



# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

FILE REF NO: MP/1819/0461

In the matter between:

**JOSEPH SIBANYONI**

**FIRST COMPLAINANT**

**RESIDENTS OF ZAKHENI COMMUNITY**

**SECOND COMPLAINANT**

And

**THEMBISILE HANI LOCAL MUNICIPALITY**

**RESPONDENT**

---

## FINAL INVESTIGATIVE REPORT

---

### 1. INTRODUCTION

- 1.1. This is a report of an investigation conducted by the South African Human Rights Commission ("**Commission**") into systemic water access challenges within the jurisdiction of the Thembisile Hani Local Municipality ("**Municipality**"), following the Commission's receipt of two complaints relating to water access challenges within the Municipality.
- 1.2. The complainants alleged that the water access challenges within the Municipality violated residents' right of access to sufficient water as enshrined in section 27(1)(b) of the Constitution of the Republic of South Africa, 1996 ("**Constitution**").

P.N 1

## 2. PARTIES

- 2.1. The First Complainant is Mr Joseph Sibanyoni, a Councillor for the Democratic Alliance in the Nkangala District Municipality in Mpumalanga.
- 2.2. The Second Complainant is the residents of the Zakheni Community ("**Zakheni**"), a community within the jurisdiction of the Municipality.
- 2.3. The Respondent is the Municipality, a public entity established in terms of the Local Government Municipal Structures Act, 117 of 1998, with its main offices situated at stand number 24, front opposite Kwaggafontein Police Station, Along the R573 (Moloto road), eMpumalanga, 0458M.

## 3. MANDATE OF THE COMMISSION

- 3.1. The Commission is an institution established in terms of section 181 of the Constitution.
- 3.2. In terms of section 184(1) of the Constitution, the Commission is specifically required to:
  - 3.2.1. Promote respect for human rights;
  - 3.2.2. Promote the protection, development and attainment of human rights; and
  - 3.2.3. Monitor and assess the observance of human rights in the Republic.
- 3.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 3.4. The South African Human Rights Commission Act, 40 of 2013 ("**the SAHRC Act**"), provides the enabling framework for the powers of the Commission.
- 3.5. Section 15(6) of the SAHRC Act determines the procedure to be followed in investigating alleged violations of or threats to fundamental rights.

## 4. BACKGROUND

- 4.1. The first complaint was received by the Commission on 16 November 2018, alleging that:
  - 4.1.1. Communities within the jurisdiction of the Municipality have been experiencing water access challenges for a long time.
  - 4.1.2. Despite residents of the Municipality having reported water access challenges to the Provincial Government of Mpumalanga during the "Taking of the Legislature to the People Programme" in 2013, and a follow-up undertaking made by the former Premier of Mpumalanga, Mr D.D. Mabuza, to the effect that the challenges would be addressed, water access challenges at the Municipality persist — more than five years since the undertaking.
  - 4.1.3. In 2016, the former President, Mr Jacob Zuma, visited the area of Kwaggafontein and made an undertaking that the water access challenges within the Municipality will be addressed through the supply of water to the Municipality from the Dr JS Moroka Local Municipality and Rand Water, as well as from the Loskop Dam. Since the undertaking, however, no progress has been made in addressing the water access challenges within the Municipality.
  - 4.1.4. The continued lack of access to water violates residents' rights in terms of section 27(1)(b) of the Constitution.
- 4.2. The Commission received the second complaint on 2 September 2019. In the complaint, the residents of Zakheni alleged that Zakheni has been without running water for many years and that municipal officials and/or contractors were selling the Municipality's water to residents at the cost of R200 per 2000 litres.

## 5. PRELIMINARY ASSESSMENT

- 5.1. The Commission's preliminary assessment was that the complaints disclosed a *prima facie* violation of the affected communities' right of access to sufficient water enshrined in section 27(1)(b) of the Constitution.

## 6. INVESTIGATIVE METHODOLOGY

- 6.1. The investigation of the above complaints was undertaken through a combination of investigative methodologies, which included:
  - 6.1.1. Correspondence with the parties; and
  - 6.1.2. The conduct of site inspections.

## 7. INVESTIGATIVE PROCESS

### ***Correspondence with all the affected parties: First Complaint***

- 7.1. After receiving the first complaint, the Commission addressed an allegation letter to the Municipality on 14 December 2018, inviting a response to the allegations levelled against it.
- 7.2. Following a lengthy delay in the delivery of a response, which necessitated the institution of subpoena proceedings against the Municipality and the laying of criminal charges against the Municipal Manager, the Municipality delivered its response to the allegations levelled against it on 27 September 2019. The following, amongst others, was stated in the response:
  - 7.2.1. The Municipality is supplied with water by three main suppliers, namely Rand Water, City of Tshwane, and Dr JS Moroka Local Municipality. Rand Water is contracted to supply 30 ML/day of water but currently supplies 30 to 35 ML/day. The City of Tshwane is contracted to supply 16.6 ML/day of water but supplies only 6 to 9 ML/day of water. On the other hand, Dr JS Moroka Local Municipality is contracted to supply 5 ML/day of water but

has not been supplying any water to the Municipality since 2019 due to their own challenges regarding access to water.

