



## **TERMS OF REFERENCE:**

### **INVESTIGATIVE INQUIRY INTO THE WATER CRISIS IN GAUTENG PROVINCE**

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#### **INTRODUCTION**

1. Access to sufficient, safe, acceptable and affordable water is a foundational human right and a cornerstone of human dignity. Water is essential to life, health, sanitation, food security, education, environmental sustainability and socio-economic development. Where access to water is unreliable, unsafe, unaffordable or structurally unequal, the consequences extend beyond service delivery failure and constitute a direct threat to the enjoyment of fundamental human rights, including dignity, equality, life, health and an environment not harmful to health or well-being.
2. In recent years, the South African Human Rights Commission (“the Commission”) through its Gauteng Provincial Office (“GPO”) has received several water-related complaints. Instead of continuing to respond to recurring water-related complaints, service disruptions and humanitarian crises on an ad hoc and reactive basis, the GPO has resolved to conduct an investigative inquiry into the Water Crisis in the Gauteng Province. (“inquiry”). By convening the inquiry, the GPO seeks, to work with organs of state, research institutions/academia/experts and private sector to develop medium- to long-term systemic interventions that will strengthen accountability, improve governance, promote sustainable planning, smart financial management, effective delivery and maintenance and embed a culture of human rights in water governance, infrastructure development and maintenance and service delivery. The purpose is to contribute to durable solutions that ensure equitable, dignified and reliable, consistent access to water for all communities in Gauteng.
3. The Commission conducts the inquiry in accordance with sections 13,15 and 16 of the *South African Human Rights Commission Act 40 of 2013* (‘the SAHRC Act’) and Chapter 4 of the Commission’s Complaints Handling Procedures (‘the Procedures Manual’).

#### **BACKGROUND**

4. The Gauteng Province is experiencing a sustained and deepening water crisis characterised by persistent shortages, intermittent supply, infrastructure failures, ageing and poorly maintained

systems, contamination risks, governance failures and inadequate emergency response mechanisms. These challenges have become a recurring feature of municipal service delivery, particularly within the City of Johannesburg, City of Tshwane and City of Ekurhuleni.

5. The impact of the water crisis is disproportionately borne by poor and marginalised communities, residents of informal settlements, schools, healthcare facilities, early childhood development centres and social care institutions. The consequences include compromised sanitation, increased public health risks, disruption of education and healthcare services, and the erosion of human dignity.
6. The crisis has also produced secondary systemic harms, including the emergence of informal and exploitative water distribution economies commonly referred to as “*water tanker mafias*”, who benefit from the dilapidated infrastructure. In many communities, prolonged outages have created dependence on unregulated private water tankers, entrenching inequality, profiteering and commodification of a constitutional right. At the same time, municipalities lack sufficient functional water tankers, logistical capacity and coordinated emergency distribution systems to respond effectively to recurring water shortages, making them dependent on private supply of water tankers.
7. The Commission is of the view that the scale, persistence and systemic nature of these failures raise prima facie concerns of a systemic human rights violation, warranting a formal inquiry process and coordinated stakeholder intervention.

## **THE MANDATE, POWERS AND FUNCTIONS OF THE COMMISSION**

8. The Commission is an independent state institution established in terms of section 181 of the Constitution of the Republic of South Africa, 1996 (Constitution) to strengthen constitutional democracy in South Africa. Its mandate, as contained in section 184 of the Constitution, is to promote the respect, protection and fulfilment of human rights and to monitor and assess the observance of human rights in the Republic.
9. Section 184(2)(a) and (b) of the Constitution empowers the Commission to investigate and report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated.
10. In addition to its constitutional mandate, the Commission derives further powers from the SAHRC Act. Section 13(3) of the SAHRC Act provides that the Commission is competent to investigate, on its own initiative or on receipt of a complaint, any alleged violation of human rights.
11. Section 15(1)(a) of the SAHRC Act provides that the Commission may conduct any investigation necessary to enable it to exercise its powers and perform its functions. In terms of section 15(5) of the SAHRC Act, any person implicated in the investigation must be afforded an opportunity to be

heard, to give evidence, make submissions and, through the Commission, to question other witnesses.

## LEGAL AND REGULATORY FRAMEWORK

### 12. The Constitution

12.1. South Africa is a democratic state founded on, amongst others, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and supremacy of the Constitution and the rule of law.<sup>1</sup>

12.2. Specifically, human rights include:

*“Everyone has inherent dignity and the right to have their dignity respected and protected.”<sup>2</sup>*

...

*Everyone has the right—*

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

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

*(i) prevent pollution and ecological degradation;*

*(ii) promote conservation; and*

*(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”<sup>3</sup>*

...

*Everyone has the right to have access to—*

...

*(b) sufficient food and water; and*

...

