



**South African Human Rights Commission**

***Report of the Gauteng Provincial Investigative Hearing  
Into the Charlotte Maxeke Hospital Protests***

**[14 June 2018]**

## **FOREWORD**

Protests are a regular feature in South Africa and the right to peacefully assemble, demonstrate, picket and to present petitions is an essential characteristic of a democratic society. However, few of these protests have had an impact on the rights of patients to enjoy access to healthcare in a safe environment. At the highest level, there is a broad and general positive right for everyone to have access to healthcare services.

While the Constitution guarantees a broad range of economic, social and cultural rights (socio-economic rights) as well as civil and political rights, it also specifically recognises the right to assemble, demonstrate, picket and present petitions peacefully and unarmed. This right is given effect to by the Regulation of Gatherings Act, 205 of 1993.

Incidents at Charlotte Maxeke Hospital drew heightened attention to the extent and nature of the impact that protest-related action has on the patient's rights to healthcare. The protests highlighted the major task of healthcare professionals which is to preserve human physical and mental well-being of patients. These protests started with a simple demand of the healthcare professionals. It was a demand that they should be paid their incentives and increases in terms of the Performance Management System. The protests for this demand, however, turned violent as certain facilities were trashed and as a result, some surgical procedures were interrupted. These incidents had a negative impact on the provision of healthcare services and risked the right of access to healthcare services to thousands of hospital users.

In presenting this report, the South African Human Rights Commission seeks to contribute to positive change in the public health care sector in South Africa, through continuous engagement relating to the report's findings, monitoring of the implementation of the recommendations contained herein and advocacy to support systemic change.

## **ACKNOWLEDGEMENTS**

The South African Human Rights Commission (“Commission”) wishes to acknowledge the contribution of the many individuals who assisted in the successful completion of this investigation. Without relevant stakeholders coming forward and narrating to the Commission what took place during the protest and why, this report would have been very hard to produce and the findings and recommendations difficult to make.

The Commission therefore expresses its appreciation to all the unions, senior management of the Charlotte Maxeke Hospital, members from the provincial Department of Health and others who came forward with the evidence that enabled the Panel of the Commission to understand and put in context the unfortunate protests that caused disruption to the normal activities of the hospital, thereby enabling the Commission to produce this report. The Commission is also grateful to the South African Police Service (SAPS) and the Gauteng Department of Health that submitted information or responded to questions on request.

The Commission is also grateful to its Gauteng Provincial Office, particularly the Provincial Manager, Buang Jones, for recognising the need for an investigation of this nature. Secondly, the Commission would like to extend its gratitude for the guidance and expertise offered throughout the process by the Hearing Panel, chaired by Buang Jones, with Kelly-Anne Cleophas and Princess Kelebogile Ka-Siboto of the Legal Services Unit. The Commission is thankful for their contributions in conducting the Hearing and in finalising this Report. An expression of thanks is also extended to Zamakhize Mkhize, Thenjiswa Jonas, Jackson Mzila and Mateenah Hunter-Parsonage for their assistance throughout the process.

The South African Human Rights Commission (SAHRC) dedicates this report on the Charlotte Maxeke Hospital Protests to all users of public healthcare facilities.

## LIST OF ACRONYMS AND ABBREVIATIONS

|                          |  |
|--------------------------|--|
| African Charter          | The African Charter of Human and Peoples' Rights   |
| CEO                      | Chief Executive Officer  |
| Commission / SAHRC       | South African Human Rights Commission  |
| COSATU                   | The Congress of South African Trade Unions   |
| Department               | Gauteng Department of Health   |
| ExCo / ExCo Subcommittee | Gauteng provincial sub-committee set up to oversee the Gauteng Department of Health        |
| GPO                      | Gauteng Provincial Office of the South African Human Rights Commission                     |
| ICCPR                    | International Covenant on Civil and Political Rights                                       |
| IPID                     | Independent Police Investigative Directorate   |
| LRA                      | Labour Relations Act 66 of 1995  |
| MEC                      | Member of the Executive Council, Gauteng Department of Health                              |
| NEC                      | National Executive Committee of the National Education, Health and Allied Workers' Union   |
| PEC                      | Provincial Executive Committee of the National Education, Health and Allied Workers' Union |
| PMDS                     | Gauteng Provincial Government's Performance Management Scheme                              |
| POP                      | Public Order Policing Unit of the South African Police Service, Gauteng                    |
| PSA                      | Public Servants Association of South Africa  |
| RGA                      | Regulation of Gatherings Act 205 of 1993   |
| SAHRC / Commission       | South African Human Rights Commission  |
| SAHRC Act                | South African Human Rights Commission Act, 40 of 2013                                      |
| SAPS                     | South African Police Service   |

VisPol

Visible Policing Division of the South African Police  
Service, Gauteng

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# **1. Introduction and background**

## **1.1 Background**

1.1.1 In May 2018, Charlotte Maxeke Johannesburg Academic Hospital became the centre of a national incident, when striking hospital staff embarked on a protest in the hospital that brought parts of the institute to a standstill and left the facilities dishevelled. These events appeared to be the result of a long simmering dispute between hospital workers and the Gauteng Department of Health (Department of Health) over wage increases and non-payment of bonuses. The workers are understood to be primarily cleaners, porters and operators.

1.1.2 Reports indicated that the protest action severely disrupted the hospital's operations, with protesters barring access to the building, trashing certain facilities, and even interrupting surgical procedures. Such a disruptions had a negative impact on the provision of health services to thousands of hospital users, by severely limiting the right of persons, who make use of public health facilities, to access adequate health care.

1.1.3 The dispute centred on the non-payment of incentives and increases in terms of the Gauteng provincial government's Performance Management Scheme (PMDS).

1.1.4 This incident speaks to a larger trend that warranted the South African Human Rights Commission (SAHRC or Commission)'s investigation. The right to protest – freedom to assemble, peacefully and unarmed – is a cornerstone part of the political and expressive rights contained in the South African Constitution. It is central to the



struggle of ordinary people to be seen and heard, and to access and enforce their other rights. There is also growing concern that protest rights may be imperilled<sup>1</sup>, with many examples on record of authorities showing hostile and often unlawful attitudes towards people trying to exercise this basic right<sup>2</sup>. Indeed, in the months since the Commission held the hearing from which this report stems, the Constitutional Court has struck down provisions from two Acts in cases brought by community activists who said their legitimate rights to protest and dissent had been criminalised<sup>3</sup>.

1.1.5 By their very nature, in order for protests to be effective, they must often be disruptive to the status quo. However, there is also a significant risk for protests, if not exercised within the confines of the Constitution and the law, to restrict or disrupt the rights of others, or indeed the rights of participants of the protests themselves. The significance of this question is even greater, given signs of a gradual rise in the number of protests in South Africa, and an increase in the rate of protests that are disruptive and violent in nature<sup>4</sup>. The Commission has already considered an aspect of this problem in a nationwide inquiry into the impact of certain protest action on children's right to basic education<sup>5</sup>.

