months prior, of pit toilets in the Makhaza¹ and Rammulotsi areas of the Western Cape and the Free State Province, respectively.

3. Preliminary Assessment

The Provincial Office of the Free State made a preliminary assessment of the media report. 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 Sasolburg. 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;

¹ Findings and Recommendations of the Commission in the matter of ANCYL Dullah Omar Region on behalf of Ward number 95 WC/2010/0029

- That the alleged violation merited a full investigation in terms of the Complaints Handling Procedures of the Commission.

4. 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 a random sample of pit latrines in the area;

4.1 Interview with Residents

- 4.1.1 The investigation team conducted several interviews with local residents to verify the observations of the media as contained in their media report.
- 4.1.2 During the interviews with the residents, some interviewees stated that although they had toilets in their houses, they did not have funds to connect their toilets to the water supply system. Others alleged that they had dug, used and filled multiple pit latrines in their yards over a period of time because they had no toilets in their houses.

- 4.1.3 Residents also told the investigators that several community meetings had been called by the Respondent to receive complaints regarding sanitation, but that notwithstanding, the situation had not been ameliorated despite undertakings by the Respondent to address this problem.
- 4.1.4 The interviewees lamented the lack of community participation in the design and implementation of municipal projects, and that there was inadequate consultation on the progress that the municipality had made towards reducing the implementation backlog in sanitation projects.

4.2 Interview with Respondents

- 4.2.1 On Tuesday, 27 March 2012, the Free State Provincial Office contacted the Municipality and spoke with the Acting Municipal Manager to confirm the correctness of the media report.
- 4.2.2 The Acting Municipal Manager, Mr R. Thekiso, acknowledged the sanitation challenges in the Sasolburg area.
- 4.2.3 The Provincial Office advised the Manager that the Commission intended to investigate this alleged human rights violation.
- 4.2.4 As part of the investigation phase, the investigators requested a comprehensive report from the Respondent in order to identify sanitation challenges facing the Sasolburg area, as well as constraints faced by the Municipality in addressing these challenges.

- 4.2.5 The Respondent attributed the difficulty of connecting water from the meter to toilets to the Department of Human Settlements. They contended that it was the sole function of the Department of Human Settlements to install sewerage pipelines from the built-in toilet to the main sewerage system. Only a few toilets in the area were connected to the water supply system and the project was underway to connect other households subject to available resources and budget.
- 4.2.6 The Respondent stated that in their frustration some residents had bought their own pipes and connected water from the meter to their toilets because they had not been connected to the water supply system.
- 4.2.7 On the 6th December, 2012 the Respondent furnished the Commission with additional information in writing, to wit, that the funding received by the Respondent from the Department of Human Settlements was insufficient to capacitate the Municipality to deal new infrastructural and sanitation projects.²

4.3 Inspection in Loco

- 4.3.1 On Wednesday, 28 March 2012, the Free State investigators visited Sasolburg, an area falling under the jurisdiction of Metsimaholo Local Municipality in the Free State Province, to inspect the sanitation challenges highlighted in the media report.
- 4.3.2 The Free State investigators conducted an inspection of the Gortin and Amelia township sanitation facilities in Sasolburg.

The following observations were noted:

² The new projects are MOOIPLAAT, MOOIDRAI and GORTIN.

(a) General Observations

- 4.3.3 Sasolburg is situated along the boundary between the Free State and Gauteng Province, and falls under the jurisdiction of Metsimaholo Local Municipality.
- 4.3.4 The investigators observed patent levels of poverty in the area.
- 4.3.5 The vast majority of Sasolburg's township residents live in homes constructed with bricks. Most shacks³ in the informal settlements of Sasolburg had been constructed in an informal manner.
- 4.3.6 In addition, the residents of these informal settlements had no electricity and did not have access to sufficient water, and decent sanitation services.
- 4.3.7 Most residents are not formally educated but displayed varying levels of functional literacy.
- 4.3.8 A number of social problems were evident in the area. These included alcohol or substance abuse, teenage pregnancy, child-headed households, and cases of HIV and AIDS.

