



## **SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT**

**File Ref. No.: MP/1213/0024**

In the matter between:

**Democratic Alliance**

**(Represented by Mr Anthony Benadie, MPL)**

**Complainant**

and

**Volksraad Verkiesing Kommissie**

**(Represented by Mr Paul Kruger)**

**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 Parties**

2.1. The Complainant is Anthony Benadie, a Member of Mpumalanga Legislature, acting in the public interest and cited in her official capacity as a Parliamentary Leader of Democratic Alliance in the legislature (hereinafter referred to as "Complainant").

2.2. The Respondent is Volksraad Verkiesing Kommissie, herein represented by Paul Kruger, the chairman of the central committee (hereinafter referred to as "Respondent" or "VVK" depending on the context).

## 3. **The Complaint**

3.1. On 5 June 2012, the Complainant lodged a complaint with the Commission based on the brutal murder of a five (5) months old baby boy (child) and his 66 years day care mother (mother) on 22 May 2012 at the "de Goede's" residence in Delmas, Mpumalanga Province.

3.2. The Complainant alleged that following the incident and on 31 May 2012, "some hundreds of protestors who represented "Die Volksraad Verkiesing Kommissie (VVK)

(hereinafter referred to as the Respondent) and other "far-right" groups launched a protest in Delmas" in condemnation of the murder.

3.3. Further, the Complainant alleged that some of the protestors displayed placards containing hateful statements such as:

3.3.1. "*Bring my R4*";

3.3.2. "*Black cowards- leave our women and children alone*";

3.3.3. "*Steal, rape and murder: Ons is klaar met swart Suid Afrika*";

3.3.4. "*Barbarians leave our children alone*";

3.3.5. "*Volksraad: Ons volg julle na ons eie staat*";

3.3.6. "*VVK Volksraad Vryheid*"; and

3.3.7. "*FW de Klerk die vark in die verhaal*".

3.4. The Complainant viewed these statements as intentionally hateful and created a generalised impression of all black persons. Further, the Complainant viewed these statements as inflammatory and, as a consequence, submitted that they violate the Bill of Rights as they amounted to discrimination and incited hate speech against black South Africans.

3.5. In view of the above complaint, the Complainant requested the Commission to investigate and determine the nature and extent (if any) to which the Bill of Right has been violated by these statements.

#### **4. Steps taken by the Commission**

4.1. The Commission requested in writing and subsequently received the contact details of the Respondent from the Complainant on 5 July 2012.

4.2. On 18 July 2012, the Commission sent out an allegation letter to the Respondent. The Respondent provided the Commission with a written response thereto on 14 August 2012.

4.3. On 6 September 2012, the Commission sent the said response to the Complainant for the latter's attention and reply. On 7 September 2012, the Commission received a written reply from the Complainant.



## 5. Summary of the Respondent's response to the complaint

The Respondent responded as follows to the statements written on the placards:

- 5.1. **Bring my R4 [with a picture of a machine gun]:** It is the Respondent's submission that "this in itself cannot be discriminatory as it does not indicate discrimination or hate specifically towards blacks. In any event, the president of the country frequently sings "bring my machine gun", without allegations of human rights breaches against him". The Respondent further submitted that "our course is not racial and, we are "allies of everybody, black and white, who recognises the right of every ethnic entity (or part thereof) to self determination regarding those who might desire same, in accordance with the principles of international law". "Similarly, we are political enemies of blacks as well as whites who try to suppress this right".
- 5.2. **"Plassmoord + Dorpsmoord + Stadsmoord = Volksmoord" [translated as farm murders + Town murders + City murders = Genocide:** The Respondent's submission is that "this placard highlights the fact that Boer-Afrikaners are not only subjected to the highly publicised farm murders- our children are also being decimated (as in a case of Delmas-murders) in towns and cities. True-members of Black population are also murdered, but the Black population is more than ten times larger than Boer-Afrikaner population. Viewed against our total numbers, we are clearly finding ourselves in phases of genocide- as confirmed by world renowned expert in this regard, Dr. G. Stanton of the US-based "Genocide Watch". (This is also clear from surrounding circumstances frequently encountered- such as hate speech writing found at murder scenes; or the total absence of theft). Statistically, White farmers and their families have the smallest chance of survival in terms of any career in South Africa, if not in the world".
- 5.3. **Black cowards- leave our women and children alone:** It is the Respondent's submission that "The placard focussed on the disproportional high number of deaths among the weak members of our people, signalling the perpetrators of such violence to terminate same. It also highlights the empirical fact that the overwhelming majority of perpetrators of murder on whites are black. Further, they continued to submit that sometimes, blacks are also victims of farm killings – but the perpetrators of these killings are almost exclusively black. This is a fact not unfair racial discrimination".

