



**SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT**

**File Ref No: FS/2010/0231**

In the matter between:

**Van Onselen, Gareth**

**on behalf of the Democratic Alliance**

**Complainant**

and

**Moqhaka Local Municipality**

**Respondent**

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**REPORT**

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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 and the other institutions created under Chapter 9 of the Constitution are described as “state institutions 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 empowers the Commission to investigate and report on the observance of human rights in the country.

1.5. Further, section 184(2)(c) 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, further supplements the powers of the Commission.

## 2. The Complaint

2.1. A complaint was lodged on the 23<sup>rd</sup> of September 2010 by Mr. Gareth Van Onselen, Executive Director of the Democratic Alliance, on behalf of the Democratic Alliance (hereinafter referred to as the “Complainant”) in relation to the residents of

Rammulotsi Township, Viljoenskroon, an area under the jurisdiction of Moqhaka Local Municipality in the Free State Province.

2.2. The Complainant alleges that the Moqhaka Local Municipality (hereinafter referred to as the “Respondent”) has violated the rights to human dignity, privacy and clean environment of the residents by installing toilets without enclosures.

2.3. The Complainant is of the view that the recommendations and finding made by the Commission in the Makhaza matter<sup>1</sup> may be directly applicable to the Respondent.

### 3. Steps Taken by the Commission

3.1. The Commission received the complaint on the 23<sup>rd</sup> of September 2010 and subsequently commenced its investigations. Two inspections *in loco* were undertaken. The first of these occurred on the 7<sup>th</sup> of October 2010 and the second was undertaken on the 11<sup>th</sup> of May 2011. These inspections were conducted in the presence of community development workers from the municipality. In addition to the general inspection, several interviews were conducted with local residents to obtain further insight in respect of the complaint.

3.2. The Municipal Manager, Mr. M. F. Mqwathi, was unavailable during the inspection. A questionnaire was then sent to the Municipal Manager on the 13<sup>th</sup> of October 2010 for

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<sup>1</sup> Findings and recommendations of the Commission in the matter of ANCYL Dullah Omar Region on behalf of ward number 95 WC/2010/0029.

his consideration and response. The questionnaire included issues raised in the complaint and those which arose from the inspection *in loco*.

3.3. The Respondent furnished the Commission with a written response dated the 21<sup>st</sup> of October 2010 which was subsequently forwarded to the Complainant for consideration. The investigators of the Commission thereafter held a telephonic discussion with the Mayor of Moqhaka Local Municipality, Ms. M. Mokgosi, who referred them to the Manager in the Office of the Mayor, Mr. Lelaka.

#### 4. Investigation Conducted by the Commission

4.1. Programmes to eradicate the bucket system were initiated by the Respondent in 2001 through the introduction of sewer borne facilities in the Rammulotsi Township. (hereinafter referred to as the "Township"). These programmes appeared to have been formalised into a project in the 2004/5 financial year ostensibly through the Upgrading of Informal Settlements Programme (hereinafter referred to as the "UISP") under the policy of Breaking New Ground (hereinafter referred to as the "BNG").

4.2. During this period and up until the present, Reconstruction and Development Programme (hereinafter referred to as the "RDP") houses were built for the residents of the Township which included the upgrading of the sanitation system in the form of the provision of toilets.

4.3. The Respondent alleges that the approach of upgrading the sanitation system in which toilets would be enclosed in phases was the best way they could accommodate the needs of the community.<sup>2</sup>

4.4. To address the remaining unenclosed toilets, the first phase of construction of top structures<sup>3</sup> commenced in September 2010 with contractors on site. The Respondent undertook to erect 1 620 top structures on the existing slabs.<sup>4</sup>

4.5. A total number of 200 top structures were completed. Service providers were appointed to undertake both phases 2 and 3 of the project totalling 400 top structures to be completed by the 15<sup>th</sup> of June 2010.

4.6. The report of the Respondent did not provide any information with regard to the remaining 1 020 structures of the total 1 620 which the Respondent undertook to erect.