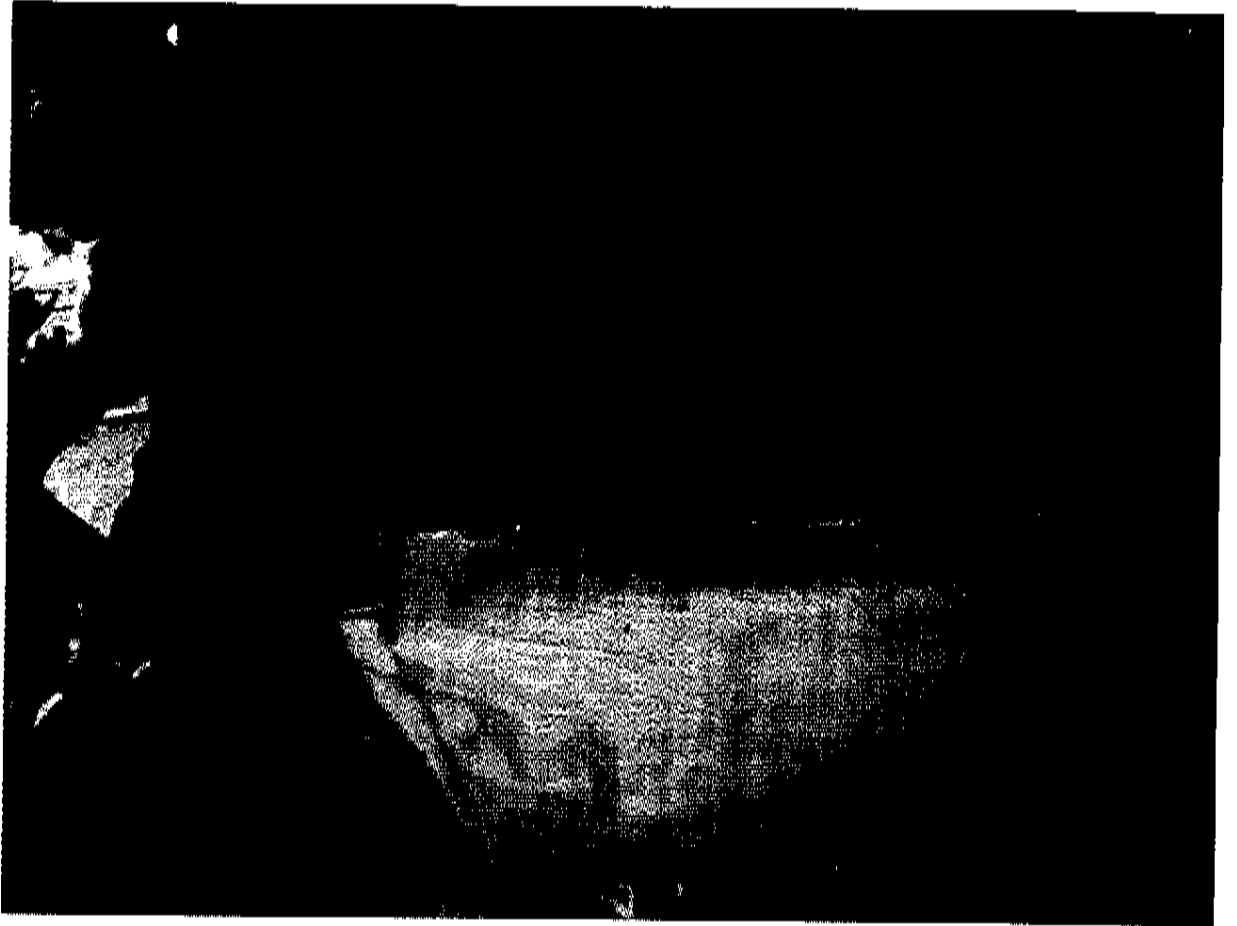
³ 'Shack' refers to a dwelling constructed of a combination of corrugated iron, wood and plastic.

- 4.3.9 The residents of the community predominantly speak Sesotho, Xhosa and Zulu.

(b) Substantive Observations

- 4.3.10 During the inspection period, the investigators established that most residents' were indeed using pit toilets as they were not connected to the water supply system. Residents had resorted to digging pit toilets in their yards as they were not connected to the sewer network. (see Photos A, B, C)

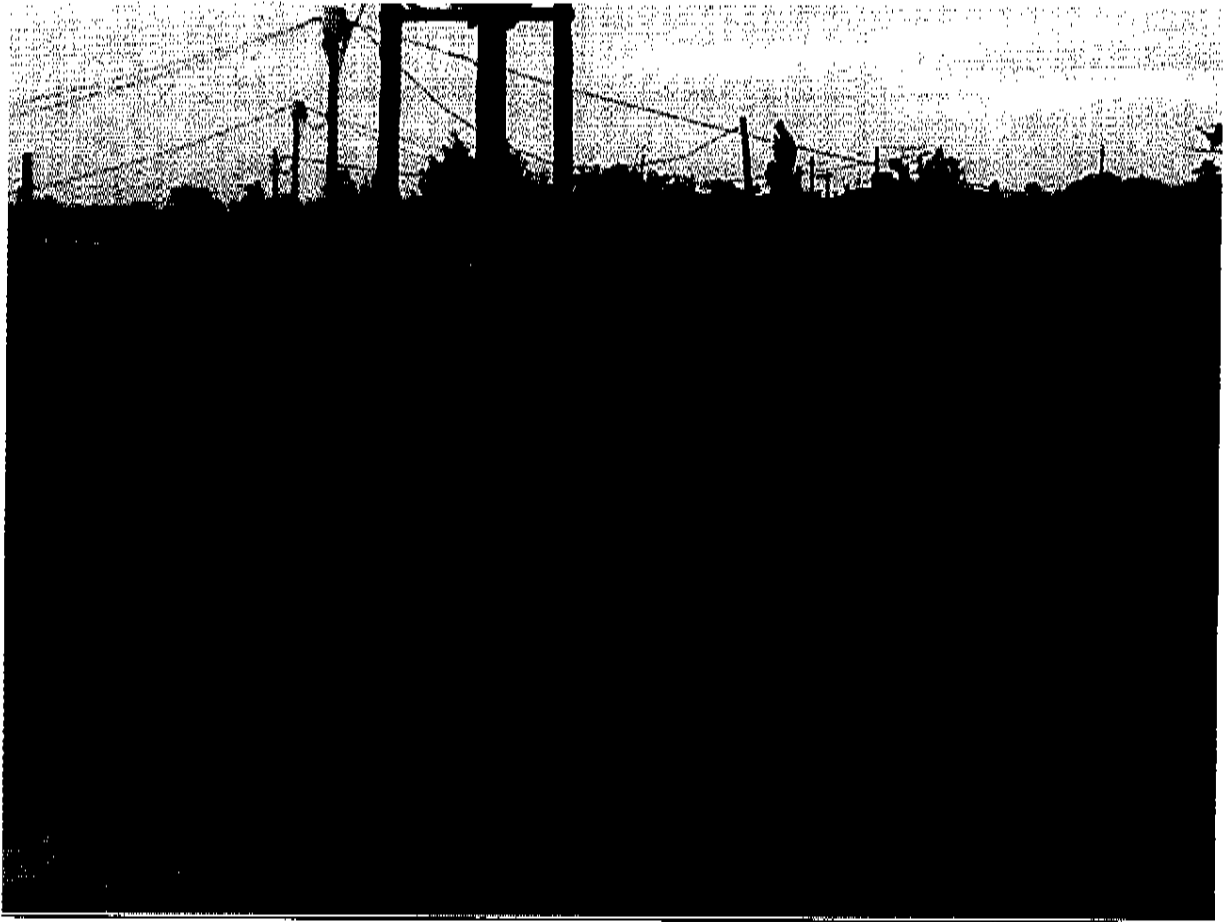
"PHOTO A"



