



## SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2011/0009

In the matter between:

**Council for the Advancement of the SA Constitution**

**Complainant**

And

**South African Police Service**

**Respondent**

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### REPORT

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#### 1. Introduction

1.1. This Report contains findings of the South African Human Rights Commission (*"the Commission"*), pursuant to an investigation undertaken by the SAHRC into a complaint alleging the violation of the human rights of a citizen in the course of a public protest.

1.2. The Council for the Advancement of the South African Constitution (*"the Complainant"*) alleges, in a nutshell, that members of the South African Police Services (*"the Respondent"*) assaulted and/or caused the death of an unarmed

civilian who was one of a group of community members in Ficksburg in the Free State Province, engaging in a public protest against poor service delivery, fraud corruption, theft and maladministration by the local municipality.

1.3. In determining its role in this matter, the Commission determined that this set of facts gave rise to three (3) distinct possible causes of action:

1.3.1 **Criminal action** in respect of assault (alternatively any other competent charges) and/or murder (alternatively any other competent charges);

1.3.2 **Civil action** in respect of damages arising from loss of support to dependants of the deceased citizen (and any further ancillary relief);

1.3.3 A **Human Rights** investigation, into possible violations of Chapter II of the Bill of Rights.

1.4. The Commission determined that the parameters of its interest in this matter was a very specific and narrow one; it was **strictly limited to declaring and determining the nature, if any, of the human rights of parties that may have been violated** in the course of this incident.

1.5. Accordingly, this report should not be construed as making any legal conclusions on the criminal culpability or civil liability of the Respondents.

1.6. Where conclusions of fact or law are made in this Report that overlap or coincide with the conclusions made by the appropriate authorities in respect of civil and criminal actions, such conclusions are incidental similarities and should

not be construed as pre-judging the outcome of either of these judicial processes.

## **2. Mandate of the Commission**

- 2.1 The South African Human Rights Commission is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (*"the Constitution"*).
- 2.2 The Commission and the other institutions created under Chapter 9 of the Constitution are described as *"state institutions supporting constitutional democracy"*.
- 2.3 The Commission is specifically required to:
  - 2.3.1 Promote respect for human rights;
  - 2.3.2 Promote the protection, development and attainment of human rights; and
  - 2.3.3 Monitor and assess the observance of human rights in the Republic.
- 2.4 Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

- 2.5 The Human Rights Commission Act, 54 of 1994, enables the work of the Commission, enjoins the Commission to conduct investigations into human rights violation allegations.
- 2.6 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.

### **3 Detailed background to the Complaint**

- 3.1 On the 15 April 2011, the Commission received a complaint from the Complainant against the Respondent in respect of the latter's conduct during the policing and crowd control of a public protest by a group of community members in Ficksburg in the Free State Province on the 13 April, 2011.
- 3.2 The Complainant alleges that the conduct of the Respondent members amounted to improper use of force against an unarmed and defenceless citizen.
- 3.3 According to the Complainant, members of the Respondent repeatedly assaulted the deceased, Andries Tatane, an unarmed community member during a peaceful public protest; and that such assault resulted in the death of a citizen at the hands of the Respondent.
- 3.4 The Complainant further alleges that, in the result, the actions of the Respondent amounted to a breach of a number of human rights protected in the Bill of Rights of the Constitution of the Republic of South Africa.

- 3.5 The Complainant called upon the Commission to investigate the alleged violation of human rights.

#### **4 Preliminary Assessment of Complaint**

- 4.1 Upon receipt of the complaint, the allegations were assessed by the SAHRC to determine whether a *prima facie* case existed for further investigation to be conducted into human rights violations arising from the alleged facts.
- 4.2 As an outcome of the assessment, the Commission determined that the complaint gave rise to:
- 4.2.1 a *criminal cause of action* that fell outside the Commission's mandate. The Commission referred this aspect of the complaint to the Independent Police Investigative Directorate ('IPID')<sup>1</sup>, a statutory body entrusted with the duty to investigate a myriad of criminal offences committed by members of the South African Police Service including police brutality.
- 4.2.2 a *civil cause of action* in respect of a Dependants Claim for damages for loss of support and other ancillary relief. The Commission referred this aspect to the Legal Aid Board of South Africa (LASA).
- 4.3 The residual cause of action was that of the investigation into possible violations of human rights. It was this aspect that the Commission decided to accept jurisdiction over, with a limited, and specific interest in declaring the ambit of the

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<sup>1</sup> Formerly known as Independent Complaints Directorate ( changed its name in April 2012)

rights of the deceased and public protestors, measured against acceptable limitations to these rights, and making a finding of fact and law regarding any possible violation of same.