It is worth noting that the Respondent indicated that they would only retract this placard and offer an apology if they could be any one who could statistically and scientifically prove them wrong concerning their submission relating to this placards. The Respondent concludes by submitting that "they did not single out blacks only when expressing their political dismay because they also referred to the placard which depicted F.W de Klerk as a pig".

- 5.4. **"Besteel, verkrag, vermoor- ons is klaar met swart SA"**: It is the Respondent's submission that "For the past two decades, South Africa had been governed by blacks, and largely for the benefit of blacks (as evident, amongst others, by the racial discrimination perpetrated against whites in terms of job, business and education opportunities - without any set targets, without any sunset clause...and thus, in total disregard of applicable law)".

The Respondent further submitted that "From this perspective, indeed South Africa can be termed - in the wording of this placard- Swart Suid Afrika; apart from the many whites stooges, cowards and opportunists falling to their knees for the proverbial scraps falling from the black table, many other Boer-Afrikaners experience the current national environment as utterly hostile and are not prepared to suffer this degrading situation indefinitely".

The Respondent also submits that "they wish to terminate their political entrapment in the state called South Africa and strive for an area where they can exercise their right to territorial self determination in accordance with section 235 of the Constitution and international law". The "ANC-government" has ignored us in wanting to reach a "peaceful settlement regarding our claim for territorial self determination".

In conclusion, the Respondent contends that it is them who suffer violation of their human rights and that compared to the black population, they consider themselves as a minority group which finds itself "in phases of genocide as confirmed by Dr G. Standton of US-based Genocide Watch".



## 6. **Summary of the Complainant's reply**

The Complainant submitted that:

- 6.1. "the Respondent and its members clearly do not consider themselves as part of modern day South Africa;
- 6.2. they clearly have not accepted South Africa's transition to democracy and do not subscribe to South Africa's vision of a united non-racial society;
- 6.3. the placards which the Respondent displayed and, are trying to defend, are blatantly racist and generalise all black South Africans as criminal".

## 7. **Issues for determination**

The following salient issues warrant a determination by the Commission:

- 7.1. Did the statements violate the Bill of Rights?
- 7.2. If so, what rights in the Bill of Rights were violated?

## 8. **The Legal framework**

### **Constitutional Provisions and Rights**

The Constitutional mandate of the Commission extends to the protection of the rights contained in the Constitution. To this end, reference is made to the relevant Founding Values contained in the Constitution and the Bill of Rights.

#### **8.1. Founding Values**

Section 1 of the Constitution provides that "*The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

- (i) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
- (ii) Non-racialism and non-sexism.*
- (iii) Supremacy of the Constitution and rule of law.*

*(iv) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.*

## **8.2. Bill of Rights**

Section 7 (1) *asserts the Bill of rights as a cornerstone of democracy in South Africa because it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*

Section 10 provides that *"Everyone has inherent dignity and the right to have their dignity respected and protected.*

Section 16 (1) provides that *"Everyone has the right to freedom of expression, which includes-*

- (a). Freedom of the press and other media;*
- (b). Freedom to receive or impart information or ideas;*
- (c). Freedom of artistic creativity; and*
- (d). Academic freedom and freedom scientific research.*

*(2) The right in subsection (1) does not extend to-*

- (a). Propaganda for war;*
- (b). Incitement of imminent violence; or*
- (c). Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

Section 17 provides that *"Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions".*

Section 18 provides that *"Everyone has the right to freedom of association".*

Section 36 provides that *"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*

- (a) the nature of the right;*



- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose”.*

Section 39 provides that, *when interpreting the Bill of Rights, a court, tribunal or forum-*

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- (b) must consider international law; and*
- (c) may consider foreign law.*

### **8.3. Other provisions of the Constitution**

Section 83 provides the following:

The President-

- (a) is the Head of State and head of the national executive;*
- (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and*
- (c) promotes the unity of the nation and that which will advance the Republic.*

Section 235 states that *“the right of South African people as a whole to self determination, as manifested in this Constitution, does not preclude, with the framework to this right, recognition of the notion of the right to self determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any way, determined by national legislation”.*

### **8.4. Relevant provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)**

Section 10 (1) provides the following:

- (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-*



- (a) *Be hurtful;*
- (b) *Be harmful or incite harm;*
- (c) *Promote or propagate hatred.*

Section 12 provides that "No person may-

- (a) *Disseminate or broadcast any information;*
- (b) *Publish or display any advertisement or notice,*

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section".

#### 8.5. **International instruments**

##### **Article 27 of the International Covenant on Civil and Political Rights provides-**

*"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."*

##### ***Declaration on the Rights of Persons Belonging to National or Ethnic Religions and Linguistic Minorities***

*The Declaration reaffirmed that one of the main purposes of the United Nations, as proclaimed in the Charter of the United Nations, is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.*

#### 8.6. **Case law**

- 8.6.1. The Respondent maintains in this matter that the complaint is baseless as it derives from a protest in terms of which it was merely exercising, among

others, its right to assembly, to demonstration and of freedom of expression. In the case of **SATAWU and another v Garvas and others**<sup>1</sup>, the court stated that *"The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns"*.

8.6.2. In **S v Mamabolo (ETV and others intervening)**<sup>2</sup>, Kriegler J stated: *"That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by freedoms of conscience, expression, assembly, association and political participation protected by ss 15-19 of the Bill of Rights"*.

8.6.3. In **Hoffman v South African Airways**<sup>3</sup> Ngcobo J held that equality can only be achieved in the absence of stereotyping and narrow-mindedness. The learned judge stated that *"our constitutional democracy has ushered a new era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly"*.

8.6.4. In **S v Makwanyane**<sup>4</sup>, 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."*

8.6.5. In **Freedom Front**<sup>5</sup> the court considered the meaning of **"harm"** and came to the conclusion that harm cannot and should not be restricted to

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<sup>1</sup> South African Transport Allied Workers Union and another v Garvas and others [2012] ZACC 13, paragraph 61

<sup>2</sup> 1999 (4) SA 469 (cc)

<sup>3</sup> [2000] ZACC 17; 2001 (1) SA 1 (cc); 2000 (11) BCLR 1211 (cc)

<sup>4</sup> 1995 (3) SA 391 (cc)



*physical or actual harm. It found that the term harm was broader than physical harm. The reference to race, gender, ethnicity and religion, was meant to prevent unwarranted intrusion into the right of freedom of expression. Harm must also be interpreted to refer to impacts upon dignity, and psychological, emotional and social harm that can be caused by hate speech. It may therefore cause psychological harm and evoke a sense of hostility.*

8.6.6. **In Malema's case**<sup>6</sup>, the court stated that the following questions would have to be asked to determine if the words complaint of falls within the definition of hate speech:

8.6.6.1. *"Are the words communicated based on one or more of the prohibited grounds?"*

8.6.6.2. *May any reasonable person consider the words to be intended to hurt, harm or incite hatred?"*

8.6.6.3. *Is the use of the said words falling within the prescribed exclusion as set out in section 12?"*

The court further stated that *"if the answer to either the first two questions is in the negative, the words complaint of do not amount to hate speech. If indeed the answer to either of the two questions is in the positive, the words amount to hate speech. **Importantly, the intention on the part of the Respondent is not required**".*

Furthermore, *"the test is whether a reasonable person would construe the speech as demonstrating a "clear intention to be hurtful"*.

## 9. Analysis of the complaint

9.1. The protest was a reaction to the killing of a child and his day care mother. From the placards, it was apparent that the killing of the child and mother made the Respondent angry and frustrated. This has been displayed, amongst others, by placards which contained statements such as *"Barbarians leave our children"; "Black cowards"; "Bring my R4"*.