## 5. The Unenclosed Toilets in Rammulotsi

5.1. The Commission's investigation revealed that the toilets in question pertain to those unenclosed toilets that were erected next to the existing bucket system toilet and which do not meet the minimum standard of basic sanitation services.

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<sup>2</sup> Respondent's report to the Commission.

<sup>3</sup> 'Top structure' refers to the cover necessary to enclose the toilet.

<sup>4</sup> 'Slab' refers to a flat concrete block on which the toilet is erected.

5.2. The affected residents are at present still using the bucket system. The Respondent alleged that some of these residents had requested toilets outside their houses to increase the living area of their homes. Some of these residents did the best they could to enclose the toilets at their own expense whilst others were unable to do so.

5.3. The pictures below are examples of toilets with make-shift enclosures:





## 6. Demographics of the Residents of Rammolutsi

Significant levels of poverty and a lack of employment opportunities are prevalent in the Township. Most residents are not formally educated but have various levels of functional literacy. There are many social problems in the area such as alcohol or substance abuse, teenage pregnancy, child-headed households, as well as a high prevalence of HIV and AIDS. The residents of the community predominantly speak Sesotho.

## 7. Constitutional Rights

7.1. The complaint before the Commission is an alleged violation of a number of rights in the Constitution based on the unenclosed toilets in the Township.

7.2. The rights alleged to have been violated by the Complainant are the right to dignity, privacy and a clean environment.

7.3. Together with these rights, the Constitution imposes certain obligations on the State.

7.4. Each of the rights and the obligation of the State to respect, protect, promote and fulfil all fundamental rights are expanded below.

7.5. Section 1(a) of the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms. These are the foundational values of the Constitution and therefore form the bedrock upon which the Constitution is based.

7.6. Section 7(2) of the Constitution requires the State, and therefore the Respondent, to respect, protect, promote and fulfil all fundamental rights.

7.7. Section 24 of the Constitution provides that:

*“Everyone has the right –*

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

*(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –*

*(i) Prevent pollution and ecological degradation;*

*(ii) Promote conservation; and*

*(iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”*

7.8. Section 10, arguably one of the most significant rights, particularly in the context of the present case, is the right to have the inherent dignity of everyone respected and

protected.<sup>5</sup> Given the facts and the nature of this matter, this right has central significance and is discussed in the context of this matter later in these findings.

7.9. Section 14 entrenches the right to privacy.

7.10. 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.*

*(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”*

7.11. Section 27 provides for the right to have access to health care services, sufficient food and water; and social security.

7.12. Section 139(1) provides that when a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –

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<sup>5</sup> Residents of Joe Slovo Community, WC v Thubelisha Homes 2010 (3) SA 454 (CC); Nyathi v MEC for Department of Health, Gauteng 2008 (5) SA 94 (CC) at para [45].

7.12.1. Issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

7.12.2. Assuming responsibility for the relevant obligation in that municipality to the extent necessary –

7.12.2.1. To maintain essential national standards or meet established minimum standards for the rendering of a service;

7.12.2.2. To prevent that municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

7.12.2.3. To maintain economic activity.

7.13. All of these rights have a bearing on the matter before the Commission. The Commission notes that a number of frameworks to realise the right of access to adequate housing are also in place. Together these form the matrix against which the complaint is considered.

7.14. Consideration of this matter is guided significantly by the judgments of the courts. In relation to the fundamental rights listed above, regard must therefore be had

to the following judgments of the Constitutional Court which is relevant to the present complaint.

7.15. 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*”.<sup>6</sup>

7.16. Further, that legislative measures adopted by the government must be supported by policies and programmes adopted must be reasonable “*both in their conception and implementation*”.<sup>7</sup> The Court held that reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise and do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril.<sup>8</sup>

7.17. The Court established that the right of access to “*adequate housing*” entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and removal of sewerage and the financing of these, including the building of the house itself.

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<sup>6</sup> Grootboom at para [41]

<sup>7</sup> Grootboom at para [42]

<sup>8</sup> Grootboom at para [44]

7.18. 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.