*(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”<sup>4</sup>*

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<sup>1</sup> Section 1(a) and (c).

<sup>2</sup> Section 10.

<sup>3</sup> Section 24.

<sup>4</sup> Section 27(1)(b) and 27(2).

- 12.3. Obligations imposed by the Constitution “must be fulfilled”.<sup>5</sup>
- 12.4. The obligations for national, provincial and local government include the obligations (within its jurisdiction) to:
- “(b) *secure the well-being of the people of the Republic;*
  - (c) *provide effective, transparent, accountable and coherent government for the Republic as a whole;*
  - (d) *be loyal to the Constitution, the Republic and its people”.*<sup>6</sup>
- 12.5. In respect of local government, the Constitution requires that a municipality “strive, within its financial and administrative capacity to achieve its objectives set out in the Constitution.”<sup>7</sup> These are objectives are:
- “(a) *to provide democratic and accountable government for local communities;*
  - (b) *to ensure the provision of services to communities in a sustainable manner;*
  - (c) *to promote social and economic development;*
  - (d) *to promote a safe and healthy environment; and*
  - (e) *to encourage the involvement of communities and community organisations in the matters of local government.”*<sup>8</sup>
- 12.6. In addition to the above, section 195 prescribes basic values and principles applicable to all tiers of public bodies and states:
- “(1) *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
  - ...
  - (b) *Efficient, economic and effective use of resources must be promoted.*
  - ...
  - (d) *Services must be provided impartially, fairly, equitably and without bias.*
  - (e) *People’s needs must be responded to, and the public must be encouraged to participate in policy-making.*
  - (f) *Public administration must be accountable.*

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<sup>5</sup> Section 2.

<sup>6</sup> Section 41(1).

<sup>7</sup> Section 152(2).

<sup>8</sup> Section 151(1).

(g) *Transparency must be fostered by providing the public with timely, accessible and accurate information.*

...”<sup>9</sup>

### 13. The Municipal Systems Act

13.1. Section 4 of the Municipal Systems Act 32 of 2000 (**‘the MSA’**) states that a municipal council, within the municipality’s financial and administrative capacity and having regard to practical considerations, has the duty to—

“(a) *exercise the municipality’s executive and legislative authority and use the resources of the municipality in the best interests of the local community;*

(b) *provide, without favour or prejudice, democratic and accountable government;*

...

(d) *strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;*

...

(f) *give members of the local community equitable access to the municipal services to which they are entitled;*

(g) *promote and undertake development in the municipality;*

...

(i) *promote a safe and healthy environment in the municipality;*  
*and*

(j) *contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.”*

13.2. In addition, section 4(3), a municipality must “in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights.”

13.3. The general duties of a municipality are set out in section 73 of the MSA, and they include the duty to give effect to the Constitution and to:

“(a) give priority to the basic needs of the local community;

...

(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.”<sup>10</sup>

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<sup>9</sup> Section 195(1).

<sup>10</sup> Section 73(1).

13.4. Municipal services must be equitable and accessible; be provided in a manner that is conducive to the prudent, economic, efficient and effective use of available resources; and the improvement of standards of quality over time. Municipal services must be financially sustainable; be environmentally sustainable; **and be regularly reviewed with a view to upgrading, extension and improvement**.<sup>11</sup>

13.5. In terms of section 6, a municipality's administration is governed by section 195 of the Constitution, set out above, and the administration of a municipality must:

- “(a) be responsive to the needs of the local community;*
- (b) facilitate a culture of public service and accountability amongst staff;*
- (c) take measures to prevent corruption;*
- (d) establish clear relationships, and facilitate cooperation and communication, between it and the local community;*
- (e) give members of the local community full and accurate information about the level and standard of municipal services they are entitled to receive; and*
- (f) inform the local community how the municipality is managed, of the costs involved and the persons in charge.”<sup>12</sup>*

13.6. A municipality must within its administrative and financial capacity establish and organise its administration in a manner that would enable the municipality to—

- “(a) be responsive to the needs of the local community;*
- (b) facilitate a culture of public service and accountability amongst its staff;*
- (c) be performance orientated and focused on the objects of local government set out in section 152 of the Constitution and its developmental duties as required by section 153 of the Constitution;*
- (d) ensure that its political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives set out in the municipality's integrated development plan;*
- ...*
- (i) hold the municipal manager accountable for the overall performance of the administration;*
- ...”<sup>13</sup>*

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<sup>11</sup> Section 73(2).

<sup>12</sup> Section 6(2).

<sup>13</sup> Section 51.

13.7. The municipal manager of a municipality is the head of administration of a municipality and is responsible and accountable for, amongst other thing:

“ (a) *the formation and development of an economical, effective, efficient and accountable administration;*

...