- 7.2.2. The Municipality has 109 282 households as per the survey conducted in 2014, and a total population of 448 056.
- 7.2.3. The water demand based on the population numbers is 74.1 ML/day. The Municipality is, however, only receiving a supply of 43 ML/day of water from its suppliers, presenting a water supply shortfall of 31 ML/day.
- 7.2.4. Given the above, there are admittedly water supply challenges, as the Municipality is not able to keep up with the water demand in its 32 wards. It can only provide a constant water supply to 5 of the 32 wards. The remaining wards (27) are supplied on a rotational basis using water trucks.
- 7.2.5. The Municipality has taken the following steps to address the identified water access challenges:
  - a) It supplies water to residents on a rotational basis, to ensure that communities have water for certain days;
  - b) It also supplies water to communities through Jojo tanks for daily consumption;
  - c) In October 2016, It made an application for a Water Use Licence to the Department of Water and Sanitation ("**DWS**") and is still awaiting a response from DWS. DWS requested additional information in March 2017. The information was submitted on 24 March 2017;
  - d) It is constructing a new water scheme: the Moses River Water Project, which is expected to supply 5 ML/day of water and store 10 ML/day of water. The construction was expected to be completed by the end of the 2019/2020 financial year;
  - e) It has an underground water scheme project in Moloto, which is expected to yield a water supply of 4ML/day;

- f) It is also engaging DWS to get water from the Loskop Dam through the Loskop Bulk Water Supply Project. Engagements with DWS regarding the scheme commenced in 2016, but progress has been slow; and
- g) In March 2019, It received an allocation of R14 million from DWS for drought relief. The money was used for the construction of boreholes within the Municipality.

7.2.6. On 27 November 2019, following receipt of the letter from the Municipality, the Commission addressed correspondence to the Minister of Water and Sanitation (Minister Lindiwe Sisulu), specifically requesting her to advise on the reasons for the delay in the approval of the Loskop Bulk Water Supply Project, as well as to provide the Commission with a time-bound plan for the implementation of the project. The Minister was further requested to advise on the steps her department has taken or is taking to assist and support the Municipality in giving effect to its constitutional obligation of supplying water to residents. The response was requested by 18 December 2019.

7.2.7. The Minister, however, did not respond to the numerous correspondences sent by the Commission. As a result, the Commission initiated a subpoena process against the Minister.

7.2.8. Following the initiation of the subpoena process against the Minister and before the execution of the process, the Minister delivered a response to the letter on 8 June 2020. In the response, the Minister advised that DWS is aware of the water access challenges at the Municipality. Insofar as the characterisation of the challenges is concerned, the Minister stated that the Municipality has a water demand of 55 ML/day, but the Municipality only receives 43 ML/day of water from its water suppliers, resulting in a water supply shortfall of 12 ML/day.

7.2.9. Having acknowledged the challenges, the Minister stated in her response that her department has taken steps, together with the Nkangala District

Municipality ("**Nkangala**"), to address the identified challenges. Some of the steps taken include:

- a) In the short term, providing water carts and tanks to communities without water reticulation;
- b) In the medium term, fixing all pipe leaks and dealing with illegal connections to restore pressure in the system;
- c) In the long term, and DWS appointed Nkangala as an implementing agent for the Loskop Bulk Water Project. The Loskop Bulk Water Project is expected to contribute an additional 20 ML/day of water to the Municipality, thereby alleviating the current water supply challenges.
- d) The construction of the Loskop Bulk Water Project is expected to take four years, commencing in October 2020 until 2024.
- e) In the interim, the Municipality has reprioritised the Municipal Infrastructure Grant funding in the amount of R22 million to drill 49 boreholes to supplement water supply. In addition to the Loskop Bulk Water Project, the Municipality is busy with the implementation of the Bundu water scheme, which they expect to contribute 5 ML/day of water to the Bundu and Boukenhouthoek cluster.

7.3. The First Complainant commented on the response from the Minister of DWS on 31 July 2020 and made the following submissions on behalf of his organisation in response:

7.3.1. They are concerned about the continued provision of water through the water trucks because it excludes poor people who cannot store water until the next weekly supply is made available;

7.3.2. Notwithstanding the dire state of water services within the Municipality, water leaks are not fixed, and leaks can be observed throughout the Municipality;

- 7.3.3. There is no water from Dr JS Moroka Local Municipality because Dr JS Moroka Local Municipality is experiencing water supply challenges of its own;
- 7.3.4. The Bundu water scheme is not yet commissioned, and there is a problem with this project because the completion date is continuously shifted;
- 7.3.5. The intervention of boreholes is not working because there are no boreholes supplying water to the treatment plant; and
- 7.3.6. The Loskop Bulk Water Project is a moving target as by the time the project is completed, the Municipality will be facing the same crisis due to growth in the population.