"PHOTO B"

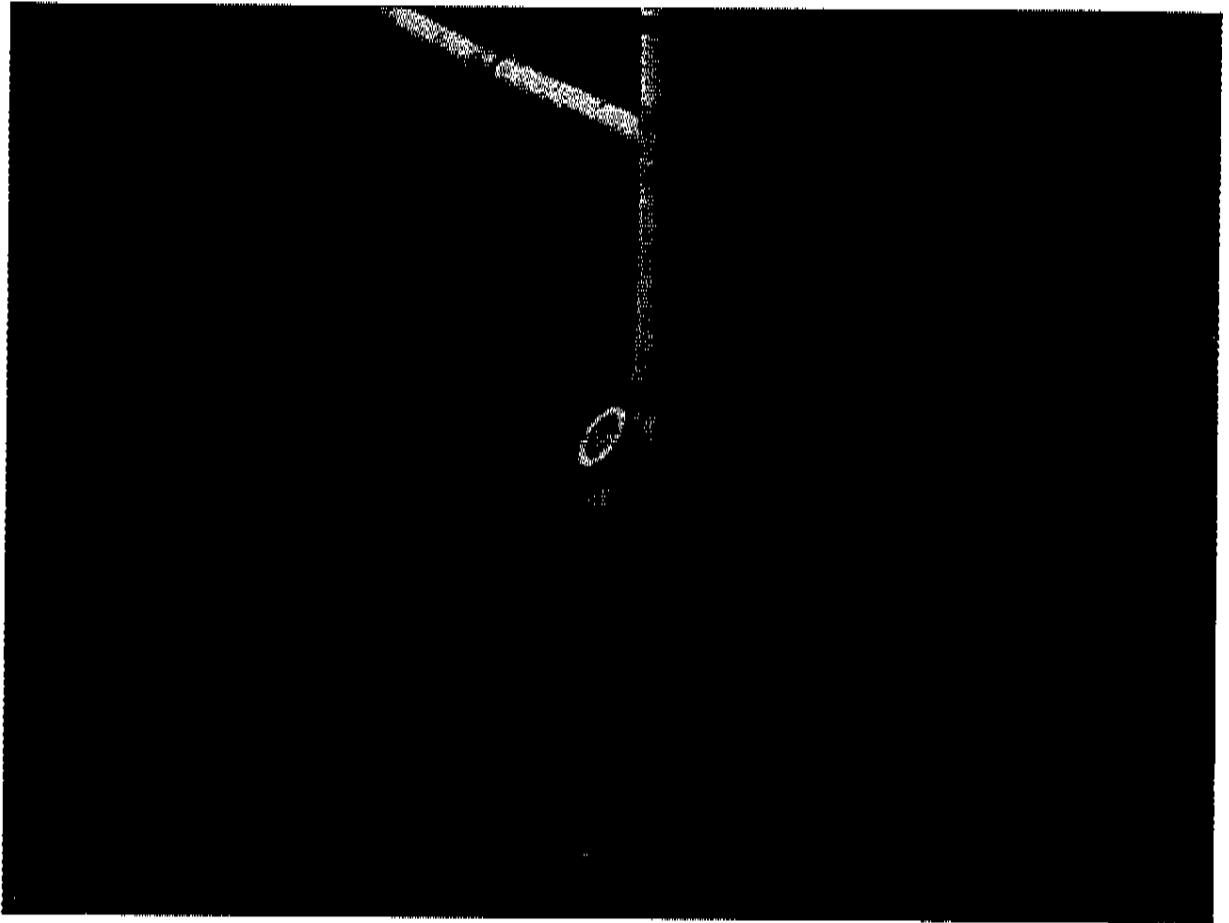


"PHOTO C"

