



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/2012/0077

In the matter between:

Theunissen Forum

Complainant

And

Department of Water Affairs

1st Respondent

Department of Co-operative Governance

& Traditional Affairs

2nd Respondent

Masilonyana Local Municipality

3rd Respondent

REPORT

(In terms of Article 21 of the Complaints Handling Procedures of the SAHRC)

1. Introduction

- 1.1 The South African Human Rights Commission (hereinafter called the "Commission") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996.

- 1.2 The Commission is an institution created under Chapter 9 of the Constitution as a "*state institution supporting constitutional democracy*".
- 1.3 The Commission is specifically required to:
- 1.3.1 Promote respect for human rights;
 - 1.3.2 Promote the protection, development and attainment of human rights; and
 - 1.3.3 Monitor and assess the observance of human rights in the Republic.
- 1.4 *Section 184(2) of the Constitution*¹ empowers the SAHRC to investigate and report on the observance of human rights in the country.
- 1.5 Further, *section 184(2) and (d)* affords the Commission authority to carry out research and to educate on human rights related matters.
- 1.6 The *Human Rights Commission Act, 54 of 1994*, (hereinafter referred to as "the Act") further supplements the powers of the SAHRC.²

¹ The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

2. Parties

- 2.1 The Complainant is Theunissen Forum, a voluntary association of residents of Theunissen, an area falling under the jurisdiction of Masilonyana Municipality, Free State Province.
- 2.2 The 1st Respondent is the Department of Water Affairs, Free State (hereinafter referred to as "**DWA**").
- 2.3 The 2nd Respondent is the Department of Co-operative Governance and Traditional Affairs, Free State (hereinafter referred to as "**COGTA**").
- 2.4 The 3rd Respondent is Masilonyana Municipality, a Municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated at corner Theron & Le Roux Streets, Theunissen (hereinafter referred to as "**MLM**").

3. Background to the Complaint

- 3.1 On the 18th of July 2012 the Commission received a complaint from the Complainant setting forth certain allegations and seeking the intervention of the SAHRC in investigating the matter, and providing a resolution herein.
- 3.2 In a nutshell, the Complainant alleges that:

- 3.2.1 That there was a water crisis in the Masilonyana Municipality, and that the Respondent was in violation of the constitutional rights of the residents of Theunissen to enjoy access to adequate supply water; and that
- 3.2.2 That the supply of water provided by the MLM to the residents of Theunissen Municipality was *inadequate*;
- 3.2.3 That the supply of water provided by the Respondent to the residents was discoloured, contaminated with visible debris and *unsafe for human consumption*.
- 3.2.4 That on several instances the Complainant attempted to engage the Respondent in an attempt to discuss the matter; but that relevant officials of the Respondent have failed and/or neglected and/or refused to meet with the Complainants;
- 3.2.5 That the Respondent has failed and/or neglected and/or refused to provide the Complainant residents of Theunissen with information, adequate or at all, on the steps that the Respondent has taken to address the Complainant's water supply and safety concern.
- 3.3 In the result, the Complainant alleges that the Respondent's failure and/or neglect and/or refusal to provide the residents of the municipality with clean and safe water supply amounted to a violation of the residents' constitutional rights to enjoy access to adequate and clean water.
- 3.4 Further, that the Respondent's failure and/or neglect and/or refusal to provide the residents with information as to the steps that they were taking to address these issues amounted to a

violation of the residents' constitutional rights to access information.