***Correspondence with all the affected parties: Second Complaint***

- 7.4. As was the case with the first complaint, following receipt of the second complaint, an allegation letter was addressed to the Municipality on 8 October 2020, inviting the Municipality to respond to the allegations levelled against it by the residents of Zakheni.
- 7.5. The Municipality delivered its response to the allegations levelled against it on 6 November 2020. In its reply, the Municipality reiterated many of the submissions it made in relation to the first complaint and made the following specific submissions in relation to Zakheni:
  - 7.5.1. Whilst acknowledging water access challenges at Zakheni, it denied that these challenges have persisted for years;
  - 7.5.2. Insofar as water access is concerned, the most affected areas are the areas next to Mountain View. Residents from those areas have opted to collect water from Mountain View across the R573 Moloto Road;
  - 7.5.3. A new water connection has been made from Mountain View to Zakheni to deter residents from crossing the R573 Moloto Road to Mountain View to collect water;



- 7.5.4. Two boreholes have also been drilled in the community through the assistance of Nkangala to augment the water supply to the area. The boreholes are, however, not yet operational;
- 7.5.5. As an interim measure, a dedicated water truck supplies water to the community daily, and water tanks are installed in the area to ensure a consistent supply of water to the community; and
- 7.5.6. It called on residents to report officials who sell municipal water to residents either to the Municipality or the Police.
- 7.6. Residents of Zakheni who complained were given an opportunity to comment on the response from the Municipality but did not comment.
- 7.7. Given the similarities between the first and second complaints, on 17 January 2020, the Commission consolidated the complaints in terms of article 13.2 of its Complaints Handling Procedures.<sup>1</sup> Residents of Zakheni who complained were, in turn, advised to report the complaint relating to the illegal selling of water to the police or the Municipality for further investigation. That aspect of the complaint will therefore not be canvased further in this report.
- 7.8. On 11 June 2020 and 18 September 2020, respectively, the Commission received further communication from residents of Zakheni, advising that the water access challenges in their community persist unabated, despite the steps the Municipality alleges have been taken to address the water access challenges in that community.

### ***Site Inspections***

---

<sup>1</sup> Article 13.2 of the Commission's Complaints Handling Procedures states:

“(1) The Head of Legal Services or Provincial Manager as applicable may, on his or her own accord or on written application by a party to the proceedings, consolidate 2 or more complaints and deal with these complaints in the some proceedings.”

(2)The Head of Legal Services or The Provincial Manager as applicable may, in consultation with any relevant stakeholders, determine that a class of complaints be handled together.”

7.9. In addition to corresponding with the parties, site inspections were conducted in various communities within the Municipality on 14 March 2019 and 3 to 8 December 2020. The latter inspections were conducted through the assistance of human rights champions from a non-profit organisation based within the Municipality, the Voice of the Voiceless.

#### 7.10. **Site inspection of 14 March 2019**

7.10.1. The areas visited during the site inspection were Suncity D, and Moloto Section 1.

7.10.2. At Suncity D:

- a) The Commission observed that there was no water reticulation infrastructure in the area. Instead, there were sparsely placed communal tanks, with many residences more than 200-metres away from their nearest communal tank; and
- b) On engaging with the residents, the residents advised as follows:
  - (i) Water in the area is supplied through water trucks. The water is, however, supplied on a selective basis, with the water trucks not supplying certain areas. When the community inquired about the selective supply of water, they were advised that the water trucks do not go to certain areas because some of the roads are not accessible. Residents then requested that the roads be fixed, which the Municipality has not done. What they have observed, however, is that water is supplied to those residents who can pay the water trucks, and to those who are connected to councillors, committee members and their friends and family.
  - (ii) Although the Municipality claims to be supplying water in accordance with a schedule, it does not keep to any schedule, as the community can go for up to 2 weeks without water.

- (iii) The provision of water through the water trucks is usually done during working hours, which denies the employed access to water, unless they can arrange with other people to collect water on their behalf.
- (iv) The Municipality has supplied communal tanks to some areas but has refused to supply communal water tanks to other areas, stating that residents must club together to purchase their own water tanks.
- (v) To compound the water access challenges in the community, the water supplied is sometimes dirty, and residents must consequently buy water at the cost of R200.

7.10.3. At Moloto Section 1:

- a) The Commission observed several residents waiting to collect water from a galvanised communal steel water tank;
- b) The Commission also observed several wind turbines in the area, which appeared to not be operational. The Commission was advised that the wind turbines are related to a failed borehole project in the area;
- c) On engaging with the residents, the residents advised as follows:
  - (i) Certain sections of Moloto have water reticulation infrastructure whilst others do not. Those which have water reticulation infrastructure receive water through that infrastructure from time to time.
  - (ii) Those who do not have water reticulation infrastructure receive water from the municipal water trucks. Whilst some residents advised that the water trucks usually deliver water on Saturdays, others indicated that they deliver water on an ad hoc basis.