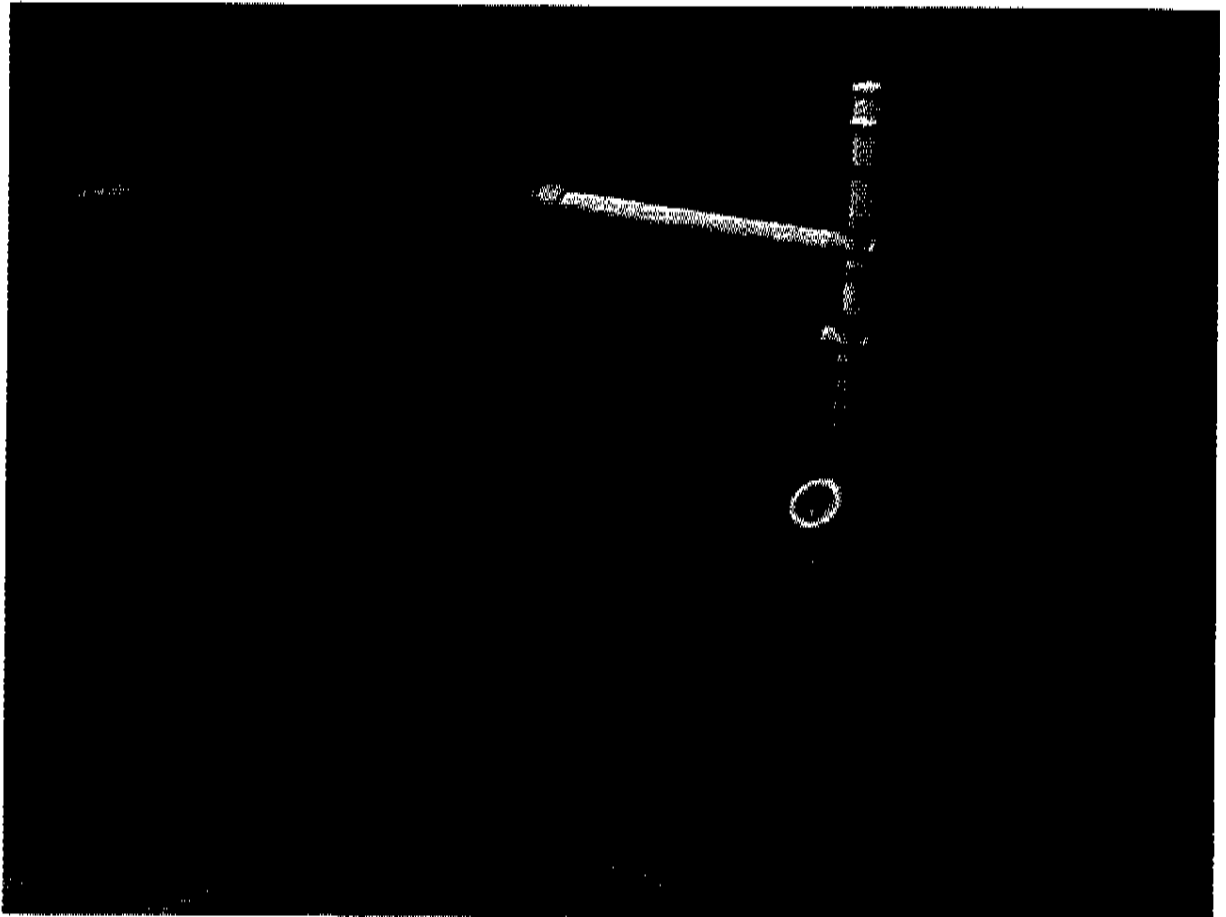


- 4.4 The investigators further observed that Reconstruction and Development Programme (hereinafter referred to as RDP) houses had built-in toilets not connected to the sewer network or water supply system. There were no pipes connecting water from the meter to the built-in toilets (**see Photos D, E, F & G**)

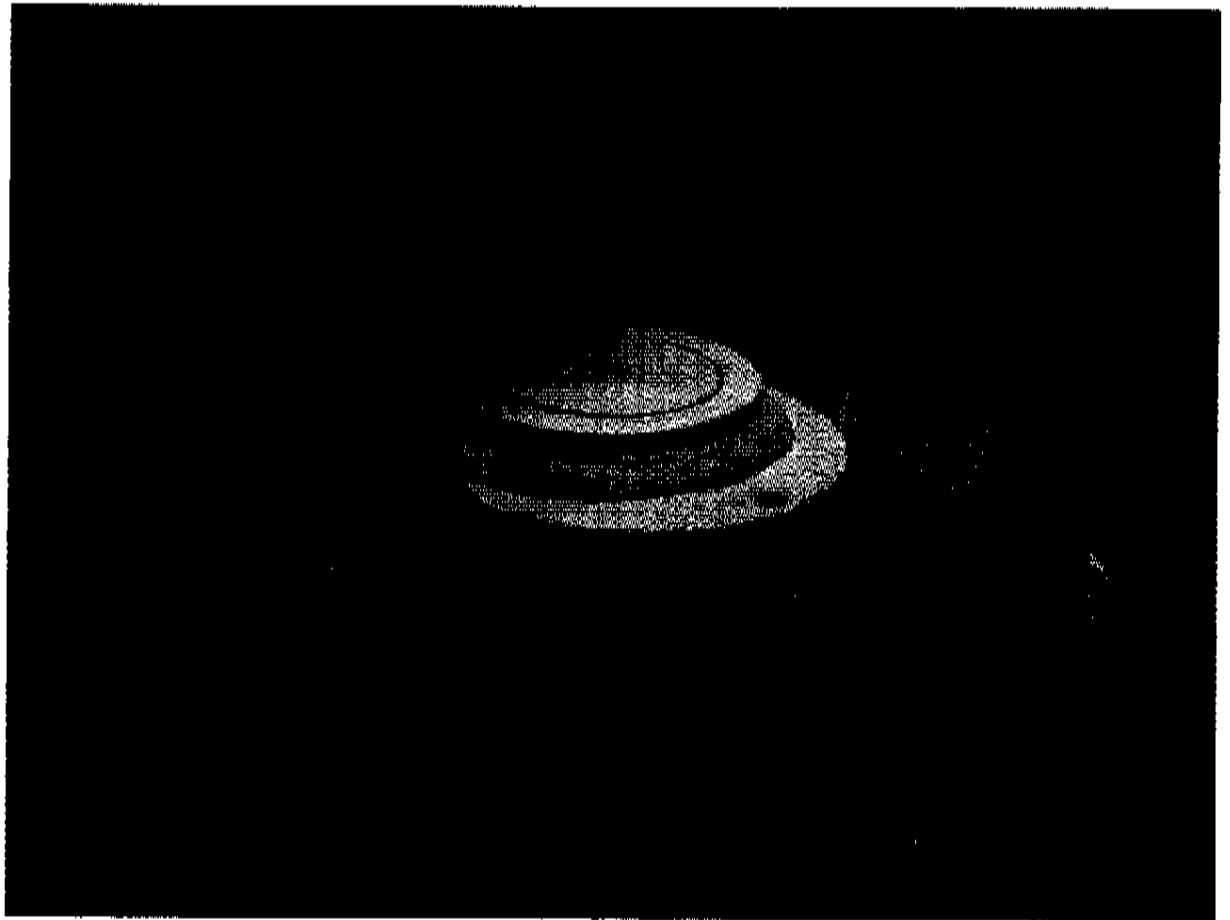
"PHOTO D"