4. Preliminary Assessment

- 4.1 In the preliminary assessment of the Commission, there had been a *prima facie* violation by the Respondent of the constitutional rights of the Complainant in terms of:
 - 4.1.1 Section 9 (2) of the Constitution;
 - 4.1.2 Section 10 of the Constitution;
 - 4.1.3 Section 27 (1) (b), Constitution Act; and
 - 4.1.4 Section 32 (1) (a) and (b), Constitution
- 4.2 The Commission further noted that in terms of Section 27 (2) of the Constitution, the duty of the state to provide adequate and clean water was **subject to** the availability of resources; *to wit*, the state is required to take reasonable legislative and other steps, within its available resources, to achieve the progressive realisation of this right.
- 4.3 The Commission further determined the alleged violation fell within the mandate and jurisdiction of the Commission;
- 4.4 Yet further, the Commission determined that the alleged violation merited further and fuller investigation;
- 4.5 In determined the appropriate Respondents to be investigated in the matter, the Commission identified the following parties:

- 4.5.1 Department of Water Affairs ("DWA");
- 4.5.2 Department Cooperative Government and Traditional Affairs ("COGTA"); and
- 4.5.3 Masilonyana Local Municipality ('MLM').

5. Issues for Determination

The three (3) key issues for determination in this matter were the following:

- 5.1.1 Whether the MLM had violated the rights of residents of the Masilonyana Municipality to access *adequate supply* of water;
- 5.1.2 Whether the MLM had violated the rights of residents of the Masilonyana Municipality to access to water that was *clean and safe for consumption*;
- 5.1.3 Whether the MLM had violated the rights of residents of the Masilonyana Municipality to *access information*.

6. Steps taken by the Commission

- 6.1 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: Written correspondence with Respondent; and an *Inspection in loco*.

(a) Correspondence with the Respondents

6.2 On or about 27 July 2012, the Commission forwarded an allegation letter to Respondent setting forth the allegations made against it by Complainant.

6.3 The purpose of this correspondence was threefold: (a) presenting the Commission's preliminary assessment of the rights violated as well as placing on record the allegations made against Respondent; (b) providing Respondent(s) with an opportunity to present its side of the matter; providing Respondent(s) with an opportunity to remedy the matter;

6.4 As per the SAHRC procedures, the Commission extended a period of twenty-one (21) days to the Respondent during which the Respondent was to furnish the Commission with a reply.

(b) Inspection in loco

6.5 On the 19th September, 2012 the Commission conducted an inspection in loco of the Masilonyana Municipality.

7. Evidence collected during Investigation

7.1 Response from the 1st Respondent

On the 19th of October 2012 the Commission received a reply to its letter dated 27 July 2012 from the DWA, which stated *inter alia* the following:

- 7.1.1 That the 1st Respondent was aware of this water crisis;
- 7.1.2 That the 1st Respondent was currently putting measures in place to deal with this water crisis;
- 7.1.3 That the 1st Respondent had identified 3 three projects worth 11 Million Rand for the construction of Theunissen Clean Water Pump Station, Two Earth Dams and a 2ML Reservoir in three upcoming financial years.

7.2 Response from the 2nd Respondent

On the 19th of October 2012 the Commission received a reply to its letter dated 27 July 2012 from the DCOGTA, which stated inter alia the following:

- 7.2.1 Confirming that that the COGTA were aware that the MLM were the lowest performing municipality;
- 7.2.2 Confirming that the quality of water in MLM was below the desired standard and that there was no defence against the high risk posed to safe water drinking;
- 7.2.3 Further that the MLM communities were warned not to consume the tap water without first administering home disinfection treatments to the water like boiling or adding bleach;
- 7.2.4 Further that the management, operation and maintenance of the Theunissen Water Treatment Works were meeting the DWA legal requirements as per indicators in the SANS 241 and Regulation No 2834;

- 7.2.5 Advising that DWA sent a non compliance letter and a follow up letter to MLM requesting an action plan after the release of the Blue Drop report;
- 7.2.6 Confirming that in June 2012 the Theunissen Water Treatment Plant was refurbished and that new filter nozzles and filter media were installed in two of the four filters;
- 7.2.7 It was further confirmed that as of the 24th of August 2012 the drinking water quality as per the SANS 241 2011 specifications were superb and safe for drinking as per an independent sample test; annexed hereto;
- 7.2.8 In addition it was confirmed that current the Water Treatment Plant is overloaded by 20% but that if the old plant can be used this will meet the demand;
- 7.2.9 COGTA advised that a two day water summit was held in May 2012 and during this summit resolutions were made on a way forward;
- 7.2.10 DWA is also assisting MLM in order to improve the management and quality of water in the area;
- COGTA also confirmed that on 3 July 2012 a meeting was held with the MLM and the Complainant;
- 7.2.11 COGTA confirmed that MLM had identified three projects for the MTEF period, these included:
- a) Construction of a clean water pump station would cost R4.2 million;

- b) Construction of two earth dams- R2 million;
- c) Construction of 2ML reservoir – R4.8 million.