7.19. Interpretation of the Bill of Rights requires basic enquiries which seek to promote the rule of law, human dignity, equality and freedom. 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.

7.20. In *NM v Smith (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC)*<sup>9</sup> 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*

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<sup>9</sup> at paras [49]-[51]

*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.'*

*[51] In S v Makwanyane and Another, this Court observed as follows:*

*'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.”*

7.21. The Court also dealt with interrelationship between privacy and dignity and concluded that:<sup>10</sup>

*“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.”*

7.22. Specifically in relation to the right to privacy the Court in *S v Jordan (Sex Workers Education & Advocacy Task Force as Amici Curiae) 2002 (6) SA 642 (CC)*<sup>11</sup> held that the constitutional commitment to human dignity invests a significant value in the inviolability and worth of the human body and the right to privacy, therefore, serves to protect and foster that dignity.

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<sup>10</sup> NM v Smith at para [131]

<sup>11</sup> at para [81]

7.23. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC)*<sup>12</sup> 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.”*

7.24. In *Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC)*,<sup>13</sup> 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.”*

7.25. In relation to the duties of all levels of government the Court held in *Grootboom*<sup>14</sup>:

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<sup>12</sup> at para [18]

<sup>13</sup> at para [77]

<sup>14</sup> *Grootboom* at para [82]

*“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.”*

7.26. Yacoob J went on to state that:

*“Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the [council] towards the [occupiers] must be seen.”<sup>15</sup>*

7.27. In fact the Court has repeatedly held that the State, including municipalities, is obliged to treat vulnerable people with care and concern.<sup>16</sup>

7.28. 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”<sup>17</sup>* and *“to promote a safe and healthy environment”<sup>18</sup>*. A municipality is obliged to try to achieve these objectives. Section 73(1)(c) of the Local Government: Municipal Systems

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<sup>15</sup> Grootboom at para [83]

<sup>16</sup> Joe Slovo at para [76]

<sup>17</sup> Section 152(1)(b) of the Constitution

<sup>18</sup> Section 152(1)(d) of the Constitution

Act<sup>19</sup>, echoes the constitutional precepts and obliges a municipality to provide all members of communities with *“the minimum level of basic municipal services”*.

7.29. 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. 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”*.

7.30. Erasmus J held further at paragraph 146 that *“The City’s decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents “with respect and care for their dignity” was not taken into account when the City decided to install the unenclosed toilets.”*

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<sup>19</sup> Act 32 of 2000

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

7.32. 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”*.

## 8. The Applicable Legislation

### The Housing Act<sup>20</sup>

8.1. The ‘definition of Housing development’ as it is included in the introduction of the Act, refers to the access of the following two key elements on a progressive basis:

8.1.1. Permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and

8.1.2. Portable water, adequate sanitary facilities and domestic energy supply.

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<sup>20</sup> 107 of 1997

## The Water Services Act<sup>21</sup>

8.2. Section 3 of the Water Services Act, provides that everyone has a right of access to basic water supply and basic sanitation. This provision is qualified in terms of Regulation 2 of the Regulations Relating to Compulsory Standards and Measures to Conserve Water.<sup>22</sup> The regulation provides that the minimum standard of basic sanitation service is:

8.2.1. The provision of appropriate health and hygiene education; and

8.2.2. A toilet which is safe, reliable environmentally sound, easy to clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests. [own emphasis added]

8.2.3. Government's white paper entitled "Water is Life, Sanitation is Dignity"<sup>23</sup> articulates government's commitment to the provision of at least a basic water and sanitation service to all people living in South Africa. It states further that the provision of water and sanitation remains an important policy. The government is also committed to reducing the backlog in services by 2008 in the case of water and 2010 in the case of sanitation. The policy of free basic water and sanitation

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<sup>21</sup> 108 of 1997

<sup>22</sup> Government Notice R509

<sup>23</sup> October 2002, Department of Water Affairs and Forestry

services means that everybody in South Africa has a right to a basic amount of water and a basic sanitation service that is affordable.