(c) *the implementation of the municipality’s integrated development plan, and the monitoring of progress with implementation of the plan;*

(d) *the management of the provision of services to the local community in a sustainable and equitable manner;*

...

(o) *developing and maintaining a system whereby community satisfaction with municipal services is assessed;*

...

(2) *As accounting officer of the municipality the municipal manager is responsible and accountable for—*

(a) *all income and expenditure of the municipality;*

(b) *all assets and the discharge of all liabilities of the municipality; and*

(c) *proper and diligent compliance with the Municipal Finance Management Act.”*

13.8. At the very outset the Constitution and the MSA place explicit and clear responsibilities on persons who are appointed to positions within the local government. The responsibilities listed above, and obligations included in a number of related statutes, remain the obligations of such persons and they agree in terms of the Constitution and the laws which bind them to be held to account for their compliance and performance with the law and responsibility of office.

13.9. Accepting a position in national, provincial and local government is a choice, loyalty to the Constitution and all other applicable pieces of legislation, once in such a position, is not.

#### 14. **The Water Services Act**

14.1. The preamble to the Water Services Act 108 of 1997 (“**WSA**”) confers a clear responsibility on all spheres of government to ensure that water supply services and sanitation services are provided in a manner which is efficient, equitable and sustainable. The preamble of the WSA confers on national government custodial powers over the water resources of the country.

- 14.2. Section 11(1) of the WSA states that a municipality, as a “water services authority”,<sup>14</sup> has a duty to all consumers<sup>15</sup> or potential consumers in its area of jurisdiction to “progressively ensure efficient, affordable, economical and sustainable access to water services”.
- 14.3. “[W]ater services, as defined in section 1, is made up of “water supply services”, which are the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water or water for commercial use but not water for industrial use,<sup>16</sup> and “sanitation services”, which are the collection, removal, disposal or purification of human excreta, domestic wastewater, sewage and effluent resulting from the use of water for commercial purposes.<sup>17</sup>
- 14.4. Section 11 (4) states that a municipality may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction. However, sections 5 and 11(5) of the WSA require that, in an emergency, or where the municipality or “water services institution”<sup>18</sup> cannot meet all of its water service and sanitation obligations, a municipality or a water services institution prioritise the provision of basic water supply and basic sanitation.
- 14.5. “[B]asic water supply” and “basic sanitation” refers to the prescribed minimum standard of water supply services and sanitation services, that “[e]veryone has a right of access to”,<sup>19</sup> and that “[e]very “water services institution”<sup>20</sup> must take reasonable measures to realise these rights”.<sup>21</sup>
- 14.6. In addition to the obligations set out in the WSA, regulation 4 of the Regulations Relating to Compulsory Water Standards and Measures to Conserve Water,<sup>22</sup> a water services

<sup>14</sup> In terms of section 1 of the NWA, “water services authority” means “any municipality, including a district or rural council as defined in the Local Government Transition Act, 1993 (Act No. 209 of 1993), responsible for ensuring access to water services”.

<sup>15</sup> In terms of section 1 of the NWA, a “consumer” is defined as “any end user who receives water services from a water services institution, including an end user in an informal settlement”.

<sup>16</sup> In terms of section 1 of the NWA, “water supply services” means “the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water or water for commercial use but not water for industrial use.”

<sup>17</sup> In terms of section 1 of the NWA, “sanitation services” means the collection, removal, disposal or purification of human excreta, domestic wastewater, sewage and effluent resulting from the use of water for commercial purposes”.

<sup>18</sup> As per the definition in the NWA, a “water services institution” includes, a “water services authority” (municipalities including the Emfuleni Local Municipality), a “water services provider” (also usually a municipality and entities such as Rand Water who provide water to municipalities) and a “water board” (this also includes Rand Water).

<sup>19</sup> Section 3(1).

<sup>20</sup> In terms of section 1 of the NWA, “water services institution” means “a water services authority, a water services provider, a water board and a water services committee”. See footnote 88 above.

<sup>21</sup> Section 3(2).

<sup>22</sup> Published under GN R509 of 8 June 2001.

institution must take steps to ensure that where the water services usually provided by or on behalf of that water services institution are not interrupted for a period of more than 24 hours for reasons other than those contemplated in section 4 of the Act, a consumer has access to alternative water services, including sanitation services sufficient to protect health. These measures recognise the need for continued access to both water and sanitation on account of their vital importance to life and health.