- (iii) The water supplied at a given time is insufficient, resulting in community members fighting over water.
- (iv) They do not know how decisions about water provision are made.
- (v) The water received is, however, sometimes dirty, as the water trucks are not cleaned.
- (vi) Their community has had water access challenges from as early as the 1990s.
- (vii) The Municipality has introduced additional communal water tanks in some areas, which are filled once a week. These communal water tanks were not, however, observed in the section of Moloto which was visited.

#### **7.11. Site Inspections of 3 to 8 December 2020**

7.11.1. The areas visited during the site inspections were Zakheni; Kwaggafontein C; Tweefontein A, B2 and DK; Vezubuhle and Vezubuhle Water Gantry; Moloto Zone 1 and Zone 20; Phola; and Vlaklagte No.1.

7.11.2. At Zakheni:

- a) Residents were observed collecting water from a water truck, whilst another resident was observed crossing the R573 Moloto Road with a wheelbarrow, seemingly heading to a BnB across the road for purposes of collecting water.
- b) On engaging with the residents, the residents advised as follows:
  - (i) They have not had water from their taps for over a year and consequently rely on various water sources.
  - (ii) In this regard, residents receive some of their water supply from the municipal water trucks. The water delivered by the municipal water trucks in the ordinary course is inadequate,

necessitating reliance on other water sources. These additional water sources include purchasing water at the cost of R400 per delivery and collecting water from a BnB across the R573 Moloto Road at the cost of R2.00 per 20-litre container.

7.11.3. At Kwaggafontein C:

- a) Residents were observed collecting water from the premises of the Municipality, which always has water.
- b) On engaging with the residents, the residents advised as follows:
  - (i) They are experiencing challenges with access to water in their area, despite the municipal offices located in the same area always having water. In this regard, whilst the upper lying areas do not receive any water from the existing water reticulation infrastructure, lower-lying areas receive water intermittently and mostly at night.
  - (ii) Residents, therefore, predominantly rely on purchasing water from vendors, as well as collecting water from the municipal offices.

7.11.4. At Tweefontein A, B2 and DK, residents advised as follows:

- a) Residents of Tweefontein A and DK rely on the delivery of water by the municipal water trucks. Some residents are unable to collect sufficient water due to not having enough containers in which to store the water. Those who have enough containers can collect sufficient water.
- b) Residents of Tweefontein B2, on the other hand, receive water through the existing water reticulation infrastructure once a week and mostly on weekends. Many residents store the water collected in their Jojo tanks. To supplement this water source, some residents also purchase water from vendors.

- 7.11.5. At Vezubuhle, residents did not raise any challenges with access to water. This is likely due to their proximity to the Vezubuhle Water Gantry, where water trucks collect water for delivery to the various parts of the Municipality.
- 7.11.6. At Moloto Zone 1 and Zone 20, the residents advised as follows:
- a) Due to the unreliable water supply in the area, residents rely on various water sources.
  - b) In this regard, the Municipality supplies water through water trucks on an intermittent and ad hoc basis. Water is also occasionally supplied through the existing water reticulation system. Yet other residents collect water from the stream for household use, whilst other residents either hire bakkies to collect water on their behalf from the Moloto Mall or purchase water from vendors at the cost of R400,00.
- 7.11.7. At Phola, residents reported receiving water once or twice a week on Tuesdays and sometimes on Thursdays. Due to the infrequency of the water supply, many residents purchase water for storage in Jojo tanks from vendors.
- 7.11.8. At Vlaklaagte No. 1, residents reported that they receive water twice a week on Wednesdays and Thursdays. Residents in the area are known for their ability to quickly mobilize themselves for protest action in the event of not receiving water.

## 8. ANALYSIS

- 8.1. In terms of the Constitution, everyone has the right of access to *sufficient* water,<sup>2</sup> with the state having a concomitant obligation to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of

---

<sup>2</sup> See section 27(1)(b) of the Constitution.

this right.<sup>3</sup> According to the Constitution, local government is primarily responsible for the fulfilment of this right.<sup>4</sup>

- 8.2. The Water Services Act, 108 of 1997 ("**WSA**") is one of the pieces of legislation enacted to give effect to the right of access to water. In terms of section 3(1) of the WSA, everyone has a right of access to basic water supply, subject to the limitation contained in the Act<sup>5</sup>.
- 8.3. Basic water supply is defined in section 3 of the Regulations relating to compulsory national standards and measures to conserve water, GNR.509 of 8 June 2001 ("**Compulsory National Water Standards**") as the "minimum quantity 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 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than 7 full days in any year."
- 8.4. In the present case, it is apparent that the current water supply levels fall woefully below the prescribed minimum standards of supply in many of the affected communities. In this regard, except for the community of Vezubuhle, the communities visited during the site inspections indicated that they are often without water, with many of them receiving water only once or twice a week. In such circumstances, unless residents can store large amounts of water at a given time, residents are usually without water for more than seven days in a year. As indicated by the First Complainant and the residents themselves, many residents cannot store large amounts of water at a given time, resulting in those residents being without water for more than seven days in a year, contrary to the provisions of section 3 of the Compulsory National Water Standards. This group of residents is invariably poor.