### The Upgrading of Informal Settlements Programme<sup>24</sup> (UISP)

8.3. The Upgrading of Informal Settlements Programme was established by the Department of Housing in 2004 as part of its Breaking New Ground Policy document. The broad objectives of the programme are to facilitate access to basic services, transform communities through *in situ* upgrading and to engender local economic development through the improvements in infrastructure.

8.4. In respect of the National Housing Code<sup>25</sup>, the central objective is to encourage the development of social capital by supporting the active participation of communities in the design, implementation and evaluation of projects. The concepts of social capital and active participation are highlighted as the central objective of the UISP to reduce economic and social vulnerability through the development of a human settlement. Academic scholar, Andries du Toit has argued that economic vulnerability is exacerbated by the vulnerable, stressed, power-laden and conflictual nature of broader social networks on which individuals and groups rely for dignity and survival.<sup>26</sup>

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<sup>24</sup> Breaking New Ground Policy Document, Department of Housing 2004.

<sup>25</sup> The National Housing Code, Technical and General Guidelines, Volume 2, 2009.

<sup>26</sup> Du Toit, A. (2004) *The Sociology of Chronic Poverty*. Paper presented at the June 2004 SASA Conference.

8.5. Deprivation, vulnerability and stress often reduce poor people to a dependant status in complex and unequal relationships of patronage in which their agency and empowerment are severely constrained. The Housing Code has emphasised the importance of community participation and places certain injunctions on service delivery agents. In this regard the Housing Code states:

*“To ensure that fragile community survival networks are not compromised and to empower communities to take charge of their own settlements, one of the basic tenets of the programme is that beneficiary communities must be involved throughout the project cycle. All members of the community, also those who do not qualify for subsidies, are included.”<sup>27</sup>*

#### Municipal Systems Act

8.6. The relevant provisions of the Municipal Systems Act are sections 106 and 107 which deal with provincial and national monitoring respectively.

8.7. Section 106 states that if an MEC has reason to believe that a municipality in the province cannot or does not perform a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must:

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<sup>27</sup> The National Housing Code, Technical and General Guidelines, Volume 2, 2009.

8.7.1. By written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or

8.7.2. If the MEC considers it necessary, designate a person or persons to investigate the matter.

8.8. Section 107 states that the Minister by notice in gazette, may require municipalities of any category or type specified in the notice, or of any other kind described in the notice, to submit to a specified national organ of state such information concerning the affairs as may be required in the notice, either at regular intervals or within a period as may be specified.

Municipal Finance Management Act<sup>28</sup>

8.9. 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.

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<sup>28</sup> Act 56 of 2003

8.10. 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.

## 9. Analysis of the Complaint

9.1. The Complainant alleges that the Respondent violated the right to human dignity, privacy and a clean environment of the residents by installing toilets which do not meet the minimum standards of basic sanitation.

9.2. Both the inspections *in loco* undertaken by the Commission and various media reports reveal that a number of toilets in the Moqhaka area are indeed unenclosed. The Respondent does not dispute this fact.

9.3. The Respondent argues that it has been constrained by a lack of available resources to enclose the toilets in question. A consideration of section 26(2) of the Constitution which requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right, was therefore necessary.

9.4. According to the Respondent “the grant funding condition was such that as many stands as possible were to be serviced, ... to provide an operational facility without a

top structure, where the owner would relocate his existing structure of sanitation ... this was the only way to do the project.”<sup>29</sup> The Respondent has also raised the issue of ‘double funding’ which it alleges would occur if it had to remove existing toilets from inside the houses and provide new outside facilities. The Commission notes that the Respondent has embarked on the process of enclosing toilets.

9.5. In considering the question of resources available to the Respondent for the undertaking of its sanitation project, the Commission notes the significant demand, costs and number of processes in place to implement such projects throughout the country. It has viewed the obligations of the Respondent in this context.

9.6. The annual reports of the Respondent which are relevant to its budgeting and planning for the project were considered by the Commission. The Commission found that in terms of the 2004/5 annual financial statements, the Respondent received less income compared to budgeted income. Actual income was R212 285 971, and budgeted income was R224 042 931. The actual budgeted income fell short by 5.25%, namely, a total of R11 756 960.