## **5. Motivation for pursuing investigation**

5.1 There are a number of reasons that motivated the Commission to undertake the investigation:

5.1.1 During pre-constitutional era public protests and demonstrations against the violation of human rights were often met by the use of force by law enforcement agents on defenceless citizens, frequently resulting in the loss of life;

5.1.2 In post-democratic South Africa, the Commission noted rise in the incidence of community protests within the Republic due to public discontent with municipal service delivery;

5.1.3 A growing policy inclination of the Respondent in post-democratic South Africa towards the use of force to maintain public order.

5.2 Drawing the strands of the afore-going reasons together, the Commission deemed it just and equitable to investigate the extent of violation of human rights by the conduct of the Respondents, if any, as an essential feature of a democratic society.

## **6. Methodology employed in the conduct of the investigation**

The Commission employed a number of methods during the investigation. These included desk-top research, interviews, written requests for responses, review of video footage.

### **6.1.1 Desk-top Research**

The investigation team conducted extensive legal research into the legal framework governing the Bill of Rights to identify the human rights that were affected in the course of the incident complained of; as well research into academic literature on best practices of policing, crowd management and the maintenance of public order in order to determine the parameters reasonableness of the limitations of these rights.

### **6.1.2 Interviews**

The investigation team conducted interviews with a random number of members of the Fiksburg community to obtain eye-witness statements to verify the factual allegations of the Complainant.

### **6.1.3 Review of Video Footage**

The Commission reviewed the video footage of the events of the 13 April, 2011 to verify the factual allegations of the Complainant.

#### 6.1.4 Written requests for response to allegation

The Commission made written requests to the Respondent's to respond to the allegations of the Complainant. As at the date of this report, the Ministry of Police and the Respondent have failed to provide the Commission with a response.

## 7. Applicable Law

### 7.1 Constitutional Rights

- 7.1.1 The complaint before the Commission is that the human rights of the protesting public, and in particular those of the deceased, were unreasonably limited when the Respondent applied undue force on unarmed citizens in the course of a public protest.
- 7.1.2 Section 10 is one of the most significant rights, particularly in the context of the present complaint; the **right to have the inherent dignity** of everyone respected and protected is paramount. The right to dignity is also a basis for a number of political rights and informs the interpretation of all other fundamental rights.<sup>2</sup>
- 7.1.3 Section 11 of the Constitution provides that everyone has the **right to life**. In **S v Makwanyane**,<sup>3</sup> the Constitutional Court described the rights to life and dignity as the 'most important of all human rights and the source of all other personal rights in the Bill of Rights.

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<sup>2</sup> Lain Currie & Johan De Waal *The Bill of Rights Handbook* 5 ed (2005) p275.

<sup>3</sup> 1995 (3) SA 391 (CC).



7.1.4 Section 12 of the Constitution provides that everyone has the **right to freedom and security of the person**, which includes the right to be free from all forms of violence from either public or private bodies. This right protects an individual against invasions of physical integrity by way of arbitrary arrest, violence, torture or cruel treatment or punishment.<sup>4</sup>

7.1.5 Section 12(1) (c) imposes positive duties on the state to protect individuals against violations of their physical integrity by others. The right to freedom from state violence protects individuals from the police use of an unconstitutional degree of force.

7.1.6 Section 17 of the Constitution recognises the **right to assemble, demonstrate, picket and present petitions peacefully and unarmed**.<sup>5</sup>

## 8 Domestic Legislation

### (a) Regulation of Gatherings Act<sup>6</sup>

8.1 During the various States of Emergency in the 1980's "illegal" protest marches were often broken up violently by the police who used teargas, rubber bullets, water cannons and live ammunition to stop citizens from protesting against the Apartheid regime.

8.2 In order to "normalise" political activity in South Africa in preparation for the first democratic election, the apartheid Parliament adopted the Regulation of

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<sup>4</sup> Lain Currie & Johan De Waal *The Bill of Rights Handbook* 5 ed (2005) p293.

<sup>5</sup> Section 17 of the Constitution.

<sup>6</sup> 205 of 193.

Gatherings Act 205 of 1993.<sup>7</sup> This Act for the first time affirmed that citizens had a right to take part in demonstrations and protest marches and provided for an elaborate procedure — requiring negotiations between the authorities and the organisers of a march or a demonstration — to ensure that such demonstration and marches were conducted in an orderly fashion to ensure that these marches and demonstrations caused the least disruption to other members of the public.