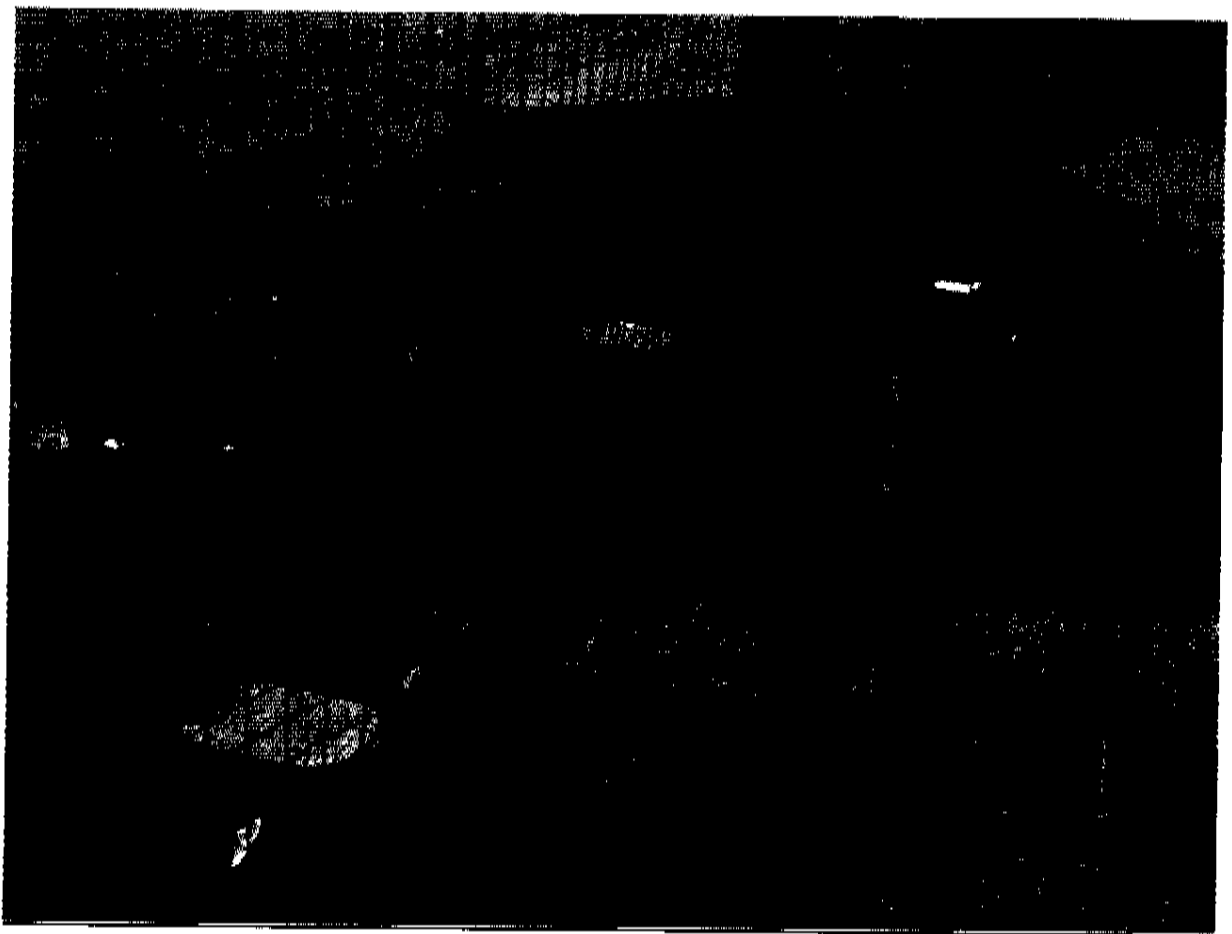
"PHOTO E"



"PHOTO F"



"PHOTO G"



5 Respondent's Response to Allegations

In response to the allegations of human rights violations, the Respondent responded as follows:

- 5.1 The Respondent furnished the Commission with a Report setting out the plans and progress that it had made towards addressing this challenge.⁴
- 5.2 To address the sanitation challenges in the township, the Respondent reported that it had initiated plans to construct a sewer network and a pump station. Out of a total number of 11 800 stands⁵ identified, only 1741 stands have been connected to the sewer network.
- 5.3 The remainder of toilets that had not been connected to the sewer network was 12069. This figure includes areas that have not yet been proclaimed as townships but earmarked to form part of the overall infrastructural development in Sasolburg townships. These informal settlements also required construction of sewer network and pump stations to address water and sanitation challenges.
- 5.4 According to the report⁶ from the Respondent, the project had been divided into phases subject to availability of funds.
 - 5.4.1 Sanitation Phase 1 (in the report received by the Commission from the Municipality, there was no reference to what the Municipality would be executing in this phase);

⁴ Undated progress report from Respondent received by the Commission on 27 June 2012

⁵ Stands refer to number of homes not connected to the sewer network.

⁶ Respondent's report to the Commission.

- 5.5 Sanitation Phase 2 (in the report received by the Commission from the Municipality, there was no reference to what the Municipality would be executing in this phase);
- 5.6 The Gortin⁷ Sanitation Phase 3 project, which was to connect the remaining 1641 toilets to the sewer network, has been implemented under the auspices of the Department of Human Settlements. 659 stands would be completed in the 2012/2013 financial year.
- 5.7 The Respondent alleged that it has been communicating with the Department of Human Settlements to provide direction regarding the issue of sewer connections and to source funding to reduce the infrastructure backlog.
- 5.8 According to the Respondent, Phase 4 of the sanitation project was likely to be implemented during the 2013/2014 financial year after the technical report or business plan for the project had been approved with recommendations by Department of Water Affairs in conjunction with Department of Cooperative Governance and Traditional Affairs.
- 5.9 The Respondent alleged that their integrated development plan had been informed by community needs after consultation with the community through relevant forums. Community liaison officers and project steering committees were tasked to keep the communities informed of the project progress and challenges through ward councillors and ward committee members.⁸

6 Applicable Legal Framework

6.1 Key International instruments

⁷ A township in Sasolburg.

⁸ Respondent's report to the Commission

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.⁹

6.1.2 General Comment no.15 (2003) of the UNESCR¹⁰ 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 Sanitation¹¹

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

⁹ This principle was enunciated by the UN Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) "Nature of States Parties Obligations" UN Doc HRI/Gen 1/Rev 1 at 45 (1994) para 9; also endorsed in the Grootboom Case.

¹⁰ The Right to Water: UN Committee on Economic, Social and Cultural Rights, November 2010

¹¹ Resolution 64/292

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:

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 proper toilet facilities 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 Act¹²

Section 3 of the Water Services Act states that:

- (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.