9.7. The Respondent’s operating expenditure increased by R33 283 792, (20.58%) compared to its previous year’s expenditure. However, a comparison of its budgeted funds

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<sup>29</sup> Page 2 of the report from the Respondent.

illustrates under-spending of R29 022 072, (12.95%). According to the 2004/5 annual financial statements, this was caused primarily by the under-spending in the sum of R20 257 526, (salaries and allowances) and R2 572 237 (repairs and maintenance).

9.8. No explanation is provided in the report for the Respondent's under-spending and what had happened to the unspent funds. It is important to note in this regard that the MFMA allows municipalities to adjust their budgets and shift funds where there are savings to areas where there are shortages. The Commission is aware that unspent funds are usually returned to the National Treasury in terms of the National Treasury Regulations. It is, however, a duty of all municipalities to adjust budgets and make specific plans to spend and avoid under-spending. In this instance, the Respondent provided no reasons why unspent funds could not be allocated to enclose toilets.

9.9. In order to determine the cost and amount of money allocated to sanitation projects of the Respondent, the Commission requested a copy of the 2004/5 Integrated Development Plan which the Respondent failed to provide. As a result, the Commission was not able to assess the details of the project. The National Treasury Guidelines state that municipalities need to prepare multi-year budget plans to address long term service delivery requirements of the community. The fact that toilets remained unenclosed for a period beyond the Medium Term Expenditure Framework (hereinafter referred to as the "MTEF") planning cycle (eight years) is an indication it had failed to use the multi-year planning framework to address sanitation needs of the community.

Its budget ought to have been prepared on the basis of enclosed toilet targets over the medium term period.

9.10. The Commission has noted further that in terms of the 2010/11 financial year, revenue from the national government in the form of grants and subsidies had been increasing. Revenue generated by the Respondent had also been growing in nominal terms. Expenditure had been growing in line with growth in revenue. In the light of the above, the Respondent's claim of insufficient funds is unacceptable.

9.11. The 2010/11 Service Delivery Budget Implementation Plan (hereinafter referred to as the "SDBIP") reveals estimated costs on projects designed to address sanitation in the affected community. On the Commission's examination of the Service Delivery Budget Implementation Plan, budget allocations for sanitation have not been consistently made during the medium term period. The Respondent did not prioritise sanitation and did not allocate any budget to it.

9.12. The Commission reviewed the annual financial statements of the Respondent from 2004/5 to date. These indicate that the Auditor-General had raised serious concerns on the ability of the Respondent to properly spend budgeted funds. The Commission finds it indefensible that the Respondent claims it has insufficient funds while at the same time failing to spend budgeted funds properly.

9.13. The Commission also explored other options which were available to the Respondent to address its alleged shortage of funds. The intergovernmental fiscal framework of South Africa allows municipalities to submit specific requests for additional funding. In this regard, the Respondent has made an assertion that it had insufficient funds to enclose the toilets but provided the Commission with no information on steps it had taken to request additional funds from the provincial or national government.

9.14. The Respondent's argument about the conditions of the grant and its own assertion that it did not have adequate resources to cover all of the toilets in question are therefore unfounded. Not only did the Respondent fail to plan and apply its budget appropriately, it also did not seek additional funds from the provincial or national government to address the situation.

9.15. The Commission proceeded to question the nature of the obligation resting on the Respondent. Such a consideration would enable a determination of the reasonableness of the measures taken to progressively realise the right to water and sanitation services.

9.16. One of the central aims of the Water Services Act is to secure healthy living conditions of households and communities. The minimum standard of basic sanitation

services according to Regulation 2 of the Regulations Relating to Compulsory Standards and Measures to Conserve Water includes the provision of appropriate health and hygiene education; and a toilet which is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests. The unenclosed toilets are therefore inconsistent with Regulation 2.

9.17. Notwithstanding the existing legislation, regulations and codes, the length of time over which people have been forced to resort to this system of sanitation is unacceptable. A situation where people are forced to resort to unenclosed toilets is irreconcilable with the Bill of Rights and any relevant applicable governing framework in our country.