1 See, for example, J Duncan, *Protest Nation: The Right to Protest in South Africa*. Durban: UKZN Press, 2016

2 Right2Protest Project, 'Report on the state of protest in South Africa October 2016 – September 2017', September 2018. Available at: [https://www.r2p.org.za/?media\\_dl=229](https://www.r2p.org.za/?media_dl=229)

3 These are *Mlungwana and Others v The State and Another* [2018] ZACC 45 and *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* (CCT174/18; CCT178/18) [2019] ZACC 40

4 P Alexander et al, 'Frequency and turmoil: South Africa's community protests 2005-2017'. *South African Crime Quarterly*, No 63 (2018): March 2018. Available at: <https://journals.assaf.org.za/sacq/article/view/3057>.

5 SAHRC, 'National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa,' 2016. Available at: <https://www.sahrc.org.za/home/21/files/WEBSITE%20Impact%20of%20protest%20on%20edu.pdf>

1.1.6 The protests at Charlotte Maxeke Johannesburg Academic Hospital drew attention to the potential for healthcare to be similarly disrupted by protest action, often driven by legitimate grievances. Limited state resources are one key factor in the struggling health sector, but previous investigations have found misspending and poor management of funds to be another<sup>6</sup>. The possibility exists that poor conditions for workers or patients in the provision of healthcare may lead to further protests and disruptions, which may have a further negative effect on access to healthcare.

1.1.7 Faced with this, the Gauteng Provincial Office of the Commission (GPO) initiated its own investigation to get clarity on the events of 31 May 2018, what led to them, and what can be done going forward. The GPO established a Panel to hear submissions from representatives of the Gauteng Department of Health, the Hospital, two labour organisations representing hospital workers, and the South African Police Service (SAPS). In particular, the Panel was tasked with determining:

- a) The cause of the protest;
- b) Steps taken by the Gauteng Department of Health and the Hospital before, during and after the protest to protect the Hospital's patients as well as the interests of its employees;
- c) Steps taken by the SAPS in relation to the protest;
- d) The position of National Education, Health and Allied Workers' Union (NEHAWU) and the Public Servants Association of South Africa (PSA) in relation to their members who are employed by the Hospital, and to the protests themselves; and
- e) Any other matter relevant to the Commission's mandate.

6 Moseneke J. The Life Esidimeni Arbitration Report. Available at <http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf>.

- 1.1.8 This exercise was not a criminal inquiry or an assessment of financial liability, but an effort by the Commission to understand the causes of the protest action and disruption and steps taken (and not taken) by stakeholders to ensure the protection of human rights, in the event of similar future disruptions.

## **1.2 Mandate of the Commission**

- 1.2.1 The Commission is an independent institution established in terms of section 181 of the Constitution of the Republic of South Africa to support constitutional democracy. Section 184(1) provides that the Commission must:

- a) Promote respect for human rights and a culture of human rights;
- b) Promote the protection, development and attainment of human rights; and
- c) Monitor and assess the observance of human rights in the Republic.

- 1.2.2 Section 184(2) of the Constitution empowers the Commission to monitor, investigate, research, educate, lobby, advise and report, on matters where human rights may have been violated. The South African Human Rights Commission Act, 40 of 2013 (SAHRC Act) gives the Commission additional powers and functions.

## **1.3 Composition of the Hearing Panel**

- 1.3.1 The panel was composed as follows:
- a. Mr Buang Jones, Gauteng Provincial Manager of the South African Human Rights Commission and Panel Chair;

- b. Ms Kelly-Anne Cleophas, Senior Legal Officer of the South African Human Rights Commission; and
- c. Ms Princess Kelebogile Ka-Siboto, Senior Legal Officer of the South African Human Rights Commission.

## **1.4 Nature and Structure of the Proceedings**

1.4.1 The proceedings were inquisitorial in nature. Respondents were required to make written and oral submissions. The submissions made by the respondents were in response to the questions posed in their respective invitations. After hearing the oral submissions, the panellists had the opportunity to ask further questions of clarity pertaining to the submissions.

1.4.2 After the hearings, the Panel wrote to all parties requesting additional information and inviting further written submissions. Ms Gladys Bogoshi provided an additional written submission.

## **2 Legal and policy framework**

### **2.1 International Obligations**

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

2.1.1 Article 20 of the Universal Declaration of Human Rights provides that “Everyone has the right to freedom of peaceful assembly and association”<sup>7</sup>.

7 UN General Assembly, Universal declaration of human rights (217 [III] A), 1948. Paris.

- 2.1.2 Article 25 of the Universal Declaration of Human Rights recognises the right of everyone to an “adequate standard of living for the health and well-being of himself and of his family including medical care”<sup>8</sup>.

### **International Covenant on Civil and Political Rights**

- 2.1.3 Article 21 of the International Covenant on Civil and Political Rights (ICCPR) states that:

“The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others”<sup>9</sup>.

### **International Covenant on Economic, Social and Cultural Rights**

- 2.1.4 Article 12 of the International Covenant on Economic, Social and Cultural Rights provides for the “enjoyment of the highest attainable standard of physical and mental health conducive to living a life of dignity”<sup>10</sup>.

### **African Charter on Human and People’s Rights**

8 Ibid.

9 UN General Assembly, International Covenant on Civil and Political Rights. Treaty Series, 999, 171.

10 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993.

2.1.5 Article 11 of the African Charter on Human and Peoples' Rights (African Charter) gives a wide recognition of freedom of assembly, in that it is not specifically limited to 'peaceful' assemblies.

2.1.6 Article 16 of the African Charter also recognises the right of individuals to enjoy the best attainable state of physical and mental health and further enjoins State parties to take the necessary steps to protect the health of their people and to ensure that they receive medical attention when they are sick<sup>11</sup>.

## **2.2 Domestic Law and Policy**

### **Constitution**

2.2.1 The Bill of Rights in the Constitution of the Republic of South Africa "affirms the democratic values of human dignity, equality and freedom."

2.2.2 Section 17 of the Constitution enshrines the rights to assembly, demonstration, picket and petition:

"Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

2.2.3 The right to free assembly is closely linked to other rights protected in the Constitution, including freedom of expression, association and political rights, and the labour rights guaranteed in Section 23.

11 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

2.2.4 Section 27 of the Constitution enshrines the right to access healthcare, among other things, and provides that:

“27(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

27(3) No one may be refused emergency medical treatment.”

2.2.5 The Constitution enshrines other associated rights, including those of dignity and life.

### **Regulation of Gatherings Act**

2.2.6 The Regulation of Gatherings Act 205 of 1993 (RGA) is the main law giving effect to freedom of assembly in South Africa. The RGA provides protections and limitations on freedom of assembly, and places various roles and obligations on the convenors and participants of gatherings, the police and other authorities.