---

<sup>3</sup> See section 27(2) of the Constitution.

<sup>4</sup> See Schedule 4B of the Constitution.

<sup>5</sup> These limitations include the discontinuation of water supply in the event of non-payment by consumers who can afford to pay for water or in the case of a disaster or insufficiency of the source. See section 4(3)(c) and section 21(2)(e) of the WSA.

- 8.5. Moreover, as was observed in Suncity D, Moloto and Zakheni, some residents travel distances longer than 200 metres to access their nearest water source, contrary to section 3 of the Compulsory National Water Standards once again.
- 8.6. In their respective responses to the Commission, both the Municipality and DWS admitted to these challenges, with the Municipality advising that only 5 of its 32 wards receive a consistent supply of water. In view of the above, therefore, it cannot be gainsaid that, for the most part, residents' right to basic water supply as contemplated in section 3(1) of the WSA is not being fulfilled.
- 8.7. The question that arises is whether the Municipality is culpable for the non-realisation of this right.
- 8.8. In terms of section 3(2) of the WSA, the Municipality must take reasonable measures to ensure residents' right to basic water supply. This obligation mirrors the obligation in section 27(2) of the Constitution. In analysing the state's obligations in terms of section 27(2) of the Constitution, the Constitutional Court in ***Mazibuko and Others v City of Johannesburg and Others 2010 (3) BCLR 239 (CC)*** held as follows:
- “Applying this approach to section 27(1)(b), the right of access to sufficient water, coupled with section 27(2), it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.”<sup>6</sup>
- 8.9. In ***Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)***<sup>7</sup>, the Constitutional Court held that to establish the reasonableness of measures aimed at fulfilling a right, it must be shown that the measures in question have appropriate financial and human resources allocated to them; are capable of facilitating the realisation of the right; are reasonable in both conception and

---

<sup>6</sup> *Mazibuko*, Paragraph 50.

<sup>7</sup> See also *Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC)*.



implementation; are flexible; attend to crises; do not exclude a significant segment of the affected population; and balance short, medium and long-term needs.

- 8.10. In the present case, the Municipality and DWS averred that they had taken several measures to ameliorate the identified water access challenges. Having considered those measures, however, the Commission is not convinced of the reasonableness of those measures. This is primarily because the measures taken do not appear to be capable of fully realising the residents' right of access to sufficient water supply in the short to long term and exclude a significant segment of the affected population.
- 8.11. In this regard, as indicated above, the supply of water on a rotational basis and through water trucks weekly or bi-weekly leaves poor residents who cannot store large quantities of water at a given time without water for most of the week. The measures exclude a significant segment of the affected population, therefore.
- 8.12. Insofar as the drilling of boreholes is concerned, although the Municipality submitted that it spent R14 million on the drilling of new boreholes, this measure does not appear to have been effective. In the case of Zakheni, the Municipality conceded that the boreholes drilled were not operational. This was also the case at Moloto Section 1, where defunct wind turbines linked to the borehole project in that area were observed. To the extent that these challenges are more widespread, it would follow that this measure is not reasonable, and that the expenditure incurred in the drilling of the boreholes may be wasteful.
- 8.13. The efficacy of the other measures proposed by the Municipality, which include the Moses River Water Project, are also in doubt. In this regard, whilst the Municipality indicated that the Moses River Water Project would be completed by the end of the 2019/2020 financial year, the Complainant indicated that this had not been done.
- 8.14. Insofar as the Loskop Bulk Water Project is concerned, both the Municipality and the DWS have posited this project as a critical measure for addressing water access challenges within the Municipality in the medium to long term. This notwithstanding, the implementation of the project has been inordinately delayed, with the project now scheduled to be completed in 2024. There are also concerns that the Loskop Bulk Water Project is a moving target, in that by the time the project is completed, the

Municipality will likely be facing the same crisis due to growth in its population. The Commission shares these concerns for reasons more fully set out below.