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<sup>5</sup> Freedom Front v South African Human Rights Commission 2003 (11) BCRL 1283 (SAHRC)

<sup>6</sup> Sonke Gender Justice Network v Malema 2010 (7) BCRL 729 (Eqc) paragraph 14

- 9.2. The anger and frustration was directed at black people. The placards labelled black people as perpetrators of the killings of white people and, consequently and by implications referred to them as criminals. To this end, the Respondent submits that "it is the empirical fact that the overwhelming majority of perpetrators of murder on whites are black people. They further challenge anyone *"to prove statistically and scientifically that there is percentage-wise as much lethal white-on-white violence as lethal black-on-white violence in the country"*. In this regard, the Respondent did not, themselves, provide such proof to support their submission that the perpetrators of murder on whites are black people. The well known principle in our law is that *he or [she] who alleges must prove"*.
- 9.3. From the response, it is clear that the Respondent isolated themselves from being part of the new South Africa. They viewed black people as being incapable of leading South Africa. To this point, they submit that for the past two decades during which South Africa has been in the hands of black people, she has become the worst country to live in. This can be inferred from the following statement *"apart from the many whites stooges, cowards and opportunists falling to their knees for the proverbial scraps falling from the black table, many other Boer-Afrikaners experience the current national environment as utterly hostile and are not prepared to suffer this degrading situation indefinitely"*. For this reason, the Respondent further submits that *"they wish to terminate their political entrapment in the state called South Africa and strive for an area where they can exercise their right to territorial self determination in accordance with section 235 of the Constitution and international law"*.
- 9.4. It is also clear from the statement that the Respondent, as an Organisation, harbours a myriad of issues relating to the governance of the country.
- 9.5. To determine the issues referred to in 7.1 and 7.2 above, it is critical to establish the parameters of the right to freedom of expression and the protection against hate speech in the context of the limitation clause contained in section 36 of the Constitution.



## 10. Application of the Legal Framework to the complaint

10.1. Section 16 of the Constitution of South Africa entrenches the right to freedom of expression. However, the right does not protect a speech or expression that amounts to propaganda for war, incitement of imminent violence or advocacy of hatred based on race, ethnicity, gender or religion, and that constitute to cause harm.

10.1.1. In **Hoffman's case**, Ngcobo J held that equality can only be achieved in the absence of stereotyping and narrow-mindedness. The learned judge stated that: "*In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly*".

10.1.2. In applying the criteria set out in the in the Malema's case, the following assessment is made:

### **Prohibited grounds**

One of the requirements that must be satisfied to prove hate speech is that the words communicated must be based on a prohibited ground(s). The definition of prohibited ground is contained in section 1 of PEPUDA above. The placards were predominantly directed at black people. This is made clear by words or phrases such as "*Black cowards- leave our women and children alone*"; "*The perpetrators of these killings are almost exclusively black*"; "*For the past two decades, South Africa had been governed by blacks and largely for the benefit of blacks*". It is therefore apparent that the placards were directed at a particular race i.e. blacks and, for that reason they were based on a prohibited ground of race.

10.1.3. **Words intended to hurt, harm or incite hatred**

In order to determine if the words communicated were intended to hurt, harm or incite hatred, it is important to highlight the context within which they were communicated. It is common cause that the protest was a

reaction against the death of a child and mother, who were both whites. The protest was organised by the Respondent and the protestors who were predominately white people. From the placards, it can be deduced that the protesters were angry and frustrated. The complainant has submitted that the Respondent and its members do not have South Africa's vision of a united non-racial society. Further, the Complainant submitted that the Respondent and its members do not see themselves as part of the new South Africa. The Commission agrees with these submissions.

The Respondent was stereotyped and the usage of phrases such as: "black cowards"; "*The perpetrators of these killings are almost exclusively black*"; "*For the past two decades, South Africa had been governed by blacks and largely for the benefit of blacks*". These phrases are generic and racial. In **Hoffman's case**, Ngcobo J stated that "*our constitutional democracy has ushered a new era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place.*"

The words were provocative and directed at one race, black people. There is no doubt that the Respondent considers black people as not able to lead the country appropriately. If the placards are read conjunctively with the R4 placard, and considering the context within which the words were communicated, it can be inferred that the R4 will be used against black people who are considered criminals by the Respondent.

Having considered the definition of harm in the **Freedom Front case**, the Commission finds that the placards, reasonably construed, were generic and impacted on the dignity of black as a whole. Further, the Commission finds the words could reasonably be construed to have been intended to hurt, harm, and incite hatred.