#### *Convenors of planned gatherings*

2.2.7 The RGA obliges convenors of a planned gathering<sup>12</sup> to notify the relevant authorities ahead of time and give specified details of the

12 Section 3(2). The RGA defines a “Gathering” as:  
“[a]ny assembly, concourse or procession of more than 15 persons in or on any public road... or any other public place or premises wholly or partly open to the air-  
(a) At which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or  
(b) Held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution. Including any government, administration or governmental institution”.

gathering<sup>13</sup>, participate in any necessary consultations with the authorities<sup>14</sup> and appoint marshals who must take all reasonable steps to ensure that participants of the gathering conduct themselves in line with the provisions of the Act<sup>15</sup>, including that participants should not block entrance to hospitals and other buildings<sup>16</sup>.

2.2.8 The RGA prohibits a range of conduct by any participant, including inciting violence, carrying dangerous weapons, covering their face from identification, or forcing anyone from joining the gathering<sup>17</sup>. The RGA also creates various criminal penalties, including knowingly attending a prohibited gathering, and disobeying instructions from a SAPS member or otherwise hindering anyone from fulfilling their responsibilities under the RGA<sup>18</sup>.

2.2.9 Notably, sections 11(1) and 11(2) of the RGA make conveners of gatherings liable for any harm or injury that falls in the Act's wide definition of "riot damage", unless they can show that the damage was not foreseeable or they took all reasonable steps to prevent it<sup>19</sup>.

### *SAPS and other authorities*

2.2.10 Broadly speaking, the RGA requires police and other authorities to take an accommodating approach to the exercise of freedom of assembly, and wherever possible to address legitimate safety

13 Section 3 of the RGA provides that 7 days' notice should be given, or at the soonest opportunity if fewer than 7 days. In the case of gatherings outside Parliament, the Union Buildings, and court buildings, the RGA requires conveners to seek additional permission.

14 Section 4(1) of the RGA.

15 Section 8(1) of the RGA.

16 Section 8(9) of the RGA.

17 Section 8(4)-(10) of the RGA.

18 Section 12 of the RGA.

19 The RGA defines "riot damage" as: "*any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering*".



concerns that might arise from a gathering without interfering unduly in the gathering itself.

2.2.11 When the authorities (usually the municipality) receive notification of a gathering or otherwise learn of an intended gathering, any legitimate safety concerns arising from the proposed gathering should be discussed at a meeting between the convenors, the SAPS and other relevant officials, with the aim of arriving at any necessary amendments through good-faith negotiations<sup>20</sup>. Authorities may only prohibit a gathering if there is sworn evidence that the gathering may result in serious traffic disruptions, injury or damage to property<sup>21</sup>; and attempts to negotiate suitable alternatives have failed<sup>22</sup>. As an exception, if convenors give less than 48 hours' notice for a gathering, the authorities can prohibit it without giving further reasons<sup>23</sup>.

2.2.12 At the gathering itself, the Act imposes conditions on the police's powers to disperse a gathering and the use of force<sup>24</sup>. Summarised, the conditions are:

- a) A senior officer has reasonable grounds that the gathering is endangering people or property, and that this danger cannot be avoided through less invasive means such as negotiation or diverting the route or negotiating with participants<sup>25</sup>;
- b) In this instance, the officer must call for the gathering to disperse in at least two languages, and give a reasonable time for the dispersal;

20 Section 4(1)-Section 4(5) of the RGA.

21 Section 5(1) of the RGA.

22 Section 5(2) of the RGA.

23 Section 3(2) of the RGA.

24 Section 9(2) of the RGA.

25 The less invasive means are spelled out in Section 9(1) of the RGA.

- c) If the crowd does not disperse in that time, the SAPS may use force to disperse the gathering, provided that the use of force is minimal and excludes the use of weapons likely to cause serious bodily injury or death.

2.2.13 These restrictions apply whether or not the conveners or participants follow the procedures outlined in the RGA<sup>26</sup>.

### **Labour Relations Act**

2.2.14 Section 69 of the Labour Relations Act 66 of 1995 (LRA) contain separate procedures for workplace pickets:

- (1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating -
  - (a) in support of any protected strike;
  - (b) in opposition to any lock-out.
- (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1) may be held –
  - (a) in any place to which the public has access but outside the premises of an employer; or
  - (b) with the permission of the employer, inside the employer's premises.
- (3) The permission referred to in subsection (2) (b) may not be unreasonably withheld.

2.2.15 Section 69(6)c of the LRA provides that no picketing may take place unless picketing rules are agreed to either via a collective bargaining agreement or as determined by a CCMA Commissioner.

2.2.16 Section 65(d) of the LRA prohibits any person who is part of an “essential service” from striking. It is understood that hospital staff have been declared part of an essential services, which makes it unlawful for them to strike.

### **Case law**

2.2.17 In *Satawu and Another v Garvas and Others*<sup>27</sup>, the Constitutional Court recognised the importance of freedom of assembly in this constitutional democracy as follows:

“It [freedom of assembly] exists primarily to give a 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. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms”<sup>28</sup>.

2.2.18 In *Garvas*, the Court upheld sections 11(1) and 11(2) of the RGA<sup>29</sup>, which hold the conveners of gatherings civilly liable for “riot damage”,

27 *SATAWU v Garvas* [2012] ZACC 13 (*‘Garvas’*)

28 At para [61]

29 “11. (1) If any riot damage occurs as a result of-

(a) A gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

(b) A demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer

unless they can show that the damage was not foreseeable or they took all reasonable steps to prevent it. The applicants argued that this created an impossible burden of proof to conveners who might be held liable for the actions of others. The Court ultimately found the “viable, yet onerous” defence in section 11(2) to be a justifiable limit on freedom of expression. The court found that section 17 of the Constitution gives guarantees only to assemblies that are peaceful and unarmed, but also cited international findings from the European Court of Human Rights:

“[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour”<sup>30</sup>.

2.2.19 In *Mlungwana and Others v The State and Another*, the Constitutional Court noted that “[t]he content and scope of this right must be interpreted generously”.<sup>31</sup> The court pronounced again on the importance of the freedom of assembly to marginalised voices:

“People who lack political and economic power have only protests as a tool to communicate their legitimate concerns.

contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.

(2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves-

(a) That he or it did not permit or connive at the act or omission which caused the damage in question; and

(b) That the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and

(c) That he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.”

30 *Ziliberberg v Moldova* ECHR (Application No. 61821/00), cited in Garvis at para [53].

31 *Mlungwana and Others v The State and Another* [2018] ZACC 45 at para [43]. (*Mlungwana*)

To take away that tool would undermine the promise in the Constitution's preamble that South Africa belongs to all who live in it, and not only a powerful elite. It would also frustrate a stanchion of our democracy: public participation"<sup>32</sup>.

2.2.20 In particular, comparative law speaks to the importance of taking an approach to freedom of assembly that is generous and accommodating.

2.2.21 A joint report of UN Special Rapporteurs found that:

"The right to freedom of peaceful assembly is held by each individual participating in an assembly. Acts of sporadic violence or offences by some should not be attributed to others whose intentions and behaviour remain peaceful in nature"<sup>33</sup>.