7.3 No Response from MLM.

7.4 **Observations of Inspection in loco**

(a) General Observations

- 7.4.1 The community in Theunissen have a white community, middle to upper class, and a black/coloured community who are vastly unemployed and living in desperate conditions.
- 7.4.2 The town has three functioning big businesses which generate work and income for the community, namely, a animal feed factory, a brick manufacturing factory and an abattoir.
- 7.4.3 These businesses employ close to Two hundred people from the area.
- 7.4.4 The community residing in the informal sectors of the town are greatly impacted as they do not have sufficient access to water when water is available (one tap per seven households) and the almost Two Thousand (2000) toilets build in the nearby formal settlement have not been working since being built in 2007-2010.

"Photo A" - Unused toilets:



7.4.5 The reason provided for this is that the contractor who was awarded the tender did not built the toilets properly, as a result it cannot/ has not been connected to water or sewage pipes. Instead what community members are forced to use...

"Photo B" – bucket toilets:



(b) Substantive Observations

7.4.6 Water Reservoirs:

- 7.4.6.1 There are three functioning water reservoirs in the town, which according to the complainant, if maintained effectively and cleaned will service the towns needs;
- 7.4.6.2 There is a fourth water reservoir that was built (date unknown) at a cost (unknown) which has not been used since being built. It has now been virtually discarded and is being used by homeless person as shelter.
- 7.4.6.3 All pipes and fittings have been long removed and sold for scrap in order to secure money for food.
- 7.4.6.4 No enclosure is apparent, and if there was any it has since been removed.

- 7.4.6.5 The area around the water reservoir is not secure and is right next to if not in the same space as a dump site.
- 7.4.6.6 There are people who live and “work” in the areas under and around the discarded fourth reservoir.
- 7.4.6.7 The area is also home to a few goats who eat the rubble and utilise the area for ablution purposes.
- 7.4.6.8 There are no visible ablution facilities in the area for the people currently squatting and there are no taps.
- 7.4.6.9 Access to the water reservoirs themselves is freely accessible to any member of the public at any time.

“PHOTO C” the reservoirs





"PHOTO D" the dumping grounds:

"PHOTO E" the people living in the area and the animals:





7.4.6.10 Waste water treatment plant

7.4.6.11 The facility is very well kept, enclosed with fencing and gates. (this was not the case at the water reservoirs which provides the town of Theunissen with its drinking water)

7.4.6.12 The cleaning lady, the only staff member at the plant allowed the investigator to freely walk around the area unaccompanied.

- 7.4.6.13 It appeared that none of the equipment was on or working in the plant.
- 7.4.6.14 Two of the dams which as explained to me collected solid waste and then in essence was suppose to separate the solid waste from the water and then facilitate a process of "purification" was stagnant had had green moss like substances floating on the top. The rotating arms were silent and not moving.
- 7.4.6.15 The "tunnels" or solid waste collection pits were unused and had weeds growing from them.
- 7.4.6.16 A few metres away from the plant a little canal ran from the plant to the river, and it would appear from the naked eye that untreated waste water was running from the plant through this little canal/stream into the river which feeds the dam with its water reserve for supply to Theunissen.
- 7.4.6.17 A room in the basement of the building housed unused new water metres which were gathering dust.