- 14.7. It is therefore clear from the WSA and the Water Standards Regulations that the obligation to provide water supply services and sanitation services is with the municipalities, with support and oversight from the Gauteng Province, particularly Gauteng COGTA and National DWS and COGTA.
- 14.8. In terms of planning and giving effect to this obligation, the WSA requires that every water services authority (i.e. all municipalities who provide water) have a “water services development plan” that sets out the measures a municipality will take or implement to realise these rights. The development plan must form part of a municipalities integrated development plan.
- 14.9. Draft water services development plans must: be made publicly available; undergo a public comment process; and be sent to the Minister of DWS, the relevant Province and all neighbouring municipalities.<sup>23</sup> Once adopted by the municipality, a copy of the development plan must be sent to the Minister of DWS, the Minister of COGTA, the Province, and all neighbouring municipalities.<sup>24</sup>
- 14.10. A new development plan must be drafted and adopted at intervals determined by the Ministers of DWS and COGTA.<sup>25</sup> Any deviation from an adopted development plan is invalid unless the deviation is included in a new adopted development plan.<sup>26</sup>
- 14.11. A municipality is required to submit a report on the implementation of its water services development plan, within four months after the end of its financial year, to the Ministers for DWS and COGTA, the province and the organisation representing the municipality (in this case the South Africa Local Government Association (**‘SALGA’**)).<sup>27</sup>
- 14.12. The water services development plan is specifically regulated and detailed in law. It is obviously an important tool or mechanism for the municipality to support fulfilling the obligation to provide water supply and sanitation services. If complied with properly, and

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<sup>23</sup> Section 14.

<sup>24</sup> Section 15.

<sup>25</sup> Section 16.

<sup>26</sup> Section 17.

<sup>27</sup> Section 18.

updated regularly or as required, the development plan allows a municipality the opportunity (in the form of a legal obligation) to gather information necessary to be able to, within its available resources, provide water supply and sanitation services in compliance its mandatory constitutional duty to provide for the right to access water and sanitation. The development plan and the obligation to report on its implementation also allows for the Ministers of the DWS and COGTA, the Province and other municipalities to monitor the performance of a municipality and to intervene where necessary given the significance to basic rights involved where this is not done.

- 14.13. In addition to the reporting requirements in sections 17 and 18, section 62 expressly requires that the Minister of DWS and, the Gauteng Province, monitor the performance of every water services institution, and not just water services authority in order to ensure compliance with and attainment of all applicable national standards prescribed by the WSA,<sup>28</sup> and compliance with every applicable development plan, policy statement or business plan adopted in terms of the WSA are observed.<sup>29</sup>
- 14.14. Section 63 gives specific effect to section 139 of the Constitution, which empowers a province or the National DWS to intervene where a water services authority has not effectively performed any function imposed on it by or under the WSA.
- 14.15. The power of the Minister of DWS to intervene is further supported by the Minister's general powers under section 73, which includes the power to:

- “(b) construct, operate, alter or repair any water services work with the permission of the relevant water services institution;*
- (c) contract with any person to perform any work which the Minister is authorised to perform under this Act;*
- (d) act as a water services provider under contract or approval only if the relevant water services authority is unable to provide the water services;*
- (e) provide water services in emergency situations;*
- (f) perform the functions of a water services authority or water board;*
- (g) levy tariffs for water services provided by him or her;*
- (h) issue guidelines to water services institutions on performing their functions in terms of this Act;*
- (i) issue model conditions for the provision of services for use by water boards and water services committees;*

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<sup>28</sup> Section 62(1)(a).

<sup>29</sup> Section 62(1)(c).

(j) *prescribe measures to be taken by water services institutions to conserve water*".

14.16. In accordance with section 33, a water board must set conditions for the provision of services not inconsistent with the WSA, relating to at least—

“... ”

(b) *the installation, alteration, operation, protection and inspection of water services works and consumer installations;*

(c) *the determination and structure of tariffs;*

(d) *the payment and collection of money due to the water board;*

(e) *the circumstances under which water services may be limited or discontinued and the procedure for such limitation or discontinuation; and*

(f) *water conservation and the prevention of wasteful or unlawful use of water provided by the water board.*”

14.17. “[W]ater services works” is defined in the WSA as, “a reservoir, dam, well, pumphouse, borehole, pumping installation, purification work, sewage treatment plant, access road, electricity transmission line, pipeline, meter, fitting or apparatus built, installed or used by a water services institution— (i) to provide water services ...”.

14.18. In accordance with section 33, a water board, such as Rand Water must set conditions for the provision of services related to the operation, protection and inspection of purification works and sewage treatment plants used by a water services institutions.

14.19. In performing its activities, exercising its powers and carrying out its duties, a water board must achieve a balance between, amongst others, striving to provide efficient, reliable and sustainable water services; through optimal use of available resources; promoting the efficiency of water services authorities; taking cognisance of the needs of water services institutions, consumers and users; acting in an equitable, transparent and fair manner; and taking reasonable measures to promote water conservation and water demand management, including promoting public awareness of these matters.<sup>30</sup>

14.20. A water board’s financial report must be audited and submitted to the Minister for DWS, the relevant Provinces and Parliament.<sup>31</sup>

14.21. While Rand Water does not own, operate, maintain or refurbish the water infrastructure in municipalities, it has considerable powers to provide much needed management

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<sup>30</sup> Section 34.