## 10. Consultation and Community Participation

10.1. It is clear that active participation, social cohesion and community empowerment are key principles to the UISP and it is incumbent upon the Respondent to demonstrate that effective and interactive community participation has taken place. Active communication and proactive information sharing lie at the heart of such engagement and participation. Such community participation therefore is one which must be initiated and sustained from the point of inception of project plans through to

implementation and evaluation of projects. A municipality must demonstrate that effective and interactive community participation has taken place in the planning, implementation and evaluation of a project.

10.2. Legislation and judgments of our courts have required not only consultation but the active participation of communities in such undertakings. Apart from reference to one meeting with the community, no evidence was provided to the Commission of the following: the number of meetings and engagements with the community, the extent of these meetings, whether any information was provided to the communities beyond the initial meeting, whether steps were taken to ensure that the information was provided in an accessible manner and how the engagements with the community impacted on the project planning, budgeting and implementation. Under these circumstances, resource constraints are not a justifiable ground for poor planning and the infringement of basic rights.

10.3. Adequate consultation from the point of conceptualisation of the project plan would have assisted the Respondent to avoid fruitless and wasteful expenditure.<sup>30</sup> Consultation at the point of conceptualisation would have provided the Respondent with clear insight of the community's needs and its own capacity to respond accordingly.

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<sup>30</sup> This refers to the 'double funding' by the Respondent of building toilets outside RDP houses that have a toilet inside the house.

10.4. 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 enclosed toilets can be built over a period of time. The fact that toilets remained unenclosed for a lengthy period is an indication that the Respondent did not use the multi-year planning framework on service delivery.

10.5. 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. The Commission has serious reservations whether any of the obligations listed above have been met.

10.6. 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")<sup>31</sup>, a law of national application which facilitates information sharing in the country and is meant

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<sup>31</sup> The Promotion of Access to Information Act 2 of 2000.

to promote public participation. PAIA obliges the Respondent to make information about its decisions relating to all aspects of the process, including tenders 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 never complied with its obligations in terms of the PAIA legislation since 2001.<sup>32</sup> 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.

10.7. 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. Concerns about the transparency of the project, planning, tender processes and implementation will however not be addressed in this finding.<sup>33</sup> The Respondent's actions can however not be said to have been justified by any governing legislation or any provision of the Constitution.

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

<sup>33</sup> We note that some of these issues are being considered by the Office of the Public Protector.

## 11. Privacy and Dignity

11.1. The High Court in the recent *Beja* judgment undertook a thorough analysis of both the rights to dignity and privacy in the context of the provision of unenclosed toilets to the poor. At paragraph 146, the court held that:

*“The City’s decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents “with respect and care for their dignity” was not taken into account when the City decided to install the unenclosed toilets.”*

11.2. The former constitutional court judge, Albie Sachs, in arguing that the right to dignity is of central significance states: *“Respect for human dignity is the unifying constitutional principle that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not to simply ensure that the ‘haves’ continue to have but to help create conditions in which the basic dignity of the ‘have nots’ can be secured.”*<sup>34</sup>

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<sup>34</sup> Sachs, A. (2009). *The Strange Alchemy of Life and Law*. Oxford University Press.

11.3. The progressive realisation of rights defined within a continuum begins at the minimum socio-economic provision necessary to meet people's basic needs, (minimum obligation) to its full realisation which culminates in the capabilities of people in society to meaningfully participate and shape society. This implies that persons are not only passive recipients but active participants in society and it is through this process where true empowerment, active participation and social cohesion will occur. The manner in which the Respondent rendered a basic service to the affected community is contrary to the Commission's understanding of progressive realisation.

11.4. Both the right to privacy and the right to dignity are inextricably linked. One cannot simply be forced to make use of an unenclosed toilet in a residential area without one's right to both privacy and dignity being gravely infringed. It is therefore the finding of the Commission that both the rights of privacy and dignity of the residents who are being forced to use unenclosed toilets in the area are being violated.