2.2.22 On finding a balance of rights, the joint report noted that:

"A certain level of disruption to ordinary life caused by assemblies, including disruption of traffic, annoyance and even harm to commercial activities, must be tolerated if the right is not to be deprived of substance"<sup>34</sup>.

2.2.23 In seeking an interpretation of unjustifiable restrictions of freedom of assembly under the European Convention of Human Rights, the Grand Chamber of the European Court of Human Rights found that an unjustifiable interference with freedom of assembly:

32 *Ibid* at para [69].

33 Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies - 4 February 2016, A/HRC/31/66, at para [11].

34 *Ibid*, at para [32].

“does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities... including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards”<sup>35</sup>.

2.2.24 Elsewhere, a Court found that:

‘interference’ with the exercise of the freedom of peaceful assembly or the freedom of expression does not need to amount to an outright ban but can consist in various other measures taken by the authorities.”<sup>36</sup>

2.2.25 In *Mlungwana*, the Constitutional Court echoed both these findings.

2.2.26 The appropriate balancing of freedom of assembly and the rights of others that may be impacted, is a matter of developing jurisprudence and research globally. This is evidenced by the recent draft General Comment tabled by the UN Human Rights Committee, which seeks to assess international legal frameworks on freedom of assembly in the modern era<sup>37</sup>.

### **3 Submission summaries**

#### **3.1 Gauteng Department of Health (Professor Mkhululi Lukhele, Head of Department)**

35 *Kudrevičius v Lithuania* [GC], no 37553/05, § 91, ECHR 2015.

36 *Novikova v Russia*, nos 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, § 106, ECHR 2016

37 Human Rights Committee, General comment No. 37, Article 21: right of peaceful assembly, available at: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>

3.1.1 Professor Lukhele's submission gave his account of the events of 31 May 2018 and some of the history of the PMDS payments that were a key grievance for workers. Prof. Lukhele conceded that the PMDS payments were part of an existing agreement between the Department and its employees. He submitted that the Executive Council of the Gauteng provincial government had set up a sub-committee to oversee the Health Department, including decision-making on the PMDS payments. As a result, the Department was not able to pay the PMDS incentives without approval from the Executive Council.

*The events of 31 May*

3.1.2 At about 10am on 31 May, Prof. Lukhele was on the way to a public meeting in Sebokeng when he received a call from Ms Bogoshi, CEO of the hospital, informing him that workers were striking and trashing the hospital. Prof. Lukhele contacted the provincial commissioner of the police, who said she was aware of the incident and would get a report from SAPS officials. Prof. Lukhele sent the Department's deputy director general and labour relations officer to the hospital.

3.1.3 Later in the day, he went to the hospital in person and toured the site with the CEO, the Gauteng MEC of Health (MEC) and the Minister of Health (Minister).

3.1.4 He observed that the entrance of the hospital was blocked with rocks and bed material.

3.1.5 He relayed an account by the head of the pharmacy, who barricaded herself with her staff in the pharmacy when strikers tried to enter. At some point, striking workers did get through the doors and told patients waiting for their medication to leave.

- 3.1.6 In the operating theatres, Prof. Lukhele reported that they had been trashed. He relayed an account by a paediatric surgeon who also said he was traumatised by the disruption, and that patients had to be moved by emergency services. Prof. Lukhele submitted that a number of scheduled operations had to be postponed.
- 3.1.7 That afternoon he attended a meeting with hospital management and SAPS representatives to discuss the deployment of police to the hospital. Prof. Lukhele told the panel that the director of security was instructed to preserve video footage of events for later use.
- 3.1.8 According to Prof. Lukhele, the Department called cleaning services to clean the hospital and contracted for removal of rocks and obstructions from the road.
- 3.1.9 The Department secured an urgent court interdict on the evening of 31 May 2018, which was distributed to all health workers. Prof. Lukhele told the panel that this order applied to all hospitals in the province. The panel requested that a copy of the interdict be made available to the Commission; this has not been received.
- 3.1.10 Prof. Lukhele also expressed dissatisfaction with the SAPS' initial response to these events, including shortcomings in the Provincial Commissioner's response.

#### *The PMDS issue*

- 3.1.11 Prof. Lukhele described the PMDS incentives as being a calculation of 1.5% of the 2016/2017 wage bill, which he estimated at about R350 million.



- 3.1.12 In short, Prof. Lukhele's submission suggested that the Gauteng Executive Council had taken firmer control over the Department's spending, meaning the Department no longer had authority over decisions about the PMDS incentive payments. The delays in decision-making on the payments were out of the Department's hands.
- 3.1.13 Prof. Lukhele conceded that the Department's failure to pay PMDS incentives was a major cause of workers' grievances, dating back to before his appointment as acting head and later head of the Department. He estimated that it would ordinarily take six to eight months to pay PMDS incentives.
- 3.1.14 Prof. Lukhele submitted that, in December 2017, the executive council of Gauteng set up a sub-committee to oversee the Department of Health, in light of a range of challenges. This sub-committee ('the ExCo sub-committee') comprised the Premier and various MECs. He submitted that the ExCo sub-committee decided that the Gauteng Department of Health should not pay PMDS incentives. This decision was due to the Department's financial shortfalls.
- 3.1.15 The MEC shared this decision with union leaders in a meeting in December 2017. As a result, there was a protected strike where workers gave a memorandum to the Department of Health and also to the Premier's Office.
- 3.1.16 Prof. Lukhele acknowledges that the payment of PMDS incentives was part of a formal agreement with labour structures, with which the Department of Health was not complying.

- 3.1.17 He submitted that the Department informed the MEC of the grievances raised by union leaders, with a request that this should be raised to the ExCo subcommittee. Prof. Lukhele also expressed concern that it would be unfair to have Gauteng health workers excluded from PMDS incentives, but not other provincial government employees.
- 3.1.18 He told the panel that the Department and unions held a labour summit to discuss several options to cover the payment of incentives, which were tabled with the MEC and the executive council of Gauteng. The NEHAWU submission gave more details of this summit.
- 3.1.19 When asked about the cancelling of a meeting with union leaders, he explained that this was due to lack of updates from the ExCo. He expressed regret to the panel that the Department had not explained the cancellation.
- 3.1.20 Prof. Lukhele conceded that instability in the leaderships of the provincial health sector may have added to the delays in resolving the PMDS payments, including the appointment of a new MEC after the Life Esidimeni tragedy.
- 3.1.21 He expressed sympathy with workers' frustrations but felt that there was a process in motion to resolve those frustrations. He submitted that if there had been an application for a protected strike, the matter would have been escalated.
- 3.1.22 At the time of this hearing, Prof. Lukhele told the panel that the parties had reached an agreement and that the incentives would be paid by 25 June 2018. He submitted that this was in line with an existing commitment and was not the result of the industrial action.