- 8.15. Additionally, the premise on which the measure was conceptualized appears to be contested, which does not bode well for its success in resolving the water access challenges within the Municipality. In this regard, based on its 2014 population numbers, the Municipality indicated that it has a water demand of 74.1 ML/day, with a water supply of 43 ML/day and a shortfall of 31 ML/day. Given that the population figures have likely increased since 2014, it is similarly probable that the water demand has increased, increasing the identified shortfall. DWS, on the other hand, indicated a water demand of 55 ML/day and a water supply of 43 ML/day, with a water supply shortfall of 12 ML/day. Based on its computation of the challenge, DWS advised that the Loskop Bulk Water Project will contribute an additional 20 ML/day to the Municipality on completion in 2024, thereby alleviating the current water supply challenges. If the Municipality's computation of the challenge is, however, accepted as correct, it follows that even assuming that water demand will remain unchanged in 2024 when the project is completed, the Loskop Bulk Water Project will not address the water supply challenges within the Municipality, as the water supplied from the project will still be 11 ML/day short of the water required, rendering the project incapable of fully realising the residents' right to basic water supply.
- 8.16. The efficacy of this measure is further challenged in circumstances where water demand is likely to rise given the growing population. In such circumstances, even if DWS' more optimistic computation of the challenge were to be accepted, water demand will likely outpace the proposed water supply from the Loskop Bulk Water Project within a short time, perpetuating the cycle of crises within the Municipality. There is, therefore, a need for forward planning, if sustainable solutions to the water challenges within the Municipality are to be found, which the current proposals fail to do.
- 8.17. In view of the above, the Commission is not convinced that the measures proposed by the Municipality and DWS are reasonable, as the measures do not appear to be capable of resolving the identified challenges in a sustained manner.

8.18. The Commission did not receive any submissions from the Municipality or DWS regarding the unavailability of resources to support the implementation of more meaningful measures capable of resolving the identified challenges in a sustained manner. Moreover, no submissions were received by the Commission from the Municipality or DWS regarding why the resources spent or earmarked for the implementation of measures that are not geared towards the resolution of the identified water access challenges could not have been used for the implementation of more effective and reasonable measures. Accordingly, no basis has been made for a finding that the inadequacy of the measures implemented and/or proposed by the Municipality and DWS is due to the unavailability of the necessary resources.

## **9. COMMENTS TO THE PROVISIONAL INVESTIGATIVE REPORT**

9.1. Following the investigation of the matter, the Commission issued a provisional investigative report on the matter on 26 January 2021. The parties were invited to submit their comments to the provisional investigative report by 15 February 2021.

9.2. The First Complainant delivered his response to the provisional report on 3 February 2021. The Municipality, on the other hand, requested an extension for the submission of its responses. The extension was requested to permit the responses after its Special Council sitting of 26 February 2021. Consequently, an extension to submit their response by 9 March 2021 was allowed, which they duly did. On 29 March 2021, a response was also received from one of the residents of Zakheni.

9.3. On 28 May 2021, as an implicated party, DWS was also allowed an opportunity to comment on the provisional investigative report. They were requested to revert with their response by 18 June 2021. When they did not respond by 18 June 2021, follow-up e-mail correspondence was sent to them. In the follow-up correspondence, they were requested to respond by 6 July 2021. Despite being granted a further opportunity to respond, however, DWS did not respond to the provisional investigative report.

9.4. In his response to the provisional report:

9.4.1. The First Complainant attached 3 (three) documents, namely: (1) the Second Quarter Report on the implementation of Supply Chain Management

("SCM") policy for the period of October 2020 to December 2020; (2) the response from the Executive Mayor of the Municipality to Councillor TJ Tibane in terms of rule 51(1) of the standing rules and orders; and (3) the progress report on the implementation of the Loskop Regional Bulk Water Supply Scheme for November 2020.

9.4.2. The report on the implementation of the SCM policy indicates, amongst others, that the expenditure incurred in respect of one Mamolato Construction, a service provider contracted by the Municipality to deliver potable water, was irregular.

9.4.3. The response from the Executive Mayor of the Municipality to Councillor TJ Tibane indicates that Mamolato Construction is owned by a relative of one Councillor M.O. Sikosana. According to the First Complainant, Councillor Sikosana is the Chairperson of the Municipal Public Accounts Committee, which gives rise to a serious conflict of interest.

The response further states that Nkangala drilled 4 (four) boreholes on behalf of the Municipality and that all 4 (four) boreholes are not functioning due to the vandalism of the solar system at 3 (three) of the boreholes and the electrical panel at 1 (one) of the boreholes.

9.4.4. The progress report on the implementation of the Loskop Regional Bulk Water Supply Scheme provides as follows, amongst others:

a) Nkangala was appointed by the DWS on 6 December 2019 as the implementing Agent for Planning and Implementation of the Loskop Regional Bulk Water Supply project, which is funded under the Regional Bulk Infrastructure Grant ("**RBIG**"). The budget allocation for the project is R5 million for the 2019/2020 financial year; R32 498 000.00 for the 2020/2021 financial year; R75 million for the 2021/2022 financial year; and R45 million for the 2022/2023 financial year.

b) The inception meeting for the project was held on 17 December 2019. By June 2020, Nkangala had completed the preliminary

design and implementation readiness reports, which were submitted to the DWS for approval. DWS is, however, yet to approve the submitted reports, resulting in delays in the project. Nkangala made various attempts to obtain responses from DWS, including the escalation of the matter to the Acting Director-General and the Minister on 6 November 2020.

- c) The Water Use License Application was also lodged with DWS on 19 May 2020.
- d) The inability to deliver potable water to communities constitutes a violation of basic human rights.