<sup>31</sup> Section 44.

services, training and other support services to water services institutions, to provide catchment management services to or on behalf of the responsible authorities, to set conditions for the operation and protection of the sewage treatment plants, and may therefore review and report on compliance with the conditions (set by it or DWS).

- 14.22. Also, as the water board responsible for setting tariffs and collecting money owed to it, Rand Water has insight into the financial or administrative failures of a municipality who does not or is unable to pay Rand Water for its services.

## 15. The National Water Act 36 of 1998

- 15.1. The purpose of the National Water Act 36 of 1998 (**'the NWA'**) is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors—

- “(a) meeting the basic human needs of present and future generations;*
- (b) promoting equitable access to water;*
- ...*
- (d) promoting the efficient, sustainable and beneficial use of water in the public interest;*
- ...*
- (g) protecting aquatic and associated ecosystems and their biological diversity;*
- (h) reducing and preventing pollution and degradation of water resources;*
- (i) meeting international obligations;*
- (j) promoting dam safety”.<sup>32</sup>*

- 15.2. According to section 3, the National Government, acting through the Minister of DWS, has the “power to regulate the use, flow and control of all water in the Republic”,<sup>33</sup> and that the National Government, acting through the Minister of DWS has the responsibility to ensure that: water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate; and s allocated equitably and used beneficially in the public interest, while promoting environmental values.<sup>34</sup>

- 15.3. Chapter 2 of the NWA regulates the development, content and implementation of the National Water Resource Strategy (**'the NWRS'**) – the framework, published by the DWS, after consultation with relevant parties, for the protection, use, development,

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<sup>32</sup> Section 2.

<sup>33</sup> Section 3(3).

<sup>34</sup> Sections 3(1) and (2).

conservation, management and control of water resources for the country at national, provincial and local level. The NWRS has to make reference to international rights and obligations; estimates of present and future water requirements; and objectives in respect of water quality to be achieved through a classifications system.<sup>35</sup>

- 15.4. According to section 7, the National DWS, organs of state and water management institutions must give effect to the NWRS when exercising or performing any duties in terms of the NWA.
- 15.5. Section 151 of the NWA makes any act or omission, whether by intent or negligence, which has the effect of polluting or likelihood of polluting a water resources unlawful. Such act or omission constitutes a statutory offence which is punishable through penalties such as a fine or imprisonment.<sup>36</sup>
- 15.6. Where harm, loss or damage caused by the offence, for which a person was convicted, is established, the person/s who suffered harm, loss or damage may be awarded pecuniary damages.<sup>37</sup>
- 15.7. The liability of the state in terms of the NWA is triggered when the exercise of power or performance of duty, or failure to exercise power or perform duties was unlawful, negligent or in bad faith.

## 16. The National Environmental Management Act 107 of 1998

- 16.1. According to the National Environmental Management Act 107 of 1998 ('NEMA'), development must be socially, environmentally and economically sustainable, and sustainable development requires the consideration of all relevant factors including, that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied; that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied; and that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.<sup>38</sup>
- 16.2. NEMA, like the NWA requires that international responsibilities relating to the environment must be discharged in the national interest.<sup>39</sup>

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<sup>35</sup> Section 6.

<sup>36</sup> Sections 151(1)(i) and (j) and 151(2).

<sup>37</sup> Section 152 and 153.

<sup>38</sup> Section 2(3) and (4)(a).

<sup>39</sup> Section 2(4)(n).

16.3. All organs of state, including National and Provincial Departments must have a five-year environmental implementation and management plan, the purpose of which is meet the objectives of NEMA. To this end the implementation and management plans are intended to:

- “(a) *coordinate and harmonise the environmental policies, plans, programmes and decisions of the various national departments that exercise functions that may affect the environment or are entrusted with powers and duties aimed at the achievement, promotion, and protection of a sustainable environment, and of provincial and local spheres of government, in order to—*
- (i) *minimise the duplication of procedures and functions; and*
- (ii) *promote consistency in the exercise of functions that may affect the environment;*
- (b) *give effect to the principle of cooperative government in Chapter 3 of the Constitution;*
- (c) *secure the protection of the environment across the country as a whole;*
- (d) *prevent unreasonable actions by provinces in respect of the environment that are prejudicial to the economic or health interests of other provinces or the country as a whole; and*
- (e) *enable the Minister [of Environment, Forestry and Fisheries] to monitor the achievement, promotion, and protection of a sustainable environment.”*

16.4. Where NWA establishes Water Courts, NEMA allows for both prosecution of offences by the state (the National Prosecuting Authority) and organisations to pursue private prosecutions.<sup>40</sup>

## 17. The Public Finance Management Act

17.1. In terms of section 6 of the PFMA, National Treasury has an obligation to:

- “(b) *coordinate intergovernmental financial and fiscal relations;*
- ...
- (g) *may do anything further that is necessary to fulfil its responsibilities effectively.”*

17.2. In terms of section 16 and 25 of the PFMA, the Minister of Finance may authorise the use of funds from the National Revenue Fund, and an MEC for finance may authorise the use of funds from that province’s Provincial Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious

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<sup>40</sup> Section 33 and 34.

prejudice to the public interest, be postponed to a future parliamentary appropriation of funds, respectively.