8.3 The preamble to the Act states:

*"Whereas every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so;*

*And whereas the exercise of such right shall take place peacefully and with due regard to the right of others..."*

8.4 In terms of section 1 of this Act, *'Demonstrations include a demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.'*

8.5 The Act only applies to a 'gathering' which is defined as *'any assembly, concourse or procession of more than 15 persons in or on any public road, or any other public place or premises wholly or partly open to the air.'*

8.6 Section 3 of the Act provides for the submission of the notice of the proposed gathering to an organisation or individual seeking to hold a gathering.

8.7 Section 4 of the Act provides for the holding of a meeting after the submission of the section 3 notice to discuss the contents of the notice and whether

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<sup>7</sup> Act promulgated after recommendations by the *Goldstone Commission of Inquiry regarding Prevention of Public Violence and Intimidation.*

amendments should be effected to the proposed facts so as to meet the objectives of the Regulation of Gatherings Act.

8.8 The Act identifies three main actors which have the responsibility to work together and to ensure that an intended public gathering takes place without any incident. The municipality, South African Police Service and the convenor who, either on his own accord or on behalf of another organisation, convenes a public gathering are expected to create a golden triangle of consultation and negotiation to the effect that public gatherings will be conducted peaceably.

8.9 The notice of gatherings contains binding conditions for the gathering. The convenor together with the marshals at a gathering must take all reasonable steps to ensure compliance with such conditions.<sup>8</sup> The police also have a duty to enforce the conditions of the notice.

8.10 The Act permits the use of force for crowd control where there are apparently 'manifest intentions' to kill or to seriously injure persons, or to destroy or seriously damage property.<sup>9</sup> However, such use of force must be necessary, moderate and proportionate to the circumstances.

#### **(b) South African Police Service Act<sup>10</sup>**

Section 13(3) (b) of this Act, provides that *'Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.'*

#### **(c) Criminal Procedure and Evidence Act 51 of 1977 as amended**

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<sup>8</sup> Section 8(9)

<sup>9</sup> Section 9(2)

<sup>10</sup> 68 of 1995.

Section 49 (1) and (2) of the CP&E Act empower the police to apply lethal force in circumstances where a suspect is attempting to flee, or posing a danger or threat to the life. The object and purport of these sections is to protect the safety and security of all persons and not to unduly threaten and undermine the rights of persons to assemble, demonstrate, protest and picket.

## **9 International Law**

### **9.1 Universal Declaration of Human Rights**

9.1.1 Article 3 recognises the *right to life, liberty and security of the person*, and places the duty of the state to protect the life of its inhabitants.

### **9.2 African Charter on Human and People's Rights**

9.2.1 Article 6 provides that *every individual shall have the right to liberty and to the security of the person*. No one may be deprived of his freedom except for reasons and conditions previously laid down by law.

9.2.2 Article 11 provides that *every individual shall have the right to assemble freely with others*. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, safety, health, ethics and rights and freedoms of others.

## 10 Analysis of the Complaint

### 10.1 Framework for legal analysis

- 10.1.1 In analysing the available factual evidence, against the applicable legal framework, the Commission considered the rights of the protesting public as set out in **Section 10, Section 11, Section 12 and Section 17** of the Constitution of the Republic of South Africa.
- 10.1.2 Against the enjoyment of these rights, the Commission considered the legal framework that defines the **acceptable limitations to the enjoyment of entrenched constitutional rights**.
- 10.1.3 Section 36 of the Constitution recognises that **fundamental rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society** based on human dignity, equality and freedom, taking into account all relevant factors including:
- (a) *The nature of the right;*
  - (b) *The importance of the purpose of the limitation;*
  - (c) *The nature and extent of the limitation;*
  - (d) *The relation between the limitation and its purpose; and*
  - (e) *Less restrictive means to achieve the purpose.*

10.1.4 Section 205(3) of the Constitution provides that members of the police have a duty to *inter alia*, maintain public order, protect and secure inhabitants of the Republic, and to uphold and enforce the law. Section 7(2) of the Constitution requires the State, and therefore the Respondent, to respect, protect, promote and fulfil all fundamental rights. In evaluating the reasonableness of the Respondent's action, the Commission, took into consideration this onerous responsibility of the State to protect the life and safety of its people.

10.1.5 Finally, in analysing the evidence and making legal conclusions there from, the Commission utilised the **standard of proof on a balance of probabilities**.

## **10.2 Analysis of violations of human rights**

Each of the rights that the Commission found to have been *prima facie* violated are analysed hereunder, in turn, using the legal framework for analysis set out in 10.1 above:

### **(a) Right to Dignity & Life<sup>11</sup>**

10.2.1. Every human being has an inherent right to dignity and life.

According to O' Regan J,

*The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It*

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<sup>11</sup> Ss 10 & 11 of the Constitution.