9.5. In its response to the provisional report:

9.5.1. The Municipality admitted most of the contents of the provisional report but disputed the following aspects:

- a) That Zakheni has been without running water for many years and that the municipal officials and/or contractors are selling water to the residents at the cost of R200 per 2000 litres;
- b) That it does not repair water leaks; and
- c) Some of the averments made regarding the outcome of the site inspections conducted by the Commission. The specific aspects being disputed were, however, not identified.

9.5.2. The Municipality also made the following averments in its response, amongst others:

- a) As it previously advised in its letter of 27 September 2019, it does not have its own water resources and relies on 3 (three) water service providers to provide it with water. These are Rand Water, the City of Tshwane and Dr JS Moroka Local Municipality. Rand water supplies it with 36 MI/day, whilst the City of Tshwane supplies it with 8.6 MI/ day. Dr JS Moroka Local Municipality was meant to supply 2 MI/day but can no longer do so due to its own water resource

challenges. The amount of water required by the Municipality per day is 74 MI/day. It, however, gets 46.6 MI/day, leaving it with a shortfall of 27.4 MI/day. It is constructing a dam that will augment the water supply by 5 MI/day per day.

- b) To manage water supply, it provides water to residents on a rotational basis. It augments the water supply through water trucks. As an interim measure, a dedicated water truck supplies water to the residents of Zakheni daily, as well as water tanks installed in the area to ensure a consistent supply of water. Private water tankers are allowed to sell water to the residents, and it is the residents' choice to either buy water from private water tankers or wait for the municipal trucks. Any information about municipal officials selling water should be reported to it, the police or any other relevant authorities.
- c) Although the Municipality is not able to fulfil its constitutional obligation of providing a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month within 200 metres of a household, it has made several efforts to address the challenges.
- d) The Commission should reconsider the submission made by the Municipality on 27 September 2019 for a solution in the matter.

9.5.3. The Municipality further averred the following, in response to the provisional directives requiring reports on the boreholes drilled by the Municipality and the status of the Moses Water Project:

- a) It has drilled 189 boreholes, but only 56 are functional, yielding 0.71 MI/day.
- b) The Moses Water Project was commissioned, and pumping commenced with water supply to the community in October 2020 at 1 MI/d. Production is being increased to 3 MI/d. The final stage of the project commenced in February 2021, with completion planned for

the end of June 2021. Once the project is completed, the water treatment works will produce an average of 5 Ml/d, with a peak capacity of 10 Ml/d, which would enable the Municipality to provide the entire Bomandu supply zone with water on a full-time basis.

- 9.6. On 29 March 2021, the Commission received a response to the provisional report from one member of Zakheni. In the response, she advised on improvements in the water situation in that community. In this regard, she advised that after 15 years of not having access to running water, they now have access to water in their yards. She, however, wanted the community to be assisted to recoup the expenses incurred in fixing a communal tap in her street over the years.
- 9.7. On 19 August 2021, the Commission contacted an official of the Municipality telephonically to determine if the Moses Water Project had been completed in June 2021 as scheduled. The official advised that although the Municipality is receiving some water from the Moses Water Project, the project is yet to be completed. During the investigative inquiry on service delivery challenges within local municipalities held by the Commission from 27 September 2021 to 1 October 2021, however, the Municipality and Nkangala confirmed that the project had since been completed.
- 9.8. Having considered the parties' respective submissions, the Commission is of the view that the submissions do not take the matter further, nor do they provide a basis for the reconsideration of the substantive findings and directives made by the Commission in its provisional report. On the contrary, if anything, the submissions appear to bolster those findings and directives.
- 9.9. Insofar as the First Complainant's submissions are concerned, for the most part, they affirm the findings made by the Commission in its provisional report. In this regard, the supporting documents provided by the First Complainant evidence recognition at the political level of the Municipality that the current water access challenges in the Municipality violate residents' right of access to water. They further evidence that the implementation of the Loskop Bulk Water Project has indeed been inordinately delayed. Insofar as the fresh allegations of impropriety in the Municipality's dealings with Mamolato Construction are concerned, however, these allegations fall outside the

jurisdiction of the Commission and should be referred to the relevant institutions as directed below.

9.10. Submissions from the Municipality, for the most part, reiterate the Municipality's submissions in its letter of 27 September 2020, although some of the figures provided differ slightly, which evidences the evolving nature of the challenge. The Municipality nevertheless called on the Commission to reconsider its findings in light of the submissions made in that letter, without providing any basis for such reconsideration.

9.11. In particular, the Municipality fails to address those aspects of its plan the Commission found to be unreasonable and incapable of resolving the identified water access challenges in a sustained manner. Those aspects include:

9.11.1. The Municipality's failure to ensure that water storage facilities are made available to poor residents to ensure that they can access water on days that the Municipality does not provide water through its water trucks or its existing water reticulation system.