### *Recommendations*

3.1.23 Prof. Lukhele offered the following recommendations to avoid a repeat of these events:

- a) Better communication, to ensure that the full workforce has insights into the financial affairs of the organisation.
- b) More bilaterals, multilaterals and indabas.
- c) Decentralising decision-making to improve communication and transparency.
- d) Better compliance from the Department with decisions and obligations.

### **3.2 Charlotte Maxeke Johannesburg Academic Hospital (Ms Gladys Bogoshi, the Chief Executive Officer)**

3.2.1 Ms Bogoshi's submission gave the panel a timeline leading up to the events of 31 May, which was also detailed in a written submission provided to the GPO on 7 August 2018.

#### *Timeline of events*

3.2.2 Noting the background of employees' grievances around the non-payment of PMDS-related bonuses, Ms Bogoshi submitted that on 4 April 2018 workers notified hospital management of their intention to do lunchtime pickets at the hospital gates starting from 6 April. While management contested that this picket was permitted by the LRA, the management agreed to these pickets provided that these were outside the gates and were confined to lunchtime hours.

3.2.3 Ms Bogoshi's supplementary submission to the GPO included copies of this exchange, which show that the 4 April notification was signed

by a NEHAWU branch secretary. Hospital management gave a written response dated 5 April, which was delivered on 9 April. In this reply, signed by acting CEO Ms M Pule, it is stated that such picketing is done outside of section 69 of the LRA. This picket happened daily.

3.2.4 On 19 April 2018, workers embarked on an unprotected strike. On this day, the first trashing of hospital facilities occurred. Ms Bogoshi noted that she was not present on this day, and was relaying events to her understanding.

3.2.5 After learning that workers were striking, management first contacted NEHAWU shop stewards, who reportedly said they were not aware of the strike. As a result, management then met with regional and provincial representatives of NEHAWU. Ms Bogoshi submitted that NEHAWU's representatives met with its members and relayed their grievances back to hospital management. These grievances included:

- a) Non-payment of bonuses
- b) Non-filling of vacant posts
- c) A plan to cut 50 percent of posts
- d) Non-payment of overtime
- e) Non-payment of doctors on call

3.2.6 Management raised a concern with NEHAWU representatives that workers in the hospital's laundry services were on a go-slow, and as a result the CEO had started to get complaints from other hospitals that linen was not coming back from the laundry services. Ms Bogoshi submitted that low productivity from the hospital laundry services meant that Charlotte Maxeke needed to buy disposable linen. According to Ms Bogoshi, NEHAWU's representatives disputed that there was a go-slow at the laundry service, and said the

backlog was due to broken machines, water leaks and power shortages.

- 3.2.7 At the meeting, hospital management disputed some of the workers concerns about the cutting of posts and non-payment of overtime, but acknowledged the non-payment of PMDS bonuses.
- 3.2.8 On 20 April, Ms Bogoshi reported that the hospital's main gate and emergency gate were locked by striking workers. Ms Bogoshi submitted that the locking of these gates effectively blocked any access to the hospital and prevented ambulances or private cars from being able to get in or out of the emergency area. She further stated that workers blocked off the main entrance to the building where patients are admitted with mattresses, wheelchairs and other objects.
- 3.2.9 On the evening of 20 April, the Department secured an urgent court order declaring the strike to be an unprotected strike, and interdicting nearly one hundred employees from participating in the strike, or blocking the hospital entrance or interrupting service at the hospital.
- 3.2.10 On 24 April, hospital operators also went on a go-slow. These are employees who assist in operating theatres or preparing patients for operations.
- 3.2.11 Striking workers 'trashed' the casualty ward. This included the scattering of medical waste, which must be disposed of by special procedure.
- 3.2.12 Later that day, management addressed workers hoping to get a commitment to prevent any further trashing and for workers to return to the original terms of the picketing.

- 3.2.13 At some point on this day, SAPS used stun grenades to disperse protesters outside. The NEHAWU submission would touch on this incident in more detail.
- 3.2.14 On 25 April, the casualty ward was closed again. Ms Bogoshi submitted that doctors made arrangements to treat patients all the same, but as a result any ambulances that came through the gate would not be able to access the area.
- 3.2.15 On 26 April, in the afternoon one of the hospital gates was again locked and a fire was lit using old mattresses and other debris. This blocked an ambulance from passing through for roughly one-and-a-half (1.5) hours.
- 3.2.16 In previous events on 26 April 2018, unknown people believed to be striking workers poured urine in the casualty ward of the hospital.
- 3.2.17 In one part of the hospital, linen was thrown on the ground, which meant it was contaminated and could not be used. This was on the eve of a long weekend, when the hospital expected an influx of patients.
- 3.2.18 As a result, the hospital had to pay for specialised laundry services. Ms Bogoshi submitted that if the bags that are used to store the linen are contaminated, the hospital must dispose of the linen. She stated that the linen had been purchased the previous year at a cost of about R2 million.
- 3.2.19 Ms Bogoshi submitted that at this time, hospital management first contacted SAPS.

- 3.2.20 Ms Bogoshi submitted that workers resumed the strike on 19 May<sup>38</sup>.
- 3.2.21 On 29 May 2018, unidentified people repeatedly put locks on an emergency entrance to the hospital and created a fire outside the entrance, blocking access to the hospital.
- 3.2.22 On the morning of 31 May 2018, workers embarked on a protest inside the hospital. Unknown people opened taps in a number of bathrooms, leading to flooding, and several parts of the hospital were 'trashed', with strewing of rubbish and medical waste in passageways and theatres.
- 3.2.23 Following these incidents, hospital management laid a criminal complaint with SAPS for intimidation and destruction of property and submitted video evidence to the investigating officer.

*Damage and disruptions to critical healthcare services*

- 3.2.24 Ms Bogoshi submitted that the known costs of the damage ran to about R3 million at the time of the hearing, although she told the Panel that additional costs such as increases to the hospital's water bill would only be incurred later.
- 3.2.25 Ms Bogoshi told the panel that the costs incurred may result in elective surgeries being postponed due to lack of funds.
- 3.2.26 Hospital staff and patients were intimidated and prevented from giving or receiving care. In one instance, a nurse and a patient locked themselves in a bathroom out of fear for their own safety.

38 This information was in Ms Bogoshi's supplementary submission.

3.2.27 Ms Bogoshi submitted that one patient who could not be admitted during the hospital shutdown subsequently died, and that she was unaware of what other impact the shutdown had on specific patients.

*Role of hospital management in labour disputes*

3.2.28 Hospital management had a series of meetings with shop stewards and provincial union representatives before and during the shutdown, but highlighted a lack of communication and forewarning about the events of 31 May 2018.

3.2.29 Labour unions' grievances relate to the provincial Department of Health, and do not fall within the powers of hospital management.

3.2.30 Hospital management did not receive the memorandum of demands sent to the provincial Department.

*SAPS activity*

3.2.31 Ms Bogoshi expressed dissatisfaction with the level of support from SAPS in the lead-up to 31 May 2018.

3.2.32 During the events leading up to the 31 May shutdown, the SAPS was only able to provide limited support because of limited capacity and other protest action in the area. On 29 May 2018, when unidentified protesters locked the entrance gate, Ms Bogoshi submitted that four police members were deployed to the hospital.