7.5 The investigators further observed the following:

- a) At the animal "veiling" / action there old unused and discarded water plant still allows water to flow into stream and canals leading to the water supply of the town;
- b) Manholes that are uncovered over flow with waste from the abattoir;
- c) Covered manholes overflowing with waste water into surround ecosystems which (as it is untested) may have caused soil and water pollution in the area;

7.6 Other parties affected in the area are detainees at the local SAPS as the right of access to water and their rights to dignity are infringed when there is no water available for them. This

results in police officers, who are employed by the state to police Theunissen, becoming water carriers to ensure that prisoners/detainees receive water for drinking use, bathing and ablution purposes.

- 7.7 Nurses at the local health care facilities are hesitant to treat patients as they are unable to wash their hands before and after handling patients.

8. Investigation Finding

The Investigation team inspected a number of sources of water supply from the area. The following were the findings of the investigation team:

8.1 Adequacy of Supply

8.1.1 The team observed that many of the residents did not have access to water;

8.1.2 The team interviewed a random sample of residents in the area and confirmed that many residents did not have access to adequate water supply.

Finding: It was patently clear from an inspection of the area, that many of the residents in this Municipality did not have access to water, in adequate amounts or at all. This fact has not been contradicted by any of the Respondents.

8.2 Water cleanliness

8.2.1 The investigation team observed that the water in some of the sources of supply in the Municipality was discoloured and contained impurities and micro-organisms that were visible to the eye.

8.3 Water Safety

8.3.1 Working under the guidance of the Laboratory of the University of the Free State, the team took water samples from water pumps in Theunissen and sent them for laboratory testing at the University.

Finding: The results received from the Laboratory of the University of the Free State indicated that although the water appeared to be dirty and contaminated, the water was safe for consumption. See attached annexure marked "**ANNEXURE TF 1**", attached hereto.

9. Applicable Legal Framework

9.1 International Legal Instruments

9.1.1 Universal Declaration of Human Rights

Article 25 of the UDHR provides:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing..."

9.1.2 International Convention on Economic, Social and Cultural Rights

Article 11 of the ICESCR states that:

"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

The ICESCR further states in Article 12

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken . . . to achieve the full realization of this right shall include those necessary for. . . (3) The prevention, treatment and control of epidemic, endemic, occupational and other diseases."

Convention on the Elimination of All Forms of Discrimination Against Women³

In relation to obligations towards rural women, article 14(2) (h) of CEDAW compels states parties to 'ensure the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...'

Convention on the Rights of the Child⁴

Article 24(2) of the Convention obliges states parties to 'combat disease and malnutrition ... through ... the provision of adequate nutritious foods and clean drinking-water...'

9.2 Regional Legal Instruments

9.2.1 African Charter on Human and People's Rights

The African Charter on Human and Peoples' Rights (African Charter) does not explicitly mention the right to water. Article 16(2) obliges state parties to the African Charter to take the necessary measures to protect the health of their people. As with the above instruments, the right to water must be deduced from the express

³ CEDAW 1979

⁴ 1989

provision of other rights such as health, the realization of which cannot be achieved without providing water and basic sanitation services.⁵

9.2.2 African Charter on the Rights and Welfare of the Child

"The African Charter on the Rights and Welfare of the Child (Charter on Welfare of the Child) explicitly includes the right to water. First, the Charter on Welfare of the Child provides that every child has the right "to enjoy the best state of physical, mental and spiritual health."

In more explicit terms, the Charter on Welfare of the Child states that:

States parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures to ensure the provision of adequate nutrition and safe drinking water.

9.2.3 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol) expressly mentions the right to water. The Protocol states that:

"States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; (b) establish adequate systems of supply and storage to ensure food security.⁶

9.3 Constitutional Rights

9.3.1. The Right to Equality

⁵ Access to sufficient water in South Africa: How far have we come?;Siyambonga Heleba ; Research Paper, 2009. Research, Community Law Centre, University of the Western Cape. www.communitylawcentre.org.za

⁶ Access to sufficient water in South Africa: How far have we come?;Siyambonga Heleba ; Research Paper, 2009. Research, Community Law Centre, University of the Western Cape. www.communitylawcentre.org.za

Section 9 (2) enjoins the state to take 'legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination'.

