



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

Case Reference No: WC/2010/0029

In the matter of:

African National Congress Youth League
Dullah Omar Region o.b.o Ward 95 Makhaza Residents

Complainant

and

City of Cape Town

Respondent

REPORT

1. INTRODUCTION AND MANDATE

- 1.1 The South African Human Rights Commission (hereinafter referred to as the Commission) is an institution that was established in terms of Section 181 of the South African Constitution Act 108, of 1996, (hereinafter referred to as the Constitution);
- 1.2 The Commission is mandated in terms of Section 184 (1) of the Constitution to-
- a) promote respect for human rights and a culture of human rights;
 - b) to promote the protection, development and attainment of human rights; and
 - c) monitor and assess the observance of human rights in the Republic.
- 1.3 In terms of Section 184(2) of the Constitution the Commission has the powers to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate on human rights related matters.
- 1.4 The Commission's authority and powers are supplemented by the provisions contained in the Human Rights Commission Act 54 of 1994 together with the Regulations¹ in respect of the procedures in conducting investigations dealing with alleged human rights violations.

¹ GN 817 in GG No. 30022 of 6 July 2007

2. COMPLAINT OF A VIOLATION OF THE RIGHT TO DIGNITY AND PRIVACY

- 2.1 In terms of section 184 (3) of the Constitution, the Commission has a specific mandate to monitor the measures taken by relevant organs of state towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.
- 2.2 On the 21st of January 2010 the Commission received a complaint from the African National Congress Youth League - Dullah Omar Region (hereinafter referred to as the Complainant).
- 2.3 The complaint was lodged on behalf of the community members of Ward 95 Makhaza,² Khayelitsha in Cape Town.
- 2.4 The Complainant alleges that the City of Cape Town, the Respondent herein, has violated the right to human dignity³ of the residents of Makhaza as well as the individual community members' right to privacy⁴.
- 2.5 The complaint stems from the action by the Respondent to install single flush toilet structures in the area without enclosing them.
- 2.6 In and during 2007 the Respondent embarked on a project to install single flush toilets for each household in Makhaza. It is alleged by the Respondent that the community had been informed that they would have to cover the cost of having these toilets enclosed. The residents were informed that the toilets would be a temporary measure until houses were built.
- 2.7 Three years later the temporary solution remains in place. 1 265 toilets of the 1316 toilets that were installed by the Respondent have been enclosed by residents at their own expense. The complaint before the Commission relates to the remaining 51 unenclosed toilets.
- 2.8 The 51 unenclosed toilets have not been covered by residents as they feel that the Respondent is responsible for enclosing the toilets and the community members state that they cannot afford to enclose the toilets at their own expense.
- 2.9 The one is to one toilets i.e. one flush toilet for every household replaces the current National standard structures (initially installed in the Makhaza area and still being used by the residents)⁵ being the one is to five toilets i.e. one toilet to be shared and used by five households (irrespective of individual numbers residing in the household).⁶

² The community of Ward 95, Makhaza, are a poor community with high levels of unemployment. The community is housed diversely in shacks and brick buildings.

³ Section 10 of the Constitution

⁴ Section 14 of the Constitution

⁵ These have remained in Makhaza and are still in use by residents. The one toilet per one household is in addition to these existing toilet structures-the 1:5 toilet facilities are enclosed.

⁶ The residents of Makhaza refused this system as they felt that the system was not shared equally by all, i.e. not everyone cleaned the shared toilets, getting keys to padlocks for five households was problematic and at times keys went missing and the facilities could not be used.

- 2.10 Clearly one household to one toilet is a more preferable and convenient short term solution in comparison to the one is to five schemes. The sustainable solution to sanitation is to address the housing backlog.

3. STEPS TAKEN BY THE COMMISSION

- 3.1 The Commission received the complaint on 19 January 2010. Thereafter the Western Cape Provincial Office of the Commission commenced its investigation with an inspection *in loco* on Monday 25 January 2010 where the abovementioned was observed and noted.
- 3.2 After initial consultations and correspondence with both of the parties, the Commission scheduled a mediation session with both the parties on the 9th of February 2010 in an attempt to reach an amicable and expeditious solution to the situation.
- 3.3 The attempted mediation broke down and the Chairperson⁷ decided to terminate the mediation as it was clear that the parties could not come to a compromise.
- 3.4 The parties were then advised that the Commission would now proceed to make a finding that would determine whether the Respondent had indeed violated the rights of the Makhaza residents when they installed toilet facilities without enclosing them as alleged by the Complainant.
- 3.5 The Respondent subsequently, during the course of the mediation process, expressed its support for the Commission's decision to make a finding, since it (Respondent) had planned similar projects in other areas.
- 3.6 Subsequent to widespread media reports, the Respondent that on the 30th of May 2010, allegedly attempted to enclose the 51 toilets with corrugated metal sheets. However,
- 3.7 These metal enclosures were subsequently allegedly removed by Makhaza residents.
- 3.8 It was further reported in the media that on the 31st of May 2010 the remaining 51 unenclosed toilets were removed by the Respondent resulting in residents not having access to their own toilets and thus they were in effect forced to revert to using the already installed communal toilets.