3.2.33 During and after the 31 May shutdown, SAPS became heavily involved. Ms Bogoshi submitted that the shutdown may have been averted if SAPS had been able to act more decisively on criminal acts in the days prior.



### *Security and openness of the hospital*

- 3.2.34 Ms Bogoshi submitted that there are risks to the hospital adopting more security. Hospital security has a limited mandate to protect access to the facility and ensure the safety of staff and patients. The functioning of the hospital requires a balance between security control and access, due to the high number of staff and patients arriving at the facility every day.
- 3.2.35 Ms Bogoshi highlighted the risk that increasing security at the hospital would mean diverting funds from other public health priorities. On top of this, she emphasised that public hospitals are by definition public facilities and should strive to remain open and accessible to members of the public who need care.

### **3.3 NEHAWU (Gracia Rikhotso, Provincial Deputy Secretary; Lulamile Sibanda, Provincial Chairperson)**

- 3.3.1 NEHAWU's representatives outlined 14 months of engagement over the non-payment of PMDS bonuses, and increasing frustration and distrust from workers.

### *Grievances with management*

- 3.3.2 The Department's failure to resolve the non-payment of bonuses in line with the PMDS led to growing frustration and anger among workers. According to NEHAWU, the Department had yet to resolve payment of bonuses for the 2016/17 financial year.
- 3.3.3 NEHAWU cited a series of engagements over 14 months between unions, hospital management and the Department.

- 3.3.4 NEHAWU's representatives also indicated that workers were owed a salary increase at the start of the new financial year (1 April 2018) which had not been paid.
- 3.3.5 On 18 March 2018, workers delivered a memorandum to the MEC during a march which detailed seven demands, including the payment of bonuses and the in-sourcing of cleaning and security staff.
- 3.3.6 Workers are over-stretched in their duties.
- 3.3.7 Union representatives and hospital management were due to meet again on 18 May 2018, but the meeting was postponed by SMS by the employer. This appears to have been a key event that escalated the conflict.

*Status of members*

- 3.3.8 NEHAWU was at pains to condemn the actions of striking workers on 31 May 2018. The deputy provincial secretary offered that the events of 31 May 2018 were the result of worker action being 'hijacked' by criminal elements.
- 3.3.9 This submission did not dispute that there was criminal behaviour among striking workers, including damage to public property and the blockading of entrances and thoroughfare. It was agreed that the conduct of workers infringed on patients' care.
- 3.3.10 The representatives disputed Ms Bogoshi's statement that the initial picketing was unprotected, saying that a dispute had been lodged.

### *Actions by unions*

- 3.3.11 In the days leading up to 31 May 2018, the union representatives gave several examples of attempting to mediate with workers. After the postponement of a negotiation meeting on 18 May, they convened a sector meeting of public health in order to report back to members and try to calm members down.
- 3.3.12 On 24 May 2018, NEHAWU and the Congress of South African Trade Unions (Cosatu) national office bearers met the MEC, and on 30 May 2018 they held a special multilateral meeting. Following the incidents of 31 May 2018, five unions convened a meeting with members on 5 June 2018 to address workers' frustrations.
- 3.3.13 In one instance in April 2018, union leaders submitted that they had tried to intervene with striking workers on the ground to de-escalate the situation and ensure access to the hospital was protected, but the SAPS would not give them a platform before dispersing the crowd.
- 3.3.14 As an example of a constructive intervention, the chairperson did intervene to ensure one door to the hospital was opened.
- 3.3.15 A special sitting of the National Executive Committee (NEC) on 8 June 2018 and a meeting of the Provincial Executive Committee (PEC) on 11 and 12 June 2018 resolved to investigate the conduct of members during the incident, although the action points from these resolutions were not considered by the Panel.
- 3.3.16 At the investigative hearing, the NEHAWU representatives undertook to formally request video footage of the incidents from the employer.

3.3.17 NEHAWU's representatives undertook to continue education and training of its members on strike and protest action to prevent future conduct of this nature.

#### *Responsibility and liability*

3.3.18 NEHAWU representatives took the view that hospital administrators should bear the cost of damage from the 31 May shutdown, arguing that the employer's failure to deliver on its own policy led to workers' frustrations boiling over.

3.3.19 The representatives invoked the metaphor of shifting goalposts, where the employer made undertakings and agreed to deadlines, which then lapsed. These shifting goal posts both fuelled worker frustrations, and also created rifts between union leaders and members, as members lost faith in the commitments their representatives had convinced them to agree to.

3.3.20 The deputy provincial secretary offered that the employer should not have been surprised at the events of 31 May 2018, given that workers had communicated their legitimate grievances in various letters and memoranda and these remained unresolved. At several meetings, NEHAWU representatives told the employer that the members were losing patience.

#### *Conduct of SAPS*

3.3.21 NEHAWU submitted that, during the initial protests in April, they had tried to intervene with striking workers on the ground, to de-escalate the situation and ensure that workers did not block access to the hospital. They requested the ranking SAPS member on the scene, a female officer who was not named, to allow five minutes for them to

engage workers. They submitted that the officer would not allow them to address the crowd and counted to five before dispersing the crowd with stun grenades and rubber bullets.

3.3.22 As a result, ten workers were injured, including the regional chairperson of NEHAWU who was not participating in the gathering but was there as one of the union leaders attempting to de-escalate the situation.

3.3.23 In this version, the decision to disperse the crowd prevented any further negotiations.

#### **3.4 Public Servants Association of South Africa (Yolanda Ralawe)**

3.4.1 In a brief submission to the panel, Ms Ralawe said that the PSA had publicly distanced itself from the protests through a media statement and a notice to members, given the status of health services as an essential service.

3.4.2 She shed more light on the history of non-payment of the PMDS incentives. She submitted that the PSA had previously secured a court order in 2010 to ensure PMDS payments but the Department did not comply.

3.4.3 She stated that PMDS payments are a recurring problem, and every year unions struggle to meet the demands of their members.

3.4.4 Ms Ralawe stated that nobody should be held responsible for any damages, as they were the result of an institutional failure. She

suggested that the Department and organised labour work together towards a solution.

- 3.4.5 She could not confirm if PSA members were involved in the protests and submitted that the PSA is conducting interviews to determine if any members participated.

### **3.5 The South African Police Service**

- 3.5.1 In their submission to the panel, representatives of SAPS disputed several statements made in submissions by the other parties. SAPS submitted that its members had little prior warning or involvement in events leading up to 31 May 2018, and faced significant disadvantages in their efforts to secure the hospital and restore order.