## 18. The Municipal Finance Management Act 56 of 2003

18.1. In terms of section 5(2) of the Municipal Finance Management Act 56 of 2003 (**'the MFMA'**) National Treasury may:

- “(a) *monitor the budgets of municipalities to establish whether they—*
  - (i) *are consistent with the national government’s fiscal and macroeconomic policy; and*
  - (ii) *comply with Chapter 4;*
- (b) *promote good budget and fiscal management by municipalities, and for this purpose monitor the implementation of municipal budgets, including their expenditure, revenue collection and borrowing;*
- (c) *monitor and assess compliance by municipalities and municipal entities with—*
  - (i) *this Act; and*
  - (ii) *any applicable standards of generally recognised accounting practice and uniform expenditure and revenue classification systems;*
- (d) *investigate any system of financial management and internal control in any municipality or municipal entity and recommend improvements;*
- (e) *take appropriate steps if a municipality or municipal entity commits a breach of this Act, including the stopping of funds to a municipality in terms of section 216 (2) of the Constitution if the municipality, or a municipal entity under the sole or shared control of that municipality, commits a serious or persistent material breach of any measures referred to in that section; and*
- (f) *take any other appropriate steps necessary to perform its functions effectively.”*

18.2. In terms of section 5(4) the Provincial Treasury must monitor municipalities’: compliance with the MFMA; preparation of their budgets; monthly outcome of their budgets; and the submission of reports to the Provincial Treasury. In terms of section 5(4)(d), a Provincial Treasury may take appropriate steps if a municipality or municipal entity in the province commits a breach of the MFMA.

18.3. Section 32(2) makes it compulsory for a municipality to recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure—

- “(a) *in the case of unauthorised expenditure, is— authorised in an adjustments budget; or certified by the municipal council,*

*after investigation by a council committee, as irrecoverable and written off by the council; and*

- (b) *in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council.”*

18.4. Section 41(1) of the MFMA requires that National Treasury monitor:

- “(a) *the pricing structure of organs of state for the supply of electricity, water or any other bulk resources that may be prescribed, to municipalities and municipal entities for the provision of municipal services; and*
- (b) *payments made by municipalities and municipal entities for such bulk resources.”*

18.5. In addition, each organ of state providing bulk resources to a municipality must within 15 days after the end of each month furnish the National Treasury with a written statement setting out, for each municipality or for each municipal entity providing municipal services on behalf of such municipalities—

- “(a) *the amount to be paid by the municipality or municipal entity for such bulk resources for that month, and for the financial year up to the end of that month;*
- (b) *the arrears owing and the age profile of such arrears; and*
- (c) *any actions taken by that organ of state to recover arrears.”<sup>41</sup>*

18.6. This means that the National Treasury is required to monitor Rand Water’s pricing structure, and the payments made by the Municipality to Rand Water, but also that Rand Water is required to send its billing to the National Treasury. Thus, if there was a problem with the billing and payments between Rand Water and the Municipality - financial and administrative failure on the part of the Municipality, this was another avenue in which it would be identified by National Treasury.

18.7. The municipal manager of a municipality is the accounting officer of the municipality and an accounting officer must, in terms of section 61 of the MFMA:

- “(a) *act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs;*
- (b) *disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable, and which in any way might influence the decisions or actions of the council or the mayor; and*

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<sup>41</sup> Section 41(2).

(c) *seek, within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interests of the municipality.”*

18.8. The MFMA, in requiring that the above terms be included in contracts, creates mechanisms through which the Municipality can terminate contract in a case of non or underperformance by a contractor and in accordance with the law of contract, the Municipality should be able to claim damages for non-performance, as opposed to just paying for work not done.

## 19. The International Legal Framework

19.1. Despite having two international covenants at the level of the United Nations: The International Covenant on Civil and Political Rights ('**ICCPR**') and the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**') which govern specific rights; human rights must be seen as a system where all rights are interdependent, indivisible and interrelated. The vision of a comprehensive human rights system<sup>42</sup> was built on the understanding that, in order to guarantee the dignity of the human person, all human rights should be reached. In this way, the integral human rights system is established where the violation of either their civil or political right; or economic, social and cultural right, damages the achievement of the others.