¹² 108 of 1997

- (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.

Section 5 of the Water Services Act states that:

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.

6.3.2 The Housing Act¹³

The Housing Act defines housing development as:

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) Portable water, adequate sanitary facilities and domestic energy supply.¹⁴

Section 9 of the Housing Act requires that every municipality must, as part of the municipality's process of integrated development planning, take all

¹³ 107 of 1997

¹⁴ Section 1 (vi) of the Housing Act 107 of 1997

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.

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 Act¹⁵

The definition of basic municipal services according to the Act ¹⁶is:

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.

6.3.4 The Development Facilitation Act¹⁷

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.

¹⁵ 32 of 2000

¹⁶ Chapter 8 of the Municipal Systems Act

¹⁷ 67 of 1995

6.3.5 The Less Formal Township Establishment Act¹⁸

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 Act¹⁹

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.

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.

¹⁸ 133 of 1991

¹⁹ Act 56 of 2003

6.3.7 Promotion of Access to Information Act²⁰

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 public participation, 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 Policy²¹

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. 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.²²

²⁰ Act 2 of 2000

²¹ Department of Water Affairs and Forestry (1994)

²² White Paper on Water and Sanitation Policy (1994)

6.4.2 National Sanitation Policy²³

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.

6.4.3 White Paper on Basic Household Sanitation²⁴

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;

²³ Department of Water Affairs and Forestry (1996)

²⁴ Department of Water Affairs and Forestry (2001)

- 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 to 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

Decisions of the courts provide the means through which the nature and scope of human rights may be determined:

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 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"*²⁵

Further, that legislative measures adopted by the government must be supported by policies and programmes must be reasonable *"both in their*

²⁵ Grootboom at para [41]

conception and implementation".²⁶ 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. These measures should not ignore people whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril.²⁷

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.

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.

²⁶ Grootboom at para [42]

²⁷ Ibid at para [44]

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

2007 (5) SA 250 (CC)²⁸ 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 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**, the Court observed as follows:

²⁸ at paragraph [49]-[51]

[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:²⁹

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

6.5.4 In Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor

²⁹ NM v Smith at para [131]

Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA

545 (CC)³⁰ 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."

6.5.5 In Bernstein and Others v Bester and Others NNO 1996 (2) SA 751

(CC),³¹ 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:

"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."

6.5.6 In relation to the duties of all levels of government the Court held in Grootboom³²:

"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:

³⁰ at para [18]

³¹ at para [77]

³² Grootboom at para [82]

"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.*"³³

In fact the Court has repeatedly held that the State, including municipalities, is obliged to treat vulnerable people with care and concern.³⁴

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 manner*"³⁵ and "*to promote a safe and healthy environment*"³⁶. A municipality is obliged to try to achieve these objectives. Section 73(1)(c) of the Local Government: Municipal Systems Act³⁷, 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.

³³ Grootboom at para [83]

³⁴ Joe Slovo at para [76]

³⁵ Section 152(1)(b) of the Constitution

³⁶ Section 152(1)(d) of the Constitution

³⁷ Act 32 of 2000

6.5.7 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 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.

6.5.8 In Joseph case,³⁸ 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.

³⁸ See Leon Joseph and Others v City of Johannesburg and Others [2009] ZACC 30

6.5.9 In the **City of Johannesburg case**,³⁹ 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 socio-economic rights are not absolute and where reasonably justifiable may be limited in respect of a law of general application.

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*”.⁴⁰

6.6 Regulatory Standards

Regulation 2 of the Compulsory National Standard⁴¹ states that the minimum standard for basic sanitation services is –

³⁹ See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11

⁴⁰ In the *Grootboom Case*, the Court opined that although South Africa had not ratified the ICESCR, it was obliged to respect the spirit of this treaty, and not to act in a manner that is contrary thereto in the progressive realization of socio-economic rights.

(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.

6.7 Strategic Frameworks

6.7.1 The Strategic Framework for Water Services⁴²

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.⁴³

It further defines a basic sanitation service as:

⁴¹ General Notice 22355 of 8 June 2001

⁴² Department of Water Affairs and Forestry (2003)

⁴³ Ibid

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 Strategy⁴⁴

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

The National Housing Code was adopted in terms of the Housing Act. In terms of section 4(6) of the Housing Act,⁴⁵ 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 Programme ("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 Programme identifies the following characteristics of an 'informal settlement':

- Illegality and informality;
- Inappropriate locations;
- Restricted public and private sector investment;

⁴⁴ Department of Water Affairs and Forestry (April 2009)

⁴⁵ 107 of 1997

- 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:

) *"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 projects, 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 six (6) key issues:

- The nature and scope of alleged human rights violations;
- The reasonableness and/or adequacy of the steps taken by the Municipality to address the problem of sanitation in the Metsimaholo Local Municipality.
- Operational efficiencies of the Respondent;
- Inter-governmental collaboration;
- The adequacy of community participation in policy and programmatic planning and implementation.
- The adequacy of funding levels provided to the Respondent by Provincial Government to provide water and sanitation in the area.

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 health care services, sufficient food and water and social security of the residents by its failure to connect toilets to the water supply system thereby leaving residents with no alternative but to dig holes for use as pit toilets.

- 7.1.2 The inspection in loco of the affected areas in townships undertaken by the Commission revealed that the media reports were indeed accurate. Interviews conducted with residents shed further light and corroborated the media reports.
- 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 Whilst the Respondent contends that the sanitation challenges in the Sasolburg townships stem from the lack of fulfilment of functions in respect of roles and responsibilities by the Provincial Department of Human Settlements, Water Affairs and Cooperative Governance and Traditional Affairs, the Respondent has not provided the Commission with information regarding interaction with the relevant Provincial government departments. The Respondent bears the duty to do so.
- 7.1.5 Further, the Respondent has not furnished the Commission with its Integrated Development Plan ('IDP'), water and sanitation policy, project action plans and timeframes, budget allocated, and minutes of community meetings despite repeated requests to do so.⁴⁶
- 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.
- 7.1.7 On this basis the Commission finds the Respondent in substantive violation of the human rights listed above.