Section 9 (2) requires the state to take steps to 'promote the achievement of equality'. In other words, municipal services not only may not unfairly discriminate on listed grounds but, in addition, where necessary to counteract historical inequality including gender, municipalities should pursue redistributive policies.

9.3.2. The Right to Human Dignity

Section 10 is the right to have the inherent dignity of everyone respected and protected. Access to water directly impacts the right to dignity.

9.3.3. Section 27 Health care, food, water and social security...

"(1) Everyone has a right to have access to

(a) ...

(b) sufficient food and water

(c) ...

(2) The state must take reasonable steps legislative and other measures, within its available resources to progressively realize each of these rights."

9.3.2 Section 152 of the Constitution

Section 152 (b) and (d) of the Constitution set out the objects of local government:

"The objects of the local government are

(b) to ensure the provision of services to communities in a sustainable manner;

(d) promote a safe and healthy environment;"

9.4 Domestic Legislation

9.4.1 Section 3 of the Water Services Act 108 of 1997:

"3. (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.

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

(4) The rights mentioned in this section are subject to the limitations contained in the section 11(2) (b)."

9.4.2 Section 5 of the Water Services Act 108 of 1997 states that:

"5. 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.

9.4.3 Section 11 of the Water Services Act 108 of 1997;

"11. (1) Every water services authority has a duty to all consumers or Potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.

(2) ...

(a) the availability of resources;"

9.4.4 The National Water Act 36 of 1998

This Act defines a new way of managing South Africa's scarce water resources. This Act states that water is an indivisible national resource for which national government is the custodian⁷.

9.4.5 Municipal Structures Amendment Act, 2000

This Act places the function of ensuring access to water services (as well as Health and Electricity) at a district level, unless a local municipality is authorised to perform this function.⁸

9.4.6 The Housing Act⁹

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) Potable water, adequate sanitary facilities and domestic energy supply.¹⁰"

9.4.7 The Municipal Systems Act¹¹

⁷ Climbing South Africa's Water Services Ladder- Safe drinking-water through Regulatory Governance; GS Machintosh, TManxodidi, A Wensley and FM Uys: Emanti Mngement, Stellenbosch, 7599 SA p2

⁸ Climbing South Africa's Water Services Ladder- Safe drinking-water through Regulatory Governance; GS Machintosh, T Manxodidi, A Wensley and FM Uys: Emanti Mngement, Stellenbosch, 7599 SA p3

⁹ 107 of 1997

¹⁰ Section 1 (vi) of the Housing Act 107 of 1997

The definition of basic municipal services according to the Act ¹²is:

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."*

9.4.8 **Municipal Finance Management Act**¹³

In considering the obligations of the Respondent with regard to its budgeting and finance processes, the Commission paid close consideration to Chapter IV 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.

¹¹ 32 of 2000

¹² Chapter 8 of the Municipal Systems Act

¹³ Act 56 of 2003

10. Legal Analysis

- 10.1 The United Nations Committee on Economic, Social and Cultural Rights (Committee on ESCR), has commented that water is a limited natural resource and a public good fundamental for life and health¹⁴ It states that the human right to water is indispensable for leading a life in human dignity. It also states that water is a prerequisite for the realization of other human rights.¹⁵ In many respects the South African water rights framework echoes the international human rights framework.
- 10.2 Everyone has the right to a sufficient quantity of water for his or her basic needs. Water is absolutely essential for human life and without it, other human rights are meaningless, this implies that the right to water must be inferred from other more general rights. These general rights include, the inherent dignity of the human person.
- 10.3 It is quite clear that these requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene. The state is obliged in terms of the Constitution, to put in place measures to progressively provide water supply to all people, and to prevent the supply of water to destitute persons from being cut off supply.¹⁶

¹⁴ **Access to sufficient water in South Africa: How far have we come?;Siyambonga Heleba** ; Research Paper, 2009. Research, Community Law Centre, University of the Western Cape. www.communitylawcentre.org.za