19.2. Everyone has the right to safe drinking water. The right to water is essential for a dignified life and is vital for the realisation of many other rights, such as the rights to health, life and an adequate standard of living. Although not mentioned explicitly in the International Covenant on Economic, Social and Cultural Rights, it is an essential part of realizing the right to an adequate standard of living, and has been recognized in a wide range of international human rights instruments.

19.3. In its November 2002 General Comment 15<sup>43</sup>, the United Nations Committee on Economic, Social and Cultural Rights provided detailed guidance to State Parties regarding their obligations to respect, protect and fulfil the right to water. The Committee on Economic, Social and Cultural Rights also notes that the right includes the following interrelated and essential features:

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<sup>42</sup> In 1948 the Universal Declaration of Human Rights (UDHR) was drawn up. The content of this document was further reflected two treaties, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights. To maintain the interrelationship between the rights contained in each of the Covenants, the idea that all rights are interdependent and indivisible was stressed.

<sup>43</sup> United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) General Comment 15

**Availability.** *Everyone should have access to the quantity of water needed to satisfy basic needs. While the minimum quantity of water required will vary depending on the context (including health status, climate, and work conditions), ordinary personal and domestic uses of water will generally include drinking, personal sanitation, clothes, washing, food preparation, and personal and household hygiene.*

**Quality.** *Water for personal and domestic use should be free from harmful substances such as micro-organisms, chemical substances and radiological hazards. Its odour, colour and taste should be acceptable for human consumption.*

**Accessibility.** *Access to water involves four key elements: physical accessibility, economic accessibility, non-discrimination, and information accessibility. Water, and associated facilities and services, must be within safe physical reach for everyone, without discrimination on any prohibited ground. States should ensure that water facilities and services are safe to access, and be attentive to gender, cultural, life-cycle, and privacy requirements. Everyone has the right to seek, receive and impart information concerning water issues.*

- 19.4. On 28 July 2010, through Resolution 64/29244, the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of human rights. To demonstrate the indivisibility of these rights the Resolution further emphasised that universal access to sanitation is, “not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality” of water resources.
- 19.5. Affirming the substance of this General Assembly Resolution, the United Nations Human Rights Council resolved in September 2010 that the human right to water and sanitation was legally binding on state governments under established human rights, tempering the expansive international obligations declared by the General Assembly while reiterating the “primary responsibility” of national governments for safe drinking water and sanitation.
- 19.6. Furthermore, in April 2011, the Human Rights Council adopted, through Resolution 16/2, access to safe drinking water and sanitation as a human right: a right to life and to human dignity.

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<sup>44</sup> The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all.

- 19.7. On May 2011, the World Health Organisation (WHO), through Resolution 64/24, made a call to Member States “to ensure that national health strategies contribute to the realisation of water and sanitation – related Millennium Development Goals while coming in support to the progressive realization of the human right to water and sanitation”.
- 19.8. On 28 September 2011, the Human Rights Council passed a new Resolution 18/1 which takes the human right to safe drinking water and sanitation a step further. The Human Rights Council welcomed the submission of the compilation of good practices on the right to safe drinking water and sanitation, in which the Special Rapporteur put particular emphasis on practical solutions with regard to the implementation of the human right to safe drinking water and sanitation. The Resolution calls on States to ensure enough financing for sustainable delivery of water and sanitation services.(Own emphasis)
- 19.9. Most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. Legal recognition has however been expanding for decades at national and regional levels. Since the United Nations Conference on the Human Environment in 1972, more than 100 countries have incorporated the right to a healthy environment into their national constitutions, in varying formations.
- 19.10. The human right to a healthy environment brings together the environmental dimensions of civil, cultural, economic, political and social rights, and protects the core elements of the natural environment that enable a life of dignity.
- 19.11. Diverse ecosystems and clean water, air, and soils are now accepted as being indispensable for human health and security. The right also protects the civic space for individuals to engage in dialogue on environmental policy.
- 19.12. General Comment 1545 also notes that environmental hygiene, as an aspect of the right to health under Article 12 paragraph 2 (b) of the International Covenant on Economic, Social and Cultural Rights, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions. The Committee on Economic, Social and Cultural Rights further notes that State parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes. In addition, State parties should monitor and combat situations where aquatic systems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments.

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<sup>45</sup> General Comment 15 Paragraph 08.

- 19.13. South Africa by virtue of the Constitution and ratification of the ICESCR, bears responsibilities for the fulfilment of the obligations to protect the environment and to provide access to safe water and sanitation.