## 12. Clean Environment

12.1. The Complainant has further alleged a violation of the right to a healthy environment. The Water Services Act is explicit that the prescribed minimum standard of basic sanitation services is for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal settlements.

12.2. The health risks posed by the above situation, particularly to vulnerable groups with low immune systems are extremely serious. This situation is exacerbated by the fact that most people experiencing these conditions have very little means of combating diseases, such as diarrhoea, resulting from unenclosed toilets and the lack of access to clean water.

12.3. The fact that 100 or more children in our country may die daily from diarrhoea, often caused as a result of poor hygiene conditions and water borne diseases<sup>35</sup> is of concern to the Commission. In addition, approximately 10.5 million people in our country live without access to basic sanitation and this is an unacceptable reality.<sup>36</sup>

### 13. Obligations and Responsibilities of National and Provincial Government

13.1. National and provincial government have a clear responsibility to ensure that municipalities meet their obligations. A number of steps could have been taken at the early stages of planning and implementation of the project as a whole. These steps would have necessarily included the obligation of provincial government to monitor reports of the local municipality.

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<sup>35</sup> Statistics released by the Department of Water Affairs and Forestry (2010) accessible at <http://www.dwa.gov.za/2020Vision/facts.asp>

<sup>36</sup> Department of Water Affairs and Forestry (2010) accessible at [http://www.dwa.gov.za/dir\\_ws/wsnis/default.asp?nStn=introduction](http://www.dwa.gov.za/dir_ws/wsnis/default.asp?nStn=introduction). Cited in a press statement by the Social Justice Coalition 27 May 2010.

13.2. It is incumbent upon both provincial and national departments to monitor and intervene if necessary in the work of local government structures. This is also true of the planning and budgeting undertaken by municipalities. National and provincial departments should have exercised closer monitoring of the Respondent. Such monitoring and scrutiny of the work of the Respondent would have permitted intervention by the MEC and relevant national ministers timeously.

#### 14. Findings

14.1. Based on the investigation conducted by the Commission and the analysis of the constitutional rights, court judgments and applicable legislation, the Commission finds that:

14.1.1. The Respondent failed to adequately conceptualise, plan and implement its project which resulted in the residents being forced to use unenclosed toilets;

14.1.2. The Respondent's explanation that it lacked adequate resources was not justified and is therefore unacceptable.

14.1.3. The measures provided by the Respondent do not meet the standard of reasonableness in terms of the progressive realisation of the right to water and sanitation services.

14.1.4. The complaint of violations to the rights of human dignity, privacy, and a clean environment are upheld; and

14.1.5. That provincial and national government have not adequately monitored the work of the Respondent or intervened in respect of their legislative and Constitutional obligations.

## 15. Recommendations

15.1. 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."*

15.2. The Commission recommends accordingly that:

15.2.1. The Respondent must proceed with urgency to enclose all toilets in the area that are required to enable people to have their rights to dignity upheld and their basic sanitation needs met.

15.2.2. The Commission requires the Respondent to furnish it with a progress report at least every six months in respect of the progressive realisation of the right to water and sanitation services in the Township.

15.2.3. The report to the Commission must demonstrate the following:

15.2.3.1. clear implementation and budgetary plans;

15.2.3.2. the manner in which it has identified and responded to the rights of vulnerable groups like women, children and people with disabilities in the identified community;

15.2.3.3. mechanisms it has put in place to ensure it remains transparent and responsive in its project planning and implementation; and

15.2.3.4. the framework through which meaningful and ongoing consultation with the community will be undertaken.

15.2.4. The provincial and national departments are required to provide a report to the Commission within one month hereof indicating the steps being taken.

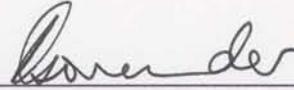
15.2.5. The Ministry of Monitoring and Evaluation must provide a report to the Commission within at least three months on the quality of sanitation services delivered by local government across the country.

## 16. 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 JOHANNESBURG THE 16<sup>TH</sup> DAY OF MAY 2011.



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Commissioner P. Govender

Deputy Chairperson

**South African Human Rights Commission**