¹⁵ The Committee on ESCR exercises oversight over compliance with the International Covenant on Economic, Social and Cultural Rights of 1966. In General Comment No.15, (29th session, 2002) [UN Doc E/C.12/2002/11], para 1. A per supra@10

¹⁶ *Access to sufficient water in South Africa: How far have we come?;Siyambonga Heleba* ; Research Paper, 2009. Research, Community Law Centre, University of the Western Cape. www.communitylawcentre.org.za –(The necessity of water to enjoy the other right explicitly mentioned in the Revised Charter is apparent in some of the recommendations of the European Committee of Ministers of member states of the Council of Europe (Committee of Ministers)

- 10.4 In terms of Section 84 of the Municipal Structures Act, the responsibility for providing water services rests with district and metropolitan municipalities. However, the Act allows the Minister of Provincial and Local Government Affairs to authorise a local municipality to perform these functions or exercise these powers.
- 10.5 Where the Provincial MEC¹⁷ has authorised a Municipality to be perform the functions of a water service provider, the primary responsibility for water services provision rests with local government.
- 10.6 In the present case, the Provincial MEC of DWA has authorised the MLM to provide water services to the residents of the Municipality. Notwithstanding, the provision of water services by a Municipality, the obligation continues to rest on the Provincial Minister for DWA to ensure that this happens.
- 10.7 One of the tools that the DWA uses to regulate and oversee water service provision by the Municipality is through Incentive-based Regulation.¹⁸ The concept was defined by two programmes: the *Blue Drop Certification Programme for Drinking Water Quality Management Regulation*; and the *Green Drop Certification Programme for Wastewater Quality Management Regulation*¹⁹.
- 10.8 These Programmes recognise that notwithstanding the assignment of responsibility for provision of water services to a Local Government authority, the oversight and performance

¹⁷ Member of the Executive Council of the Provincial Government

¹⁸ This regulation was introduced to the water sector on 11 September 2008 at the National Municipal Indaba in Johannesburg by the Minister of Water Affairs.

¹⁹ DWAF Blue drop hand book version 1: [@introduction pii](http://www.dwa.gov.za/Docuemnts/default.aspx?type=policy)

monitoring duties are delegated to Provincial and National Government. The Department of Water Affairs (DWA) at all material times, remains overall responsible for the regulation of water services as dictated by Section 62 of the W

10.9 Water Services Act (No. 108 of 1997)²⁰.

In the present case, the duty of the Masilonyana Municipality was to provide basic water services to the residents of the Municipality, ensuring *progressive realisation of the right to basic water services, and safe and clean water, subject only to available resources. According to the Report from COGTA, due to the "small conditional Municipal Infrastructure Grant (MIG) allocation, the MLM has no other option but to implement the projects over 3 financial years"*

10.10 In terms of **adequacy of water supply**, the Masilonyana Municipality is expected to provide a quantity of water supply that is:

"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 sewerage from household".²¹

Section 3 of the Water Services Act states:

- (1) *Everyone has a right of access to basic water supply and basic sanitation.*

²⁰ DWAF Blue drop hand book version 1: [@ p1-1](http://www.dwa.gov.za/Documents/default.aspx?type=policy)

²¹ The Water Services Act

- (1) *Every water services institution must take reasonable measures to realise these rights.*
- (2) *Every water services authority must, in its water services development plan, provide for measures to realise these rights.*
- (4) *The rights mentioned in this section are subject to the limitations contained in this Act.*

Section 4 of the Water Services Act states:

- (3) *Procedures for the limitation or discontinuation of water services must:*
 - a) *be fair and equitable;*
 - b) *provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless:*
 - i) *other consumers would be prejudiced;*
 - ii) *there is an emergency situation; or*
 - iii) *the consumer has interfered with a limited or discontinued service; and*
 - c) *not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.*

Regulation 3 of the Minister's published regulations provides:

- The minimum standard for basic water supply services is—*
- (a) *the provision of appropriate education 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 that no consumer is without a supply for more than seven full days in any year.*

Water Supply and Sanitation Policy White Paper (Nov 1994) states:

Basic water supply is defined as:

Quantity: 25 litres per person per day. This is considered to be the minimum for direct consumption, for the preparation of food and for personal hygiene. It is not considered to be adequate for a full, healthy and productive life which is why it is considered as a minimum.