## 20. Regional Legal and Policy Framework

- 20.1. There is considerable progress on the recognition of the right to water and sanitation in line with the 2010 United Nations Resolution on the Right to Water and Sanitation. 29 out of the 56 African countries have recognized the human right to water in their constitutions or legislations and 25 have recognized the right to sanitation.
- 20.2. Article 16 under the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights obligates State parties to ensure that the “determinants of health include access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions.”
- 20.3. The Guiding Principles further take note that “while the African Charter does not directly protect the right to water and sanitation, it is implied in the protections of a number of rights, including but not limited to the rights to life, dignity, work, food, health, economic, social and cultural development and to a satisfactory environment.” By implication and in line with the international legal framework, the right to water and sanitation are indivisible and interdependent on the non-derogable rights to life and dignity. There is therefore a legal obligation on the State to guarantee the protection, promotion and fulfilment of the enjoyment of these rights.
- 20.4. The Guiding Principles further provide the criteria upon which to assess the enjoyment of the right to water and sanitation derived from international legal treaties that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal, domestic, and agricultural uses.”
- 20.5. The State as a party is charged with specific obligations in the context of this matter, to ensure that “safe water is water that, in particular, is free from hazardous substances (microorganisms, chemical substances and radiological hazards) that could endanger human health, and whose colour, odour and taste are acceptable to users.”
- 20.6. Furthermore, the Guiding Principles obligate the State parties to guarantee that “everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment. Sanitation comprises at least, a clean toilet or latrine, together with collection, disposal and treatment of human excreta, wastewater, solid waste and storm water removal and hygiene education.”

- 20.7. The African Union, in its Guidelines on the Right to Water in Africa, stipulated that: “States shall develop comprehensive integrated strategies to realise the right to water in such a way as to ensure the right to water of present and future generations. Sustainability goes beyond the functionality of services. Water and sanitation shall be provided in ways that protect water resources from overexploitation and pollution.”

## **THE SCOPE AND OBJECTIVES OF THE INQUIRY**

21. The Commission approaches this inquiry from an inquisitorial, non-adversarial perspective. The inquiry will not proceed on the basis of individualised allegations alone but will examine the water governance and service delivery system in Gauteng Province as a whole, with reference to the Legal Framework provided herein, which requires specific action of multiple organs of state at local, provincial and national level.
22. The objectives of the inquiry are to, *inter alia*:
- 22.1. Assess the extent and nature of water access challenges across the Gauteng Province;
  - 22.2. Examine the root causes of recurring water shortages, infrastructure failures and service delivery breakdowns;
  - 22.3. Examine the impact of loadshedding/reduction on the water infrastructure;
  - 22.4. Assess the extent of lost water (water leakages or non-revenue water) across the province;
  - 22.5. Assess the impact of the water crisis on the enjoyment of fundamental human rights, particularly for vulnerable and marginalised communities;
  - 22.6. Determine whether the current state of affairs constitutes a systemic human rights violation;
  - 22.7. Examine whether state actors have taken reasonable and adequate steps to progressively realise the right of access to sufficient water;
  - 22.8. Assess governance, planning, budgeting, infrastructure management and emergency response systems;
  - 22.9. Examine the role of municipalities as Water Services Authorities and the effectiveness of intergovernmental support and oversight mechanisms;

- 22.10. Examine the emergence and impact of informal water distribution economies and tanker dependency;
- 22.11. Identify the roles and responsibilities of different actors in both causing and resolving the crisis; and
- 22.12. Make findings, recommendations and directives aimed at addressing systemic failures and securing sustainable, rights-based solutions that are adequately funded and can be objectively measured.

## **PROCEDURE**

23. The Commission has deemed it appropriate and in the public interest to conduct the investigation through a formal inquiry. The proceedings will be inquisitorial in nature and presided over by a panel appointed by the Commission.
24. The panel will consist of the focal area Commissioner and two Senior Legal Officers.
25. The Commission will receive written and oral submissions from stakeholders, including organs of state, civil society organisations, experts, research institutions, affected communities and other relevant actors.
26. Where necessary, all parties will be afforded an opportunity to make further written submissions after the conclusion of the inquiry, within a period determined by the Commission.
27. The proceedings will be open to members of the public and the media, having regard to the public interest nature of the matter and the constitutional principles of accountability, openness and transparency.
28. Parties may be legally represented, but oral submissions must be made by the parties themselves, unless otherwise directed by the Commission.

## **THE INQUIRY PANEL**

29. In accordance with the Commission's Procedures Manual, the inquiry panel will comprise:
  - 29.1. The Focal Area Commissioner : Commissioner Henk Boshoff;
  - 29.2. Acting Provincial Manager of the Gauteng Provincial Office: Khululiwe Sithole;
  - 29.3. One Senior Legal Officer; and

29.4. Any additional experts or commissioners designated by the Commission.

**Information on the dates of the Water Inquiry, Venue and the making submissions in respect of the Water Inquiry can be accessed on the Commission's website.**