⁴⁶ Date of Request - 15 May 2012; Reminder letter - 26 June 2012

7.2 Reasonableness of steps taken by the Municipality to progressively address the challenge of Water and Sanitation

- 7.3 In terms of section 27, the Municipality is required to progressively realise the supply of adequate water and sanitation to the community.
- 7.4 The onus rests on the Municipality to prove that measures it took to progressively realise the supply of adequate water and sanitation to the community were reasonable.
- 7.5 According to the report⁴⁷ received from the Municipality, they engaged with the Department of Human Settlement to provide direction regarding sewer connections to households. The Commission was not in a position to ascertain the veracity of this assertion as the Municipality failed to furnish the Commission with proof of discussions it had held with this Department. It is thus difficult to conclude whether measures adopted by the Municipality to progressively realise the right to water and sanitation were reasonable or not.

7.6 Inter-governmental collaboration

- 7.6.1 According to the 2001 White Paper on Basic Household Sanitation, the Department of Local Government, now Cooperative Governance and Traditional Affairs, has the primary responsibility inter alia for promoting the development by the municipalities of their IDP and the coordination, together with the National Treasury, of the provincial and local governments Equitable Share⁴⁸ ('ES') and Municipal Infrastructure Grant⁴⁹ ('MIG') grants.

⁴⁷ Reported dated 11 April, 2012

⁴⁸ 'Equitable Share' refers to an unconditional grant meant to be used by municipalities to fund the operations and maintenance of water and sanitation infrastructure

⁴⁹ 'Municipal Infrastructure Grant' refers to a ring-fenced, conditional grant administered by COGTA to fund the capital cost of basic infrastructure for poor households

- 7.6.2 According to the 2003 Strategic Framework on Water Services, Provincial Government, together with the national government, has the constitutional responsibility to support and strengthen the capacity of local government in the fulfilment of its functions, and to regulate local government to ensure effective performance of its duties.
- 7.6.3 Provincial government departments may undertake or oversee the construction of water and sanitation infrastructure. In terms of housing delivery, which is closely linked to sanitation, provincial housing are responsible for developing housing projects across the country in terms of the Constitution and the Housing Act.
- 7.6.4 Part E of the National Water Services Regulation Strategy⁵⁰ defines the approach to the regulation of sanitation. In terms of financing, the Department of Water Affairs monitors all Municipal Infrastructure Grant (MIG) applications for sanitation projects.
- 7.6.5 Since the National Sanitation Programme Unit was transferred to the Department of Human Settlements in 2009, there has been confusion over functions, and a lack of cooperation and collaboration between departments. It appears that the Department of Human Settlements is responsible for household sanitation infrastructure, while the Department of Water Affairs for bulk reticulation. The Respondent contends that it is the Department of Human Settlements' responsibility to connect sewer networks to households. The Respondent's role is to monitor financial expenditure, commission projects, manage the maintenance and operation of sewer and water infrastructure.
- 7.6.6 The analysis of these findings leads to the conclusion that there is an absence of effective collaboration between the national policy sphere and the municipal delivery targets and capacities. This needs to be corrected.

⁵⁰ Department of Water Affairs (January 2010)

7.7 Community Participation

7.7.1 The Respondent alleges project steering committees were required to keep the community informed of project progress and challenges through ward councillors and committee members. It is not clear whether there was adequate consultation with the community as the Respondent did not provide the Commission with minutes of these meetings.

7.7.2 The Respondent is bound by the Constitution and the National Housing Code to ensure community participation.

7.7.3 The burden to prove that adequate consultation took place rests on the Respondent. In the absence of minutes, a reasonable inference can be drawn that effective and interactive community participation did not take place.

7.7.4 In terms of the MFMA, a municipality must consult communities and present the budget available to undertake specific projects. The budget must be presented through the MTEF process, where there is an agreement as to how many toilets can be connected to the sewer network over a period of time. The fact that pit toilets remained for a lengthy period is an indication that the Respondent did not use the multi-year planning framework on service delivery.

7.7.5 The Municipal Systems Act states that municipalities must encourage and create conditions for the local community to participate in the affairs of municipalities 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.

7.7.6 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")⁵¹, a law of national application which facilitates information sharing in the country and is meant to promote public participation.

7.7.7 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 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.⁵² A clear example of this is the absence of any records in accessible format which have been shared with the community during the implementation of the project.

7.7.8 Based on the Respondent's failure to share information and consult with the community, the Commission is unable to establish any factor which could be said to constitute a reasonable response by the Respondent. The Respondent's actions can however not be said to have been justified by any governing legislation or any provision of the Constitution.

7.7.9 In the circumstances, the Commission is unable to make a finding that the Respondent has executed the obligations listed above, even though the Respondent asserts that it has in its report⁵³.

⁵¹ The Promotion of Access to Information, Act 2 of 2000.

⁵² These include its mandatory duty to report to the Commission in terms of section 14 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.

⁵³ Paragraph D of the report received on 11 April 2012

7.8 Operational Inefficiencies

- 7.8.1 Section 9 of the Municipal Systems Act requires of municipalities to act as points of delivery. Local government is responsible for water services, including sanitation.
- 7.8.2 Section 10A⁵⁴ requires organs of State which assign functions to local government to provide the latter with sufficient funding and capacity as required. The Respondent in this matter depend on national and provincial governments for funding and capacity.
- 7.8.3 More clarity on the national institutional framework around basic sanitation, particularly as the Department of Human Settlements took over the National Sanitation Programme from Department of Water Affairs in 2009 is required as the Respondent is constrained to act only within the parameters of national and provincial policies.
- 7.8.4 In the final analysis, the conclusion reached is that there are myriad challenges at the local government level, including shortage of critical skills and competencies, inadequate national financing to address sanitation backlog and lack of leadership and administrative competency at local level. In the present complaint, the Respondent has been adversely affected by interim management and instability at leadership level. The level of institutional capacity required to address sanitation challenges has not been adequately tabled.