#### *Major General Hendricks*

- 3.5.2 The first part of SAPS' submission to the panel was made by Major General Hendricks, from SAPS legal services. Major Gen. Hendricks expressed frustration at the criticism that they had not intervened earlier in events or made any arrests. In explaining the constraints on police powers, he submitted that:
- 3.5.3 Prior to 31 May 2018, SAPS did not receive any criminal complaints or reports of disturbances relating to disruption or vandalism at the hospital.
- 3.5.4 This was compounded by the fact that protesting workers had not given any notice of a gathering in terms of the RGA, or applied for a protected strike in terms of the LRA.

- 3.5.5 On 27 and 30 April 2018, senior SAPS members met with hospital management to discuss the first court order, dated 20 April 2018, which interdicted specific NEHAWU members from taking part in certain activities at the hospital. Major Gen. Hendricks submitted that SAPS did not get assistance from hospital management in identifying those individuals, or information relating to possible violations of the court order. SAPS legal services advised hospital management to seek an amended court order that was not limited to particular individuals, but Maj. Gen. Hendricks submitted that SAPS did not receive an updated court order.
- 3.5.6 Following the events of 31 May 2018, SAPS submitted that it had not received assistance from witnesses and hospital management to press criminal charges in instances where criminal conduct had occurred without a SAPS member present.
- 3.5.7 Major Gen. Hendricks cautioned that when SAPS members are put under external pressure to make arrests, this can result in unlawful arrests.
- 3.5.8 The SAPS submission was confined to the events of 31 May and 1 June 2018, and did not speak in detail to SAPS's conduct during previous protests and strike action at the hospital. SAPS submitted that no members used rubber bullets or stun grenades on 31 May and 1 June 2018, and stated that no shooting incidents were reported to the Independent Police Investigative Directorate (IPID).
- 3.5.9 Where NEHAWU representatives had submitted that SAPS had used unnecessary force in dispersing pickets during one of the April protests, the SAPS representatives pleaded that they did not have information on hand to respond to those allegations. Having said that,

Major Gen. Hendricks conceded that the Public Order Policing (POP) Unit had used rubber bullets and stun grenades in previous instances at the Hospital.

3.5.10 Major Gen. Hendricks denied that SAPS members had been equipped with R5 rifles, referring to a statement in the NEHAWU submission. Citing the findings of the Farlam Commission, he stated that POP members are not issued with R5 rifles, although the Visible Policing Division (VisPol) sector vehicles do have R5s in order to respond to armed robberies and other incidents.

*SAPS representative*

3.5.11 The SAPS representative presented to the panel on SAPS's role during the shutdown of the pharmacy.

3.5.12 After the situation was brought under control at the Emergency ward, SAPS representatives met with hospital management and union representatives in the hospital boardroom to discuss the next steps.

3.5.13 During the meeting, they received reports that other workers had mobilised to 'trash' the pharmacy, after which the SAPS representative left the meeting to go to pharmacy.

3.5.14 He reported that about 300 people were picketing in the pharmacy.

3.5.15 He told the panel that workers from the pharmacy shut down the pharmacy and joined the striking workers.

3.5.16 He submitted that SAPS was unable to disperse the crowd safely due to the risk of stampede and the presence of elderly and sick patients in the area.



*Colonel Beeslaar*

- 3.5.17 Colonel Beeslaar, Unit Commander for the Johannesburg Public Order Policing unit, presented on SAPS's operations at the hospital on 31 May and 1 June 2018.
- 3.5.18 He outlined four principles in SAPS crowd management: legality, situation appropriateness, optimisation of resources and proportionality.
- 3.5.19 He submitted that after calm was restored to the hospital on the afternoon of 31 May 2018, SAPS mobilised more resources in preparation for the next day. These includes additional POP and VisPol members, Crime Intelligence, vehicles, a water cannon, and other equipment.
- 3.5.20 At 8:00am on 1 June 2018, there was a meeting between SAPS and hospital management to discuss the implementation of the new court order. He said that hospital management expressed a willingness to allow striking workers to sing and dance in the corridors as long as it did not disrupt essential services such as operations or cancer treatment; however, SAPS management did not want to permit any marching or protest activity within the hospital premises.
- 3.5.21 At about 10:30am on 1 June 2018, about 230 workers gathered in a main passage on the Hospital Street side of the building and started marching towards outpatients, but that POP members formed a line and walked the crowd towards the exit of the building. He submitted that this was done without making physical contact.

3.5.22 However, some of the marchers ran into side passages and stairways and POP members pursued them. Colonel Beeslaar submitted that there was “conflict” between those members and workers they encountered. Colonel Beeslaar offered the view that other workers protected and harboured those who were being pursued by the police.

3.5.23 Colonel Beeslaar submitted that outside the hospital premises, union representatives asked to be able to address workers and SAPS agreed. At around 12pm, the workers left to attend a mass meeting and returned at 1pm, informing SAPS that they were happy with the outcome. The agreement was to be signed by 3 June 2018, and payment was to be made by 15 June 2018, with workers returning to work. There were no further incidents.

#### *Brigadier Levhuhuwi*

3.5.24 Brigadier Levhuhuwi submitted that there was one complaint about police conduct during 31 May and 1 June 2018. The complaint was from a hospital employee who said SAPS mistook him for a striking worker and had tried to arrest him.

#### *Budgetary challenges*

3.5.25 SAPS submitted that under-resourcing and high demands on public order policing had seriously impacted the ability of police to respond effectively to disruptions such as the Charlotte Maxeke protests. By way of example, SAPS submitted that in the week of 31 May, the majority of POP in Gauteng were deployed to a severe and ongoing community protest in Mohlakeng on the West Rand. Of 66 POP members on duty on that day, 44 were deployed to the West Rand and 16 were deployed to Charlotte Maxeke.

3.5.26 Major. Gen. Hendricks submitted that the National Treasury cuts the SAPS human resources intake by 3% every year, and that there was currently one SAPS member to every 530 people in Gauteng.

3.5.27 Colonel Beeslaar submitted that there are two provincial units in Gauteng, in East Rand and Johannesburg. A third unit in Pretoria has become a national unit. There were satellite units in Krugersdorp and Vaalrand which are not fully fledged. The Johannesburg unit has 341 members, of which 19 are civilian staff. He stated that SAPS intends to increase the number of POP units.

*Operational*

*challenges*

3.5.28 From an operational point of view, Colonel Beeslaar submitted that several factors made SAPS's task more difficult:

- a) Striking workers arrived dressed for work and were already inside the building before starting the strike. This prevented police from being able to identify striking workers and stop them from entering the building.
- b) The size and complexity of the hospital layout prevented the SAPS from effectively securing the building. SAPS had no prior knowledge of the key points of the building which needed to be secured to ensure the functioning of the hospital.
- c) Police did not have any prior intelligence about the motives or intentions of the protesters on 31 May.
- d) As previously submitted, SAPS often did not get specific complaints or reports of criminal behaviour, limiting the scope for police to act on specific offences.
- e) The first court order identified specific individuals, but SAPS did not get enough assistance in identifying the employees who were contravening a court order.

- f) In some instances, non-striking workers gave support or assistance to striking workers and were reluctant to assist SAPS.
- g) For safety reasons, the presence of patients in the passages limited SAPS's ability to disperse or remove protesting workers by force.