Cartage: The maximum distance which a person should have to cart water to their dwelling is 200m.

Water and Sanitation Service Standard (Preliminary Draft 2, Mar 2008) states:

The minimum standard for basic water supply service is the provision of appropriate education in respect of effective water use, and, a minimum capacity of potable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute, within 100 metres of a household, with a maximum of 25 families sharing, and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

10.11 Further, it is by now generally accepted that meeting the standards of Article 25 of UDHR, Article 11 and 12 of ICESR and even Article 6 of ICCPR cannot be achieved without water

of "sufficient and quality to maintain human health and well-being."²² "

10.12 In determining whether the water supply to the Complainants by the MLM was adequate, the Commission considered as a first element of its investigation, whether water supply for each person is sufficient personal and domestic uses, including drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene.

10.13 In the present case, interviews carried out with residents, coupled with a physical inspection of the area, indicated that residents did not have access to water for domestic purposes and in many cases water for drinking and sanitation and personal and household hygiene.

10.14 As a second element of its investigation, the Commission considered the length of time that the Municipality had failed to provide residents with water. In the case of *The Federation for Sustainable Environment vs The Minister of Water Affairs. C/N 35672/2012 North Gauteng High Court*: at [6] the applicant argues that the "residents of Carolina Have not had an effective or reliable supply of fresh drinking water for an extended period beyond the seven day period prescribed for this year, ..."

In the present case, the investigation team ascertained that the residents of Theunissen and the surrounding areas had not had access to water supply for a period of four (4) weeks preceding the date of investigation.²³ This allegation was not disputed by the DWA in its reply to the SAHRC.

²² *Access to sufficient water in South Africa: How far have we come?*, Siyambonga Heleba ; Research Paper, 2009. Research, Community Law Centre, University of the Western Cape. www.communitylawcentre.org.za

²³ Water supply was restored to the area on the 30th June, 2012.

10.15 In terms of the **quality of water of supply**, the Masilonyana Municipality is expected to provide a quality of water that is:

"Water for personal and domestic use must be safe and free from impurities, micro-organisms and other kinds of contamination".²⁴

10.16 The outcome of the investigation by the Commission into the quality of water supplied by the MLM, indicated that there were visible impurities, contaminants and micro-organisms in the water supplied to the community.

10.17 The question for determination in this matter therefore is whether, notwithstanding the afore-going investigation observations, the MLM supported by DWA have taken reasonable steps towards the progressive realisation of the right to water by the community.

10.18 The case of Grootboom²⁵ was instrumental in recognising and entrenching the *concept of progressive realisation*. The *judgement in this case* was precedent setting in the sphere of Government's responsibilities and duties in progressively realising socio-economic rights.

10.19 One of the main pronouncements of the Constitutional Court in this case was that the *burden to prove unavailability of resources* rests on the state.

10.20 A second pronouncement of the Court was that the *duty rests on the state* to put in place concrete plans and programmes to ensure the attainment, all be it over a reasonable time frame, of socio economic rights essential to a good quality of life.

²⁴ World Health Organisation guidelines

²⁵ *Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)*

10.21 It is common cause that as per the provisions of the Water Services Act, the National Water Act and the Constitution as respectively stipulated above, the duty and responsibility of the provision of sufficient, clean and potable water to the Theunissen community and surrounding areas rests with MLM under the overall guidance of DWA.

10.22 As per the judgment in *The Federation for Sustainable Environment vs The Minister of Water Affairs. C/N 35672/2012 North Gauteng High Court* at [14] the court indicates what the responsibilities of local government entails inter alia as per s. 152 are to:

- "a) to provide democratic and accountable government for local communities
- b) to ensure the provision of services to communities in a sustainable manner;
- c) to promote social and economic development;
- d) to promote a safe and healthy environment;
- e) to encourage the involvement of communities and community organisation in the matter of local government "within its available resources". This entails, inter alia, that within its resources, a municipality should strive towards improving the quality of life of its community. Municipalities are also bound to be responsive to the needs of their communities.