*is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our Constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.*<sup>12</sup>

10.2.2. The *Universal Declaration of Human Rights* recognises the right to life, liberty and security of the person.<sup>13</sup> It is the state's duty to protect life of its inhabitants. The Respondent and its political head have a constitutional mandate to secure the inhabitants of the Republic.<sup>14</sup>

10.2.3 The use of force should not arbitrarily deprive life or undermine human dignity, and should not be disproportionate to the requirements of law enforcement. During the public protest in Ficksburg, an unarmed protester was assaulted in full view of bystanders. The video footage, which was widely publicized<sup>15</sup>, patently displayed this fact. It was apparent from this footage that the deceased could have been apprehended by the Respondents without the need to apply lethal force.

10.2.4 It was further clear that the deceased was not attempting to flee. Accordingly, he was not a suspect to warrant use of lethal force in terms of section 49(1) of the *Criminal Procedure Act*.<sup>16</sup> Even if the deceased had been obstructive to the Respondents in the carrying of their duties, it was open to the Respondents to employ alternative means of apprehending or otherwise subduing him. For this reason, the Respondents could not have been acting within the scope and ambit of the aforesaid section when the protestor was

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<sup>12</sup> *S v Makwanyane* paras 326-7.

<sup>13</sup> Article 3.

<sup>14</sup> Section 205 & 206 of the Constitution.

<sup>15</sup> Reported in: *The Citizen* "Tatane's Death Was a Hit" 17 April 2011.

<sup>16</sup> 51 of 1977 as amended.

killed. The objects and purport of subsections 49(1) and (2) are to protect the safety and security of all persons.

10.2.5 In the analysis of the Commission, the only acceptable limitation of the right to life in this instance would have been if the deceased had posed an immediate threat or danger of serious physical harm to the Respondents. In this case, on proper evaluation of the facts of this matter and the evidence at the disposal of the Commission, no such danger or threat of harm presented itself to the Respondents.

10.2.6 In the result, in weighing up the actions of the deceased against the degree of force used by the members of the Respondent, the Commission comes to the conclusion that no justifiable grounds, acceptable in an open and democratic society based on human dignity, equality and freedom, existed for the use of excessive force to limit the exercise of the rights of the deceased to protest in terms of section 17 of the Constitution.

**(b) Freedom and security of the person<sup>17</sup>**

10.2.7 Section 12(1) (c) requires the state to protect individuals, both negatively by refraining from such invasions itself and positively by restraining or discouraging private individuals from such invasions.<sup>18</sup> The state is required to take appropriate steps to reduce violence in public and private life.

10.2.8 As aforesaid, it cannot be found on the facts that the deceased posed any threat or danger to the police or members of the public as he was unarmed.

10.2.9 Accordingly, the Commission does not find on the facts any compelling justification for the limitation by the Respondent of the exercise of the deceased of his freedom and right to security of person.

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<sup>17</sup> Section 12 of the Constitution.

<sup>18</sup> See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 47.



10.2.10 The Commission concludes that the Respondents violated the deceased's right to exercise his freedom and right to security of his person in a manner that is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

**(c) Right to peacefully assemble, demonstrate, picket and to present petitions<sup>19</sup>**

10.2.11 Public demonstrations and marches are a regular feature of present day South Africa and the right to peacefully assemble, demonstrate, picket and to present petitions is an essential characteristic of a democratic society. However this demonstrations and pickets must take place within certain procedural requirements outlined in the *Regulation of Gatherings Act* ('RGA').<sup>20</sup>

10.2.12 An unpublished report<sup>21</sup> on protest actions stated the following regarding alleged infractions on the right to assemble and expression-

*"There is a growing perception that authorities have used the RGA, particularly section 3(2) to deny activists their basic civil rights. The RGA, according to activists, is used by the ruling elite to criminalise genuine grassroots political actions, delegitimize and discredit civil society organisations and social movements. Activists further caution that the RGA's provisions might seem harmless – but in essence pose a serious challenge to the poor – who might not be able to comply for a variety of reasons. At the same time, basic freedoms of association, expression and assembly are seriously and adversely affected by the onerous regulations, which some activists argue might be unconstitutional."*

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<sup>19</sup> Section 17 of the Constitution.

<sup>20</sup> 205 of 1993.

<sup>21</sup> Hlatshwayo Z, *Intabazwe- A Portrait of a Revolt*, 2006, p.11.

10.2.13 In terms of the Gatherings Act, a gathering is a march, picket, or parade of more than 15 people. A gathering is an activity that expresses any form of contestation or is critical towards whomsoever, whether it is, a person, a private entity or a public body. A gathering requires prior notification to the relevant local authority but a demonstration of 15 people or less requires no notification. The Act was designed to ensure that public protests and demonstrations are confined within the legally recognised limits with due regard for the rights of others.