4 CONSTITUTIONAL CONSIDERATIONS

4.1 Human Dignity Section 10

Everyone has inherent dignity and the right to have their dignity respected and protected.

4.2 Equality Section 9(2)

⁷ The mediation was chaired by Ms Bianca Valentine, Legal Consultant and file handler investigating the complaint.

Equality includes the full and equal enjoyment of all rights and freedoms.....

4.3 Freedom and security of the person

Section 12(2)

Everyone has the right to bodily and psychological integrity.....

4.4 Privacy

Section 14

Everyone has the right to privacy, which includes the right not to have

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized;

(d) the privacy of their communications infringed.

4.5 Housing

Section 26

(1) Everyone has the right to have access to adequate housing

(2) The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of this right.

4.6 Health, food, water and social security

Section 27

(1) everyone has the right to have access to-

(a)

(b) sufficient food and water;

5 ANALYSIS

5.1 The Complainant in its complaint filed with the Commission alleges *inter alia* that the right to dignity⁸ has been violated by the Respondent in the matter.

5.2 In the Constitutional Court case of *S v Makwanyana*⁹ O' Regan J stated that "*Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.*"¹⁰

5.3 All rights in the Constitution and the Bill of Rights are universal, indivisible, and inter-dependent. Human dignity is both the first value listed in the founding provisions of the Constitution and the pre-eminent right in the Bill of Rights. Human dignity in terms of the manner in which the Constitutional Court has assessed it has been viewed in light of or in relation to other rights.

5.4 It is prudent to draw attention to Section 7(2) of the Constitution which states:
(2) – The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

⁸ Section 10

⁹ 1995(3) SA 391 (CC) par 144

¹⁰ *S v Makwanyana* 1995(3) SA 391 (CC)

- 5.5 Section 7(2) of the Constitution specifically mandates the state to give effect to the rights contained in the Bill of Rights by compelling the state to respect, protect, promote and fulfil these rights.
- 5.6 This is an important provision which imposes a positive constitutional duty on the state. The following is proposed as indicators of how the aforementioned provision is to be understood.
- 5.7.1 The obligation to respect means that the state has a negative duty not to interfere with the existing enjoyment of rights.¹¹
- 5.7.2 The duty to protect places a positive duty on the state to protect the bearers of rights from unwarranted interference by private parties or alternatively to provide an effective remedy should such interference occur.¹²
- 5.7.3 The obligation to promote imposes a positive duty on the state to ensure that people are aware of their rights.¹³ To promote the right also means to advance it and therefore it places a positive duty on the state to further the right.
- 5.7.4 The obligation to fulfil the right requires the state to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realisation of the right.
- 5.7 In addition the right to human dignity is very closely linked to socio economic rights and more specifically the right of access to adequate housing in terms of Section 26 and the right to access to basic services as contained in Section 27 of the Constitution. The concept of access becomes very important when assessing the progressive realisation of economic and social rights. In this regard, access can be defined as the minimum conditions required in order for the state to meet its constitutional mandate of progressively realising economic and social rights. In line with international interpretations, the constituent elements of access are physical accessibility, economic accessibility, non discrimination and information accessibility.
- 5.8 Sandra Liebenberg states in her article: "The value of Human Dignity in Interpreting Socio-Economic Rights" that "*to value the inherent dignity of human beings as a society is to ensure that the material conditions exist in which people can develop their capacity and participate in shaping their society.*"¹⁴
- 5.9 The most significant international human rights instrument relating to socio economic rights is the International Covenant on Economic, Social and Cultural Rights,¹⁵(ICESCR). Although signed in 1994 but not ratified by South Africa to date, the ICESCR has substantially influenced the manner and form in terms of which the socio economic rights provisions in the Bill of Rights have been drafted.
- 5.10 Article 2(1) of the ICESCR¹⁶ places an obligation on all state parties to undertake steps to the maximum of their available resources to enable all citizens to enjoy the rights