7.9 Adequacy of Funding

- 7.9.1 According to the Respondent, funding for the implementation of the Programme is allocated to Provincial Governments by the Minister of Human Settlements on

⁵⁴ Ibid

an annual basis.⁵⁵ The Provincial Department of Human Settlement must therefore do everything in its power to assist municipalities to achieve their obligations under this programme. The Respondent stated in its report that the Provincial Government had delayed to proclaim informal settlements in the area as townships.

7.9.2 The Nokotyana case⁵⁶ underlined the ineffective manner around the way in which the different spheres of government approached informal settlement upgrading, the lack of access to interim basic services in informal settlements, and the lack of minimum standards for basic sanitation provision.

7.9.3 The Respondent failed to provide the Commission with information regarding provision of interim basic services in informal settlements and imminent plans to upgrade them.

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 makes the following determinations:

8.1 Violation of Human Rights

The condition of unenclosed pit toilets and lack of health education gives credence to the allegation that the Respondent has violated the rights of residents to water, to health and to a clean environment;

⁵⁵ Paragraph 3.4 of letter from the Respondent to the Commission dated 6th December, 2012

⁵⁶ Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others [2009] ZACC 33

The lack of privacy and security to the person presented by the present form of outdoor sanitation leads the Commission to a finding that the rights of residents to privacy and dignity have been violated.

Finding

The Commission is satisfied, on the facts of this complaint, that the Respondent is in violation of sections 10 (right to dignity), 24 (right to environment) and 27 (right to water and health).

8.2 Systemic Operational Inefficiencies & Constraints

With regard to operational efficiency of the Respondent, the Commission finds that the Respondent is weak in a number of operational competencies which include leadership and management. The Commission notes that there was no substantive Municipal Manager in the Respondent for the period of one year between November 2011- November 2012.

The transition period that culminated in the appointment of the new Municipal Manager on the 26th November 2012 was also fraught with leadership instability which adversely impacted on planning and operational efficiency and led to a continual decline in provision of water and sanitation services.

Finding

Governance, leadership and management of the Municipality during the period under investigation was weak.

8.3 Poor Inter-governmental collaboration

The Respondent failed in its role and responsibility to effectively engage with the relevant National and Provincial Governments on budget and capacity challenges of the Municipality, particularly in this critical area of sanitation.

The National and Provincial Governments have not worked closely with the local sphere of government and the Respondent in particular, to ensure that the provision of sanitation is realised and sanitation infrastructure is installed and maintained. In this regard it was quite clear that both finance administration at the level of the water and sanitation project implementation and finance allocation was inadequate.⁵⁷

Finding

Consequently, the finding of the Commission is that there were weaknesses in the inter-governmental collaboration of national, provincial and local government, (Department of Human Settlements/Municipality) resulting in the failure and/or neglect to provide adequate sanitation service delivery to the community of Salsolburg.

8.4 Inadequate Community Participation

The Respondent has failed and/or neglected to furnish the Commission with minutes of meetings⁵⁸ with the community in order for it to assess the adequacy of public participation and municipal consultation around sanitation infrastructural challenges in Sasolburg;

⁵⁷ Letter dated 6th December, 2012 from Metsimaholo Municipality, Para 3.4: "*Indeed the Municipality has been allocated funds directly from National Treasury for capital costs for MIG Projects, which is for backlogs only. However the Municipality is inundated with a number of new developments that includes GORTIN, AMELIA, MOOIDRAAI and MOOIPLATS which cannot be funded from MIG as they do not fall within the backlog category. The Department of Human Settlements is responsible for the funding of new Settlements, and to-date no funding has been made available for MOOIPATS, MOOIDRAAI and GORTIN.*"

⁵⁸ Date of Request - 15 May 2012

The Respondent's failure to submit its Section 14 Report to the Commission for the last 3 years, coupled with alleged inadequate information transmitted to the community leads the Commission to uphold the allegation of violations to the right of access to information.

Finding

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 sanitation needs of the Sasolburg community; and that each member of the community has access to an enclosed toilet facility.

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;
2. furnish the Commission with a Progress Report at least every three (3) months in respect of the progressive realisation of the right to water and sanitation services in the townships and informal settlements in Sasolburg.

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 water and sanitation.

9.2 Inter-governmental Collaboration

The Department of COGTA is directed to take active measures to review the effectiveness of inter-governmental collaborative links between national, provincial and local government with respect to sanitation service provision in the Metsimaholo Municipality, and to furnish the Commission with a Report on this aspect, within 6 (six) months of date of this finding.

The Department of Human Settlements is directed to assess current infrastructural and sanitation projects in the Metsimaholo Municipality, to identify the causes of backlog, to develop plans and strategies to resolve same, and to furnish the Commission with a Report within 6 (six) months of this finding.

9.3 Improvement of Operational Efficiency

The Departments of Human Settlements and Water Affairs are directed to:

- undertake an assessment of water and sanitation challenges, identify strategies to deal with those challenges, identify resources necessary to implement these strategies and set out clear timeframes for operational and capacity shortcomings of the Metsimaholo Municipality to be addressed.
- furnish the Commission with a Plan detailing how it intends addressing and monitoring and evaluating operational and capacity shortcomings of the Metsimaholo Municipality, within 3 (three) months from date of this finding.

9.4 Community Participation

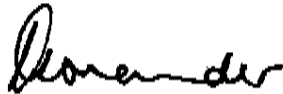
The Commission directs the Respondent to furnish the Commission with the Minutes of every community meeting held at least every three (3) months in respect of development in the Metsimaholo Municipality relating to access to water and t sanitation services.

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 CAPE TOWN THE 13TH DAY OF
DECEMBER 2012.



Commissioner P. Govender
Deputy Chairperson
South African Human Rights Commission