10.23 A reading of the Blue Drop Reports of DWA raise an additional issue for consideration by the Commission; that is, whether the Respondent failed to ensure that the facilities that were crucially responsible for the provision of these services were

properly maintained and in a good condition ensuring the meeting of quality standards.

10.24 It is common cause, as per the DWA report that the Respondent in both the 2011 and 2012 Blue Drop report were amongst the worst fairing municipalities in respect of quality. In *Climbing South Africa's Water Services Ladder- Safe drinking-water through Regulatory Governance*; GS Machintosh, TManxodidi, A Wensley and FM Uys: Emanti Mngagement, Stellenbosch, 7599 SA at p5, it states-

"... Free State with 7 local municipalities had only 3 complying with above and the average score herein was 43%"

10.25 The MLM was one of the 7 Municipalities scored below the average score.

10.26 When taking the above considerations, in conjunction with the findings of the DWA Blue Drop Report of 2011 and 2012, it is clear that MLM was failing in its duty of care towards the complainant in carrying out its duties and in the provision of safe clean drinking water to its consumers, the Theunissen community and surrounding areas.

11. Finding

11.1 Based on the legislative, constitutional and international human rights obligations,²⁶ the Commission finds that the Respondent, albeit for a

²⁶ The South African Constitution of 1996 allows for reference to international law in its interpretation. Section 39(1)(b) obliges "a court, tribunal or forum" to "consider international law" "[w]hen interpreting the Bill of Rights". In *S v Makwanyane and Another*,¹³ the South African Constitutional Court (CC) held that in terms of the above section 'public international law' means both international law that is binding on South Africa and international law that is not binding on South Africa. The CC stressed that our courts are obliged to consider both 'hard' and 'soft' international law in their interpretation of the Bill of Rights.

limited period of time, violated Complainant and the surrounding community's right to access to adequate drinking water.

- 11.2 Based on the laboratory findings of the University of the Free State, the Commission finds that the Respondent did not violate the right of residents of the Theunissen to safe drinking water.
- 11.3 Based on patent observation of water samples taken from the area by the Investigation Team, the Commission finds that whilst the water supplied by the Respondent was safe for consumption, it was nonetheless contaminated and contained micro-organisms that constituted a nuisance, at the very least.

12. Recommendation

Based on the finding that the Respondent has fallen short of the required threshold for the indicators in both 2011 and 2012 Blue Drop Reports, of its standards and quality guidelines, the Commission recommends that the following steps be taken:

- 12.1 That MLM provide the Commission within a period of three (3) months of the date of this finding, with a Report that indicating interim measures the MLM has put in place within the Municipality to address access to water challenges for residents of the Municipality, especially women, children and other vulnerable groups;
- 12.2 That MLM provide the Commission, within a period of three (3) months of the date of this finding, with a Report that sets out immediate measures that the MLM is taking to remove impurities, discoloration

and micro-organisms from the water supply to residents of the Municipality;

- 12.3 That DWA continue to monitor the water supply conditions as well as the water supply facility infrastructural conditions on a regular basis, and take regular water samples from the MLM for testing to ensure that the water supply is of a safe and clean quality.
- 12.4 That DWA provide the SAHRC with a detailed report within a period of six (6) months of the date of this finding in respect of measures put in place to ensure that the challenge of adequate supply of water is progressively resolved.
- 12.5 That DWA provides the SAHRC with a bi-annual Report indicating the progress that has been made towards the progressive realization of the right to adequate water supply to residents of the Theunissen Municipality.

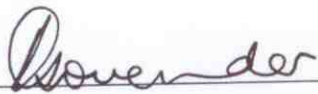
13. APPEAL

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**

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

SIGNED IN Braamfontein THE 28 DAY OF
May 2013.



Commissioner P. Govender

Deputy Chairperson

South African Human Rights Commission