¹¹ www.chr.up.ac.za/centre_projects/socio/compilation1part1.html-2010/04/21

¹² www.chr.up.ac.za/centre_projects/socio/compilation1part1.html-2010/04/21

¹³ www.chr.up.ac.za/centre_projects/socio/compilation1part1.html-2010/04/21

¹⁴ Acta Juridica 2008 1 149-170

¹⁵ Adopted by GA resolution 2200 A (xxxi) of 16 December 1966

¹⁶ International Covenant on Economic, Social and Cultural Rights

- which the Covenant enshrines. The Constitution echoes this obligation on the state to take reasonable legislative and other measures, within its available resources, to progressively realize the rights.¹⁷
- 5.11 In the Grootboom¹⁸ decision, which was a ground breaking decision in respect of the justiciability of socio-economic rights in South Africa, the court considered the extent of the positive duty placed on the state in terms of the provisions of Section 26 and Section 27.¹⁹
 - 5.12 In terms of the decision in Grootboom, substantial discretion is afforded the state in relation to how this duty is fulfilled, but it is clear that the measures taken must be reasonable.
 - 5.13 The court determined in Grootboom that the reasonableness of the measures need to be assessed in relation to the design, adoption and implementation of the measures undertaken to fulfil this duty, which are "*comprehensive and does not exclude those most in need of the protection of those rights.*"²⁰
 - 5.14 In Grootboom, Yacoob J noted "*...the respondents have a right to reasonable action by the state in all circumstances and with particular regards to human dignity. In short, I emphasize that human beings are required to be treated as human beings*" (at par 83).²¹
 - 5.15 One of the most fundamental points raised by the court in the judgment is that the duty in terms of these provisions is dependent on the availability of resources, and that the fulfilment of these rights is progressive. In other words, it recognises that in certain context the rights and entitlements can only be fully realised over a period of time.
 - 5.16 In Grootboom²² the Court held that "*the Constitution required the state to put in place a comprehensive and workable plan in order to meet its socio-economic rights obligations...the program must,..., be balanced and flexible and must make appropriate provision for attention to short, medium and long term needs*" The Court held further that *the programme must be reasonable both in conception and implementation...*²³
 - 5.17 In relation to the right to privacy, it should be noted that both the common law and the Constitution regulate this right.
 - 5.18 The constitutional right to privacy is twofold. In the first instance it guarantees a general right to privacy and second it protects against specific infringements of privacy, namely searches and seizures and the infringement of the privacy of communications.
 - 5.19 The common law recognizes the right to privacy as an independent personality right that the courts have considered as being part of the concept of *dignitas*.
 - 5.20 At common law a violation of the right to privacy constitutes an *iniuria* and such violation occurs when there is an unlawful infringement of the person's personal privacy or an unlawful disclosure of private facts about the person.

¹⁷ Litigating Socio Economic Rights In South Africa- A choice between corrective and distributive justice: Christopher Mbazira;2009;Chp 3:p53-54

¹⁸ 2000 3 BCLR 277 (C)

¹⁹ The Bill of Rights Handbook, 5th edition, Currie & de Waal, 2005, p576-580

²⁰ The Bill of Rights Handbook, 5th edition, Currie & de Waal, 2005, p576-580

²¹ The Value of Human Dignity in Interpreting socio-Economic Rights; Sandra Liebenberg; p1

²² 2000 3 BCLR 277 (C)

²³ Litigating Socio Economic Rights In South Africa- A choice between corrective and distributive justice: Christopher Mbazira;2009;Chp p58-59

- 5.21 In the matter at hand the question of privacy is inextricably linked to the question of dignity and is accordingly viewed from this perspective

6 CONCLUSION

- 6.1 Both international human rights instruments and the Constitution, place a positive duty on the state and state bodies to ensure that reasonable measures are implemented to achieve the realization of human rights as embodied in the Constitution, for all South Africans as well as non South Africans.

The Constitutional Court in *Grootboom* determined the extent of the duty placed on the state in terms of Sections 26 and 27, *“to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right”*

This three tiered duty delimits the state’s positive obligation in relation to:

- a) Reasonableness of the legislative and other measures implemented;
- b) The resources available to the state; and
- c) The progressive realization of the right;

In order to comply with the Constitutional Court’s criteria, the following evaluation is conducted:

- 6.1.1 The measures taken by the state to implement the right cannot merely be legislative action. The state is obliged to achieve the intended result with well-directed policies and programmes.

- 6.1.2 In addition the programme must be reasonable as well as reasonably implemented. In addition the Court has held that there are specific criteria that are to be met that determine the reasonableness of such measures for implementation. *“Reasonableness being inclusive of design, adoption and implementation of measures to realize socio-economic rights that are comprehensive, in the sense that they do not exclude those most in need of the protection of those rights.”*²⁴

- 6.1.3 The second and third tier, progressive realization within its available resources, limits the right in that the implementation of the right is dependent on the resources available and therefore limited as a result of a lack of resources.

- 6.2 Having taken the above into consideration together with the allegations by the complainant the following is noted.