However, it is important to ascertain whether the words in the placards are not falling within the prescribed exclusions as set out in section 12 of PEPUDA. In the **Malema case**<sup>7</sup>, the court stated: "*If the Complainant succeeds in proving the words complaint of amounts to hate speech, it however would not be the end of the inquiry. An assessment would still need to be made whether or not the words are not protected under section 12*". Further, the court stated that "*In the event of such a finding being made, the words would still constitute hate speech, but*"

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<sup>7</sup> Paragraphs [15] and [16]



*the Respondent cannot be held liable. Thus, the provisions of section 12 of PEPUDA can be raised as a defence”.*

10.1.4. The Respondent submitted as a fact that the perpetrators of the killings of white people are almost exclusively black people. The court in the **Malema case**<sup>8</sup>, held that *“In order for the Respondent to succeed in his defence he has to allege and prove that:*

10.1.5. *the statement complained of was a comment (opinion) and not a statement of fact and that it was or would have been understood as a comment by a reasonable hearer;*

10.1.6. *the comment was fair. It need not necessarily have been impartial or well balanced, that it does not exceed certain limits;*

10.1.7. *the facts commented on were truly stated; and*

10.1.8. *the matter was of public interest.*

10.2. It is also vital to determine whether each of the aforementioned requirements have been satisfied by the Respondent to prove that the placards constituted a fair comment.

(a) **Was the statement complained of a comment or opinion and not a statement of fact and that it would have been understood as a comment by a reasonable hearer?**

In the Respondent’s response, it is clear that the statements were couched as facts and not as comments or opinions. In their own words they used the following phrase: *“the perpetrators of these killings are almost exclusively black. This is a fact - not unfair discrimination”*. Read collectively, the statements would not have been understood as a comment or opinion by a reasonable hearer.

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<sup>8</sup> Paragraph [19]

- (b) **Was the comment fair? It need not necessarily have been impartial or well balanced, that it does not exceed certain limits.**

Even though the Respondent attempted to make their statement balanced or impartial, the Commission finds that the statements were not a fair comment. They have thus violated the rights of the black community and consequently fell within the provisions of section 16 (2) of the Constitution read with the provisions of PEPUDA.

- (c) **Was the matter commented on of public interest?**

As mentioned above, the protest was a reaction on the death of a child and mother. Victims and perpetrators of murder cut across all racial lines in South Africa. It therefore cannot be of public interest to attribute murder to any racial group. The statements were inherently offensive and, against the spirit and founding provisions of the Constitution.

## **11. Findings**

Based on the investigation conducted by the Commission and the above analysis of the Constitutional rights, court judgments and applicable legislation, the Commission finds that:

- 11.1. The statements contained in the placards, and read together within the context of the protest, cannot be protected by the provisions of the right to freedom of expression enshrined under section 16 of the Constitution as they extended to advocacy of hatred that is based on race in contravention of section 10 of PEPUDA read with section 16 (2) (c) of the Constitution. Furthermore, these statements constituted hate speech which cannot be justified under section 36 of the Constitution.
- 11.2. The manner in which the Respondent reacted during the protest displayed resentment which, if ignored for a long time, may spread and ultimately lead to racial violence between whites and blacks communities.
- 11.3. The statements contained in the placards, and read together within the context, further violated the right to human dignity of the black people in the country.



## 12. Recommendations

In view of the above findings, the Commission hereby makes the following recommendations:

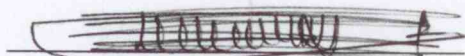
- 12.1. That the Respondent retracts the statements and issue an unconditional written public apology in a local newspaper with sufficiently wide distribution to the black community within two weeks of receipt of this report.
- 12.2. That the Respondent is free to raise issues relating to governance directly with the Office of the President.
- 12.3. The Commission retains the ability to proceed to institute legal proceedings in an appropriate court of law should the recommendations listed above not be complied with within the timeframes stipulated.

## 13. APPEAL

The Complainant and the Respondent have the **right to lodge an appeal** against this Report. 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 ON 5<sup>th</sup> DAY OF December 2013.



Commissioner M. L. Mushwana  
Chairperson

**South African Human Rights Commission**