10.2.14 Community protests are an expected consequence of systemic failures in the provision of basic services to the entire populace, in particular, the impoverished members of society. In Ficksburg, protestors expressed concerns with their local municipality and cited theft, corruption, maladministration and nepotism as their main grievances.

10.2.15 It is unclear from our investigations whether the organisers of the protest complied with provisions of RGA when they embarked on this protest action. In any event, this aspect is not material to the determination of the issues for determination.

10.2.16 The first protest in March 2011 went without any significant unrest as residents presented their memorandum. The second protest, on the 13<sup>th</sup> April 2011, was also initially commenced without unrest. Thereafter, enraged supporters set fire to the library and the home affairs office.<sup>22</sup> A storeroom at the municipal offices was burned to the ground. Police used water cannons, rubber bullets, and tear gas to disperse the dangerous crowd.<sup>23</sup> There was no meaningful attack of the Respondents by the protesting public; certainly, none of the nature that posed a threat to life of members of the Respondent.

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<sup>22</sup> Reported in: The Citizen "Tatane's Death Was A Hit" 17 April 2011; The Citizen "Ficksburg Erupts in Mob Violence" 15 April 2011.

<sup>23</sup> See above footnote 32.

10.2.17 Police members have powers in terms of RGA <sup>24</sup> to quell protesters anger and outbursts of violence by using force proportionate to the circumstances prevailing at that juncture. If not, the anger generated during a public protest might fuel further protests. In this case, the Respondent might contend that the acts of violence and damage to public property by the protesting residents militate against the rule of law and the rights of others, and that this warranted use of force by the Respondents. In the view of the Commission, this contention cannot be correct. The unlawful acts of violence against public property do not call for the use of lethal force, and the actions of the Respondent in so acting cannot be condoned.

10.2.18 In the result, the Commission concludes that the Respondents acted in violation of the deceased's right to peacefully assemble, demonstrate, picket and to present petitions as enshrined in the Constitution; and that this was done in a manner that is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

## 11. Findings

11.1 Based on the investigation conducted by the Commission and the analysis of the Constitution, reports and the applicable law, the Commission finds that:

11.1.1 The Respondent's members acting in pursuance of their mandate in terms of section 205 of the Constitution neglected provisions of RGA by using excessive force resulting in the injury and/or death of one protestor;

11.1.2 The Respondent's members used a degree of force that was disproportionate in the factual circumstances of the case, and in so doing, unduly limited and violated the deceased protestor's right to life in terms of section 11 of the Constitution and/or freedom and security of the person in terms of section 12 of

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<sup>24</sup> Section 9(2).

the Constitution; and the protesting public and deceased protestor's right to peacefully and unarmed to assemble, demonstrate, to picket and present petitions;

11.1.3 The Respondent's members were not suitably equipped to quell public disorder and failed, within the circumstances, to devise a plan to regulate and monitor the gathering;

11.1.4 The Respondent failed to authorise a suitably qualified and experienced member to represent police at consultations or negotiations contemplated in section 4 of the RGA; If a suitably qualified person had been chosen, such member would have reasonably foreseen that the demonstration in question would degenerate into violence and prepared for that eventuality;

11.1.5 The Respondent failed to ensure that adequate numbers of police officers were deployed to minimize or avoid destruction of public property.

## **12. Recommendations**

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

12.2 The Commission recommends accordingly that:

12.2.1 The Respondent to improve training of police officers in managing and regulating gatherings to ensure that future police interventions in public protests result in a more peaceful and non-violent outcome;

12.2.2 The Respondent to develop a training manual for the Public Riot Unit together with the Commission's Advocacy Programme; The Respondent should put more focused attention to specialised training for the Public Riot Unit;

12.2.3 The Respondent should actively engage in communication with communities where there are popular protests;

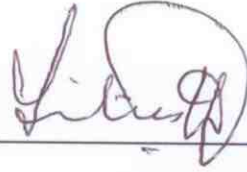
12.2.4 The Commission requires the Minister of Police and Minister of Cooperative Governance and Traditional Affairs to collectively report every six (6) months on measures it has put in place to address the phenomenon of increasingly violent community protests. The latter to report on measures to ameliorate systemic failures in local government that often lead to service delivery protests, and to report to the Commission on meaningful engagement on such concerns so as to avert these protests.

## **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 BRAMFONTEIN THE 30 DAY OF  
OCTOBER 2012.



Commissioner D. Titus

**South African Human Rights Commission**