- 6.2.1 In terms of the reasonableness of the project, which aimed to achieve the facilitation of access to sewerage systems to all in the community and to avoid the impact of budget constraints on the housing project that was to follow, the following conclusion is reached: while the City’s project to provide flush toilets for all residents is reasonable and indeed commendable, the manner in which the project was implemented (no enclosures or walls for the toilet facilities) was not

²⁴ The Bill of Rights Handbook, 5th edition, Currie & de Waal, 2005, p576-580

reasonable. Furthermore while it is accepted that the measures employed were intended as temporary solutions to a situation that needed to be urgently addressed, the situation persisted from 2007, a period of just under three years. It also failed to take into consideration the gendered impact on women and girls, both in terms of different biological needs as well as their vulnerability to high levels of gender-based violence. No provision was made for those who were unemployed and poor and could not fund the enclosure of their own toilets. Issues of access for those with disability and issues of safety for those most vulnerable to violence in terms of the structure such as ensuring they were well lit do not seem to have featured in the planning and implementation of this project. Such an omission does not fulfil the constituent elements of access, namely, physical and economic accessibility as well as non discrimination. The Respondent was constitutionally obliged to come to the aid of those who, due to poverty and their particular disadvantaged socio-economic status, could not afford to enclose their toilets. The Commission notes that such action violated the right to dignity of the community members. Consultation processes appear to have been inadequate. The aforementioned considerations in this instance are of particular significance in light of an Apartheid past in which the least amount was spent on basic services for those classified "African". It is indeed a sad legacy that remnants of the past system remain in the form of previously disadvantaged communities still being exposed to the indignities of the bucket system.

- 6.2.2 A comprehensive programme designed to achieve the ultimate delivery of full basic services to the community, vulnerable groups in the community and individuals would have placed a premium on prior consultation with the target groups. These consultations ought to have been accompanied by a full and expeditious sharing of information with the community. The absence of such crucial information does not fulfil the constituent element of access, namely, information accessibility. The Promotion of Access to Information Act²⁵ which gives effect to the constitutional right to access to information²⁶ places an obligation on public bodies to share information proactively with people. The objectives of this piece of legislation makes it clear that transparency, openness and public participation can only be achieved if information sharing is embraced and embedded within public bodies. Public bodies should therefore take pains to ensure that appropriate mechanisms to facilitate such consultation and information sharing throughout the implementation of projects are in place.
- 6.2.3 While the alleged actions of the community in the removing of the corrugated metal sheets used to enclose the toilets on 30 May 2010 cannot be condoned, it bears mention that given the high rate of crime in the area in question, corrugated iron sheeting cannot be regarded as adequate or safe enclosures. The Respondent ought therefore to consider these circumstances, the community members' particular vulnerability and concerns about safety in determining the reasonableness of using metal sheeting, as opposed to more durable structures, to enclose the toilets and to ensure proper lighting.

²⁵ Act 2 of 2000

²⁶ Section 32(1) of Act 108 of 1996

It is accordingly concluded that the provision of the unenclosed toilets was not reasonable and nor was the full impact (financial and otherwise) thereof effectively conveyed to the community.

This finding is premised on the fact that no conclusive evidence was placed before the Commission that all parties had been adequately communicated with and consulted with before the programme was implemented. The Commission's observations are accordingly that the consultation processes embarked upon by the Respondent were neither adequate nor sufficient.

7 FINDING

- 7.1 The Respondent violated the right to dignity as envisaged by section 10 of the Constitution by not enclosing the toilets. The Respondent ought to have ensured that the rights of all were protected, promoted and fulfilled.
- 7.2 The Commission notes the legacy of Apartheid in which adequate sanitation was denied the majority of our citizens.
- 7.3 The Commission finds that the consultation process was inadequate.

8. RECOMMENDATIONS

- 8.1 It is recommended that the Respondent re-install the 51 toilets and adequately enclose them with immediate effect.
- 8.2 The Commission recommends that the Respondent's projects that have currently been placed on hold pending this finding are carried out and completed in a manner that does not violate the right to dignity.
- 8.3 The Respondent must inform the Commission at least on a monthly basis as to its progress in respect of Recommendations 1 and 2 above.
- 8.4 The National Department of Human Settlements in conjunction with the Department of Water Affairs should intervene more actively in all provinces to ensure that its stated policy of ensuring the eradication of the bucket system is achieved more expeditiously throughout the country. This intervention should strive for the phasing out of the communal toilets and ensure that all toilets installed are adequately enclosed.


9. APPEAL

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so **in writing within 45 days** of receiving this letter by writing to:

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

INVESTIGATORS: BIANCA VALENTINE (LEGAL OFFICER, WESTERN CAPE) LEONARDO GOOSEN (PROVINCIAL MANAGER, WESTERN CAPE)

DATED AT CAPE TOWN ON THIS THE 11TH DAY OF JUNE 2010

SIGNED: 

DEPUTY CHAIRPERSON: PREGS GOVENDER
SOUTH AFRICAN HUMAN RIGHTS COMMISSION