### *Recommendations*

3.5.29 SAPS offered a list of recommendations, principally for hospital management, to assist SAPS in the event of future disruptions.

- a) **Early warning system:** While Hospital management and the Department of Health submitted that the events of 31 May could not have been anticipated, the SAPS submitted that previous disruptions, acts of vandalism and possible court order violations could have activated police involvement at an earlier stage.
- b) **Better lines of communication:** SAPS submitted that a better line of communication between hospital and authorities would enable more effective intervention by SAPS. This includes ensuring that SAPS receives copies of court orders, gets assistance in identifying employees that are bound by the court order, and ensuring that any disruptions or criminal complaints are reported in good time.
- c) **Contingency plan for disruptions:** SAPS recommended that hospital management develop a contingency plan to safeguard its work against future disruptions, with the hospital's security service taking primary responsibility for securing the premises, and SAPS playing a supporting role.
- d) **Access control and security measures:** SAPS recommended that the hospital improves security and access control in certain areas, for example by installing doors at

entrances to key locations. This would enable SAPS or security staff to be deployed more effectively in case of a disruption.

## **4. Findings**

The Commission makes the following findings:

### **4.1 The nature of the protests**

4.1.1 Those responsible for shutting down, blocking access to or trashing the hospital affected patients' right to healthcare and acted outside of their rights to assembly and protest. Nonetheless, these protests were underpinned by legitimate frustration.

4.1.2 Despite being legitimately aggrieved, workers who engaged in trashing of hospital facilities and blocking access did have other avenues to vent these grievances which would have had less negative effect on patients' rights. It should be emphasized that even where there are no other such avenues, it is not legitimate and it amounts to a human right violation, to deny anyone the right to access health care services, this, being a right entrenched in the Constitution.

### **4.2 The causes of the protest**

4.2.1 The Gauteng government's failure to resolve workers' legitimate grievances created conditions for the 31 May protests.

4.2.2 The employer's apparent delays and 'moving goal posts' in engaging workers' grievances contributed to a climate of anger and distrust

among employees and undermined union leaders' ability to engage with their members.

4.2.3 This was compounded by centralised decision-making which resulted in key role-players being sidelined. It is a given that hospital management, which received the brunt of workers' grievances, did not have the power to meet their grievances. However, the decision to place financial oversight with the Gauteng ExCo sub-committee meant that the Department itself did not have the authority to address employees' demands.

4.2.4 Serious breakdowns in communication and trust between all stakeholders hampered any opportunity to forestall the disruptions and resolve grievances productively.

4.2.5 These conditions put the delivery of health services to the public at risk.

### **4.3 Steps taken by the Gauteng Department of Health and the Hospital prior to, during and after the protest to protect the Hospital's patients as well as the interests of its employees;**

4.3.1 Hospital management's delay in acting on unlawful acts in the lead-up to the 31 May protests put the delivery of health services to the public at risk. It is common cause that there were serious disruptions on 19 April and 20 April, which led the Department to get an interdict against the strike. Despite that court order, there was further trashing from 24 to 26 April. However, hospital management only formally engaged SAPS on enforcing the court order and securing the hospital on 26 April.

#### **4.4 Steps taken by the SAPS in relation to the protest;**

4.4.1 The steps taken by the SAPS on 31 May appear to have been necessary and proportionate under the circumstances, despite the circumstances noted here.

4.4.2 With regard to NEHAWU's allegation that on 24 April 2018, the SAPS dispersed a gathering of striking workers with stun grenades and rubber bullets: NEHAWU submitted to the panel that the commanding officer did not allow union leaders to try address the gathering and negotiate dispersal, and did not give a reasonable time for the group to disperse. The SAPS submitted that the use of force was unavoidable. Minimum force was used to disperse the protestors who denied emergency vehicles and members of the public access to the hospital. The panel found that SAPS action on 24 April 2018 was not disproportionate and unlawful in terms of the RGA and National Instruction 4 of 2014.

#### **4.5 NEHAWU's position regarding the protests;**

4.5.1 NEHAWU's leadership did make efforts throughout the disruptions to broker a solution the protests and prevent disorder.

4.5.2 Striking workers' frustrations at the failed engagements between labour and management undermined the influence of union representatives.

## **4.6 Other matters relevant to the Commission’s mandate.**

4.6.1 The breakdown in trust between all parties was a profound factor in the escalation of the protests at the hospital and the failure of all parties to find a way forward.

4.6.2 The Commission considered whether the findings in *Garvas* are relevant to this inquiry, in which the Court upheld provisions of the RGA that hold the conveners of gatherings liable for “riot damage”, unless they can show that the damage was not foreseeable or they took all reasonable steps to prevent it. However, the question of civil liability does not arise as these provisions apply principally to people or organisations who formally convene a gathering in terms of the RGA.

4.6.3 The information before the Commission suggests that the protests at Charlotte Maxeke hospital did not take place in terms of the Regulation Gatherings Act, and there was no convenor.

## **5. Directives**

5.1 The SAHRC Act empowers the Commission 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, as well as other measures for the observance of such rights”<sup>39</sup>.

39 Section 13(1)(a)(i).



5.2 Notwithstanding any criminal processes that may stem from the events of and leading up to 31 May 2018, the Commission makes the following recommendations:

5.2.1 The **Gauteng Provincial Government** is directed to:

- a) ensure that the Department, together with the hospital workforce and labour structures, undertake a joint programme of reconciliation to create a more conducive environment for communication and problem-solving; This must be done within six (6) months of the receipt of this report.
- b) take steps to ensure any provincial executive oversight of the Department is responsive and participatory;
- c) create guidelines for any future protest-related disruption to health services. These guidelines should include provisions for an early-warning system, and spell out the procedures and roles that each government department must carry out in the event of future disruptions. This must be done within six (6) months of the receipt of this report.

5.2.2 **NEHAWU** should provide a report to the Commission on the outcomes of its undertaking to train shop stewards and sensitise its members to their burden of care when dealing with legitimate grievances. This must be done within six (6) of the receipt of this report.

5.2.3 The **SAPS** should implement a proactive public disclosure mechanism on protest-related incidents that it reports to the IPID to ensure public transparency and oversight on these matters. This

mechanism must be implemented within a period of twelve (12) of the receipt of this report.

## **6. JUDICIAL REVIEW**

- 6.1. The Commission's directives herein are binding on the Respondents. Should any of the parties be aggrieved by the findings and directives of the Commission as contained herein, such a party is entitled to challenge same in court through the process of judicial review. An application for judicial review must be made within 180 days of the date on which all internal remedies were exhausted. Where there are no internal remedies available, the application must be made within 180 days of the date on which the applicant became aware of the decision (or could reasonably be expected to have become aware of the decision).

ISSUED ON THIS THE 05 DAY OF OCTOBER 2020.

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Adv. Bongani Christopher Majola

**Chairperson**

**South African Human Rights Commission**