9.11.2. The apparent ineffectiveness of the borehole project, in which the Municipality has invested considerable resources. Whilst at the time of the provisional investigative report, only anecdotal evidence was available to the Commission, the Municipality's submissions confirm the abject failure of that project. In this regard, of 189 boreholes drilled, only 56 are functional, which is less than 30%. To persist with such a project as a measure for addressing water access challenges in the Municipality appears to be unreasonable, therefore, given the costs involved in implementing such a project and the expected yields. Given the abject failure of the project, there may be a need for a further investigation into the possible maladministration and mismanagement of the project.

9.11.3. The delays in the finalisation of the Moses River Project, which was due for completion in the 2019/2020 financial year.

9.11.4. The inordinate delays in the implementation of the Loskop Bulk Water Project and the failure to factor current and future demand in the implementation of that project, given the ever-increasing population of that Municipality.



9.12. In view of the above, whilst water access has reportedly improved at Zakheni as per the submissions of the Municipality and one of the members of that community, overall, the measures proposed by the Municipality and DWS remain unreasonable for the reasons advanced in paragraph 8 above. More is therefore required from the Municipality and DWS.

9.13. In the short term, it would be necessary to ensure a more regular supply of water to all affected communities, whether through the existing water reticulation system or water trucks. Water supply through the water trucks and the reticulation system would need to be augmented by water tankers within 200 metres of every household to ensure water access for all members of the affected communities, particularly the poor, on days when the Municipality does not provide water. The number and volume of the water tanks that would be required would be determined by the population size and water needs of each community.

9.14. In the medium to long term, it would be necessary to expedite the completion of the water projects currently underway, including the Loskop Bulk Water Project, to ensure the adequate supply of water to the Municipality for onward distribution to residents. In addition, the project would also need to factor in current and future demands due to the ever-growing population of the Municipality to ensure that the Municipality does not find itself in a cycle of crises insofar as water provision is concerned.

9.15. Insofar as the request that members of Zakheni be assisted to recoup the costs of repairing a communal tap in their community is concerned, such a request cannot be given effect to unless the costs are quantifiable and can be reliably verifiable. The request, as it stands, does not, however, meet any of the above criteria.

## **10.FINDINGS**

10.1. The Commission makes the following findings:

10.1.1. The allegations of water access challenges within the Municipality have been established.

- 10.1.2. The water access challenges within the Municipality constitute a violation of residents' right of access to basic water supply as contemplated in section 27(1)(b) of the Constitution, and section 3(1) of the WSA, read with section 3 of the Compulsory National Water Standards.
- 10.1.3. The measures taken by the Municipality, with the assistance of DWS and Nkangala, to address the identified challenges are not reasonable in their conception and implementation, as they do not appear to be capable of realising residents' right of access to basic water supply in the short to long term.
- 10.1.4. The allegations relating to the sale of water to residents by municipal officials and impropriety in the Municipality's dealings with Mamolato Construction do not fall within the Commission's jurisdiction and should be indirectly referred.

## 11. DIRECTIVES

- 11.1. In light of the findings set out in paragraph 10 above, the Commission makes the following directives:
  - 11.1.1. Within 3 months of this report, the Municipality to submit a revised Council approved plan for addressing the water access challenges within its jurisdiction in the short term, with due regard to the needs of poor residents who cannot store large quantities of water at a given time.
  - 11.1.2. Within 3 months of this report, the Municipality and DWS to jointly reconsider the Loskop Dam Bulk Project insofar as it pertains to the Municipality, with the view to aligning the projected water supply with the growing water demand. A revised project plan is to be submitted to the Commission thereafter for its consideration.
  - 11.1.3. Within 30 days of this report, the Municipality to submit a report on the status of all its current water projects and the expected completion dates.
  - 11.1.4. Within 30 days of this report:

P. N

- a) The DWS to submit a report on the status of the Loskop Bulk Water Project, as well as the reason(s) for the delays in the implementation of that project, together with the measures it will be taking to ensure the expedition of the project, in view of the water access challenges at the Municipality and other surrounding Municipalities.
- b) The DWS to submit a report on the reason(s) for the delays in the processing of the Municipality's Water Use License, together with the measures to be taken to expedite the processing of the license application, in view of the water access challenges at the Municipality and other surrounding Municipalities.

11.1.5. The First Complainant to refer the alleged impropriety in the Municipality's dealings with Mamolato Construction to the Office of the Public Protector or the Special Investigative Unit for further investigation. The findings by the appropriate bodies in this regard should, in turn, be provided to the Auditor-General South Africa. In addition, the Commission will provide a copy of this report to both these bodies created in terms of the Constitution.

11.1.6. The Complainants and residents to refer complaints relating to the alleged illegal selling of water by municipal officials and/or contractors to the police and the Office of the Public Protector for further investigation.

SIGNED AT DURBAN ON THE 15 DAY OF NOVEMBER 2021.

  
\_\_\_\_\_

Commissioner  
South African Human Rights Commission